# Clearing the Red Tape – Towards a Balanced Regulatory Framework for Early Childhood Development

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## Abstract

The state of early childhood development (ECD) provisioning in South Africa is dire. An onerous regulatory regime is one factor contributing to this crisis. Instead of a developmental and enabling framework, the regulatory landscape is convoluted and overly burdensome. This in turn frustrates the realisation of the rights of children. The author argues that regulatory reform in this context is not only desirable but constitutionally required. The article begins by providing an overview of the evolution of the ECD regulatory landscape in South Africa with a particular focus on health and safety regulation. A shift from under-regulation in the pre-constitutional era to over-regulation in the constitutional era is identified. The author proceeds to argue that South Africa's current state of affairs is animated in part by a failure to articulate the full set of interests that should inform a balanced ECD regulatory regime. Pathways towards a more coherent and coordinated regulatory framework for ECD health and safety standards are suggested. The proposed reforms, albeit limited, have the potential to offer immediate relief to both under-resourced providers and overburdened administrators.

## Keywords

Early childhood development; regulatory law; rule of law; children's rights; administrative law; state capacity.

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## 1 Introduction

The last three decades have heralded a significant paradigm shift, indeed a "revolution",[1] in the field of childhood development. Whereas previous childhood interventions focussed primarily on children from school-going age, an "explosion"[2] of interdisciplinary research at the end of the last century shifted attention toward the first years of life.[3] In line with this shift the South African government has recognised that universal access to comprehensive, age-appropriate and quality early childhood development (ECD) services is both a "public good" and a "universal right".[4] Despite this recognition the state of ECD provisioning in the country remains dire. Less than a third of children aged 0-3 years access some form of ECD programme.[5] The vast majority of children aged 0-5 years in the country's poorest households remain without any government subsidy for ECD programmes.[6]

An onerous regulatory regime is one factor contributing to this crisis. Instead of a developmental and enabling framework - which is responsive to the reality of under-resourced ECD providers and constrained state capacity - the regulatory landscape is convoluted and overly burdensome.[7] Many ECD programmes, particularly those which provide services to children in poor communities, are unable to navigate this regulatory minefield and operate

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* Nurina Ally. LLB (Wits) MSc (Edinburgh) MSt (Oxford). Senior Lecturer, Faculty of Law, University of Cape Town, South Africa. Email: nurina.ally@uct.ac.za. ORCiD: https://orcid.org/0000-0003-1587-7676. This article originated from a research report prepared for Ilifa Labantwana and the Equality Collective, which formed part of a broader project aimed at assessing the regulatory framework for ECD provisioning in South Africa. I am particularly indebted to Tess Peacock for her generous and considered input on the themes raised in this contribution, and as a collaborator more generally. I must also thank my colleagues, Leo Boonzaier, Hugh Corder, Tshepo Mosaka, Khomotso Moshikaro, Tjakie Naudé and Cathleen Powell for their spirited and collegial engagement with an earlier version of this article, as presented at an internal faculty seminar.

1 Lombardi 2016 https://bernardvanleer.org/app/uploads/2016/06/Early-Childhood-Matters-2016.pdf.

2 Young 2015 https://bernardvanleer.org/app/uploads/2015/12/ECM124_A-good-start-advances-in-early-childhood-development.pdf.

3 Ally *Failing from the Start* 4.

4 DSD 2015 https://www.gov.za/sites/default/files/gcis_document/201610/national-integrated-ecd-policy-web-version-final-01-08-2016a.pdf.

5 Brooks *et al* 2022 *SAJHR* 2.

6 According to Brooks *et al* 2022 *SAJHR* 12, a mere 13 per cent of children (if not less) aged 0-5 years in the country's poorest households receive the government subsidy for ECD programmes.

7 See, for example, concerns raised by ECD stakeholders reported in Nganga 2022 https://www.iol.co.za/weekend-argus/news/red-tape-around-the-early-childhood-development-sector-raises-concerns-d973f6b5-6eec-4182-aa88-ae7612bddd77. Also see Biersteker, Berry and Gwele 2023 *SAJHR* 16, where they record the perception by an ECD stakeholder that the regulatory framework is "penalising" and creates a situation where "nobody wins".

outside the regulatory net. This in turn frustrates the realisation of the rights of children who do not have access to effectively regulated, subsidised ECD services.

I argue that regulatory reform in this context is not only desirable but constitutionally required. I begin by providing an overview of the evolution of the ECD regulatory landscape in South Africa with a particular focus on health and safety regulation. I identify a shift from *under*-regulation in the pre-constitutional era to *over*-regulation in the constitutional era. I suggest that our current state of affairs is animated in part by a failure to articulate the full set of interests that should inform a balanced ECD regulatory regime. I then consider pathways towards a more coherent and coordinated regulatory framework for ECD health and safety standards. The proposed reforms, albeit limited, have the potential to offer immediate relief to both under-resourced providers and overburdened administrators.

## 2 Evolution of the ECD health and safety regulatory framework: under-regulation to over-regulation

### *2.1 Pre-constitutional era and transition*

Prior to the introduction of the *Children's Act* 38 of 2005 (the *Children's Act*), partial care of children was regulated under the *Children's Act* 33 of 1960 (the 1960 Act) and, subsequently, the *Child Care Act* 74 of 1983 (the 1983 Act).[8] The 1960 and 1983 Acts primarily envisaged health and safety compliance for "places of care" to be the domain of local authorities. Registration required a certificate from the local authority regarding building and health requirements. While inspections by nationally-appointed authorities considered whether standards at places of care were maintained, such standards were not prescribed by national legislation. Even though this meant that there was a relatively low threshold for entry (as health and safety requirements were not strictly prescribed by national legislation), operating a place of care without registration was a criminal offence under the 1983 Act.[9] Once a place of care was registered, however, the 1983 regime specifically required that a developmental approach be adopted, with guidance and support being provided to the place of care prior to any withdrawal of registration.[10]

The transition to democracy heralded a period of review and reform of childcare legislation. Following engagement with ECD stakeholders, the South African Law Reform Commission (SALRC) identified fragmentation and overlap in the regulation of ECD services as a key challenge, which had

8 The *Child Care Act* 74 of 1983 came into effect on 1 February 1987 (the 1983 Act).
9 Section 30(2) of the 1983 Act read with s 30(6).
10 Section 31(4) of the 1983 Act read with Reg 34(A)(1) in GN R2612 in GG 10546 of 12 December 1986.

contributed to children, particularly children with disabilities, "fall[ing] through the cracks".[11] In this period there appeared to be general agreement that a "clear set of simple and achievable"[12] health and safety standards was needed, which would be able to contribute toward "tighter control"[13] of ECD provisioning and help to reduce regulatory fragmentation and lack of coordination. In 2002 the SALRC proposed draft legislation, which included high-level ECD health and safety norms (which were very general and non-specific).[14] This "core aspects only"[15] approach was welcomed by some commentators as striking a balance between providing guidance to officials while avoiding the imposition of unrealistic "first world standards" on ECD providers.[16] Matthias and Zaal, for example, took the view that:

> The "core aspects only" approach … would have the advantage that partial care providers in impoverished shack settlements and rural areas could be expected to comply. This is important in view of the fact that many partial care facilities operate as businesses. There is thus sometimes a temptation to offer the minimum services for children in return for the maximum profits.[17]

At the same time Matthias and Zaal also cautioned that the express setting of norms and standards as a "minimum" meant that there was still some "danger that municipalities might continue to set unrealistically high standards that would discourage appropriately skilled persons who are without extensive financial resources from setting up badly needed facilities."[18]

As it turned out, the "core aspects only" approach to health and safety was overtaken by a more detailed and prescriptive set of norms and standards. This would first be reflected in the 2006 Guidelines for Early Childhood Services (the Guidelines),[19] which were prepared by the Department of Social Development (DSD) alongside the SALRC process. The Guidelines provided "minimum standards" on certain ECD health and safety issues, and also emphasised that a "developmental and empowering process"

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11 SALRC *Discussion Paper 103* 665. More specifically, the SALRC identified "the fragmentation of ECD services" and "an absence of clear lines of governmental responsibility for the provision of ECD services" as having an adverse impact on ECD provisioning by the sector. This was attributed in part to the fact that ECD was "seen as an overlapping responsibility of the Departments of Health, Education and Social Development."

12 SALRC *Discussion Paper 103* 690.

13 SALRC *Discussion Paper 103* 686.

14 For general discussion on the draft Bill, see Matthias and Zaal 2003 *SALJ* 477-493.

15 Matthias and Zaal 2003 *SALJ* 483.

16 Matthias and Zaal 2003 *SALJ* 483.

17 Matthias and Zaal 2003 *SALJ* 483.

18 Matthias and Zaal 2003 *SALJ* 485.

19 DSD 2006 https://www.gov.za/sites/default/files/gcis_document/201409/childhooddev0.pdf.

should be adopted in monitoring and evaluation processes.[20] One of the drafters of the Guidelines, Eric Atmore, indicated that the Guidelines established a relatively low bar while still protecting children.[21] In his view the Guidelines were "reasonable even for the poorest, otherwise the safety of children will be compromised."[22] Moreover, the Guidelines re-iterated that the DSD should adopt a "developmental and empowering process, with the best interest of the child being more important than anything else" in monitoring and evaluation processes.[23] The Supreme Court of Appeal (SCA), in a judgment dealing with the delictual liability of provincial department officials, recently affirmed the developmental thrust of the Guidelines and emphasised that it "provided a framework that was largely aspirational."[24] The Constitutional Court endorsed this assessment of the Guidelines, recognising the role of a progressive, corrective and developmental approach rather than a punitive one. As the Court noted:

> Given the important role fulfilled by child care facilities across social and economic strata throughout the country it is not surprising that a corrective rather than a purely punitive approach is preferred where there is non compliance with minimum standards.[25]

The Guidelines thus provided a non-binding framework which was largely "aspirational" and explicitly geared toward a progressive, developmental approach. Entering into the twenty-first century, however, South Africa still did not have binding, nationally prescribed health and safety standards for ECD provisioning. This position would change with the introduction of the children's Act.[26]

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20 DSD 2006 https://www.gov.za/sites/default/files/gcis_document/201409/childhood dev0.pdf 28.

21 South African Congress for Early Childhood Development and Early Learning Resource Unit 2004 https://open.uct.ac.za/handle/11427/3920 15.

22 South African Congress for Early Childhood Development and Early Learning Resource Unit 2004 https://open.uct.ac.za/handle/11427/3920 15.

23 The Guidelines did, however, attract some criticism. Campbell, for example, critiqued the Guidelines for its focus on centre-based ECD programmes to the detriment of informal home and community-based programmes. Campbell *Critical Examination of the Legislative and Policy Framework* 67.

24 *Minister: Western Cape Department of Social Development v BE obo JE* 2021 1 SA 75 (SCA) para 27. See also *Government of the Western Cape: Department of Social Development v C B* 2019 3 SA 235 (SCA) para 44.

25 *BE obo JE v MEC for Social Development, Western Cape* 2022 1 SA 1 (CC) para 23, quoting with approval *Government of the Western Cape: Department of Social Development v C B* 2019 3 SA 235 (SCA) paras 44-45.

26 Provisions of the *Children's Act* 38 of 2005 (the *Children's Act*) relating to places of care were passed in 2007 and brought into effect in 2008.

### *2.2 The Children's Act*

The *Children's Act* replaced the 1983 Act and Guidelines as the legislative instrument regulating partial care facilities.[27] The Act introduced more detailed provisions regarding ECD provisioning, including the requirement that national norms and standards for ECD be prescribed.[28]

According to the *Children's Act*, provincial departments are responsible for registering partial care facilities.[29] Broadly speaking, such facilities must comply firstly with the health and safety requirements of the relevant local authority (with a health certificate required when registering a partial care facility).[30] Secondly, compliance with nationally prescribed health and safety norms and standards for partial care is required.[31] Thirdly, a provider must also comply with any health and safety requirements as may be required by any law.[32] While the Act provides for the possibility of a developmental approach being adopted where there is non-compliance with the prescribed health and safety framework, this is not mandatory (as it was under the regulations prescribed under the 1983 Act).[33]

Significantly, the *Children's Act* separately provides for the regulation of an ECD programme, defined as "a programme structured within an early childhood development service to provide learning and support appropriate to the child's developmental age and stage".[34] According to the *Children's Act,* partial care facilities must provide ECD programmes for children up to school-going age.[35] ECD programmes also have to be registered,[36] and

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27 The *Children's Act* no longer refers to the regulation of "places of care" but rather "partial care" (s 76 of the *Children's Act*). The definition of partial care bears some similarity to that of a place of care, although Mahery argues that a key distinction is that the former is "service-oriented" whereas the latter is "premises oriented" (Mahery "Partial Care" 4).

28 See ss 79 and 94 of the *Children's Act*.

29 Section 80(1)(a) of the *Children's Act.*

30 Sections 80(1)(c) and 81(1) of the *Children's Act* read with Reg 14(4) in GN R261 in GG 33076 of 1 April 2010. This may, in turn, also require compliance with further legislation and regulations, such as the *National Building Regulations and Building Standards Act* 103 of 1977. While the scope of this paper does not allow detailed consideration of these additional requirements, this is an important area for future research.

31 Section 80(1)(c) of the *Children's Act.*

32 This follows from s 304(3) of the *Children's Act*, which empowers any person authorised by the Director-General, provincial head of social development or a municipality to inspect a partial care facility for compliance with the structural, health and safety requirements of any law.

33 See part 2.1 above.

34 Section 91(3) of the *Children's Act*.

35 Section 93(5) of the *Children's Act*.

36 Section 95 of the *Children's Act*.

national norms and standards for ECD programmes must also be prescribed by regulation.[37]

In other words, the operator of a partial care facility must provide ECD programmes, register both the facility and the ECD programme, comply with norms and standards for both the facility and ECD programme, and comply with any other requirements as per the Act. Evidently, in comparison to the 1960 and 1983 regimes, the Act's ECD regulatory framework is more stringent. As emerged from the SALRC's consultation processes, this appears to have been driven by the well-intentioned view that "tighter control"[38] was required over the quality of ECD service provisioning, and that there was a need for national norms and standards to ensure greater consistency and coordination.

The General Regulations Regarding Children were promulgated under the *Children's Act* in 2010.[39] The Regulations include norms and standards pertaining to health and safety for both partial care and ECD programmes (in Annexure B, Part I and Annexure B, Part II respectively). These are the country's first binding national norms and standards for ECD health and safety. While the rationale underpinning the determination of specific norms and standards in the Regulations is not entirely clear, these appear to have been inspired by the norms and standards set out in the Guidelines (although the Regulations are generally more detailed). This is in contrast to the "core aspects only" approach initially proposed by the SALRC, which was welcomed by some observers as avoiding the imposition of overly prescriptive "first world" standards on providers.[40] Nonetheless, there do not appear to have been significant objections to the introduction of more finely grained norms and standards when published for public comment.[41] Indeed, some commentators welcomed the norms and standards as a promising framework for the protection and development of children, particularly when compared to the 1983 regime. Mahery, for example, commented:

> [T]he Child Care Act did not contain such an elaborate set of norms and standards and the inclusion of the norms and standards in the Act augur[s] well for the protection and development of children using these facilities. It is commendable that the Act explicitly sets out standards of care for facilities that provide partial care for children with disabilities or chronic illnesses.[42]

37 Section 94 of the *Children's Act*.
38 SALRC *Discussion Paper 103* 686.
39 GN R261 in GG 33076 of 1 April 2010.
40 Matthias and Zaal 2003 *SALJ* 483.
41 At least as appears from the submissions made available at Children's Institute date unknown http://www.ci.uct.ac.za/ci/law-reform/childrens-act/research-submissions. Mahery "Partial Care" 16 notes that the omission of norms and standards relating to behavioural management practices drew some objection.
42 Mahery "Partial Care" 15.

The introduction of a binding framework aimed at establishing uniformity in ECD health and safety standards was undoubtedly an important and "commendable" development.[43] Indeed, the determination of standards for child care services is in line with the *United Nations Convention on the Rights of the Child*,[44] which requires state parties to ensure that institutions responsible for the care of children conform to, amongst others, health and safety standards established by relevant authorities. The "elaborate"[45] regulatory regime introduced in terms of the *Children's Act* is not, however, without its drawbacks.

First, the dual regulation of partial care facilities and ECD programmes is extremely burdensome, particularly for under-resourced ECD providers in poor and rural communities. In addition to the double-registration requirement, there are also two sets of health and safety standards with which to comply. As it stands, the norms and standards relating to health and safety for ECD programmes are less detailed than those relating to partial care. This makes sense as ECD programmes that are not provided by a partial care facility are not necessarily premises based and are likely to be less formal. It is notable, however, that there are some norms and standards which are included for ECD programmes but are not included in the norms and standards for partial care. These include, for example, the requirement that "where children are bottlefed, a suitable facility must exist for cleaning the bottles";[46] staff to child ratios;[47] and the requirement that "at least one meal per day must be provided" and "all meals and snacks should meet the nutritional requirements of children".[48] This disjuncture between the norms and standards for partial care facilities and ECD programmes does not necessarily create a lacuna, as partial care facilities must comply with both sets of norms and standards. It does, however, lend to confusion as the regulatory requirements are spread across various provisions of the regulations and must be pieced together.

Second, there are two sets of monitoring processes requiring compliance and enforcement. The *Children's Act* regime requires the provincial head of social development to conduct inspections of partial care facilities at least once every five years.[49] These inspections must include consideration of compliance with the partial care norms and standards as prescribed under

43 Mahery "Partial Care" 15.
44 Article 3(3) of the *United Nations Convention on the Rights of the Child* (1989).
45 Mahery "Partial Care" 15.
46 Paragraph 3(b)(vii)(dd) of Annexure B, Part II in GN R261 in GG 33076 of 1 April 2010.
47 Paragraph 3(c)(iv) of Annexure B, Part II in GN R261 in GG 33076 of 1 April 2010.
48 Paragraph 3(b)(vii)(bb) of Annexure B, Part II in GN R261 in GG 33076 of 1 April 2010.
49 Section 87(1)(c) of the *Children's Act* read with Reg 21(4) in GN R261 in GG 33076 of 1 April 2010.

the *Children's Act*[50] and must result in a report to the provincial head of social development. In addition to this mandatory inspection requirement, the Act also empowers the Director-General, provincial head of social development or a municipality to authorise any person to inspect a partial care facility and submit a report to the relevant authority.[51] Amongst other matters, such a person may consider whether the facility complies with the provisions of the Act and the prescribed norms and standards for partial care; other national norms and standards as may be prescribed by regulation; and any structural, safety, health and other requirements as may be required by any law.[52] In addition to the inspection and monitoring of partial care facilities, the regulations under the *Children's Act* provide for the "assessment and compulsory monitoring" of ECD programmes to determine their compliance with prescribed norms and standards.[53] Such assessment and monitoring must be executed every two years by a person designated by the provincial head of social development. A report and development plan must be submitted to the provincial head of social development and the management of an ECD programme.[54] Thirdly, the introduction of national norms and standards has not reduced inconsistency in the requirements or the overlap of roles between local and provincial government. Instead, as Peacock[55] has observed, there is an ongoing overlap between provincial and local government roles and responsibilities in respect of ECD health and safety compliance. Local government by-laws are also not necessarily consistent among one another, nor in relation to the prescribed norms and standards.

In the result, the current approach to the regulation of partial care facilities under the *Children's Act*, while well-intentioned, results in placing significant regulatory burdens on partial care operators as well as the regulatory authorities. As Table 1 shows, there are two sets of registration and monitoring or compliance processes, with both sets of processes including some regulation over health and safety requirements, and with both local and provincial government officials responsible for health and safety oversight. Significantly too, funding for partial care facilities and ECD programmes depends on compliance with the myriad of requirements prescribed in terms of the *Children's Act* as well as the "structural safety,

50 Regulation 21(1) in GN R261 in GG 33076 of 1 April 2010.
51 Sections 304(1) and 304(5) of the *Children's Act*.
52 Section 304(3) of the *Children's Act*.
53 Regulation 28 in GN R261 in GG 33076 of 1 April 2010.
54 Regulation 28(4) and 28(5) in GN R261 in GG 33076 of 1 April 2010.
55 Peacock 2023 *SAJHR* (forthcoming).

health and other requirements of the municipality of the area where the partial care facility is situated."[56]

**Table 1: Health and safety regulation of partial care facilities under the *Children's Act***

| | **Partial Care Facility** | | **ECD Programme** |
|---|---|---|---|
| **Registration** | Health Certificate by local authority needed.<br><br>Compliance with norms and standards for partial care (including health and safety) must be considered by the provincial department. | AND | Compliance with norms and standards for ECD programmes (including health and safety) must be considered by the provincial department. |
| **Inspections** | Every 5 years by the provincial department – assessing compliance with norms and standards for partial care.<br><br>Possibility of additional inspections (by persons appointed at national, provincial or local level), assessing:<br><br>(i) compliance with prescribed norms and standards for partial care;<br><br>(ii) other national norms and standards as may be prescribed by regulation;<br><br>(iii) any structural, safety, health and other requirements as may be required by any law. | AND | Every 2 years by the provincial department – assessing compliance with norms and standards for ECD programmes. |

### *2.3 National Health Act*

The dual registration of partial care and ECD programmes, as well as the additional requirements imposed under local government by-laws, already pose challenges of overregulation in the ECD landscape. Nonetheless,

56 Sections 78(2) and 78(3) of the *Children's Act*, as well as ss 93(2), 93(3) and 97(5) of the *Children's Act*. Notwithstanding this requirement, the provincial head of department "may assist" a partial care provider to comply with the norms and standards (s 82(5) of the *Children's Act*).

when the norms and standards under the *Children's Act* were initially introduced there were at least no competing norms and standards at a national level. This position would be complicated in 2015 by the introduction of additional norms and standards by the Department of Health (DoH).

The *National Health Act* 61 of 2003 (the *Health Act*) was published prior to the *Children's Act*. The objects of the *Health Act* include the aim of providing "uniformity in respect of health services across the nation by … protecting, respecting, promoting and fulfilling the rights of children to basic nutrition and basic health care services contemplated in section 28(1)(c) of the Constitution."[57] In 2015 the Director-General of Health prescribed the National Environmental Health Norms and Standards for Premises and Acceptable Monitoring Standards for Environmental Health Practitioners[58] (NEHNS) in terms of section 21 of the *Health Act*.[59] The NEHNS is directed toward guiding environmental health practitioners (EHPs) in the carrying out of their functions, and includes detailed norms and standards pertaining to "child care centres",[60] including partial care facilities.

The NEHNS creates, alongside the Regulations, a parallel set of norms and standards regarding health and safety at partial care facilities. While parallel norms and standards may not, in themselves, cause regulatory confusion, there is a substantial lack of alignment between the norms and standards under the NEHNS and the *Children's Act* regulations respectively. First, there are some health and safety issues specified in the NEHNS which are not set out in the *Children's Act* regulations (for example: the enclosure of the premises; outdoor play areas; artificial or synthetic grass surfaces; after-care services; sand pits; and after-school facilities). Conversely, there are some health and safety issues which the *Children's Act* regulations regulate, but which are not set out in the NEHNS (for example: food preparation, the separation of children according to groups, an action plan for emergencies, policies and procedures regarding health). Second, even where there is an overlap on the issues covered by both sets of regulations, one set of

57 Section 2(c)(iii) of the *National Health Act* 61 of 2003 (the *Health Act*).

58 Published under GN 1229 in GG 39561 of 24 December 2015.

59 Section 21 of the *Health Act* obliges the Director-General of Health to "issue, and promote adherence to, norms and standards on health matters" including in relation to "environmental conditions that constitute a health hazard", as well as "nutritional intervention" and "the provision of health services, including social, physical and mental health care". "Health services" are very broadly defined under s 1 of the *Health Act* as including, amongst other things, "basic nutrition and basic health care services contemplated in section 28(1)(c) of the Constitution", as well as "municipal health services".

60 Defined by the NEHNS as a "partial care facility as categorised in terms of Section 76-90 of the Children's Act, and shall include partial care: ECD, afterschool care; hostel and respite care, child and youth care centers as well as drop-in centers"; see para 1 in GN 1229 in GG 39561 of 24 December 2015.

regulations may provide additional and/or stricter requirements in respect of that issue. By way of example, both instruments regulate indoor play areas. However, the NEHNS includes additional norms and standards on this issue which are not included in the Regulations.[61] Some of these additional requirements in the NEHNS create a stricter framework.[62] Third, in at least one instance the norms and standards under the *Children's Act* and the NEHNS are in direct conflict with each other.[63] The result of this lack of alignment is ongoing confusion over ECD health and safety requirements, which is the very issue which the sector identified as requiring resolution during the law reform processes in the early 2000s.[64]

This misalignment may stem in part from the NEHNS's explicit orientation toward establishing the "highest possible level"[65] of standards, with reference to "international best practice".[66] While this may be laudable as an aspirational goal, a rigid application of the "highest possible" standards would simply be inapt in South Africa's developing context. Unfortunately the NEHNS is not entirely clear as to whether or to what extent the norms and standards are meant to create an immediately binding framework for ECD providers. On the one hand the NEHNS refers to its being based on the principle of "voluntary compliance" and the need to "strike an appropriate balance between promotion and education and law enforcement."[67] On the other hand the NEHNS indicates that child care centres "must" comply with the standards set out therein, thus suggesting mandatory compliance.[68] The requirement of an annual health certificate to

61 For example, the requirements that the exterior walls and roof be constructed "in a manner as to prevent the permeation of wind and rain and to ensure the health and safety of children", and that "floors have a smooth surface that is easily cleanable and prevents the permeation of dampness" are found at para 2(6)(b) of Annexure A in GN 1229 in GG 39561 of 24 December 2015. There is no equivalent in the regulations under the *Children's Act*.

62 For example, in relation to indoor play areas, the NEHNS (but not the regulations under the *Children's Act*) requires that: (i) an indoor play area must have a minimum of 1.5 $m^2$ unobstructed floor space for each child, and where there are no outdoor play areas, unobstructed floor space of 3 $m^2$ must be provided; (ii) different age groups should have separate indoor and outdoor play areas; and (iii) every child of school-going age on the premises must have an activity area of 4 $m^2$ (see paras 2(6)(c)-(f) of Annexure A in GN 1229 in GG 39561 of 24 December 2015).

63 In relation to toilets and ablutions, the regulations under the *Children's Act* require every child under the age of 3 to have their own potty (para 5(c)(iii) of Part I Annexure B in GN R261 in GG 33076 of 1 April 2010). In contrast, the NEHNS requires one potty for every 5 toddlers (para 9(d)(iv) of Annexure A in GN 1229 in GG 39561 of 24 December 2015). Interestingly, the NEHNS adopts a lower threshold in this instance.

64 See part 2.1 above.

65 Paragraph 3 in GN 1229 in GG 39561 of 24 December 2015.

66 Paragraph 3 in GN 1229 in GG 39561 of 24 December 2015.

67 Paragraph 6.8 in GN 1229 in GG 39561 of 24 December 2015.

68 Paragraph 2 of Annexure A in GN 1229 in GG 39561 of 24 December 2015.

be issued by an EHP (and which can be withdrawn)[69] reinforces the view that compliance with the NEHNS is not merely voluntary. The guideline template for health certificates set out in the NEHNS is, however, quite high-level suggesting that a relatively basic check would suffice for the purposes of obtaining a health certificate.[70] Nonetheless, it is not clear that EHPs adopt this approach to implementation and, overall, the NEHNS does not offer clear guidance on whether and how a developmental approach to health and safety compliance should be implemented.

In addition to inconsistencies, the NEHNS also creates inspection, monitoring and enforcement processes parallel to those of the *Children's Act* and the regulations thereunder, thus adding to the regulatory burden of providers and of state administrators. By way of example, an ECD provider is potentially subject to three sets of inspections: four times a year by an EHP under the NEHNS,[71] every two years by the provincial Department of Social Development (in respect of their ECD programme) under the *Children's Act* regime[72] and once every five years by the provincial Department of Social Development (in respect of the partial care facility itself).[73] Table 2 highlights overlapping regulatory processes in respect of ECD health and safety requirements for partial care facilities under the *Health Act* and NEHNS, on the one hand, and the *Children's Act* and its regulations on the other. It will also be recalled that partial care facilities must also comply with the regulatory requirements for ECD programmes, as set out in Table 1 above.

69 Paragraph 2(4)(f) of Annexure A in GN 1229 in GG 39561 of 24 December 2015.

70 Published under Appendix 3 in GN 1229 in GG 39561 of 24 December 2015. Appendix 4 and Appendix 5 further include a "guideline risk assessment tool for child care centres", which provides for the identification of health hazards and risks according to a scale of severity. Read together, these appendices suggest that EHPs are directed to primarily assess whether there is basic compliance with the relevant standards, to identify health hazards and recommend corrective measures.

71 Paragraph 8(2)(2) in GN 1229 in GG 39561 of 24 December 2015.

72 Regulation 28(4) and 28(5) in GN R261 in GG 33076 of 1 April 2010.

73 Section 87(1)(c) of the *Children's Act* read with Reg 21(4) in GN R261 in GG 33076 of 1 April 2010.

**Table 2: Regulation of health and safety standards at partial care facilities under the *National Health Act* and *Children's Act***

| | **Health Act and NEHNS** | **Children's Act and Regulations** |
|---|---|---|
| **Official responsible for inspections** | EHP (may be appointed at national / provincial / local government level) | Person designated by provincial head of social development |
| **Frequency of inspections** | 4 times a year | At least once every 5 years |
| **Health certificate / relevance of norms and standards for registration** | Health certificate must be issued by EHP and renewed annually. | Health certificate must be issued by local authority.<br>Compliance with norms and standards considered by provincial department in registration |
| **Consequence of non-compliance with norms and standards** | Compliance notice issued to person responsible for health nuisance or hazard.<br>Health certificate may be withdrawn where conditions pose hazard or risk to children | Department can cancel registration by written notice, or approach court to require partial care facility to stop operating.<br>Cancellation of registration can be suspended to remedy non-compliance; or notice of enforcement issued for compliance.<br>Provision of an ECD programme may be stopped by way of written notice. |

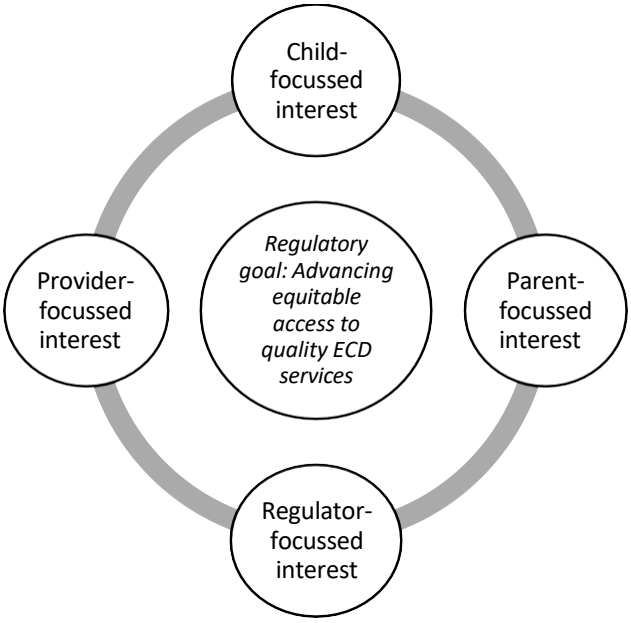
## 3 Finding a balance – the need for regulatory reform

The overview of the various instruments regulating ECD health and safety as set out above reflects a move from the under-regulation of such requirements in the pre-constitutional era to the over-regulation in the constitutional era. Under the 1960 and 1983 regimes the lack of any national instrument establishing uniform standards led to inconsistent requirements across municipalities, with no benchmark against which to assess the appropriateness of the standards that were applied at local government level. The introduction of the *Children's Act* and its accompanying regulations appropriately sought to fill this lacuna. While motivated by the laudable intention of establishing stricter control and greater uniformity over the conditions of ECD provisioning, the Act and its accompanying

regulations have now introduced an onerous regulatory regime.[74] Adding yet a further layer of regulatory control, the NEHNS under the *National Health Act* not only overlaps with the *Children's Act* Regulations but also contributes to inconsistencies in the national standards informing EHPs, on the one hand, and provincial department officials on the other. Taken together, the resultant regulatory scheme is bloated and confusing for both partial care facility operators and regulators.

This state of affairs may be animated in part by a failure to articulate the full set of interests informing a balanced ECD regulatory regime. I suggest that there are at least four such interests, as illustrated in Figure 1.

**Figure 1: The quartet of interests informing a balanced regulatory regime aimed at advancing equitable access to quality ECD services**




First, there is the interest in protecting children and ensuring their safety (the child-focussed interest). Second, there is the interest in facilitating parents' ability to choose safe and quality ECD services for their children that is appropriate to their context (the parent-focussed interest).[75] Third, there is an interest in creating an enabling and developmental framework promoting ECD provisioning for all children (the provider-focussed interest). Fourth, there is an interest in ensuring that the regulatory burden on government is targeted and achievable, and maximises the efficient use of government

74 As explained at part 2.3 above, this stems from the dual regulation of partial care facilities and ECD programmes (requiring compliance and the enforcement of extensive and detailed standards), as well as overlapping oversight by both provincial and local government officials.

75 As Biersteker, Berry and Gwele 2023 *SAJHR* 7 note: "Choices about ECD services are driven by parents' priorities and ECD programmes need to be responsive to them."

resources where most needed (the regulator-focussed interest). The four interests set out above are not necessarily in tension with one another, but instead are mutually supportive. A regulatory framework that ensures adequate oversight, monitoring and accountability in relation to the care and protection of children – which is informed by their right to quality early childhood development services[76] and to have their best interests given paramount importance[77] – is a constitutional imperative. But this regulatory goal cannot be effectively achieved (and may well be undermined) where:
(i) the developmental needs and resource limitations of ECD providers; and
(ii) the "thin"[78] capacity of regulatory authorities in South Africa's post-Apartheid context are insufficiently appreciated.[79] If the regulatory scheme is overly demanding and complex, ECD providers operating in under-resourced areas may be excluded from the regulatory net altogether, with detrimental consequences to access to ECD services for children (and parental choice) in those communities. Relatedly, if there are significant overlap and duplication in the regulatory framework, then the state's already limited capacity to ensure effective oversight and compliance will not be optimally utilised; worse still, it may be strained even further. This could undermine the aim of ensuring that children have access to quality ECD services, which includes a safe environment. As the Constitutional Court recognised in *Grootboom*,[80] in the context of the right to housing, a

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76 There is no explicit right to quality ECD services in South Africa, as such. There are, however, arguments that can be made to support the constitutional grounding of a holistic rights-based approach to ECD, see Sloth-Nielsen and Philpott 2015 *Stell LR*; Ally, Parker and Peacock 2022 *SAJCE* 7-9; and Fredman, Donati and Naicker 2023 *SAJHR* (forthcoming).

77 Section 28(2) of the *Constitution of the Republic of South Africa*, 1996. The best interests of the child requirement is extensively relied on in South African jurisprudence, although its invocation has been subject to some critique (see, for example, Skelton 2019 *De Jure* 557-579). In the context of ECD regulatory frameworks, Biersteker, Berry and Gwele 2023 *SAJHR* 1-25 offer an enlightening analysis of differing interpretations of the best interests of the child requirement by different ECD stakeholders in one vulnerable community in Western Cape.

78 Dubash and Morgan 2012 *Regulation & Governance* 264 suggest that limited state capacity has both "thin" and "thick" dimensions. On the one hand, thin capacity issues include "prosaic concerns of budget, personnel and training." On the other hand, thick capacity issues "address the growing pressures on the state to manage multiple forms of engagement with diverse stakeholders in order to balance competing concerns of growth, efficiency and redistribution." I am concerned here with the potentially "thin" dimensions of state capacity in South Africa.

79 Such capacity constraints were recognised by the Supreme Court of Appeal in a case relating to the delictual liability of provincial authorities for injuries in ECD facilities. Noting the limited state capacity for monitoring and oversight, the Court quoted evidence relating to the shortage of registered social workers in the country (with only 16 164 social workers available against a need of 68 498 such workers); see *Government of the Western Cape: Department of Social Development v C B* 2019 3 SA 235 (SCA) para 43.

80 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (hereafter *Grootboom*).

reasonable government programme must be assessed in the light of the "social, economic and historical context" of the problem it seeks to address, as well as "the capacity of institutions responsible for implementing the programme."[81] Importantly, the Court emphasised that a programme that "excludes a significant segment of society" cannot be reasonable.[82] Yet this is precisely the challenge facing the ECD sector in South Africa. ECD providers in under-resourced communities are excluded from the regulatory net (and, consequently, from access to state funding resources)[83] as they struggle to comply with an overly cumbersome and demanding regulatory framework.

Comprehensive regulatory reform, intentionally designed to balance the interests set out above, is urgently required. It is promising that a significant overhaul of the *Children's Act* has been initiated. Following input from civil society and other stakeholders, however, an initial round of amendments to the ECD-related provisions of the Act was rejected by Parliament.[84] The proposed reforms reflected a profound failure to grasp the depth of the legislative and regulatory reform required in the sector. Instead of advancing an integrated approach to ECD regulation, the draft legislation had the potential to introduce further confusion and incoherence, including the possibility of a triple registration requirement.[85] The rejection of the proposed amendments was thus welcome and, with the recent migration of the responsibility for ECD services from the DSD to the DBE, there appears to be renewed willingness to comprehensively address the regulatory challenges burdening the sector. This includes considered engagement with stakeholders on holistic reforms to the current legislation, and the possibility of bespoke ECD-specific legislation.

But full-scale legislative reform can be a slow process. While the crafting of a context-sensitive, responsive and holistic rights-based legislative framework is underway, there are also possibilities for more immediate regulatory interventions. Indeed, it is encouraging that the Presidency has recently established a "red tape reduction" task team with early childhood development being one of its priority areas.[86] And some practical steps in

81 *Grootboom* para 43.

82 *Grootboom* para 43.

83 See note 6 above. The DBE has reported that 41 per cent of ECD providers are not registered. As an illustration of the confusion arising from the regulatory framework, it is notable that some providers were unsure as to whether they were registered as a partial care facility or an ECD programme or both (see DBE 2021 https://www.datafirst.uct.ac.za/dataportal/index.php/catalog/908/download/12309 32).

84 Ally, Parker and Peacock 2021 https://mg.co.za/opinion/2021-05-21-unattainable-and-untenable-hearings-expose-problems-in-the-early-childhood-development-sector/. Also see Ally, Parker and Peacock 2022 *SAJCE* 9-10.

85 Ally 2021 https://pmg.org.za/files/210512UCT_SUBMISSION.pdf.

86 PMG 2022 https://pmg.org.za/committee-meeting/36039/.

this direction have already been taken. The DBE, for example, recently removed the requirement that a partial care facility be registered as a non-profit organisation in order to obtain a government subsidy.[87] This minor (but impactful) change is a welcome move toward clearing non-essential administrative hurdles in the system. In my view similar interventions, aimed at ensuring a coherent and coordinated national framework for health and safe standards are not only desirable but also constitutionally necessary.

## 4 Reforming national health and safety regulations in line with the rule of law

The existence of parallel, inconsistent national health and safety norms and standards suggests the need for regulatory reform. As described earlier,[88] prior to the introduction of the NEHNS there was an overlap between the local and provincial government regulation of ECD health and safety. It was, however, at least clear that the Regulations served as the instrument establishing national norms and standards for ECD health and safety standards at the national level. This would change with the introduction of the NEHNS, which established a parallel set of national norms and standards. This has not only resulted in regulatory overlap between the DSD and DoH but has also caused regulatory confusion and complexity owing to the lack of alignment between the two sets of norms and standards.

The rule of law requires rules to "be stated in a clear and accessible manner"[89] that should "enable citizens and officials to understand what is expected of them".[90] In *Kruger*[91] the Constitutional Court held that a situation requiring readers to refer to the content of an earlier, invalid proclamation in order to ascertain the meaning of a later proclamation was inimical to the rule of law. The majority noted that the public "should not have to depend on lawyers to interpret the meaning and import of words in proclamations in order for them to know whether a particular piece of legislation passed by Parliament has taken effect."[92] In the case of *Earthlife*

87 Metelerkamp 2023 https://www.dailymaverick.co.za/article/2023-01-30-early-childhood-development-programmes-no-longer-require-nonprofit-registration-to-access-state-subsidy/.

88 See para 2.3 above.

89 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 47. While the rule of law is a contested idea, even very "thin" concepts of it accept that laws must be accessible, intelligible and predictable; see, for example, Bingham *The Rule of Law* 37-40; and Tamanaha *On the Rule of Law* 91.

90 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 24.

91 *Kruger v President of the Republic of South Africa* 2009 1 SA 417 (CC) (hereafter *Kruger*).

92 *Kruger* para 66.

*Africa*[93] the High Court held that inconsistency between two energy-related determinations was obviously inimical to the rule of law. The first determination appointed the Department of Energy as the procurer in respect of a certain energy programme, whereas the second determination appointed Eskom Holdings (SOC) Limited or its subsidiaries to that role. The Court held that the co-existence of the two determinations was "highly problematic" and that the "lack of certainty and the need for conjecture [are] inimical to the rule of law."[94] Admittedly, the Court in *Earthlife Africa* dealt with two determinations made by the same decision maker that were clearly irreconcilable with each other. Nevertheless, the thrust of the Court's reasoning was based on the basic principle that laws should offer sufficient clarity and certainty to those who are bound by it. Similarly, the extent of the inconsistency between the norms and standards under the *Children's Act* and the NEHNS, which requires ECD providers and administrators to piece together the regulatory framework to decipher their obligations, arguably renders the regulatory scheme so unclear and uncertain as to be inconsistent with the rule of law.[95]

The Constitutional Court has held that another important aspect of the rule of law is that the exercise of public power must be rational.[96] Rationality concerns the relationship between means and ends, or more specifically the "relationship, connection or link … between the means employed to achieve a particular purpose on the one hand and the purpose or end itself."[97] Viewed independently, the determination of norms and standards for child care facilities in the NEHNS may appear to be rationally related to its stated purpose of "standardising activities in the delivery of [environmental health services]".[98] However, when assessed in its broader legislative and

93 *Earthlife Africa Johannesburg v Minister of Energy* 2017 5 SA 227 (WCC) (hereafter *Earthlife Africa*).

94 *Earthlife Africa* para 73.

95 Incertitude of this type is a general feature of the ECD regulatory landscape. For example, in *Skole-Ondersteuningsentrum NPC v Minister of Social Development* 2020 4 All SA 285 (GP), the High Court commented on the uncertainty arising from overlaps in the regulation of Grade R and pre-Grade R respectively. The Court noted that it is "a challenge to wade through the complexities of the situation" even for "trained legal professionals" (para 27.1).

96 See, for example, *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 85, where the Constitutional Court held: "It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement."

97 *Democratic Alliance v President of South Africa* 2013 1 SA 248 (CC) para 32. Importantly, as Hoexter and Penfold *Administrative Law* 466 note, rationality is not an invasive threshold, and all that is demanded is "merely a rational connection rather than perfect or ideal rationality."

98 Paragraph 3 in GN 1229 in GG 39561 of 24 December 2015.

regulatory context, the inconsistency between the norms and standards under the *Health Act* and *Children's Act* arguably undermines, rather than furthers, the purpose of standardisation and consistency. While there is limited case law assessing the rationality of regulatory instruments together as part of a regulatory scheme, as opposed to each instrument in isolation, there is some precedent for courts' engaging a legislative scheme as a whole. In *Liebenberg*[99] the Constitutional Court recognised the need to read the provisions of two statutes as forming part of a "unique legislative suite" and as working "in tandem" with the "various provisions in the different statutes work[ing] together in a coordinated scheme."[100] The Court endorsed the view that "where a particular statute forms part of a suite of statutes, then it is logical to analyse that suite as a whole in order to determine what the overall legislative scheme is."[101] Given the holistic nature of ECD[102] and the express recognition by the NEHNS that it exists in a broader legislative framework, including that of the *Children's Act*,[103] it is arguably necessary to read the legislative and regulatory instruments "in tandem" in order to assess the overall regulatory scheme.

Read together, it is clear that the regulations under the *Children's Act* and the NEHNS each seek to establish a coordinated and uniform approach to ECD health and safety regulation.[104] More specifically, the *Children's Act* emphasises that the Act "must be implemented … in an integrated, coordinated and uniform manner",[105] and requires all organs of state in the various spheres of government to "cooperate in the *development of a uniform approach* aimed at coordinating and integrating the services delivered to children" (my emphasis).[106] In respect of the NEHNS, there is an explicit recognition that the aim is "to provide *a national approach in standardising activities* in the delivery of [environmental health services] and establish a level against which [environmental health services] delivery can be assessed and gaps identified" (my emphasis).[107] The NEHNS also

99 *Liebenberg v Bergrivier Municipality* 2013 5 SA 246 (CC) (hereafter *Liebenberg*).

100 *Liebenberg* para 46.

101 *Liebenberg* para 47 quoting *Rates Action Group v City of Cape Town* 2004 5 SA 545 (CPD) para 41.

102 See note 76 above.

103 Paragraph 4(3) in GN 1229 in GG 39561 of 24 December 2015.

104 Indeed, as set out in part 0 above, the proposal to introduce norms and standards during the legislative reform process was made in response to the variation in health and safety requirements implemented by municipalities under the 1983 Act.

105 Section 4(1) of the *Children's Act*.

106 Section 5 of the *Children's Act*. This requirement is constitutionally undergirded by section 41(1)(h)(iv), which requires all spheres of government and organs of state in each sphere to "co-ordinat[e] their actions and legislation with one another." For more on the duty and failure to ensure effective intergovernmental coordination in ECD regulation, see Ally 2021 https://static.pmg.org.za/210512 UCTPRESENTATION.pdf.

107 Paragraph 3 in GN 1229 in GG 39561 of 24 December 2015.

recognises that "[a] coordinated and collaborated effort by various government departments and other stakeholders" is required.[108] In the light of these provisions and the legislative scheme as a whole, the lack of a rational connection between the means (the determination of unaligned standards) and the ends (achieving uniform, coordinated standards) is arguably constitutionally unsustainable.

Finally, it is notable that section 7(2) of the Constitution requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights". In *Glenister*[109] the Constitutional Court confirmed that "implicit in section 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be *reasonable and effective*"[110] (my emphasis). The Court in *Glenister* explained that courts "will not be prescriptive as to what measures the state takes, as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt."[111] As noted earlier, the Court has also made it clear that a scheme that operates to exclude a significant segment of society cannot be reasonable. It is arguable that the confusing, overlapping regulatory scheme - occasioned by the co-existence of inconsistent norms and standards - impedes rather than furthers access to quality ECD services and cannot be considered a "reasonable and effective" step toward advancing the rights of children to ECD services in South Africa.

In summary, the lack of consistency and coordination in the national health and safety regulatory framework threatens to undermine the rule of law. In the least, the current situation is highly undesirable from a regulatory perspective. Steps are undoubtedly required to create a single or aligned set of norms and standards for the benefit of ECD providers as well as to better guide the regulatory authorities. How should this be done?

Ideally the NEHNS should exclude partial care facilities from the "scope of application of the norms and standards"[112] on the basis that these are provided for under the *Children's Act*.[113] There is precedent for this in the

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108 Paragraph 6(4) in GN 1229 in GG 39561 of 24 December 2015.

109 *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) (hereafter *Glenister*).

110 *Glenister* para 189.

111 *Glenister* para 191. And more recently, see *Sonke Gender Justice NPC v President of the Republic of South Africa* 2021 3 BCLR 269 (CC), where the Court confirmed that "[t]he measures taken by the State to fulfil its constitutional obligations are subject to judicial review for reasonableness" (para 43).

112 Paragraph 5(2) in GN 1229 in GG 39561 of 24 December 2015.

113 This approach aligns with the maxim of statutory interpretation that the reach of a statute dealing with a subject in general terms is limited by legislation dealing with a subject in more specific terms (see, for example, *Minister of Justice and Constitutional Development v Southern African Litigation Centre* 2016 3 SA 317 (SCA) para 102). In other words, the reach of the Director-General of Health's general power to determine norms and standards under the *Health Act* is arguably

NEHNS itself, with some areas such as "domestic health care risk waste generators" and "mining waste" being excluded from its remit.[114] To be clear, this is not to suggest that the role of EHPs at local government level should be excluded. Rather, the aim is to ensure that EHPs are not implementing norms and standards that are inconsistent with those of the *Children's Act*. If limiting the scope of the NEHNS is viewed as too dramatic, the NEHNS should at the very least be amended to cross-refer to the regulations under the *Children's Act* insofar as the content of the norms and standards is concerned. The NEHNS would then only set out additional aspects that are entirely specific to EHPs (for example, the frequency of inspections by EHPs). The regulations under the *Children's Act* should in turn be amended to address any lacunae in the norms and standards (i.e. issues which are currently covered by the NEHNS but not included in the Regulations, for example, outdoor play areas and the enclosure of the premises). Such revisions would serve to offer a more coordinated regulatory framework (with the *Children's Act's* regulations providing primary guidance on the applicable norms and standards, to which both provincial and local government authorities could have reference).

In addition to ensuring that there are coherent and aligned norms and standards at national level, there are also opportunities for furthering a more developmental, context-sensitive, responsive and enabling health and safety regulatory regime. I offer here just a few examples of reforms that can be implemented relatively quickly, but which have the potential to advance a more balanced regulatory scheme. First, the regulations can differentiate more clearly between absolute minimum threshold standards on the one hand and aspirational or progressively achievable standards on the other.[115] This would meet the goal of establishing protective standards that uphold the best interests of children, while also recognising that many providers will require time and support in order to meet the "highest possible" standards.[116] Second, and relatedly, a provision requiring officials when applying health and safety standards to consider the context of the community in which an ECD facility is situated may offer a pathway to supporting ECD providers in conditional registration processes.[117] There is precedent for this in Namibia, for example, where legislation provides that the conditions of the community surrounding an ECD facility must be

limited by the *Children's Act*, which specifically contemplates the determination of norms and standards for partial care.

114 Paragraph 5(2) in GN 1229 in GG 39561 of 24 December 2015.

115 The Jamaican "Standards for the Operation, Management and Administration of Early Childhood Institutions" is instructive here (see Early Childhood Commission of Jamaica 2007 https://www.open.uwi.edu/sites/default/files/docs/Standards.pdf).

116 See note 65 above.

117 Section 83 of the *Children's Act* provides for conditional registration of partial care facilities.

considered when interpreting the relevant minimum standards.[118] Third, it would be beneficial for the regulations to include a regular review mechanism to ensure that the appropriateness of the standards and its implementation are regularly assessed. This is already provided for in the basic education context with the DBE required to "periodically review" the minimum norms and standards for public school infrastructure.[119] Fourth, inspection processes can be streamlined and reduced based on a realistic assessment of the administrative capacity of the relevant authorities as well as the need for the effective monitoring of providers. The requirement, for example, of quarterly inspections by EHPs appears to be quite onerous and excessive.[120] Finally, the regulations could benefit from a clearer developmental framework where there is non-compliance with the norms and standards. It is notable that the mandatory developmental provisions under regulations to the 1983 Act (applying to registered facilities that failed to meet the relevant requirements) are no longer included in the current regulatory framework. This is a regrettable omission as a clear developmental mandate, together with detailed guidance to administrators on how to implement it, would assist ECD providers and would make it clear that the norms and standards provide a progressive framework for compliance. It is recommended that similar provisions be considered in any amendments to the regulations under the *Children's Act* including, for example, in relation to conditional registration holders, with a realistic time allowance for the providers to comply with the requirements.

The analysis and recommendations outlined in this section have focussed narrowly on just one aspect of ECD health and safety regulation in South Africa. The proposal to align the norms and standards for health and safety at the national level does not resolve all the regulatory challenges facing the ECD sector. It does, however, illustrate that there are opportunities for swift and targeted interventions that could help clear a pathway toward a more coordinated and enabling legal framework and, in so doing, advance children's access to effectively regulated and quality ECD services.

## 5 Conclusion

The ECD law and policy landscape in South Africa is in flux. The recent migration of functions from the DSD to DBE; the establishment of a presidential task team directed at, amongst other things, clearing red tape from the sector; and renewed efforts at holistic legislative reform; all present important opportunities to address the regulatory challenges hampering the realisation of quality ECD provisioning. This paper has identified one area where interventions could be initiated and implemented relatively swiftly.

118 Section 71(5) of the *Child Care and Protection Act* 3 of 2015.
119 Regulation 19(1) in GN R920 in GG 37081 of 29 November 2013.
120 Also see n 79 above regarding the capacity of social workers at provincial level.

Such reform is certainly desirable and, as I have argued, may indeed be constitutionally necessary. Moreover, I have suggested that regulatory reform in the sector must be designed with regard to the interplay between child-focussed interests aimed at child protection; parent-focussed interests in access to quality ECD services for their children; provider-focussed interests aimed at advancing ECD provisioning; and a regulator-focussed interest in ensuring that the regulatory burden on government is achievable. In this way we may begin to find a balance between the extremes of under-regulation on the one hand and over-regulation on the other.

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## List of Abbreviations

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| DoH | Department of Health |
| DBE | Department of Basic Education |
| DSD | Department of Social Development |
| ECD | early childhood development |
| EHP | environmental health practitioner |
| PMG | Parliamentary Monitoring Group |
| NEHNS | National Environmental Health Norms and Standards for Premises and Acceptable Monitoring Standards for Environmental Health Practitioners |
| SAJCE | South African Journal of Childhood Education |
| SAJHR | South African Journal on Human Rights |
| SALRC | South African Law Reform Commission (previously South African Law Commission) |
| SALJ | South African Law Journal |
| SCA | Supreme Court of Appeal |
| Stell LR | Stellenbosch Law Review |