THE EQUALITY COLLECTIVE

ilifa labantwana

# Research Study: Health, Safety, and Environmental Standards for Early Childhood Development

## Summary Report

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A project of Ilifa Labantwana and the Equality Collective
Stakeholder interviews coordinated by Bridge

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# Introduction

1. We want to see all children in South Africa thriving and accessing inclusive, holistic, and quality early learning or early childhood development (**ECD**) services.

2. Children in poor communities should have access to government subsidised support while attending these programmes, and should be provided with stimulating early learning programmes in a safe and healthy environment.

3. The legal framework can either **enable** this or **impede** services through overly onerous and unreasonable registration requirements and processes. South Africa's current regulatory framework is complicated and overly burdensome, resulting in most programmes operating outside of the "regulatory net" in the informal sector.

4. Ilifa Labantwana and the Equality Collective seek to develop proposals for law and policy reform aimed at ensuring an appropriate regulatory framework for health, safety, and environmental standards for ECD. This research study explored both short- and longer-term possibilities for streamlining national and local frameworks governing the regulation of ECD health and safety.

5. The focus of the study was to broadly assess the regulatory framework, and the relationship between various regulatory instruments. The appropriateness of the *level* of the norms and standards was, however, beyond the scope of the study. **The study also focuses primarily on health and safety standards for partial care registration.** Our suggested approach to streamlining the regulatory frameworks is compatible with differentiated health and safety norms and standards for different types of ECD programmes, as proposed by a wide number of organisations and included in the Real Reform for ECD Campaign on the Second Children's Amendment Bill [B18-2020].

6. This summary is structured as follows:

    - **Part I** describes the evolution of the ECD health and safety regulatory framework and tracks how South Africa went from a system of under-regulation to a system of burdensome over-regulation.
    - **Part II** considers challenges and legal concerns in the current health and safety regulatory framework.
    - **Part III** explores pathways to a more coordinated and enabling regulatory health and safety framework with a set of short- and long-term recommendations.[1]

7. This summary of the study also refers to a series of stakeholder interviews coordinated by Bridge. Almost forty stakeholders from civil society, the Department of Basic Education (**DBE**), the Department of Social Development (**DSD**) and municipalities were interviewed, as well as ten environmental health practitioners and eighteen ECD practitioners.

[1] Part I (Section A to E), Part II (Section B), and Annexure A are based on research prepared by Ally. Part I (Section F) and Part II (Section A) is based on research prepared by Peacock. These sections are nonetheless presented jointly and reflect a joint position. The recommendations have been jointly developed.

8. The full study report includes a broad assessment of the DBE's regulation of health and safety in public and independent schools, and suggests comparative learnings for ECD health and safety regulation from three jurisdictions, namely, Namibia, Jamaica, and Zambia. A synopsis of this assessment can be found in **Annexure A** to this summary report.

9. During this research project, ECD was the remit of the DSD. However, as of 1 April 2022, the DBE is responsible for ECD, pursuant to a Presidential proclamation. References to DSD throughout this report should therefore be read as DBE, where necessary.

10. Finally, the recommendations we propose lay a foundation for further discussion and are not intended to be final. This study is the first step of a broader project to draft and pilot a fit-for-purpose environmental, health, and safety standards framework to advance access to inclusive, quality, and holistic ECD programmes. This study aims to capture key reflections, conclusions, and recommendations that will feed into this broader work.

# Part I: The Evolution of the ECD Regulatory Framework, from under- to over-regulation

### *Before democracy and the Children's Act*

11. Prior to the introduction of the Children's Act in 2005 (**the Children's Act**), the partial care of children was regulated under the Children's Act of 1960 (**the 1960 Act**) and, subsequently, the Child Care Act of 1983 (**the 1983 Act**).[2]

12. The 1960 and 1983 Acts made the health and safety compliance of "places of care" the domain of primarily local authorities. Registration required a building and health compliance certificate from the local authority. While inspections were conducted by nationally appointed authorities, to assess whether places of care were maintaining standards, such "standards" were not prescribed by national legislation.

13. Notably, while health and safety requirements were not strictly prescribed by legislation (thus providing a relatively "low" threshold to entry), operating a place of care without registration was a criminal offence under the 1983 Act. The 1983 Act did not provide for the state to assist a place of care to **become** registered. However, once registered, the 1983 regime specifically required that a developmental approach be adopted before registration could be **withdrawn because of non-compliance with standards.** The developmental approach required guidance and support to be provided and to give a place of care an opportunity to meet those standards.

### *The transition to democracy and a time of reform*

14. The transition to democracy heralded a period of review and reform of childcare legislation. The South African Law Reform Commission (**SALRC**) engaged ECD stakeholders and identified the following key issues:

    (i) fragmentation and overlap in the regulation of ECD services, and
    (ii) differing building and safety standards across municipalities, in the absence of national health, safety, and evironmental norms and standards for ECD.

    In this period there appeared to be general agreement that a "clear set of simple and achievable"[3] health and safety standards were needed, which would contribute to "tighter control"[4] of ECD provisioning and help to reduce regulatory fragmentation and lack of coordination.

2 The 1983 Act came into effect on 1 February 1987.
[3] Matthias, C. and Zaal, N., 2003 "Local government responsibilities for children revisited: an evaluation of the approach taken in the 2002 draft Children's Bill" South African Law Journal, 120(3), 477-493 at 482.
[4] Mahery, P., 2018 "Chapter 5: Partial care" in Davel, CJ. And Skelton, A. 2021, Commentary on the Children's Act, Juta at 5.

15. Interestingly, in 2002, the SALRC proposed draft legislation which included high-level ECD health and safety norms (which were very general and non-specific). This "core aspects only"[5] approach was welcomed by some commentators as striking a balance between providing some guidance to officials yet avoiding the imposition of unrealistic "first world standards" on ECD providers.[6]

16. At the same time, the DSD had begun developing "Draft Guidelines for ECD Services" (in 2002), these were finalised in 2006 (**the Guidelines**). The Guidelines provided "minimum standards" on certain ECD health and safety issues, and also emphasised that a "developmental and empowering process" should be adopted in monitoring and evaluation processes. However, the Guidelines were a non-binding framework and viewed as largely "aspirational".[7]

### *The Children's Act, 2005*

17. The Children's Act would, for the first time, provide for a binding national ECD health and safety framework. The Children's Act requires norms and standards to be prescribed in respect of various ECD health and safety issues, which were duly prescribed in 2010 (**the Regulations**).[8] While the rationale underpinning the norms and standards that were ultimately adopted remains unclear, the prescribed framework appears to have been based, at least in part, on the 2006 Guidelines.

18. Broadly speaking, the Children's Act requires operators wanting to register a partial care facility to comply with:

    (i) Health and safety requirements of the relevant local authority, with a health certificate being a requirement for registration; **and**
    (ii) nationally prescribed health and safety norms and standards for partial care **and** ECD programmes; **and**
    (iii) any other health and safety requirements as may be required by the Children's Act.

    The Children's Act does provide for the possibility of assisting a partial care facility to become compliant with all these requirements, so the facility can then be registered. However, this power is discretionary, and the state is not obliged to provide this developmental assistance to operators to help them comply with registration requirements.

19. In comparison to the 1960 and 1983 regimes then, the Children's Act introduced a more stringent regulatory framework for ECD provisioning. As emerged from the SALRC's consultation processes, this appears to have been driven by the well-intentioned view that "tighter control"[8] was required over the quality of ECD service provisioning, and the need for national norms and standards to ensure greater consistency and coordination. **However, the introduction of national norms and standards has not reduced inconsistency in requirements across and between local and provincial government. Instead, there has been ongoing overlap between provincial and local government roles and responsibilities in respect of ECD health and safety compliance.** This position has been further complicated by the introduction of a parallel set of national norms and standards regulating ECD health and safety requirements under the National Health Act of 2003 ('**the Health Act**').

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[5] Matthias and Zaal 2003:483.
[6] Matthias and Zaal 2003:483.
[7] As characterised by the Supreme Court of Appeal in *Government of the Western Cape: Department of Social Development v C B & Others* [2018] ZASCA 166 at para 44, and endorsed by the Constitutional Court in *BE obo JE v MEC for Social Development, Western Cape* [2021] ZACC 23 at para 23.
[8] Mahery 2018:5

### *The NEHNS, 2015*

20. The **Health Act** was published in 2003, before the Children's Act. The objects of the Health Act include 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."[9]

    - "Health services" in the Health Act is very broadly defined as including, amongst others, "basic nutrition and basic health care services contemplated in section 28(1)(c) of the Constitution", as well as "municipal health services".[10]
    - "Municipal health services" in the Health Act is defined as including, amongst others, "health surveillance of premises".[11]

21. In 2015, after the Children's Act Regulations were finalised, the Director-General in the Department of Health prescribed the "National Environmental Health Norms and Standards for Premises and Acceptable Monitoring Standards for Environmental Health Practitioners"[12] (**NEHNS**). The NEHNS contains a distinct set of norms and standards for specific premises including, amongst others, "child care centres" which include partial care facilities,[13] in terms of section 21 of the Health Act.[14] It is not clear on what basis the specific norms and standards in the NEHNS were determined which, in some respects, are more detailed and/or onerous as compared to the regulations under the Children's Act.

### *A parallel set of norms and standards*

22. The NEHNS creates a parallel set of norms and standards regarding health and safety at partial care facilities, alongside the Children's Act Regulations. In some instances, the NEHNS simply cross-refers to the norms and standards set out in the Children's Act Regulations (for example, keeping of registers and records and staffing requirements). However, generally, there is a substantial lack of alignment between the norms and standards under each regulatory instrument.

23. In addition to this lack of alignment, the NEHNS creates parallel inspections, monitoring, and enforcement processes to that of the Children's Act and its Regulations, thus adding to the regulatory confusion of providers and of state administrators.

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[9] Section 2(c)(iii) of the Health Act.

[10] Section 1 of the Health Act.

[11] Section 1 of the Health Act. "Premises" is defined as "any building, structure or tent together with the land on which it is situated and the adjoining land used in connection with it and includes any land without any building, structure or tent and any vehicle, conveyance or ship".

[12] National Environmental Health Norms and Standards for Premises and Acceptable Monitoring Standards for Environmental Health Practitioners published under Notice 1229 in Government Gazette 39561 of 24 December 2015.

[13] Defined by the NEHNS at 8 as "partial care facility as categorized 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."

[14] Section 21 of the Health Act obliges the Director-General of Health to, in accordance with national health policy, "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".

### *The role of EHPs*

***24.*** The NEHNS "speaks" to or is aimed at providing a guiding framework within which Environmental Health Practitioners (EHPs) must implement their duties in terms of the Health Act. EHPs inspect premises and issue compliance notices where there is non-compliance with the NEHNS.[15] Stakeholder interviews strongly relayed that the expertise for health and safety rests with EHPs who are professionally trained, and not with provincial DSD officials.

### *The frequency of inspections*

25. The NEHNS indicates that child care centres should be inspected by EHPs at least once every quarter (four times a year),[16] and that they must issue annual health certificates.[17] Although, in our view, even taking into account EHP expertise, a quarterly inspection requirement is overly onerous on administrators. It is notable that EHP stakeholders also acknowledged that conducting four inspections a year was not feasible.

### *What is the binding nature of the standards contained in the NEHNS?*

26. The NEHNS is not entirely clear as to whether, or to what extent, its norms and standards are meant to create an immediately binding framework for ECD providers. On the one hand, the NEHNS refers to it being based on the principle of "voluntary compliance" and the need to "strike an appropriate balance between promotion and education and law enforcement".[18] On the other hand, the NEHNS indicates that child care centres "must" comply with the standards set out therein, thus suggesting mandatory compliance.[19] Although, in stakeholder interviews, EHP representatives noted that they consider the NEHNS as binding on all ECD providers and apply it as such. Based on responses, they consider it necessary to apply these standards as part of their code of conduct and the professional ethics that govern their profession.

27. The requirement of an annual health certificate to be issued by an EHP also reinforces the view that compliance with the NEHNS is not merely voluntary.[20] The NEHNS defines a health certificate as a certificate issued "to certify that the premises complies with the relevant norms and standards." While this may seem to indicate a "checklist" type approach to each of the norms and standards, the Guideline Template for Health Certificates for Child Care Centres under Appendix 3 to the NEHNS is more "high-level", **suggesting that a more "basic" check would suffice.** Appendix 4 and Appendix 5 of the NEHNS 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. **Very importantly, read together, these appendices suggest that EHPs are directed to primarily assess whether there is basic (as opposed to full) compliance with the relevant standards, to identify health hazards, and recommend corrective measures.**

[15] Section 82(3).
[16] NEHNS at 10.
[17] NEHNS at 35, para 4(a) and (e).
[18] NEHNS at 13.
[19] NEHNS at 35.
[20] NEHNS at 35, para 4(a) and (e).

*Are provincial DSD officials bound by the NEHNS?*

28. Our understanding is that some provincial DSD officials have also been uncertain as to whether they are bound by the NEHNS – in other words, whether provincial DSD officials should have regard to the NEHNS for purposes of registering, funding, and/or inspecting partial care facilities. For the reasons set out below, **provincial DSD officials are not, in our view, legally bound to apply or implement the NEHNS**, either under the Health Act or the Children's Act:

    28.1 First, the Health Act does not inform the obligations of provincial DSD administrators when registering, funding, and/or inspecting partial care facilities.

    28.2 Second, the Children's Act does not require provincial DSD administrators to consider compliance with norms and standards under other laws.

        28.2.1 When considering applications for registration, the provincial DSD must consider the Children's Act Regulations and "such other requirements as may be prescribed." As noted, the Act indicates that "prescribed" means "prescribed by regulation" and "regulation", in turn, is defined as "a regulation made in terms of this Act". For purposes of registration then, the Children's Act does not require (or empower) provincial DSD officials to consider norms and standards prescribed under laws other than the Children's Act.

        28.2.2 To qualify for funding, partial care facilities must comply with the norms and standards prescribed under the Children's Act Regulations, and "the structural safety, health, and other requirements of the municipality of the area where the partial care facility is situated". While this provision requires compliance with municipal health and safety requirements, there is no requirement to comply with norms and standards established under other *national* legislation, such as the NEHNS under the Health Act. The NEHNS will only be relevant if a municipality has chosen to align its by-laws to the NEHNS.

        28.2.3 The Children's Act requires provincial officials to inspect partial care facilities at prescribed intervals, and the Children's Act Regulations indicate that inspections and monitoring must be aimed at checking compliance with the norms and standards determined by the Regulations. There is no requirement to assess compliance with other norms and standards.[21]

*The overlapping roles and responsibilities of different levels of government*

29. The table below illustrates a confusing regulatory terrain with very poor guidance available to ECD programme providers who want to become registered.

[21] While section 304 empowers a person to be authorised by either national, provincial, or local government to inspect partial care facilities for compliance with "any structural, safety, health and other requirements as may be required by any law", this is not a mandatory inspection provision (unlike the inspection requirement under section 87 of the Act). Therefore, it is not mandatory for provincial DSD officials to assess compliance with the NEHNS during required inspections.

| DESCRIPTION | COMMENTARY |
|---|---|
| **Determination of health and safety norms and standards**<br>In terms of the Constitution and legislation, which departments and spheres of government can determine norms and standards for health and safety? | |
| **The Children's Act** specifically mandates the Minister of Social Development to determine norms and standards for health and safety for ECD programmes after consultation with various Ministers including the Minister of Health.[22] Mandatory guidance as to the content of the norms and standards is also provided.[23]<br><br>**The National Health Act** broadly empowers the Minister of Health to determine norms and standards for health and safety for "health services" which is broadly defined to include "municipal health services" which includes the "health surveillance of premises", which can be interpreted to include the premises of ECD programmes.[24]<br><br>**Local governments** have the competency to determine norms and standards for health and safety for ECD programmes since "child care facilities" and "municipal health services" are in schedule 4B of the Constitution. The power of local governments to determine their own standards is also incorporated in the funding requirements of the Children's Act[25] as well as the application requirement of a "health certificate issued by the local municipality."[26] | • Multiple levels of government and different departments are empowered to determine health and safety norms and standards. However, only the requirements prescribed in terms of the Children's Act are registration requirements.<br><br>• In terms of the 1960 and 1980 legislation, only local authorities determined health and safety requirements. |
| **National guidance on norms and standards**<br>National and provincial legislatures are empowered to provide guidance concerning the content of norms and standards. The Constitutional Court has made it clear that national guidance can be provided to local governments in respect of their competencies.[27] | |

[22] Section 79(1) of the Children's Act.
[23] Section 79(2) of the Children's Act.
[24] Section 21 of the National Health Act.
[25] Section 78(2)(ii) of the Children's Act.
[26] Reg 14(4)(f) of the General Regulations.
[27] Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others [2014] ZACC 9.

| | |
|---|---|
| **Legislation may provide guidance** on the scope and content of norms and standards concerning health and safety (even if it is a local government competency).[28]<br><br>At present, the only national piece of legislation to provide guidance to any department regarding what norms and standards for health and safety for ECD programmes should consist of, is the Children's Act.[29] **The guidance is given to the Minister of Social Development**, as the person responsible for determining such norms and standards. | • No guidance is provided for in the National Health Act (in the primary legislation itself) for partial care facility norms and standards.<br><br>• National legislation currently provides no explicit guidance to municipalities as to what their by-laws regarding health and safety for ECD programmes should consist of. The national norms and standards could arguably be an indirect guide to municipalities.<br><br>• The 1983 Act provided no guidance to municipalities either. |
| **Standardisation of norms and standards**<br>What efforts have been made in national regulation or legislation to standardise local government norms and standards for health and safety? | |
| The NEHNS purport to provide "a national approach in standardizing activities in the delivery of EHS and establish a level against which EHS delivery can be assessed, and gaps identified."[30]<br><br>No other express attempts aimed at standardisation are made, despite this being one of the motivations behind the development of norms and standards in terms of the Children's Act. | • Even though the NEHNS mentions an effort at standardization, it is not a model of clarity who the efforts at standardization are aimed at and how ensuring compliance with the NEHNS will be achieved. One possible interpretation is that the NEHNS are aimed primarily at local governments, and municipalities should be aligning their local standards to the NEHNS (this is because local governments are to be audited annually to 'monitor' compliance with the NEHNS).[31]<br><br>• It would be an arduous task to standardise norms and standards entirely as local governments are an autonomous sphere of government with the power to make and administer by-laws concerning health and safety.[32] This is not insurmountable though and efforts can and should be made to encourage municipalities to align their by-laws with national norms and standards or model by-laws. |

[28] See Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others [2014] ZACC 9.
[29] Section 79(2) of the Children's Act.
[30] NEHNS at 13.
[31] NEHNS at 10.
[32] Section 156(1) of the Constitution.

| **Registration requirements**<br>What health and safety requirements are registration requirements and who is responsible for evaluating compliance? | |
|---|---|
| Children's Act includes **compliance with the partial care facilities norms and standards**[33] together with the provision of a **health certificate issued by the local authority** as registration requirements.[34]<br><br>The **NEHNS are not formally registration requirements** and would only become so through a local municipality adopting or aligning their by-laws and health certificate requirements to the NEHNS. | • Health and safety requirements are detailed as the responsibility of two spheres of government (local and provincial).<br><br>• It is not immediately obvious that the NEHNS are **not** registration requirements, and this has led to much confusion in the sector.<br><br>• The different norms and standards in different regulatory instruments make it very difficult for ECD providers to know and appreciate which norms and standards they must adhere to. In other words, the regulatory regime provides a poor level of guidance to providers. |
| **Consideration of application**<br>Which sphere of government considers, approves, approves with conditions or declines a registration application? | |
| It is the provincial department of social development that has the responsibility to consider an application. When doing so they must consider whether the ECD programmes complies with national norms and standards.[35] | The decision to register or not lies with the provincial sphere of government. |
| **Funding of ECD programmes** | |
| Only the provincial head of social development has the power to fund partial care facilities and ECD programmes as defined in the Children's Act. Funding is contingent on compliance with health and safety norms and standards and any such other requirements as may be prescribed including the "structural safety, health and other requirements" of the municipalities.[36]<br><br>Notwithstanding this provision the provincial head also has the power to assist facilities to comply with norms and standards.[37] | No commentary. |

[33] Section 80(1)(c) of the Children's Act.
[34] Reg 14(4)(f) of the General Regulations.
[35] Sections 82(2)(a) and S97(2)(a) of the Children's Act.
[36] Section 78(2) of the Children's Act.
[37] Sections 82(5) and 97(5) of the Children's Act.

**Inspection and monitoring**

Which sphere of government is responsible for inspection and monitoring for compliance with health and safety norms and standards?

The **provincial head of social development** must designate people to inspect partial care facilities[38] at least every 5 years[39] and every 2 years for ECD programmes as defined in the Act.[40] These functions can be delegated to a municipal manager.

Inspection reports must be drawn up and submitted to the **provincial head**[41] and contain considerations of compliance with the norms and standards.[42]

Inspections of partial care facilities can take place at shorter intervals under certain conditions.[43]

The **provincial head, the Director General, and a municipality** also have broad powers to authorize an inspection and may consider compliance with norms and standards, other requirements as prescribed and any structural, safety, health and other requirements as may be required by any law.[44]

Under the NEHNS, the **Health Officer/EHP must inspect child care facilities at least once every quarter** (4 times a year)[45] and must do so if there is any reason to believe that there is a health nuisance or health hazard.[46] This is despite the Health Certificate issued under the NEHNS only requiring renewal annually.[47]

Stakeholder interviews with EHPs suggested that EHPs use the NEHNS, the Children's Act regulations, and a local municipality's by-laws at the same time when doing their inspections. Others interviewed indicated that in some regions the EHPs do not use the NEHNS at all and only use local government by-laws.

- Partial care inspections by the province are more infrequent and only at every five-year intervals. Stakeholder interviews with EHPs insisted that the provinces should also be checking facilities annually and they are encouraging provincial officials (social workers) to do annual checks together with EHPs.
- The requirement to inspect quarterly is incredibly onerous and, as gleaned from the stakeholder interviews with the EHPs, not practicable due to capacity constraints.
- It is unclear why provinces AND local governments must, as suggested by stakeholders, inspect compliance with health and safety requirements.
- The 1983 Act required a quality assurance assessment every two years by national authorities and that this was "presumably based on standards of local authorities."

[38] Reg 21(2) of the General Regulations.
[39] Reg 21(4) of the General Regulations.
[40] Reg 28(5) of the General Regulations.
[41] Regs 21(3) and 28(4) of the General Regulations.
[42] Regs 21(1) and 28(1) of the General Regulations.
[43] Regs 21(4) and (5) of the General Regulations.
[44] Section 304(3) of the Children's Act.
[45] NEHNS at 18.
[46] Section 83(1) of the Children's Act.
[47] NEHNS at 2(4)(e)(i).

## Consequences for non-compliance with health and safety N&S

Non-compliance with the norms and standards may impact on the ability of a partial care facility or ECD programme to be registered. This is because the **provincial head of social development** is required to consider "all relevant factors" when considering an application for registration, including whether the facility or programme "complies with the prescribed national norms and standards."[48]

The **provincial head of social development** has the power to cancel the partial care facility or ECD programme's registration by written notice.[49] The cancellation may be suspended to allow the facility or programme to remedy the non-compliance within a specific period (after which registration may be reinstated).[50] Furthermore, the provincial head of social development is specifically empowered to assist a facility to comply with the norms and standards where cancellation was as a result of non-compliance.[51]

Alternatively, the **provincial head of social development** may issue a written notice of enforcement instructing a partial care facility or ECD programme that is being operated contrary to the requirements of the Act and its Regulations (or conditions of registration) to comply with those requirements or conditions.[52]

A **health officer** may issue compliance notices to persons responsible for a health nuisance or hazard (i.e. not for general non-compliance with the NEHNS).[53]

An **EHP** can also withdraw a health certificate for non-compliance.

- Non-compliance with health and safety N&S is not a criminal offense in terms of the NEHNS or the Children's Act.
- Generally, the provincial departments under the Children's Act have broad powers in relation to ensuring compliance.
- The consequence for non-registration with the 1983 Act was a criminal offense (more severe than the current consequences). Despite this, the 1983 Act had a greater developmental approach where there was non-compliance with relevant requirements. A "developmental programme, guidance and support" was offered to help a provider meet requirements within a specified period. While inspections by nationally-appointed officials considered compliance with standards, these were not strictly prescribed.

[48] Sections 82(2)(a) and 97(2)(a) of the Children's Act.
[49] Sections 84(1)(a) and 99(1) of the Children's Act.
[50] Sections 84(2) and 99(2) of the Children's Act.
[51] Sections 82(3) and 99(3) of the Children's Act.
[52] Sections 85(1)(b), 100(b) and (c)(ii) of the Children's Act.
[53] Section 80(1) of the National Health Act.

30. The current regulatory regime is a muddle of disconnected and uncoordinated role and responsibilities, which makes it challenging to clearly identify:

- Who has the power to determine health and safety norms and standards?
- What guidance do national and provincial legislatures provide concerning health and safety norms and standards?
- How does compliance with various health and safety requirements relate to registration and funding?
- Who has the responsibility to inspect and monitor facilities and how frequently?
- Who should have the power to act when there has been non-compliance?

31. In summary, there has been a move from under-regulation of ECD health and safety requirements in the pre-democratic era to over-regulation in the democratic era. Regulatory reform is urgently required to ensure alignment between the frameworks prescribed under the Children's Act and Health Act respectively, as well as alignment between local government by-laws and national norms and standards.

# Part II: Challenges and legal concerns with the current regulatory framework

## A. Challenges within the Children's Act – Constitutional concerns regarding duplicated roles and responsibilities[54]

32. The South African Constitution designates "child care facilities" as well as "municipal health services" as competencies of **local government**. The Constitution provides that a municipality has "executive authority" and the "right to administer" functions related to child care facilities.[55] This will include the powers to implement laws as well as powers of management, planning and decision-making. Local government also has the power to "make and administer by-laws" for the purpose of the effective administration of the function[56] and it will have the power to govern[57] its affairs in relation to that function which will include the ability to regulate and make policy.

33. A core responsibility of **local government** for "child care facilities" is its **executive authority to regulate health and safety** in partial care facilities, as part of its primary responsibility to ensure a healthy and safe environment for children.[58] This primary responsibility is evidenced by:

(i) the historical role that municipalities played in this area; [59]
(ii) their technical expertise with EHPs operating at the local government level; [60]
(iii) the allocation of responsibilities by the Municipal Demarcation Board;[61]
(iv) the current role they play in terms of the Children's Act and its Regulations;[62] and
(v) how municipalities see and understand their roles and responsibilities.[63]

Although the NEHNS mandates EHPs to inspect facilities quarterly, our stakeholder interviews revealed that local municipalities typically inspect facilities annually.

34. Alongside this, the Children's Act also allocates a set of responsibilities to **provincial government** relating to health and safety norms and standards. When considering an application for registration, the provincial head of social development has the responsibility to consider if a facility complies with the norms and standards for partial care.[64] Here, the provincial head will

[54] Peacock, in a draft paper for the South African Journal for Human Rights, discusses the roles and responsibilities of local government in respect of health and safety standards. This paper is referenced and quoted directly in the Full Report
[55] Section 156(1)(a) of the Constitution.
[56] Section 156(2) of the Constitution.
[57] Section 151(3) of the Constitution.
[58] As per section 152(1)(c) of the Constitution.
[59] The regulatory regimes under the 1960 and 1983 Acts largely deferred to local authorities in respect of ECD H&S requirements.
[60] EHPs are professionally trained and belong to a professional body and are the officials well-placed to undertake these kinds of checks.
[61] MBD "Local Government Powers and Function – Definitions, Norms and Standards" at 10.
[62] Section 78(2)(ii) of the Children's Act; regulation 14(4)(f) of the Children's Act Regulations.
[63] Stakeholder interviews indicated that EHPs are, in practice, operational at the local level and understood their role as falling within a local government function.
[64] Section 82(2)(a).

take into consideration a social service professional's report[65] on the viability of the application. The provincial heads are also required to inspect a facility at prescribed intervals.[66] According to the Children's Act Regulations, this process happens at least every five years.[67]

35. The Children's Act therefore duplicates inspection roles by requiring provinces to evaluate and monitor health and safety standards in partial care facilities themselves (at five yearly intervals), alongside municipalities whose EHPs are inspecting ongoing health and safety compliance more regularly (at quarterly intervals, or annually in practice). In our view, this duplication could be constitutionally impermissible.

36. The Constitutional Court makes it clear in a series of judgments[68] that another sphere of government cannot:

(i) usurp the powers of a local authority;
(ii) intrude on their autonomy; or
(iii) allocate the performance of functions to other levels of government.

37. In our view, the guidance of the Constitutional Court provides multiple potential avenues to further streamline the roles and responsibilities across the spheres of government. This should start with removing the duplication of the function sitting with provinces as far as health and safety is concerned, and establishing their role as firmly one of oversight.

38. The Constitutional Court also provides very useful advice about what an appropriate regulatory framework consists of for provincial and national government to guide, monitor, and oversee the effective implementation of a local government function. None of this advice is heeded in the design of the Children's Act. **The Children's Act and its Regulations should:**

**(i) give details about the roles and responsibilities of local government;**
**(ii) outline norms and guidance to local government; and**
**(iii) provide national and provincial government with a framework for the monitoring of local government.**

39. We believe that addressing these constitutional concerns will require a fundamental re-working of the national legislative framework governing health and safety roles and responsibilities for partial care facilities and ECD programmes. A more coherent framework can be achieved either within the Children's Act or within a new piece of legislation governing ECD.

40. Lastly, it is important to note that while it may be possible to streamline the roles and responsibilities of the different spheres of government further, perfect and neat silos are neither realistic nor possible. Thus, in addition to regulatory reform, there is also generally a need for greater coordination across the spheres of government.

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[65] Section 81(c)(i).
[66] Section 87(1)(c).
[67] Regulation 21.
[68] See, *Premier of the Province of the Western Cape v President of the RSA & Others* 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC) para 51; *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) para 25; *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11 para 44; and *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others* [2014] ZACC 9.

## B. Challenges between the Children's Act and the NEHNS

41. Concerns also arise from the parallel regulatory frameworks established under the Children's Act and the NEHNS. It is our understanding that this regulatory overlap and confusion between the Children's Act Regulations and the NEHNS has had an impact on both ECD providers and provincial administrators. This presents the challenge of overlapping and duplicated regulation, compounded by inconsistency and/or conflicts between the requirements under each of these instruments. It is clear that greater clarity and regulatory reform is urgently required to ensure alignment between the frameworks prescribed under the Children's Act and Health Act respectively.

42. Our preliminary view is that there is some basis to suggest that the lack of consistency and coordination in the regulatory framework is unlawful. In any event, the current situation is highly undesirable from a regulatory perspective and that steps are required to create a more integrated and coordinated system – for the benefit of ECD providers as well as to better guide the regulatory authorities.

43. Key legal challenges include:

43.1 **Firstly, in relation to whether the NEHNS can regulate ECD health and safety standards alongside the Regulations** — It is a maxim of statutory interpretation that a general statute's reach may be limited by the existence of more specific legislation. Considering this maxim, it is arguable that the "reach" of the more general provisions of the Health Act empowering the determination of norms and standards should not be interpreted as extending to the determination of norms and standards for partial care, which is more specifically provided for under the Children's Act. If this approach is correct, the NEHNS should not determine ECD health and safety standards parallel to that of the Children's Act Regulations.

43.2 **Secondly, even if the NEHNS can regulate ECD health and safety alongside the Children's Act Regulations, provincial DSD officials are not bound by the NEHNS** — As explained above, we believe that neither the Health Act nor the Children's Act requires or empowers provincial officials to consider compliance with the NEHNS before registering or funding partial care facilities. While provincial officials **may** consider compliance with the NEHNS in **discretionary** inspections conducted under the Act,[69] this is also not a requirement for the **mandatory** provincial inspections that occur every five years, and the NEHNS is primarily the domain of EHPs conducting health and safety inspecting at local government level.

43.3. **Thirdly, even if the NEHNS can regulate ECD health and safety alongside the Children's Act Regulations, whether the lack of alignment between the NEHNS and Regulations may be irrational, unreasonable, or create such uncertainty as to be inimical to the rule of law** – Organs of state have a constitutional obligation to coordinate their actions and legislation with one another and to exercise public power rationally and, in some instances, reasonably. There are three potential bases upon which the current regulatory scheme may fail to meet these requirements:

[69] Section 304(3) of the Children's Act.

43.3.1 First, both the Children's Act Regulations and NEHNS aim, at least in part, to achieve uniformity and standardisation in the regulation of ECD health and safety requirements through the introduction of norms and standards. However, the lack of alignment between the instruments results in that purpose being undermined rather than furthered. This arguably renders the regulatory scheme irrational as the means chosen (inconsistent norms and standards) does not bear a rational connection to the ends sought to be achieved (a uniform and coordinated regulatory framework).

43.3.2 Second, the inconsistency and lack of alignment between the NEHNS and Children's Act Regulations is arguably unreasonable as not only are the aims of uniformity and coordination being undermined, with no apparent reason for the inconsistencies, but the resulting regulatory confusion and increased regulatory burden has a severely detrimental impact on ECD providers (and, in turn, children).

43.3.3 Third, the extent of the inconsistency (and, in at least one instance, direct conflict) between the Children's Act Regulations and the NEHNS, together with the fact that administrators and ECD providers are required to "piece" together the regulatory framework – an exercise that even well-trained lawyers find challenging – arguably renders the regulatory scheme so unclear and uncertain as to be inconsistent with the rule of law.

# Part III: Pathways toward a more coordinated and enabling regulatory health and safety framework

44. The recent migration of functions from the DSD to DBE presents an opportunity to address regulatory challenges burdening the sector and ultimately hampering the realisation of quality ECD provisioning. Below we propose some high-level regulatory amendments that are intended to lay a foundation for further discussion and engagement. These are not final recommendations. Next steps following this study will include a series of engagements and further research that will help finalise a set of proposed reforms.

45. It is important to note that the "short-term" interventions below are characterised as such simply because they may require amendments to regulations (delegated legislation) as opposed to amending an Act (primary legislation). Our characterisation of recommendations as "short-term" should not be understood to mean that we think their implementation will necessarily be quick or simple.

## A. Recommendations for short-term interventions

46. For the purposes of these recommendations, the following points emerging from our analysis of the existing legal framework bears emphasis:

    46.1 In our view, provincial officials are not required to consider compliance with the NEHNS before registering or funding partial care facilities.[70]

    46.2 Additionally, as explained in above,[71] in our view the NEHNS can be interpreted to mean that EHPs must assess whether there is **basic** compliance with NEHNS standards, as opposed to full compliance with each and every standard.

47. **Further**, a single or aligned national set of norms and standards under the custodianship of the DBE should be a primary goal for the DBE. Without achieving this, attempts at streamlining or simplifying the norms and standards will continue to be hamstrung by the presence of the NEHNS standards in its current form.

48. We suggest that a single or aligned national set of norms and standards can be achieved through the following approach:

    ***Option 1***

    48.1 Ideally, the NEHNS should exclude partial care facilities from its "scope of application" on the basis that these are provided for under the Children's Act and Regulations. There is precedent for this in the NEHNS itself, with some areas such as "domestic health care risk waste generators" and "mining waste" being excluded from the NEHNS.

    48.2 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 when EHPs inspect the environmental health and safety of partial care facilities, they are referring to and implementing only the norms and standards that are detailed by the Children's Act Regulations, as the singular set of national set of norms and standards, determined by national government.

[70] While provincial DSD officials may consider compliance with the NEHNS in discretionary inspections conducted under Section 304(3) of the Children's Act, the NEHNS is not a requirement for the mandatory provincial inspections that occur every five years.
[71] See par 24 and 25.

***Option 2***

49. The NEHNS should in the least be amended to cross-refer to and be aligned with the Children's Act Regulations insofar as the content of norms and standards are concerned, and only detail additional aspects that are entirely specific to EHPs (for example, the frequency of inspections by EHPs).

50. The Children's Act Regulations should, in turn, be amended to address any gaps 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 enclosure of the premises).

51. Such revisions will serve to offer a more coordinated regulatory framework, with the Children's Act Regulations providing **primary guidance** on the applicable norms and standards, to which both provincial and local government authorities can have reference.

52. **Secondly**, it is possible to introduce some greater flexibility concerning the **level of the norms and standards.** As a reminder, the appropriateness of the level of the norms and standards is beyond the scope of this Study.[72] These suggestions are drawn from the stakeholder interviews and the comparative research, and include recommendations to explore amending the Regulations as follows:

    52.1 To clearly indicate which of the norms and standards emanating from the Children's Act and Regulations, as the single set of N&S, are minimum threshold or "floor" requirements (if any) as compared to aspirational or progressively achievable norms and standards, or "ceiling" requirements.[73] The Jamaican "Standards for the Operation, Management and Administration of Early Childhood Institutions" (**SOMA**) is instructive here. The SOMA clearly sets out which standards are legally required (i.e., binding in terms of the Act or Regulations) and which are voluntary (i.e., best practice).

    52.2 To provide for a regular review mechanism of the Children's Act Regulations, as provided for in the **norms and standards for school infrastructure**.[74] This will ensure that the appropriateness of the standards is regularly assessed.

    52.3 To include a provision requiring relevant officials, when considering conditional registration, to take into account the community context within which an ECD facility is situated when applying the standards, similar to the approach in **Namibia**'s Child Care and Protection Act.[75]

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[72] A potentially useful set of parameters concerning the development of norms and standards was provided by Smart Start in stakeholder interviews. It was proposed that standards should be: realistic; contextually appropriate; proportionate; objective; comprehensible; observable.

[73] The establishment of minimum norms and standards implies the establishment of a "floor", which must be complied with in the least. At present, it is unclear whether the norms and standards as prescribed intend to act as such a "floor" or as a progressively achievable framework. A "ceiling" would suggest, for example, that local government may not impose standards higher than those set out in the Regulations or part thereof.

[74] Regulations relating to Minimum Uniform Norms and Standards for Public School Infrastructure (2013), in terms of the South African Schools Act 48 of 1996.

[75] Child Care and Protection Act 3 of 2015. The Act does not specifically empower officials to consider community context when applying standards. However, our preliminary view is that this may be lawful in respect of conditional registration as the conditional registration mechanism is inherently aimed at recognising the individual provider's particular circumstances.

52.4 To **streamline and reduce inspection processes** considering a realistic assessment of administrative capacity and the need for effective monitoring of providers. Quarterly inspections should be reduced to annual inspections.

53. **Thirdly**, in the shorter term, we also think it would be wise to include in the Children's Act Regulations a clearer **developmental framework** where an official wishes to withdraw a provider's registration (or conditional registration) certificate due to non-compliance with norms and standards. This would align with suggestions made by some DBE representative stakeholders in the interviews conducted. It is notable that the mandatory developmental provisions under the 1983 Act Regulations[76] (applying to registered facilities that failed to meet relevant requirements) are no longer included in the current regulatory framework. This is a regrettable omission as the clear developmental mandate, together with detailed guidance to administrators on how to implement it, would assist ECD providers and would make clear that the norms and standards provide a progressive framework for compliance.

## B. Recommendations for longer-term interventions

54. Finally, we make some longer-term recommendations for the streamlining of the regulatory system, much of which is most appropriate for the future design of a self-standing piece of legislation. Most of these recommendations are informed by our understanding that the inspection of environmental health and safety of partial care facilities is a function of local government, with standards being set at the national level through the Children's Act and Regulations. Please consider the recommendations above as part and parcel of our longer-term recommendations. Our longer-term recommendations are as follows:

54.1. **The power to determine health and safety norms and standards:**

54.1.1. The Minister of Basic Education, after consultation with the Minister of Health, should be empowered to determine a **singular instrument of differentiated, national, minimum health and safety norms and standards** that expressly guide local government in the exercise of their executive authority to regulate health and safety for ECD programmes.[77] The NEHNS should ideally exclude partial care facilities from its "scope of application" on the basis that these would be provided for under the singular norms and standards instrument determined by the Minister of Basic Education.

54.1.2 The Minister of Health should be permitted to determine national norms and standards for health and safety only in respect of the services for which that department is responsible, e.g. health and nutrition programmes for pregnant women, infants, and children (as suggested by the National ECD Policy).

[76] Child Care Act 74 of 1983.

[77] The thrust of this recommendation is that there should be a singular instrument that guides local government. Any concerns about whether the DBE is the appropriate department should be mitigated by ensuring that any standards are finalised after consultation with the Minister of Health.

54.1.3. Municipalities must retain their powers to develop their own by-laws, but these should align with the differentiated national norms and standards for ECD programmes set by the Minister of Basic Education, and should accommodate local needs.

54.2 **National guidance on health and safety norms and standards:**

54.2.1 Legislation should make it clear that the aims of the health and safety norms and standards are to:

(i) secure a national set of minimum health and safety norms and standards that will help standardise the requirements and expectations of providers across municipalities;

(ii) provide clear guidance to ECD programme providers; and

(iii) secure a basis for quality provision for ensuring a healthy and safe environment for children.

54.2.2. It should be made clear that the local government holds the executive authority to inspect compliance with health and safety standards.

54.2.3. The legal framework should provide simple guidance as to the content of the minimum health and safety norms and standards of local government.

54.3 **Standardisation of health and safety norms and standards:**

54.3.1 National legislation should require national and provincial departments of basic education only to **monitor and evaluate** local government compliance with national norms and standards, and assist them to align with national standards. This will help to ensure ongoing consistency between local government by-laws.

54.3.2 While a significant reform, it may be worth considering the model of introducing an agency to serve as a coordinating structure, to ensure alignment and effective standardisation (Jamaica offers an instructive example in this regard, in the form of the Early Childhood Commission[78]).

54.4 **Inspection and monitoring of health and safety norms and standards:**

54.4.1 The **responsibility to regularly inspect** partial care provider compliance with structural, health, and safety norms and standards must lie with local government alone.

54.4.2 The obligations on provincial departments to inspect partial care facilities for compliance with structural, health, and safety norms standards, should be removed – provincial and national departments should only be empowered to **monitor and evaluate** local government performance of its functions. A general power to inspect (as per the 1983 Act) that is not prescriptive, is likely appropriate as part of a monitoring function.

[78] See Early Childhood Commission, "About Us" accessible at https://ecc.gov.jm/about-us/.

54.4.3 Legislation should include intervention criteria that details when and how provinces can intervene and assist or take over from local government when they are failing to perform their responsibilities.

54.5 **Consideration of application for registration** (that includes compliance requirements related to health and safety norms and standards):

54.5.1 Provincial education departments should retain the power to consider applications and register an ECD programme. This is because registration is not based on compliance with health and safety standards alone, but also on curriculum and other programmatic standards which are not in the purview of local government. They should also retain the power to grant conditional registration, as conditional registration allows the province to balance other competing considerations alongside health and safety compliance and to evaluate what is in the best interests of the child.

5.5.2 Insofar as a health certificate is required for registration, this will be issued by an EHP at the local level prior to the application for registration.

54.6 **Consequences for non-compliance with health and safety norms and standards:**

54.6.1 A clearer developmental approach should be adopted in the primary legislation to deal with non-compliance before withdrawing registration (drawing from the 1983 regulatory framework).

54.6.1 The National ECD Policy should also be updated to provide much needed guidance for future legislation in this area.

## Conclusion

55. While the current health and safety regulatory framework is characterised by considerable overlap and duplication of roles at various levels of government, and potential legal and constitutional challenges, there is both opportunity and scope to streamline the framework and align the relevant instruments.

56. We believe this can be achieved with a series of regulatory amendments: some can be initiated and implemented by the executive relatively swiftly, and others can be initiated and implemented as part of longer-term legislative and regulatory reforms.

57. The recommendations emanating from the study will now form the basis of further discussion and consultation, including with the broader ECD sector, to crystalise a coherent set of regulatory reforms. Ultimately, we hope to offer practical pathways to finding a balance between the extremes of past under-regulation on the one hand, and current over-regulation on the other, towards an enabling regulatory environment that is in the best interests of all young children in South Africa.

# Annexure A: South Africa's ECD Health and Safety Framework in Comparative Perspective

## A. Comparison with ECD health and safety standards in basic education sector

A high-level assessment of the current regulatory framework for health and safety standards in schools was undertaken to broadly compare the regulation of the basic education sector with the ECD health and safety regulatory framework.

Minimum norms and standards issued by the DBE regulate aspects of health and safety for public schools.[79] In addition, the NEHNS includes certain standards for schools (applying to both public and private schools).

The following broad observations are notable:

- The DBE regulations (in relation to public schools) address less issues and are less prescriptive than the Children's Act Regulations and the NEHNS (for ECD). In some respects, however, the DBE Regulations are slightly more onerous,[80] including in relation to some aspects of Grade R.[81]
- The DBE Regulations include a mechanism for periodic review of the regulations to ensure that they remain current and appropriate, whereas the Children's Act Regulations do not contain such a mechanism.
- Private schools must be registered with the provincial departments to operate. Regulation of health and safety standards for private schools is provincially determined and largely inconsistent. The extent to which the DBE undertakes monitoring of private schools' compliance with health and safety standards is unclear.
- The duplicate and parallel regulation of health and safety standards in schools under the DBE framework and the NEHNS is also apparent in the basic education sector. Stakeholder interviews suggested that DBE officials' and EHP interviewees' views on inspection were not necessarily aligned in respect of public school inspections. Moreover, there may also be regulatory overlap with the Department of Labour's Occupational Health and Safety inspections.

[79] Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure (2013), in terms of the South African Schools Act 84 of 1996.
[80] For example, the perimeter fence for a school must be 1.8m2 whereas in the ECD Framework, a fence needs to be 1.5m2.
[81] For example, in relation to minimum space allocation per child, minimum education area and toilets and basins.

### *Public Schools*

The South African Schools Act, 1996[82] ("**SASA**" or "**the Act**") did not initially provide for the determination of norms and standards relating to health and safety requirements for schools. The Act was, however, amended in 2007[83] to include provision for minimum uniform norms and standards regarding *public* school infrastructure, capacity, and learning and teaching support material, as well as provisions relating to compliance with such norms and standards.[84]

The purpose of the *minimum* norms and standards provisions appears to be at least two-fold: first, to establish a *benchmark* for quality education provisioning at public schools; and, secondly, to establish *uniformity* in minimum requirements relating to infrastructure, capacity and teaching and learning support materials across the country.[85]

The Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure ("**the Regulations**") were published on 29 November 2013.[86] The Regulations apply to *public* schools, including Grade R.[87]

The Regulations are clearly articulated as "minimum" requirements or a "floor", which must be achieved within certain time periods.[88] These deal with issues such as universal access, water, electricity, classroom sizes, perimeter security and sport and recreation facilities. The Regulations do not prescribe requirements for issues such as food or milk preparation areas, record-keeping and medical care as does the ECD health and safety framework.

In interviews, one DBE representative noted that only schools that pose an immediate danger to children have been closed and that it is rare for the DBE to close down public schools. While this was not expressed by the DBE stakeholder, we note that the considerations relating to the closure of public schools may be complex, including needing to find alternative placement for learners.

In some cases, the norms and standards are differentiated according to grade, with some Grade R specific requirements. This includes:

- The minimum space allocated for each learner in Grade R should be 1.6m$^2$, and 7m$^2$ for each educator.[89] Notably, the NEHNS for ECD requires 1.5m$^2$ of unobstructed space per child in indoor play areas (slightly *less* than the DBE Regulations).

[82] The Act commenced from 1 January 1997.
[83] By the Education Laws Amendment Act, 2007 (commenced 31 December 2007).
[84] Section 5A of the Act.
[85] Explanatory Memorandum to the Bill, p13 and Education Portfolio Committee, 21 August 2007, available at https://pmg.org.za/committee-meeting/10334/. According to Schedule 4, Part A of the Constitution, basic education is a functional area of concurrent national and provincial legislative competence. The establishment of national minimum uniform norms and standards would therefore be of particular relevance to creating uniformity between provinces.
[86] Published under GNR.920 in Government Gazette 37081.
[87] Regulation 5(2).
[88] Regulation 4(1)(b). However, the Regulations were challenged by Equal Education (EE) as having various "loopholes". EE's challenge was upheld by the Bhisho High Court in 2018, which affirmed the binding nature of the norms and standards (*Equal Education and another v Minister of Basic Education and Others* 2018 (9) BCLR 1130 (ECB)).
[89] Regulation 9(1). For Grades 1-12, the allocation is 1m2 and 7m2 respectively.

- An "acceptable norm" for class size in Grade R is a "maximum of 30 learners".[90] The Children's Act Regulations have age differentiated staff:child ratios, with a maximum of 30 children to 1 staff member for ages 5 and 6 years. Although there must, in addition, be an assistant.
- The "minimum education area" for a Grade R classroom is a minimum size of 60m2, and 48m2 for classrooms for other grades.[91] There is no minimum education area in the Children's Act Regulations and NEHNS for ECD.
- There is a minimum allocation of Grade R basins and toilets in primary schools.[92] A Grade R enrolment of approximately 8-17 children,[93] for example, requires a minimum of 2 toilets and 1 bathroom. The Children's Act Regulations, which requires at least 1 toilet and 1 basin for every 20 children, is less onerous in this regard.

The Regulations require the DBE to "periodically" review the norms and standards contained therein to ensure they "remain current and serve the needs of the teaching and learning process".[94] To the best of our knowledge, even though the DBE has previously indicated that it is in the process of reviewing the Regulations,[95] it has not, since its initial promulgation, completed any such review.

In addition to the Regulations, it is notable that the NEHNS also include detailed norms and standards pertaining to school premises, which overlap in some respects with the Regulations under SASA. A high-level analysis also reveals some inconsistencies between the two sets of regulations.[96] The NEHNS also address some health and safety requirements that are not covered by the Regulations. This includes, for example, medical care for students and vector control. A school also requires a health certificate, which must be renewed every 2 years.

Interestingly, stakeholder interviews suggested that DBE officials are either not aware or are otherwise uncertain of EHP inspections of public schools taking place. Whereas EHP interviewees indicated that such inspections and the issuing of health certificates does take place. It was unclear what standards the EHPs apply when conducting such inspection (i.e. the NEHNS or the Regulations). Notable too is that, according to EHP stakeholder interviews, the basic education sector may also experience overlap with the Department of Labour's Occupational Health and Safety inspections.

[90] And a maximum of 40 learners for all other classes (Regulation 9(2)).
[91] Annexure A to the Regulations.
[92] Annexure G to the Regulations.
[93] Annexure G provides the range of 66-134 total learners in a school with an assumption that children are spread equally across grades. Therefore Grade R is 1/8th of total enrolment.
[94] Regulation 19.
[95] Based on engagements with the DBE during Ally's tenure at the Equal Education Law Centre.
[96] For example, the Regulations require a total of at least 4 toilets (and one urinal) for learners in a primary school with an enrolment of up to 25 learners. The NEHNS require one toilet facility for every 25 learners (and with no differentiation between primary and secondary school). The Regulations clearly stipulate that plain pit latrines are not allowed at schools. The NEHNS do not include a similar prohibition, but rather state "[i]f pit toilets are used, the design of the pit toilets should be constructed in such a manner as not to cause harm or injury to the children".

### *Private schools*

SASA states that independent schools cannot be established or maintained unless registered by the provincial head of department ("**HoD**").[97] It is a criminal offence to establish or maintain an independent school that has not been so registered.[98]

SASA requires that an HoD registering an independent school must be "satisfied that the standards maintained by such school will not be inferior to the standards in comparable public schools."[99] Based on this requirement, it is arguable that independent schools should not have inferior standards to that required under the norms and standards for public school infrastructure.

Notably, however, the grounds on which registration of independent schools may be granted (or withdrawn) must be determined by MECs at a provincial level. Provincial regulations are not entirely consistent on the requirements for independent schools to obtain and maintain registration. Nonetheless, generally speaking:

- Applications for registration must be accompanied by a health certificate from a *local* authority confirming compliance with health and safety requirements, and by-laws.[100]
- Registration may be withdrawn if the requirements of registration are no longer met and after the school has been given an opportunity to make representations on such closure.
- Provincial department officials may inspect registered independent schools, although *regular* intervals for such inspections are not prescribed.

Insofar as a local authority health certificate is concerned, as with ECD, this is likely to be informed by the NEHNS. Although stakeholder interviews do suggest that many local governments have not been guided by the NEHNS in their by-laws.

## B. Comparison with other jurisdictions

A high-level overview of ECD health and safety standards in three countries (namely, Namibia, Zambia, and Jamaica) was undertaken to broadly compare against South Africa's regulatory regime. The exercise was not intended as a thorough comparative survey, nor does it aim to offer in-depth country reviews. Instead, it has merely been used to draw some insights and potential lessons for South Africa from other jurisdictions.

[97] Section 46(1).
[98] Section 46(4).
[99] Section 51(2)(b)(ii).
[100] A notable exception is the Northern Cape, which merely requires that "the school buildings and grounds offer the space, design, facilities and comply with the safety standards that are adequate in the opinion of the Head of Department". Although the province does make subsidies dependent on a certificate from a local authority confirming that the school complies with health regulations.

All jurisdictions require early childhood provisioning by private actors to be registered. The following features of some of the regimes may be worth considering for potential incorporation in South Africa:

- Legislative provisions requiring that community context be considered when applying health and safety standards, as in **Namibia**, where the Child Care and Protection Act 3 of 2015 includes two provisions which specifically provide that the contextual needs of communities be considered. First, the standards of the surrounding community must be considered when interpreting the minimum standards.[101] Second, the Minister is empowered to give ECD centres and informal settlements a period of time, from the commencement of the Act, to comply with the required standards.
- Establishing a consolidated standards framework, which clearly identifies mandatory (minimum) and voluntary (best practice) standards, together with clear criteria for assessing whether compliance is satisfactory or not, as in **Jamaica** under the "Standards for the Operation, Management and Administration of Early Childhood Institutions" ("**SOMA**").[102]
- Establishing one authority that is primarily responsible for oversight of ECD provisioning, such as the **Jamaican Early Childhood Commission,**[103] may advance the objective of achieving a streamlined and co-ordinated system.

[101] Section 71(5).
[102] Determined by the Early Childhood Regulations (2005), in terms of the Early Childhood Act of 2005.
[103] Section 2 of the Early Childhood Act of 2005.