



**TO: DEPARTMENT OF BASIC EDUCATION**

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**SECTION27 & THE TEDDY BEAR FOUNDATION SUBMISSIONS ON THE  
CHILDREN'S AMENDMENT ACT**

**JUNE 2024**

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## **A. INTRODUCTION**

1. SECTION27 (Incorporating the Aids Law Project) and the Teddy Bear Foundation (“TBF”) welcome the opportunity to make submissions on the Department of Education’s proposed amendment to the Children’s Act 38 of 2005.
2. SECTION27 is a public interest law organisation that works to influence, develop, and use the law to further the right to basic education and the right to access to healthcare in South Africa through research, advocacy, and litigation.
3. The TBF is a non-profit organisation offering medico-legal and psycho-social victim support services to abused children. It uses a holistic and integrated approach to assist abused children and their families.
4. In light of the Presidential Proclamation made in 2019 announcing the Early Childhood Development (“ECD”) function shift from the Department of Social Development (“DSD”) to the Department of Basic Education (“DBE”), we welcome the proposed amendments to the Children’s Act 38 of 2005 by the DBE that seek to regulate the sector.
5. SECTION27 and the TBF have extensive experience working on the right to basic education and the rights of the child. Given the function shift, the DBE now bears the obligation to ensure that ECD programmes are safe environments that are conducive to the learning and development of children.
6. In ensuring that ECD programmes are safe environments for children, the DBE is obligated to ensure that children are protected from the scourge of sexual violence. The Children’s Act provides a safeguard for children to this effect in the form of

the National Child Protection Register (“the Register”). Both SECTION27 and the TBF have experienced shortcomings in the implementation of the Register particularly in the school setting, which we outline shortly. This will be the primary focus of our submission.

7. In this regard, our submissions on the draft Children’s Amendment Bill will be commenting on the following proposed amendments to the Bill:
  - a. Clause 9 – Consideration of an application for registration made by an ECD Programme
  - b. Clauses 17, 18 & 19 – Part B of the Register
  - c. General Comments

## **B. SECTION27 AND TBF’S INTEREST IN THE MATTER**

8. Gender-based violence (“GBV”) is endemic in South Africa. The scourge of GBV is also present in educational institutions. It is reported that between 2019/20 and 2021/22, 452 cases of sexual misconduct were reported to the South African Council of Educators (SACE). Concerningly, there was a drastic increase in the number of reported cases from 92 in 2019/20 to 169 in 2020/21 and 191 in 2021/22.<sup>1</sup> Furthermore, the 2022 crime statistics from the South African Police

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<sup>1</sup> Ntombi Nkosi “The increase in sexual offences in South African schools, a concern” 4 April 2023 <https://www.iol.co.za/the-star/news/the-increase-in-sexual-offences-in-south-african-schools-a-concern-76ca8d00-bb08-4d01-9d5b-c6d74e250127> (Accessed on 12 May 2023); Desiree Van Der Walt. “191 cases of sexual misconduct reported to SACE”. *Politicsweb*, 27 March 2023. <https://www.politicsweb.co.za/politics/191-cases-of-sexual-misconduct-reported-to-sace--d> (accessed 17 May 2023)

Service indicate that 294 reported rapes occurred on the premises of educational institutions.

9. Part of the reason for the persistence of sexual violence in the educational setting can be attributed to the systemic failures of education authorities to address GBV in the schooling environment. The failure of educational authorities to enforce legal frameworks and hold perpetrators accountable is in breach of various constitutional obligations to respect, protect, promote, and fulfil learners' constitutional rights.<sup>2</sup>
10. Through its Advice Office, SECTION27 routinely receives complaints and cases related to sexual violence in schools. One such case involved the rape of a 12-year-old learner by a caretaker at a school in the North-West in 2015. A year later, the caretaker who had not faced any disciplinary process, sexually assaulted the learner's sister. The Principal, School Governing Body ("SGB") and the North-West Department of Education ("NWDoE") failed to take any steps to hold the perpetrator to account. In 2021, SECTION27 successfully instituted a court application to compel the NWDoE, the Principal and the SGB to take the necessary disciplinary action to ensure that the perpetrator was held to account.
11. Subsequently, the Principal, SGB, and the NWDoE held a disciplinary hearing against the caretaker. The Disciplinary Committee ("DC") held that the caretaker

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<sup>2</sup> The education authorities' constitutional obligations are espoused in sections 9, 10, 12, 29(1)(a) and 28 of the Constitution of the Republic of South Africa, 1996. These rights include the right to equality, the right to inherent dignity, the right to freedom and security, the right to access basic education, and the best interests of the child respectively.

was guilty of rape and sexual assault. The DC further recommended that the perpetrator be dismissed.

12. Despite the DC's findings, SECTION27 had to intervene once more to secure the dismissal of the caretaker. SECTION27 requested that the NWDoE report the caretaker to the Department of Social Development ("DSD") to have the caretaker's name placed on Part B of the Register, regulated in terms of section 111 of the Children's Act. The NWDoE had failed to do so. SECTION27 approached the DSD directly and it was only in March 2023, that the caretaker's name was placed on the Register.
13. The Teddy Bear Foundation has also raised concerns about the inclusion of perpetrators in the Register. They have assisted children in criminal matters, where the perpetrators were found guilty. However, they have not received any confirmation that the perpetrators' names were included in the Register.
14. It is based on SECTION27's experience in the North-West case, the TBF's experience of the criminal justice system and our combined experience in child protection that we make submissions that are intended to improve the vetting of staff prior to appointment and the reporting of perpetrators who are unsuitable to work with children.

### **C. CLAUSE 9 – AMENDMENT TO SECTION 97 OF THE ACT**

15. We note that the proposed amendments provide that a person or organisation providing an ECD programme must meet a list of requirements to be registered. These include an assessment as referred to in subsection (6) of section 97 and the

completion of an environmental health assessment completed by a registered environmental health practitioner. Section 97(6) of the Children's Act states that a provincial head of the DSD must assess compliance with the norms and standards as prescribed in section 94.

16. Section 94 of the Children's Act sets out what the norms and standards that are to be created by the Minister of Basic Education must address. What the norms and standards must address is also, subject to amendment in Clause 6 of the Children's Amendment Bill. The proposed amendments to what the norms and standards must address are welcomed as they include explicit and wider protection of children. Clause 6 reads:

“(2) The prescribed national norms and standards contemplated in subsection (1) must relate, amongst others, to the following:

- (a) **[The provision of appropriate developmental opportunities]** Nurturing environments that provide protection, support and security;
- (b) **[programmes aimed at helping children to realise their full potential]** appropriate and adequately resourced environments for play and learning;
- (c) **[caring for children in a constructive manner and providing support and security]** group size and adult-child ratios;
- (d) **[ensuring development of positive social behaviour]** support for children with disabilities;
- (e) **[respect for and nurturing of the culture, spirit, dignity, individuality, language and development of each child; and]** child protection;
- (f) **[meeting the emotional, cognitive, sensory, spiritual, moral, physical, social and communication development needs of children.]** support and information for parents and caregivers;
- (g) record-keeping;
- (h) qualifications, skills and training; and
- (i) minimum health and safety requirements.”

17. The proposed amendment asserts that children should be protected, supported and provided with safety and security (section 94(2)(a)). It explicitly provides for child

protection in the proposed amendment of section 94(2)(e). And finally, the proposed amendment entrenches child protection by requiring adherence to minimum health *and safety requirements*.

*a) Vetting ECD Personnel*

18. To comply with the norms and standards as amended in Clause 6, children in ECD programmes must be protected against the risk of sexual violence or any threat of harm. In the same context of the schools, personnel employed at these programmes should be vetted against the Register.
19. On 13 May 2024, City Press released a story of a 23-year-old man who allegedly raped a 3-year-old toddler at an ECD Centre in Bloemfontein.<sup>3</sup> The Centre was not registered. The registration process and regulation of ECD programmes must be closely monitored to avoid incidents of sexual misconduct.
20. The guidelines for the norms and standards outlined in Clause 6 of the Children's Amendment Bill call upon the various role players to put in place child protection mechanisms that entrench the best interests of the child. The requirements for registration of the ECD programmes must be read with the proposed amendments to the guidelines for the norms and standards. In the promotion of child protection, safety and security, vetting of ECD personnel at the point of registration would be

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<sup>3</sup> City Press <https://www.news24.com/citypress/news/suspect-appears-in-court-for-allegedly-raping-a-three-year-old-at-bloemfontein-pre-school-20240513> 3 May 2024.



important. This would serve as a safety measure against sexual predators being employed in ECD programmes.

21. The registration requirements set out in Clause 9 ought to include a vetting requirement that would ensure full compliance with the guidelines for the norms and standards as set out in Clause 6 and specifically proposed amendment 94(2) (a) and (e) of the minimum norms and standards.
22. It is against this backdrop that SECTION27 and the TBF call for the DBE to include vetting as a requirement for the registration of ECD programmes.

*b) Environmental health practitioners*

23. We note that clause 5(d) of the proposed amendments requires that ECD programmes must comply with the structural safety, environmental health and other requirements of the municipality in the area where the ECD programme is offered. We further note that clause 9(a) of the proposed amendments requires that before the provincial head of education decides on an application for registration, conditional registration or the renewal of registration, the provincial head of education must consider the outcome of an environmental health inspection of the early childhood development programme conducted by a registered environmental health practitioner of the relevant municipality.
24. While we support the move to ensure that all ECD programmes are compliant with environmental health and safety regulations, SECTION27 and the TBF are concerned that a large number of municipalities do not have environmental health practitioners to enable this process to take place. In a Parliamentary Portfolio

Committee of the Committee on Social Development, the South African Local Government Association ('SALGA') revealed that there was a severe shortage of Environmental Health Practitioners. SALGA noted that "In South Africa, there was one EHP for every 35 000 citizens. This made it almost impossible for EHPs to perform their functions effectively. There had been times when EHPs had been able to monitor the status of their recommendations only once a year"<sup>4</sup>.

25. Our concern is whether it is practical to require that every ECD programme is inspected by a registered environmental health practitioner, given the above concerns.

#### **D. CLAUSES 17, 18 AND 19 – AMENDMENTS TO SECTIONS 123, 124 AND 126 OF THE ACT**

26. Section 123 of the Children's Act provides for the consequences of persons listed in Part B of the Register. Part B of the Register includes names of persons unsuitable to work with children. Section 123 provides a list of places where persons listed in part B of the Register should not be employed. We welcome the inclusion of ECD programmes as a place where persons listed in Part B of the Register should not be employed.
27. Section 124 of the Children's Act stipulates that persons listed in Part B of the Registrar should not be employed at places that work with children. If a person who appears in Part B of the Register fails to disclose that they appear in Part B of the Register, such a person will be immediately dismissed, and a penalty will

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<sup>4</sup> <https://pmg.org.za/committee-meeting/34488/>

be imposed. The proposed amendment in Clause 18 of the Children's Amendment Bill seeks to expand the list of places that work with children to include ECD programmes. We welcome the inclusion of the ECD programmes as places of employment that work with children, wherein employees would be dismissed for failing to disclose that they appear on Part B of the Register.

28. However, this would require that all ECD personnel are vetted against the Register prior to registration of the ECD programme, at the appointment of an employee and thereafter annually.
29. Section 126 of the Children's Act makes specific provision for persons to be vetted against Part B of the Register when they seek employment at places that work with children. The proposed amendment in the Children's Amendment Bill includes an ECD programme, which places an obligation on the employer of the Programme to vet employees against the Register.
30. The regulation of ECD programmes has shifted to the DBE. Whether the ECD programme is privately owned or state-subsidised, a PED would be responsible for the registration process. As stated in our submission to clause 9 above, evidence of a vetting process of all employees must be furnished to approve the registration of an ECD programme. PEDs, as the immediate department responsible for registration should ensure that vetting is completed before registration and also, verify annually that ECD programmes conduct vetting of all

its employees. Under the proposed amendments, provincial education departments will be responsible for the registration of ECD programmes.<sup>5</sup>

31. The proposed amendment in clause 9, places ECD programmes under the scope of provincial education departments and calls for oversight from provincial departments to ensure that the personnel at ECD programmes are vetted. Since provincial education departments are provided with access to the Register as stipulated in section 125(2) of the Children’s Act, such vetting would be easily enabled through the provincial education department.
32. Currently, section 125(2) of the Children’s Act makes provision for the Director-General of the DSD to provide access to Part B of the Register to Provincial Education Department for the purposes of vetting employees “in relation to schools under the jurisdiction of that department”. We recommend that access be expanded for the purposes of vetting employees of ECD programmes and not just schools.
33. We recommend that the provincial education department put in place mechanisms for vetting existing ECD personnel that ensure that all new employees are vetted against the Register. Operators of ECD programmes should report to the provincial education department on the status of its vetting processes. ECD programmes should report to provincial education departments annually on the status of the vetting of its employees.

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<sup>5</sup> Clause 7(b) of the Children’s Amendment Bill.

34. We note that the proposed amendments do not provide for reporting of a person found guilty of sexual assault to DSD. However, the processes to be followed when a child is seriously injured or abused at an ECD programme are regulated through the insertion of section 103A canvassed in Clause 15 of the Children's Amendment Bill. This process includes reporting to the district director who must cause an investigation to be conducted. In this regard, we recommend the following:
- a. First, Clause 15 should explicitly state that sexual abuse is included in the incidents of abuse that must be reported to the authorities, including the district director.
  - b. Upon the finalisation of the investigation, the provincial education department should ensure that the person found guilty of sexual assault is reported to DSD to be included on the Register as stated in section 122 of the Children's Act.

## **E. GENERAL COMMENTS**

35. Section 97(1), (2) and (6) of the Children's Act sets out the considerations that must be taken into account by the provincial head of social development. We believe that the proposed amendments have erroneously left out this required amendment designating this responsibility to the provincial head of education or the MEC for Education.
36. Similarly, section 101 of the Children's Act refers to the appeal and review of decisions made by the provincial head of social development. The proposed

amendments do not address the required amendment to instead reference the provincial head of education or the MEC for Education.

## **F. RECOMMENDATIONS**

37. In summary, we recommend the following:
- a. Registration requirements for ECD programmes listed in Clause 9 include proof of compliance with the vetting of all personnel employed at the Centre.
  - b. Provincial education departments be responsible for putting in place mechanisms that would ensure that vetting of all ECD programme personnel are vetted against the Register.

## **G. CONCLUSION**

38. The proposed amendments seek to ensure that sexual predators are not employed in ECD programmes. We submit that with oversight of the vetting process and the reporting of persons to DSD, the proposed amendments will achieve the intended outcome of creating ECD programmes that are safe and thriving spaces for children.

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**SECTION27**

**TEDDY BEAR FOUNDATION**

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