



PART ONE:

# Children and Law Reform

Part one summarises and comments on policy and legislative developments that affect children. These include:

- the White Paper on National Health Insurance
- the National Integrated Policy on Early Childhood Development
- amendments to the Children's Act
- case law promoting children's rights
- South Africa's international and regional reporting obligations.

# Legislative and policy developments 2015/2016

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This chapter summarises and comments on legislative developments between August 2015 and July 2016. These include:

- the White Paper on National Health Insurance
- the National Integrated Policy on Early Childhood Development
- amendments to the Children's Act
- case law promoting children's rights
- South Africa's international and regional reporting obligations.

## White Paper on National Health Insurance

The White Paper on National Health Insurance (NHI)<sup>1</sup> builds on its predecessor, the NHI Green Paper of 2011 (which was reported on in *South African Child Gauge 2013*), as well as lessons emerging from the 10 NHI pilot districts from 2010 – 2015. In essence, the NHI aims to address the inequitable distribution of resources between the public and private health care systems, as 52% of health care spending and the majority of South Africa's health professionals are focused on the needs of the richest 16% of the population who can afford private health care.<sup>2</sup>

The White Paper reiterates Government's commitment to universal health coverage (UHC) and ensuring that all South Africans – both rich and poor – are able to access a comprehensive package of health care services and are protected from the potentially catastrophic costs of medical treatment. NHI includes plans to pool public and private health care resources into a single NHI fund and efforts to strengthen the public health care system and improve the quality of health care.

The White Paper in its current form attempts to address the necessary conditions that would enable the achievement of UHC, whilst at the same time outlining the nature, form and structure of an NHI fund, which is at the heart of current reform debates. Whilst the White Paper provides some detail on these two interlinked policy reforms, it still lacks detail on how the NHI fund will be structured and funded, and exactly how sufficient capacity will be built within the public health care system to deliver on these reforms, given current inequities and constraints.<sup>3</sup> This commentary, while recognising these shortcomings, will focus on the implications for child health.

## The re-engineering of Primary Health Care

The White Paper outlines three key mechanisms to strengthen the district health system that should offer direct and indirect benefits to children. These include:

- ward-based outreach teams of community health workers (CHWs) who reach out to households and communities to promote health and identify those in need of preventive, curative or rehabilitative services;
- the Integrated School Health Programme which aims to reduce barriers to learning, and improve the overall well-being and life chances for young children and adolescents; and
- district clinical specialist teams who provide clinical support and oversight to improve the quality of maternal and child health services at district level and strengthen referral systems.

Yet the impact of these interventions on child health and the associated costs and systems constraints in the pilot districts has not yet been adequately evaluated.

For example, the White Paper provides for the contracting in of private health practitioners and includes a strong focus on allied health professionals such as "nutritionists, dental therapists, audiologists, speech and hearing therapists, psychologists, optometrists, and oral hygienists."<sup>4</sup> The explicit emphasis on early childhood development and efforts to address physical barriers to learning is welcome given concerns expressed in the 2013 *Child Gauge* around staff shortages in the public sector, but needs to be interpreted cautiously as efforts to contract in general practitioners have had limited success in the pilot districts.

Research on the early implementation phase indicates that contracting of private health practitioners occurred unevenly across pilot sites, and that a new model of getting public sector doctors to work in clinics has had the possible unintended consequence of encouraging doctors to move out of public sector hospitals into clinics. Nonetheless, early implementation results show benefits for clinic nurses through in-service training, general- and referral support in particular. Patients no longer have to travel long distances to access referral services for uncomplicated conditions and this benefits the spectrum of patients including mothers and children.<sup>5</sup>

Other interventions that should benefit children include:

- the National Core Standards (NCS) for Health Care Establishments and Ideal Clinic Programme which are designed to improve the quality and functioning of health care facilities; and
- increased numbers of doctors at primary level clinics which should help reduce waiting times and enable the treatment of children closer to home – provided that general practitioners are adequately trained to manage child health conditions.

### Towards an essential package of care

The White Paper starts to outline a “comprehensive package of health services”<sup>6</sup> that range from prevention and promotion services to rehabilitative and palliative care. This includes an explicit mention of mental health services which is a critical area in child and adolescent health given its intersection with violence and substance abuse – but it does not spell out what services patients are entitled to at each level of care. This will be established by the NHI Benefits Advisory Committee based on “evidence of cost-effectiveness and efficacy”.<sup>7</sup>

In other words, the White Paper does not yet specify what the core service package for children will look like, nor does it specify exactly how these services will be sustainably staffed, resourced, delivered and monitored for quality. Yet, a process of delineating such an essential package of care for children has been initiated by the Committee on Morbidity and Mortality in Children Under Five Years<sup>8</sup> which will, for the first time, provide a benchmark against which to measure children’s right to basic health care services.<sup>9</sup>

### Creating an enabling environment

The Office of Health Standards Compliance (OHSC) is intended to play a central role in ensuring the quality of health care services – an essential prerequisite for the successful implementation of NHI. Yet a 2011 baseline audit noted poor compliance with ministerial priority areas such as waiting times (68%), cleanliness (50%), patient safety (34%) and positive and caring attitudes of health care providers (30%).<sup>10</sup> This, together with accusations of mismanagement and<sup>11</sup> ongoing stock-outs of essential medicines,<sup>12</sup> raises concerns around the capacity of the public health system to support the proposed NHI reforms. At the same time, children’s needs are rarely considered in the NCS.<sup>13</sup> It is therefore important that the standards are aligned with the proposed essential package of care and that they factor in children’s specific health care needs at all levels of the health care system.

It is also essential that sufficient resources are put in place to ensure that NHI realises its potential. For example, CHWs have the potential to significantly improve child health outcomes but this depends on adequate training and support as well as a sufficiently high ratio of CHWs to households to enable regular home visits and follow up care.<sup>14</sup> Health promoters and community health workers have also been identified as an essential component of the new Integrated Policy on Early Childhood Development, but government has yet to finalise a policy on CHWs, formalise their conditions of service or ring fence funding for this essential cadre of health care worker.<sup>15</sup>

### Prevention and the social determinants of health

The White Paper has a strong emphasis on prevention, yet this tends to focus on personal health care and health promotion rather than addressing the broader social determinants of health, including the role of industry in the rising obesity epidemic. Key drivers of child morbidity and mortality – such as malnutrition, diarrhoeal disease, injuries and violence – are profoundly affected by the social determinants of health and require significant

interventions in other sectors. It is therefore vital that child health interests are adequately represented on the proposed National Health Commission which is intended to promote intersectoral collaboration and address the risk factors that contribute to diseases of lifestyle. It is also essential that similar structures are established to address the drivers of childhood illness and injury at district level, and that there is strong representation by child health advocates on these and other core structures such as the OHSC, NHI Benefits Advisory Committee, clinic committees and hospital boards.

### Addressing inequity

One of the challenges with universal policies such as universal health coverage is that they need to take into account inequities in the existing system. In other words, well-resourced areas are best placed to immediately embrace and implement innovations, while under-resourced hospitals and clinics struggle to implement new initiatives and may even deteriorate due to the added pressure. It is therefore essential to explicitly prioritise those with the greatest health care needs and those who have greatest difficulty in accessing care – such as children with disabilities – to ensure that health care reforms do not widen the inequity gap.

### Foreign children

The NHI proposes a special contingency fund to provide “basic health coverage” for refugees. Asylum seekers will only be entitled to “emergency health care services” and treatment of “notifiable conditions”,<sup>16</sup> and other foreign nationals will be required to have their own health insurance or cover the costs of care. The White Paper also makes “no mention of, and therefore appears to offer no coverage to, pregnant and lactating women from outside South Africa or to their children below age six. This directly contradicts the protection given to pregnant and lactating women and children in the National Health Act and in the Constitution, and the policy imperative of providing special treatment to marginalised groups.”<sup>17</sup> These measures are potentially regressive and are likely to compromise health care for refugees, asylum seekers and unaccompanied minors who are particularly vulnerable.

### National Integrated Policy on Early Childhood Development

In December 2015, Cabinet approved the country’s first national policy on early childhood development (ECD). The policy aims to transform ECD service delivery in South Africa and address critical gaps to ensure the provision of comprehensive, universally available and equitable ECD services. The policy covers the period from conception until the year before children begin formal schooling, or in the case of children with disabilities, until the year they turn seven.

The National Integrated ECD Policy aims to:

- provide an overarching and enabling framework for ECD services;
- define a comprehensive package of ECD services and support and prioritise essential components;

- identify the relevant role players and their roles and responsibilities; and
- establish a national ECD leadership and coordinating structure.<sup>18</sup>

### A comprehensive and essential package of services

The policy provides for a comprehensive package of ECD services, namely: health care, nutrition, social protection and parent<sup>i</sup> support programmes; opportunities for learning; public communications; water, sanitation, refuse removal and energy sources; food; and play facilities, sport and culture. However, it prioritises the delivery of essential services:

- Free birth registration for all children born in South Africa, and the pre-registration of pregnant women for the CSG to ensure access to the grant from birth;
- Basic preventive, promotive and curative health care for pregnant women and young children;
- Preventive and curative maternal and child food and nutrition services;
- Parent support, including the provision of income, nutritional and psychosocial support, and support for the stimulation of children from birth;
- In their parents' absence, safe quality child care and early learning;
- Early learning support and services from birth in the home, community and centres;
- Information about ECD services and support and their importance for ensuring optimal child development targeted at children, parents, and leaders in government, business and civil society, for example.<sup>19</sup>

These elements are prioritised because they are regarded as necessary to promote children's survival and development and are pre-conditions for the realisation of young children's constitutional rights, which should be realised with immediate effect. The policy prioritises the provision of services and support to vulnerable groups, especially: pregnant women and children younger than two years; young children living in poorly serviced geographical areas; young children in poverty; and those with disabilities. It also promotes a shift from facility-based services to home and community-based delivery channels. The emphasis on interventions and support during pregnancy and the first two years is commendable since this life stage is critical for later development.

A phased-in approach to policy implementation has been adopted: The essential components should be available and accessible to all young children and their caregivers by 2024, and the comprehensive package rolled-out by 2030, while government should have the necessary legal frameworks, institutional arrangements and plans in place by 2017. While it is positive that medium- to long-term targets have been set, the 2017 target is less feasible as the existing legislative framework will need to be amended, new leadership structures developed and resourced, and communication and coordination mechanisms established between all relevant stakeholders – from national to district level.

### Responsible role-players, leadership and coordination

The policy acknowledges that effective delivery of ECD services requires collaboration across several sectors, and establishes government as the lead duty-bearer. Roles and responsibilities for various government departments are clearly outlined in the policy, as well as the functions of national, provincial and local governments. For example, the Department of Health is indicated as the lead department for the provision of comprehensive services for pregnant women, new parents, and children younger than two years.

As the policy builds on the existing ECD service delivery system, the non-governmental sector continues to feature as partners delivering services on a contractual basis, and public and private delivery of ECD programmes and services will be regulated by government. However, the policy possibly does not go far enough to recognise the invaluable role that non-governmental organisations (NGOs) has played over many decades, and that their knowledge and expertise in training, resource development and service delivery is indispensable going forward.

A national coordination mechanism is vital to ensure multi-sectoral planning, coordination and monitoring of the policy. As such, the policy mandates a National Inter-Ministerial Committee for ECD, supported by a National Inter-Departmental Committee for ECD, to fulfil this role. The Inter-Ministerial Committee is envisaged as having the expertise and high-level influence to raise the political profile of ECD, facilitate coordination of ECD policies and programmes across sectors, and hold multiple role players accountable. The policy asserts that the Minister for Social Development will lead both structures. While the need for a high-level co-ordinating structure is essential, it is not clear whether the Department of Social Development (DSD) will have the necessary influence to hold other government departments to account. It also perpetuates the existing bias towards social development, which may undermine the valuable contributions of other departments.

### Funding ECD services

The funding model aims to expand coverage of the comprehensive package of ECD services, prioritising the provision of essential services in under-served areas, and targeting vulnerable children. Improvements to service quality are also prioritised. The policy diversifies the types of funding available, including post-provisioning, infrastructure development and management funding. It also introduces programme funding to support the delivery of home-, community- and facility-based programmes, a significant shift from the current focus on facilities. The implementation of programme funding is likely to be challenging and will require the capacity to implement a model that recognises a diversity of programme designs and delivery channels. The policy asserts that funds to implement the national policy will not only be obtained from the fiscus, but that alternate funds, such as corporate and donor funds, will be sourced to augment fiscal funding.

<sup>i</sup> The policy refers to parenting both in terms of biological and social parenting.

## Infrastructure

The policy provides for infrastructure development and management, which includes both the physical infrastructure required to deliver a service, and the related infrastructure to support and oversee delivery. The policy commits government to invest in the growth and maintenance of infrastructure, prioritising amongst others: safety; ensuring that services are universally available and easily accessible to children and caregivers; and the infrastructural deficits for early learning services. To attain these goals, government must develop a coherent population-based infrastructure plan linked to clear norms and standards. In the interim, the policy promotes the use of existing available infrastructure for ECD programmes, such as clinics, primary schools, and public libraries. While the emphasis on infrastructure for facilities is critical, implementation should be balanced, ensuring that home- and community-based delivery is not neglected.

## Human resources

The policy outlines the human resources and training required to ensure a suitably skilled ECD service workforce. An important policy development is that DSD will employ or fund ECD practitioners to facilitate ECD and parent-support programmes, and includes measures for professional development. The policy calls for an expanded suite of services for pregnant women, mothers and young children. These include health and nutrition services, parenting support and learning support for children from birth to two years of age, to be delivered by health promoters and CHWs. This implies a comprehensive re-training of existing cadres of health practitioners to apply a social and developmental approach rather than a narrowly focused medical paradigm.

## Monitoring and evaluation

Monitoring and evaluation activities are critical to ensure the effective implementation of the policy. Government therefore commits to designing and implementing a national monitoring and evaluation framework, and conducting research at five-yearly intervals, to monitor progress and contribute to improved planning and provisioning of the comprehensive package of services.

## Amendments to the Children's Act

The Children's Amendment Bill and Children's Second Amendment Bill were deliberated in 2015 and 2016, with public hearings taking place in September 2015. The National Assembly passed the Children's Amendment Bill and the Children's Second Amendment Bill in August 2016. Both Bills have been referred to the National Council of Provinces (NCOP): The Children's Amendment Bill for acceptance, amendment or rejection; and the Children's Second Amendment Bill, which is a bill that affects the provinces, must be further debated in the provincial legislatures before the NCOP can adopt it and refer it back to the National Assembly to be passed. It is unclear whether Parliament will finalise the bills by the end of 2016. The amendment bills introduce a number of changes to

the Children's Act, largely aimed at ensuring that the legislation is consistent with other legislation and to implement rulings of the Constitutional Court.<sup>ii</sup>

## National Child Protection Register

Once the Children's Amendment Bill has been enacted, child offenders' names can no longer be automatically included in the National Child Protection Register (NCPR). A court may only order that a child offender's name be included in the register if:

- a prosecutor has made an application to the court to include the child's name;
- the court has considered a report by the probation officer about the child offender's risk of recidivism,<sup>iii</sup> and
- the child offender has been given the opportunity to explain to the court why his or her name should not be included in the register; and
- the court is satisfied that substantial and compelling circumstances exist which justify the inclusion of the child offender's name in the register.

These amendments are important to protect child offenders' right to have their best interest considered in every matter that affects them (section 28(2) of the Constitution) and to bring the Children's Act in line with the Constitutional Court ruling in *J v National Director of Public Prosecutions*.<sup>20</sup> Not all child offenders are likely to reoffend, therefore their names should not automatically be included in the NCPR. While child offenders' names are not automatically entered, they *can* still be included in the NCPR. The new provision allows courts to include the child offender's name if substantial and compelling circumstances exist. In this way, the new clause strikes a balance between the rights of child offenders and the rights of children at risk of being abused.

The amendment also clarifies that child offenders who have been convicted for a crime against children in the five years prior to the commencement of the Children's Act (i.e. five years prior to 2010) are also not automatically deemed unsuitable to work with children. Furthermore, once the Bill has been promulgated, child offenders whose names have already been entered into the NCPR can apply to have their names removed from the register.<sup>21</sup>

## Removal of child to temporary safe care without a court order

Once approved by the NCOP, the Children's Second Amendment Bill will give effect to the Constitutional Court ruling in *C v Department of Health and Social Development, Gauteng*.<sup>22</sup> In this decision, the Constitutional Court found that where a child has been removed from the family, this decision has to be automatically reviewed by the children's court. This applies to cases where the child has been removed by a decision of a children's court or without a court order. If, for instance, a police official has removed a child and placed him or her in temporary safe care without a court order, he or she must refer the matter to a designated social worker for investigation

<sup>ii</sup> Early versions of the Amendment Bills were discussed in the 2015 issue of the *South African Child Gauge*.

<sup>iii</sup> The chances of the child committing the same offence again.

before the end of the first court day after the day of the removal of the child. The social worker, in turn, must ensure that:

- the matter is placed before the children’s court for review before the expiry of the next court day after the referral of the child;
- the child and, where reasonably possible, the parent, guardian or caregiver is present at the children’s court; and
- the social worker’s investigation is conducted within 90 days of the removal.

These strict timeframes, which have been in effect since the judgment was handed down, ensure that cases where children have been removed from their parents, guardians or caregivers are reviewed by courts timeously while giving the social worker a minimum of one day after the referral of the child to prepare for the court hearing. The amendment furthermore highlights the child’s right to participate in the children’s court hearing.

### Adoption

Another area of reform is adoption. The Children’s Amendment Bill extends the definition of adoptable children to include stepchildren and children whose parent or guardian has consented to the adoption. The amendments also allow the spouse or life partner of a biological parent to adopt their partner’s children, without the biological parent automatically losing his or her parental rights and responsibilities. Furthermore, the Children’s Second Amendment Bill will, once enacted, allow government social workers to render adoption services if they have a specialty in adoption services and are registered in terms of the Social Services Professions Act 110 of 1978. It has been argued that this amendment is problematic because government social workers will both accredit and provide adoption services and therefore “be both a player and a referee”<sup>23</sup>.

### Alternative care

Section 176(2) of the Children’s Act allows young people between 18 and 21 to apply to remain in alternative care until the age of 21 whilst completing their education or training. The Children’s Amendment Bill clarifies what is meant by “education or training”. According to the Bill, education includes grade 12, higher education, college education, internships and learnerships. Young people need to apply for an extended stay in alternative care and this application must be submitted to the provincial head of Social Development before the end of the year in which the child turns 18. The provincial head of Social Development may accept late applications upon good cause shown, if such applications are submitted within three months after the application deadline.

Civil society organisations (CSOs) have made two (unsuccessful) requests in terms of this amendment. First, they recommended allowing young persons to also remain in child and youth care centres (CYCC) until they have completed an independent living

programme. Such programmes are designed to assist young people who have stayed in CYCC with the transition to living on their own. Second, CSOs recommended allowing late applications for an extension of alternative care at any time instead of only up to three months after the deadline. While it is disappointing that these proposals were not accepted, overall the amendment of section 176(2) of the Children’s Act is positive because it clarifies the law and will promote a more consistent application of the law.

### Foster care

The Children’s Amendment Bill presented an opportunity to address the systemic problems in the child protection/foster care system. South Africa has more than 1.2 million maternal orphans and the vast majority of them are cared for by family members. To address the needs of relatives caring for orphaned children, DSD created an unwritten policy to place orphaned children living with relatives into formal foster care. In this way, relatives caring for orphaned children were eligible for the Foster Care Grant (FCG), which at R890 is substantially higher than the Child Support Grant (R360). As a result, the number of children in foster care has increased from approximately 50,000 to 500,000 over a 15-year period.<sup>24</sup> Due to the sharp increase in foster care applications, social workers’ administrative workload has substantially increased thereby decreasing social workers’ capacity to undertake “real” social work, including child protection work.<sup>25</sup> At the same time, access to the FCG is slow. Relatives taking care of orphans have to wait for a long time before their cases are assessed by social workers and heard at the children’s court.<sup>26</sup>

The amendment to section 150(1)(a) of the Children’s Act introduced by the Children’s Amendment Bill entrenches the use of the child protection system to facilitate access to the FCG. The Amendment Bill changes section 150(1)(a) of the Children’s Act to read:

*A child is in need of care and protection if such a child has been abandoned or orphaned and does not have the ability to support himself or herself and such inability is readily apparent.*

The wording of the provision has been adapted from the judgment *NM v Presiding Officer of the Children’s Court: District of Krugersdorp*.<sup>27</sup> The judgment suggests that the judge interpreted the term “without visible means of support” to mean “without financial support”.<sup>iv</sup> The new wording introduced by the Children’s Amendment Bill reinforces the (mis)perception that the inquiry of section 150(1)(a) of the Children’s Act is about children having the financial means to support themselves. Given that the amendment fails to respond to the systemic challenges in the child protection/foster care system, it is important that future law reform efforts

<sup>iv</sup> Judge Carelse used a two-tier test to determine whether the children before the court were in need of care and protection according to section 150(1)(a) of the Children’s Act. Referring to the *Sterele* judgment the question of whether a child was “without any visible means of support” was based on the question “whether there is a legal duty of support resting on someone in respect of the child and whether, in addition to the status of being orphaned or abandoned, the child has the means currently, or whether the child has an enforceable claim for support.” *NM v Presiding Officer of the Children’s Court: District of Krugersdorp*. Also see Jamieson L, du Toit C & Jobson J (2015) Legislative Developments 2014/2015. In: De Lannoy A, Swartz S, Lake L & Smith C (eds) *South African Child Gauge 2015*. Cape Town: Children’s Institute, University of Cape Town. P. 15.

such as the so-called “Third Amendment Bill” to the Children’s Act address this issue.

## Third Amendment Bill and Child Care and Protection Policy

With the Children’s Amendment Bill and Children’s Second Amendment Bill (almost) passed, more amendments of the Children’s Act are on the horizon. The “Third Amendment Bill” proposes more substantial changes to the Children’s Act than the previous two bills. There are a number of reasons for these substantial changes. The Children’s Act was passed in 2005 but the full Children’s Act only came into operation in April 2010. As is often the case with new legislation, the Children’s Act had some drafting errors and weaknesses. In addition, certain provisions of the Children’s Act have been challenged in court and others have proven ineffective or impractical. Furthermore, over the past 10 years, government priorities regarding services for children have changed.

DSD is currently developing a policy that will underpin the amendments proposed in the Third Amendment Bill. This policy is called the Child Care and Protection Policy. While there are already numerous policies in place that address certain aspects of the Children’s Act, there is no overarching policy document that matches the law and spells out the gaps that should be addressed during the next law reform process.

Draft policy positions (not the policy itself) were discussed at a meeting between DSD and civil society in March 2016<sup>28</sup> and further consultations with civil society are due to take place in late 2016. Once it has been finalised, the policy will be submitted to Cabinet for approval. It is beyond the scope of this chapter to discuss the draft Child Care and Protection Policy because it covers a very wide range of topics including corporal punishment, surrogacy, children’s courts, prevention and early intervention, adoption, child protection, international child abduction, and parental rights and responsibilities, to name but a few.

In light of the focus of this *Child Gauge* it should be highlighted that the Child Care and Protection Policy includes a proposal to introduce a “top-up” amount to the CSG for relatives taking care of orphaned children. This proposal recognises that the vast majority of orphaned children in South Africa are in the care of relatives.<sup>29</sup> The introduction of a CSG top-up is meant to mitigate the crisis in the foster care system by creating an easily accessible alternative to the FCG. For more information see the essay on p. 68.

## Case law promoting children’s rights

### Social assistance

Children’s right to social assistance was strengthened through policy reform and case law. In May 2016, DSD promulgated amendments to Regulation 26A of the Social Assistance Act to specify the circumstances under which deductions may be made from social grants. Before the amendment, funeral insurance companies were allowed to make one deduction directly from a social grant, including from child grants, as long as the deduction

was not more than 10% of the grant. The amended Regulation 26A expressly stipulates that companies are not allowed to make direct deductions from any grant targeting children i.e. the CSG, the FCG and the Care Dependency Grant. The explicit exclusion of deductions from child grants is a welcome step to protect children’s right to social assistance.

The right to social assistance was further strengthened by the decision in *Coughlan N.O. v Road Accident Fund*.<sup>30</sup> In this case, the Constitutional Court had to decide whether FCGs are deductible from compensation paid out by the Road Accident Fund (RAF). The complainants, three children, were placed in foster care with their grandparents after the death of their mother. The children’s father was already deceased. As foster parents, the grandparents were eligible for foster child grants in terms of the Social Assistance Act. As the mother of the children had been killed in a road accident, the RAF compensated the children for loss of support arising from their mother’s death. However, the RAF argued that the FCGs had to be deducted from the compensation because the grants were paid out as a direct result of the death of the mother. According to the RAF, receiving both the FCGs and compensation from the RAF would amount to double compensation.

The Constitutional Court disagreed and decided that the FCG is not deductible from the compensation by the RAF because the nature and purpose of the FCG is substantially different from such compensation. According to AJ Tshiqi, the aim of the FCG is to encourage foster parenting which “extends beyond mere money and encompasses parenting, love, care, nurturing, discipline and other benefits”.<sup>31</sup> The “non-monetary dimension of fostering” highlights the inappropriateness of equating the FCG with compensation for loss of material support.

Another difference between compensation by the RAF and the FCG is that compensation from the RAF is paid to the child, whereas the FCG is paid to the foster parent. Given that the child has no claim to the FCG, there is no double compensation. The Constitutional Court also disputed that there was a causal link between the receipt of the FCG and compensation by the RAF because the FCG is also awarded in cases where the biological parents are alive. For a foster care placement, what matters is whether the child is in need of care and protection, not whether the parents have died.

In addition to the case before the Court, the Constitutional Court overturned the decision of the Supreme Court of Appeal in *Road Accident Fund v Timis*<sup>32</sup> which dealt with a similar case concerning the CSG. The Constitutional Court found that the CSG should not be taken into account when an award of damages for loss of support is made because the purpose of the CSG was different from that of damages paid by the RAF. The Court held that:

*In cases of child support grants, the state assumes the role of a caregiver as enjoined by the Constitution. When it pays compensation for loss of support through the RAF it steps into the shoes of the wrongdoer.*<sup>33</sup>

The Coughlan judgment upholds the right to social assistance, the right of every child to family care, parental care or alternative care when removed from the family environment, children's right to basic nutrition, shelter, basic health care services and social services and the best interest of the child. It encourages individuals to become foster parents because it safeguards their right to social security. Foster parents do not need to fear that the FCG will be taken away from them should the biological parents of the child die in a road traffic accident. Indirectly, the judgment also acknowledges the links between the right to social assistance and other children's rights such as nutrition, shelter, and health care services. Ensuring that a foster family has the means to adequately care for the child is essential for the realisation of these rights.

### Textbooks for children in school

In *Minister of Education v Basic Education for All*<sup>34</sup> the Supreme Court of Appeal had to decide about the scope of the right to a basic education, in particular whether the right includes the right to receive textbooks.<sup>v</sup> The NGO Basic Education for All, together with 22 school governing bodies and the South African Human Rights Commission, took the Department of Basic Education (DBE) to court because the DBE had failed to provide learners at public schools in Limpopo with textbooks in 2012, 2013 and 2014.<sup>35</sup> The Supreme Court of Appeal decided that since the DBE had adopted a policy that each learner must be provided with a textbook for each subject, the Department was bound by its own policy. The Court declared that the failure to provide learners with textbooks violated children's right to education and that it is the duty of the State to provide every learner with every textbook prescribed for his or her grade before the teaching of the subject begins. Because every province except Limpopo had complied with the DBE's policy, the Court found not only children's right to education had been violated, but also their right to equality and dignity.

### Child participation in court proceedings

In *Centre for Child Law v Governing Body of Hoerskool Fochville*<sup>36</sup> the Supreme Court of Appeal strengthened children's right to participation. The Court held that children's right to participate in all matters that affect them includes the right to legal representation in court or administrative proceedings. In this case, the Gauteng Department of Education and other authorities ordered Hoerskool Fochville to admit a number of learners, although the school claimed that these additional learners would exceed the school's capacity. After the learners were enrolled, the school sought an order setting aside the admission and the Gauteng authorities filed a counter-application seeking to change the school's language policy. One of the questions was whether the "additional learners" could be separately represented in the court proceedings. Drawing on international and domestic law, the Supreme Court of Appeal held that children have a right to participate in all matters that

affect them and this right includes a right to legal representation which is independent of their parents' rights.<sup>37</sup>

### Developments in international child law

South Africa has ratified both the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) which are key international child rights instruments. Government is required to report regularly on the progress towards the realisation of children's rights in South Africa. Under the UNCRC, countries have to submit a report on their progress every five years to the United Nations Committee on the Rights of the Child (UNCRC); and under the ACRWC, countries need to submit a progress report every three years to the African Committee of Experts on the Rights and Welfare of the Child (African Committee).

These country reports are an important tool to hold governments accountable and measure their progress (or lack thereof) in promoting children's rights. CSOs can participate in the monitoring process by submitting so-called "shadow" or "alternate" reports presenting their own data and/or challenging information provided in the government reports. Government and CSOs are also invited to make oral presentations to the two committees. After considering government's and civil society's reports and presentations, the committees release their "concluding observations". These include recommendations which government needs to address in order to promote and protect children's rights more effectively.

The country reports were particularly significant given the South African government's delay in submitting the reports to the UNCRC and the African Committee. South Africa only submitted its second and third country reports (due in 2002 and 2007, respectively) to the UN with its fourth country report in 2014.<sup>38</sup> South Africa's initial report to the African Committee was submitted in December 2013 – 11 years late.<sup>vi</sup> Several CSOs, including a coalition of 26 CSOs, submitted shadow reports to the UNCRC and the African Committee.<sup>39</sup>

The African Committee released its concluding recommendations in December 2014.<sup>vii</sup> While the Committee commended South Africa for certain achievements, it also raised a number of areas of concern, some of which relate directly to social assistance.<sup>40</sup> For instance, the African Committee asked South Africa to progressively increase the amount of the CSG and to address the implementation challenges that prevent children accessing social grants. In addition, the Committee highlighted the need to develop a long-term policy solution to prevent the lapsing of FCGs.

The African Committee also made recommendations in the area of political leadership, child budgets, poverty and inequality, harmful traditional practices, corporal punishment, breastfeeding, and nutrition.<sup>41</sup> Some, but not all, of the recommendations by the African Committee have been acknowledged in ongoing policy debates and have been incorporated into new policy documents

v The judgment by the North Gauteng High Court on this matter was discussed in the *South African Child Gauge 2014*.

vi The report that was submitted to the African Committee is the same report that was submitted to the UNCRC.

vii The UN Committee issued concluding observations on South Africa's initial report in 2000 and issued its concluding observations on the second, third and fourth country report in September 2016. The concluding observations are available at: [http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ZAF/CRC\\_C\\_ZAF\\_CO\\_2\\_25463\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ZAF/CRC_C_ZAF_CO_2_25463_E.pdf).

such as the draft Child Care and Protection Policy and the National Integrated Policy on Early Childhood Development, discussed earlier in this essay.

## Conclusion

The policy and law reforms outlined in this essay can largely be described as “steps in the right direction”. While some elements of the NHI offer clear benefits for child health, it remains to be seen whether children’s interests will be safeguarded in the broader process of health systems reform. The National Integrated ECD Policy and the draft Child Care Protection Policy are examples of government’s commitment to strengthen policy on children’s rights. However, what matters most is implementation and the effective budgeting and roll-out of the programmes and services promised under any of the new policies or laws.

Mechanisms to hold government departments accountable are key when it comes to the implementation of laws and policies.

The courts will continue to play an important role in ensuring the implementation of law and policy, and the international child rights bodies may provide a further measure of accountability for government’s progress in realising children’s rights. It is important that CSOs seize the opportunity to actively participate in these processes. The reporting under international law, for instance, provides a valuable opportunity for civil society to engage in dialogue with government and other NGOs, submit alternate reports and use the recommendations made by the international bodies for local advocacy on children’s rights. While the delays in submitting the previous country reports have been concerning, it appears that DSD has since established structures to ensure that the next report to the African Committee – due in January 2017 – will be submitted on time.<sup>viii</sup> All of these processes will, however, only be fruitful if there is political will to act upon the recommendations.

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<sup>viii</sup> Regular meetings with a multi-sectoral government team have been held and a draft progress report to the African Committee has already been circulated.