

Legislative developments 2004 and 2005

Paula Proudlock (Children's Institute)



In reflecting on recent child law reform developments, there is no doubt that the Children's Bill dominated the agenda during 2004 and 2005. This Bill is aimed at providing a legal framework for the realisation of children's rights in terms of family care, protection from abuse and neglect, social services, and legal representation in civil matters. It is also concerned with elaborating on the principle of the 'best interests of the child' and with promoting substantive equality for groups of children in especially difficult circumstances, such as children with disabilities. Apart from the Children's Bill, there has also recently been much other activity in the area of law reform that affects children.

This section focuses on the following questions:

- What is the current status of the Children's Bill?
- What does the Children's Bill focus on?
- What problem areas should still be addressed by the Children's Bill?
- What other new laws have major implications for children?
- What are our conclusions?

What is the current status of the Children's Bill?

The process of drafting a new Children's Act began in 1996 and it is now in its final stages. The first part of the Children's Bill, which was passed by the National Assembly (NA) in June 2005, deals with areas over which the national government has exclusive competence. It introduces provisions and systems that will greatly advance South Africa's capacity to care for and protect children. Thus, the Children's Bill Working Group, a national network of umbrella organisations working with children, celebrated when the NA passed the first part of the Bill, as it was seen as a major milestone for South Africa in the struggle to protect children from abuse and neglect.

This first part of the Bill is now being debated by the National Council of Provinces (NCOP). Once the NCOP has finished its deliberations on this part of the Bill, the second part of the Bill will be tabled in Parliament. This second part deals with issues where the national and provincial governments share competency. The earliest we can expect the second part of the Bill to be tabled in Parliament is March 2006 and it will take Parliament another year from the date of tabling to complete its deliberations on it. We can anticipate that the new law will be put into effect in late 2007 or early in 2008.

What does the Children's Bill focus on?

It is aimed at giving effect to constitutional rights to protection, social services and family care

To give effect to rights, the government needs to adopt laws, policies and programmes. To ensure their full realisation, each right in the Constitution needs to be supported by a law. All the chapters in the Children's Bill are aimed at giving effect to and realising the following three very important children's rights:

- The right to family care, parental care or appropriate alternative care.
- The right to social services.
- The right to protection from abuse, neglect, maltreatment and degradation.

All the chapters in the Children's Bill also emphasise the core international and constitutional principle that, in every matter affecting a child, the child's best interests should be the main consideration. This is an important development because the Children's Bill will eventually replace the 1983 Child Care Act, which was not written from a child rights perspective. It was written by the apartheid government at a time when South Africa did not have a Bill of Rights, or a democracy. It therefore did not take into account key concepts such as equality for all children, equality for parents regardless of their gender, and the principle of the best interests of the child.

It promotes equal opportunity and protection for children with disability

Children with disability are more likely to be abused and neglected than other children. This is, firstly, because of their increased vulnerability to abuse as a result of their disability. Secondly, this is because the child protection system has many barriers restricting equal access for children with disability and so does not adequately protect children. The Children's Bill says that these barriers must be removed and that the necessary support services must be provided to enable children with disability to have equal opportunities and equal access to protection.

It obliges all government departments to deliver services to children in an integrated, co-ordinated and uniform manner

Protecting children from abuse and neglect is a task that involves at least seven different government departments at the national, provincial and local spheres of government. At present, a major problem affecting the protection system is the lack of co-ordination between all the different departments and spheres of government. As a result, many children are not protected and many suffer secondary trauma when they are placed in the system. Recently, two High Court judgments ordered the different government departments involved to sit down together and jointly plan their services for children.

In recognising this problem of a lack of co-ordination between different departments and spheres of government, the Bill contains two clauses that strongly oblige all role players to co-ordinate their services to ensure integrated service delivery to children and to co-operate with one another. Although the actual mechanism to ensure co-ordination is not stipulated in the Bill, it could be set out in the regulations.

It obliges all departments to “take reasonable measures to the maximum extent of their available resources to achieve the realisation of the Act”

In Section 4 of the Bill the words ‘maximum extent’ have been included before ‘available resources’. This is a major victory for children. It means that all departments need to prioritise children when they are making decisions about budgets and the allocation of resources. These words come from Article 4 of the United Nations Convention on the Rights of the Child and are aimed at ensuring that children’s issues are prioritised in budget decisions.

It carefully regulates adoption and inter-country adoption

The Bill closes the loophole on backdoor inter-country adoptions. It streamlines adoption processes and provides adequate protection for children involved. Now any application for guardianship or the right to remove a child from the country will be regarded as an inter-country adoption and will have to go through a well-regulated procedure.

This is a particularly important provision as it protects orphaned children and those living in unregistered children’s homes from being removed from the country without the proper procedures being followed. Many of these children have relatives who are available to care for them. However, these relatives are not approached or supported with financial aid to enable them to care for these children. With this support these children would not have to be removed from their place of birth, cultural identity and family ties.

The Bill also makes it clear that the adopting parents may not pay the biological mother compensation for loss of earnings. This removes a possible form of unfair incentive that could be used to put pressure on the mother to give her consent to the adoption of her child.

What problem areas should still be addressed by the Children’s Bill?

On the whole, the Children’s Bill is a major step forward for children in South Africa, but there are still a few problem areas that should be addressed. One of these areas is protecting the property rights of orphans. When children’s parents or

caregivers die, leaving them with a house or a shack, the children need assistance to protect their property rights from unscrupulous people. Children cannot own a house or conclude contracts related to house ownership because of their age. Therefore, they need an adult to represent them and protect their property rights. If the children have a living parent, the parent normally provides this protection. If the children have been orphaned and are living with a relative, such as a granny or an aunt, it is important that the relative has the necessary legal status to protect the children’s property.

Unfortunately, the Bill does not allow magistrates’ courts to grant guardianship to relatives. This means relatives will need to go to the High Court to obtain guardianship over the children so that they can protect the children’s right to their inherited property. The High Court is inaccessible to most families, as it is located far away from most people, and the process involves a considerable amount of expenses. An accessible solution still needs to be found in this regard.

What other new laws have major implications for children?

Sexual Offences Bill and Child Justice Bill

Other new laws that are in draft form and waiting for tabling in Parliament are the Sexual Offences and Child Justice Bills. Public hearings on these two Bills were held in 2003 in Parliament shortly before the 2004 general elections. However, both Bills were withdrawn from Parliament in 2004 and taken back to Cabinet for revisions. The current Parliament will need to call for a second round of parliamentary hearings before deliberating and passing the Bills. Both these Bills are way overdue and need to be prioritised.

Social Assistance Act and the National Health Act

The new Social Assistance Act 13 of 2004 and the National Health Act 61 of 2003 were both passed in late 2003 and signed and assented to by the President. However, neither of the laws have been put into effect as their regulations are still being finalised.

The 2004 Social Assistance Act replaces the Social Assistance Act of 1992 and provides a new legislative framework for the realisation of the right to social security. It stipulates the

eligibility criteria and procedures for gaining access to social grants for the elderly (Old Age Pension), children living in poverty (Child Support Grant), people with disabilities (Care Dependency Grant and Disability Grant), children in need of foster care (Foster Care Grant), and people in social distress (Social Relief of Distress Grant).

None of these grants are new. They were all present under the 1992 Social Assistance Act and there are no substantive changes to the eligibility criteria. The main reason for the amendment to the 1992 Act was to remove the social security function from the provinces and allocate it to the national government. This was done to improve implementation and financial control over the State's biggest poverty alleviation programme. We will only be able to evaluate whether this shift has achieved the desired improvements in the administration of these grants once the new law is fully in effect and the new Social Security Agency has begun its operations.

In its preamble and in its objects clause, the National Health Act says that it is aimed at giving effect to children's rights to basic health care and basic nutrition. However, this intention is not followed through in the rest of the Act as it does not entrench an approach that gives priority to children within the health system. The Children's Bill does not contain any provisions on nutrition and health care either, other than stipulating ages of consent for medical treatment. In light of South Africa's unacceptably high infant mortality and child death rates we need a focused approach to children's health care services. Many child health providers and policy experts are now calling for a new law on child health services in order to prioritise child health.

What are our conclusions?

It is now over 10 years since South Africa became a democracy, which is underwritten by a Bill of Rights that demands priority attention for children. Legislative reform for children is now on the agenda. However, the 'honeymoon' period of the new democracy is over and a concern about insufficient budget is dominating many of the child law reform debates. It is therefore a pity that, compared to other areas of law reform, child law reform has taken so long to get off the ground.

However, on the positive side, there is a strong and vocal children's sector within civil society and a growing awareness amongst government decision-makers of the extent and nature of the challenges facing children. The result is a committed drive from both government and civil society for efficient solutions that can be implemented.

Sources

This section has drawn on the following sources:

Children's Bill (B70b – 2003).

Child Justice Bill (B49 – 2002).

Criminal Law (Sexual Offences) Amendment Bill (B – 2003).

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National Health Act, No 61 of 2003.

Social Assistance Act, No 13 of 2004.