

Recent developments in legislating for children's socio-economic rights

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Children's socio-economic rights are most adversely affected by the high levels of poverty in South Africa. Legislation aimed at giving effect to these rights should therefore be prioritised. This part of the *South African Child Gauge 2006* gives an update on the major recent shifts in legislation concerning children's socio-economic rights. These rights are enshrined in the Bill of Rights in the South African Constitution in Sections 26, 27, 28 (1) and 29, and include the rights to:

- shelter and housing;
- basic health care services and health care services;
- sufficient water;
- basic nutrition and sufficient food;
- social security;
- social (welfare) services; and
- education.

This essay focuses on the following questions:

- What is government's constitutional obligation to children?
- What role do laws play in giving effect to socio-economic rights?
- What laws give effect to children's socio-economic rights?
- What are the latest law reform developments in education?
- What are the latest law reform developments in social security?
- What are the latest law reform developments in health care services?
- What are the latest law reform developments in social services?
- What are the conclusions?

What is government's constitutional obligation to children?

All the socio-economic rights contained in the Bill of Rights apply to children. These rights can be categorised into two groups. The first group contains the rights of everyone and the second group are extra rights given to children.

The first group of rights appears in Sections 26 and 27 – the rights of everyone to have access to housing, health care services, food, water and social security – and must be realised progressively within available resources. This means that each government department needs to have a clear plan with targets and timeframes to realise these rights, and must show that it is implementing that plan reasonably and progressively.

The second group of rights is in Sections 28 (1) and 29 (1) (a) – children's rights to shelter, basic nutrition, basic health care services, social services and basic education. In comparison to the first group of rights, these rights place a more immediate obligation on government. These "basic" rights constitute a minimum core which the State is obliged to deliver as a priority.

Therefore, each department's plan for the delivery of socio-economic rights to everyone should give priority attention to children's needs. For example, when the Department of Health drafts the National Health Act, it should ensure that priority attention is given to meeting the minimum core of children's health care needs.

In order to ensure that laws provide the necessary legislative framework to realise children's socio-economic rights, Parliament needs to consider and apply the obligation in Section 7 (2) of the Bill of Rights to "*respect, protect, promote and fulfill the rights in the Bill of Rights*".

This means that parliamentary committees, officials and members of Parliament need to apply their minds to the meaning of the rights in the Bill of Rights, and especially reflect on the related obligations imposed on the State. Decisions on whether or not to include a particular provision in a law should therefore not be based only on political, economic or scientific considerations, but should be driven by the imperative on the State to fulfil the rights in the Bill of Rights.

The principle of the 'best interests' of the child that appears in Section 28 (2) of the Bill of Rights places a further obligation on the State to consider and prioritise children's needs. This section is modelled on Article 3 (1) of the United Nations Convention on the Rights of the Child, which provides that "[i]n all actions concerning children, whether

undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

The principle of the best interests of the child requires governments to determine the impact of their proposed actions on children, and to give priority consideration to the envisioned impact *before* taking decisions on matters that concern children. This obligation is not only restricted to laws that are aimed at giving effect to children's "special rights" (e.g. the right to protection from abuse and neglect) but also applies to laws aimed at giving effect to children's "general human rights" (e.g. children's right to water).

What role do laws play in giving effect to socio-economic rights?

The State is obliged to take a range of steps to give effect to rights. These steps include drafting and implementing laws. Since 1994, the majority of South Africa's laws have been re-drafted to bring them in line with the Constitution and international law.

Laws have a distinct role to play in giving effect to rights. This includes:

1. Providing for the service or programme that is needed to give effect to the right. For example, the South African Schools Act places an obligation on the provincial ministers of education to provide sufficient schools to ensure that all children can access education. This legislative mandate ensures that provincial parliaments allocate funding for the building and maintenance of schools.
2. Clarifying which sphere of government is responsible for funding and providing the service or programme. This helps to ensure that the State has a well co-ordinated system for delivering the service or programme.
3. Regulating the service or programme. This is aimed at ensuring that the service is of good quality and is delivered properly.

While many new laws have been passed by Parliament and are in effect, some are still being finalised. These new laws need to be amended over time by to ensure that they adapt to changing needs in society.

TABLE 1: Key laws giving effect to children's socio-economic rights

Right in the Constitution	Key laws
EDUCATION Section 29 (1)	South African Schools Act 84 of 1996
SOCIAL SECURITY Section 27	Social Assistance Act 13 of 2004
SUFFICIENT WATER (AND SANITATION) Section 27	Water Services Act 108 of 1997 Housing Act 107 of 1997 Municipal Systems Act 32 of 2000
SHELTER AND HOUSING Section 28 (1) (c) and Section 26	Housing Act 107 of 1997 Municipal Systems Act 32 of 2000 Child Care Act 74 of 1983
BASIC HEALTH CARE SERVICES AND HEALTH CARE SERVICES Section 28 (1) (c) and Section 27	National Health Act 61 of 2003
BASIC NUTRITION AND SUFFICIENT FOOD Section 28 (1) (c) and Section 27	Social Assistance Act 13 of 2004 National Health Act 61 of 2003
SOCIAL (WELFARE) SERVICES Section 28 (1) (c)	Child Care Act 74 of 1983 (soon to be replaced by the Children's Act 38 of 2005)

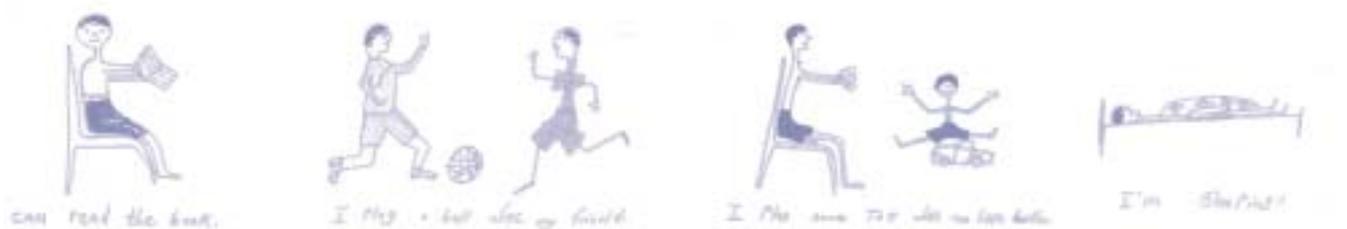
All the laws give the relevant minister the authority to draft regulations. While a law contains the principles, its regulations contain the detail. Laws are passed by Parliament in an open and transparent manner that provides for active participation by the public. This helps to ensure that the provisions in the law have the support of the public and are appropriate and implementable.

Regulations, on the other hand, are drafted by executive officials behind closed doors with little opportunity for public participation. As is evidenced throughout this edition of the *South African Child Gauge*, the detail in the regulations and the manner in which the regulations are implemented can influence children's access to socio-economic services and benefits. The regulations therefore are just as important as the laws, and need all duty-bearers' and role-players' active consideration and participation when they are drafted to ensure improved access to services for children.

What laws give effect to children's socio-economic rights?

It is important that all laws related to socio-economic rights take children's needs into consideration. As noted earlier, it is not just the special laws like the Children's Bill that impact on children's socio-economic rights. General laws like the Housing Act, the Water Services Act and the National Health Act all impact greatly on children's socio-economic rights.

The key laws that have the potential to create the necessary legislative framework for the realisation of children's socio-economic rights are listed in Table 1 above. These laws and their respective regulations set out the State's obligations and children's entitlements with regards to socio-economic rights.



What are the latest law reform developments in education?

Over the past year, there has been much activity in the area of education law reform which has seen the introduction of significant changes to the school funding and school fee systems.

These include:

- amendments to the South African Schools Act of 1996 and its regulations, i.e. the:
- *Regulations on the Exemption of Parents from Payment of School Fees in Public Schools (2006)*; and
- new *National Norms and Standards for School Funding (2006)*.

Amendments to the South African Schools Act

The amendments to the South African Schools Act came into effect on 1 January 2006. The amendments strengthen the Act and clarify areas where discrimination has been occurring.

The South African Schools Act (as amended) states:

- caregivers must ensure their children aged seven to 15 (or in Grade 9) attend school;
- provincial Members of Executive Councils (MECs) must provide sufficient schools for children aged seven to 15 to attend school;
- the State must fund public schools on an equitable basis to redress past inequalities in education provision;
- schools may charge school fees;
- school fee exemptions must be granted to caregivers who can't afford to pay fees;
- schools may not charge any other form of fee except school fees;
- discrimination against children who have not paid school fees is not allowed, and
- no-fee schools are to be determined by the National Minister in consultation with the provincial MECs.

New Regulations on the Exemption of Parents from Payment of School Fees in Public Schools (2006) and new *National*

Norms and Standards for School Funding (2006) were published in terms of the amendment to the Act and came into effect in October 2006 and January 2007 respectively.

Regulations on the Exemption of Parents from Payment of School Fees in Public Schools

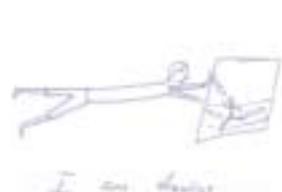
The regulations:

- introduce a checklist which schools and parents have to complete to show that the school has informed the parents of their right to apply for an exemption;
- introduce a new standardised fee exemption application form and means test formula;
- grant automatic exemptions to:
 - (a) children in foster care, youth care centres, places of safety, and orphanages;
 - (b) children living with relatives (in kinship care) because they are orphans or because they have been abandoned by their biological parents and are without any visible means of support;
 - (c) children who receive social grants; and
 - (d) children living in child-headed households.

Research has indicated that schools generally do not inform parents about the fee exemption policy or assist them to apply for exemptions because schools are under pressure to raise funds for the functioning of the school. While the strengthened measures, and the checklist in particular, may pressurise schools to obey the law, they do not address underlying reasons for the non-implementation of the School Fee Exemption policy. A major contributing reason for non-implementation is the lack of any funding from the government to reimburse schools for loss of income when they grant exemptions.

The new means test, while still very complicated, is clearer, fairer and more accessible than the previous means tests and could lead to improved access for children if reasonably implemented. However, it may still be difficult for some school governing bodies to understand and implement.

The introduction of automatic exemptions for various groups of vulnerable children is a progressive move and



should partially alleviate the financial burdens carried by a range of caregivers, especially poor parents and relatives, and children's homes.

National Norms and Standards for School Funding

The *National Norms and Standards* allow for schools in the poorest areas to become no-fee schools, with these schools being re-imbursed by the government for this loss of revenue from school fees. While some provinces voluntarily implemented the policy in 2006, compulsory implementation was scheduled to begin in January 2007.

By removing the school fees barriers, the no-fee policy should improve poor children's access to schools in the poorest 40% of areas. However, as the policy is geographically defined, poor children wanting to attend good schools in wealthier areas will still have to negotiate the school fee exemption system, and will continue to pay high transport costs to receive better quality education.

Another problem with the policy is that it is currently restricted to grades R to 9, which leaves out children 15 years and older. The essay on education in *PART TWO: Children and poverty* offers a fuller discussion on the higher costs of high school relative to primary school, the impact of the Child Support Grant cessation at age 14, and the associated drop out of learners from high school.

What are the latest law reform developments in social security?

The regulations to the Social Assistance Act of 2004 have not yet been finalised but the new Act has been in effect since 1 April 2006. The regulations to the 1992 Act therefore still apply. The Act and its regulations provide three types of grants for children, namely the Child Support Grant for poor children under the age of 14, the Foster Child Grant for children who have been placed in alternative care by a court order, and the Care Dependency Grant for children with severe disabilities.

Grants should not be suspended on death of primary caregiver

Social grants for children are paid to the primary caregiver of the child or the foster parent in the case of the Foster

Child Grant. These grants lapse upon the death of the child's primary caregiver or foster parent. With a higher than usual death rate amongst women of child-bearing age in the context of HIV/AIDS, the suspension of grants on the death of a primary caregiver causes hardship for many children.

To remedy the situation, Section 20 (6) of the Social Assistance Act provides that the Social Security Agency may not suspend the grant upon the death of the child's primary caregiver and must appoint a person to take over the grant. However, the exact mechanism to ensure that this happens still needs to be specified in the new regulations.

Alternative proof of identity may soon be permitted

The requirement of birth certificates and identity documents is a common barrier for caregivers trying to access social grants for children. The draft regulations published in February 2005 propose an amendment which, if accepted into the final regulations, could have positive effects for many children living in poverty. The amendment will allow officials to accept alternative proof of identity if caregivers and children applying for grants do not have official birth certificates or identity documents.

Many children and their caregivers do not have birth certificates or identity documents or do not have the finances or accompanying documents needed to apply for identity documents. Lack of these documents is often cited by researchers and civil society organisations as a pervasive barrier. The essay on the Child Support Grant in *PART TWO: Children and poverty* gives evidence that lack of identity documents is a major factor preventing caregivers from applying for this grant. If the draft provision is accepted into the final regulations and officials are given training and clear guidance on how to apply their discretion, many more children living in poverty should be able to access social grants.

Remaining gaps

Two major gaps around the Child Support Grant remain in need of reform. The first is the exclusion of children from 14 to 17 years from accessing the grant. The second is the static income threshold of the means test that caregivers must pass to access the grant on behalf of the children in their care. This threshold has not changed since 1998 and rising inflation excludes more children every year.

What are the latest law reform developments in health care services?

The National Health Act of 2003 came into effect on 2 May 2005 but new regulations have not yet been published for comment. Until the new regulations are published, all regulations and notices published under the 1977 Act still apply.

Free health care services entrenched in the law

Free health care services for pregnant women and children under six, and free primary health care services for everyone, were introduced by the Minister of Health in 1994 and in 1996 by government notice.¹ These entitlements to free health care services are now firmly entrenched in the National Health Act of 2003. The Act also adds a third category of people entitled to free health care services at all levels, namely women who need termination of pregnancy services.

As opposed to providing for free health care services in a notice or in regulations, as was the situation before the new Act, the entrenchment of these entitlements in an Act of Parliament ensures they cannot be retracted without significant public and parliamentary consultation. This provides protection to an important entitlement that greatly increases children's and their mothers' access to health care services.

Uniform Patient Fee Schedule

The Act gives the Minister the authority to declare further categories of people eligible for free health care services and the Minister may also prescribe conditions regulating access to free health care services. The national Uniform Patient Fee Schedule is published annually and the provinces also publish their own fee schedules based on the national schedule.

The national schedule prescribes further categories of people who qualify for free services. These include children who have been placed in the care of a foster parent, children's home or school of industry in terms of Section 15 of the Child Care Act. Some provinces provide for additional categories of people to have access to free services.

The national and provincial schedules also prescribe fees for people who do not qualify for free health care services. The first category, unemployed people with no income or people receiving social grants, are classified as "HO" patients. They do not have to pay for health services if they are able

to prove their HO status by producing an unemployment insurance card or a social grant card.

See the essay on health in *PART TWO: Children and poverty* for more information as to how free health services and hospital fee schedules are working in practice.

What are the latest law reform developments in social (welfare) services?

Services to give effect to the constitutional rights to social services, family care or alternative care, and protection from abuse and neglect fall mainly within the framework of the Child Care Act of 1983. This Act will soon be repealed by the Children's Act 38 of 2005. The Children's Act was signed by the President in June 2006 but will only come into effect once the Children's Amendment Bill has been passed by Parliament. This is expected to take place in 2008.

The new law will provide the primary legal framework for the realisation of children's right to social services, parental care or family care or appropriate alternative care, and protection from abuse and neglect. Through public participation in the law-making process, Parliament decided to amend the Bill to refer explicitly to these rights in the objects clause. This amendment signifies a clear recognition that the Children's Act is aimed at giving effect to these constitutional rights.

The new challenge, however, is to ensure that the substantive clauses in the Children's Amendment Bill do in fact provide the necessary legislative framework for the realisation of these rights. The Bill provides for and regulates partial care facilities such as crèches and nursery schools, early childhood development programmes, prevention and early intervention services, child protection services, foster care, child and youth care centres, shelters and drop-in centres. But a major problem in the Bill is the lack of clear "provisioning clauses". The Bill does not expressly state that government has a duty to provide or fund all the services that the Bill is regulating. The Bill is also not clear which spheres of government are being allocated the duty of providing or funding the various services.

A recent costing of the Children's Bill by Cornerstone Economic Research has shown that the government is only providing and funding 25% of its current obligations to

¹ Government Notice 657 of 1 July 1994; and Government Notice 1514 of 17 October 1996.

children under the Child Care Act. There is therefore major under-provisioning to a very vulnerable category of children by the State. This area of budget allocation and spending needs urgent attention. Improvements will be seen if the new Children's Act of 2005 is strengthened to include clear provisioning clauses obliging the national and provincial spheres of government to allocate sufficient funding.

What are the conclusions?

Over the past year and a half, there were many positive amendments which, if implemented reasonably, could greatly improve children's access to socio-economic goods and services.

A glaring gap however is the neglect in law reform of the needs of children 14 – 17-years old. This neglect is spread across many departmental policies and laws with the result that this group of children is especially vulnerable:

- The Child Support Grant stops when the child turns 14.
- The automatic school fee exemption for children receiving social grants excludes children aged 14 to 17.
- The school feeding scheme is not available in high schools.
- The No-fee Schools policy stops at Grade 9, or when a child turns 15 years old.
- The H0 category of patients who qualify for fully subsidised health care services requires the patient to produce a social grant card. Children between the ages of 14 and 17 are excluded from accessing the Child Support Grant, which in turn excludes them from being able to qualify as H0 patients.

One obvious result of these exclusions is that the children in this age group become more likely to drop out of school. It is a serious concern, given that this group of children are at a particularly important developmental phase of their lives and investment in their well-being and especially their education will have significant and positive effects on their lives, and on the well-being of the nation in general.

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