

# The Children's Act: Providing a strong legislative foundation for a developmental approach to child care and protection

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**A**t the end of 2007, Parliament passed the Children's Amendment Bill [B19F-2006]. Once the President signs the Bill, it will amend the Children's Act (No 38 of 2005) and South Africa will have a comprehensive Children's Act providing for the full range of social services<sup>1</sup> needed to support vulnerable children and their families.

This essay looks at:

- why a new law was needed;
- what's in the Children's Act;
- how the Act takes South Africa forward into a new era of child care and protection;
- some clauses which could have a negative impact; and
- some implementation challenges.

## Why was a new law needed?

Since 1994 South Africa has been reforming all the old laws to bring them in line with the Constitution. To date, most old laws have been replaced but a few still remain in force, including the Child Care Act (No 74 of 1983). This Act was written by the apartheid government before South Africa became a constitutional democracy.

Besides the constitutional imperative to draft a new law, the complex social challenges facing children and families demanded a new approach. Widespread poverty, social fragmentation, a culture of violence, high rates of unemployment, and the HIV/AIDS pandemic have resulted in a vastly increased number of vulnerable children and families in dire need of social services.

The 1997 White Paper for Social Welfare recognised these challenges and promoted a developmental approach to social services to address the root causes of child vulnerability. However, the Child Care Act of 1983 provided for an outdated approach focusing on state protection for children only after they have been abused with no provision for prevention and early intervention services. This 1983 Act also did not place a legislative obligation on the State to provide any social services

for children as all the provisioning clauses in the Act are framed in discretionary language. Therefore, to give effect to the policy set out in the White Paper, a new law was needed.

## What process was followed to pass the new law?

In 1997, soon after the Bill of Rights and the White Paper were completed, the South African Law Reform Commission (SALRC) was tasked with reviewing the Child Care Act and drafting a new law. In 2002, after five years of research and consultation, the SALRC handed a draft Bill to the Minister of Social Development for tabling in Parliament. The draft Bill was then split into two Bills for technical reasons and the first Bill was tabled in Parliament at the beginning of 2004. Parliament went through a series of consultative processes with government departments and civil society (including children) and passed the Bill at the end of 2005. It was signed by the President as the Children's Act (No 38 of 2005) and certain founding provisions were put into effect on 1 July 2007.

The second Bill, the Children's Amendment Bill (hereafter referred to as the "Amendment Bill") also went through an extensive consultative process in Parliament and in the provincial legislatures and was passed at the end of 2007. The Children's Act (as amended) is therefore the culmination of a 10-year-long consultative law reform process.

Once the regulations have been finalised, the Act will replace the Child Care Act and South Africa will have a new legislative framework for the care and protection of children. Early 2009 is an optimistic date for the Act to come into full effect.

## What's in the Children's Act?

The Act provides for a range of social services that are primarily aimed at strengthening and supporting families and communities to care for and protect children. If families are unwilling or unable to care for their children, the Act provides for state alternative care.

<sup>1</sup> The term 'social services' means the services that need to be delivered to give effect to children's constitutional right to "social services" in s28(1)(c). Please see the essay on page 23 for more details.

Services which were regulated in the Child Care Act and which the Children's Act now continues to provide for, as well as strengthen, include:

- protection services for children who have suffered abuse, neglect, abandonment or exploitation;
- foster care (this has been extended to include cluster foster care);
- adoption; and
- child and youth care centres.

Services provided for in law for the first time include:

- partial care (crèches and nursery schools);
- early childhood development (ECD) programmes;
- primary prevention and early intervention programmes;
- support programmes for child-headed households; and
- drop-in centres providing basic services.

## How does the Children's Act take South Africa into a new era of child care and protection?

### Provides the services needed to give effect to a range of children's constitutional rights

The Children's Act brings South Africa's child care and protection law up to date with the Bill of Rights in the Constitution, and with international law. Section 28 of the Bill of Rights specifies that every child has the right to family care, parental care or appropriate alternative care; the right to be protected from abuse, neglect, maltreatment and degradation; the right to social services; and the right to have their best interests given paramount importance in all matters concerning them. Section 9 guarantees all children the right to equality and non-discrimination.<sup>2</sup>

Children's right to social services in section 28(1)(c) of the Bill of Rights is often forgotten or misunderstood. Just as children have the rights to education and social security (grants), they also have the right to social services. To give effect to the right to education, the South African Schools Act (No 84 of 1996) obliges government to provide schools and, for social security, the Social Assistance Act (No 13 of 2004) obliges government to provide social grants. In following the precedent of these laws, the Children's Act spells out what services government is obliged to provide to give effect to children's right to social services.

While the Children's Bill was being drafted and debated there was much discussion on what services are needed and who should provide them. It is generally accepted that schools are needed to give effect to the right to education, and that grants are needed to give effect to the right to social security, but what services are needed to give effect to children's right to social services? It is also commonly accepted that govern-

ment bears the primary responsibility for providing and funding schools and grants, but throughout the Children's Bill debates, the concept that government is primarily responsible for providing social services was not a clear point of departure for all stakeholders involved in the decision-making process. The lack of knowledge on the existence and meaning of children's constitutional right to social services and the historical perception of social services as "charity" that is provided by non-profit organisations (NPOs) contributed to the confusion.

To provide answers to this debate, the Children's Institute conducted legal research on the meaning of children's constitutional right to social services (see the essay on page 23). The research found that a range of services are needed to give effect to this right, as well as the rights to family care and protection from abuse and neglect. The range of services can be categorised as:

- services to prevent abuse and neglect;
- services to intervene early if a child is at risk of abuse or neglect;
- services to protect children who have suffered abuse or neglect from further harm;
- alternative care for children who cannot live with their families due to abuse, neglect, orphaning or abandonment; and
- services for children with special needs to enable their full participation in society.

The Children's Act provides the primary legislative framework for ensuring that the majority of these services are provided. It does this by providing clarity on which services must be provided, to whom and by whom.

### Government takes the lead in moving into a rights paradigm

Each chapter of the Act, relating to each area of service delivery, has strategy, provisioning, and norms and standards clauses. Read together, these clauses place a legislative duty on the national Minister and provincial Members of Executive Councils (MECs) for Social Development to ensure that:

- a sufficient spread of each service is provided in every province;
- updated records of services are available in every province for planning, monitoring and budgeting purposes;
- budgets are allocated at a national and provincial level for the provision of these services; and
- national norms and standards are set in regulations.

These clauses are new in South African law governing social services. The Children's Act shifts the country from a charity model to an approach that recognises that children have a constitutional right to social services and that the State bears

<sup>2</sup> All these rights have their roots in international law treaties that South Africa has ratified, in particular the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

the primary duty to ensure that these services are delivered. This does not mean that the State is obliged to provide all of the services itself but that it is obliged to ensure that the services are provided and accessible to all vulnerable children. This requires a good partnership between government and NPOs, with government playing the lead role and NPOs being paid full cost by government for services rendered on behalf of the State.

### **Budget for implementing the Act to be prioritised**

The Act provides explicit guidance to National Treasury and the provinces with regards to making decisions about how much budget should be allocated for implementing the Act. Section 4(2) states that all spheres of government “must take reasonable measures to the maximum extent of their available resources to achieve the realisation of the objects of this Act”.

This means that Treasury and the provinces need to prioritise the implementation of the Children’s Act when they are making decisions about budgets and the allocation of resources. No longer can children’s social services be given the left-over crumbs of the budget but they should be prioritised when budget allocation decisions are made.

If budgets are limited for partial care, ECD, drop-in centres, and prevention and early intervention services, the Act says that priority must be given to funding of these services in communities where families lack the means of providing proper shelter, food and other basic necessities of life to their children, and to making services accessible to children with disabilities.

### **Applications for registration to be considered timeously**

The government has made a commitment in the Act to provide all the social services itself or, indirectly, through funding the NPOs who currently deliver many of these services. However, NPOs only qualify for funding if they are registered. Delays by provincial departments in considering registration applications can prevent NPOs from being able to apply for government funding. See the case study below of an ECD centre providing daily care and education for 80 children in Philippi, Cape Town, and its struggle to get registered and funded.

To minimise delays and to ensure fair administrative action, the Act provides that applications for registration by NPOs for the various services must be considered within six months of the application being submitted. This is longer than the period normally considered reasonable (three months) under administrative law. But, given the backlogs and capacity constraints within the provincial departments, and the likely increase in applications once the new law is in force, the National Assembly considered a period of six months to be more pragmatic.

### **Conditional registration and government assistance for struggling NPOs**

Many community-based projects struggle to qualify for registration and government funding because they don’t meet the minimum norms and standards for registration. Recognising this, the Act provides for a process of conditional registration and assistance by the provincial departments of social development to help struggling NPOs to meet the norms and standards.

## **CASE STUDY 5: ECD centre struggles to get registered and access government funding**

**“I\* do this because I want to give help in my community, also to protect children from the abuse. There is a high rate of abuse in this area. When they can’t go to crèche, they can get abused from the people around the area and they can also have accidents because nobody looks after them when their parents go to work and to school. So I saw it was good to open the educare in my area. I also want to educate the children, to make them ready before they go to school.**

**I want to talk about registration, especially the Department of Social Services. They are supposed to be helping us before anything else, before the fundraising. But their registration is too slow. They need so many things before they take us to the registration. They take time to do that. I think if they can make a better plan than they do now, it will be fine for us and the children too. Even now we don’t have groceries to cook for the children, because of their registration problem. Last year we filled the forms and we**

**\* Nomsa Manxina Nqeza**

**received the certificate last year late. So we thought early this year we’re supposed to get the funding for the children, maybe in April or May. But until now we didn’t hear anything.**

**I don’t know. If government can come and see how we work very hard and the parents trust us. We’ve got the love for the children and our communities and our country. Because you know, we’re not doing this to be a star of South Africa or of Philippi. We’re doing this because we want those children to be a star of South Africa. To grow up with something that is going to be there for the future. I also say to them today: you know what? In twenty years’ time, you’re going to help me if I’m sick and you’re a doctor. That’s what I want. Not to have the children at the robots asking for something and staying under the bridge. I want them to get a better future from the education. You can get a better future with this education. That’s why we need this help.”**

**Source:** Extracted from a submission by Qhamani Educare on the Children’s Bill to the Portfolio Committee on Social Development in Parliament (August 2004).

### **Commitment to improve the funding of prevention and early intervention services**

Programmes aimed at stopping abuse or neglect before it starts (prevention and early intervention services) have for the first time been clearly legislated for. Prevention and early intervention services are cost effective because they reduce the demand for more costly services such as state alternative care in children's homes. They are also an investment in human capital because they ensure children can develop to their full potential.

Section 144 of the Act outlines the types of prevention and early intervention programmes that government will provide funding for. These include programmes aimed at:

- preserving a child's family structure (e.g. home-based care for families with chronic illnesses such as AIDS);
- developing appropriate parenting skills;
- developing the capacity of parents to safeguard the well-being and best interests of children with disabilities and chronic illnesses (e.g. support groups for parents of children with disabilities);
- diverting children in trouble with the law from the criminal justice system into restorative justice programmes;
- helping children and families to access other government services (e.g. health care, grants, school fee exemptions, water and electricity); and
- providing psychological, rehabilitative and therapeutic services for children who have suffered abuse, abandonment or grief (e.g. child and family counselling services and phone crisis lines).

Many community-based projects currently provide services that are aimed at linking vulnerable families with government services such as health care, schooling, assistive devices, and grants. These projects, which provide an invaluable service especially in rural areas, need government funding to continue. They also tend to be run by women and youth which means that funding also provides skills development and work for these groups. By paralleling social with economic development, these types of initiatives fall squarely in the realm of the developmental social welfare system.

The commitment to fund prevention and early intervention services, especially those in poor areas, means that the vision of the White Paper can now be put into practice (see the essay on page 29).

### **Recognition for drop-in centres providing basic services**

The definition of a drop-in centre has been substantially changed. Previously, the term described centres offering support to children on the streets during the day. More recently the term has also been used to describe the informal projects set up by women in communities deeply affected by poverty and the HIV/AIDS pandemic to provide food and homework support to vulnerable children. The National Assembly wanted to ensure that community workers in rural communities can get funding from government, therefore the definition of drop-in centres has been restricted to centres providing basic services, making it easier for community-based projects to qualify for funding.<sup>3</sup>

### **Non-violent forms of discipline promoted**

The clause which banned corporal punishment by parents (section 139) has been deleted from the Act. However, new provisions were introduced in section 144 to ensure that parenting programmes promoting positive, non-violent forms of discipline are rolled out.

In its report on the Amendment Bill, the Parliamentary Portfolio Committee on Social Development emphasised its commitment to ensure that the corporal punishment debate is continued when the next Amendment Bill is tabled.

### **Equal access to social services for children with disabilities**

Children with disabilities are more vulnerable to abuse and neglect than other children. This is due firstly to their increased vulnerability to abuse as a result of their disability and secondly because the child protection system has many barriers restricting equal access. The Act provides that these barriers must be removed and that the necessary support services must be provided to enable children with disabilities to have equal access to services, and therefore to protection. References to equality for children with disabilities and chronic illnesses can be found in sections 2, 6, 7, 11, 13, and 42, and in most of the provisioning and strategy clauses in each of the service chapters.

### **Appropriate utilisation of the full range of social service practitioners**

In recognising the acute shortage of social workers in the country and the valuable role played by a range of other social services practitioners (e.g. child and youth care workers, auxiliary social workers, and community development workers), Parliament replaced some references to social workers with the term 'social service professionals'. This was to ensure that many of the tasks restricted to social workers can be

<sup>3</sup> Services for children on the street will fall under the *Prevention and Early Intervention* or *Child and Youth Care Centres* chapters to ensure that children on the street receive a more comprehensive intervention than merely basic services.

done by other social service practitioners. These tasks include assessing partial care centres, ECD programmes and drop-in centres for registration; and monitoring long-term foster care placements. Diversification of roles will help ensure that each category of worker is appropriately used according to their particular training and will make services more accessible in poor and rural communities where social workers are scarce.

However, this new approach cannot be implemented until the South African Council for Social Service Practitioners (SACSSP) and the Minister of Social Development officially recognise and register the full range of social service practitioners (see the essay on human resources on page 48).

### **Mentorship scheme for child-headed households**

Child-headed households are defined as children whose parents have died or abandoned them and who are living alone, and children whose parents are present but are too ill to care for them. Such households are entitled to receive support through the adult mentorship scheme created in section 137 of the Act. Support can be delivered immediately without the need for a social worker report to be completed first.

NPOs currently run programmes that provide daily support to child-headed households. An example is the Isibindi Model managed by the National Association for Child and Youth Care Workers (see case study 9 on page 52). The Act legislates for such programmes to be registered and funded by government, and so provides the foundation for these programmes to be rolled out to more vulnerable children across the country.

### **Which clauses in the Act could impact negatively on children's access to social services?**

#### **Obligation on social workers to report possible offences to the police**

Reports of children in need of care and protection need to be made to either the Department of Social Development or a designated child protection organisation. Thereafter a social worker will investigate the case. Parliament inserted a new subsection (110(8)) providing that, if a social worker finds that the child is in need of care and protection, they "must report the possible commission of an offence to a police official".

This amendment introduces a major change in practice. Currently social workers exercise discretion in whether or not to report the matter to the police. Section 110(8) takes that discretion away and obliges them to report the matter to the police if a criminal offence or an offence created under the Children's Act has allegedly been committed. This effectively will require most cases to be reported to the police and social

workers have expressed a fear that this will interfere in their ability to gain the trust that is needed from the child and family to address the problem effectively.

### **Over reliance on foster care system to provide income support to families caring for orphaned and abandoned children**

The Act now allows for courts to make permanent foster care orders in specified circumstances (section 186). This reduces the costs of the two yearly reviews by social workers and the court that are required by the Child Care Act. Nevertheless, social workers and courts are still required for the first placement decision. The backlog in foster care placement is therefore set to continue. The result is that families caring for orphaned children will continue to wait for a long time before they receive the Foster Child Grant, while services for children who have been abused or exploited will also be delayed as social workers and the courts struggle under a heavy case load.

The opportunity to promote the use of the administratively simple Child Support Grant for children placed with relatives and who are considered low-risk placements, has been lost. Besides reaching more orphaned children faster, and saving considerable costs for both the Departments of Justice and Social Development, it would also have freed up precious court and social worker time to deal with active cases of child abuse. The consequences of delays in dealing with child abuse cases are serious, as can be seen in the case study of child abuse below, which was referred to a social worker in the department. It received no response for 10 months at the time of the case being recorded.

#### **CASE STUDY 6: Missed opportunities to help children who have been abused**

**"On 24 March 2004, it was reported that a 13-year-old child was sexually abused by her stepfather since 2003. The child is currently [January 2005] pregnant as a result of the abuse. The case was reported to the [social] service office on 24 March 2004, but there has been no response [10 months later]. The lack of response in this instance is particularly concerning as it will be too late to offer the child all possible options with regard to the management of her pregnancy and the birth of the child."**

**Source:** Childline (2005) *Report on children's rights and child protection management in South Africa, 14 January 2005*. Presentation to Portfolio Committee on Social Development, KwaZulu-Natal provincial legislature.

Also see the essay on human resources challenges on page 48 for more details and examples on how shortages of social workers and the high foster care case loads impact on protection services for abused children.

In recognition of the burden on the foster care system and the rapid growth in take-up of the Foster Child Grant, the Portfolio Committee on Social Development in its report on the Amendment Bill has requested that the Department of Social Development “conduct an urgent comprehensive review of the social security policy for children and the foster-care system”. (See the essay on page 55).

## What are some of the implementation challenges?

### Funding of NPOs needs to be reviewed in light of the provisions in the Act

NPOs currently assist government to fulfil its obligation to provide social services to children but are only partially funded by government. This is in direct contrast to the funding approach used when government requires a hospital or a soccer stadium to be built by an outside service provider. In these cases government covers the full costs, with added provision for profit. As government does not cover NPOs' full costs it is impossible for NPOs to grow and extend their services into under-served areas. Consequently a major review of the way NPOs are funded is needed to ensure that services can be continued, developed and expanded. See page 31 for a critique of the current funding policy for NPOs.

### The full range of social service practitioners need to be recognised and developed

The Children's Act defines a social service professional to include a probation officer, development worker, child and youth care worker, youth worker, social auxiliary worker and social security worker “who are registered in terms of the Social Service Professions Act of 1978”. However, currently only social workers can register under this Act. The blockages to registration and development of the full range of social service practitioners need to be addressed urgently to ensure that children, especially in rural areas where social workers are scarce, have access to the services outlined in the Act (see the human resources essay on page 48).

## What are the conclusions?

The Children's Act (as amended) is a pioneering step forward in the realisation of a developmental approach to social welfare services for children, and this needs to be celebrated. While some amendments may be needed to address gaps and implementation challenges, the Act as a whole provides the strong legislative foundation that was so desperately needed to enable the country to respond adequately to the needs of vulnerable children.

Clauses in the Children's Act that can impact negatively on children's access to social services include the obligation on social workers to report possible offences to the police, and the reliance on the court-based foster care system as income support to families caring for orphaned or abandoned children.

The focus now turns to planning and monitoring implementation to ensure that this strong foundation is used to the maximum extent. Implementation challenges which need to be addressed as a matter of priority include a reform of the funding of NPOs who deliver social services on behalf of government and the recognition and development of the full range of social service practitioners.

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