



PART ONE

Children and Law Reform

Part one discusses recent key legislative developments affecting children. In this edition there is commentary on the Children's Act and the Children's Amendment Bill, the Sexual Offences Act, the Education Laws Amendment Act and the Child Justice Bill.

Key legislative developments affecting children in 2007

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The year 2007 was an historic year in the development of legislation affecting children. Some sections of the Children's Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act (referred to here as the "Sexual Offences Act") came into effect. Parliament passed the Children's Amendment Bill and the Education Laws Amendment Bill, and Cabinet approved changes to the Child Justice Bill.

On the one hand this package of laws advances the fulfilment of children's rights with the introduction of a wider range of services and new offences that will protect children from abuse and exploitation. The package is progressive in

introducing community-based services that support children and their families to prevent abuse and neglect. These services will also help to address the socio-economic drivers of crime committed both by children and by adults against children. On the other hand, some of the legislation seems regressive in using the justice system to deter children from risk-taking behaviour.

There are potentially many strong linkages between the laws. If these services can be properly linked and co-ordinated, South Africa would be well on the way to providing a comprehensive protection system and creating an environment in which children can flourish. However, there are also a number of contradictions and conflicting provisions that need to be dealt with.

The Children's Act and the Children's Amendment Bill

Social services for children have been neglected over the past 10 years in part due to the absence of a legislative framework in line with the Constitution. The new Children's Act (No 38 of 2005) and the Children's Amendment Bill [B19F-2006] will replace the Child Care Act (No 74 of 1983) and aim to bring South Africa's law in line with the Bill of Rights and international law.

Current status

The first Children's Bill was signed into law by the President in June 2006, officially entitled: Children's Act (No 38 of 2005). Certain sections of the Act came into effect on 1 July 2007. The rest of the Act will come into effect at the same time as the Children's Amendment Bill.

Parliament passed the second bill, the Children's Amendment Bill on 22 November 2007, and the Bill has been sent to the President for signature. A set of draft regulations covering the Act and the Amendment Bill have been finalised and are expected to be gazetted for comment in 2008.

Foundations and Principles

The Act states that national, provincial and local government must implement the Act in a co-ordinated way to the maximum extent of available resources. One of the general principles of the Act is that decisions should be made in the best interests of the child, and related to this is a child's right to participate in all decisions affecting her or him. The Act changes the age of majority from 21 to 18, and obliges government to ensure substantive equality and equal access to services for children with disabilities and chronic illnesses.

Focus on strengthening the family

The Act makes an important conceptual shift from parents having power over children to parents having responsibilities and rights. Another shift is the process of dealing with disputes between parents or caregivers around care (previously custody), contact (access) and guardianship. Previously, the legal system slanted towards litigation but the new Act emphasises mediation and family group conferencing to resolve family challenges before resorting to the court.

The Act outlines the procedures and functions of Children's Courts. These civil courts, situated at magisterial level, are responsible for assessing whether a child is in need of care and protection and for ensuring the child gets the necessary support. Children's Courts now have more powers to promote the strengthening of families and the best interests of the child.

The Act also contains chapters on adoption, inter-country adoption, child abduction, trafficking in children, and surrogate motherhood.

Ages of consent

The Act outlines the processes for giving consent to medical treatment, surgical operations, access to contraception, HIV testing and disclosure of results. Previously, age alone determined a child's capacity to consent and the age of 14 was used as the threshold. Now the age threshold is 12 and the child's maturity and ability to understand the risks and benefits of any treatment or testing must also be assessed before the child can consent on their own.

Social services

The Amendment Bill provides for and regulates a range of child care and protection services including:

- Partial care (e.g. crèches).
- Early childhood development programmes.
- Prevention and early intervention services for vulnerable children.
- Protection services for children who have suffered abuse, neglect, or exploitation. This includes a system to report, refer and support children.
- A support programme for children living in child-headed households.

- Foster care, cluster foster care, and child and youth care centres for children in need of alternative state care.
- Drop-in centres for vulnerable children to access basic services.

Key challenges to implementation

The Act and the Amendment Bill together provide a foundation for the reform and development of children's social services. The challenge now is to make sure necessary budgets are allocated, provincial departments' capacity for delivery is improved, the human resources challenge is prioritised, and sustainable funding is provided to non-profit organisations, which provide the bulk of social services to vulnerable children.

The Children's Act and the Children's Amendment Bill are discussed in detail in *PART TWO*.

The Sexual Offences Act

The Sexual Offences Act amends the Sexual Offences Act (No 23 of 1957) and the common law relating to sexual offences. It also creates new statutory offences. It defines and categorises sexual offences, sets out ages of consent to sexual activity and details procedures around prosecution. The majority of the provisions of the Act effect both children and adults; however, certain sections relate only to children.

Current status

The Sexual Offences Bill was tabled in Parliament in 2003 and was passed in November 2007. Its official name is the Criminal Law (Sexual Offences and Related Matters) Amendment Act (No 32 of 2007). Most of the Act came into effect on 16 December 2007. Chapters 5 and 6 will come into effect in 2008.

Rape more broadly defined

The Act broadens the definition of 'rape' to include all forms of sexual penetration without consent – irrespective of the gender of either person. This means that penetration of the mouth or anus by the genitals of another person or with an object are now considered 'rape'. Previously these were classified as 'indecent assault' and considered less serious than penetration of the vagina by a penis.

Sexual assault

A wide range of non-penetrative acts of 'sexual violation' are defined and are covered by the crime of 'sexual assault'. This replaces acts covered under the common law crime of 'indecent assault' and includes kissing, feeling breasts and rubbing the genitals of a person without consent.

Sexual crimes and children

The Act also defines a range of crimes that commonly occur against children and these include expanded definitions for 'sexual grooming', 'sexual exploitation' and the use of children

in pornography or the display of pornography to children.

The legal age of consent to any sexual activity is 16. This means that it is a crime for any person, adult or child, to engage in sexual activity with a child under the age of 16 years – even if the child is a willing participant. The Act states that all adults charged with such crimes should be prosecuted, but it deals differently with children charged with these crimes.

In cases where two children between the ages of 12 and 16 engage in consensual sexual penetration, which includes oral sex and “fingering”, both children must be charged with statutory rape. Only the national Director of Public Prosecutions may decide whether or not to prosecute (this function cannot be delegated). This requirement is intended to prevent unnecessary prosecutions (normally the local prosecutor would make the decision). If prosecution is instituted, both children must be charged.

Consensual sexual acts not involving penetration between children under 16 are also crimes. Two 15-year-olds, for example, who kiss can be charged with statutory sexual assault. However, prosecution must be authorised by the provincial Director of Public Prosecutions to prevent unnecessary legal action and both children must be prosecuted when the decision is taken. A difference in ages of less than two years between children can however be raised in court as a defence to a charge in non-penetrative cases.

Concerns have been raised about this criminalisation of early sexual activity. While it is clear that any form of coercive sex should be illegal, sexual exploration between children is a natural part of childhood and puberty. Children who engage in early sexual activity need to be educated and supported to take responsible decisions and to protect themselves. This kind of response is best delivered by social service or health professionals who are trained in child care and protection rather than the criminal justice system.

Weaknesses in the Act

The Act fails to address the challenges in prosecuting cases of sexual crimes against children:

- There has been only minimal improvement in measures to protect children in court. Many children will continue to be expected to testify in the presence of the accused and the possibility of direct cross-examination of the child by the accused remains. This causes severe anxiety and impacts on the ability of the child to give evidence, ultimately contributing to low conviction rates for offences against children.
- The Act abolishes the common law rule that courts should treat the evidence of adult complainants in sexual offences cases with caution. However, the common law rule that children’s evidence should be treated with caution still

stands. This is based on an incorrect assumption that children are more likely to lie than adults. Research shows quite the opposite and the application of this rule has often resulted in children’s evidence not being considered by the court – contributing to low conviction rates for sexual offences against children.

- The Act also does not address the competency tests where children are put through unnecessary processes to assess their competence to testify. These processes sometimes exclude the evidence of children who are able to describe their experience to the court truthfully and clearly.

The Act does however provide for a National Policy Framework and departmental directives to address procedural aspects of the investigation and prosecution. These could potentially address a number of problematic areas relating to investigation and prosecution of children’s cases.

Obligation to report sexual offences against children to the police

The Act places an obligation on *anyone* who has knowledge of a sexual offence against a child to report such knowledge to the police (the Children’s Amendment Bill only places a reporting obligation on certain practitioners, e.g. teachers and doctors). The two laws therefore contradict one another. Currently, many children who have been abused experience further victimisation in an ineffective, biased and unjust system. If individuals are compelled to report there should be a concomitant obligation on the State to provide quality victim support services.

Sex offender register

The Act creates a sex offender register to prevent offenders who have been convicted of sexual offences against children from working with children. This duplicates some aspects of the register in the Children’s Act.

Poor provision of services following sexual offence

In line with current Department of Health guidelines, the Act provides for post-exposure prophylaxis (PEP) against HIV infection to be given to sexual offence victims without a charge having to be laid with the police first. However, there is no mandatory provision for a service response to any other physical or mental health needs of victims, such as trauma counselling.

The Children’s Amendment Bill could address this gap, as it obligates provincial Members of the Executive Council (MECs) for Social Development to provide and fund counselling services for children. Hopefully, this will be interpreted to include much needed court preparation services for children giving evidence in adversarial court environments. However,

without mandatory referral provisions in the Sexual Offences Act, it is unlikely that police will refer children for these services.

The Education Laws Amendment Act

The Education Laws Amendment Act amends an array of education laws, including the South African Schools Act (No 84 of 1996) and the National Education Policy Act (No 27 of 1996).

Current status

The Education Laws Amendment Bill [B33D-2007] was passed by Parliament in November 2007, and signed by the President in December 2007. Its official name is the Education Laws Amendment Act (No 31 of 2007).

Changes the process for developing law and policy

Substantive amendments include a change to the process for developing law and policy. Under the previous legislation, all draft policy and legislation had to be presented by the Minister of Education to the National Education and Training Council (NETC). The NETC was meant to comprise education sector representatives, including parents and students, and to have strong powers as a negotiating forum – but it was never set up. The Act scraps the NETC and allows the Minister to consult with a panel of experts that s/he appoints.

Introduces minimum norms and standards for all schools

To promote equal access to quality education, the Act gives the Minister authority to prescribe minimum norms and standards for schools. When governing bodies and schools determine policy they must comply with these norms and standards. They relate to physical infrastructure (e.g. buildings, electricity, water, sanitation, library, laboratories, recreational facilities and internet access); capacity of the school (e.g. number of teachers and learners, classroom size, curriculum and extra-curricular choices); and learning materials (e.g. stationary, textbooks and computers). The MEC for Education and the Head of Department (Education) in each province must ensure that all schools meet the norms and standards and report on progress to the national Minister.

Outlines school performance indicators

The Act also defines the functions and responsibilities of principals in public schools, and requires governing bodies to support the provincial Head of Department in dealing with principals who do not perform. Provincial Heads of Departments are responsible for identifying and supporting under-performing schools. Performance indicators relate not only to academic achievement but also to levels of safety and security at the school.

New school safety measures

The Act provides new measures to curb the presence of drugs and dangerous objects in schools. The definition of ‘dangerous objects’ includes explosives, firearms, knives and anything that can “cause bodily harm to a person or damage to property”.

Principals are given the power to do body searches and urine tests if there is reasonable evidence of illegal activity and if it is in the best interest of that child or any other child in the school. The principal may delegate this power to a teacher. Both body searches and drug testing can infringe the child’s right to freedom and security, privacy and dignity and could expose the child to possible abuse by principals and teachers. To safeguard against possible abuse the Act provides that body searches and urine tests for drugs may only be done by a person of the same gender as the learner, that a witness of the same gender must be present, that searches must be done “in a manner that is reasonable and proportional to the suspected illegal activity”, and that body cavity searching is not allowed.

The Act also says that criminal proceedings may not be instituted by the school against any learner who is searched or tested by the school. The school can hold disciplinary proceedings as long as they use a code of conduct that appropriately protects the learner. The learner must receive counselling after any disciplinary hearing. Most schools do not have trained counsellors and will need to refer children to services provided or regulated by the Department of Social Development. Searches and testing without the provision of social services to help children change their behaviour, or to find the underlying cause for the child’s behaviour, can result in exposing the child to more harm than the risk-taking behaviour itself. It is therefore essential that programmes to provide drug abuse counselling and rehabilitation, and interventions for children found carrying dangerous weapons, are provided.

The Child Justice Bill

The best interests principle applies to all children, and the Constitution contains specific provisions to protect children in conflict with the law. Over and above the general protections for all accused people, the Constitution states that children should only be detained as a measure of last resort, for the shortest appropriate period of time, and they must be held separately from adults and in conditions that take account of their age. This means that the criminal justice system should treat children with special care.

The current legislation governing the criminal justice system does not recognise children’s vulnerabilities nor does it provide special protection to children in conflict with the

law. Therefore, the Child Justice Bill was written to reform the law in line with constitutional and international obligations.

Current status

The Bill was tabled in Parliament in 2002 and the Portfolio Committee on Justice held public hearings and deliberated on the Bill in 2003. The process stalled until November 2007 when a revised Bill was referred back to Cabinet for approval. Fresh public hearings were held on the new draft in early 2008.

Children's capacity to be held criminally liable for their actions

The Child Justice Bill raises the minimum age at which a child is considered to have "criminal capacity" from seven to 10 years of age. Children under 10 years do not have criminal capacity and therefore cannot be arrested or prosecuted; instead they must be referred for social services if they commit a crime.

Children older than 10 but younger than 14 years may be arrested and prosecuted, but they are "rebuttably" presumed to lack criminal capacity. In other words, the prosecutor must prove to the court that the child knew the difference between right and wrong and had the capacity to act on that knowledge before the prosecution can proceed.

Children who are 14 years or older are considered to have full criminal capacity.

Focus on diversion and restorative justice

The original version of the Bill said that, when *any* child is charged, a probation officer must assess the child. The probation officer must make recommendations for the release or detention of the child, the diversion of the child and also assess whether the child needs care and protection. After the assessment a preliminary inquiry is held.

A preliminary inquiry is a new procedure introduced into the criminal justice process aimed at the comprehensive and individualised management of the accused child. During such an inquiry the court must proactively consider whether the child needs care and protection and whether the child can be diverted away from formal court procedures. Diversion programmes aim to help the child make amends for the crime, and to heal the child and the victim or community affected by the crime.

Whilst the 2002 version of the Child Justice Bill allowed for *all* children to be assessed and attend a preliminary inquiry, the 2007 version now *excludes* certain children based on their age and the nature of the alleged offence.

Of further concern is that the Criminal Law (Sentencing) Amendment Act (No 38 of 2007) provides that children over 16 who are convicted of certain serious offences are also subject

to minimum sentencing legislation, which requires life imprisonment as a first resort. The Child Justice Bill is silent on this issue and therefore mandatory minimum imprisonment sentences are now a reality for children. If the Child Justice Bill is passed in its 2007 form, South Africa will not be in compliance with its constitutional and international obligations regarding children in conflict with the law.

What are the conclusions?

There is a worrying tendency to use the justice system to deal with children manifesting social problems. Both the Sexual Offences Act and the Education Laws Amendment Act come down hard on children engaging in what is deemed risky behaviour. This is counter-productive if there are inadequate preventative and rehabilitative support services to refer children and families to. The Child Justice Bill sets out an individualised and appropriate response for younger children charged with less serious offences, but it leans towards a punitive, adult-based approach for older children and for children who are charged with more serious offences.

During the deliberations on the Children's Amendment Bill, Parliament realised the importance of a holistic social service system that expanded beyond statutory protection and embraced prevention and early intervention services. If properly resourced these services will help to strengthen families and communities to protect their children from abuse, neglect and poverty, which are often the underlying causes of risk-taking behaviour by children.

Since the Bills are complementary and interdependent, implementation requires inter-sectoral and inter-departmental communication, co-operation and support, as well as clear protocols for managing child protection issues. If this can be achieved these services will provide the basis for a paradigm shift where social services and community-based approaches are used to deal with and prevent crime.

Sources

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