



# PART 1

---

## Children and Law Reform

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

- reforms at the final stages such as the amendments to the Maintenance Act;
- bills before Parliament including the Traditional Courts Bill, draft Rates and Monetary Amounts Amendment Bill (VAT increase), and the Social Assistance Amendment Bill; and
- draft amendments that have been published for comment, including the Basic Education Laws Amendment Bill, regulations on the Sexual Offences Courts, the Children's Amendment Bill and the Child Care and Protection Policy.

# Recent developments in law and policy affecting children

*Paula Proudlock and Stefanie Rohrs*

**T**his essay analyses a number of policy and legislative developments between July 2017 and October 2018 that affect children's rights. These include:

- reforms at the final stages such as the coming into effect of amendments to the Maintenance Act;
- bills before Parliament including the Traditional Courts Bill, draft Rates and Monetary Amounts Amendment Bill (VAT increase), and the Social Assistance Amendment Bill;
- draft amendments published for comment, including amendments to the South African Schools Act, draft regulations relating to the Sexual Offences Courts, the draft Child Care and Protection Policy, and draft Children's Amendment Bill.

## **Maintenance Amendment Act of 2015**

The Children's Act sets out parental rights and responsibilities, which include the responsibility to contribute to the maintenance of the child.<sup>1</sup> Questions around the provision of maintenance – e.g. what maintenance entails and who owes the child a duty of support – are regulated by the common law and the Maintenance Act.<sup>2</sup> Maintenance generally includes food, clothing, accommodation, medical care and the education of the child, but can also include other costs depending on the financial means of the family.<sup>3</sup>

The payment of maintenance often becomes contentious when parents separate. Given that it is mostly mothers (and/or female relatives) who care for children when parents separate,<sup>i</sup> they tend to bear the burden of securing maintenance payments for themselves and their children. Where the payment of maintenance is in dispute or the person legally liable to maintain the mother and/or the child fails to do so, the person caring for the child can lodge a complaint at the maintenance court. As highlighted by Judge Mokgoro, "effective mechanisms for the enforcement of maintenance obligations are thus essential for the simultaneous achievement of the rights of the child and the promotion of gender equality".<sup>4</sup> Although

the Maintenance Act sets out clear steps for the investigation and adjudication of such complaints, the system is not working well.<sup>5</sup> One of the biggest challenges is the shortage of properly trained maintenance officers and maintenance investigators.<sup>6</sup> Other problems include employers' failure to cooperate with emolument attachment orders and the tracing of maintenance debtors and beneficiaries.<sup>7</sup> In addition to these systemic problems, some debtors resist paying maintenance or are unable to do so due to unemployment or poor management of their income.<sup>8</sup>

The Maintenance Act has been under review by the South African Law Reform Commission (SALRC) since 2011 when the Minister of Justice and Constitutional Development referred the issue for the commission's "priority attention".<sup>9</sup> An issue paper was published for comment in 2014 and a discussion paper is in progress.<sup>10</sup> Once this review is completed, a comprehensive overhaul of the maintenance law and system can be expected.

Pending the finalisation of the SALRC review, the Maintenance Amendment Act of 2015<sup>11</sup> aims to address some of the challenges outlined above. Most of the amendments came into effect in September 2015, but two amendments only came into effect in January 2018 because they required the prior drafting of regulations. The first requires maintenance officers to forward the personal details of a "maintenance defaulter" – a person who fails to pay maintenance – to credit bureaus, thereby exposing the defaulter to blacklisting and preventing them from obtaining further loans or credit.<sup>12</sup> The second amendment aims to make it easier to trace maintenance defaulters whose whereabouts are unknown, and enables the maintenance courts to direct cell phone and data service providers to supply the defaulter's contact details.<sup>13</sup> The costs of getting this information need to be covered by the complainant or, if he/she is unable to pay the costs, by the state.<sup>14</sup>

The Deputy Minister of the Department of Justice &

<sup>i</sup> Approximately one in three children (34%) live with both parents. Of the remaining 66% of children, 41% live with their mothers but not with their fathers, and 3% live with their fathers but not their mothers. While these statistics may include parents who are not separated but merely not cohabiting, the data suggest that children are generally more likely to live with their mother. See: Chapter 2.

Constitutional Development (DJCD) is “confident that these changes will improve [...] service delivery to maintenance beneficiaries”.<sup>15</sup> However, the benefits of the amendments are unclear, given that maintenance courts are already able to get contact information from cell phone service providers by subpoenaing them to supply this information. It has further been argued that improvements to the system will only be achieved if additional maintenance officers and investigators are appointed.<sup>16</sup> In light of the high levels of child poverty (see Chapter 7) and the increased risk for poverty in single parent households,<sup>17</sup> effective enforcement of maintenance can be a lifeline for children and their mothers or caregivers. It is therefore paramount that the amendments to the Maintenance Act are accompanied by adequate budget and staff allocations to enable maintenance courts to put the new provisions into practice.

### **Traditional Courts Bill**

In March 2018, public hearings on the third version of the Traditional Courts Bill (TCB)<sup>18</sup> took place in Parliament. The bill aims to provide a uniform legislative framework for the structure and functioning of traditional courts which are customary law dispute resolution forums that operate in many parts of the country. The TCB determines which matters traditional courts are competent to deal with. Traditional courts can, for instance, provide advice on customary law practices, customary law marriages and inheritance. They are further competent to resolve disputes in relation to altercations between community members and minor criminal offences such as theft and common assaults.

At the public hearings, civil society organisations made oral submissions to the Portfolio Committee on Justice and Correctional Services, with only one submission – the joint submission by the Centre for Child Law and the Children’s Institute – focusing on the implications of the bill for children’s rights.<sup>19</sup> Several presenters welcomed the change in the 2017 version of the bill that – in response to earlier civil society submissions – now allows community members living in the area of a traditional court to “opt-out” of traditional courts and pursue proceedings in a magistrate’s court. Yet, many members of the Portfolio Committee fundamentally disagreed with this provision, arguing that this would render traditional courts inferior to formal courts.<sup>20</sup>

The Portfolio Committee failed to respond to concerns raised about children’s rights and the need for corporal punishment and physical abuse cases to be referred to the

Department of Social Development (DSD) or the formal court system to ensure a child protection response. Committee members also brushed over concerns around traditional courts dealing with domestic violence. Instead of engaging in a debate, members of the Portfolio Committee questioned the credibility of certain presenters based on their gender, age and nationality.<sup>21</sup>

The Commission for Gender Equality raised several concerns around the bill in relation to gender equality, including women’s representation, access to and participation in traditional courts. However, their written submission was not debated by the committee during the public hearings.

In August 2018, the Portfolio Committee resumed its deliberations on the TCB, with specific discussions on the “opt-out” clause. Two legal advisors, including Parliament’s Chief Legal Advisor, recommended retaining the “opt-out” clause because its deletion would render the bill unconstitutional.<sup>22</sup> However, a majority of the committee members rejected the arguments of the legal advisors, voted for the removal of the “opt-out” clause and instructed the DJCD to remove the clause.<sup>23</sup> The committee further requested that traditional courts be recognised as courts of law. The amendments requested by the Portfolio Committee are contrary to submissions by civil society organisations and deepen concerns around the protection of women’s and children’s rights in the bill.

### **Draft Rates and Monetary Amounts Amendment Bill (VAT increase)**

In February 2018, the Minister of Finance announced that Cabinet had decided to increase the rate of Value Added Tax (VAT) from 14% to 15% with effect from 1 April 2018. In terms of the VAT Act, the minister can put an increase into effect before Parliament has passed the required amendment to the Act, with the proviso that Parliament must pass the amendment within 12 months.<sup>24</sup>

Parliament held hearings on the proposed revenue increases and the draft Rates and Monetary Amounts Amendment Bill in March, April and August 2018 and is expected to pass the bill in late 2018. At the public hearings, the Budget Justice Coalition<sup>ii</sup>, a group of civil society organisations, opposed the regressive taxation mix, in particular the VAT increase juxtaposed with minimal changes to Personal Income Tax (PIT) and no increases to Company Income Tax (CIT).<sup>25</sup> Of the additional revenue the 2018 budget hopes to raise, over 70% will come from three

ii The coalition includes Equal Education Law Centre, Equal Education, Institute for Economic Justice, Children’s Institute at UCT, Public Service and Accountability Monitor, Section 27, Alternative Information and Development Centre, and Studies in Poverty and Inequality.

indirect taxes: VAT, fuel and excise (sin) taxes. Yet the lowest income groups spend the highest share of their expenditure on these three taxes.

The submission showed that the real value of social grants has barely kept pace with consumer price index inflation in recent years and often not with food price inflation. This means that the modest increases to social grants proposed in the February 2018 budget will not ameliorate the impact of the VAT increase for poor and low-income households that are dependent on social grants.

The coalition argued that direct taxes such as PIT, CIT and estate and property taxes should rather be increased to make up the lion's share of the needed revenue. Their submission demonstrated that effective rates of CIT and PIT have fallen since 1999 and therefore there is room to increase these taxes. The submission also countered the claim by Treasury that South Africa's CIT is high by international standards – we rank 172 out of 213 countries for company tax contributions (where 1 is the highest).<sup>26</sup>

The coalition emphasised that tax decisions must be redistributive. Reducing inequality and poverty, and investing in pressing social needs is essential for inclusive economic growth, and ensuring substantive equality (as outlined in s9 of the Constitution). To this end, the coalition costed and proposed alternative revenue raising measures that would ensure a more progressive tax system while ensuring that revenue shortfalls and social needs are met.

In response to concerns raised about the VAT increase, Cabinet announced that it would consider expanding the list of zero-rated items to reduce the impact of the VAT increase on poor households. The Minister of Finance subsequently established an expert panel, chaired by Professor Ingrid Woolard, to make recommendations on additional items for zero-rating and to consider whether improvements to current social programmes such as social grants or the school nutrition programme, could compensate for the negative impact of the VAT increase. The panel received 2,000 submissions, held consultations and after deliberations were completed, submitted their report to the minister in early August 2018.<sup>27</sup>

The panel recommended the zero-rating of an additional six items: white flour, white bread, cake flour, sanitary products, nappies and school uniforms. This could save poor and low-income households approximately R2.8 billion per year.<sup>28</sup> The panel could not reach consensus on whether individually quick frozen chicken should be included and the majority decided to exclude it. They also considered

baby formula but decided against it due to the national policy imperative of promoting breastfeeding to improve child health and nutrition outcomes. With regards to social programmes, the panel recommended an increase to all social grants and specifically the Child Support Grant (CSG), increased investment in the school nutrition programme, and the direct provision of sanitary products to women and girls in poor households.

Treasury called for written submissions on the panel's recommendations and the Standing Committee on Finance held a day of public hearings to hear stakeholders' opinions.<sup>29</sup> The Budget Justice Coalition called for:

- more items to be zero-rated (including chicken, peanut butter, sorghum meal powder and mabella, powder soup, canned fish and soya products);
- increases to social grants, especially the CSG;
- a conditional grant to subsidise scholar transport;
- a participatory process to discuss the most effective way to distribute sanitary products to poor households; and
- an increase in the early childhood development (ECD) subsidy to improve the nutrition of young children and salaries of women and youth employed by ECD programmes.<sup>30</sup>

In the October 2018 Medium Term Budget Policy Statement, Treasury announced that it had decided to zero-rate only three additional items: cake and white bread flour, and sanitary products.<sup>31</sup> They estimated that it would have cost a further R9 billion and R1 billion in lost revenue to zero-rate chicken and nappies respectively and therefore decided against including these items.<sup>32</sup> With regard to school uniforms they cited the difficulty in differentiating between normal clothes and uniforms as the reason for not zero-rating.<sup>33</sup>

With regards to increased investments in social programmes, no additional budgetary allocations were made for programmes benefiting children, while R100 million was taken away from the CSG budget line-item due to under-spending.<sup>34</sup> This follows on a similar trend in the previous financial year where R518 million was moved out of the CSG budget line-item due to under-spending.<sup>35</sup>

Parliament will need to make the final decision on the addition of further items for zero-rating when it passes the Rates and Monetary Amounts Amendment Bill in late 2018. Besides Treasury, it is not clear what forum will be considering the panel's recommendations for improved funding of social programmes such as the CSG and the school nutrition programme.

## Social Assistance Amendment Bill

The Social Assistance Amendment Bill<sup>36</sup> was tabled in Parliament in April 2018 and contains provisions which give the Minister of Social Development the authority to increase the grant amounts for certain categories of grant beneficiaries based on need. These provisions are intended to be used to add a top-up payment to the CSG for relatives caring for orphans. They would therefore get the normal CSG amount of R400 plus a R200 top-up,<sup>iii</sup> totalling approximately R600. This CSG Top-Up is part of the solution to the foster care crisis described below under the draft Child Care and Protection Policy and draft Children's Amendment Bill. If designed and administered effectively, caregivers will be able to access it directly from the South African Social Security Agency (SASSA) without the need to go through social workers and the courts, and it will therefore reach orphans faster than the Foster Child Grant (FCG). Once Parliament has passed the bill, DSD has to draft regulations clarifying the proof required to prove orphanhood (and/or abandonment) and family relationship.

While the bill was tabled on 13 April 2018, the Portfolio Committee on Social Development has not yet started to process it and has instead indicated that the committee does not plan to deal with it this year.<sup>37</sup> If the bill is not passed by Parliament by March 2019, then the additional budget for the CSG Top-Up that is already included in the 2019/20 budget, will be forfeited, at a time when poor households are struggling to cope with the VAT increase and a number of petrol price increases. Taking into account South Africa's high rates of child poverty and stunting, the UN Committee on Economic, Social and Cultural Rights recently flagged this issue for priority attention in its Concluding Observations to the South African Government.<sup>38</sup>

## Draft Basic Education Laws Amendment Bill

The draft Basic Education Laws Amendment Bill<sup>39</sup> proposes to amend the South African Schools Act (SASA)<sup>40</sup> and the Employment of Educators Act<sup>41</sup> to "align them with developments in the education landscape" and to ensure that the right to basic education is fulfilled. When the draft bill was published for comment in October 2017, the Department of Basic Education (DBE) received "an avalanche of input", particularly on the proposed amendments to School Governing Body (SGB) powers.<sup>42</sup> The department is currently considering and collating the comments before the bill can be tabled in Parliament. Many amendments are being proposed but we focus on two areas, namely the enforcement of compulsory

school attendance, and the respective powers of the Head of Department (HOD) and SGBs with regards to admissions.

## Enforcing compulsory school attendance

Section 3 of the SASA obliges parents to ensure that their children attend school and creates an offence if a parent does not fulfil this duty. It is also an offence for any other person to prevent a learner from attending school. If convicted by a court, a parent or other person can be fined or imprisoned for a maximum of six months. The original purpose of enacting s3 in 2005 was to comply with South Africa's international obligations to ensure compulsory school attendance and was aimed at parents who did not send their children to school owing to neglect, religious belief or other such reason.<sup>43</sup>

The DBE is proposing an amendment to increase the maximum imprisonment sentence for offenders to six years. Equal Education (EE) and Equal Education Law Centre (EELC) have opposed the increased prison terms for parents, and proposed that s3 be amended to remove the prospect of criminalisation, in favour of a social interventionist approach to address the underlying reasons for school dropout, truancy and absenteeism.<sup>44</sup>

The DBE's Policy on Learner Attendance recognises that poverty is the "root cause of irregular school attendance":

*Irregular attendance may be the result of parents' inability to pay school fees, or buy uniforms; lack of transport to school; parents' or children's chronic illness, including HIV/AIDS and tuberculosis; poor nutrition or hunger, child labour, unstable or dysfunctional family and gang violence.*<sup>45</sup>

If s3 is enforced and parents are imprisoned due to their child's absenteeism, the state will effectively criminalise parents (mainly women) for being poor, sick or for living in dangerous places.

EE and EELC argue that the criminalisation of parents "represents an ill-advised attempt to impose an easy answer on an intricate issue".<sup>46</sup> They cite a UNESCO analysis of the truancy laws of 34 countries which concluded that no substantial evidence exists that punitive approaches to addressing truancy are effective, whereas supportive social interventions are more likely to increase school attendance.<sup>47</sup>

The DBE is also proposing to make it an offence, subject to a fine or imprisonment of up to six years, if anyone "wilfully interrupts or disrupts any school activity or wilfully hinders or obstructs any school in the performance of the schools activities".<sup>48</sup> DBE's aim is to deter communities (including

iii The Department of Social Development has committed to a top-up that is 50% of the value of the current CSG.

parents, learners and teachers) from forms of protest that result in learners being prevented from attending school.<sup>49</sup>

The majority of protests resulting in school non-attendance have tended to be about issues other than education, for example border demarcation disputes or service delivery failures that are affecting the broader community.<sup>50</sup> Many of these protests have resulted in children missing school for many days (and in some cases, several months). The DBE is therefore seeking solutions to protect children's rights to education. However, the Centre for Child Law, EE and EELC have all advised DBE (and government as a whole) that using s3 of the SASA is inappropriate and likely to be unconstitutional and ineffective. Section 3 has not been used in the past, even for its original purpose, and it is therefore likely to be difficult to use in the event of violent or intimidatory protests.<sup>51</sup> They also argue that parents should not be targeted for prosecution if their reason for not sending their children to school is the fear that they or their children may become victims of protest-related violence.<sup>52</sup>

The South African Human Rights Commission has recommended that government concentrate on preventing protests from escalating to the point where schools are targeted.<sup>53</sup> This could be achieved by earlier engagement with protesting communities. EE has also opposed the proposed amendment on the grounds that it would be stretching the purpose of s3 to control or limit protest action when other laws exist for that purpose.<sup>54</sup>

### **Powers of SGBs and HODs with regards to admissions**

The draft bill makes it clearer that the provincial HODs have final authority on admission policies and individual admission decisions.<sup>55</sup> This amendment is being made in the wake of several court cases involving disputes between SGBs and HODs with regards to admission decisions<sup>56</sup> and aims to strengthen government's ability to ensure equitable access to education.

EE and EELC have welcomed the clarity but argue that the draft bill should more clearly recognise the partnership that exists between government and SGBs.<sup>57</sup> With regards to individual learner admission decisions, they propose that the bill should provide for a 14-day consultation period between the two bodies before the HOD makes the final decision.

### **Draft Regulations on Sexual Offences Courts**

In November 2017, the DJCD published a revised version of the Draft Regulations Relating to Sexual Offences Courts<sup>58</sup> for public comment. These regulations stipulate the infrastructure and services of sexual offences courts and

training requirements for criminal justice personnel. Nearly half (46%) of sexual offence complainants are children,<sup>59</sup> so it is critical that sexual offences courts respect children's rights, are responsive to children's needs, and avoid secondary victimisation of children who have been sexually abused.

While some of the suggested regulations promote children's best interests (for instance the regulations state that a sexual offence case involving a child witness must be prioritised)<sup>60</sup> others disregard children's rights. For example, the decision to withdraw a charge can be discussed with the parents of a child complainant without consulting the child,<sup>61</sup> which violates children's right to participation.

The regulations attempt to address some of the key challenges child complainants face in sexual offences courts. For example giving evidence through an intermediary can reduce a complainant's fear and emotional trauma during testimony. The draft regulations therefore set out requirements to ensure the availability of sufficient and adequately trained intermediaries. These regulations will need to be costed and an adequate budget allocated to the DJCD to ensure effective implementation.

### **Draft Child Care and Protection Policy**

In December 2017, civil society organisations were invited by the National DSD to submit comments on the first draft of the Child Care and Protection Policy (CCPP).<sup>62</sup> The policy recognises that many at-risk children are trapped in an intergenerational cycle of risk and that government is currently not providing the developmental services necessary to address the risks and break the cycle. The policy therefore seeks to "ensure a national public programme and systems to ensure that all children survive, develop to their full potential, are protected and participate (not just about protecting them from harm)",<sup>63</sup> and requires that "multiple role players must work together, unified around a common vision to provide a continuum of developmental and protective care and protection services"<sup>64</sup>.

Since the draft was released in late 2017, there have been several formal and informal engagements between DSD, other government departments and civil society to refine the draft policy. This section reflects on the June 2018 draft<sup>65</sup> which was circulated as the "final" draft and is scheduled to be presented to Cabinet for approval in late 2018.

The policy requires three levels of services for children and their families:

1. **Universally accessible promotive services** for all families – for example clean water, sanitation, electricity, birth registration, early education facilities, schools, health care services, recreational facilities, police services, parent

support programmes and public education on child development. This level is the responsibility of a range of government departments across all three spheres of government. Challenges and gaps identified include inequities in access to the full range of services, poor quality health and nutrition services, lack of affordable day care, poor quality early and basic education, and a lack of recreational facilities and play areas. These gaps are mostly the mandates of departments other than DSD.

2. **Targeted prevention and early intervention services** for vulnerable families whose circumstances limit their capacity to provide nurturing and responsive care and protection. These include parenting skills programmes, social grants, employment programmes for caregivers, psychosocial support for families and children, diversion programmes for children in trouble with the law, peer support programmes, services for victims of domestic violence, free or subsidised day care and education, and assistive devices and rehabilitative services for children with disabilities.

Challenges and gaps identified include the inadequate reach and scale of prevention and early intervention programmes, inadequate planning and targeting to reach all vulnerable children, administrative bottlenecks in the foster care system preventing the majority of kinship carers from accessing foster care grants, and the lack of parenting programmes.

3. **Responsive protection services** for children who are exposed to abuse, neglect or exploitation or who lack family care – e.g., criminal sanctions and protection from harmful practices, risk assessments, investigations into abuse, therapeutic services, children’s court inquiries, placement in alternative care, provision of alternative care, supervision and regular review of placements in alternative care, family reunification services and support when leaving the alternative care system at the age of 18.

Challenges and gaps identified at level three include high levels of violence against children, inadequate therapeutic services for the majority of child victims and their caregivers, poor quality and delayed services from social workers and the police, poor record-keeping by social workers, failure or delay in removing children at risk, social workers who fail to bring children’s cases to the children’s court as required by the law, and a lack of family reunification services for the majority of children in alternative care.<sup>66</sup>

The policy deals explicitly with some of these challenges, but not all. Below we describe and critique the policy’s proposals with regards to:

- prohibiting corporal punishment in the home
- introducing a government-wide screening platform to identify and refer vulnerable children; and
- supporting children in kinship care.

### **Prohibition of corporal punishment in the home**

As part of the developmental approach to preventing violence and abuse, the draft policy prohibits the use of corporal punishment in all spheres, including the home. This is a clear shift in public policy because the common law defence of “moderate and reasonable chastisement” effectively allows parents to hit their children, as long as the hitting is “moderate” and intended for correction. A ruling of the South Gauteng High Court in October 2017 found that this legal defence is inconsistent with the Constitution and struck it down (see Box on page 16).<sup>67</sup>

The draft policy prohibits corporal punishment – and therefore deprives parents of any legal defence for hitting a child – but states that the criminal prosecution of caregivers for using corporal or other degrading punishment should be a measure of last resort. Instead, the policy promotes the universal provision of parenting programmes (which should promote positive discipline), and recommends that caregivers who do use corporal punishment are referred to prevention and early intervention programmes. This approach is commendable because a policy or law in itself will not stop parents from using corporal punishment. Many parents and caregivers require information on child development, the importance of nurturing care, the negative effects of corporal punishment, and practical guidance on how to use positive discipline. Furthermore, the focus on prevention and early intervention will – in many or perhaps most cases – be sufficient to protect children and may be more in line with the best interest of the child rather than separating children from their caregivers by invoking a criminal prosecution.

### **Government-wide screening programme for identifying vulnerable children**

Most government officials who regularly come into contact with children have a legislative duty to report abuse or deliberate neglect in terms of s110 of the Children’s Act.<sup>68</sup> However, there is currently no duty on state officials to help vulnerable children and families access promotive, prevention and/or early intervention services.

Children whose survival, safety and development are at risk should be linked with the services necessary to promote development and prevent further harm. To achieve this, the policy proposes that all government staff who come into

## High Court prohibits corporal punishment in the home

In 2017, the South Gauteng High Court heard an appeal from a father who had been convicted of assault for physically disciplining his 13-year-old son. In the appeal, the father argued that he was not guilty of assault because his conduct was covered under the common law defence of “moderate and reasonable chastisement”. In practice, this legal defence – which originates from a judgment in 1913 – allows parents to physically punish their children as long as such punishment is “moderate” and “reasonable”.

During the appeal, the High Court thought it necessary to consider whether the defence is consistent with the Constitution and invited organisations that have an interest in the matter to make submissions to the court. The Children’s Institute, Quaker Peace Centre and Sonke Gender Justice, legally represented by the Centre for Child Law, joined the proceedings as *amici curiae* (friends of the court) and provided the court with an expert affidavit highlighting the detrimental short- and long-term effects of physical punishment and its links with other forms of violence against children. Furthermore, the *amici*’s detailed legal submission demonstrated that the defence is inconsistent with children’s constitutional rights.

In its submission DSD, another *amicus*, argued that the legal defence is unconstitutional and should be

struck down. DSD underlined that the Concluding Recommendations of the UN Committee on the Rights of the Child required the South African Government to prohibit all forms of physical punishment.

Contrary to these submissions, the organisation Freedom of Religion South Africa (FOR-SA), another *amicus*, made a submission to the High Court arguing that the common law defence is constitutional and should be retained.

After hearing oral arguments, the High Court ruled in October 2017 that the common law defence of “moderate and reasonable chastisement” is inconsistent with children’s constitutional rights and struck down the defence. As a result of the judgment, parents would no longer be allowed to smack or spank their children or use any other form of physical discipline. This is a critical first step in curbing the use of physical punishment in the home – one of the most widespread forms of violence against children in South Africa (as outlined in Chapter 6).

However, the High Court judgment is currently not in force because FOR-SA has appealed it. The Constitutional Court will hear the appeal on 29 November 2018.

contact with children and families, should be mandated and capacitated to identify vulnerable children and families and refer them to the services they need:

*All relevant departments and agencies bear a minimum duty to understand and recognise vulnerable children and families through a basic screening process, along with an accompanying duty to provide the promotive and preventative services for which they are primarily responsible.<sup>69</sup>*

For example, home affairs officials have a responsibility to provide birth registration services, and the duty to recognise and refer vulnerable children and families to a social service practitioner for an initial screening. If this initial screening reveals a need for promotive or prevention services, these must be provided. If the child is in “need of care and protection” in terms of s150 (1) of the Children’s Act, they should be referred to a designated social worker who will investigate the circumstances of the child and family and submit a report to the children’s court.

This approach is welcomed as it could ensure an integrated response to children’s and families’ developmental needs. However, for the system to work, the following ingredients need to be present:

- A clear definition of what makes a child and family “vulnerable”.
- All state officials who come into contact with children and families need to be trained to recognise risk and protective factors, and understand the basics of child development in order to identify vulnerable children.
- DSD and the non-profit organisations (NPOs) that implement social welfare services will need sufficient human and financial resources to respond to the significant increase in referrals for screening and assessment that could result from such a nationwide surveillance system.

The policy currently defines vulnerable children as inter alia: children living in poverty (11 million); orphaned children (3 million); children separated from, or living without, their biological parents (4 million); and children with disabilities.<sup>70</sup> This equates to more than 50% of the child population.



Requiring other departments to refer vulnerable children for screening and support to DSD and NPOs only makes sense if there are sufficient human and financial resources to do the screening or provide the necessary prevention and early intervention programmes. It is therefore essential that DSD targets its limited resources at the most vulnerable children rather than attempting to reach half the population.

Considering the country's child health and nutrition indicators, it may be worth focusing on children who are stunted (27% of children under 5 years or 1.58 million children); those at greatest risk of stunting (the 1.9 million children under six years of age living below the food poverty line);<sup>71</sup> those who are eligible but not accessing the Child Support Grant (approximately 2 million children) or Care Dependency Grant; and children without birth certificates who are consequently unable to access social grants, school or the school nutrition programme.

Currently a referral system does exist in practice. The Department of Home Affairs, South African Social Security Agency (SASSA) and schools regularly refer parents and caregivers to social workers to obtain a letter, report or court order before they will assist the family to access the promotive or preventative services that they have applied for. In most instances social workers do not have the capacity to respond to these requests due to the high number of referrals. The result is that children are denied access to birth registration, grants or education for many months and/or years, making them more vulnerable. It is therefore important that the new surveillance system does not make screening a prerequisite for access to promotive and preventative services, but rather introduces it as a support service that occurs after these essential services have been obtained.

### Supporting children in kinship care arrangements

The policy distinguishes between children living with kin who have a living parent residing elsewhere, and those living with kin whose parents have died or abandoned them. There are approximately 3 – 3.5 million children living in the first category, and approximately 500,000 – 1 million children living in the second category (depending on the definition of orphans and abandoned children being used).<sup>iv</sup>

For children in the first category, the policy proposes that the kinship caregiver and parent must formalise

their arrangement by concluding a parenting rights and responsibility (PRR) agreement:

*In situations where a parent or other person is available to do so, informal care arrangements should be formalised through the conclusion of PRR agreements following the relevant procedures prescribed in law.<sup>72</sup>*

Section 22 of the Children's Act regulates PRR agreements and requires the agreement to be made an order of court or registered with the family advocate before it will be considered enforceable.

It is not specified in the policy why kinship caregivers should be required to have a PRR agreement or what the document will be required for. If the proposal becomes law,<sup>v</sup> the PRR agreement could become a document requested by schools and SASSA when caregivers apply for schools or social grants. A significantly large number of caregivers (those caring for 3 million children) will then need the services of the family advocate or the courts. This proposal should therefore be costed to assess the budget needed to increase the capacity of the family advocates and the children's courts to enable them to respond to a significant increase in demand. If the additional financial resources are not available, then the proposal should not be implemented as it will prevent children from accessing essential services such as school and grants. A less administratively burdensome approach to proving the status of primary caregivers would be to draw on the documents currently listed in the Regulation 11 (3) of the Social Assistance Act for proving primary caregiver status.<sup>vi</sup>

The impact on caregivers and the children in their care should also be carefully considered due to the logistical and financial difficulties families are likely to face in concluding such agreements. For example, the caregiver and child often live far away from the parent and travel costs to get together to formalise the agreement may prove to be prohibitive.

For orphaned and abandoned children living with kin, the policy recognises that it is not effective to continue using the foster care system to provide material support:

*Large numbers of orphaned children in the care of relatives do not access the social assistance they need because of the historical diversion of these families into the foster care system as a mechanism to access the FCG. ... This placed tremendous strain*

iv The policy defines "orphan" to include paternal orphans (those that have lost a father), maternal orphans (those that have lost a mother) and double orphans (those who have lost both parents). See page 18. The draft Children's Third Amendment Bill (August 2018) defines an orphan as a child who has lost both parents, thereby restricting the definition to double orphans only. See section 1.

v The proposal is not included in the draft Children's Third Amendment Bill (August 2018).

vi Regulation 11 (3) provides that a caregiver may prove that they are the primary caregiver for the purposes of a social grant application, by providing any of the following documents: (i) an affidavit from a police official; (ii) a report from a social worker; (iii) an affidavit from a biological parent of the child; or (iv) a letter from the principal of the school attended by the child.

*on the foster care system, with the excessively high numbers of children and caregivers entering it having created administrative bottlenecks. It has led to the exclusion of large numbers of children in need of intensive protection services and left the system unable to maintain its monitoring and renewal of court-ordered foster placements. Critically, this has resulted in the exclusion from the FCG of many of the orphans unable to access the system because of overcrowding, delays and inequities in administration of the relevant processes.<sup>73</sup>*

The policy also recognises that the large majority of orphans living with kin do not need formal protection services via the foster care system because they are not suffering abuse, neglect or exploitation. However, DSD still considers them to be more “vulnerable” than children in the care of biological parents and will therefore require these caregivers to present themselves and their children to DSD to be screened and assessed, or to a court to obtain a PRR order.<sup>74</sup> If they pass the screening and assessment stage, they will be issued with a “letter of recognition” which recognises them as caregivers with parental rights and responsibilities.

If the assessment process reveals a need for prevention and early intervention services, the caregiver and child will be assisted to access these services (e.g. the CSG Top-Up as outlined in the Social Assistance Amendment Bill above; and/or a parenting skills programme). If a protection issue is detected, for example the caregiver is abusing or neglecting the child, then the case will be referred to a designated social worker for a formal child protection investigation which may result in the child being removed from the caregiver.

In terms of a High Court order, the department is obliged to devise and implement a comprehensive legal solution to the crisis in the foster care system by December 2019.<sup>75</sup> This requires a solution that ensures the majority of orphans in kinship care can access a social grant timeously. The challenge in using the foster care system for orphans living with kin is the gap between the large number of orphans in need (over 1 million) and the small number of social workers available to process the applications and two-yearly extensions. The solution therefore needs to reduce the burden on social workers. The current proposal should therefore be carefully assessed and costed to determine whether it will reduce the demand on social workers and enable kinship carers to more easily access social assistance, birth registration and schools.

### **Draft Children’s Third Amendment Bill**

DSD is in the process of drafting a Children’s Amendment Bill<sup>76</sup> which is closely aligned with the policy. The bill covers a range of issues including amendments aimed at dealing with the crisis in the foster care system described above. The draft bill, gazetted for public comment in October 2018, provides that s150 (1)(a) should be amended to read that “a child is in need of care and protection if such child has been abandoned or orphaned and is not in the care of a family member...”.<sup>77</sup> This would mean that orphans and abandoned children in the care of extended family would no longer be considered children in need of alternative care because they are in family care. This amendment is aimed at complementing the Social Assistance Amendment Bill (see above) which aims to provide more accessible financial support to relatives caring for orphans. If both laws are approved, orphans and abandoned children living in extended families will not need to be placed in alternative care by a social worker and court before they can access the CSG Top-Up.

Some have argued that kinship carers also need some sort of legal recognition or “regulation”. In May 2018, DSD circulated two amendment options for regulating or recognising kinship carers. The first is voluntary and involves an application to the children’s court for a declaratory order.<sup>78</sup> The second is mandatory based on an assumption that extended family care is more risky for the child than biological parent care. It involves social workers vetting whether the carers are fit and proper and the Head of Department issuing a “recognition notice” which can then be used by the carer to access state services.<sup>79</sup> The second option has been included in the draft that was gazetted for public comment as a process that will be prescribed in regulations in terms of s32 (5). This proposal has been criticised due to the likelihood that it will consume social worker’s time unnecessarily when they should rather be assisting children who are in need of child protection services due to abuse or neglect, and because it may result in children living with relatives being excluded from accessing state services due to their relatives not being able to access the required “recognition notice”.<sup>80</sup>

To meet the terms of a High Court order,<sup>81</sup> this bill needs to be tabled in Parliament by February 2019 and passed and put into effect by December 2019. This is going to be difficult as 2019 is a general election year and Parliament will therefore have considerably less time and capacity to debate and pass complex legislation.

## Conclusion

If effectively implemented, the amendments to the Maintenance Act and the Social Assistance Act may result in more income in the pockets of a few parents and caregivers, enabling them to feed, clothe and educate their children. However, the increase to the VAT rate coupled with the fuel levy and fuel price increases are already having a negative impact on all poor and low-income households – reducing their already strained capacity to provide for children’s basic nutritional, health and education needs. The addition of only three more items for zero-rating and no increased budgetary allocations to social programme’s benefitting children shows no consideration of the constitutional obligation to prioritise children’s socio-economic rights.<sup>82</sup>

While the Justice Department’s draft regulations on the sexual offences courts are aimed at improving the protection of child witnesses and victims within the criminal courts, Parliament’s intended amendments to the Traditional Courts Bill are likely to undermine gender equality and respect for

children’s rights within the traditional courts setting. Women and children have the right to choose whether they would prefer their complaint to be adjudicated in a traditional or magistrates court, however the removal of the opt-out clause from the Traditional Courts Bill will erode that right.

Many children living in kinship care arrangements struggle to access late birth registration, social grants and schooling. The Child Care and Protection Policy and the amendments to the Children’s Act and Social Assistance Act aim to provide legal recognition and better support to kinship carers and the children in their care. However, if the proposal imposes requirements that caregivers find difficult to meet or that government does not have the capacity to provide, then their situation could be made worse, not better. It is important that well-intentioned efforts to protect a few children in kinship care from potential abuse, do not prevent the majority of children living in kinship care from accessing birth registration, grants, health care services or school.

## References

- 1 Children’s Act 38 of 2005, section 18 (2)(d).
- 2 Maintenance Act 99 of 1998.
- 3 Kruger H (2017) Maintenance for children. In: Boezaart T (ed) *Child Law in South Africa*. 2nd edition. Cape Town: Juta. P. 42.
- 4 *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC). Para 30.
- 5 See no. 3 above.
- 6 De Jong M (2009) Ten-year anniversary of the Maintenance Act 99 of 1998 – a time to reflect on improvements, shortcomings and the way forward. *South African Law Journal*, 126(3): 590-614.
- 7 See no. 6 above.
- 8 See no. 6 above.
- 9 South African Law Reform Commission (2014) *Issue Paper 28: Review of the Maintenance Act 98 of 1999. Project 100*. Pretoria: Department of Justice and Constitutional Development. P. 1.
- 10 South African Law Reform Commission (2016/7) *Annual Report 2016/17*. Pretoria: Department of Justice and Constitutional Development. P. 37-38.
- 11 Maintenance Amendment Act 9 of 2015.
- 12 See no. 11 above, sections 26 (2) & 31 (4).
- 13 See no. 11 above, section 7 (3).
- 14 See no. 11 above, section 7 (3)(i).
- 15 Jeffrey J (2018) Better Maintenance Act a definite relief for many. *Cape Argus*, 12 January 2018.
- 16 Van der Heyde J (2018) Maintenance Act changes a relief or a burden? *Cape Argus*, 8 January 2018.
- 17 Holborn L & Eddy G (2011) *First Steps to Healing the South African Family*. Research Paper. Johannesburg: South African Institute of Race Relations. P. 3.
- 18 Traditional Courts Bill [B1 – 2017].
- 19 Hansungule Z & Rohrs S (2018) *Submission on the Traditional Courts Bill [B1-2007] by the Centre for Child Law, University of Pretoria and Children’s Institute, University of Cape Town*. Pretoria & Cape Town: Centre for Child Law, University of Pretoria & Children’s Institute, UCT.
- 20 Parliamentary Monitoring Group (2018) *Minutes of the Portfolio Committee on Justice and Correctional Services*, 21 August 2018. Viewed 31 October 2018: <https://pmg.org.za/tailed-committee-report/3455/>
- 21 Makinana A (2018) Presenters belittled at traditional courts hearing. *City Press*, 18 March 2018.
- 22 See no. 20 above
- 23 See no. 20 above.
- 24 Value Added Tax Act 89 of 1991, section 7(4).
- 25 Budget Justice Coalition (2018) *Submission to the Standing Committee on Finance on the 2018 Fiscal Framework*. March 2018; Budget Justice Coalition (2018) *Submission to the Standing Committee on Finance on the Drafts Rates and Monetary Amounts Amendment Bill*. April 2018;
- 26 See no. 25 (Budget Justice Coalition, March 2018) above.
- 27 Independent Panel of Experts for the Review of Zero Rating in South Africa (2018) *Recommendations on Zero Ratings in the Value-Added Tax System*. August 2018.
- 28 See no. 27 above
- 29 Parliamentary Monitoring Group (2018) *Minutes of the Standing Committee of Finance*. 12 September 2018. Viewed 20 October 2018: <https://pmg.org.za/committee-meeting/27077/>
- 30 See No. 25 (Budget Justice Coalition, August 2018) above.
- 31 National Treasury (2018) *Medium Term Budget Policy Statement 2018*. P. 23. The zero-rating will come into effect on 1 April 2019.
- 32 Treasury officials’ answers to questions posed by civil society representatives at the MTBPS Lock-Up in Parliament on 25 October and subsequently via e-mail on 26 October 2018.
- 33 See no.32 above
- 34 National Treasury (2018) *Adjusted Estimates of National Expenditure 2018*. Pg 159
- 35 National Treasury (2017) *Adjusted Estimates of National Expenditure 2017*. Pg 125
- 36 Social Assistance Amendment Bill B8-2018.
- 37 Parliamentary Monitoring Group (2018) *Minutes of the Portfolio Committee on Social Development, National Assembly*. 30 May 2018. <https://pmg.org.za/committee-meeting/26533/>
- 38 UN Committee Economic, Social and Cultural Rights (2018) *Concluding observations on the Initial Report of South Africa*. 12 October 2018. Paras 57(c) & 83
- 39 Draft Basic Education Laws Amendment Bill. *Government Gazette* 41178, Notice 1101, 13 October 2017.
- 40 South African Schools Act 84 of 1996.
- 41 Employment of Educators Act 76 of 1998.
- 42 Mr Hubert Mwel, Director General of the Department of Basic Education, quoted in the Parliamentary Monitoring Group (2018) *Minutes of the Portfolio Committee on Basic Education*. 28 November 2017. Viewed 20 October 2018: <https://pmg.org.za/committee-meeting/25598/>
- 43 Skelton A & Nsibirwa M (2018) #SchoolsOnFire: Criminal justice responses to protests that impede the right to basic education. *SA Crime Quarterly* 2017, 62: 39-50.
- 44 Equal Education & Equal Education Law Centre (2018) *Joint Submission by Equal Education and Equal Education Law Centre on the Basic Education Laws Amendment Bill (GG No. 41178 of 13 October 2017)*. 10 January 2018. Cape Town: EE & EELC. P. 8.
- 45 Department of Basic Education (2010) *Policy on Learner Attendance*.

- Government Gazette No. 33150, Notice 361, 4 May 2010. Pretoria: DBE.
- 46 See no. 44 above. P. 20.
- 47 United Nations Educational, Scientific and Cultural Organisation (2017) *Accountability in Education: Meeting our commitments. Global Education Monitoring Report 2017/8*. Paris: UNESCO. PP. 88-89.
- 48 See no. 39 above. Proposed addition of section 3 (7) to the South African Schools Act
- 49 See no. 39 above, section 2.2.
- 50 South African Human Rights Commission (2016) *National Investigative Hearing into the Impact of Protest-related Action on the Right to a Basic Education in South Africa*. Johannesburg: SAHRC.
- 51 See no. 43 above. P. 46.
- 52 See no. 43 above.
- 53 See no. 50 above.
- 54 See no. 44 above. P. 7
- 55 See no. 39 above. Proposed amendment to section 5 of the South African Schools Act.
- 56 See *MEC for Education Gauteng Province and Another v Governing Body of Rivonia Primary School and Others* 2013 (6) SA 582 (CC).
- 57 See no. 44 above. P. 9.
- 58 The Department of Justice and Constitutional Development (2017) *Draft Regulations Relating to Sexual Offences Courts 2017*. Government Gazette 41272. Notice 912. Pretoria: DJCD.
- 59 Machisa M, Jina R, Labuschagne G, Vetten L, Loots L, Swemmer S, Meyersfeld B & Jewkes R (2017) *Rape Justice in South Africa: A retrospective study of the investigation, prosecution and adjudication of reported rape cases from 2012*. Pretoria: Gender and Health Research Unit, South African Medical Research Council. P. 13.
- 60 See no. 58 above. Regulation 47 (2)
- 61 See no. 58 above. Regulation 45 (4)(a)
- 62 Department of Social Development (2017) *Draft Child Care and Protection Policy*. Pretoria: DSD
- 63 Sebopela M (2018) Department of Social Development Presentation to the National Child Care and Protection Forum, 18 April 2018. Slide 2.
- 64 See no. 63 above, slide 13
- 65 Department of Social Development (2018) *Draft Child Care and Protection Policy*. Pretoria: DSD
- 66 See no. 65 above. P. 63-64.
- 67 *YG v The State* 2018 (1) SACR 64 (GJ).
- 68 Children's Act 38 of 2005.
- 69 See no. 65 above. P. 93-95.
- 70 See no. 65 above. P. 20-21.
- 71 Hall K, Sambu W, Berry L, Giese S & Almeleh C (2017) *South African Early Childhood Review 2017*. Cape Town: Children's Institute, University of Cape Town & Ilifa Labantwana.
- 72 See no. 65 above. P. 87.
- 73 See no. 65 above. P. 62.
- 74 See no. 65 above. P. 134-135.
- 75 *Centre for Child Law v Minister of Social Development and Others* case no. 72513/17 HC Gauteng Division, Pretoria
- 76 Draft Children's Amendment Bill (October 2018) As gazetted for public comment in Government Gazette No. 42005 on 29 October 2018.
- 77 See no.76 above. (Draft Children's Amendment Bill)
- 78 Draft Children's Amendment Bill: section 32 version (April 2018)
- 79 Draft Children's Amendment Bill: section 137A version (April 2018)
- 80 Proudlock P (2018) *Children's Institute Submission on the Draft Children's Amendment Bills (Section 32 and section 137A versions)* Cape Town: Children's Institute, UCT; Proudlock P, Berry L, Jamieson L & Rohrs S (2018) *Children's Institute's Submission on the Draft Children's Amendment Bill (August 2018 version)* Cape Town: Children's Institute, UCT; Centre for Child Law (2018) *Submission on the Draft Children's Amendment Bill (August 2018 version)*. Pretoria: CCL, University of Pretoria.
- 81 See no. 75 above.
- 82 Constitution of the Republic of South Africa, Act 108 of 1996, section 28 (1)(c).