

The Children's Act

- providing a strong foundation for caring for vulnerable children

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Introduction

South Africa finally has a new comprehensive Children's Act providing for the full range of social services needed to support vulnerable children and their families. On 1 April 2010 the Children's Act 38 of 2005 and the Children's Amendment Act 41 of 2007 came into full effect. This means that the Child Care Act of 1983 is repealed and the child care and protection system is now governed by the new Children's Act of 2005 (as amended).

Why was a new Law needed?

The Child Care Act of 1983 was written by the apartheid government, and was not in line with the Bill of Rights and South Africa's legal obligations in terms of international treaties such as the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. A new law was therefore needed that would give effect to children's constitutional rights.

Besides the constitutional imperative to draft a new law, the complex social challenges facing children and families in South Africa 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 vast number of vulnerable children and families in dire need of social services. Therefore a new law was needed to provide for an increase in and diversity of the services available and to tackle the historical inequalities in terms of access.

The 1997 White Paper on Social Welfare recognised these challenges and promoted a developmental approach to social services to address the root causes of child vulnerability through a focus on prevention services. However, the Child Care Act of 1983, provided for an outdated residual approach to social services that focused on state protection services for children only after they have been abused and there was no provision for prevention and early intervention services. Furthermore the Child Care Act did not place a legislative obligation on the state to provide any social services for children as all the provisioning clauses in the Act were framed in discretionary language. To give effect to the vision of a developmental model of social welfare services a new law was therefore needed.

The Children's Act is the culmination of a long and consultative law reform process

In 1997, soon after the Bill of Rights and the White Paper on Social Welfare had been completed, the South African Law Reform Commission (SALRC) was tasked with reviewing the Child Care Act of 1983 and drafting a new law. After five years of research and consultation, the SALRC handed a Report and a draft bill to the Minister of Social Development in 2002, for tabling in Parliament. The draft bill was then split into two bills for technical reasons. The first Bill dealt with matters for which national government

is primarily responsible and the second Bill dealt with matters which national and provincial government share responsibility.

The first bill was tabled in Parliament at the beginning of 2004. Parliament went through a series of consultative processes with government departments, civil society and 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 (the Amendment Bill) also went through an extensive consultative process in Parliament as well as the Provincial legislatures and was passed at the end of 2007. On 1 April 2010 the regulations were published and the Act put into full effect.

The new Children's Act is therefore the culmination of a 13 year long consultative law reform process.

What is 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, and the primary level of support to the family has not solved the problem, then the Act provides for protection services and state alternative care.

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

New services provided for include:

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

How does the Children's Act take us forward into a new era of child care and protection?

Provides the services needed to give effect to a range of children's constitutional rights to care and protection

The Children's Act brings South Africa's child care and protection law up to date with our Bill of Rights 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.

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. These rights are inter-linked and inter-dependent and require a continuum of care which involves all government departments.

Children's right to social services in s28(1) (c) of the South African Bill of Rights is often forgotten or misunderstood. Just as children have the rights to education, health care services and social security (grants); they also have the right to social services. To give effect to the right to education, the Schools Act of 1996 obliges government to provide schools; for health care services, the National Health Act of 2003 obliges government to provide clinics and hospitals; and for social security the Social Assistance Act 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 be providing them. It is quite obvious that schools are needed to give effect to the right to education, and clinics and hospitals to give effect to the right to health care services, and grants 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 government bears the primary responsibility for providing and funding schools, clinics, hospitals 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) and Faith Based Organisations (FBOs) contributed to the lack of clarity.

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

- 1) Services to prevent abuse and neglect (This includes partial care and early childhood development, parenting skills development, support groups for parents with children with disabilities, and provision of material assistance such as social grants to assist families to provide for their children).
- 2) Services to intervene early if a child is at risk of abuse or neglect (This includes diversion and rehabilitative programmes for children in trouble with the law, family and child counselling, drop in centres for vulnerable children, and home based care for families affected by chronic illnesses such as HIV/AIDS).
- 3) Services to protect children who have suffered abuse or neglect from further harm (This includes mechanisms to identify, report, refer and support children in need of care and protection; social worker investigations and supervision; and court inquiries and court orders).
- 4) Alternative care for children who cannot live with their families due to abuse, neglect, orphaning or abandonment (This includes foster care, adoption, and child and youth care centres).

5) Services for children with special needs to enable their full participation in society (Children with special needs include children with disabilities, children on the streets and foreign children).

The Children's Act provides the primary legislative framework for ensuring that the majority of these services are provided¹. It does this by providing clarity on which services must be provided, to whom and by whom.

Government takes the lead in the move towards a rights paradigm

In terms of the Constitution and the Children's Act, national, provincial and local government share responsibility for delivering social services to children.

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 Ministers of Social Development (MECs) to ensure:

- a sufficient spread of each service in every province (eg. ranging from ECD programmes through to child and youth care centres);
- that there is an updated record of the services available in every province for planning, monitoring and budgeting purposes (eg a record of the registered and unregistered child and youth care centres);
- that budgets are allocated at a national and provincial level for the provision of these services by the state and for paying NPOs for providing the services for the state;
- that national norms and standards are set in regulations and that community based organisations are assisted by government to achieve these norms and standards

These clauses are new in South African law governing the arena of social services. Social services have tended to be viewed as charity work that is done by the faith based organizations and non-profit sector. The Children's Act shifts the country to an approach which recognizes that children have a constitutional right to social services and that the State bears 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 the non-profit sector with government playing the lead role and NPOs being paid full cost by government for services rendered on behalf of government. Consequently a major review of the way NPOs are funded is needed.

Legislative imperative to prioritise budgetary allocations for implementing the Act

The Children's 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 national 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 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 by NPOs for registration to be considered timeously

The government has made a legislative commitment in the Act to provide all the social services either directly itself, or indirectly, through funding the NPOs who currently deliver many of these services. However, NPOs only qualify for funding if they have been granted registration under the Act. Delays by provincial departments in considering registration applications can therefore have the effect of preventing NPOs from being able to apply for government funding. To minimise delays and to ensure fair administrative action as required by s33 of the Constitution and the Promotion of Administrative Justice Act (PAJA) of 2004, the Children's Act provides that applications for registration by NPOs for the various services must be considered by the provincial departments of social development within 6 months of the application being submitted.

Conditional registration and government assistance introduced to assist struggling NPOs to access government funding

Many community based projects struggle to qualify for registration because they don't meet the minimum norms and standards set for registration. Without a registration certificate they cannot qualify for government funding. However their inability to register is mainly due to not having any funding. If CBOs in poverty stricken areas cannot access government funding, the likelihood of a developmental and preventative approach being put into practice remains a dream on paper. In poverty stricken areas, community based projects need to be nurtured and assisted to meet the minimum norms and standards so that government funding can be accessed.

Recognising this, the Act provides for a process of conditional registration and support from the department of social development to help struggling NPOs to meet the norms and standards.

Legislative commitment to improve the provision and 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. This means that the government has recognised their importance and committed to improve the provision and funding of these essential social services. These clauses will enable the vision of the White Paper to be put into practice.

Section 144 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
- Programmes aimed at developing appropriate parenting skills including the promotion of positive, non-violent forms of discipline
- Programmes aimed at developing the capacity of parents to safeguard the well-being and best interests of children with disabilities and chronic illnesses
- Psychological, rehabilitative and therapeutic programmes for children who have suffered abuse, abandonment or grief
- Diversion programmes for children in trouble with the law
- Programmes helping children and families to access other government services e.g. health care services, social grants, school fee exemptions, water and electricity

Services such as child and family counselling, parenting skills development, support groups for parents of children with disabilities, diversion of children from the criminal justice system

and home based care for families with chronic illnesses such as HIV/AIDS will now be able to be rolled out to reach more vulnerable children. All these programmes are much needed by many families.

The inclusion of psychological, rehabilitation and therapeutic programmes for children is a very positive move. Organizations providing these essential services to child victims of abuse and neglect, should be able to access improved government funding.

Many community based projects currently provide services that are aimed at linking vulnerable families with all the available government services such as health, schooling; assistive devices for disabled children; and social 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 them also provides skills development and work for these groups. Programmes and services which strengthen families and communities to care for children are cost-effective because they reduce the demand for costly services, such as state alternative care in children's homes. They are also a social investment in human capital because they ensure children can develop to their full potential. Funding of prevention and early intervention services, partial care and ECD therefore needs to be prioritised in the budget decision making processes.

Equal access to social services for children with disabilities is promoted

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 and treatment for children with

disabilities. 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 opportunities and equal access to services and therefore to protection. The strategy clauses for the chapters on partial care, early childhood development, child and youth care centres and drop-in centres place an obligation on the national and provincial Ministers of Social Development to ensure that children with disabilities and chronic illnesses have equal access to these services. For partial care; early childhood development; prevention and early intervention and drop-in centres the provisioning and funding clauses oblige government to prioritise delivery of these programmes for children with disabilities. Children with disabilities have been chronically neglected by social services in the past. These provisions will contribute towards ensuring that they are provided with equal access and opportunities.

Full range of social service practitioners to be appropriately utilised

Recognising the acute shortage of social workers in the country to deal with the increasing demands on the child protection system 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), the term "social service professionals" is used in the Act. The intention is to ensure that many of the tasks that have traditionally been restricted to social workers can be done by a range of 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. This diversification of roles will help ensure that each category of workers is appropriately used according to their

particular training and skills and will make services more accessible in poor and rural communities where social workers are scarce. It could also reduce the cost of implementing the Act.

However, this new approach cannot be implemented until the South African Council for Social Service Professionals (SACSSP) and the Minister officially recognise and register the full range of social service practitioners. At the moment, only social workers can be registered despite the fact that child care and protection services are currently provided by a large number of other social service practitioners such as child and youth care workers, home based carers, early childhood development practitioners and community development workers.

Mentorship scheme for child headed households to be rolled out to reach more children

Children whose parents have died or abandoned them and who are living alone, and children whose parent is present but is too ill to care for them, are defined as child headed households and entitled to receive support through the adult mentorship scheme created in 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 of such a

programme is the Isibindi Model that is managed by the National Association for Child and Youth Care Workers. The Act now clearly legislates for such programmes to be registered and funded by the government, thereby providing the foundation needed for these programmes to be rolled out to many more vulnerable children across the country.

Implementation challenges

The way NPOs are funded 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 school 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. Because government does not cover the NPOs' full costs it is impossible for NPOs to grow and extend their services into under-serviced areas. Subsequently a major review of the way NPOs are funded is needed.

Minister and SACSSP need to recognise and develop the full range of social service practitioners

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, child and youth care workers cannot yet register in terms of the Social Services Professions Act. This can prevent this category of worker from developing and from taking on the new tasks that have been envisaged for them. The blockages to registration and development of the full range of social service practitioners need to be addressed urgently, in order to ensure that children in rural areas, where social workers are scarce, have access to the services outlined in the Act.

Conclusion

The Children's Act is a pioneering step forward in the realisation of a developmental approach to social welfare services for children. It provides the strong legislative foundation that was so desperately needed to enable the country to respond adequately to the needs of vulnerable children. This step needs to be celebrated. The challenge now turns to ensuring that we use this strong foundation to the maximum extent to enable the necessary capacity development and upscaling of budgetary allocations and service delivery.

1. Children's social grants are provided for in the Social Assistance Act of 2004, ■

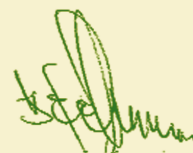
PRESIDENT'S MINUTE NO 91

In terms of section 15 of the Children's Amendment Act, 2007 (Act No. 41 of 2007), I hereby, by means of the accompanying proclamations in English and isiZulu, determine 1 April 2010 as the date on which the abovementioned Act comes into operation.

Given under my Hand and the Seal of the Republic of South Africa at Pretoria on this 26th day of March, Two Thousand and Ten.



President



Minister of Cabinet