South Africa's progress in realising children's rights: A law review

Paula Proudlock (ed)

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2014

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Many people have played a part in the production of this book. In particular we would like to acknowledge:

The authors: Lizette Berry, Lucy Jamieson, Shanaaz Mathews and Paula Proudlock (Children's Institute, University of Cape Town); Patricia Martin (Advocacy Aid); and Morgan Courtenay and Zita Hansungule (Centre for Child Law, University of Pretoria).

Peer reviewers: Merle Allsopp (National Association of Child Care Workers), Lisa Andrews (Equal Education), Charmain Badenhorst (Department of Justice and Constitutional Affairs), Linda Biersteker (Early Learning Resource Unit), Carol Bower (independent), Debbie Budlender (independent), Justine Burns (School of Economics, University of Cape Town), Lisa Draga (Equal Education), Edmund Fole (Child Justice Alliance), Katharine Hall (Children's Institute, University of Cape Town), Lori Lake (Children's Institute, University of Cape Town), Divya Naidoo (Save the Children South Africa), Neil McKerrow (Department of Health, KwaZulu-Natal), Sue Philpott (Disability Action Research Team), Tal Schreier (Refugee Rights Project, University of Cape Town), Julie Todd (Pietermaritzburg Child Welfare), Adam Salmon (Research Unit, Parliament), Ann Skelton (Centre for Child Law, University of Pretoria), Nicholas Spaull (Department of Economics, Stellenbosch University), Nikki Stein (Section 27), Lorenzo Wakeford (Research Unit, Parliament), and Chantell Witten (UNICEF).

Production team: Charmaine Smith for copy editing, proofing and production management; André Wiesner for copy editing; Lori Lake for formatting; Mandy Lake-Digby for designing the cover; and Nicola Proudlock for the cover artwork.

Research and administrative assistants: Bronwen Williams, Isabbel Cooper and Zelda Warrin (Children's Institute, University of Cape Town).

Funders: Save the Children South Africa. The support of Swedish International Development Cooperation Agency (SIDA) as the financier of Save the Children South Africa is acknowledged.

Opinions expressed and conclusions arrived at are those of the authors and are not necessarily attributed to any of the funders or reviewers.

Citation suggestion

Proudlock P (ed) (2014) *South Africa's Progress in Realising Children's Rights: A Law Review*. Cape Town: Children's Institute, University of Cape Town & Save the Children South Africa.

ISBN: 978-0-7992-2504-4

Contact details

Children's Institute, University of Cape Town
46 Sawkins Road, Rondebosch, Cape Town, 7700, South Africa
Tel: +27 (0)21 689 5404 Fax: +27 (0)21 689 8330
Email: info@ci.org.za Web: www.ci.org.za

Save the Children South Africa
SAQA House 2nd Floor, 1067 Arcadia Street, Hatfield, Pretoria, 0028, South Africa
Tel: +27 (0)12 430 7775 Fax: +27 (0) 430 7776
Email: info@savethechildren.org.za Web: www.savethechildren.org.za

Contents

About the editor

Paula Proudlock is the programme manager of the Child Rights Programme at the Children's Institute, University of Cape Town. She has a masters in constitutional and administrative law from the University of Cape Town.

About the authors

Lizette Berry is a senior researcher at the Children's Institute, University of Cape Town. She has a masters in social work from the University of Cape Town.

Morgan Courtenay is an attorney at the Centre for Child Law, University of Pretoria. He has a masters in criminal law from the University of Pretoria.

Zita Hansungule is a project co-ordinator at the Centre for Child Law, University of Pretoria. She has a LLB from the University of Pretoria and is the final stages of completing a masters in child law.

Lucy Jamieson is a senior advocacy co-ordinator at the Children's Institute, University of Cape Town. She has a masters in democratic governance (politics and law) from the University of Cape Town.

Patricia Martin is an independent researcher from Advocacy Aid. She has a masters in public law from the University of Cape Town.

Shanaaz Mathews is an associate professor and the director of the Children's Institute, University of Cape Town. She has a doctorate in public health from the University of Witwatersrand.

Chapter 1

Foreword and summary of findings

Paula Proudlock

The year 2014 marks 20 years of democracy for South Africa. Children born in 1994 at the start of democracy are now 20 years old and entering the next phase of their lives as young adults. It is a good moment to take stock of South Africa's progress in realising children's rights.

To realise rights, the state needs to design and implement a range of measures which include strategic plans, policies, laws, programmes, budgets and services. These measures together make up the state's overall plan for the realisation of children's rights. Since 1994 South Africa has re-conceptualised and re-written nearly all its laws to bring them in line with the Constitution and international human rights law. These laws are continually being reviewed and amended to respond to design and implementation challenges.

This book focuses on a selection of laws that affect children, and examines whether they have been designed in compliance with international and constitutional law. With a few notable exceptions, South Africa's challenge generally does not lie in the design of the laws but in the management, co-ordination and implementation of services required by the laws. For this reason we decided not only to focus on the content of the laws but also to assess what is happening at implementation level.

Each chapter deals with a different right and reviews the laws and policies aimed at realising that particular right. Where design flaws or implementation challenges are identified, the authors make recommendations for reform. The aim of the book is to provide an evidence-based resource for government officials, Members of Parliament, judges and magistrates, and representatives from civil society to use in their work for and with children.

Each chapter has been written by an expert on child law. The methodology used by the authors includes an analysis of international, regional and constitutional law; an analysis of the content of South Africa's laws; desktop reviews of existing legal and social science evidence on design and implementation challenges; and interviews with key informants from government and civil society. To improve accuracy and relevance, the draft chapters were each peer-reviewed by experts from civil society, academia, government and national Parliament, with their comments addressed in the final chapters.

Chapter 2 on **children's rights to birth registration** reviews the *Births and Deaths Registration Act* and its regulations. Due to a significant amendment to the Act, signed by the President as far back as 2010, but not put into force until just recently on 1 March 2014, the law regarding birth registration has been in a state of flux, which has caused some confusion among officials and the public.

Lack of a birth certificate can result in a child being denied access to health care services, social grants, education, protection services or alternative care. The categories of children most likely to struggle to access birth certificates, and consequently other essential services, include children born in rural areas, children whose parents do not have identity documents, children born to foreign national parents, abandoned children, and children living in the care of extended family members (orphans and non-orphans).

These vulnerable children are also those most in need of accessible and non-punitive mechanisms for late registrations of birth. The chapter raises concerns that aspects of the Act, as amended, and the recently promulgated 2014 regulations to the Act, could make matters worse for children in the care of extended family members (both orphans and non-orphans alike), and children born to foreign national parents. South Africa's marriage rate is declining and more than 24% of children do not live with either of their biological parents but are cared for by extended family members. However the birth registration law and practice at a service delivery level favours the married, "nuclear" family, while requiring other caregivers who do not fit that mould to navigate increasingly complex checks and burdens of proof.

Chapter 3 on **children's rights to basic nutrition** reviews the state subsidy for the early childhood development programmes provided for by the *Children's Act* and its regulations. While the chapter recognises that a range of laws and programmes, including the National School Nutrition Programme and the Child Support Grant, aim to realise children's rights to nutrition, it takes a detailed look at the role played in particular by the ECD subsidy for children under five years of age.

The concerns the chapter raises include:

- the law does not make it clear what the aim of the subsidy is in respect of child nutrition;
- the provinces each have different means test levels and different formulae regarding the number of days that are subsidised;
- the subsidy pays less than what it actually costs to run a quality ECD programme; and
- because the subsidy is restricted to programmes offered in centres, children in home-based ECD programmes are unable to benefit from the nutritional value of the subsidy.

A new policy on ECD is in its final stages of development and is likely to make recommendations for improving the ECD programme's potential to contribute to the nutritional needs of young children. This policy, it is hoped, will be followed by the necessary amendments to the Children's Act and its regulations in order to translate the policy into enforceable law.

Chapter 4 on **children's right to social assistance** reviews the Child Support Grant (CSG) which is provided in terms of the *Social Assistance Act* and its regulations, to primary caregivers of children living in poverty. South Africa's CSG is well known internationally for its rapid, successful roll-out and proven positive impact on nutrition, health and educational outcomes. However, approximately 2.35 million eligible children remain excluded from its reach. These tend to be particularly vulnerable groups, including children under one year of age, orphans, children in child-headed households, children of teen mothers, children of refugees, and adolescents who have dropped out of school.

The CSG's success is partly attributable to its simplicity and non-conditional nature. However, in 2009 school enrolment was introduced as a "soft-conditionality". The regulations make it clear this is not an eligibility requirement to be used to bar children's access to the grant but a mechanism to identify children who have dropped out of school so that they can be supported to return to school. Nonetheless, evidence gathered by the author reveals that school enrolment is being enforced unlawfully by the South African Social Security Agency (SASSA) as an eligibility requirement at the application stage.

A further concern is the low monetary value of the grant compared to objective poverty lines and the actual costs of feeding a child. This is preventing the CSG's proven positive impact from being maximised to full potential.

Chapter 5 focuses on the **rights of children with disabilities to social assistance** and reviews the Care Dependency Grant (CDG) provided for in the *Social Assistance Act* and its regulations.

Although the Act was amended in 2004 to remove the restriction that only children with "severe" disabilities requiring permanent "home" care are eligible, the regulations and medical assessment form have not been amended accordingly, nor have officials and medical officers been trained to implement the conceptual shifts brought about by the 2004 amendments. The intention behind the 2004 amendments was to move South Africa from a medical model of assessing eligibility for the grant towards a social model that focuses on promoting equality and full participation for children with disabilities. However this intention has not been translated at the level of implementation.

While a new assessment form was piloted in 2008, it has not been finalised. Medical officers and SASSA officials are therefore using either the repealed medical assessment form promulgated under the 1992 Act, or SASSA's newly designed form for assessing eligibility of adults for the Disability Grant. Neither form matches the CDG eligibility criteria as set out in Social Assistance Act of 2004. As a result, children with moderate to mild disabilities in need of permanent care or support services are being excluded from the proven positive benefits of the grant.

Chapter 6 on **children's rights to basic education** provides a comprehensive review of the laws underpinning the education system in South Africa. These include the *South African Schools Act* and *National Education Policy Act.* This chapter also looks in more detail at whether the education legislative framework is ensuring equal access and opportunities for children with disabilities.

Key challenges raised include:

- the inadequate number of schools;
- inadequate infrastructure at schools;
- the low level of skills and capacity and high levels of absenteeism amongst teachers;
- the low capacity of school governing bodies to fulfil their management functions;
- high costs of education (fees, uniforms and transport) for families living in poverty;
- lack of support for pregnant learners to finish their schooling;
- insufficient home language teachers and materials to implement the policy that learners should be taught in their home language in the foundation phase; and

- high levels of violence in schools.

In terms of the challenges limiting the realisation of the right to basic education for children with disabilities; the chapter reveals that large numbers of children with disabilities are not in school, not receiving quality teaching and not completing secondary schooling. The underlying cause of this worrying situation is that although White Paper 6 commits South Africa to inclusive education, the legal framework does not adequately compel the state to ensure that mainstream schools are adequately resourced to provide inclusive education.

Chapter 7 on **protecting the rights of children in conflict with the law** reviews the *Child Justice Act.* The Act aims to establish a system that has, as a central feature, the possibility of diverting children's matters away from the criminal justice system, and that expands and entrenches the principles of restorative justice while ensuring that child offenders are held responsible and accountable for offences they have committed.

Although the Act in general is compliant with international and constitutional law, the age of 10 that is set for criminal capacity, is below the minimum age of 12 years recommended by the UN Committee on the Rights of the Child (CROC). The CROC's recommendation of 12 as the minimum age for criminal capacity was released in 2007 when the South African Parliament was in the final stages of deliberating on the Child Justice Act. Parliament opted for 10 as the minimum age but built in a mechanism to enable the Act to be reviewed and amended within five years to respond to the new developments in international law. The Child Justice Act therefore provides that a review of the minimum age of criminal capacity must be conducted and that a Cabinet-approved report be tabled in Parliament by 31 March 2015 for Parliament to consider whether or not the minimum age of criminal capacity should be raised. The authors voice concerns about the reliability and availability of the data that is required to support the review.

At an implementation level, key challenges are that:

- only 23% of police officers have been trained on the new law;
- police are generally not using the new methods available, other than arrest, to secure the child's attendance at the preliminary inquiry;
- the use of diversion has declined; and
- non-profit organisations (NPOs) providing diversion programmes are not adequately funded and are struggling to meet the rigid accreditation process.

Chapter 8 on **children's rights to be protected from violence** reviews a number of laws and policies that aim to protect children from violence, including the *Children's Act, Criminal Procedure Act, Sexual Offences Act* and *Domestic Violence Act*. Children in South Africa are subjected to high levels of violence, with perpetrators most often being someone known to the child. The authors emphasise it is important for the law to enable and support programmes that aim to address the root causes of violence. This requires renewed commitment to and investment in a range of prevention and early intervention programmes, and in therapeutic services for healing children and families who have experienced violence.

Challenges hampering the prevention of violence include:

- a lack of evidence-based planning by national and provincial departments of social development, despite the fact that the Children's Act requires such an approach;
- inadequate state funding of NPOs, who provide the bulk of violence prevention programmes; and
- the fact that the state has not yet prohibited the use of corporal punishment in the home, thereby sending a message that using violence to discipline children is an acceptable legal and social norm.

With regards to providing child protection services and an adequate criminal justice response after incidents of violence, the challenges include:

- a lack of evidence-based planning by the national and provincial departments of social development, despite the Children's Act requiring such an approach;
- inadequate funding of NPOs providing child protection services;
- a scarcity of social workers;
- ineffective use of the scarce resources in the child protection system to channel poverty alleviation grants to extended family members caring for orphans;
- lack of collaboration between the police and the departments of social development in cases of child abuse;
- misguided decisions to close specialised courts and policing units (decisions which, fortunately, were recently reversed);
- lack of recognition in laws and policy governing domestic violence shelters and services that children are commonly co-victims of domestic violence alongside their mothers;
- the absence of a legal obligation on the state to provide and fund shelters to protect women and children from domestic violence; and
- inadequate state funding for NPOs that provide shelters.

Children who have suffered violence or witnessed violence require therapeutic services to enable psychological healing that will break the cycle of abuse. The following challenges were identified:

- children involved in long criminal trials tend not to receive ongoing therapeutic support to enable them to endure the process and produce credible evidence in court;
- NPOs that provide therapeutic services for children and families do not receive adequate state funding;
- long waiting times and other logistical barriers deter caregivers and children from following through with long-term therapeutic support; and
- few services provide the necessary psychological support to the caregiver to enable caregivers to adequately support the children who have been abused.

Chapter 9 on **children's rights to appropriate alternative care when removed from the family environment** reviews the *Children's Act* and its regulations. The chapter focuses on one form of alternative care, namely child and youth care centres. CYCCs have to be registered with the Department of Social Development to operate legally and to qualify for state funding. The majority are operated by NPOs, especially those previous known as "children's homes" or "shelters" for street

children. South Africa has approximately 355 registered CYCCs which accommodate approximately 21 000 children. However, at least 2 000 children are cared for in 115 unregistered CYCCs.

The challenges identified include the following:

- The Children's Act requires the state to draft a comprehensive national strategy to ensure that there are sufficient places in CYCCs across the country offering a range of therapeutic programmes to meet children's needs. However, four years after the Act came into effect the state has completed neither the strategy nor the profiles of need upon which the strategy should be based.
- The state's policy of only partially funding the NPOs that provide the majority of South Africa's CYCCs means that most CYCCs (registered and unregistered) are unable to meet all the norms and standards required by law.
- The Children's Act provides for "conditional registration" of CYCCs to enable unregistered or new CYCCs to access state support to meet the norms and standards. This mechanism, however, is not being used to its full potential, and the majority of unregistered centres are struggling with the registration process.
- Although it is illegal to operate a CYCC without a registration certificate, more than 115 such centres currently exist and the Department of Social Development, designated child protection organisations and children's courts continue to place children in these centres.
- There are insufficient social service professionals to meet the prescribed staff-to-child ratios, and many child and youth care workers lack formal qualifications.
- Children in CYCCs and their families are not receiving adequate family re-unification services due to a scarcity of service providers and lack of funding; consequently they remain in alternative care longer than necessary or are returned to unsafe environments.

This summary has touched lightly on the complex challenges raised in the chapters that follow. I encourage you to read the individual chapters to gain a more nuanced understanding of the particular design flaws and implementation challenges the authors have identified in relation to each right. The recommendations for reform that are made in each chapter are works in progress and require further dialogue and consultation between the relevant stakeholders.

Paula Proudlock

Paula.proudlock@uct.ac.za

Chapter 2

Children's rights to birth registration: A review of South Africa's law

Paula Proudlock and Patricia Martin

Contents

1. Introduction

This chapter examines whether South Africa's laws and practices with respect to birth registration are giving effect to children's rights to birth registration. Section 2 describes the meaning of the right, while section 3 provides an overview of the primary law that regulates access to birth registration, the Births and Deaths Registration Act, and its accompanying regulations. The law has been in a state of flux and confusion for the past four years due to a 2010 amendment act and its regulations waiting in the wings to be put into force. This finally occurred on 1 March 2014 just as this chapter was being finalised for print[1].

Section 4 describes current evidence on birth registration rates, showing that there has been significant improvement in the rate of births registered within one year of birth, however the rate of births registered within the prescribed 30 days is not yet optimum, with about half of birth registrations in South Africa still occurring after 30 days. Section 5 looks at the groups of vulnerable children that struggle the most to access birth certificates, while section 6 elaborates on the effects of not having a birth certificate in South Africa, namely, exclusion from a range of services essential for the survival, development and protection of the child.

Section 7 provides the detail of the recently amended law and its regulations with commentary on how the amendments change the law. The amended regulations introduce much needed clarity on the requirements and procedures for birth registration and will assist in improving officials' and the public's understanding of the law. However in some instances the amendments make access to birth certificates for vulnerable groups more difficult which may exacerbate their exclusion from other services. Lastly, in section 8 we make recommendations for reform aimed at improving birth registration for all children in South Africa.

2. Rights analysis

2.1 International and regional law

The United Nations Convention on the Rights of the Child (1989) (UNCRC) and the African Charter on the Rights and Welfare of the Child (1990) (ACRWC) protect the right of all children to be registered immediately after birth, to be given a name, and to acquire a nationality.[2] They both also contain a sub-article requiring the state to ensure that its laws and systems in relation to birth registration do not result in foreign children becoming stateless.[3]

Birth registration represents the state's first official acknowledgement that the child exists and of the child's status under the law. The state's register of births also fulfils an important planning function

[1] Peer reviewers commented on draft 1 of this chapter when it contained analysis of the 2012 draft regulations. Due to the final 2014 regulations coming out as the book was being finalised for print, and the consequent need for a rapid re-write, our analysis in section 7 of the final 2014 regulations and our recommendations in section 8 were not able to be peer reviewed.
[2] Art 7(1) of the UNCRC and art 6(1 – 3) of the ACRWC.
[3] Art 7(2) of the UNCRC and art 6(4) of the ACRWC.

which enables the state to ensure that its laws, policies and programmes are appropriately designed to reach all children. An accurate database of registered births is also an essential ingredient needed to calculate infant and child mortality rates accurately.

The UN Committee on the Rights of the Child (CROC) has prescribed that birth registration should be accessible to all, irrespective of legal status of the child's parent or nationality, and free of charge.[4] It should also be flexible and responsive to the circumstances of the family – in other words, it should be built to accommodate all family forms and reach all areas of the country, if necessary with the use of mobile units.[5] States should also provide for and facilitate late registration of births.[6] The CROC discourages states from imposing penalties or fines on parents for late registrations as this can become a barrier for many parents, resulting in children not being registered.[7]

In many countries caregivers are required to produce their child's birth certificate in order to access basic services such as education, social grants and health care. The CROC has made clear that this practice is misguided: the absence of a birth certificate should not be used to deny children access to services.[8]

2.2 South African constitutional law

The Constitution of the Republic of South Africa Act 108 of 1996 provides that "**every** child has the right to a name and nationality from birth" (emphasis added).[9] The right is not restricted to South African citizens but must be able to be enjoyed by all children in South Africa irrespective of their parents' nationality and legal status in South Africa.

2.3 Summary of rights and obligations

To realise children's rights to birth registration, name and nationality, the state needs to adopt laws and procedures that facilitate accessible birth registration for all children born in South Africa irrespective of the nationality of their parents. The law should encourage early birth registration through incentives but also ensure that late registrations are accessible. In addition, it should be flexible enough to enable registration by the diverse range of caregivers caring for children in South Africa, and should not discriminate against children based on who their primary caregiver is, or the marital status of their parents. The law should also ensure that foreign children born in South Africa can access birth registration in South Africa and are protected from becoming stateless.

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[4] Committee on the Rights of the Child (2005) *General Comment No.7 on Implementing Child Rights in Early Childhood.* CRC/C/GC/7/Rev.1. Geneva: United Nations. Para 25.
[5] Committee on the Rights of the Child (2005), note 4 above.
[6] Committee on the Rights of the Child (2005), note 4 above.
[7] Committee on the Rights of the Child (2005) *Concluding Observations of the Committee on the Rights of the Child:* Albania CRC/C/15/Add.249. Geneva: United Nations. Para 34;
Committee on the Rights of the Child (2002) *Concluding Observations of the Committee on the Rights of the Child:* Guinea Bissau CRC/C/15/Add.177. Geneva: United Nations. Para 28.
[8] Hodgkin R & Newell P (2007) Birth registration, name, nationality and right to know and be cared for by parents. *Implementation Handbook for the Convention on the Rights of the Child*. Fully revised third edition. Geneva: UNICEF. Pg 99.
[9] s28(1)(a).

3. Overview of legislative measures to realise the rights

3.1 The Births and Deaths Registration Act and its regulations

The obligation to provide birth certificates falls primarily within the mandate of the Department of Home Affairs (DHA), with supporting roles played by the Departments of Social Development (DSD), Basic Education (DBE), Health (DOH) and Justice (DOJ).

The requirements and processes to access birth certificates are governed by the Births and Deaths Registration Act 51 of 1992[10] and it accompanying regulations.[11] In this chapter we report on the new law as amended by the Births and Deaths Amendment Act 18 of 2010 and its 2014 regulations. Because the amendments are very recent we refer in places also to the previous law[12] prior to the commencement of the amendments on 1 March 2014.

3.2 Background to the recent amendments to the Act and its regulations

In 2010 significant amendments to the Act were passed by Parliament and signed into law by the President as the Births and Deaths Amendment Act 18 of 2010. This was followed in May 2012 with draft regulations for public comment[13]. Both the amendment act and final regulations were only put into operation on 1 March 2014[14].

When the amendment act and regulations were being developed, civil society organisations raised concerns via submissions to Parliament[15] and the DHA.[16] The main concerns were that the amendments proposed to introduce stricter requirements of proof and stricter verification procedures for birth registrations after 30 days; stricter rules around birth registration by grandparents and other family members caring for children; paternity tests for unmarried fathers at their own cost even if they had the consent of the mother confirming them as the father; and a new requirement that non-South African citizens wishing to obtain a birth certificate for their child must first provide a copy of their passport and proof of their lawful residence in South Africa.

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[10] As amended up to and including the Births and Deaths Registration Amendment Act 18 of 2010 which commenced on 1 March 2014.

[11] Births and Deaths Registration Act 51 of 1992: Regulations on the Registration of Births and Deaths, 2014. *Government Gazette* 37373, Notice R128 (26 February 2014). [Hereafter 2014 Regulations on Registration of Births]

[12] Births and Deaths Registration Act 51 of 1992, as amended up to 2003;
Births and Deaths Registration Act 51 of 1992: Regulations on the Registration of Births and Deaths, 1992. *Government Gazette* 14182, Notice R2139 (9 September 1992), as amended up to 2008. [Hereafter 1992 Regulations on Registration of Births]

[13] Births and Deaths Registration Act 51 of 1992: Publication of the Draft Regulations on the Registration of Births and Deaths, 2012. *Government Gazette* 35346, Notice 383 (15 May 2012).[Hereafter 2012 draft Regulations on Registration of Births]

[14] Commencement of the Births and Deaths Registration Amendment Act, 2010 (Act No.18 of 2010). *Government Gazette* 37373, Notice R11,2014 (26 February 2014).

[15] Alliance for Children's Entitlement to Social Security (2010) *Submission on the Births and Deaths Registration Amendment Bill [B18-2010].* Presented to the Portfolio Committee on Home Affairs, National Assembly, Parliament of South Africa,24 August 2010;
Law Society of South Africa (2010) *Submission on the Births and Deaths Registration Amendment Bill [B18-2010].* Presented to the Portfolio Committee on Home Affairs, National Assembly, Parliament of South Africa, 24 August 2010.

[16] Lawyers for Human Rights (2012) *Submission on the Draft Regulations to the Births and Deaths Registration Act 51 of 1992.*

There was a lengthy delay in putting the amendment act and its regulations into operation: In late 2011 the DHA announced that it was ready to implement the Amendment Act.[17] However at this stage there were no regulations to enable implementation. Draft regulations were then published for public comment in mid-2012[18], and civil society organisations made submissions raising concerns about a number of the proposed regulations[19].

In October 2012 the DHA reported to Parliament that it planned to put the Act into operation by January 2013 but that the regulations first needed to be approved by the Minister (a new Minister had been appointed in 2012).[20] The Portfolio Committee of Home Affairs expressed concern at the lengthy delay in the finalisation of the regulations.[21] In mid-2013, the DHA again reported to Parliament, indicating that although the regulations were still in the process of finalisation and had not yet been approved by the Minister, the department was at an advanced stage of preparation for implementation of the Act and officials had already received training.[22] The Portfolio Committee of Home Affairs again expressed concern at the delay in finalising the regulations.[23]

Interviews conducted by the authors in July 2013 with social workers and civil society organisations working with vulnerable children revealed that the DHA was already implementing parts of the amendment act and its draft regulations despite these not yet being in operation[24]. The department had also already begun to train its officials on the draft regulations.[25] It appears therefore that the lengthy delay has caused some confusion at a service delivery level for DHA officials, other government departments and the public.

Section 7 of this chapter revisits the potential impact for children of the amendment act and the new regulations. The sections immediately below first elaborate on birth registration rates and trends, the groups of children who are struggling to access birth registration, and the impact that the lack of a birth certificate has on these vulnerable children.

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[17] Department of Home Affairs (2011) *Media Briefing 19 August 2011*.

[18] Births and Deaths Registration Act 51 of 1992: Publication of the Draft Regulations on the Registration of Births and Deaths, 2012. *Government Gazette 35346*, Notice 383 (15 May 2012).

[19] Lawyers for Human Rights (2012), note 16 above.

[20] Parliamentary Monitoring Group (2012) *Implementation of the South African Citizenship Amendment Act & Births and Deaths Registration Amendment Act: Briefing by Department of Home Affairs*. Minutes of the Portfolio Committee on Home Affairs for 23 October 2012. Accessed at: www.pmg.org.za/report/20121023-implementation-south-african-citizenship-amendment-act-births-and-dea.

[21] Parliamentary Monitoring Group (2012), note 20 above.

[22] Department of Home Affairs (2013) *Implementation of the Regulations on Births and Deaths.* Presentation to the Portfolio Committee on Home Affairs, National Assembly, Parliament of South Africa, 28 May 2013.

[23] Parliamentary Monitoring Group (2013) *Births and Deaths Registration Act Regulations: Departmental briefing*. Minutes of the Portfolio Committee on Home Affairs for 28 May 2013. Accessed at: www.pmg.org.za/report/20130528-births-and-deaths-registration-act-regulations-departmental-briefing.

[24] Interview with Julie Todd, Director, Pietermaritzburg Child Welfare, July 2013.

[25] The Department reported to the Portfolio Committee on Home Affairs that it had started to train officials on the draft regulations already in October 2012. By May 2013 a total of 553 officials had been trained. See: Department of Home Affairs (2013*),* note 22 above.

4. Birth registration rates and trends

4.1 Births registered versus total births in the country

- *In the year 2008: 11% of children under three were not registered.*

It is not possible to determine with accuracy how many children in South Africa are born each year versus how many are registered. However, analysis of the National Income Dynamics Study revealed that, in 2008, 11% of 0 – 3- year-old children in South Africa did not have a birth certificate.[26]

4.2 Births registered within one year of birth

- *In the year 2008: 85% of recorded births were registered within a year of birth.*

South Africa recently reported to the CROC that there have been improvements in the rate of birth registrations within one year of birth.[27] The data presented in the country report was supplied by the DHA. We present the same data in this section, with some updated data from Statistics South Africa.

The DHA records indicate a total of 912 822 children born in 2003 were registered with the department in 2003 or later. Of this total number of registered children, 68% were registered within a year of their birth; the remaining 32% were registered between the ages of 1 – 7 years (over the period 2004 to 2010).

For 2008 the DHA has a record of 1 047 581 births, 87% of which were registered within a year of birth, and the remaining 13% in the period 2009 – 2010 (between the ages of 1 – 3 years).[28] The DHA analysis of births in 2008 only goes as far as 2010; these percentages are thus likely to change slightly towards a greater percentage of late registrations as more late registrations trickle in. Statistics South Africa has slightly updated statistics, showing that 85% of births that occurred in 2008 were registered within a year of birth, with the remaining 15% being registered over the period 2009 – 2012.[29]

The data reveals a substantial improvement in the period 2003 – 2008 in the rate of births registered within a year of birth (from 68% to 85%). The good progress is attributable to improvements in the DHA's reach and quality of services as well as improved collaboration between it and the DOH to enable DHA presence and online birth registration at health facilities [See chapter 4 on the Child Support Grant for more detail on these improvements.]

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[26] K Hall, Children's Institute, University of Cape Town, analysis of the National Income Dynamics Study 2008, Wave 1. In: Berry L, Biersteker L, Dawes A, Lake L & Smith C (eds) (2013) *South African Child Gauge 2013*. Cape Town: Children's Institute, University of Cape Town. Pg 28.

[27] Department of Women, Children and People with Disabilities (2013) *The United Nations Convention on the Rights of the Child. South Africa's Combined Second, Third and Fourth Periodic State Party Report to the United Nations Committee on the Rights of the Child. (Reporting period: January 1998 – April 2013)* Pretoria: DWCPD. Pg 74 and 136.

[28] Department of Women, Children and People with Disabilities (2013), note 27 above.

[29] Statistics South Africa (2013) *Recorded Live Births 2012.* Statistical release PO305. Pretoria: Statistics South Africa. Pg 11.

4.3 Births registered within 30 days of birth

- *For the year 2011/2012: About half of recorded births were registered within 30 days.*

The legally prescribed period for birth registrations is within 30 days of birth.[30] Data on rates of registration for this prescribed period is only available for the 2010 and 2011 financial years.[31] This data reveals that the DHA has a record of 1 107 942 births for the year 2010/2011. Of this total, only 45% were registered within the prescribed period of 30 days; 47% were registered between the period 31 days and one year, with 9% being registered after one year. For the financial year 2011/2012, the DHA has a record of 1 092 367 births. Of this total, 51% were registered within 30 days, 39% between 31 days and one year, and 9% after one year.

While it appears as if there has been some improvement in the rate of children registered within 30 days (if we compare 2010/11 with 2011/2012), this cannot yet be verified as the 2011/12 data is not yet complete because more late registrations are likely to come in.

A matter of concern is that the provinces with large rural child populations were below the national average for early birth registrations in 2011/2012[32]:

- KwaZulu-Natal: only 43% of registrations occurred within 30 days;
- Limpopo: only 41% of registrations occurred within 30 days; and
- Mpumalanga: only 37% of registrations occurred within 30 days.

These statistics reveal that about half of births in South Africa are registered after the prescribed 30-day period and that the situation is worse in the more rural provinces. There are a number of reasons for this that need to be ascertained and better understood so as to incentivise parents and caregivers to register earlier. As it is still going to take a number of years before early birth registration rates reach optimum levels, it is important that parents and caregivers wanting to register children after 30 days are not prevented from doing so by onerous requirements of proof or having to pay a fee. As we explain in the next section, it is the most vulnerable groups of children who are likely to be disadvantaged by stricter requirements and fees for birth registrations after 30 days.

5. Children facing challenges in accessing birth certificates

Certain groups of children struggle more than others to access birth certificates. They include:

- children in rural areas;
- children whose caregivers do not have identity documents;
- children living in the care of grandparents and other extended family members;
- orphaned and abandoned children; and
- children born in South Africa to foreign national parents.

[30] s9(1) of the Births and Deaths Registration Act.
[31] Department of Women, Children and People with Disabilities (2013), note 27 above.
[32] Department of Women, Children and People with Disabilities (2013), note 27 above.

5.1 Children living in rural areas

Children in rural areas are more likely not to be registered or to be registered late because of the limitations of the DHA's service delivery footprint, most notably in low population rural areas; higher levels of poverty; longer travel distances and the higher transport costs involved in reaching DHA offices.[33] In addition, cultural naming practices, which take longer than 30 days, are more prevalent in rural areas, and affect parents' ability to register the baby within 30 days as the baby has not yet been given a name and a name is required before registration can be made.[34]

Parents and family members attempting registrations after 30 days face extra burdens of proof in order to complete the late registration process successfully. This often requires multiple trips to obtain the supporting documents and return with them to DHA offices. Given the longer travel distances, resultant higher transport costs, and higher levels of poverty in rural areas, many parents and family members are prevented from completing the registration process.

Children in rural areas are also more likely than urban-based children to be born at home rather than in state health facilities. In these circumstances, their parents will not be able to produce the prescribed proof from the health facility to prove the child's birth. While alternative forms of proof are accepted at some DHA offices, this is practised inconsistently across the different DHA offices, with some offices turning away parents and primary caregivers if they cannot produce a maternity certificate.[35]

5.2 Children whose caregivers do not have identity documents

To register a child, the parent or family member has to have an official identity document (ID). There are South Africans who do not yet have IDs and struggle to access them because they are unable to prove their identities. As a result, they are unable to obtain birth certificates for their children.[36]

A mother experiencing this problem presented her story to the Parliamentary Portfolio Committee on Home Affairs at public hearings on the Births and Deaths Registration Amendment Bill in August 2010. Ms Nozuko Mengcane, aged 31 years, a mother of two young children, explained how she had been trying to access social grants for her children but had been unable to do so as she did not have an ID and could not obtain birth certificates for her children. Her own mother had died without identification or the issuance of a death certificate. The Alliance for Children's Entitlement to Social Security (ACESS),

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[33] Peters K & Williams L (2009) *Barriers to Accessing Comprehensive Social Security in Vulnerable Rural Areas in South Africa*. Cape Town: Alliance for Children's Entitlement to Social Security;
Giese S & Smith L (2007) *Rapid Appraisal of Home Affairs Policy and Practice Affecting Children in South Africa*. Cape Town: Alliance for Children's Entitlement to Social Security;
Save the Children UK (2006) *Legal and Policy Frameworks to Protect the Rights of Vulnerable Children in Southern Africa.* Pretoria: Save the Children UK.

[34] Alliance for Children's Entitlement to Social Security (2010), at slide 9, note 15 above.

[35] Lawyers for Human Rights (2012), at pg 2, note 16 above;
Children's Institute fieldworker's experience at the Home Affairs office in Port Elizabeth when presenting as a caregiver whose child had been born at home and therefore did not have a maternity certificate, February 2014.

[36] E-mail correspondence with Sanja Bornman, former staff member of the Alliance for Children's Entitlement to Social Security (ACESS), February 2014.

which assisted Ms Nozuko, reported that they were aware of a number of similar cases of caregivers without IDs in rural areas in the Eastern Cape and KwaZulu-Natal.[37]

5.3 Children in the care of extended family members

Analysis of children's care and living arrangements in South Africa reveals that a significant number of children (approximately 4.5 million, or 24% of all children) do not live with their biological parents, and are cared for by extended family members.[38] The reasons for this relate to poverty, labour migration, the search for educational opportunities, death of parents, and cultural child care practices. The majority of these children (78%) are not orphans but have a living parent who resides elsewhere, while approximately 1.5 million are orphans who have lost either both parents or their mother.[39] When looking at the younger age group where birth registration is most likely to occur, 10% of children under two years were not living with either of their parents in 2011.[40]

The law technically does allow extended family members/next of kin to register the birth of a child.[41] The law was clearer on this issue prior to the 2010 amendment to section 9(1) of the Act coming into effect on 1 March 2014[42] [discussed in section 7 below]. However, the burden of proof required by the law is high and does not take into account the lived realities of many extended family carers. For example, extended family members also have to supply a certified copy of the mother's ID, which proves a challenge if the mother has disappeared, is not contactable or has never had an ID.[43]

At an implementation level, DHA officials tend to discourage extended family members from registering births. Some DHA officials deter grandmothers by telling them they need a social worker report and/or a children's court order before they can register the child.[44] This is not an accurate interpretation of the law, and often results in the family member not returning to the DHA due to the scarcity of social workers to supply reports and process children's court inquiries. Some DHA officials simply tell extended family members they are not allowed to register the child because only the mother can register the child and send the extended family member away without assisting them.[45]

Due to the extra burden of proof and unlawful practices by DHA officials mentioned above, family members face increased costs as they attempt to gather the necessary proof, approach social workers or locate the mother.

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[37] E-mail correspondence with Sanja Bornman, note 36 above.
[38] Meintjes H & Hall K (2013) Demography of South Africa's children. In: Berry L, Biersteker L, Dawes A, Lake L & Smith C (eds) (2013) *South African Child Gauge 2013*. Cape Town: Children's Institute, University of Cape Town. Pg 87.
[39] Meintjes H & Hall K (2013), note 38 above.
[40] Meintjes H & Hall K (2013), note 38 above.
[41] See s9(1) of the Act, as amended in 2010, read with reg 3(2) of the 2014 Regulations on Birth Registration.
[42] See s9(1) of the Act prior to the 2010 Amendment.
[43] Giese S & Smith L (2007), at pg 64, note 33 above.
[44] Giese S & Smith L (2007), at pg 40 and 64, note 33 above;
Interview with Julie Todd, Director, Pietermaritzburg Child Welfare, note 24 above.
[45] Children's Institute fieldworker visit to DHA office in Port Elizabeth, February 2014. The fieldworker presented as a grandmother of a two-month-old baby whose mother had disappeared and left the child with the grandmother. The DHA official insisted that only the mother could register the child and that the grandmother therefore had to find the mother and bring her to the offices.

These challenges for family members are likely to be exacerbated as the 2010 amendment act and 2014 regulations come into effect as they could be narrowly interpreted to only allow family members to register the child if the child's biological parents are deceased, and are also likely to perpetuate DHA officials' insistence on a social worker report or children's court order. [See section 7.3.]

5.4 Orphaned children

Approximately 1.5 million of the 4.5 million children living with extended family members are orphans who have lost both parents, or their mother.[46] Orphan children are often separated from their documents, or did not have documents to start with, which translates into the need for their caregiver to make multiple trips to obtain documents and go through the more difficult late birth registration process. This requires time, and the proof requirement and cost involved are often prohibitive.[47] The caregivers of orphaned children whose mothers have died without ever having an ID document face an even more difficult journey.[48]

Some family members are able to access social workers to assist them by writing a report or getting a children's court order. However these processes take very long due to the scarcity of social workers [See chapter 8 on Children's Rights to be Protected from Violence for more details on the insufficient number of social workers.]

5.5 Children of migrant parents

Increasing numbers of people migrate to South Africa from neighbouring African countries, including Somalia, the Democratic Republic of the Congo, and Zimbabwe.[49] In 2011, there were approximately 220 000 asylum-seekers in South Africa; by the end of that year, only 63 000 had been recognised as refugees.[50] These statistics speak to the often several years of delay in processing of asylum claims. As a result of having to renew permits every few months and the long-term closure of three out of the six urban refugee reception centres, a large number of asylum-seekers are without documents or with lapsed documents, making them effectively illegal in South Africa. Children born in South Africa to migrant parents who do not yet have lawful permits for residence in South Africa due to these long delays in the permitting system, refusals of asylum, or the growing backlog in appealing refused asylum applications, currently all struggle to access birth certificates.[51]

[46] Meintjes H & Hall K (2013), at pg 88, note 38 above.
[47] Giese S & Smith L (2007), at pg 64, note 33 above.
[48] Interview with Hloniphile Dlamini, National Association of Child Care Workers (NACCW), July 2013.
[49] Schreier T (2012) Critical challenges to protecting unaccompanied and separated foreign children in the Western Cape: Lessons learned at the University of Cape Town Refugee Rights Unit. *Refuge*, 28(2).
[50] United Nations High Commissioner for Refugees (2012) *2014 UNHCR country operations profile - South Africa. Statistical snapshot*. Accessed on 5 March 2014: http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e485aa6&submit=GO.
[51] Lawyers for Human Rights (no date) *Towards Universal Birth Registration in South Africa: A Briefing Paper*. LHR. Pg 3.

6. Birth certificates as the gatekeeper to a range of services

While the CROC discourages states from excluding children from accessing services and protection based on absence of a birth certificate[52], in practice this does occur in South Africa and appears to be driven by an attempt to prevent foreign nationals without lawful residence from accessing state services. The result is the exclusion of particularly vulnerable children, both South African and non-South African, from a range of services essential to their survival, development and protection. If a child is not able to obtain a birth certificate, or his or her caregiver is not able to obtain an ID (or asylum-seeker permit, refugee permit, refugee ID or work permit in the case of migrant children), the child is at risk of being denied health care services, social security, education, protection services and alternative care.

It is important, therefore, that the systems and procedures to enable children and their caregivers to access identifying documents are transparent, clear and accessible to all. Moreover, recognising that it is the most vulnerable children who struggle to access birth certificates, enforcing a rigid requirement that a birth certificate must be produced to access services is likely to marginalise these already vulnerable children further, thus aggravating the denial of their rights to survival, development and protection. It is crucial, then, that there are provisions for exceptions to the requirement of a birth certificate in the rules governing access to other services, especially when the child affected is already in a vulnerable position as a result of poverty, abandonment, orphaning or statelessness.

6.1 Social security

6.1.1 Social grants

In terms of the Social Assistance Act 13 of 2004 and its accompanying regulations[53], all children lawfully resident in South Africa, including South African citizens, and children in the care of permanent residents or refugees, are entitled to the Child Support Grant (CSG), Foster Child Grant (FCG), Care Dependency Grant (CDG) and the Social Relief of Distress Benefit (SROD).[54]

For an application for a social grant to be successful, however, the caregiver must produce in respect of themselves (and their spouse if married) a South African ID, permanent residence permit, refugee permit or refugee ID; and in respect of the child, a birth certificate.[55] As a result of litigation by ACESS[56] on behalf of particularly vulnerable children who were being excluded from social grants due to this requirement, the DSD amended the regulations in 2008 to include a proviso that "if no valid proof is

[52] Hodgkin R & Newell P (2007), note 8 above.
[53] Social Assistance Act 13 of 2004: Regulations relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance. *Government Gazette* 31356, Notice R. 898 (22 August 2008). As amended up to April 2012.
[54] See s5(1) (c) of the Social Assistance Act and Reg 6(1) (g), 7(c), 8(c) and 9(1) (b).
[55] Reg 11(1) (a) and (b).
[56] *Alliance for Children's Entitlement to Social Security v Minister of Social Development.* Case no: 5251/2005 TPD. [Court-ordered settlement]

obtainable, a sworn statement or an affidavit in a format prescribed by the Agency may be accepted"[57].

Since the introduction of this proviso approximately 11 184 children have been assisted to obtain the CSG despite the absence of a birth certificate or ID for their caregivers.[58] Nevertheless, this is a very small number compared to the 2.35 million eligible children who are still excluded from accessing the CSG[59], with lack of documents continuing to be cited as an underlying barrier to accessing the CSG, especially for children under one year of age, orphans and refugees[60]. [See chapter 4 on the Child Support Grant for a detailed analysis of lack of documents as a barrier preventing access to the CSG.]

6.1.2 Social insurance

Certain contributory social insurance benefits are payable to the previously employed contributor's dependents in the event of the death of the employee. Benefits include the death benefit paid from the Unemployment Insurance Fund (UIF) and the Mines and Works Compensation Fund.

A study of children's access to social insurance benefits, conducted in 2008, revealed that vulnerable children who do not have documents such as birth certificates, parental ID documents and parental death certificates, face challenges in accessing their social insurance entitlements.[61] Whilst the DSD commissioned the study, there has been no further action to address the challenges identified therein.[62]

6.2 Health care services

South Africa has an expansive public health care system in terms of which all people in South Africa, regardless of the legality of their residency, are entitled to free or subsidised health care services. While there is no provision in health legislation that requires users to produce identifying documentation, there are reports that some facilities require identification documents including South African IDs, birth certificates, or refugee permits.[63]

6.3 Basic education

In terms of the South African Schools Act 84 of 1996[64] and the Admission Policy for Ordinary Public Schools[65], no child may be excluded from school on the grounds of his or her race or nationality, or lack

[57] Reg 11(1).
[58] Statistics supplied by SASSA for the period 2009 – 2013, via e-mail, on special request of the second author.
[59] South African Social Security Agency & UNICEF (2013) *Preventing Exclusion from the Child Support Grant: A Study of Exclusion Errors in Accessing CSG Benefits.* Pretoria: UNICEF South Africa.
[60] Martin P, Lane A, Ngobane C & Voko B (2013) *A Rapid Review of the Implementation of the Regulation 11(1) to the Social Assistance Act, 2004.* Cape Town: Alliance for Children's Entitlement to Social Security;
SASSA & UNICEF (2013), note 59 above.
[61] De Villiers N & Giese S (2008) *A Review of Children's Access to Employment-based Contributory Social Insurance Benefits.* Pretoria: UNICEF & Department of Social Development.
[62] Interview with Brenton van Vrede, Chief Director for Social Security, national Department of Social Development, July 2013.
[63] Human Rights Watch (2009) No Healing Here: Violence, Discrimination and Barriers to Health for Migrants in South Africa. New York: HRW;
Interview with Gwendolina Wolela, Refugee Rights Centre, Nelson Mandela Metro University, July 2013.
[64] s5.

of identification documentation. Where parents have not yet applied to the DHA, they must be provisionally admitted pending their application, and the school principal is required to assist them in obtaining their documents[66].

However, in practice parents are requested to submit, in the case of South African children, the child's birth certificate, immunisation card and previous school report when enrolling their children. In the case of migrant children, parents are required to produce either their permanent residence or refugee permit and their children's birth certificates, or proof of their asylum or residence application made to the DHA. While the Schools Act and Admissions Policy make it clear that this should not be imposed as an access criteria, there are reports that some schools apply it as such and also request additional documents like passports.[67] Many refugee children in particular are barred from enrolling at schools without proof of lawful residence.[68]

A further challenge in the education system is that an identification document with an identity number is required for sitting a matric exam.[69] For children born in South Africa to parents who are not citizens or permanent residents, this poses a challenge to them because the majority have only been issued with a handwritten birth certificate without an identity number.[70]

6.4 Protection services and alternative care

Protection services and access to alternative care for children who have been abused, neglected, abandoned or orphaned are provided for by the Children's Act 38 of 2005. Where a child is brought before the children's court, the court will not make an order confirming that the child is in need of care and protection, or an order placing him or her in alternative care (e.g. foster care or adoption) until the social worker submits the child's birth certificate.[71] Due to the extra proof required for applications to the DHA by social workers, especially for late birth registrations, as well as the scarcity of social workers, this requirement can delay the process of providing the child with appropriate protection services or placing him or her in alternative care. [See chapter 8 on the Children's Right to be Protected from Violence and chapter 9 on Children's Right to Alternative Care for more details on the insufficient number of social workers and the impact on children in the protection system.]

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[65] National Education Policy Act, 1996 (Act No. 27 of 1996): Admission Policy for Ordinary Public Schools. *Government Gazette* 19377, Notice 2432 (19 October 1998). As amended in 2006 – see section 19.
[66] National Education Policy Act, 1996 (Act No. 27 of 1996), note 65 above.
[67] Interviews with Gwendoline Wolela, Refugee Rights Centre, NMMU, note 63 above; Sbongile Mzulwinin, National Association of Child Care Workers (NACCW) in Mpumalanga; and Rosina Kanawanga, NACCW in North West, July 2013.
[68] Nkosi B (2011) Refugees 'barred' from schooling. *Mail & Guardian Online*, 4 November 2011.
[69] South African Schools Act 84 of 2006: Regulations Pertaining to the Conduct, Administration and Management of Assessment for the National Senior Certificate. *Government Gazette* 31337 (21 October 2008).
[70] Interview, Gwendoline Wolela, Refugee Rights Centre, NMMU, note 63 above.
[71] Interviews with Olebogeng Tladi, Social Worker, North West DSD; Nishkah Muller, Social Worker, Uviwe, Eastern Cape; Julie Todd, Director, Child Welfare Pietermaritzburg, KwaZulu-Natal, July 2013.

6.4.1 Requests by courts for unabridged birth certificates

Children's courts in KwaZulu-Natal are requesting that the social workers provide the child's unabridged (full) birth certificate[72] while children's courts in the North West accept abridged (short) birth certificates.[73]

This practice by the children's courts in KwaZulu-Natal poses a challenge if the child was born before March 2013 – the date when the DHA changed its policy from producing abridged certificates to unabridged certificates. The majority of children older than one year tend to have only an abridged birth certificate, and obtaining a full unabridged birth certificate involves a cost of R75 per certificate. A large proportion of child protection services in South Africa are provided by non-profit organisations (NPOs) with only partial funding from the state. These NPOs are under considerable financial strain and cannot cover the costs for unabridged birth certificates for the many children whom they assist. [See chapter 8 on Children's Right to be Protected from Violence for more details on the financial strain being faced by NPOs that provide child protection services.]

In the Durban area of KwaZulu-Natal, the children's courts are not only requesting unabridged birth certificates for new cases that reach them but are also refusing to extend existing alternative care orders where there is only an abridged birth certificate on file. (In term of the Children's Act alternative care orders have to be extended by the court every two years to remain valid.).[74] Due to the logistical and cost-related challenges that NPO social workers face in accessing unabridged birth certificates, they cannot obtain certificates in time, with the result that the children's alternative care orders expire before new ones are granted and the whole process has to be reinitiated with a full social worker investigation and new children's court inquiry. However, in the Pietermaritzburg area, the children's courts have been less severe; they have agreed to extend the alternative care orders for a year (based on the existing abridged certificate) to allow time for unabridged certificates to be obtained ahead of the next court date to review the alternative care order.[75]

It is not clear on what legal basis magistrates in some children's courts are insisting on unabridged birth certificates. Due to the change in the DHA's policy in 2013, such certificates are the norm only for children under one year. For older children, who generally do not have unabridged certificates, imposing this requirement on social workers is creating delays in access to protection services and alternative care.

6.4.2 First-time registrations for children who have been abandoned

In the case of an abandoned child who have never been registered with the DHA, the Births and Deaths Registration Act provides that their births must be registered by a social worker after the conclusion of an inquiry in terms of the Children's Act.[76] While the law did not impose such a requirement for orphaned children in the past, as of 1 March 2014 the law now requires the first time notice of the

[72] Interview with Julie Todd, Director, Pietermaritzburg Child Welfare, note 71 above.
[73] Interview with Olebogeng Tladi, Social Worker, North West DSD, note 71 above.
[74] Interview with Julie Todd, Director, Pietermaritzburg Child Welfare, note 71 above.
[75] Interview with Julie Todd, Director, Pietermaritzburg Child Welfare, note 71 above.
[76] s12(1) of the Births and Deaths Registration Act.

birth of orphaned children, in cases where a family member or legal guardian is not available to do so, to be submitted by a social worker.[77] [Discussed in more detail in section 7.3 below.]

From our interviews with social workers in the field it appears that the DHA was enforcing the requirement of a children's court order in the case of orphan children in 2013 already, despite the amendment not yet being in operation. There are also reports of the DHA imposing it in respect of applications by extended family members to register an orphan child even though this is not a requirement under the current law or the 2010 amendment act.[78]

Where a social worker identifies an abandoned child (or orphaned child without a family member to register them), the process for the registration of the child's birth is as outlined below.[79]

- After the initial court appearance for the temporary removal of the child in terms of section 151(1) of the Children's Act, the social worker concerned must approach a district surgeon for an age estimation of the child.
- The age estimation is then presented to the court with the social worker's report, and the children's court will then issue an order to the DHA to register the birth of the child and issue a birth certificate.
- The social worker then submits the children's court order to the DHA and applies for the birth certificate. At this stage of the process the child is likely to be older than 30 days, which means the social worker will need to follow the stricter requirements for late registration of births.
- Only once the birth certificate has been issued by the DHA can the children's court inquiry be heard and the final order as to the placement of the child be handed down.

Delays within the children's court processes to obtain the initial order for the DHA and delays at the DHA in issuing the birth certificates (especially if it is a late birth registration) are challenges raised by social workers in the field.[80] These in turn create further delay in the finalisation of placement orders such as foster care and adoption, which tend to take a very long time in their own right already.

Where the abandoned child is not a South African citizen, the DHA is less inclined to issue a birth certificate for the child despite a children's court order requesting it to do so.[81] Lawyers for Human Rights have observed that late birth registration applications to the DHA for children born to foreign nationals or unaccompanied foreign children can take upwards of six months.[82]

[77] s12(2) of the Births and Deaths Registration Act, as amended by the 2010 Amendment Act.
[78] Interview with Julie Todd, Director, Pietermaritzburg Child Welfare, note 71 above.
[79] Interviews with Olebogeng Tladi, Social Worker, North West DSD; Nishkah Muller, Social Worker, Uviwe, Eastern Cape; Julie Todd, Child Welfare Pietermaritzburg, KwaZulu-Natal, note 71 above.
[80] Interviews with Olebogeng Tladi, Social Worker, North West DSD; Nishkah Muller, Social Worker, Uviwe, Eastern Cape; Julie Todd, Pietermaritzburg Child Welfare, KwaZulu-Natal, note 71 above.
[81] Interview with Olebogeng Tladi, Social Worker, North West DSD, note 71 above.
[82] Lawyers for Human Rights (2012), at pg 8, note 16 above.

7. Procedures and requirements for birth registration

7.1 Law in flux

When we began to write this chapter the Births and Deaths Registration Amendment Act 18 of 2010 and its 2014 Regulations on Registration of Births were not yet in operation. However the week we went to print the regulations were promulgated and the amendment act and regulations was put into force. This required a rapid re-write of the chapter. As we had previously analysed the 2012 draft Regulations on Registration of Births we had good insight into the concerns raised by civil society with regards to the draft regulations. Many of the problematic aspects of the draft regulations have been addressed in the final regulations. Some however remain. As we describe the new law below we comment therefore on the amendments that could cause challenges for vulnerable children and their caregivers.

7.2 Overview of the Act

In terms of the Act the birth of every child that is born alive in South Africa must be registered with the DHA within 30 days of the birth.[83]

Registration of births after 30 days is also provided for. The law has changed with regards to registrations after 30 days. It appears as a slight change; behind it, however, lies a policy decision to improve early birth registrations and discourage registrations after 30 days so as to minimise opportunity for fraud:

- Prior to the 1 March 2014 the Act made a distinction between registrations before one year[84] and registration after one year[85], with registrations after one year considered "late registration of birth". For all registrations after 30 days the Act gave the Director-General the authority to demand reasons for the late notice and to take fingerprints of the child.[86] For registrations after one year, besides giving reasons for the late notice and the child's fingerprints, the applicants were obliged as well to comply with the requirements prescribed in the regulations for a late registration of birth.[87]
- As of 1 March 2014 when the 2010 amendment act came into force, the Act no longer makes a distinction between registrations after 30 days, but before one year, and registrations after one year. **All registrations after 30 days are now considered late registrations** and must comply with the prescribed requirements for a late registration of birth.[88] The 2014 regulations distinguish between two types of late registration (after 30 days but before one year, and after one year); set out the required proof for each type; and require applicants to pay a fee.

[83] s9(1).
[84] s9(3), prior to 1 March 2014.
[85] s9(3A), prior to 1 March 2014.
[86] s9(3) and reg 6(6) in the 1992 Regulations on Registration of Births, prior to 1 March 2014.
[87] s9(3A) and reg 6(7) – (10), in the 1992 Regulations on Registration of Births, prior to 1 March 2014.
[88] s9(3A) and reg 4 and 5 in the 2014 Regulations on Registration of Births, post 1 March 2014.

7.3 Who may register a child's birth?

7.3.1 Parents who are married at the time of the birth

Where the child's parents are married, the birth may be registered by either parent under the surname of the mother or father or under both of their surnames joined together.[89]

7.3.2 Parents not married at the time of the birth

Mothers

Where the parents are not married, the mother must register the child.[90] She can do so under her own surname and without including the father's particulars[91], or with the father's particulars if the father consents and acknowledges he is the father in writing on the birth notice form[92].

Fathers

The child can be registered under the father's surname if the mother and father are both present at the office of the DHA at the time of application for registration, if the mother consents in writing (on the birth notice form), and if the father acknowledges he is the father and consents in writing (on the birth notice form) to the child being registered under his name.[93]

When mothers and fathers want the unmarried father's particulars to be added to the birth notice form, the father will need to fill out an affidavit acknowledging paternity of the child.[94] If the unmarried father is not a South African citizen, permanent resident or refugee (with a section 24 refugee permit or a refugee ID) he will also need to submit a paternity test, obtained at his own cost, confirming paternity.[95]

Insertion of unmarried father's particulars at a later stage

The law also provides a mechanism for unmarried fathers to apply later to have their particulars inserted in the birth register of his child and an amended birth certificate issued.[96]

If the mother consents, the father and mother need to fill in an affidavit and submit it to the DHA.[97] If the father is not a South African citizen, he must also submit a paternity test at his own cost.[98] In the draft 2012 regulations the requirement of paternity tests was applied to all unmarried fathers whether South African or non-South African and was also required at first notice, not only if a later amendment was requested. The requirement was motivated by the DHA's desire to prevent foreigners from falsely

[89] s9(1) and (2).
[90] s10(2)(a) and reg 12(1) of the 2014 Regulations on Birth Registration.
[91] s10(1)(a).
[92] s10(1)(b) and 10(2).
[93] s10(1)(b).
[94] Reg 12(2)(b)(ii) and Annexure 2D/Form DHA-288/C of the 2014 Regulations on Registration of Births.
[95] Reg 12(2)(c) read with Annexure 2D/Form DHA-288/C of the 2014 Regulations on Registration of Births.
[96] s11(4)-(6).
[97] s11(4) and (4A) of the Act, as amended in 2010, and reg 14(1) of the 2014 Regulations on Registration of Births.
[98] s11(4A) of the Act, as amended in 2010, read with reg 14(2) of the 2014 Regulations on Registration of Births.

claiming to be fathers of children who are South African citizens as it then gives them a better chance of obtaining legal rights to remain in the country.[99] Fortunately the 2014 regulations have removed the requirement in respect of first application for fathers who have South African citizenship, permanent residency or a refugee permit, and in respect of applications for later insertions, by fathers who have South African citizenship.

However, paternity tests will remain a prohibitive barrier for unmarried fathers who cannot produce the required proof of citizenship, permanent residency or refugee status. Asylum-seeker permits for example will not suffice as proof of refugee status and unmarried fathers in possession of only asylum-seeker permits will have to submit paternity tests. The impact for children is that their right to know and be cared for by both their parents[100] is put at risk.

If the mother does not consent (due to refusal, death, absence or incapacity) the father will first have to apply to the High Court for a declaratory order that confirms his paternity before he can apply to the DHA.[101] Applications to the High Court are expensive and pose a prohibitive barrier for many unmarried fathers.[102] In KwaZulu-Natal the DHA is requesting that unmarried fathers obtain an order from the children's court but are unable to explain what type of order is required.[103]

7.3.3 Foreign national parents

The 2014 regulations distinguish between parents who are permanent residents or refugees (with section 24 refugee permits) versus parents with temporary residence, work permits, asylum-seeker permits or no documentation.

Permanent residents and refugees

The regulations provide that parents who are permanent residents or refugees should be assisted to obtain birth certificates the same way as South African parents.[104] This means they will get an unabridged birth certificate with a unique identity number.[105]

Temporary residents, asylum-seekers and parents with work permits

The regulations require the parents to submit a copy of their passport **and** visa, work permit or asylum-seeker permit.[106]

In the case of a child born to a non-South African mother and South Africa father, if the parents want to register the child as a South African citizen, the DHA requires that the father must apply to register the birth of the child under his surname with the mother present.[107]

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[99] Lawyers for Human Rights (2012), at pg 3 and 12, note 16 above.
[100] Art 7(1) of the UNCRC.
[101] s11(5) and (6) of the Act, as amended by the 2010 amendment Act, post 1 March 2014.
[102] Interview with Julie Todd, Pietermaritzburg Child Welfare, note 24 above.
[103] Interview with Julie Todd, Pietermaritzburg Child Welfare, note 24 above.
[104] Reg 7(1) of the 2014 Regulations on Registration of Births.
[105] Reg 7(2) of the 2014 Regulations on Registration of Births.
[106] Reg 8(3) (c) of the 2014 Regulations on Registration of Births.
[107] Department of Home Affairs (2013), note 22 above.

The new requirement of having to submit a valid passport **and** a visa or permit has been criticised by Lawyers for Human Rights as it is likely to prevent many children born to foreigners in South Africa from being registered, thereby putting such children at a high risk of growing up stateless.[108] There are many migrants in South Africa without proof of legal residence. There are also many asylum-seekers with valid asylum-seeker permits but without passports, who will be unable to obtain their passports from their country of origin. Many asylum-seekers' permits regularly expire as they endure the long delays in the refugee status application process. The result of the imposition of this requirement will be that many children born in South Africa to migrant parents (lawfully and unlawfully in the country) will be unregistered. This may result in them being denied access to a range of socio-economic services such as education and health care while living in South Africa. As mentioned, it will also put them at greater risk of remaining stateless as they may struggle to obtain birth registration in their parent's country of origin.

7.3.4 Family members, legal guardians and others

As of 1 March 2014, the law has changed with regards to family members and legal guardians' capacity to register the birth of a child in their care.

- Prior to 1 March 2014, if neither of the child's parents was "able" to give notice of the child's birth, "the person having charge of the child or a person requested to do so by the parents or the said person" was allowed to give notice of the child's birth to the DHA.[109] The description in the Act of persons, other than parents, allowed to register a child was very broad, and the circumstances were not confined to instances where the parents were deceased. In practice, people other than parents who were generally allowed to register births were family members, legal guardians and social workers.[110] The birth notice form also provided a category for "other".[111] When people other than parents applied for birth registration for a child older than one year, they were required to give reasons on a prescribed affidavit as to why they and not the parents were registering the birth.[112]
- As of 1 March 2014, a child's birth may be registered by "any one of his or her parents, or if the parents are deceased, any of the prescribed persons".[113] The 2014 regulations name "next-of-kin or legal guardians" as prescribed persons and reiterate the proviso that registration by such persons is allowed when "both parents … are deceased".[114]

The new limitation of requiring parents to be deceased before another person can register the child's birth does not take cognisance of the fact that over three million children do not live with their

[108] Lawyers for Human Rights (2012), at pg 4-5, note 16 above.
[109] s9(1) of the Act prior to the 2010 Amendment Act commencing on 1 March 2014.
[110] See Annexure A in the 1992 Regulations on Birth Registration, prior to being repealed on 1 March 2014
[111] See Annexure A in the 1992 Regulations on Birth Registration, prior to being repealed on 1 March 2014.
[112] See Reg 6(7)(a) read with Annexure 1C, section A, in the 1992 Regulations on Birth Registration, prior to being repealed on 1 March 2014.
[113] s9 (1) of the Act as amended by the 2010 Amendment Act commencing on 1 March 2014.
[114] Reg 3(2) of the 2014 Regulations on Birth Registration.

biological parents despite their biological parents being alive.[115] There are a number of reasons, other than death of a parent, which can result in a child being cared for by an extended family member [see section 5.3 above]. The 2010 amendment act and 2014 regulations do not take cognisance of this lived reality for many children in South Africa.

The amendment act and 2014 regulations also do not define "next of kin" which may lead to different interpretations by different officials.[116]

7.3.5 Social workers

In the case of an abandoned child who has never been registered, the Act requires a social worker to apply for registration but she or he must first initiate a children's court inquiry and get an order from the court to submit to the DHA.[117]

A new provision introduced as of 1 March 2014 includes orphaned children under the category that can be registered by social workers. A proviso is however included that this is the case only if none of the other persons contemplated in section 9(1) are listed on the notice of birth form (parents, legal guardians or family members).[118] This proviso means that this new section should not be interpreted to mean that all orphans now have to be registered by social workers. Due to the large number of orphans in South Africa (1.5 million if only maternal and double orphans are counted) and the shortage of social workers, such a requirement would delay the birth registration of orphans and result in their exclusion from other services such as social grants.

There is already a practice by some DHA offices to require family members caring for orphans to submit a social worker report or a children's court order. Misinterpretation of the new section 12(2) could deepen this unlawful practice and result in orphans' applications for birth certificates being delayed unnecessarily. It must therefore be made clear in the regulations, forms, and DHA training for officials, that extended family members and legal guardians are also allowed to register orphans and that they do not first need a social worker report or children's court inquiry in order to do so.

The amendment also does not apply to orphaned children who have already been registered and are already on the National Population Register. In such a case the child's family member or social worker could apply for a copy of the original birth certificate. However Annexure 22 in the 2014 regulations does not have a space for "family member" to apply for a copy of a birth certificate and appears to restrict applicants to parents, social worker or legal guardians. Hopefully this is a mistake and not intentional.

[115] Meintjes H & Hall K (2013), note 38 above.
[116] Lawyers for Human Rights (2012), at pg 1, note 16 above.
[117] s12(1) of the Act, as amended in 2010, and put into force on 1 March 2014.
[118] s12(2) of the Act, as amended in 2010, and put into force on 1 March 2014.

7.4 What form of birth certificate is issued?

7.4.1 Unabridged certificates are the norm since March 2013

Before March 2013, the DHA issued the first birth certificate for children born to South African citizens in an abridged form. This is a short version which only reflects the child's name, place of birth and unique identity number of the child and mother. If parents wanted the unabridged version, they had to make a second application. From March 2013 the DHA changed this practice and now issues only unabridged birth certificates.[119] These are issued immediately, and the first certificate is issued at no cost to the parents. The unabridged certificate contains additional information, including the father's name and identity number.

The DHA's stated reason for changing the policy is that the previous abridged birth certificate was easy to reproduce illegally and contained only the names and ID numbers of the baby and the mother. The department believes that, in contrast, the unabridged birth certificate will be more secure and reliable because it will contain particulars of both parents and their ID numbers and it will streamline DHA processes since only one document will be issued per birth rather than two.[120]

7.4.2 Children older than one are likely to have abridged certificates

Most children older than one year in South Africa are likely to have only an abridged birth certificate as the new system was implemented only in March 2013. It is important that other government departments take cognisance of this reality and do not now require caregivers to produce unabridged certificates in order to access services.

7.4.3 Children born prior to March 2013 to parents not in the NPR are likely to have handwritten abridged certificates

Children born to parents who are not registered in the National Population Register (NPR) (in other words, those who are not citizens or permanent residents) were prior to 1 March 2013 issued with an abridged handwritten birth certificate[121] without an identity number.

Handwritten birth certificates are often not accepted in other countries as proof of birth because they can be easily forged. This puts foreign children born in South Africa at a high risk of statelessness.[122] The fact that the certificates are handwritten also makes it difficult for applicants to access reproductions of the original from the DHA. For these reasons Lawyers for Human Rights has recommended that applicants be given computer-printed certificates.[123]

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[119] See Annexure 4/DHA-5 and Annexure 24/DHA-19 in the 2014 Regulations on Registration of Births.
[120] Department of Home Affairs (2013) Speaking notes for Home Affairs Minister Naledi Pandor, 4 March 2013 – following the briefing to media on Thursday 31 January 2013. Accessed at: www.home-affairs.gov.za.
[121] Reg 6(3)(b) of the 1992 Regulations on Registration of Births.
[122] Lawyers for Human Rights (2012), at pg 6, note 16 above.
[123] Lawyers for Human Rights (2012), at pg 6, note 16 above.

The DHA appears to have heeded this concern and the 2014 regulations include a *pro forma* computer-printed unabridged certificate.[124] However as this change only came into effect on 1 March 2014 there will be many children still with only a handwritten birth certificate.

The lack of an identity number can also pose problems for the child later in life, for example when he or she wants to write matric exams.[125] Unfortunately this has not been addressed in the 2014 regulations.[126]

7.5 Different requirements for early and late birth registrations

7.5.1 Birth registration within 30 days of birth

In order to register a birth within 30 days, the applicant must complete form DHA-24[127] at a DHA office. According to the regulations the following supporting documents are required:[128]

- Proof of birth on form DHA-24/PB[129], attested to by a medical practitioner who attended to the birth or examined the mother or the child after the birth. This replaces the previous requirement of a maternity certificate or clinic card.
- If the birth did not occur at a health institution, then an affidavit must be submitted by a South African citizen, who witnesses the birth of the child, using form DHA-24/PBA.[130]
- Biometrics of the child (palm, foot or fingerprint).
- Fingerprints of the parents.
- Certified copy of the identity document of the mother or father or both parents.
- Certified copy of the parents' marriage certificate, where applicable.
- Certified copy of a valid passport and visa or permit if one parent is a non-SA citizen.
- A certified copy of the identity document or valid passport and visa or permit of the next of kin or legal guardian, where applicable.
- A certified copy of a death certificate of any deceased parent, where applicable.
- An affidavit, using form DHA-288/B[131], by the next of kin or legal guardian explaining why they and not the parents are registering the child's birth, and giving the details of the child's grandparents (when they differ from the applicant).
- If the child is abandoned and the birth is being registered by a social worker, a copy of the children's court order ordering the registration of the birth is also required.[132]

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[124] DHA 19/Annexure 24 in the 2014 Regulations on Registration of Births.
[125] Interview, Gwendoline Wolela, Refugee Rights Centre, NMMU, note 63 above.
[126] Reg 8(5) of the 2014 regulations states that the certificate will not contain an identity number.
[127] Reg 3(3) and annexure 1A of the 2014 Regulations on Registration of Births.
[128] Reg 3(3)(a)-(j) of the 2014 Regulations on Registration of Births
[129] Annexure 1D in the 2014 Regulations on Registration of Births.
[130] Annexure 1E in the 2014 Regulations on Registration of Births.
[131] Annexure 2C in the 2014 Regulations on Registration of Births.
[132] Annexure 1A in the 2014 Regulations on Registration of Births;
Interviews with Olebogeng Tladi, Social Worker, North West DSD; Nishkah Muller, Social Worker Uviwe, Eastern Cape; Julie Todd, Director, Child Welfare Pietermaritzberg, Kwa-Zulu Natal, note 71 above.

The affidavit by the next of kin and the requirement of a death certificate are new requirements which add to the burden of proof for extended family members wanting to register children in their care.

The standardised proof of birth form and alternative option to complete an affidavit if the child was not born in a health institution are welcome improvements. However, allowance needs to be made for applicants with children born prior to the introduction of the standardised proof of birth form to submit previously acceptable documents such as the maternity certificate.

7.5.2 Registrations after 30 days but before one year

Applicants must fill in form DHA-24/LRB[133] at a DHA office. The main difference between this form and the form for early birth registrations is that it contains space for the applicant to explain the reason why they did not register the child within 30 days.

In addition to the list of documents required for birth registrations before 30 days (as outlined in section 7.5.1 above) the following documents are required:[134]

- An affidavit by one of the parents explaining why the application is late, using form DHA-288/A.[135]
- Proof of payment of the applicable fee.[136]

It is not clear why the parent has to state on two separate forms (DHA-24/LRB and DHA-288/A) why the application is late. The charging of a fee for registrations during this period is problematic given that about half of birth registrations in South Africa are still occurring after 30 days.

7.5.3 Registrations after one year of birth

Applicants must fill in form DHA-24/LRB[137] at a DHA office. The form contains space for the applicant to explain the reason why they did not register the child within 30 days.

In addition to the list of documents required for birth registrations within 30 days (see 7.5.1 above), the following documents are required:[138]

- An affidavit by one of the parents explaining why the application is late, using form DHA-288/A.[139]
- Proof of payment of the applicable fee.[140]
- Two recent photos of the child if he or she is seven years or older.[141]
- A prescribed affidavit, using form DHA-288[142], by the parent (or family member, legal guardian, or social worker if the parent is deceased) which specifies the identity, status and date of birth of the

[133] Annexure 1B in the 2014 Regulations on Registration of Births.
[134] Reg 4 (3)(a)-(l) of the 2014 Regulations on Registration of Births.
[135] Annexure 2A in the 2014 Regulations on Registration of Births.
[136] Reg 4(3)(l) in the 2014 Regulations on Registration of Births.
[137] Annexure 1B in the 2014 Regulations on Registration of Births.
[138] Reg 5(3)(a)-(m) in the 2014 Regulations on Birth Registration.
[139] Annexure 2A in the 2014 Regulations on Birth Registration.
[140] Reg 5(3)(m) in the 2014 Regulations on Birth Registration.
[141] Annexure 1B in the 2014 Regulations on Birth Registration.
[142] Annexure 2B in the 2014 Regulations on Birth Registration.

child and includes information on the child's life events such as crèche attended, primary school, secondary school and religious ceremonies.

8. Recommendations

8.1 Improve transparency, public education and awareness

The forms, procedures, proof and supporting documents required for accessing birth certificates should be transparent and clear to the public and to officials. Currently applicants are not allowed to leave the DHA offices with a copy of the application form[143], the forms are not available on the DHA website, and due to the delay in the changes to the law there is a lot of uncertainty as to the requirements of the law.

While the 2014 regulations and forms are a major improvement with regards to clarity and transparency, the general public will not be able to access them. It is vital therefore that:

- the DHA and DOH develop and produce public educative materials (eg posters, pamphlets and DVDs) and disseminate them widely at all health facilities, DHA and DSD offices;
- the public educative materials should state clearly which supporting documents are compulsory and which are discretionary for each type of birth registration (i.e. those within 30 days, after 30 days, after one year) and for each category of applicant (parent, social worker, family member); and
- the application forms and prescribed *pro forma* affidavits should be made available at DHA offices (for applicants to remove from the offices if necessary) and on the DHA website to enable applicants to see what information and documents are required.

8.2 Ensure DHA officials are trained on the new law and sensitised to the lived realities of children and their caregivers

The DHA reported to Parliament that it had begun to train officials on the amendment act and regulations in 2012 already. However at this stage the regulations were only in draft form and contained several problematic provisions that were addressed before the final regulations were promulgated on 1 March 2014.

It is important that all DHA officials (including and especially those who have already been trained on the 2012 draft regulations):

- receive updated training on the 2014 regulations,
- are sensitised to the lived realities of children and their caregivers, such as the fact that over three million children live with extended family members; and are trained not to discourage, deter or turn away caregivers of vulnerable children; and

[143] Children's Institute fieldworker experience at the DHA offices in Port Elizabeth, February 2014.

- are educated on the correct interpretation of the law especially with regards to areas where misinterpretations are rife, such as:
  a) the misinterpretation that extended family members cannot register a child in their care;
  b) the misinterpretation that only the mother can register the child;
  c) the misinterpretation that extended family members need a social worker report or court order before they can register a child in their care; and
  d) the misinterpretation that only social workers can register orphans.

8.3 Ensure late birth registration is accessible for vulnerable children

The evidence reviewed for the purposes of writing this paper reveals that it is especially vulnerable children who are most likely to need the mechanism of late birth registration. While the state's drive to improve the rate of birth registrations within 30 days, and to reduce the likelihood of fraud in late birth registrations, are legitimate policy imperatives, they should not be pursued in a way that results in vulnerable children being further marginalised. In particular we recommend that:

- the DHA should not prescribe a fee for late registration;
- the regulations should be amended to delete the requirement of proof of payment of a fee for both types of late birth registration; and
- the requirement that applicants registering in the period 30 days to one year have to explain in writing why their application is late, in two separate forms, should be changed to require only one form.

8.4 Allow unmarried fathers to approach the children's court

Unmarried fathers who want to add their particulars to the birth register of their child but who are unable to get consent from the mother, due to the mother refusing or being unable or deceased, currently have to approach the High Court for relief. Applications to the High Court are prohibitively expensive and not accessible to the majority of unmarried fathers. The Births and Deaths Registration Act should therefore be amended to allow unmarried fathers to also approach the children's court, not just the High Court. The children's court is more accessible being at magistrate court level, less costly, and well- practiced in making decisions based on children's best interests.

8.5 Ensure that children (orphans and non-orphans) in care of extended family members can access birth certificates

The limitation in the Act and the 2012 regulations of requiring parents to be deceased before another family member can register the child's birth does not take cognisance of the fact that more than three million children do not live with their biological parents for reasons other than the death of their parents. These children will become at increased risk of not being registered or of being registered late if the law and practice by DHA officials prevent or deter their caregivers from completing their registrations.

- The Act, regulations and forms should be amended to remove the requirement that the parents be deceased before an extended family member can register the child, and to recognise the range of reasons why an extended family member may need to register a child.
- Next of kin/family members should be defined in the regulations to prevent different interpretations by different DHA officials. A definition already exists in section 1 the Children's Act that could be used in part or entirety to ensure continuity across laws as well as a uniform interpretation by DHA officials.
- To address the current misinterpretation of the law, it should be expressly stated in the regulations and clarified in the forms that extended family members caring for children (orphans and non-orphans) do not first need to obtain a social worker report or children's court order before they can obtain a birth certificate for a child in their care.
- Annexure 22 in the 2014 regulations currently does not have a space for "family member" to apply for a copy of a birth certificate and appears to restrict applicants to parents, social worker or legal guardians. The annexure should be amended and re-promulgated so as to ensure family members caring for children can request copies.

8.6 Ensure children born to foreign national parents can access birth certificates

The onerous requirement in the 2014 regulations that foreign national parents produce both proof of lawful residence in South Africa **and** a copy of their passports should be amended to require only one document proving identity, and to allow for the use of alternative forms of recognising their identity where none of the documents are available.

8.7 Improve collaboration between DHA and DOH with regards to proof of birth

The 2014 regulations now prescribe a proof of birth form that needs to be filled in by medical practitioners at health facilities where children are born. This standardised form will hopefully remove the confusion with regards to the exact kind or proof of birth form that is required. It is important that the DHA and DOH collaborate to ensure that all health facilities (public and private) are informed of this change in the law and have copies of the prescribed form to fill in.

8.8 Allow previously prescribed forms of proof of birth to be accepted during the transition between the old and new law

Because many children born before 1 March 2014 will not have the newly prescribed standardised proof of birth form, previously acceptable forms of proof of birth, such as maternity certificates or clinic cards, should be allowed to be submitted and should be accepted by DHA for a reasonable period of time as the transition is made from the old law to the new law.

8.9 Improve interdepartmental collaboration for children in need of care and protection

Reports from social workers reveal different practices by different children's courts with respect to the form of birth certificate required (abridged or unabridged). The DHA, DSD and DOJ should meet to clarify what is required and should not impose additional unnecessary requirements.

This clarification should then be translated, as a short-term solution, into a practice note or guidelines and, as a longer-term solution, into amendments to the regulations to the Children's Act and to the Births and Deaths Registration Act. The guidelines and regulations should specify that:

- the cost of obtaining birth certificates and reproductions of birth certificates for purposes of children's court inquiries should be waived by the DHA; and
- all birth certificate applications and requests for copies required for the purpose of a children's court inquiry or requested by a children's court should be concluded within an expedited period of time.

8.10 Ensure lack of birth certificates does not result in vulnerable children being barred access to essential services

Recognising that it is the most vulnerable children who struggle to access their birth certificates, it is crucial that where laws governing access to services require the submission of a birth certificate, there should always be an accessible exception to the rule. Regulation 11(1) to the Social Assistance Act is an example of an exception to the rule.

However such provisions are seldom used by officials unless they are specifically educated and encouraged to do so by their managers. Officials should therefore be trained to assist caregivers and children who do not have birth certificates and not to discourage them and turn them away.

8.11 Monitor and evaluate the impact of the law for children and families

While South Africa has a diverse range of family forms and a declining marriage rate[144], our analysis reveals that the birth registration law (past and recently amended) favours the "nuclear" family unit of a married biological mother and biological father. Applications for registration of children by extended family members and unmarried fathers, though technically allowed in terms of the law, are discouraged and not supported in practice.

Primary research should be conducted with decision-makers and officials to establish the motives for this approach, and with caregivers, parents and children to establish the impact of this approach on their daily lives, decisions about care arrangements and access to services.

[144] Posel D & Casale D (2013) Sex ratios and racial differences in marriage rates in South Africa. *Applied Economics* 45(3): 663-676;
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Chapter 3

Children's rights to basic nutrition: A review of South Africa's subsidy for ECD programmes

Lizette Berry and Paula Proudlock

Contents

1. Introduction

Children need adequate nutritious food to survive and develop to their potential. While parents are primarily responsible for providing their children with food, the state has an obligation to support families in need by providing material assistance and a range of support programmes. One of the programmes South Africa has adopted to give effect to its obligation to realise children's right to basic nutrition is the state subsidy transferred to non-profit organisations (NPOs) providing early child development (ECD) centres and programmes. This chapter analyses the role that the ECD subsidy plays in realising children's right to basic nutrition and makes recommendations for improvement.

2. Rights analysis

2.1 International and regional law

Children's right to adequate nutritious food is recognised by the United Nations Convention on the Rights of the Child (1989) (UNCRC) and the African Charter on the Rights and Welfare of the Child (1990) (ACRWC). Both instruments make their main references to nutrition in the context of the child's right to the enjoyment of the highest attainable standard of health, and oblige the state to:

- provide adequate nutritious food and clean drinking water to combat malnutrition and disease; and

- ensure that all segments of society (including ECD practitioners) are educated and supported in the use of basic knowledge of child nutrition, hygiene and environmental sanitation.[1]

While recognising that the child's parents and family are primarily responsible for providing for the child's nutritional needs, the two instruments place an obligation on the state to support families in need by providing material assistance and support programmes with regard to nutrition.[2] To give effect to its obligations, the state must take all appropriate legislative, administrative and other measures to the maximum extent of its available resources.[3]

When interpreting what article 24 of the UNCRC means in relation to nutrition, the UN Committee on the Rights of the Child (CROC) has recommended that:

> *[s]chool feeding is desirable to ensure all pupils have access to a full meal every day, which can also enhance children's attention for learning and increase school enrolment. The Committee recommends that this be combined with nutrition and health education, including setting up school gardens and training teachers to improve children's nutrition and healthy eating habits.*[4]

The CROC's interpretation could be read expansively as referring to the provision of daily meals not only in schools but also in pre-schools, crèches and other kinds of ECD programmes.

2.2 South African constitutional law

The Constitution of the Republic of South Africa Act 108 of 1996 recognises everyone's right to have access to sufficient food and water.[5] The state is under an obligation to take reasonable legislative and other appropriate measures within its available resources to progressively realise these rights.[6]

Section 28(1)(c) provides additional protection for children by recognising the right of every child to "basic nutrition".[7] Since children's right to basic nutrition is not expressly limited by the concept of progressive realisation, human rights experts have interpreted this to mean that the state is under an obligation to immediately ensure a basic level of nutrition for all children.[8]

The Constitutional Court has not as yet provided an interpretation specifically of children's right to basic nutrition. However, in two cases before the Court – the one dealing with the rights to housing,

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[1] Art 24 of the UNCRC and Art 14 of the ACRWC.
[2] Art 27 of the UNCRC and Art 20 of the ACRWC.
[3] Art 4 of the UNCRC.
[4] Committee on the Rights of the Child (2013) *General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24).* CRC/C/GC/15, 17 April 2013. Geneva: United Nations. Para 46.
[5] s27(1)(b).
[6] s27(2).
[7] s28(1)(c).
[8] See: De Vos P (1995) The economic and social rights of children and South Africa's transitional Constitution. *South Africa Public Law,* (10):233;
Creamer K (2004) The implication of socio economic rights jurisprudence for government planning and budgeting: The case of children's socio economic rights. *Law, Democracy and Development,* (8):208-221;
Liebenberg S (2006) The interpretation of socio-economic rights. In: Woolman S & Bishop M (eds) *Constitutional Law of South Africa.* Cape Town: Juta. Chapter 33;
Stewart L (2008) Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socio-economic rights of others. *South African Journal on Human Rights*, (24):472.

the other, with those to health care services[9] – it has interpreted section 28(1)(c) as a whole, finding that, in the case of children in the care of their families, families bear the primary responsibility for taking care of children's basic needs as set out in s28(1)(c)[10]. The Court made it clear, nevertheless, that the state is still under an obligation to support families to care for their children, an obligation which it has to fulfil by providing families with:

> *access to land in terms of section 25, access to adequate housing in terms of section 26 as well as access to health care, food, water and social security in terms of section 27. One of the ways in which the state would meet its section 27 obligations would be through a social welfare programme providing maintenance grants and other material assistance to families in need in defined circumstances.*[11]

The Court's illustration of how the state would meet its obligations mirrors article 27(3) of the UNCRC, which provides that "in cases of need [states shall] provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing".

2.3 Summary of rights and obligations

Parents and families are primarily responsible for providing children with basic nutrition, but where parents are unable to do so, the state has an obligation to provide material assistance and support programmes. This obligation must be realised by taking reasonable legislative and other appropriate measures to the maximum extent of the state's available resources.

The government's National School Nutrition Programme, Child Support Grant and ECD subsidy are all forms of material assistance or support programmes aimed at assisting parents and families in need to provide for their children's nutritional and other socio-economic needs.

To assess the state's progress in realising children's right to basic nutrition, the reasonableness test can be applied to these programmes. This test was developed by the Constitutional Court to assess the constitutionality of the state's socio-economic programmes, and it requires that the following questions be asked:

- Is the programme reasonably conceptualised (in other words, is its design capable of facilitating the realisation of the right)?
- Is the programme comprehensive, coherent and co-ordinated?
- Have appropriate financial and human resources been allocated for the implementation of the programme?
- Is the programme being reasonably implemented?
- Is the programme transparent and have its contents been made known effectively to the public?

[9] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC); *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC).
[10] *Grootboom*, para 77, note 9 above.
[11] *Grootboom,* para 78, note 9 above.

- Is the programme balanced and flexible, and does it make provision for short-, medium- and long-term needs? In particular, the programme should not exclude a significant segment of the population, especially not those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril.[12]

The questions above guide this chapter's analysis of the ECD subsidy.

3. The status of child nutrition in South Africa

Undernutrition continues to be identified as a key contributing factor to South Africa's high rate of child morbidity and mortality.[13] An audit conducted in 2009 of child deaths in the country's hospitals showed that 60% of the children who died were severely malnourished or underweight for their age.[14]

The South African Health and Nutrition Examination Survey (SANHANES-1)[15], completed in 2012, provides recent data on the status of child nutrition. While the data on children is considered nationally representative, the child population sample size is relatively small and few White and Indian children were included in the sample. Nevertheless, the data is comparable to the 2005 National Food Consumption Survey (NFCS).[16] Another survey which can be drawn upon for child anthropometric data is the National Income Dynamics Study 2008 (NIDS).[17] Reliable rates of exclusive breastfeeding are available only from the 2003 Demographic and Health Survey[18], which indicates that only 8% of infants were exclusively breastfed for the first six months after birth.

[12] *Grootboom,* paras 30 and 39-44, note 9 above;
Treatment Action Campaign, para 123, note 9 above.
[13] Bamford L (2013) Maternal, newborn and child health. In: Padarath A & English R (eds) *South African Health Review 2012/13*. Durban: Health Systems Trust;
Hendricks M & Bourne L (2010) An Integrated approach to malnutrition in childhood. In: Kibel M, Lake L, Pendlebury S & Smith C (eds) *South African Child Gauge 2009/2010.* Cape Town: Children's Institute, University of Cape Town.
[14] Stephen CR, Bamford LJ, Patrick ME & Wittenberg DF (eds) (2011) *Saving Children 2009: Five Years of Data: A Sixth Survey of Child Healthcare in South Africa.* Pretoria: Tshepesa Press, Medical Research Council & Centers for Disease Control and Prevention.
[15] Shisana O, Labadarios D, Rehle T, Simbayi L, Zuma K, Dhansay A, Reddy P, Parker W, Hoosain E, Naidoo P, Hongoro C, Mchiza Z, Steyn NP, Dwane N, Makoae M, Maluleke T, Ramlagan S, Zungu N, Evans MG, Jacobs L, Faber M & SANHANES-1 Team (2013) *South African National Health and Nutrition Examination Survey (SANHANES-1)*. Cape Town: HSRC Press.
[16] See: Labadarios D (2007) *National Food Consumption Survey: South Africa 2005*. Pretoria: Directorate: Nutrition, Department of Health.
[17] W Sambu, Children's Institute, University of Cape Town, analysis of the *National Income Dynamics Study 2008, Wave 1*. See: Sambu W (2013) Malnutrition in children: stunting, wasting and underweight. In: Berry L, Biersteker L, Dawes A, Lake A & Smith C (eds) *South African Child Gauge 2013*. Cape Town: Children's Institute, University of Cape Town. Pg. 99.
[18] Department of Health, Medical Research Council & OrcMacro (2007) *South Africa Demographic and Health Survey 2003*. Pretoria: Department of Health.

Table 1: Anthropometric status of children in South Africa in 2012

	0 – 14 years	0 – 5 years	0 – 3 years
Stunting	15%	22%	27%
Wasting	3%	3%	3%
Underweight	6%	5%	6%

Source: Shisana O, Labadarios D, Rehle T, Simbayi L, Zuma K, Dhansay A, Reddy P, Parker W, Hoosain E, Naidoo P, Hongoro C, Mchiza Z, Steyn NP, Dwane N, Makoae M, Maluleke T, Ramlagan S, Zungu N, Evans MG, Jacobs L, Faber M & SANHANES-1 Team (2013) *South African National Health and Nutrition Examination Survey (SANHANES-1)*. Cape Town: HSRC Press.

Notes: Stunting (low height-for-age), wasting (low weight-for-height) and underweight (low weight-for-age) are based on cut-offs of < - 2 standard deviations from the norm. Underweight reflects acute and chronic malnutrition; stunting points to chronic malnutrition; and wasting is the result of acute malnutrition.

Comparisons between the 2005 and 2012 surveys show that while the prevalence of undernutrition decreased in this period for children younger than 10 years, stunting increased among children aged 1 – 3 years, with severe stunting increasing in this age group by almost one third. A further worrying trend is the rapid rise in overweight and obesity levels among children since 2005.[19] In addition, the national averages mask high rates of wasting and underweight in certain provinces, with rates in the North West, Free State and Northern Cape being of concern. Undernutrition rates are higher in rural informal areas than elsewhere; they are higher, too, among Coloured children when compared to Black African children under 15 years of age.[20]

Sufficient micronutrient intake is critical for optimal growth and development as well as the prevention of illness and death. The 2012 SANHANES-1 shows that for children aged 0 – 5 years, 44% were deficient in vitamin A.[21] While this represents a steady decline in vitamin A deficiency in this age group since 2005, current vitamin A deficiency rates are still considered extremely high and, according to World Health Organisation classifications, South Africa has a severe public health problem.[22] The status of anaemia and iron deficiency anaemia in children under five years of age has improved significantly since 2005, but the iron deficiency rate shows little change, with 8% of children under five years suffering from iron deficiency in 2012.[23] HIV-infected children generally show higher levels of malnutrition and micronutrient deficiency than non-infected children.[24]

Poor access to food is, of course, one of the main causes of child undernutrition.[25] Although South Africa is a middle-income country, large sectors of the population experience hunger and food insecurity.[26] According to the 2011 General Household Survey,[27] 14% of children lived in households

[19] Shisana O et al (2013), note 15 above.
[20] Shisana O et al (2013), note 15 above.
[21] Shisana O et al (2013), note 15 above.
[22] Shisana O et al (2013), note 15 above.
[23] Shisana O et al (2013), note 15 above.
[24] Hendricks M & Bourne L (2010) An integrated approach to malnutrition in childhood. In: Kibel M, Lake L, Pendlebury S & Smith C (eds) *South African Child Gauge 2009/2010*. Cape Town: Children's Institute, University of Cape Town.
[25] This is compounded by inappropriate feeding practices, particularly those applying to infants.
[26] Hendricks M & Bourne L (2010), note 24 above.
[27] Hall K, Nannan N & Sambu W (2013) Child health and nutrition. In: Berry L, Biersteker L, Dawes A, Lake L & Smith C (eds) *South African Child Gauge 2013.* Cape Town: Children's Institute, University of Cape Town.

where child hunger was reported. Provinces with comparatively high levels of child hunger include the Northern Cape (33.5%), Eastern Cape (18%), KwaZulu-Natal (16%), Free State (16%) and Western Cape (16%). Child hunger rates as captured in the General Household Survey (GHS) have declined since 2002 from 30% to 14% in 2011, suggesting improved access to food.[28] However, the GHS food security measure is not considered robust[29], and its self-reported nature has raised concerns about the accuracy of the data. The SANHANES-1 survey, by contrast, used an internationally validated hunger scale, finding that 28% of households were at risk of hunger in 2012 and that a further 26% actually experienced hunger; the majority of the latter were in rural and urban informal areas.[30]

Since 2002, social grants have expanded and are particularly reaching households with children. Chief among them is the Child Support Grant, which has been proven to be making an important contribution to the alleviation of poverty[31] and hence to food insecurity as well [See chapter 4 on the Child Support Grant].

4. Overview of South Africa's laws, policies and programmes

The government has established a suite of laws, policies and programmes to address child hunger and malnutrition, in addition to which it recognises the value of supporting the nutrition of pregnant women.[32] Relevant laws, policies, programmes and interventions include:

4.1 Laws

- The 1994 Regulations of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972, which provide for the iodisation of salt.[33]
- The 2003 Regulations of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972, which provide for the fortification of maize and bread flour with zinc, iron and six vitamins.[34]
- The 2012 Regulations of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972, which regulate foodstuffs for infants and young children.[35]
- The National Health Act 60 of 2003, which obliges the state to provide "health services" and includes "basic nutrition" within the definition of health services.[36]

[28] Hall K et al (2013), note 27 above.
[29] Jacobs P (2009) The status of household food security targets in South Africa. *Agrekon*, 48(4):410-433.
[30] Shisana O et al (2013), note 15 above.
[31] Budlender D & Woolard I (2012) Income inequality and social grants: Ensuring social assistance for children most in need. In: Hall K, Woolard I, Lake L & Smith C (eds) *South African Child Gauge 2012*. Cape Town: Children's Institute, University of Cape Town.
[32] Hendricks M & Bourne L (2010), note 24 above.
[33] Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972: Regulations Relating to Salt. *Government Gazette* 16078, Notice R. 5426 (18 November 1994).
[34] Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972: Regulations Relating to the Fortification of Certain Foodstuffs. *Government Gazette* 24715, Notice R. 7634 (7 April 2003).
[35] Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972: Regulations Relating to Foodstuffs for Infants and Young Children. *Government Gazette* 35941, Notice R. 991 (6 December 2012).
[36] s1 – definition of "health services" read with ss2 and 3.

- The Social Assistance Act 13 of 2004, which provides for a range of social grants, including the Child Support Grant and the Social Relief of Distress Grant.
- The Children's Act of 2005 and its 2010 regulations[37], which enable and regulate the provision of ECD services to young children. Registered ECD programmes run by NPOs can apply for funding from the provincial departments of social development to subsidise children whose caregivers earn below a certain income threshold. This funding is provided in the form of a per-child subsidy of R15 per day. The Act's Norms and Standards stipulate that programmes are obliged to ensure the provision of a daily nutritious meal.

4.2 Strategic plans, campaigns and guidelines

- The Tshwane Declaration of Support for Breastfeeding (2011)
- A Roadmap for Nutrition in South Africa 2013 – 2017 (2013)
- Health systems strengthening and primary health care re-engineering (2011)
- Food for All Campaign, under the umbrella of the Zero Hunger Campaign (launched in 2011)
- National Integrated Plan for ECD 2005 – 2010 (NIP for ECD) (2005)
- Clinical Guidelines: Prevention of Mother-to-Child Transmission (2010)[38]

4.3 Programmes

- National School Nutrition Programme (NSNP)
- Vitamin A supplementation programme
- Parasite control
- Immunisation
- Integrated food security and nutrition programme
- Baby-friendly hospital initiative

This chapter focuses on the funding which the Department of Social Development (DSD) transfers to ECD programmes[39] in terms of the Children's Act, and the nutritional value of the meals provided with this funding. This area has been selected for scrutiny because, compared to many other laws and programmes relating to nutrition, it is fairly under-researched. For information about the proven impact of the Child Support Grant on children's nutritional status and the challenges in access and adequacy that need to be addressed to maximise this successful social grant, see chapter 4.

[37] Children's Act 38 of 2005: General Regulations Regarding Children. *Government Gazette* 33076, Notice 26, Regulation 9256 (1 April 2010). [Hereafter the Children's Act Regulations (2010)]
[38] Includes guidance that HIV-positive mothers on ARVs should continue breastfeeding until 12 months.
[39] ECD programmes as defined in the Children's Act can either operate within partial care facilities, commonly known as ECD centres, or through community- or home-based programmes.

5. The role of the ECD subsidy in realising children's right to nutrition

5.1 Centre-based ECD programmes

Young children need to enjoy access to nutritious foods, in the appropriate quantities and form, to ensure that their dietary requirements are adequately met. While primary caregivers have the main responsibility to provide meals and ensure adequate food intake, many do not care for their children full-time but instead transfer responsibility for child care, including feeding, to ECD programmes for a period of time during the day. These programmes are run in crèches, pre-schools and other early learning centres for young children.

ECD programmes for children who are not yet of school-going age are provided on the whole by NPOs and the private sector. Government support is available mainly via a per-child subsidy paid to NPOs for poor children attending ECD centres. However, because it does not cover the full expense of running an ECD programme, centre managers have to make up the cost difference by generating funds through other means, primarily by charging fees to the caregivers.[40]

The Children's Act requires that government's funding of ECD programmes should prioritise families who lack the means to provide food, shelter and other basic necessities to their children; and children with disabilities.[41] As such, the subsidy is means-tested to facilitate targeting of poor children. Although access to ECD centres has increased in recent years, with 38% of children under five years attending a learning facility in 2011[42], this should not be taken to imply that 38% of children are therefore benefitting from the ECD subsidy. The subsidy is available only to children attending those non-profit centres that have registered as partial care facilities and as ECD programmes, applied for the subsidy, and succeeded in obtaining it. According to the Department of Social Development, in 2012, approximately 485 000 children under five years attending an ECD centre were subsidised by government.[43] Barberton estimates that while there are 2.6 million children aged 0 – 5 years in the bottom two poverty quintiles, only 16% (412 435) of these poor children would be covered by the subsidy in 2013/14.[44]

In sum, then, large numbers of children are excluded from access to the subsidy. These exclusions are due to several barriers:

- Most children younger than three years do not attend centres: only about 21% of them attended an ECD centre or crèche in 2011.[45] Although home-based care is regarded as preferable for this age

[40] Barberton C (2013) Government funding of centre- and community-based early childhood programmes prior to grade R. In: Berry L, Biersteker L, Dawes A, Lake L & Smith C (eds) *South African Child Gauge 2013.* Cape Town: Children's Institute, University of Cape Town. Pg 41;
Giese S, Budlender D, Berry L, Motlatla S & Zide H (2011) *Government Funding for Early Childhood Development: Can Those Who Need It Get It?* Cape Town: Ilifa Labantwana.
[41] s93(4).
[42] K Hall, Children's Institute, University of Cape Town, analysis of *General Household Survey 2011*.
[43] Personal communication with Louise Erasmus, Social Work Policy Manager: Partial Care and ECD, Department of Social Development, March 2012.
[44] Barberton C (2013), note 40 above.
[45] K Hall, Children's Institute, University of Cape Town, analysis of *General Household Survey 2011*.

group[46], programmes supporting caregivers and young children in their homes are not able to access the subsidy.

- Poor children three years and older who live in areas with few or no registered ECD centres tend not to benefit from the subsidy. Many ECD centres in under-resourced areas are unable to register because they lack the funding and capacity to meet the registration requirements and norms and standards.
- Children whose caregivers cannot afford to pay fees are often excluded from centres.

While the Children's Act currently governs the realm of child care and early learning programmes for children prior to formal schooling, it does not expressly mention the subsidy. The per-capita subsidy was introduced by Regulation 38 of the Regulations to the Child Care Act of 1983 (the predecessor of the Children's Act) to support poor children under five years attending registered non-profit "places of care".[47] Known as the "place of care grant"[48] and administered by the DSD, its aim was to help to provide for young children's basic needs, especially nutrition and education.[49]

The subsidy value has increased gradually over the years, with the subsidy itself representing the DSD's main investment in ECD services – a trend confirmed by budget analysis, which indicates that the bulk of provincial spending on ECD is consistently directed to ECD-centre subsidies.[50]

In 2010 the Children's Act introduced a new regulatory framework for places of care, now termed "partial care facilities" and "early childhood development programmes". The Act places the responsibility for providing and funding these programmes on the provincial Members of the Executive Council for Social Development. Although the per-capita subsidy funding method introduced under the Child Care Act has continued, the Children's Act and its regulations do not speak expressly to the subsidy or its rationale. In other words, they do not specify eligibility criteria for the subsidy, the subsidy amount, or how centres should allocate the subsidy.

Prior to the finalisation of the Children's Act and its regulations, the Guidelines for Early Childhood Development Services (2007)[51] provided direction on how to support the nutritional needs of young children in ECD programmes. It set out the following instructions:

- All meals and snacks should meet the nutritional requirements of the children.
- Children must be provided with at least one meal a day by either parents or the centre.

[46] Richter L, Biersteker L, Burns J, Desmond C, Feza N, Harrison D, Martin P, Saloojee H & Slemming W (2012) *Diagnostic Review of Early Childhood Development*. Pretoria: Department of Performance, Monitoring and Evaluation & Inter-Departmental Steering Committee on ECD.
[47] Reg. 38 of the Regulations to the Child Care Act of 1983.
[48] Reg. 38 of the Regulations to the Child Care Act of 1983.
[49] Reg. 38 of the Regulations to the Child Care Act of 1983.
[50] Giese S et al (2011), note 40 above;
See also: Budlender D & Proudlock P (2013) *Are Children's Rights Prioritised at a Time of Budget Cuts? Assessing the Adequacy of the 2013/14 Social Development Budgets for Funding of Children's Act Services.* Cape Town: Children's Institute, University of Cape Town.
[51] Department of Social Development & UNICEF (2007) *Guidelines for Early Childhood Development Services*. Pretoria: DSD & UNICEF.

- Menu planning, differentiated for children of different ages, must be done in consultation with an expert (for example, a clinic sister or dietician).
- Children younger than one year should be fed on demand.
- Food (and, in the case of babies, milk) must be prepared and cooked in a designated area that is kept safe and clean.
- When they are eating, children must be supervised by an adult.
- Safe, clean drinking water must be available.

The norms and standards in the regulations to the Children's Act[52] have retained all the standards prescribed in the Guidelines, with the exception of prescribing menu planning and ensuring that infants are demand-fed. An important distinction between them is that the norms and standards oblige the ECD programmes (rather than the parents) to ensure the provision of the daily meal to children. The law therefore now places an obligation on centres to ensure that a daily meal is provided to the children in their care.

5.2 Community- and home-based programmes

The Children's Act norms and standards apply to ECD programmes and therefore are not limited to programmes in partial care facilities or ECD centres. Community- and home- and family-based ECD programmes[53] are also subject to these norms and standards, and hence should be ensuring that children benefitting from their programmes receive nutritious meals. However, out-of-centre programmes do not receive the per-capita ECD subsidy, despite having been prioritised as a major form of ECD programme delivery in the National Integrated Plan for ECD. These programmes may be recipients of "programme" funding from the DSD and may receive funding specifically for nutritional support.[54] While a few provinces are allocating some funds to home-based and community ECD programmes, the budgets are not known and the coverage is poor.[55]

A recent evaluation of selected home-visiting programmes found them to be effective in a number of areas, such as providing information to support children's nutrition and helping parents to access grants, food parcels and food gardens. Home visiting was also found to be a very effective vehicle for reaching the most vulnerable children and families.[56]

[52] See: Children's Act Regulations 2010, Annexure B, Part I, no. 4(a) and no. 8(a), and Part II, no. 3(b)((vii)(bb) – (dd).
[53] Examples are home-visiting programmes, mobile toy libraries and community playgroups.
[54] For example, Giese at al note that programme funding was allocated to Grassroots Educare in the Western Cape for informal playgroups and giving nutritional support to child participants.
[55] Barberton C (2013), note 40 above.
[56] Dawes A, Biersteker L & Hendricks L (2012) *Towards Integrated Early Childhood Development: An Evaluation of the Sobambisana Initiative.* Cape Town: Ilifa Labantwana.

6. Gaps in the law and implementation challenges

6.1 It is not clear what the state subsidy aims to achieve

The Children's Act and its regulations neither explain what the subsidy aims to achieve nor offer clarity on how it should be spent. No formal document has been provided by the national DSD to clarify what the subsidy should be allocated to and in what proportions.[57] In June 2013 the Social Work Policy Manager in the ECD Directorate, National Department of Social Development[58], noted that the prescribed formula is nutrition, 50%; staffing, 25%; and other costs, 25%. Later in October that year the national Minister of Social Development provided a slightly different split, indicating in a press statement that the subsidy is meant to be split between nutrition (at 50%), staff salaries (30%) and stimulation material and administrative costs (20%).[59]

In the absence of national guidance, provincial departments of social development have developed their own formulae outlining what the subsidy is allocated to and in what proportions. For example, the Western Cape specifies that 50% of it is for nutrition, 30% for salaries, and 20% for equipment; while the Eastern Cape sets aside 40% for nutrition, 40% for administration, including staff stipends, and 20% for stimulation programmes.[60]

Provinces are also applying their own means test income thresholds to parents and caregivers in determining whether or not children qualify for the subsidy. In 2011, the North West's threshold was R1 800 per month, while in the Western Cape it was R3 000 per month.

Moreover, while the subsidy is calculated and disbursed on a monthly basis, the provinces employ different methods for calculating these payments. The Eastern Cape calculates them on the basis of the number of registered children but pays largely on actual attendance figures, with the result that the amounts paid to centres fluctuate each month even though the centres will have stable monthly overheads and expenditures to meet. By contrast, in the Western Cape monthly payments are based on the number of children registered at the beginning of the year, which means payments remain stable each month.[61]

In order to ensure equality in access to services across the country, the Children's Act obliges all government spheres and departments to implement the Act in a co-ordinated and uniform way.[62] It is the responsibility of the national department to lead this approach in consultation with the provincial departments. The absence of clarity in law from a national level is hampering the uniform implementation of the ECD subsidy across the provinces.

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[57] Personal communication with Linda Biersteker, Head of Research, Early Learning Resource Unit, August 2013.
[58] Personal correspondence with the Social Work Policy Manager, ECD Directorate, Department of Social Development, June 2013.
[59] Department of Social Development (2013) *Children the Focus of Ministerial Visit.* Media statement, 15 October 2013. Pretoria: DSD.
[60] Giese S et al (2011), note 40 above.
[61] Giese S at al (2011), note 40 above.
[62] s4.

If the reasonableness test is applied to this challenge, the absence of a clear rationale for the subsidy leads to the finding that the state's ECD programme is not coherent or co-ordinated. It is also not possible to assess whether the ECD programme is reasonably conceptualised because it is not clear what the subsidy aims to achieve.

The challenge could be addressed if the Children's Act and its regulations were amended to clarify the purpose of the subsidy, specify how it should be allocated, and set a national means test based on an objective measurement of levels of child poverty.

6.2 The subsidy is not reaching the most vulnerable children

Although the ECD subsidy shows good targeting of the poor[63], there is concern that the most vulnerable young children (the 0 – 3-year-olds, children in rural areas, those in severe poverty and those with disabilities) remain excluded from appropriate support.[64] Provision and targeting at the moment is not based on a population-based approach but is driven mainly by NPOs' ability to successfully register and apply for government funding for their centres. The Diagnostic Review on ECD concluded that the current funding approach perpetuates inequality and therefore needs revision.[65]

Comparisons between the 2005 and 2012 surveys of children's nutritional status show that stunting has increased among children aged 1 – 3 years, with severe stunting in this age group having risen by almost one third. This is the age group that relies predominantly on non-centre-based ECD programmes such as home-visiting programmes, playgroups and mobile toy libraries. However, because these programmes are not centre-based, they do not qualify for the subsidy and have to apply for programme funding instead. The difficulty then is that no explicit funding mechanism is available to them for accessing DSD funds or for enabling sufficient and sustained funding of the programmes.[66] Even though the notion of programme-based funding was introduced more than a decade ago, the lack of clarity about a funding mechanism continues to pose a challenge. If children in this category are to be reached with better nutrition, it is essential that a funding mechanism be developed to support non-centre-based ECD programmes; it is crucial, too, that such programmes specifically include a nutritional component.

The most vulnerable children face another barrier, too: the complicated registration processes. If a centre cannot register, it is unable to apply for the subsidy. The Children's Act requires ECD programmes to register as both a "partial care facility" (i.e. a crèche) and an "ECD programme". This dual registration is often a source of confusion and leads to misunderstanding.[67] ECD centres also have to obtain their registration as an NPO, and comply with numerous municipal by-laws for building

[63] Departments of Basic Education and Social Development & UNICEF South Africa (2010) *Tracking Public Expenditure and Assessing Service Quality in Early Childhood Development in South Africa.* Pretoria: UNICEF South Africa.
[64] Biersteker L (2012) Early childhood development services: Increasing access to benefit the most vulnerable children. In: Hall K, Woolard I, Lake l & Smith C (eds) *South African Child Gauge 2012*. Cape Town: Children's Institute, University of Cape Town.
[65] Richter L et al (2012), note 46 above.
[66] Budlender D (2010) Development of a Subsidy Model for Home-and-Community-based ECD Services for Children 0 – 4. Draft report. Human Sciences Research Council.
[67] Giese S et al (2011), note 40 above;
Departments of Basic Education and Social Development & UNICEF South Africa (2010), note 63 above.

regulations and health and safety standards. In addition, the norms and standards must be met before registration will be granted. It is the centres in poorly resourced areas that battle the most to satisfy the registration requirements and the norms and standards. The subsidy application process, which can take place only after successfully obtaining multiple registrations, is also cumbersome and administratively complex.[68]

In terms of the Children's Act, ECD centres that struggle to comply with the regulations and norms and standards have the option to apply for conditional registration, but there is no clear regulation or form which enables them to do so. While the national DSD has indicated support for conditional registration and outlined a process that provinces should follow[69], little evidence exists that they are making use of this mechanism. Furthermore, conditional registration is available only for a year, whereas the reality for many centres is that they could well end up waiting longer than that to procure all their clearance certification from local governments.

6.3 The subsidy amount is arbitrary

The amount of the subsidy has varied across the provinces for a number of years (in the region of R12 – R15 per day per child) but is being equalised to R15 per day. In 2013, all provinces bar one were providing funding at R15 per day.[70] In the absence of a clear rationale for the subsidy and an objective costing of what it takes to run an ECD programme fully compliant with the Children's Act, the subsidy amount is arbitrary.[71]

The subsidy is paid for a maximum number of days per annum per child. However, the number of days varies from province to province, with 264 days considered the norm. Some provinces pay the subsidy for fewer days.[72] As a result of this inconsistency in days funded per year, the state is in effect subsidising children in different provinces with different amounts and thereby contributing to inequities in service delivery.

6.4 The subsidy amount is not adequate

Research into the adequacy of the current subsidy reveals that poor service quality persists despite access to the subsidy.[73] A tracking public expenditure survey (PETS) conducted in three provinces and including more than 300 community-based ECD centres showed that centres in the most impoverished areas have the least quality[74] and poorer provision of food. Those in areas of greater affluence have a

[68] Giese S et al (2011), note 40 above.
[69] Information provided by Department of Social Development, ECD Directorate. See: Berry L, Jamieson L & James M (2011) *Children's Act Guide for Early Childhood Development Practitioners.* Cape Town: Children's Institute, University of Cape Town & LETCEE. Pg 42.
[70] Barberton C (2013), note 40 above.
[71] Barberton C (2013), note 40 above.
[72] Barberton C (2013), note 40 above.
[73] Departments of Basic Education and Social Development & UNICEF South Africa (2010), note 63 above.
[74] Departments of Basic Education and Social Development & UNICEF South Africa (2010), note 63 above.

more diversified funding base, and the income from user fees is considerably higher than it is for centres in poor areas.[75]

Because the subsidy amount is insufficient to cover the full operational costs of centres and funding from other sources is lower for centres in poor areas, the allocation for nutrition is often diverted into other areas. The PETS study shows that, on average, less than R400 per child per year was spent on food in registered (subsidised) ECD centres included in the study. While the average expenditure on food went up to R505 for quintile one centres, these amounts are considered exceptionally low.[76]

As part of the *Nawongo* court case[77], the Free State DSD commissioned KPMG to undertake a costing of social welfare services in the province, including ECD programmes. The KPMG costing estimates that the ECD subsidy should be R53 per day per child[78], which would require a substantial increase in the subsidy allocation.[79] However, in view of the fact that the ECD subsidy is but one of several state programmes aimed at improving nutrition, care should be taken in deciding which of them should receive increased investment and at what value; one factor to consider among others is a programme's ability to reach the most vulnerable children.

6.5 Is the subsidy being used to buy food for the children?

Seeing as ECD centres draw on a range of income sources other than the subsidy to cover operating costs, it is hard to establish exactly how they spend their subsidy allocation. Provincial departments admit that it is challenging to monitor compliance with subsidy allocation formulae.[80] The difficulty is complicated by poor financial administration practices, which in recent studies of funding emerge as an overwhelming problem for ECD centres.[81] For example, of the more than 300 centres in the PETS study, only 105 of the centres that kept financial records recorded their expenditure on groceries. Even so, it is futile to monitor use of the subsidy if there is no clarity as to its rationale and if its value is not based on the actual costs of operating the programme including ensuring the provision of adequate nutritious food for each child.

6.6 Is the food that is provided adequate and nutritious?

The adequacy of the food provided at ECD centres is a matter of concern. The PETS survey showed that unregistered facilities are likely to serve fewer meals per day than registered ones (which have diversified funding and greater likelihood of being subsidised) and are less likely to have a menu.[82] The presence of a menu is significant because it suggests that meals are planned and prepared with a view

[75] Departments of Basic Education and Social Development & UNICEF South Africa (2010), note 63 above.
[76] Departments of Basic Education and Social Development & UNICEF South Africa (2010), note 63 above.
[77] *National Association of Welfare Organisations and Non-Governmental Organisations and Others vs the Member of the Executive Council for Social Development, Free State and Others.* Case no: 1719/2010. Free State High Court.
[78] This amount was estimated to be necessary to ensure sustainability of an ECD centre with 60 children.
[79] Barberton C (2013), note 40 above.
[80] Giese S et al (2011), note 40 above.
[81] Giese S et al (2011), note 40 above;
Departments of Basic Education and Social Development & UNICEF South Africa (2010), note 63 above.
[82] Departments of Basic Education and Social Development & UNICEF South Africa (2010), note 63 above.

to ensuring variety between days and diversity across essential food groups. The Guidelines for Early Childhood Development Services give direction on menu planning and encourage centres to contact the Department of Health (DOH) for assistance. In an analysis of the PETS data in relation to a menu stipulated by the DOH, Harrison notes that ECD centres (whether or not they receive the subsidy) are spending far less on food annually than the estimated cost of the DOH menu. On the basis of the PETS study findings, it is estimated that ECD centres spend only 43% of the amount which is needed to provide nutrient-rich meals according to the DOH-costed menu.[83]

An ECD programme's ability to spend money on appropriate and nutritious food is, of course, highly dependent on whether it has adequate funding. While the regulations to the Children's Act oblige ECD programmes to provide children with a daily meal and the DOH menu gives guidance on how to ensure it is nutritious, the amount of the subsidy is not large enough to enable centres to meet the full requirements of the law. The result is that centres spend less on food than what would make it possible to match the DOH menu. For example, registered sites participating in the PETS study spent an average of 14% of their annual budget on food, while centres in quintile one spent 24%.[84]

Another factor contributing to the poor nutrition children receive at centres is that staff are not fully equipped with the knowledge and skills to ensure that meals of the sufficient quantities and quality are served. Unfortunately, they are often poorly trained in menu planning, food purchasing and preparation, food hygiene and responsive feeding practices.[85]

7. Areas in need of further research

7.1 What are the actual costs of providing an ECD programme?

It is evident that the current value of the subsidy is not adequate to ensure the provision of quality nutritious meals along with the other components of an ECD programme. As such, research should be conducted on the actual cost of providing good-quality ECD programmes as required by the Children's Act and its regulations. This research should cover centre-, home- and community-based programmes, and it should be used to inform the determination of the subsidy amount. The KPMG study mentioned above is a useful example of such a costing exercise.

7.2 What is the most appropriate approach to financing ECD programmes?

It is necessary to ensure that ECD programmes reaching vulnerable children who are not participating in centre programmes (for example, those younger than three years) can access funding through

[83] Harrison D (2012) Background paper 7: Opportunities for learning (ECCE). In: Richter L, Biersteker L, Burns J, Desmond C, Feza N, Harrison D, Martin P, Saloojee H & Slemming W (2012) *Diagnostic Review of Early Childhood Development*. Pretoria: Department of Performance, Monitoring and Evaluation & Inter-Departmental Steering Committee on ECD.
[84] Departments of Basic Education and Social Development & UNICEF South Africa (2010), note 63 above.
[85] Saloojee H & Slemming W (2012) Background paper 4: Maternal and child health and nutrition. In: Richter L, Biersteker L, Burns J, Desmond C, Feza N, Harrison D, Martin P, Saloojee H & Slemming W (2012) *Diagnostic Review of Early Childhood Development*. Pretoria: Department of Performance, Monitoring and Evaluation & Inter-Departmental Steering Committee on ECD.

appropriate funding mechanisms. Alternatives to the subsidy-based model therefore need to be explored. The options include financing programme start-up costs (i.e. infrastructure, equipment and other capital costs) or financing human resource costs in the form of post-provisioning. Additional support could be provided by subsidising running costs on a monthly basis.

8. Recommendations

8.1 Clarify the subsidy's purpose and set an objective subsidy value and means-test threshold

- In the short-term, the national DSD should issue a directive to standardise and bring clarity regarding current practices, including the formula for the subsidy allocation; the means-test threshold; the subsidy amount and maximum number of days per year for which the subsidy is paid; and the basis on which monthly payments are calculated.
- In the long-term, the national DSD should clarify the objective behind the subsidy and set the subsidy value and means test to match this objective. A new national ECD policy is in development, and it is hoped that it will provide guidance on how to improve the financing of the ECD system. The decisions that are taken in this policy-making process should then be translated into amendments to the Children's Act and its regulations. In particular, the Children's Act should be amended to:

  a) expressly state the objective of the subsidy and how it relates to realising children's rights to early learning, nutrition and care; and
  b) give the Minister of Social Development clear authority to:
     - set a national minimum subsidy amount by notice in the *Government Gazette*;
     - increase the subsidy amount every year by notice in the *Government Gazette* so as to keep pace with inflation; and
     - set a means-test threshold equivalent to an objective poverty line, and thereafter adjust this threshold annually to keep pace with inflation.

8.2 Increase the number of poor children being reached with the subsidy

It is estimated that only 16% of 0 – 5-year-olds in the bottom two poverty quintiles will benefit from the ECD subsidy in 2013/14.[86] This means that the majority of poor children in need of support will not receive it and that the ECD programme is therefore not reaching a significant segment of the targeted child population. These are mostly children aged 0 – 3, children living in poverty in rural areas and urban informal settlements, and children with disabilities – all children whose needs are the most urgent and whose ability to enjoy their rights is most in peril if they are not reached.

[86] Barberton C (2013), note 40 above.

- To enable state funding of the many unregistered centres providing ECD to children in rural and urban informal areas:

  a) The national Minister should issue a directive to the provinces directing that conditional registration be used and implemented with immediate effect to enable early funding of ECD centres, especially those emerging in poverty-stricken areas.
  b) The regulations to the Children's Act should be amended to include a form to use for conditional registration.
  c) The Children's Act should be amended to allow the period of conditional registration to be extended beyond one year where an applicant's delay in meeting the norms and standards is due to a delay by a government agency.
  d) The bureaucratic and administrative systems pertaining to registration and funding application requirements need to be streamlined to make them more accessible. Duplication should be reduced and there should be stronger collaboration between the various government spheres and departments.
  e) DSD officials should provide information and assistance to centres and programmes to support their registration and funding applications and to minimise bottlenecks and delays within the processes both of the DSD and other departments.

- To enable funding for ECD programmes not delivered at a centre, especially those for children aged 0 – 3, the national DSD should design and legislate a funding mechanism that allows home- and community-based programmes to access DSD programme funding.

8.3 Ensure the provision of adequate nutrition to children in ECD programmes

- The national and provincial departments should improve communication and advocacy on the importance of the regular provision of nutritious foods at ECD centres. These activities should be targeted at NPOs and private ECD service providers.
- The provincial departments should provide training to ECD practitioners, especially cooks, in food purchasing, meal preparation, menu planning, food hygiene, age-appropriate feeding and responsive feeding practices. The Western Cape has developed a training programme for ECD practitioners at centres. The programme includes a manual of affordable and nutritious meals and the establishment of food gardens.[87] This manual could be adopted by other provinces.
- Provincial departments should facilitate monitoring, quality assurance and support in the areas of menu planning, costing, food purchasing and food hygiene and safety.
- ECD centre managers should receive support and training in the areas of budgeting and financial administration.

[87] Hendricks M, Goeiman H & Hawkridge A (2013) Promoting healthy growth: Strengthening nutritional support for mothers, infants and children. In: Berry L, Biersteker L, Dawes A, Lake L & Smith C (eds) *South African Child Gauge 2013*. Cape Town: Children's Institute, University of Cape Town. Pg 44.

- ECD centres located in poverty-stricken areas may endure lengthy waits before registration and funding is granted – even if the mechanism of conditional registration is better utilised. A short-term programme such as a "feeding scheme" should be put in place by the local departments of social development to ensure that, while a centre is awaiting its registration and DSD funding, nutritious foods are provided daily to the children who attend it.

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Chapter 4

Children's rights to social assistance: A review of South Africa's Child Support Grant

Patricia Martin

Contents

1. Introduction

Children's rights to social security are guaranteed in a number of international human rights instruments. These include the United Nations Convention on the Rights of the Child (1989) (UNCRC), the African Charter on the Rights and Welfare of the Child (1990) (ACRWC), and the International Covenant on Social, Economic and Cultural Rights (1966) (ICSECR). At a domestic level, the Constitution of the Republic of South Africa Act 108 of 1996, guarantees children's right to social security.

In furtherance of its obligations, the government has developed a social security system that provides three social grants specifically for children: the Child Support Grant (CSG), Care Dependency Grant (CDG) and Foster Child Grant (FCG). Children can also benefit from grants targeted to adults or the household, such as the Old Age Grant and Social Relief of Distress benefit (SROD). This review focuses on the CSG, the state's primary grant for alleviating child poverty. [For a review of the CDG, see chapter 5.]

The CSG is a cash transfer of R300 per month per child.[1] It is paid to the primary caregivers of children between the ages of 0 – 18 years whose income falls below the prescribed means test income threshold (which is 10 times the value of the grant). The CSG is intended to form an integral part of the broader social protection programme, which includes free and/or subsidised health care, water, sanitation and education, and is thus conceptualised as part of a package of services and support.[2]

The governing law is the Social Assistance Act 13 of 2004 and accompanying regulations. The social security rights of especially vulnerable groups of children (notably children in need of state care and protection) are given further protection by the Children's Act 38 of 2005.

The national Department of Social Development (DSD) is responsible for the overall development, implementation and oversight of policies and laws governing social assistance grants. The DSD is supported by the South African Social Security Agency (SASSA), which was created by the South African Social Security Agency Act 9 of 2004 to administer social assistance grants.

2. Targeting, reach and impact of the CSG

2.1 Targeting and reach of the CSG

Owing to the strength of its targeting, reach and developmental impact, the CSG is widely recognised as one of South Africa's most successful poverty alleviation interventions. On 1 March 2013 it was reaching over 11.3 million children.[3] The CSG is effective in targeting caregivers and children in provinces with higher concentrations of child poverty and those who are especially vulnerable due to other co-variants such as race and caregiver status.[4] The studies suggest that, compared with non-

[1] As at 1 October 2013.
[2] Interview with Dianne Dunkerley, Executive Manager, Grants Administration, SASSA, May 2013.
[3] South African Social Security Agency (2013) *A Statistical Summary of Social Grants in South Africa, 31 March 2013.* Pretoria: SASSA.
[4] De Koker C, De Waal L & Vorster J (2006) *A Profile of Social Security Beneficiaries in South Africa.* Department of Sociology and Social Anthropology, Stellenbosch University;
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recipient households, households that receive the CSG are larger, have less access to services and are predominantly Black African, with many headed by women who have lower levels of education and less access to employment.[5]

Although the take-up of the grant has been a major success story, a significant number of eligible children are still not receiving it. A recent study by SASSA and UNICEF estimates that 2.35 million income-eligible children are excluded from the CSG.[6]

2.2 The social and economic developmental impact of the CSG

Numerous studies, discussed in more detail below, have shown the positive impact of the CSG both on the child's and household's rights and well-being, as well as on the broader social and economic well-being of the country. They show that the CSG has a beneficial effect on rights of children and their caregivers not only to social assistance but to food, education, health care and basic services. These improvements in children's well-being, set alongside the increased income injected into vulnerable households, are likely to yield longer-term national social and economic development returns.

2.2.1 Impact on food security and nutrition

A 2008 study reveals that the CSG improves food security.[7] The majority of CSG-recipient households interviewed in the study spent more than half their household income on food, and the share of expenditure on food had increased in CSG-receiving households. Caregivers reported that the CSG improved food security, reduced hunger and improved the quality of food in their households. Earlier studies also reveal a positive link between the CSG and food security.[8] Furthermore, between 2002 and 2008 (a period which saw a large increase in CSG take-up) the number of hungry children in households dropped from 31% to 17%.[9]

Various studies have confirmed that access to the CSG, especially early and prolonged access, contributes to children's improved nutritional health and well-being. Early receipt of the CSG (especially for more than 50% of the first three years of the child's life) impacts positively on children's height-to-weight scores, a key indicator of nutritional health.[10] Agüero *et al* calculate the value of the nutritional impact of the CSG (when received early) to be 1.5 – 2 times as large as the direct cost of the grant; it is noteworthy that the same impact is not observed among children who do not receive the CSG early in their lives (i.e. those who do not receive it for at least 50% of their first three years of life). A more recent CSG impact assessment found that early receipt of the CSG (in the first two years of life)

South African Social Security Agency & UNICEF (2013) *Preventing Exclusion from the Child Support Grant: A Study of Exclusion Errors in Accessing CSG Benefits.* Pretoria: UNICEF South Africa. [Hereafter SASSA & UNICEF (2013)]

[5] Delany A, Ismail Z, Graham L & Ramkissoon Y (2008) *Review of the Child Support Grant: Uses, Implementation and Obstacles.* Pretoria: Department of Social Development, Community Agency for Social Enquiry, South African Social Security Agency & UNICEF;
Voster J & De Waal L (2008), note 4 above;
SASSA & UNICEF (2013), note 4 above.

[6] SASSA & UNICEF (2013), note 4 above.

[7] Delany A et al (2008), note 5 above.

[8] De Koker C et al (2006), note 4 above;
Williams M (2007) *The Social and Economic Impacts of South Africa's Child Support Grant*. Williamstown: Williams College.

[9] Van der Berg S, Siebrits K & Lekezwa B (2010) *Efficiency and Equity Effects of Social Grants in South Africa*. Stellenbosch Economic Working Papers 15/10, Stellenbosch University.

[10] Agüero JM, Carter MR & Woolard I (2006) *The Impact of Unconditional Cash Transfers on Nutrition: The South African Child Support Grant*. Working Paper 39. Brazilia: International Policy Centre for Inclusive Growth.

increased the likelihood that parents would monitor the child's growth and was associated with reduced stunting (low height-for-age) amongst girls.[11]

Nutritional benefits have longer-term social and economic development benefits for the child and the country as a whole. Adequate nutrition in the early years is important not only for the child's immediate welfare but for his or her later physical and mental development as well. Notably, it impacts on children's school success.[12] Agüero *et al* note that the returns outweigh the immediate cost of early-life CSG support by between 60% and 130%.[13]

2.2.2 Improved health

The CSG has been shown to improve access to health services. This is partly because beneficiaries can spend a portion of the CSG income on accessing health care services.[14] Early access to the grant is also associated with a reduced likelihood of illness.[15]

Studies have found a mutually reinforcing relationship between health and social assistance. While access to the CSG improves children's health, early and regular access to the health system (during the antenatal and early infancy periods) is associated with earlier access to the CSG.[16] This association is strengthened where health care services promote access to CSG through counselling and advocacy.[17]

2.2.3 Improved access to early childhood care and education

The CSG improves the ability of caregivers to send their children to pre-school. Respondents in at least two studies indicate that the CSG enabled them to cover pre-school fees and associated costs.[18]

2.2.4 Improved educational outcomes

The CSG has a proven impact on school enrolment and attendance as well as learning outcomes. It increases school enrolment of child beneficiaries[19], reduces absenteeism (hence improving attendance, particularly amongst male adolescents), and improves learning outcomes, especially where the CSG

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[11] Department of Social Development, South African Social Security Agency & UNICEF (2010) *Child Support Grant Evaluation 2010: Qualitative Research Report.* Pretoria: UNICEF South Africa;
Department of Social Development, South African Social Security Agency & UNICEF (2012) *The South African Child Support Grant Impact Assessment: Evidence from a Survey of Children, Adolescents and their Households.* Pretoria: UNICEF South Africa.

[12] Agüero J et al (2006), note 10 above;
Department of Social Development, South African Social Security Agency & UNICEF (2010), note 11 above.

[13] Agüero J et al (2006), note 10 above.

[14] Delany A et al (2008), note 5 above;
Department of Social Development et al (2010), note 11 above.

[15] Department of Social Development et al (2010), note 11 above.

[16] SASSA & UNICEF (2013), note 4 above;
Department of Social Development et al (2010), note 11 above;
Zembe-Mkabile W, Doherty T, Sanders D, Jackson D, Chopra M, Swanevelder S, et al (2012) Why do families still not receive the child support grant in South Africa? A longitudanal analysis of a cohort of families across South Africa. *BMC International Health and Human Rights*, 12:24.

[17] Zembe-Mkabile W et al (2012), note 16 above.

[18] Delany A et al (2008), note 5 above;
Department of Social Development et al (2010), note 11 above.

[19] Budlender D, Burns J & Woolard I (2008) *Analysis of Survey Data on the Impact of Social Security Grants.* Pretoria: Department of Social Development;
Williams M (2007), note 8 above;
Case A, Hosegood V & Lund F (2005) The reach and impact of child support grants: Evidence from KZN. *Development Southern Africa*, 22(4):467- 482.

commences early in the child's life (from birth)[20]. Children who are registered for the CSG shortly after birth complete more years of schooling than those registered for the CSG at the age of six years and achieve higher scores in maths. This is especially true for girls.[21]

2.2.5 Reduced likelihood of child labour

Early receipt of the CSG (in the first seven years of a child's life) "reduces the likelihood that they will grow up into adolescents who will work outside of the home", particularly so in the case of girls who receive the grant in the first years of life.[22]

2.2.6 Reduced risky behaviours amongst adolescents

Receipt of the CSG, especially in the earlier years of the child's life, significantly reduces a number of risky behaviours associated with the high levels of vulnerability that adolescents and youth have to HIV and AIDS and other adverse outcomes. CSG receipt has been shown to reduce sexual activity, multiple sexual partners, early pregnancy, and alcohol and drug use, particularly amongst females.[23]

Moreover, a new study has revealed that adolescent girls from homes that received the CSG were two-thirds less likely to date older men for money.[24] This reduces their risk of contracting HIV and falling pregnant; conversely, it increases their chances of finishing their schooling.

2.2.7 Gender equality

The CSG makes a significant and positive difference to the ability of women living in extreme poverty to cope with the burdens of poverty and child care. Eighty-two percent of women participating in a small survey on the CSG in Doornkop, Soweto, stated that the CSG improved their lives; 79% believed it enabled them to take better care of their children; 65% said it contributed to family cohesion; 66% said it gave them a sense of personal power and courage; and 61% said it made them feel good about themselves. In sum, the study found that the CSG provides a safety net for women and their households; empowers them to seek labour and engage in some economic activity; provides women with a minimum level of financial security (especially among those who did not have a partner); and increases their decision-making power over how household income is spent.[25]

However, some commentators argue that while the feminisation of the CSG has supported women, it has also served to intensify their roles and responsibilities within and outside the home, and consequently their burden of care. Although the CSG is widely believed to be good for women – for example, because it supports girls' education and allows better access to health care services – it does not necessarily result in women's empowerment in the household. Patel *et al* argue that for many women it entrenches unequal gender roles at the household level because it ratifies the caregiving

[20] Department of Social Development et al (2010), note 11 above.
[21] Department of Social Development et al (2010), note 11 above; Department of Social Development et al (2012), note 11 above.
[22] Department of Social Development et al (2012), note 11 above.
[23] Department of Social Development et al (2010) note 11 above; Department of Social Development et al (2012), note 11 above.
[24] Cluver L, Boyes M, Orkin M, Pantelic M, Molwena T & Sherr L (2013) Child-focused state cash transfers and adolescent risk of HIV infection in South Africa: A propensity-score-matched case-control study**.** *The Lancet Global Health* (December 2013), 1(6):362-370.
[25] Patel L, Hochfield T, Moodley J & Mutwali R (2012) *The Gender Dynamics and Impact of the Child Support Grant in Doornkop, Soweto.* Johannesburg: Centre for Social Development in Africa, University of Johannesburg.

roles and responsibilities of women.[26] In the study sample, receipt of the CSG appeared to discourage the payment of maintenance by a substantial number of fathers for their children. Thirty percent of women CSG recipients indicated that, since receiving the CSG, the fathers of their children no longer paid maintenance.[27] Nevertheless, this was not a universal finding, given that 24% of respondents did in fact receive regular payments from the fathers.

2.2.8 Reductions in poverty and protection against economic shocks

Poverty levels, and child poverty rates in particular, dropped by 15 percentage points from 73% to 58% between 2003 and 2011.[28] This drop is due largely to social grants, including the CSG.[29] The latter has made a more significant impact on reducing the depth and severity of poverty than on the poverty headcount, especially between 2000 and 2008 during which time there was a substantial roll-out of the grant.[30]

Woolard and Leibbrandt note that, in addition to affecting poverty levels, the CSG impacts on the ability of households to invest in education and health and is thus a critical force in breaking the intergenerational transmission of poverty.[31]

The link between adult unemployment and child poverty makes children highly vulnerable to shocks brought about by economic decline or crisis. The CSG serves as a buffer against economic shocks in vulnerable households.[32] However, the adequacy of the buffer has been called into question in view of the fact that food prices, fuel and inflation have increased faster than the value of the grant.[33]

3. Gaps in the law and challenges in implementing the law

The preceding section elaborated on why the social assistance system, especially the CSG, is internationally lauded for its effective reach, targeting and positive impact on children's well-being and social and economic development. However, various design flaws in the law and challenges in implementing it are leading to a situation in which significant numbers of children in poverty and especially vulnerable categories of children are excluded from accessing the grant. These difficulties frustrate the social assistance and other rights of an estimated 2.35 million poor children.[34] The number of excluded children has dropped since 2008, when the number was calculated to be as high

[26] Patel L et al (2012), note 25 above.
[27] Patel L & Hochfeld T (2011) *It Buys Food, but does it Change Gender Relations? Child Support Grants in Soweto, South Africa*. University of Johannesburg.
[28] Hall K (2013) Income poverty, unemployment and social grants. In: Berry L, Biersteker L, Dawes A, Lake L & Smith C (eds) *South African Child Gauge 2013*. Cape Town: Children's Institute, University of Cape Town. Pg 90.
[29] Woolard I & Leibbrandt M (2010) *The Evolution and Impact of Unconditional Cash Transfers in South Africa.* Cape Town: Southern Africa Labour and Development Research Unit, University of Cape Town;
Hall K & Wright G (2010) A profile of children living in South Africa. *Journal of Economics and Econometrics,* November 2010, 34(3):45-68.
[30] Hall K & Wright G (2010), note 29 above.
[31] Woolard I & Leibrandt M (2010), note 29 above;
Van der Berg S et al (2010), note 9 above.
[32] Department of Social Development & UNICEF South Africa (2010) *Vulnerability of Children and Poor Families to the Economic Recession of 2008 – 2009.* Pretoria: UNICEF South Africa.
[33] Proudlock P (2012) Budget for Children's Social Grants and Social Services. Presentation to South African Human Rights Commission and UNICEF Budget Symposium, 23 February 2012.
[34] SASSA & UNICEF (2013), note 4 above.

as 3.8 million.[35] Furthermore, the low amount of the grant has been criticised for not meeting the requirement of "adequacy" specified under international law and not being tied to any rational basis such as a poverty line or the costs of caring for a child.

The exclusion of this substantial number of poor and otherwise vulnerable children and the low amount of the grant has negative social and economic developmental implications for the country. If these design flaws and implementation challenges are not addressed as soon as possible, South Africa's ability to continue to demonstrate progress in realising children's rights to social security – and indirectly to food and nutrition, health care, education and equality – will be compromised.

3.1 Especially vulnerable children excluded from the CSG

The UN Committee on Economic, Social and Cultural Rights requires that the national social security framework makes the CSG accessible to all persons, especially the most disadvantaged and marginalised groups. More specifically, it requires that all policies, laws, programmes and allocation of resources recognise and remove *de jure* (in law) and *de facto* (in fact) discriminatory grounds that exclude people, particularly the most vulnerable, from accessing social security benefits.[36] The current legislative framework fails to meet these requirements because of the exclusion of a number of highly vulnerable groups of children, described below.

3.1.1 Infants and young children (aged 0 – 1 year)

Low take-up of CSGs for children under one year means that infants are at especially high risk of exclusion. There is a consistent trend amongst caregivers to delay the application for a CSG for their infants until after the child is one or two years old.[37] In 2008 the take-up rate for children aged 0 – 1 (47%) was much lower than for children aged 1 – 13 years (60% – 69%). Between 2008 and 2011 the take-up rate for children aged 0 – 1 increased only marginally and at a slower pace than for other age groups. It increased by only three percentage points to 50% in 2011, compared to the much bigger jumps from 74% to 81% for 2-year-olds, 75% to 83% for 3-year-olds, and 77% to 87% for 7-year-olds.[38] This is of particular concern given the developmental importance of access to adequate health care and nutrition (which is linked to grant access) in the first 1 000 days (or two years) of the child's life.[39] In addition, high levels of access to the CSG from as early an age as possible are a precondition for realising the longer-term developmental impacts on children's health and well-being later in life, for example, educational and health outcomes and the reduction of risky behaviours.[40]

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[35] Samson M, Renaud B, Miller E, McTague E, Neuborg E, Dearsouth T, et al (2011) *Feasibility Study on the Universal Provision of the Child Support Grant (CSG) in South Africa.* Pretoria: UNICEF & Department of Social Development. These figures were based on National Income Dynamic Survey (NIDS) 2008 data.

[36] United Nations Committee on Economic, Social and Cultural Rights (2008) *General Comment No. 19: The Right to Social* Security *(art. 9).U.N. Doc. E/C.12/GC/19 (2008)***.** Geneva: UNCESCR.

[37] SASSA & UNICEF (2013), note 4 above;
Zembe-Mkabile W et al (2012), note 16 above.
Delany A et al (2008), note 5 above;
De Koker C et al (2006), note 4 above.

[38] SASSA & UNICEF (2013), note 4 above.

[39] Richter L, Biersteker L, Burns J, Desmond C, Feza D, Harrison D, Martin P, Saloojee H & Slemming W (2012) *Diagnostic Review of Early Childhood Development*. Pretoria: Department of Performance, Monitoring and Evaluation & Inter-Departmental Steering Committee on Early Childhood Development.

[40] Department of Social Development et al (2010), note 11 above.

The reasons for the exclusion of children in this age group include:

- lack of access to documents such as birth certificates and parents' ID documents at the time of birth;
- post-birth limited mobility of caregivers caused by medical, psychosocial and cultural factors linked, for example, to traditional post-birth confinement periods;
- lack of knowledge among caregivers and some SASSA staff of the right to the CSG from the date of birth of the child;
- incorrect advice given by SASSA staff to parents about the child's eligibility from birth;
- lack of awareness of the importance of early access to the CSG amongst caregivers and SASSA staff;
- lack of clean and baby-friendly facilities at SASSA's local offices, long queues and the need for multiple trips to different offices to obtain documents; and
- misunderstandings about the means test and financial eligibility for the CSG, especially where caregivers receive income from other sources such as maintenance from the father or maternity benefits through the Unemployment Insurance Fund (UIF).[41]

Whilst a number of barriers impede early CSG registration, there are also factors that promote it. Improved access to the CSG in the early years of a child's life appears to be correlated with sustained contact with the health system prior to the child's birth and in the months immediately after it. Although it is not clear why children in contact with the general public health system enjoy better CSG access, a recent study of a targeted programme that sought specifically to integrate CSG information and awareness-raising into health services at a community level found the targeted integration to be the cause of better take-up.[42] At present, general government public health services do not formally integrate CSG messaging and promotion, but the data suggests it is happening informally and that there is scope in the health system for improved integration of CSG awareness and take-up among infants.[43]

Lack of documents

Many of the preceding studies cite documents, particularly children's birth certificates, as the most common barrier to early access to the CSG. It must be noted that this barrier is a common one not only for infants but all age groups, especially among additionally vulnerable groups such as orphaned children and children in the care of refugees.[44]

Two innovations were implemented after 2008 to remedy the situation. The Department of Home Affairs initiated online birth registrations in health facilities (including hospitals and clinics). As at March 2013, 334 (42%) of the targeted 795 health facilities had been resourced with registration equipment.[45] This national innovation has improved birth registration rates within the first year of life

[41] Delany et al (2008), note 5 above;
Department of Social Development et al (2010), note 11 above;
Zembe-Mkabile W et al (2012), note 16 above;
SASSA & UNICEF (2013), note 4 above.
[42] Zembe-Mkabile W et al (2012), note 16 above.
[43] SASSA & UNICEF (2013), note 4 above.
[44] Community Agency for Social Enquiry (2009*) Barriers to Accessing Comprehensive Social Security in Vulnerable Rural Areas in South Africa.* Cape Town: Alliance for Children's Entitlement to Social Security (ACESS);
Department of Social Development et al (2010), note 11 above;
Martin P, Lane A, Ngobane C & Voko B (2013) *A Rapid Review of the Implementation of the Regulation 11(1) to the Social Assistance Act, 2004*. Cape Town: Alliance for Children's Entitlement to Social Security (ACESS).
[45] SASSA & UNICEF (2013), note 4 above.

but has not yet made a significant difference to the rate of early CSG applications within the first year of life. While registrations within the first year of birth increased from 68% to 87% between 2003 and 2008[46], the CSG take-up rate for eligible children aged 0 – 1 has increased only from 47% to 50% since the introduction of online birth registration[47]. This may suggest that a lack of documents is not the only driver of low CSG take-up amongst infants. [See however the analysis in chapter 2 on the Right to Birth Registration, which shows that approximately 50% of parents or caregivers are registering after 30 days, and hence registration within the prescribed 30 day period is still not optimum. This is likely to be contributing to low CSG up-take within the first year of life.]

The second innovation was the introduction of regulation 11(1) to the Social Assistance Act, which allows applicants who lack the prescribed documents to use alternative documents to identify themselves when applying for the CSG. If the regulation 11(1) application succeeds, the grant is made available for a period of three months to allow the applicant time to obtain the official identity documents prescribed by the Social Assistance Act. The applicant must either present the official identity documents or proof that he or she has applied for them from the Department of Home Affairs within three months, failing which the grant is suspended. Where proof of application for the official documents is submitted, the temporary grant will be extended for a further three months, subject to the same conditions. As soon as the official identity documents are obtained and presented to SASSA the grant becomes permanent.

Table 1: Number of children who accessed the CSG between 2009 and 2013 using regulation 11(1)

Province	2009	2010	2011	2012	2013	Total
Eastern Cape	29	30	18	356	228	661
Free State	62	60	23	14	7	166
Gauteng	290	289	200	1 695	689	3 163
KwaZulu-Natal	1 188	1 308	866	588	484	4 434
Limpopo	86	56	67	55	21	285
Mpumalanga	105	107	93	17	17	339
Northern Cape	151	146	135	202	108	742
North West	190	144	110	94	58	596
Western Cape	67	91	93	84	463	798
Total	**2 168**	**2 231**	**1 605**	**3 105**	**2 075**	**11 184**

Source: Statistics in table supplied by SASSA via e-mail, on special request of the author.

Table 1 reflects the rate at which these provisions were used across the provinces between 2009 and 2013. The figures do not suggest robust use of the alternative documentation mechanism as the numbers of children being assisted by the regulation are very small compared to the larger number of 2.35 million excluded children.

[46] Department of Women, Children and People with Disabilities (2013) *The United Nations Convention on the Rights of the Child. South Africa's Combined Second, Third and Fourth Periodic State Party Report to the United Nations Committee on the Rights of the Child. (Reporting period: January 1998 – April 2013).* Pretoria: DWCPD.
[47] SASSA & UNICEF (2013), note 4 above.

The 2010 National Income Dynamic Survey (NIDS)[48] found a smaller percentage of respondents (11%), who cited lack of documents as the reason why they were not receiving the CSG, than were found in the 2008 NIDS (18%)[49]. Lack of documents however remains a substantial barrier to access for vulnerable children and their caregivers, especially in the case of babies. Of those children without birth certificates in 2010, 77% in all age groups, and 92% of children aged 0 – 1-year-old, did not access the CSG.[50] Likewise, of those whose caregivers did not have South African ID documents, 42% of children across all age groups, and 62% of those under a year, did not access the CSG.[51]

Moreover, in a study on the implementation of regulation 11(1), interviews with caregivers in the Eastern Cape confirmed that documents like birth certificates, ID documents and death certificates continue to present a barrier for especially vulnerable groups, notably refugee children and teen mothers as well as orphans and other children separated from their parents.[52] These are the very children whom regulation 11(1) is meant to assist.

There are a number of reasons why the regulation is not being used to its potential. These include: [53]

- A lack of public communication and awareness-raising by SASSA amongst targeted vulnerable groups and the broader public about regulation 11(1) and how to use it.
- Concerns among SASSA staff about the risk of fraud and corruption, concerns which in turn inhibit them from publicising the regulation and putting it to active use.
- Widespread lack of knowledge about the availability of regulation 11(1) amongst the public, especially vulnerable households and the non-governmental organisations (NGOs) and community-based organisations (CBOs) providing services and support to them.
- The complexity of the alternative document process, which is aggravated by the language barriers experienced by the refugee community.
- The process has been incorrectly interpreted by SASSA staff, to apply only to children and caregivers who have never been issued with documents, and not to children and caregivers who have lost their documents. The exclusion of applicants who have lost their documents from the ambit of regulation 11(1) is not contemplated or authorised by the wording of the regulation, which simply provides that where "no valid proof [of the documents] is obtainable, a sworn statement or an affidavit in a format prescribed by the Agency may be accepted". In spite of this, it is common practice at SASSA offices not to apply regulation 11(1) to register applicants who have lost their documents. Applicants are instead directed to the Department of Home Affairs to obtain duplicate IDs and birth certificates before being allowed by SASSA to complete a full CSG application. The fee to access these documents is high for caregivers living in poverty and therefore many simply cannot afford to obtain the documents.

[48] Southern Africa Labour and Development Research Unit (2012) *National Income Dynamics Study 2008, Wave 1* [dataset]. Version 5.1. Cape Town: Southern Africa Labour and Development Research Unit [producer], 2012. Cape Town: DataFirst [distributor], 2013.
[49] Southern Africa Labour and Development Research Unit (2012) *National Income Dynamics Study 2010 – 2011, Wave 2* [dataset]. Version 2.1. Cape Town: Southern Africa Labour and Development Research Unit [producer], 2012. Cape Town: DataFirst [distributor], 2013.
[50] SASSA & UNICEF (2013), note 4 above.
[51] SASSA & UNICEF (2013), note 4 above.
[52] Martin P et al (2013), note 44 above.
[53] Martin P et al (2013), note 44 above.

Misinformation about the means test

A further common and historically persistent barrier to accessing the CSG, especially amongst caregivers of infants, is misinformation about the means test and related eligibility requirements.

An incorrect and commonly-held belief among the public, employers and even some SASSA staff is that any person receiving an income other than a grant, regardless of its source and whether or not it falls below the prescribed income threshold, is automatically disqualified from the CSG. This misconception is especially prevalent among potential applicants employed by the government, people involved in short-term expanded public works programmes, those receiving benefits such as maternity and other UIF benefits, and those getting maintenance from the child's father or other family members.[54]

This misconception has a significant effect, as can be seen in the much lower levels of access among income-eligible – but employed or otherwise economically active – caregivers of young children aged 0 – 1 (53%) compared to the levels of access of those who are unemployed (72%).[55]

The NIDS 2008 and 2010 data shows not only that this barrier excludes many income-eligible children but also that its frequency and impact has remained consistent. In 2008, and again in 2010, 26% of eligible caregivers who had not accessed the grant attributed their exclusion to this barrier.[56]

3.1.2 Children of mothers who are under 20 years of age

The children of young mothers (those under 20 years of age) are at a higher risk of exclusion than children of mothers over 20.[57] Roughly 4.5% of girls between the ages of 13 – 19 years were pregnant in 2011.[58] In 2011 the CSG take-up rate for children whose mothers were under 20 years was much lower (54%) than for those with mothers aged between 20 – 29 years (80%). More than 175 000 income-eligible children with mothers under 20 years of age did not access the CSG in 2011.[59]

The key reasons for the exclusion of the children of young mothers are:

- A limitation in the Social Assistance Act precludes simultaneous access to the CSG for a mother who is under 18 years and her child.[60] At present a mother under 18 years cannot be registered as both a CSG beneficiary (where her mother receives the CSG for her) and a caregiver recipient who receives the CSG on behalf of her infant.
- Section 1 of the Social Assistance Act requires that the primary caregiver must be 16 years or older to qualify. This excludes mothers aged 15 years and younger from applying directly for the CSG.
- Young mothers fear stigmatisation and discrimination at the hands of SASSA staff, other departmental staff, parents and community members. In particular, they worry that they will be accused of having gotten pregnant in order to receive the grant. [61]

[54] Community Agency for Social Enquiry (2009), note 44 above;
Department of Social Development et al (2010), note 11 above;
SASSA & UNICEF (2013), note 4 above.
[55] SASSA & UNICEF (2013), note 4 above.
[56] SASSA & UNICEF (2013), note 4 above.
[57] Van der Berg S et al (2010), note 9 above.
[58] Statistics South Africa (2012) *General Household Survey 2011.* Pretoria: Statistics South Africa.
[59] SASSA & UNICEF (2013), note 4 above.
[60] SASSA & UNICEF (2013), note 4 above.
[61] Community Agency for Social Enquiry (2009), note 44 above;
SASSA & UNICEF (2013), note 4 above.

3.1.3 Older adolescents

Older children in the age group 13 – 17 years are at risk of exclusion, especially adolescents who have dropped out of school. In 2011 only 59% and 28% of eligible 16- and 17-year-old children, respectively, were accessing the CSG.[62] This number dropped substantially among older children who were not enrolled in school. Only 13% of eligible children who had left school before matriculating were receiving the CSG in the 12 – 17-year age group.[63]

The key reasons for the exclusion of adolescents appear to be:

- misunderstanding of school enrolment as an eligibility requirement;
- stigmatisation; and
- child employment and misconceptions about the means test.

Misunderstanding of school enrolment as an eligibility requirement

There is evidence of misunderstanding amongst older children and caregivers about the school enrolment soft conditionality which was introduced into the Social Assistance Act in 2009. The erroneous belief is that it constitutes an eligibility requirement and that non-enrolment disqualifies the child from receiving the CSG.[64] This misinformation discourages the caregivers of older children not enrolled at school from applying.

The extension of the CSG to children between the ages of 15 – 18 years was accompanied by a soft conditionality that children between the ages of 7 – 18 years in receipt of a CSG should be enrolled at and attend school.[65] However, school enrolment is not listed among the CSG eligibility requirements in the Act or regulations[66]. The regulations do not require the suspension or termination of the CSG if a child in receipt of the CSG is not enrolled or does not attend school. Regulations 6(6) and (7) require that the Head of the Department of Basic Education advise the Director-General (DG) of the DSD of any CSG-recipient children who are not enrolled at or attending school. Where the DG is so notified, he or she must order a social worker to investigate the causes of the child's failure to enrol or attend and must, upon receipt of the report, take appropriate steps to ensure that the child is enrolled at and attends school. The intention of this amendment to the regulations was thus not to make school enrolment or attendance an eligibility requirement, but rather to initiate a supportive intervention for the child to facilitate a return to school.[67]

SASSA staff, from national to district level, seem to have a generally-shared understanding of the correct legal position. However, their implementation of the relevant provisions is at odds with their technical reading of the regulation.

Across the board, SASSA staff recognise in principle that the regulation introduces a condition without consequences, namely, that the failure to enrol, attend or produce a school report does not affect the child's eligibility for the CSG.[68] Nevertheless, SASSA's systems and application forms contribute to the confusion and promote incorrect application of the regulation. In the pre-application screening

[62] SASSA & UNICEF (2013), note 4 above.
[63] SASSA & UNICEF (2013), note 4 above.
[64] SASSA & UNICEF (2013), note 4 above.
[65] Social Assistance Act 13 of 2004: Amendment: Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance. *Government Gazette* 32853, Notice R. 1252 (31 December 2009).
[66] See s6 in the Act and reg 6(1)(a)-(g) in the regulations.
[67] Interview with Dianne Dunkerley, Executive Manager, Grants Administration, SASSA, June 2013.
[68] SASSA & UNICEF (2013), note 4 above.

process, grant applicants are asked to produce a copy of the child's school report or other proof of enrolment. SASSA's screening form, which is used to inform a client of the application process, stipulates that a school report is required (and makes no mention of the fact that failure to submit this document is not fatal to the application). In addition, SASSA's CSG application form has a box that must be ticked by the staff member processing the application to indicate that proof of school attendance has been attached to the application form. If proof of attendance is not attached, the SASSA official is instructed to issue a letter to the caregiver requesting the production of proof of enrolment before the application can be processed. It is not clear, however, why this information is requested if school attendance is not an eligibility requirement under the Act or regulations. Including it in the application form creates the perception both among SASSA officials and caregivers that school attendance is an eligibility requirement.

There is a common misconception amongst excluded caregivers of adolescents and adolescents themselves that children who are not at school or do not have a school report do not qualify for the CSG. There is also evidence of teen mothers self-excluding from accessing the CSG on the grounds that they qualify for the CSG for themselves only if they return to school.[69] This incorrect belief, which is likely to have been caused and perpetuated by SASSA's application forms and internal systems, discourages older out-of-school children from making applications and also results in caregivers voluntarily cancelling grants when their children drop out of school.[70]

Over and above its CSG screening form and processes, SASSA's information, literacy and training materials promote incorrect application of the "conditionality" and engender uncertainty in the minds of staff and the public, thereby perpetuating the mistaken belief that school enrolment is an absolute eligibility requirement. For example, SASSA's official information booklet, *You and Your Grants,* published on its website and distributed through its offices, expressly lists school attendance as an eligibility requirement.[71] In addition, the national SASSA training manual stipulates that if the child is between the ages of 7 – 18 years of age applicants **must** submit proof that he or she is enrolled at school; if no such proof is available, it must be submitted within 30 days. The manual does not elaborate on the consequences that arise if a child does not have a report or is not enrolled.

The SASSA application form, information material and training materials contradict the Social Assistance Act, which does not specify school enrolment as eligibility criteria. They are therefore *ultra vires* the Act, i.e. they have been developed outside the limits of the governing law and are hence unlawful. There are compelling grounds, then, for SASSA to review and revise its documents and training in order to ensure compliance with the provisions of the Act.

In addition to these interpretative inconsistencies and uncertainties, the original supportive intention of the soft conditionality is rendered meaningless. School principals cannot be expected to know which children are not enrolled in school, and there are simply no systems in place within the DSD to provide social welfare services in response to reports of out-of-school children. In instances where these are reported by SASSA to the DSD, there is no follow-up action.[72]

[69] SASSA & UNICEF (2013), note 4 above.
[70] SASSA & UNICEF (2013), note 4 above.
[71] South African Social Security Agency (2013/2014) *You and Your Grants*. Pretoria: SASSA.
[72] Interview with Dianne Dunkerley, Executive Manager, Grants Administration, SASSA, June 2013.

Stigma

The stigma associated with CSG receipt constitutes a barrier among older children, who are more aware than younger ones of their grant status and frequently reluctant to be seen to be "on welfare".[73] Moreover, as previously mentioned, teen mothers are hesitant to apply for the CSG for fear of accusations that they have fallen pregnant as a ploy to access the CSG.[74]

Child employment and misconceptions about the means test

According to the GHS 2011 data, only 12% of employed eligible children access the CSG, while none of the employed eligible children who participated in the NIDS study were receiving it.[75] One of the reasons why working children are excluded is that there is misunderstanding and limited awareness amongst SASSA staff, employers, caregivers and adolescents themselves about the fact that they are eligible even if they are employed.[76]

3.1.4 Orphaned children

Orphaned children face a high risk of exclusion from the CSG.[77] An analysis of the NIDS 2010 data shows that CSG take-up rates amongst income eligible double orphans was 42% and, for single orphans, 66%.[78]

The key reasons for the exclusion of orphans appear to be:

- the availability of the higher-valued Foster Child Grant;
- lack of awareness that caregivers other than mothers can apply for the CSG;
- inefficient use and poor knowledge of the interim caregiver provision in the Act; and
- lack of documents (birth certificates and identity documents).

Availability of the higher-valued Foster Child Grant

In 2011 approximately 460 000 orphans were accessing the FCG instead of the CSG[79] (at least 10% of those accessing the FCG were over 18 years)[80]. There is a clear incentive to apply for the FCG rather than the CSG as it has significantly higher value than the CSG: R800 per month, compared to R300 per month for the CSG in October 2013. While many orphans are accessing the FCG, evidence shows that a greater number are accessing the CSG largely because of its easier application process: in 2011, 570 000 double and maternal orphans were getting the CSG, whereas 460 000 orphans were getting the FCG[81].

[73] Interview, Regional Managers, South African Social Security Agency Western Cape, May 2013.
[74] SASSA & UNICEF (2013), note 4 above.
[75] SASSA &UNICEF (2013), note 4 above.
[76] SASSA &UNICEF (2013), note 4 above.
[77] Delany et al (2008), note 5 above;
Woolard I & Leibrandt M (2010), note 29 above.
[78] SASSA & UNICEF (2013), note 4 above.
[79] K Hall, Children's Institute, University of Cape Town, analysis of *General Household Survey 2011*.
[80] K Hall analysis, note 79 above.
[81] K Hall analysis, note 79 above.

Lack of awareness that the CSG can be applied for by caregivers other than mothers

The NIDS 2010 data reveals that, in 2010, 5% of caregivers who were not accessing the CSG incorrectly believed that only the mother of the child can apply.[82] However, the Social Assistance Act allows all primary caregivers, not only biological parents, to apply for the CSG for children in their care.

Inefficient use and poor knowledge of the interim caregiver provision in the Act

The Social Assistance Act includes a provision aimed at ensuring that CSGs do not lapse upon the death of a caregiver. In terms of section 20(6) of the Social Assistance Act, where a parent or caregiver receiving a grant on behalf of a child dies, SASSA must not suspend the grant but find and appoint someone else – an alternative, interim caregiver – to receive it, subject to prescribed conditions. The process for transferring the CSG to the interim caregiver is not means-tested and is thus less onerous than standard applications.

The system has been designed to be supply-driven. Provincial SASSA offices are supposed to identify and contact relevant households, identify the interim caregivers, advise them of the less onerous documentation and application requirements, and ask them to come in and register as the interim caregiver, after which they can receive the CSG for a six-month period until the new permanent caregiver has been identified and a new full CSG application completed.

However, the system has not been implemented effectively. Very few affected families are identified and contacted, and, as is seen in Table 2, the number of children who have benefited from the interim caregiver provision is miniscule. In the six-month period between August 2012 and January 2013, only 113 interim CSG primary caregivers were appointed, and in only two provinces; stated differently, seven of the nine provinces are not applying the provision at all.

Table 2: Number of interim caregivers appointed to receive the CSG over 6 month period (Aug 2012 – Jan 2013)

Province	Interim caregivers appointed to receive the CSG
Eastern Cape	108
North West	5
National total over 6 months	**113**

Source: Statistics in table supplied by SASSA via e-mail, on special request of the author, June 2013.

In addition to SASSA's poor implementation, there is a widespread lack of knowledge about the provision, particularly among NGOs and outreach workers supporting vulnerable households and communities.[83]

Lack of documents

Lack of documents is an especially common barrier amongst children whose parents have died or who have been separated from them.[84] Documents that create problems are birth certificates, caregiver ID

[82] SASSA &UNICEF (2013), note 4 above.

[83] Interviews with National Association of Child Care Workers, Children In Distress network member organisations in KwaZulu-Natal, and Community Development Workers in Western Cape, May 2013.

[84] Community Agency for Social Enquiry (2009), note 44 above;
Giese S & Smith L (2007) *Rapid Appraisal of Home Affairs Policy and Practice Affecting Children in South Africa*. Cape Town: Alliance for Children's Entitlement to Social Security (ACESS);
Interviews with National Association of Child Care Workers and Children In Distress Network member organisations, May 2013.

documents and death certificates of the children's biological parents.[85] There is a variety of reasons why children and caregivers do not have documents. In some cases, they may not have had any documents to begin with (for example, in situations where births were never registered); in others, documents may have been lost, or children separated from documents as a result of separation from their parents.

Problems with missing documentation are notably burdensome where caregivers are responsible for multiple orphaned children, given that this escalates the cost, complexity and effort of obtaining ID documents.[86]

3.1.5 Children in child-headed households

Children in child-headed households (CHHs) are vulnerable to exclusion from the CSG. In order to alleviate their vulnerability, section 137 of the Children's Act seeks to protect the social security rights of children living in a child-headed household.

The Act makes provision for provincial heads of DSD to recognise and register child-headed households, defined as households where the adult parent/guardian/caregiver is either terminally ill, has died or abandoned the children in the household, and where, with no adult family member available to care for them, a child of 16 years or older has assumed the role of their caregiver. In addition, a CHH must function under the supervision of an adult, NGO or organ of state designated by a Children's Court. The Act further provides that the child heading the household, or the adult supervising it, may collect and administer social security grants for the household.

SASSA's SOCPEN system does not record the child-headed status of households or the number of children in CHHs who are accessing the CSG. Furthermore, little evidence is available from NGOs to indicate whether section 37 of the Children's Act is being implemented and, if so, to what extent.

The key reasons for the exclusion of children in CHHs relate to:

- legal limitations in the Social Assistance Act; and
- referrals of CHHs to the foster care system.

Legal limitations in the Social Assistance Act

Children below the age of 16 years who may be heading a household are precluded from accessing the CSG for their siblings because the definition of "primary caregiver" requires the caregiver to be 16 years or older. However, this is a relatively small problem because more than 88% of CHHs are in fact headed by children over the age of 15.[87]

A further challenge is that children who head households cannot receive the CSG for themselves since they cannot be a caregiver and receiving child at the same time.[88] The Children's Act offers a solution enabling such children to access the CSG both for themselves and their siblings in that it provides for a designated supervising adult to do so on behalf of the household. However, SASSA's systems cannot

[85] SASSA &UNICEF (2013), note 4 above;
Interviews National Association of Child Care Workers, Children In Distress network member organisations, Tapologo Programme and St Francis Hospice, May and June 2013.
[86] SASSA & UNICEF (2013), note 4 above.
[87] Meintjies H, Hall K, Marera D & Boulle A (2010) Orphans of the Aids epidemic? The extent, nature and circumstances of child-headed households in South Africa. *AIDS Care,* 22(1), January 2010:40-49.
[88] Community Agency for Social Enquiry & Children's Institute, University of Cape Town (2012) *Comprehensive Review of the Provision of Social Assistance to Children in Family Care*. Commissioned by Department of Social Development. Pretoria.

receive – and are at present not receiving – applications from supervising adults. There are two reasons for this. The first is that the Social Assistance Act does not yet make provision for receipt of an application from a supervising adult. The second is that the recognition of child-headed households must be made by social workers who then refer the matter to SASSA, but to date no formally recognised CHHs have been referred to it.[89]

Referrals of CHHs to the foster care system

Social workers tend to route CHHs away from the CSG to the FCG because of the higher value of the latter grant.[90] However, no evidence exists of a court ever having appointed a child under 18 as a foster parent. What happens in these situations, then, is that social workers locate an adult family member to live with the children or take them into care, meaning that the household is thus no longer categorisable as a child-headed household.[91]

3.1.6 Refugee children

On 1 April 2012 the Social Assistance Act was amended to allow primary caregivers who are lawful refugees to access the CSG for their children. Previously, only citizens and permanent residents qualified as primary caregivers.

Whilst little if any data is available as to the number of refugees who would potentially qualify as CSG beneficiaries, SASSA is concerned that the numbers applying for and accessing the CSG are substantially lower than the eligible population. In 2013 only 4 540 refugee children accessed the CSG.[92]

Table 3: CSG receipt by child refugees, 2013

Province	Refugees
Eastern Cape	234
Free State	2
Gauteng	694
KwaZulu-Natal	1 057
Limpopo	3
Mpumalanga	23
Northern Cape	91
North West	3
Western Cape	2 433
Total	**4 540**

Source: Statistics in table supplied by SASSA via e-mail, on special request of the author.

[89] Personal correspondence with Dianne Dunkerley, Executive Manager, Grants Administration, South African Social Security Agency, 27 July 2013.
[90] Community Agency for Social Enquiry & Children's Institute, University of Cape Town (2012), note 88 above.
[91] SASSA &UNICEF (2013), note 4 above.
[92] SASSA & UNICEF (2013), note 4 above.

Key reasons for the exclusion of refugee children include:

- The Social Assistance Act does not extend coverage to asylum-seekers. Only children in the care of lawful refugees who have successfully completed the refugee application process qualify for the CSG.
- Refugees commonly lack appropriate identity documentation, and there is limited awareness of the right to use alternative documents to prove identity.[93]
- Language difficulties can impede understanding of the law and application procedures, particularly so in the case of complicated matters like the alternative document process.[94]

3.2 Inadequacy of the amount of the CSG

In addition to the limitations and gaps described above, there are concerns that the value of the monthly CSG is not sufficient for South Africa to meet its international and constitutional obligations in relation to social assistance. The CSG has the lowest value of all children's grants, and in 2012 it was 2.7 times smaller than the FCG.[95]

The low value of the CSG, coupled with the disparity between it and other grants, is problematic in several respects. The current amount is too small to make a strong enough impact on poverty levels[96] or meet the basic needs of the child.[97] Furthermore, it is inequitable that some orphans benefit from the much higher-value FCG, and others from the lower-value CSG, particularly given that there is no apparent rational basis for the distinction.[98] The value of the CSG is based neither on an objective measure, an agreed poverty line (a variety of national poverty lines could offer such a reference point), nor on the cost of providing essential food to children.[99]

The Committee on Economic, Social and Cultural Rights requires that social assistance benefits be adequate in amount and duration so that everybody may realise their rights to assistance, an adequate standard of living and adequate access to health care. This translates into the requirement that the amount of the benefit should be enough to enable beneficiaries to afford the goods and services needed to realise the rights protected by the Covenant on Social, Economic and Cultural Rights (and the UNCRC and ACRWC).[100]

The original value of the CSG was based on the amount needed to provide food to the young children initially covered by the CSG (0 – 7-year-olds). The Lund Committee of Inquiry (upon which the introduction of the CSG was founded) acknowledged that this amount was low, but reconciled itself to it in view of the government's commitment to roll out the CSG as part of a broader package of services and support. The rate and pace of increase in the value has certainly not kept up with the cost of providing essential foods to children in today's monetary terms, nor has the value been adjusted to take account of the higher costs of feeding a child older than seven years. The Community Agency of

[93] Martin P et al (2013), note 44 above.
[94] Martin P et al (2013), note 44 above.
[95] Community Agency for Social Enquiry & Children's Institute, University of Cape Town (2012), note 88 above.
[96] Hall K (2012), note 4 above.
[97] Frye I & Brockerhoff J (2011) *The Role of Social Security in Alleviating the Levels of Poverty and Inequality in South Africa.* Input paper to the National Planning Commission. Johannesburg: Studies in Poverty and Inequality Institute; Community Agency for Social Enquiry & Children's Institute, University of Cape Town (2012), note 88 above.
[98] Community Agency for Social Enquiry & Children's Institute, University of Cape Town (2012), note 88 above.
[99] Community Agency for Social Enquiry & Children's Institute, University of Cape Town (2012), note 88 above.
[100] Committee on Economic, Social and Cultural Rights (2008), note 36 above.

Social Enquiry (CASE) and the Children's Institute (CI), University of Cape Town, calculate such costs to be R458 per child per month (in April 2013 terms).[101]

The inadequacy of the current amount (R300) is noted by Frye *et al,* who argue that it is not enough to cover the basic needs of the child and that this inadequacy is aggravated by the high cost of food for the poor.[102] Earlier studies have also observed that food inflation hits the poor hardest and that the CSG is insufficient to prevent hunger because its value is too low to cover these costs.[103]

Since 2001 the value of the CSG has been adjusted annually to take inflation into account. Table 4 shows the adjustments for grants in the 2013/14 financial year. The Old Age; War Veterans, Disability; and Care Dependency Grants increased by R60 each in April 2013, and by another R10 each in October 2013. The FCG had one increase of R30 in April, while the CSG increased by R10 in April and a further R10 in October 2013. Due to the bi-annual increases in April and October, as opposed to an inflation-linked annual increase in April, the *real* cumulative increase for the CSG is only 5.4%.[104]

Table 4: Social grant values, 2012/13 and 2013/14

Grant	**Amount in 2012/13** (Rands)	**Amount in 2013/14** (Rands)	**Nominal Increase** (difference between October 2013 and previous year)	**Real Increase** (difference between 2012/13 and 2013/14 values)
Old Age Grant	1 200	1 270	5.8%	5.4%
Old Age Grant, over 75	1 220	1 290	5.7%	5.3%
War Veterans Grant	1 220	1 290	5.7%	5.3%
Disability Grant	1 200	1 270	5.8%	5.4%
Foster Child Grant	770	800	3.9%	3.9%
Care Dependency Grant	1 200	1 270	5.8%	5.4%
Child Support Grant	280	300	7.1%	5.4%

Source: K Hall, Children's Institute, University of Cape Town, calculations for the purposes of this paper, December 2013.

Due to the low base at which the CSG started and the fact that all the grants tend to be increased at equal rates, the gap between the CSG and the other grants continues to widen.

3.3 Summary of gaps in the law

While the CSG is expansive in its reach of children living in poverty, a significant number of children rendered vulnerable by factors such as nationality, household status and age do not enjoy their right to social assistance. In addition, the current amount of the CSG is inadequate.

Gaps in the law include the following:

- The monthly amount of the CSG is inadequate.

[101] Community Agency for Social Enquiry & Children's Institute, University of Cape Town (2012), note 88 above.
[102] Frye I & Brockerhoff j (2011), note 97 above.
[103] Delany et al (2008), note 5 above;
De Koker C et al (2006), note 4 above.
[104] K Hall, Children's Institute, University of Cape Town, calculations for the purposes of this paper, December 2013.

- Children younger than 16 years of age heading households are excluded by the law from accessing the CSG for themselves and their siblings.
- Child household-heads between the age of 16 and 18 years are excluded from accessing the CSG for themselves.
- The Social Assistance Act has not been amended to facilitate CSG access by supervising adults designated to assist child-headed households in this regard.
- Teen mothers are excluded from receiving the CSG for their infants if their own mothers are already receiving a CSG for them, their teen daughters.

3.3.1 Summary of implementation challenges

- SASSA staff are applying the school enrolment soft conditionality as an eligibility requirement at the application stage rather than a retrospective supportive mechanism. This administrative action is not lawful because the Act and regulations clearly do not make create school enrolment and/or attendance an eligibility requirement.
- There are misconceptions among some SASSA staff members how the means test is applied to working caregivers and employed children whose income falls below the income threshold. The result is that eligible caregivers are either discouraged from applying or turned away at the application stage.
- The public lacks accurate information about the means test, particularly as it applies to the threshold amount and the eligibility of working caregivers, working children, caregivers receiving other social security benefits, and caregivers getting maintenance. Misconceptions arise in this information vacuum and discourage caregivers from applying for the CSG.
- SASSA limits application of the alternative documentation mechanism to cases where documents were never issued and excludes those where documents were lost. The regulations do not authorise any such limitation. The result is that many vulnerable children, especially orphans, are denied the opportunity to benefit from the mechanism.
- There is a lack of public knowledge of, and consequently a lack of demand for, use of the alternative documentation regulations.
- There is a lack of public knowledge, and hence a lack of demand, for use of the interim caregiver process upon the death of a caregiver.
- There is a lack of knowledge and training among outreach workers and NGOs providing services and support to especially vulnerable households (for example, CHHs, family caring for orphans, and elderly caregiver households) about special CSG measures such as the alternative document provisions and the interim caregiver grant.
- There is a lack of awareness among caregivers and SASSA officials of the availability of the CSG for infants and youth/older adolescents as well as the social and developmental value this holds.
- No training, education and public awareness is targeted at stigma and discrimination, especially against especially vulnerable groups like refugees and teen mothers.
- No formal partnerships exist between SASSA and provincial DSDs for identifying and referring especially vulnerable children to access the CSG. Notable groups in need of referral include orphans, employed adolescents and adolescents not attending school.
- CSG support and messaging are not formally and systematically integrated into the infant, maternal and child health services as a standard element of promotive health and early childhood development.

4. Policy and law reform currently under discussion

4.1 Universalisation of the CSG

In 2010 the DSD commissioned research into the feasibility of universalising the CSG. Conducted by the Economic Policy Research Institute (EPRI), the study found that eliminating the means test would resolve a number of institutional and administrative barriers and inefficiencies as well as address concerns about fraud and corruption.[105] The researchers conclude that universalisation would impact specifically on the following barriers:

- possible perverse incentives amongst applicants not to disclose their full income and the associated concerns about fraudulent applications, concerns which drive the development of increasingly onerous application procedures and requirements and thereby erect further barriers to access;
- barriers created by the need for documents (and multiple trips and transport costs) to prove income;
- confusion about the means test and income threshold among the public and SASSA staff, a state of affairs which results in the exclusion of prospective beneficiaries;
- administrative inefficiencies caused by the implementation and monitoring of the means test, processes which consume a significant amount of human and financial resources;
- corruption amongst SASSA staff: there is a high risk of corruption where officials are responsible for admitting only those beneficiaries who comply with the means test requirements; and
- stigmatisation: universalising the CSG would eliminate distinctions between those who are "on welfare" and those who are not.

Since the study was concluded, the DSD has not published any discussion or draft policy documents, nor has it created space for debate on the concept of universalisation. The DSD is nevertheless convinced that universalisation is the way to go. The Minister has given her department the mandate to promote it, but the National Treasury remains to be convinced. The DSD thus faces the challenge of preparing appropriate modelling to show the impact of universalisation on equality and national development objectives.[106]

At a process level, there has been no consultation with civil society or the general public on the proposal for universalisation. Given the scale of the reform and its likely impact on the rights of children and caregivers, progress would be facilitated by further research and participatory input through, for example, a Green Paper process.

4.2 Higher CSG for orphans living with extended family

In 2011 the DSD identified a challenge with regards to social assistance for orphan children living in the care of family members and children in child-headed households. While family members caring for orphans can apply for the CSG, many prefer to apply for the FCG because it is almost three times the value of the CSG. However, the procedure for accessing the FCG requires a child protection inquiry, which is labour intensive, involving overburdened social workers and courts, and likely to take up to

[105] Samson M et al (2011), note 35 above.
[106] Interview, Brenton van Vrede, Chief Director for Social Security, Department of Social Development, July 2013.

three years. As a result, families living in poverty struggle financially to cover the costs of caring for the children in their care.

The DSD therefore commissioned research and recommendations on the challenge. CASE and the CI conducted the research and recommended the creation of a kinship grant for family members caring for the country's 1.1 million maternal and double orphans living below the CSG means-test threshold. This recommendation is similar to the proposal made by the South African Law Reform Commission when it researched and drafted the Children's Bill in 2002. The recommendation in the CASE–CI report is that the kinship grant should amount to 80% of the value of the FCG. In addition, to introduce greater equity in the amounts of the FCG and CSG, the report recommended that the standard CSG amount should be increased incrementally to bring it in line with the value of the per-capita cost of food in Statistics South Africa's lower poverty line. The objective is that the CSG ultimately equal 60% of the value of the FCG.[107]

Subsequent to the research, the DSD asked the CI to illustrate how the proposal could be translated into law. The CI; Centre for Child Law, University of Pretoria; and Johannesburg Child Welfare formed a task team and drafted an illustrative set of regulations to the Social Assistance Act that provided for a larger CSG to be available to family members caring for orphans. The amount would be higher than the CSG but less than the FCG. This proposal avoids a new grant having to be developed, a process which would take much longer and also introduce complexity into South Africa's current child grant system. The proposal instead capitalises on the original intention that the CSG be available to primary caregivers (including family members caring for orphans) and on the proven success CSG administrative systems have in reaching large amounts of children timeously.

The DSD has responded with the development of a draft proposal that seeks to introduce:

- an extended CSG (i.e. one larger in amount) for orphans living with their family members; and
- an extended CSG for a child heading a household that enables him or her as well as the household children to receive the grant.

The proposed reform was presented orally by the DSD in November 2012 and April 2013 at consultative workshops and welcomed by civil society. While the concept as a whole stands to be in children's best interests, the children's sector was nevertheless concerned that details of the proposal had not yet been made public for comment and engagement.

At the time of writing, the proposal was at an advanced stage, had been approved by the Management Committee in DSD, and was being processed for the next stage of internal approval. The intention is to implement it in 2014.[108] It is important that the process be opened up for public consultation as soon as possible to ensure that the details of the proposal are in the best interests of all categories of children affected. These include all children living in poverty (non-orphans and orphans), orphans living with extended family members including children in child-headed households, and children who have been abused and neglected. [See chapter 8 on the Right to be Protected from Violence for more detail on the lack of capacity within the child protection system to process foster care applications timeously, and the impact of attempting to do so on orphans, as well as children who have been abused and neglected.]

[107] Community Agency for Social Enquiry & Children's Institute, University of Cape Town (2012),note 88 above.
[108] Interview with Brenton van Vrede, Department of Social Development, note 106 above.

4.3 Increasing the value of the CSG

The DSD has issued terms of reference for research on the feasibility of increasing the amount of the CSG. The expected completion date of the research is not known.

5. Recommendations

5.1 To address the gaps in the law

- The Social Assistance Act should be amended to allow teen mothers and children heading households to receive the CSG simultaneously for themselves and the children in their care.
- The Social Assistance Act should be amended to bring it into alignment with the Children's Act and allow supervising adults supporting child-headed households to apply for the CSG on behalf of the children under their supervision.
- The school enrolment soft conditionality should be removed from the Social Assistance Act's regulations to prevent it from being used as an eligibility requirement.
- The reform to create an extended CSG for orphans in the care of family members should be prioritised in order to ensure that orphans receive an adequate grant timeously and abused and neglected children receive quality and timeous protection services. Before final decisions are taken on the details of the proposal, the draft proposal should be published for comment.
- Details of the proposal for universalising the CSG should be published by the DSD and publicly debated via a Green Paper process.
- Once finalised, the DSD's research into the feasibility of increasing the CSG amount should be published for public engagement and followed up by consultative workshops. This should be followed by appropriate incremental increases to the CSG amount.

5.2 To address the implementation challenges

- Interventions and programmes targeting the barriers faced by especially vulnerable groups of children such as orphans and children under one year should be better integrated within the DSD and SASSA's data collection, training and communications systems.
- Formal partnerships should be established between SASSA, strategic departments and civil society organisations providing services and support to targeted groups at a high risk of exclusion. Relevant entities include the Departments of Health, Labour, Higher Education and Training, the Department of Public Service and Administration (to reach community development workers) and NGOs involved in community-based outreach, such as the National Association of Child Care Workers and organisations participating in the Children in Distress (CINDI) network.
- SASSA should review its training, inter alia, in order to:
  a) align it closely with the provisions of the Social Assistance Act and the Children's Act;
  b) include modules on the specific barriers and measures in place to include children at high risk of exclusion;
  c) identify and correct erroneous interpretations of the Social Assistance Act such as the incorrect application of the school enrolment soft conditionality as an eligibility requirement, the failure to apply regulation 11(1) to cases of lost documents, and the incorrect interpretation and application of the means test; and
  d) provide education on stigma and discrimination.

- SASSA should amend its application forms, communication materials and processes so that these do not perpetuate incorrect application and interpretation of the law, a case in point being the screening form that requires the submission of a school enrolment letter.
- SASSA should develop a comprehensive communications and literacy campaign to promote the social and economic developmental value of the CSG, raise awareness of the rights and remedies available to vulnerable groups, and explain how these groups should apply the relevant laws and processes to ensure that they can access the grant.

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Chapter 5

The rights of children with disabilities to social assistance: A review of South Africa's Care Dependency Grant

Patricia Martin, Paula Proudlock and Lizette Berry

Contents

1. Introduction

Children with disabilities are entitled to equal enjoyment of all the rights guaranteed for children under international, regional and constitutional law. They and their caregivers require, and are entitled to, support from the state to make this a reality. The Care Dependency Grant (CDG) is one of the programmes that the South African government has adopted to realise the rights of children with disabilities. In this chapter we analyse the legislative framework which provides for the CDG and identify a number of inconsistencies within it as well as practical challenges that arise in its implementation.

In a nutshell, while international, constitutional and statutory law require the government to move away from a medical model to a social-functioning model for eligibility for the CDG, South Africa's social assistance continues to be based on a medical model of disability, with the result that the majority of children with disabilities are excluded from enjoying the CDG's proven benefits.

2. Rights analysis

2.1 International and regional law

The government of South Africa has pledged itself to the full and equal realisation of the rights of children with disabilities. It signed and ratified the United Nations Convention on the Rights of the Child (1989) (UNCRC), the African Charter on the Rights and Welfare of the Child (1990) (ACRWC), and the United Nations Convention on the Rights of Persons with Disabilities (2006) (CRPD) and its accompanying Optional Protocol (2007).

In ratifying these instruments, the government has committed to ensuring the realisation of the rights of all children with disabilities by (a) removing barriers to the enjoyment of their rights and access to services and (b) providing assistance to children with disabilities and their caregivers that is appropriate to the child's condition and the circumstances of their caregivers. The objective of the assistance is to ensure that the child enjoys a full and decent life, full and equal enjoyment of his or her rights, and an adequate standard of living.[1]

The CRPD brought about a paradigm shift in how governments should view and address the realisation of the rights of people with disabilities. In particular, it affected a shift from a medical model of disability towards a social model. As a result, signatory states (including South Africa) are required to give effect to the rights of people with disabilities within a legal framework that recognises people with disabilities as subjects with rights rather than objects with special needs. Moreover, this framework is to be based on a definition of disability that treats it not as a matter of medical abilities or limitations upon people but as "an evolving concept … that results from interaction between persons with

[1] Art 13 ACRWC, Art 23 UNCRC, and Arts 7 and 28 of the CRPD.

impairments and attitudinal and environmental barriers that hinder full and effective participation in society on an equal basis with others". [2]

The social model of disability thus requires states to see disability as a human rights issue and to develop an enabling legal framework for the promotion and protection of the rights of people with disabilities that is not confined to providing disability-related services but which also seeks to change attitudes and practices that stigmatise and marginalise children with disabilities.[3]

2.2 South African constitutional law

The Constitution of the Republic of South Africa Act 108 of 1996 guarantees the rights of all children, including those with disabilities, to equality before the law and equal protection and benefit of the law.[4] Furthermore, it expressly prohibits unfair discrimination against children with a disability.[5]

Section 27(1)(c) of the Constitution guarantees that everyone has the right to have access to social security, including appropriate social assistance where they are unable to support themselves and their dependants. The right to special protection for children is dealt with in further detail in section 28(1)(c), which states that every child has the right to basic nutrition, shelter, basic health care services and social services.

2.3 Summary of rights and obligations

The UNCRC, ACRWC, CRPD and the South African Constitution recognise the right of all children with a disability to a standard of living adequate for ensuring their survival and development. Similarly, they recognise that children with disabilities have the right to dignity, equality, full participation in life and to protection from discrimination on the basis of their disability. Whilst parents are recognised as the primary duty-bearers in respect of children's rights to an adequate standard of living, the state is obliged, especially in conditions of poverty, to support parents and others with a duty of care, in fulfilling these responsibilities.[6]

The government has recognised its obligations to address the social assistance rights of children with disabilities within the internationally and constitutionally prescribed rights-based social framework to ensure their survival and adequate standard of living. It has committed itself to developing inclusive laws and programmes in relation to social security, health, education[7] and other areas. To qualify as "inclusive", laws and programmes should recognise, respond to and seek to mitigate, on the one hand, the medical causes and consequences of disability, and, on the other, the social, economic and

[2] Preamble, para (e), CRPD.
[3] Department of Social Development; Department of Women, Children and People with Disabilities & UNICEF South Africa (2012) *Children with Disabilities in South Africa: A Situation Assessment 2001 – 2011.* Pretoria: UNICEF South Africa.
[4] s9(1).
[5] s9(3).
[6] Art 27(2) and (3) of the UNCRC;
Government of the Republic of South Africa and Others v Grootboom and Others [2000] ZACC 19, para 77.
[7] See section 7 of chapter 6 on the Right to Basic Education for a detailed analysis on South Africa's education system in relation to the rights of children with disabilities.

environmental factors which inhibit children's participation in society and full enjoyment of their rights.[8]

In the context of social security, this undertaking translates into an obligation to develop and implement a children's social security system that recognises and responds to the complex, dynamic nature of disability and seeks to eliminate the contextual factors which shape it.[9]

3. Situation analysis

In South Africa, children with a disability do not enjoy the right to an adequate standard of living to the same extent as their able-bodied counterparts. By implication, their right to equality is also thereby compromised. In the absence of extra care, support and/or services, children with disabilities or chronic health conditions are often unable to participate fully in the daily activities and social amenities available to them. Limitations on their participation may be – and, in most cases, are – attributable to a combination of physical limitations associated with their medical condition, and environmental ones that stem from inadequate accommodation of their needs and circumstances.[10]

For children with disabilities, especially those in households living in poverty, securing enjoyment of the right to equality and to an adequate standard of living requires that these barriers to basic services and full participation be overcome. In turn, this requires that measures be taken to eliminate the underlying barriers and that financial support is provided to cover the related extra costs.

Children with a disability are likely to require extra care, support or supervision while performing ordinary activities of daily living. In addition, depending on the nature of the impairment, they may need medication, therapy, assistive devices or regular hospital visits. In this regard, a number of costs are associated with caring for a child with a disability. Among them are the costs of travel to access medical care; of treatment, medication or therapeutic services; and of special dietary requirements, medical equipment or devices. A caregiver may decide to care for his or her child on a full-time basis or employ a substitute caregiver, either of which situation results in a loss of money for the family: in the latter, through the extra expense, and in the former, through the negative effect it has on the caregiver's employment.[11] Caring for a child with a disability, in a way which ensures equality of opportunity, can therefore place significant financial strain on a family – strain which is felt with particular intensity by already vulnerable low-income families.

Against this backdrop, the Social Assistance Act 13 of 2004 enables the provision of a cash transfer, called the Care Dependency Grant (CDG), to the parent, primary caregiver or foster parent of a child

[8] Department of Social Development (June 2009) *Integrated National Strategy on Support Services to Children with Disabilities (Revised Draft).* Pretoria: DSD.
[9] Department of Social Development et al (2012), note 3 above.
[10] Department of Social Development et al (2012), note 3 above.
[11] Berry L & Van de Smit A (2011) Social assistance needs of children with chronic health conditions: A comparative study of international and South African eligibility assessment instruments. *Social Work in Public Health*, 26:635-650.

with a physical or mental[12] disability. Research has shown that receipt of the CDG improves standards of living both for children with disabilities and their broader households:

- 98% of households receiving the CDG said the grant improved the general well-being of the household, with 78% of these households indicating that it did so because it enabled them to buy better quality of food;
- 8% of households used it to pay transport costs to access health facilities;
- 7% used it to cover the cost of medicines; and
- 6% used it to improve housing.[13]

However, substantial numbers of children with disabilities are not receiving the CDG and are therefore not able to benefit from its proven positive impact.

No accurate statistics are available as to the total number of children with disabilities in South Africa.[14] The most current Census (2011) and General Household Survey (GHS) (2012) collected data only for the number of people with a disability who are older than five years of age[15], while the older Census 2001 collected information across all ages, but only in respect of people with severe disabilities. Earlier General Household Surveys, such as the 2009 GHS, collected data across all age ranges and in respect of all disabilities. However, the 2009 GHS data is considered unreliable because the questions that were used did not distinguish adequately between disabilities and normal age-appropriate developmental processes. The figure of 2.1 million children with disabilities, arrived at in terms of the 2009 GHS, is thus likely to be a significant over-estimation. Nonetheless, given that the Census data counted only severe disabilities, the 2011 Census figure of 474 000 is an under-estimation of the actual number of children with disabilities in South Africa.[16] A further limitation of the data is that children with disabling chronic illnesses are not considered.

Because of this insufficiency of data about children with disabilities, it is impossible to assess what percentage of children targeted by the CDG are being reached, or if there has been growth in CDG coverage relative to population increases.[17] The difficulty is compounded by inconsistencies between the Act, regulations and assessment form (see sections 4 and 5 below) which leave it unclear as to who precisely the CDG's target group is within the general population of children with disabilities.

Despite these problems with the data, what is apparent from the available information is that CDG coverage is low. Whilst the total number of children receiving a CDG increased from 86 917 in March 2005 to 120 268 in March 2013[18], this number is significantly less than even the lower estimation in Census 2011 of 474 000 children with severe disabilities. In summary – the CDG is reaching only a

[12] This is the terminology used in the Act, although "intellectual disability" is considered more politically correct.
[13] De Koker C, De Waal L & Vorster V (2006) *A Profile of Social Security Beneficiaries in South Africa.* Stellenbosch: Department of Sociology and Social Anthropology, Stellenbosch University. Pg 463.
[14] Department of Social Development et al (2012), note 3 above.
[15] Statistics South Africa (2013) *General Household Survey 2012.* Pretoria: Statistics South Africa.
[16] Department of Social Development et al (2012), note 3 above.
[17] Department of Social Development et al (2012), note 3 above.
[18] South African Social Security Agency (2008 – 2013) SOCPEN database. In: Berry L, Biersteker L, Dawes A, Lake L & Smith C (eds) (2013) *South African Child Gauge 2013.* Cape Town: Children's Institute, University of Cape Town.

quarter of children with severe disabilities, never mind the many more children with moderate to mild disabilities who are also eligible.

A number of design and implementation challenges are limiting the proven positive impact of the CDG to a small proportion of children with disabilities and excluding the majority of children in need. The following section describes the legal framework that provides for and regulates the CDG and assesses whether the grant is reasonably designed and implemented.

4. Legislative framework: Social Assistance Act, regulations and the assessment form

The eligibility requirements and application procedures for the CDG are regulated by the Social Assistance Act 13 of 2004 and its accompanying regulations.[19]

The CDG is a cash transfer in the sum of R1 270 per month paid to a caregiver caring for an eligible child with a disability.[20] Caregivers who qualify include biological and adoptive parents, primary caregivers or foster parents. To qualify, the monthly income of the caregiver and spouse (if married) must be less than 10 times the value of the CDG.[21]

Not all children with a disability qualify. The Act provides that caregivers of children qualify for the grant if the child "requires and receives permanent care or support services due to his or her physical or mental disability"[22]; the caregiver will not be eligible if the child "is cared for on a 24-hour basis for a period exceeding six months in an institution that is funded by the state"[23]. The CDG is thus limited to children who require permanent care or support services due to their physical or mental disability, excluding those who are cared for on a 24-hour basis in a state-funded institution.

The Act and its regulations were amended in 2004 and 2008, respectively, effectively to introduce the more inclusive eligibility criteria outlined above. The earlier Social Assistance Act of 1992 expressly limited the CDG to children older than one year who had a "severe" disability and who, in addition, required permanent "home" care. The 2004 amendments to the Act removed the words "severe" and "home" from the eligibility criteria section. Furthermore, the words "or support services" were introduced as an alternative to "permanent care", expanding the scope of application of the CDG to all children with disabilities who require either permanent care **or** support services. The exclusion of children under the age of one year from being eligible for the grant was also addressed.

The amendments thus marked a shift from a purely medical to a more balanced social model of disability. In terms of eligibility, the emphasis changed from assessing the medical severity and

[19] Social Assistance Act 13 of 2004: Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance. *Government Gazette* 31356, Notice R. 898 (22 August 2008).
[20] This was the amount in January 2014. The value of the CDG is increased annually in April to keep pace with inflation.
[21] Reg 8.
[22] s7(a) read with s5.
[23] s7(b) read with s5.

permanence of the child's disability to assessing the level of care or support services required: where permanent care or support services are needed, the child should be considered eligible, regardless of the severity of the disability.

The 2008 regulations elaborate on the eligibility criteria and stipulate that the child undergo an assessment. An assessment is defined as a "medical examination by a medical officer" to determine "care-dependency for the purposes of recommending a finding for the awarding of a social grant".[24] The wording of the eligibility section of the regulations is however different to that of the eligibility section of the Act. Section 7 of the Act defines an eligible child as one who requires permanent care or support services, whereas regulation 8 defines an eligible child as a "care-dependent child". To find the definition of "care-dependent child" one needs to look at section 1 of the Act which defines such a child as one "who requires and receives permanent care due to his or her severe mental or physical disability".[25] Regulation 8 therefore re-introduces the requirement of "severe" despite it having been removed from the eligibility criteria in the principal Act.

Children are assessed by a medical practitioner employed by the government or commissioned by the South African Social Security Agency (SASSA) to determine the nature of the disability; whether the child's care needs are permanent; and whether the child requires support services. When the Act and regulations were amended in 2004 and 2008, the previous assessment form – which comprised one of a number of gazetted forms accompanying the regulations to the 1992 Act – was repealed along with the rest of the regulations. This created the need for government to prescribe a new assessment form.

Recognising the gap, the Department of Social Development (DSD) commissioned consultants to develop a new assessment form to assess the child's eligibility in accordance with the new eligibility criteria. The purpose was both to align the form with the new eligibility requirements and to institutionalise a shift towards a more balanced socio-medical assessment, one premised on an evaluation of the level of care and support services required by the child with a disability. A draft of the new form was piloted by DSD in three provinces in 2008.

However, to date a new assessment form has not been promulgated or otherwise implemented.[26] Although the DSD presented the new assessment form to Cabinet for approval after it was piloted, Cabinet did not approve it, requesting instead that a new CDG policy be developed and presented along with the revised assessment form. A revised draft CDG policy has since been developed, but, pending Cabinet approval and other internal consultations, it is not publicly available.[27]

In the absence of a new assessment form, many medical practitioners are using the repealed CDG assessment form that had been designed to assess eligibility specifically in terms of the former Act and is thus based on repealed eligibility criteria.[28] They do so under instruction from the relevant offices of

[24] Reg 8.
[25] See the definition of "care-dependent child" in s1 of the Act.
[26] Interview with Dinah Mokaba, Deputy Director, Sub-directorate: Care Dependency Grant, Directorate: Disability and Old Age Grant, national DSD, 25 January 2014.
[27] Interview with Dinah Mokaba, Deputy Director, national DSD, note 26 above.
[28] Forms gathered in 2013 from the Red Cross Children's Hospital, Worcester Community Health Centre, and SASSA office in Athlone in the Western Cape.

SASSA[29] within whose jurisdiction these medical officers fall. As such, the latter are using forms that continue to make express reference to repealed words and criteria, such as "severe" and "home" care, and which do not refer to the requirement of assessing the child's need for support services.

In KwaZulu-Natal (KZN) medical officers are using a form designed by SASSA titled: "Medical Assessment: Referral Form".[30] This form was developed by SASSA for the adult Disability Grant. The form underwent only a limited internal consultation process with the Departments of Social Development and Health, is currently not available to the public, and was not gazetted in the regulations. At present it is used in processing the adult disability grant and some CDG applications.[31]

5. Legal gaps and implementation challenges

5.1 Inconsistencies between the Act and regulations

Prior to the 2004 amendment of the Act, the CDG was available only to children who were older than one year and had a "severe" disability requiring that they receive permanent **"**home" care. The focus, in other words, was on the medical diagnosis of the child as having a severe disability rather than on the child's circumstances or care and support needs. The 2004 amendments to the Act expanded the range of children eligible to include all children with disabilities who require permanent care **or** support services, regardless of the nature or severity of their disabilities. The eligibility criteria in the Act in section 7 were expressly amended to exclude any reference to (and hence exclude as eligibility requirements) "home" care or "severe" disability. In effect, this means children are eligible for the CDG if they have a mental or physical disability and, as a result thereof, are in need of either permanent care or support services.

The 2008 regulations however did not follow the lead of the 2004 principal Act. Regulation 8 provides that only caregivers of a "care-dependent" child who is found to be in need of permanent care or support services will qualify for the CDG. A "care-dependent" child is defined in section 1 of the Act as a child "who requires and receives permanent care due to his or her severe mental or physical disability".[32]

However, because the word "severe" and the phrase "care dependent child" are not used in the eligibility sections of the Act, the inclusion of the severity requirement in the eligibility criteria via the subordinate legislation (namely the regulations) may be construed as outside the scope of the enabling legislation. When inconsistencies between the eligibility criteria set out in an Act of Parliament and those set out in sub-ordinate legislation such as regulations arise, the Act trumps the regulations and the regulations will be considered *ultra vires* (unlawful). However in practice it appears as if the

[29] When the SASSA offices in Athlone, Western Cape, were asked for the assessment form currently in use, they handed out the old form gazetted under the 1992 Act. Medical officers and social workers at Red Cross Children's Hospital and Worcester Health Centre confirmed that they were using the repealed form under instruction from SASSA.
[30] Personal correspondence with Dr Neil McKerrow, Head Paediatrics and Child Health, Department of Health, KwaZulu-Natal, 6 September 2013.
[31] Interview with Dianne Dunkerley, Executive Manager, Grants Administration, SASSA, August 2013.
[32] See the definition of "care-dependent child" in s1 in the Act.

eligibility criteria specified in the regulations are trumping the Act because our evidence reveals that SASSA and many medical officers are misinterpreting the law as excluding children with moderate to mild disabilities and children who do not require permanent care but do require support services.

If the eligibility requirements in the regulations were to be challenged as unlawfully narrowing the scope of the eligibility criteria in the Act, any exclusion of children with moderate to mild disabilities from the CDG based on this *ultra vires* regulation will be unlawful.

5.2 Assessment form has not been prescribed

As explained above in section 4, to qualify for a CDG a child first has to be assessed by a medical officer. However the Minister has not yet prescribed an appropriate form to guide the medical officers to assess children based on the new eligibility criteria brought about by the amendments to the Act and regulations in 2004 and 2008 respectively. Our research revealed that, as a result, medical officers are either using the repealed assessment form that was prescribed under the 1992 Act based on the repealed eligibility criteria or a form designed by SASSA for assessing adults' eligibility for the Disability Grant. Both of them are framed in a medical rather than social model of disability; and SASSA's form focuses on employability. As a result, neither of them is a viable tool for assessing children's functional abilities or their care or support service needs.

5.2.1 The repealed assessment form is still in use

The repealed CDG assessment form expressly directs medical officers to consider what is now irrelevant, namely whether the disability is "severe" and whether the child needs permanent "home" care. There is also no space for consideration of the alternative eligibility criteria to being in need of permanent care, namely, being in need of support services. Medical officers using this repealed form are likely to exclude children with moderate to mild disabilities as well as children who may not require permanent care but do require support services.

5.2.2 SASSA is promoting use of its adult-focused medical assessment form

Some medical officers are using SASSA's adult Disability Grant "Medical Assessment: Referral Form". However this form does not align with, or facilitate, an assessment of a child's needs or compliance with the eligibility criteria for the CDG as prescribed by the Social Assistance Act. The questions contained therein are aligned to the eligibility criteria for the Disability Grant for adults. For example, a central question in the form is whether the patient's condition prevents him or her from being employed. There are no child-specific sections in the form that align to the eligibility criteria for the CDG. For these reasons it is unsuitable as a vehicle for assessing a child's needs and eligibility for the CDG.

A further question arises as to whether the form and its continued use is lawful. We raise this question based on the following considerations:

- The Act endows the Minister, not SASSA, with the authority to prescribe forms.[33]
- Whilst the Act allows the Minister to delegate any authority in writing, she is prohibited from delegating her authority to make regulations.[34]
- Under the 1992 Act, the assessment form was gazetted as part of the regulations and was consequently subject to transparent notice-and-comment processes.
- It is common legislative practice to promulgate forms as part of the regulations. See for example the regulations to the Children's Act 38 of 2005 and the Births and Deaths Registration Act 51 of 1992.
- The medical assessment form plays a critical role in determining eligibility for the CDG and hence the determination of children's social security rights.

Taking these considerations into account there is a strong legal argument to be made that the use of the SASSA-designed form is an unlawful practice.

5.3 SASSA's interpretation of eligibility criteria is not consistent with the Act

SASSA confirmed to the authors that it (and the medical officers using the old form) still applies the same criteria as it did in the case of the old Act. The only 2004 amendment which SASSA currently implements is that applications are now taken from birth rather than the age of one year. By implication, for a child to qualify for the CDG, he or she must be severely disabled and require full-time care until he or she reaches the age of 18 years. This serves to exclude:

- children with moderate to mild disabilities; and
- children with severe or moderate disabilities who require care for only a limited period of time in that the care ceases before they reach the age of 18 years.

Furthermore, information obtained from SASSA suggests that the phrase "or support services" is being mistaken as an additional requirement to "permanent care" instead of an alternative one.[35] This is despite the clear wording of section 7 of the Act, which uses the term "or" (not "and") between the concepts of "permanent care" and "support services" and thereby makes them alternative eligibility requirements rather than a pair of complementary conditions. Regulation 8 is also clear that they are two alternative eligibility requirements and do not both have to be satisfied: it provides that a caregiver of a care dependent child is eligible if a medical assessment confirms that the child requires and receives permanent care **or** support services.

SASSA's interpretation of the eligibility requirements (which is documented in its guidelines)[36] has been adopted by a number of medical officers who, as a matter of course, exclude children with mild

[33] s5(2)(e).
[34] s29(1)(a).
[35] Interview with Dianne Dunkerley, Executive Manager, SASSA, note 31 above.
[36] At the time of writing, the authors had not been able to obtain a copy of the CDG guidelines developed by SASSA. We requested a copy from SASSA in August 2013; however it did not materialise.

to moderate disabilities and thus limit the CDG application to children with severe disabilities[37]; and exclude children who do not require permanent care but do require support services.

5.4 Medical officers not provided with guidance and training

Since no clear and unambiguous direction is provided by either of the assessment forms in use, the assessments rely predominantly on the assessor's opinion and interpretation of the child's needs. In the hands of inexperienced medical assessors, this results in the unlawful exclusion of many children with mild to moderate disabilities who do in fact require permanent care or support services.[38]

In the hands of experienced medical officers who are aware of the shifts brought about by the 2004 amendments to the Act there are cases where children with mild and moderate disabilities, who are in need of permanent care or support services, are recommended for the CDG as intended by Parliament.[39] The continuum from mild to severe disability is fluid, as are the care needs, which means that a child with a mild or moderate disability may well need permanent care or support services. Accordingly, a number of medical officers recognise that a child with a moderate, or even mild, disability may require a degree of supervision that translates into a need for permanent care. These officers have thus interpreted and applied the Act and the assessment forms, despite their built-in inconsistencies and limitations, as enabling them to motivate that particular children with mild to moderate disabilities be deemed eligible for the CDG.

Doing so, though, demands skill on the part of medical officers. Given that the repealed assessment form is ideologically focused on the medical severity of the disability rather than the care or support needs, the only people who are usually successful in motivating that a child with a mild to moderate disability be classified as eligible for the CDG are skilled medical officers who have experience in working with children with disabilities.[40] Such medical officers are the exception and not the norm. In most cases the medical assessments and forms are completed by junior medical staff with little such experience; the assessment, then, is frequently based on the medical diagnosis of the child rather than the child's social-functioning needs as determined by his or her medical condition and environmental circumstances. The result, typically, is that where the child is seen as physically able, irrespective of other possible considerations, he or she is not determined to be eligible.[41]

The misinterpretation of the law and exclusion of lawfully eligible children by inexperienced medical officers using the repealed form is linked to the insufficient guidance and training provided to them to understand the legal concepts and words used to define eligibility, or how to apply the provisions in different contexts.[42] For example, the two key terms – namely, "permanent care" and "support services" – are not defined in the Act or the regulations. Moreover, there is insufficient practical

[37] Interview with Wiedaad Slemming, lecturer, Division of Community Paediatrics, University of the Witwatersrand, August 2013.
[38] Berry L & Van de Smit A (2011), note 11 above.
[39] Interview with Wiedaad Slemming, note 37 above.
[40] Interview with Wiedaad Slemming, note 37 above.
[41] Interview with Wiedaad Slemming, note 37 above.
[42] Interview with, Sue Philpott, Disabled Children's Action Group (DICAG), August 2013; and Wiedaad Slemming, note 37 above.

guidance provided to allow for consistent and proper application of the Act and the regulations to different practical scenarios. For instance, a child's impairment may be "corrected" with the use of an aid or device (as when a hearing aid assists a child with a hearing loss). It is unclear to medical officers and officials whether a child's eligibility should be considered with or without the use of assistive devices or other interventions. SASSA has advised that its CDG guidelines for medical officers clarify such matters. The researchers were unable to assess the extent to which effective guidance is provided, seeing as a copy of the guidelines was not available.[43] However, it would appear that if the guidelines do provide clarity, they are not sufficiently accessible to medical officers doing the assessments.[44]

5.5 Children with chronic illnesses not considered

Children with chronic illnesses may experience some form of impairment and have additional care needs as a result of their illness, but there are no guidelines or legal clarifications to explain how the CDG eligibility criteria apply in these circumstances. Section 11(2) of the Children's Act 38 of 2005 obliges the provision of the same level of care and support to children with chronic illnesses as to those with disabilities. This includes the provision of special care; conditions to ensure the child's dignity, self-reliance and active participation in the community; and the provision of the child with the necessary support services. As such, there is a compelling legal imperative for the Social Assistance Act to expressly address the needs of children experiencing mental or physical disabilities as a result of their chronic illness so as to render them in need of permanent care or support services.

6. Recommendations

The lack of consistent presentation and interpretation of the eligibility criteria for the CDG in the Act and regulations; the failure to develop, promulgate and implement a revised CDG assessment form aligned to the 2004 amendments; and the insufficient guidance and training given to medical officers together undermine the social security rights of children with disabilities.

These factors also undermine key objectives of the Social Assistance Act – namely uniformity across the country and equal access to social grants for all who are eligible in terms of the law. Paragraph 2 of the Preamble states that the Act intends to ensure uniformity and standardisation of social assistance and equal access to government services. Paragraph 3 commits the Act to preventing situations where a proliferation of laws, policies and approaches to its execution materially prejudices social assistance beneficiaries or recipients.

A number of the historical and current design limitations (and resultant implementation limitations) appear to be rooted in the original rationale for the CDG. The CDG was regarded as a source of compensatory income for the income a child's caregiver lost by staying at home and providing

[43] Note 36 above.
[44] Interview with Wiedaad Slemming, note 37 above.

permanent home care rather than going to work and earning a living.[45] This would appear to have informed the original wording of the 1992 Act and the old assessment form's focus on whether or not the child required permanent home care. There was little interest in quantifying and assessing the child's specific needs to ensure full development and integration in society; the emphasis fell instead on his or her medical condition/diagnosis and the severity thereof (and not on the social and environmental factors restricting the child's ability to participate). While the 2004 amendments to the Act shifted South Africa away from this old rationale towards a more rights-based approach – a shift is not being observed in practice.

Several of the CDG gaps observed in this chapter can be resolved by immediate short-term interventions such as the promulgation and implementation of an updated, standardised assessment form and the provision of training and detailed guidance to medical officers on the revised Act.

However the underlying blockages may call for more intensive policy reform. Given how deep-rooted and influential the CDG's original rationale continues to be, a more impactful and sustainable method of addressing the challenges may be to review the CDG as a whole so as to adopt a new rationale for the grant based on evidence and consultation. The Act, regulations and assessment form would then need to be amended accordingly. It is encouraging to note that a revised CDG policy is in process. It is worrying however that child disability experts and activists are not aware of this process. It is critical therefore that the process be opened for public consultation as soon as possible.

Given the lengthy nature of a policy development process, it is important that the short-term measures such as the gazetting of a standardised assessment form and training of medical officers on the 2004 amendments be undertaken timeously and not be deferred until after the finalisation of the policy.

6.1 Short-to-medium-term reform

- A standardised assessment form that takes into account the 2004 amendments to the Act should be developed and gazetted for use by all medical officers responsible for CDG assessments across the country.
- The SASSA guidelines for medical officers and SASSA officials should be reviewed and corrected to reflect the intention of the 2004 amendments. Clear and practical guidelines ought to be developed (and the current guidelines amended) to provide guidance to medical officers on how to apply the definitions and other provisions of the Act to different forms of disability and in different contexts.
- Consideration should be given to upgrading the guidelines to prescribed norms and standards for service delivery so as to ensure consistent and standardised application of the applicable definitions and interpretations in all provinces and districts.[46]

[45] Interviews with Dianne Dunkerley, Executive Manager, SASSA, note 35 above; and Mark Rasmussen, Executive Manager, Grants Administration, SASSA Eastern Cape, August 2013.
[46] The Minister of Social Development is authorised to make regulations regarding uniform norms and standards for service delivery in terms of s32(1)(c) of the Act.

- The SASSA guidelines should be made accessible to all medical officers responsible for CDG assessments and all training institutions responsible for educating medical students and in-service medical practitioners.
- All medical officers should receive standardised training on the conceptual shifts brought about by the 2004 amendments and the meaning and implementation of the revised eligibility requirements. A vehicle for this training exists in the Re-engineering of Primary Health Care being led by the national Department of Health. District Clinical Specialist Teams are being rolled out in all districts and should be the target for training so that they in turn can train frontline clinicians and support the implementation of appropriate systems for facilitating early recognition of eligible children and easy access to the CDG.

6.2 Longer-term reform

- The Social Assistance Act and regulations need to be amended to achieve consistency, clarity and equality of reach of the CDG for all children with disabilities in need of permanent care or in need of support services due to their physical or mental disability. This could be achieved by removing the word "severe" from the definition of "care-dependent child" in section 1 of the Act, or, more simply, by amending the regulations to remove the reference to the definition of a "care-dependent child" and align with the eligibility criteria of the Act. This is necessary in order to comply with the national objectives of consistency, equality, uniformity and inclusivity in social assistance, as spelled out in the Preamble to the Social Assistance Act.
- The Act and/or regulations should be amended to include definitions of the terms "permanent care" and "support services".[47] The definitions should be informed by a combined medical/social model of disability as committed to in terms of the National Integrated Strategy on Disability.
- Disability should be defined in the Act as the composite outcome of impairment and the objectives of social security clearly articulated as not only enabling access to services but also preventing disability.
- The CDG policy revision process should be opened for public consultation and engagement on the rationale and resultant scope of the CDG.
- The CDG policy revision process should consider and include consultation on the eligibility of children with chronic illnesses.
- If the shift from a medical model to a social model is to be effected in reality, the assessment process should involve professionals who have the necessary qualifications, training and ability to assess the child's social functioning and environment.

[47] Interview with Sue Philpott, DICAG, note 42 above.

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Chapter 6

Children's rights to basic education: A review of South Africa's laws and policies

Patricia Martin

Contents

1. International, regional and constitutional rights and obligations

The right of all children to basic education enjoys international, regional and national legal protection. The Universal Declaration on Human Rights (1948) (UDHR), the United Nations Convention on the Elimination of Discrimination Against Women (1979) (CEDAW), the United Nations Convention on the Rights of the Child (1989) (UNCRC), the Convention of the Rights of Persons with Disabilities (2006) (CRPD), the African Charter on the Rights and Welfare of the Child (1990) (ACRWC), and the International Covenant on Social, Economic and Cultural Rights (1966) (ICSECR) recognise basic education as a fundamental human right and oblige the government to take all necessary legislative, administrative and other steps to respect, protect and fulfil the right.

In addition to its legal undertakings, the government of South Africa has committed, as a signatory to UNESCO's Education for All (EFA) and the UN's Millennium Development Goals campaigns, to prioritise spending and measures to secure the rights of all children to basic education as a developmental priority, especially for the most marginalised children.

The Constitution of the Republic of South Africa Act 108 of 1996 not only enshrines the right to basic education, but in section 29(1) also makes it immediately realisable rather than subject to progressive realisation within available resources.[1]

The sum of the obligations created by the preceding instruments have been organised within the internationally recognised 4A Framework. The 4A Framework was originally developed by Katarina Tomaševski, the former UN Special Rapporteur on the right to basic education. It is now widely accepted by the United Nations and human rights organisations as providing a concise description and organising framework of the scope and content of the right to basic education. It forms the foundation of the UN Committee on Economic, Social and Cultural Right's General Comment No. 13 on the Right to Basic Education.

In terms of the 4A Framework, the government's education laws, policies, budgets and programmes must ensure that education is **available**, **accessible**, **acceptable**, and **adaptable** for all children. The availability and accessibility of education relate to obligations to ensure access to education for all children, notably children at risk of exclusion because of their socio-economic, geographic, racial and other circumstances. The acceptability and adaptability of education relate to the quality of the content and outcomes of education. The United Nations Special Rapporteur on the right to basic education recently highlighted that government responses to realise the right to education in terms of their MDG and 4A obligations have, amongst other inadequacies discussed in the course of this review, neglected the issue of providing quality education. He has called for a strong focus on quality by states when moving beyond 2015.[2]

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[1] *Governing Body of Juma Masjid Primary School and Another v Essay N.O.*, 2011 (8) BCLR 761 (CC).
[2] Singh K (2013) *Report of the Special Rapporteur on the Right to Education*. 9 August 2013. Geneva: United Nations General Assembly.

The South African Human Rights Commission's Charter of Children's Basic Education Rights has synthesised the full range of international and regional obligations under the following headings:[3]

Availability of education refers to what must be in place, legally, institutionally and structurally before the right to basic education can be accessed. This in turn requires laws and related actions that:

- recognise basic education as a fundamental right;
- provide early childhood education, universal and compulsory primary education, and make different forms of secondary education generally available;
- provide sufficient numbers of functional educational institutions;
- provide sufficient, qualified and available teachers;
- provide teaching and learning support materials and equipment for all children; and
- ensure that there are sufficient funds made available and used to sustain the educational system.

Accessibility requires that the governing education laws and systems oblige and enable all children of school-going age to enrol, attend and complete their education. This implies the dual obligations to prohibit discrimination and to take positive steps to reach and include the most marginalised children. In summary, the legal framework for education must ensure:

- that all children can enrol and complete their education at an appropriate age;
- that no child is excluded from education on the grounds of disability, health status, gender, race, or geographical location and that special measures are taken to identify and include especially vulnerable and marginalised children;
- that economic barriers to education are addressed, notably that primary education should be free;
- that physical barriers, such as distance and transport costs, are addressed; and
- that administrative barriers such as documentation requirements are addressed.

Acceptability requires that the government prescribes and ensures compliance with acceptable criteria to secure the realisation of the teaching and learning or pedagogical aims of education and the safety of the learning environment. This requires that the system sets standards for, and secures:

- a quality curriculum that is linguistically responsive so that language is not a barrier;
- the acquisition of literacy, numeracy and problem-solving skills by all children; and
- a learning environment that is not harmful to children.

Adaptability requires that the education system be sufficiently diverse and flexible to meet the needs of children in different circumstances as well as the needs of changing societies, for example adapting the curriculum to produce the skills required in terms of technology innovations. More specifically, the system must:

- include children precluded from formal schooling such as children in prisons or in long-term care in hospital, working children, and children with disabilities; and

[3] South African Human Rights Commission (2012) *Charter of Children's Basic Education Rights.* Johannesburg: SAHRC.

- promote human rights, equality and freedom from discrimination through the curriculum.

2. South Africa's laws and policies

The government has developed an extensive body of education laws, policies, strategies and programmes, and has invested a comparatively large percentage of the national budget towards fulfilling its obligations.

2.1 Laws

- National Education Policy Act 27 of 1996[4]
- Employment of Educators Act 76 of 1998
- South African Schools Act 84 of 1996[5]
- Further Education and Training Colleges Act 16 of 2006[6]

2.2 Regulations and norms and standards prescribed in terms of the Schools Act

- National Norms and Standards for Public School Funding (1998)[7]
- Regulations for Safety Measures at Public Schools (2001)[8]
- Regulations to Prohibit Initiation Practices in Schools (2002)[9]
- Regulations Relating to Safety Measures at Independent Schools (2004)[10]
- Exemption of parents from payment of school fees in public schools (2006)[11]
- Regulations relating to minimum uniform norms and standards for public school infrastructure (2013)[12]

2.3 Policies promulgated in terms of the National Education Policy Act

- Admission Policy for Ordinary Public Schools (1998)[13]
- Education White Paper 5: Early Childhood Education – Meeting the Challenges of Early Childhood Development in South Africa (2001)[14]

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[4] As amended in 1997, 1999, 2007 and 2011.
[5] As amended in 1997, 1999, 2000, 2001, 2002, 2004, 2005, 2007 and 2011.
[6] As amended in 2006 and 2012.
[7] As amended in 2006, 2008, 2011, 2012 and 2013.
[8] South African Schools Act 84 of 1996: Regulations: Safety Measures at Schools. *Government Gazette* 22754, Notice 1040 (12 October 2001).
[9] South African Schools Act 84 of 1996: Regulations to Prohibit Initiation Practices in Schools. *Government Gazette* 24165, Notice 1589 (13 December 2002).
[10] South African Schools Act 84 of 1996: Regulations Related to Safety Measures at Independent Schools. *Government Gazette* 26663, Notice 975 (20 August 2004).
[11] South African Schools Act 84 of 1996: Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools. *Government Gazette* 29311, Notice R. 1052 (18 October 2006).
[12] South African Schools Act 84 of 1996: Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure. *Government Gazette* 37081, Notice 10067 (29 November 2013).
[13] National Education Policy Act, 1996 (Act No. 27 of 1996): Admission Policy for Ordinary Public Schools. *Government Gazette* 19377, Notice 2432 (19 October 1998).

- Education White Paper 6: Special Needs Education – Building an Inclusive Education and Training System (2001)[15]
- National Policy on Learner Attendance (2010)[16]
- National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (2010)[17]
- Policy on the Minimum Requirement for Teacher Education Qualifications (2011)[18]

2.4 National guidelines

- Guidelines to Ensure Quality Education and Support in Special Schools (2007)[19]
- Guidelines for Full-Service and Inclusive Schools (2010)[20]
- Guidelines for Responding to Learner Diversity in the Classroom (2011)[21]
- Guidelines Relating to Planning for Public School Infrastructure (2012)[22]
- National Guidelines for School Library and Information Services (2012)[23]

2.5 Other policies (legal status unclear)

- Measures for the Prevention and the Management of Learner Pregnancy[24]

These represent the key laws and policies that relate to the government's primary and secondary education obligations. There are other related policies and laws which are not covered in this review. These include obligations in respect of early childhood education (including Grade R) and obligations on the education system to ensure children's rights to food and nutrition are addressed.

These laws and policies are further supported by a host of planning and programme documents such as the Delivery Agreement for Outcome 1: Improved Quality of Basic Education (2010); Action Plan to 2014: Towards the Realisation of Schooling 2025 (2010); and the Integrated Strategic Planning Framework for Teacher Education and Development in South Africa (2011).

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[14] National Education Policy Act, 1996 (Act No. 27 of 1996): National Policy: Education White Paper Five (5) on Early Childhood Development. *Government Gazette* 22938, Notice 1369 (13 December 2001).
[15] National Education Policy Act, 1996 (Act No. 27 of 1996): Education White Paper 6: Special Needs Education – Building an Inclusive Education and Training System. *Government Gazette* 22524 (27 July 2001).
[16] National Education Policy Act 27 of 1996: Policy on Learner Attendance. *Government Gazette* 33150 (4 May 2010).
[17] National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment. *Government Gazette* 33283, Notice 515 (11 June 2010).
[18] National Qualifications Framework Act 67of 2008: Policy on the Minimum Requirements for Teacher Education Qualifications. *Government Gazette* 34467, Notice 583 (15 July 2011).
[19] Department of Education (2007) *Guidelines to Ensure Quality Education and Support in Special Schools and Special School Resource Centres*. Pretoria: DoE.
[20] Department of Basic Education (2010) *Guidelines for Full-service/Inclusive Schools*. Pretoria: DBE.
[21] Department of Basic Education (2011) *Guidelines for Responding to Learner Diversity in the Classroom through Curriculum*. Pretoria: DBE.
[22] Department of Basic Education (2012) *Guidelines Relating to Planning for Public School Infrastructure*. Pretoria: DBE.
[23] Department of Basic Education (2012) *National Guidelines for School Library and Information Services.* Pretoria: DBE.
[24] Department of Education (2007) *Measures for the Prevention and Management of Learner Pregnancy: Choose to Wait for a Brighter Future*. Pretoria: DoE. The DBE has advised, in private correspondence, that these measures have been withdrawn. However, there is no formal written record of their withdrawal in the *Government Gazette* and the Measures continue to be applied by a number of schools. See discussion on learner pregnancy at item 5.3 in the review.

The budget for education has not yet reached the 9% of Gross Domestic Product (GDP) committed to by all signatories to UNESCO's EFA Dakar Framework of Action (2011). Nonetheless, South Africa has one of the highest rates of expenditure on education in the world. In 2012, approximately 7% of GDP was allocated to education. The education budget (basic and higher education) of R232.5 billion in 2013 represents the largest slice of the total national 2013 budget of R1.06 trillion. At a provincial level – where the bulk of the basic education budget lies – the total budget allocated to basic education for the 2013/14 financial year is R173.5 billion.[25] The total budget allocated to the national Department of Basic Education (DBE) for the 2013/14 financial year is R 17. 6 billion.[26] However, as will be discussed and illustrated during the course of this review, there is significant variation in the allocation by and the efficiency with which different provincial education administrations use their budgets to ensure realisation of the right to education.

The focus of the state's laws, policies, programmes, and strategies has been on remedying historically inequitable education funding, inputs and outcomes rooted in apartheid's exclusion of the majority of children in South Africa from enjoying their right to quality basic education; notably Black children, children living in poverty, children in rural areas, and children with disabilities.

White Paper 5 on Early Childhood Development, the South African Schools Act and the Further Education and Training Colleges Act lay the legal and institutional framework for recognising and giving effect to the right to basic education for all children. They make primary education universal, and secondary education generally available through two education bands – the General Education and Training (GET) band and the Further Education and Training (FET) band.

The General Education and Training (GET) band covers Grades R (a pre-school reception year) to Grade 9. Grades R to 9 have been universalised, and Grades 1 to 9 have been made compulsory. The GET band falls within the dual competency of the national and provincial departments of basic education. The national DBE is responsible for the development of national education policy, drafting national education laws and promulgating regulations and norms and standards in terms of these laws, spending the national education budget, and monitoring of the national education system. The provincial DBEs are responsible for the implementation of national and provincial education laws and policies, the development of provincial policies and draft provincial laws, and the expenditure of provincial education budgets. The Council of Education Ministers is a body established in terms of the National Policy Act which has both national presence in the form of the Minister and the Deputy Minister and provincial representation in the form of all the Education Members of the Executive Councils (MECs). This body is responsible to co-ordinate action between the national sphere and the provinces on matters of mutual interest.

The FET band makes the last three years of the secondary phase of education generally available, but not compulsory. It can be completed at either secondary schools (Grades 10 – 12) or FET colleges

[25] Minister of Basic Education (2013) *Basic Education Budget Vote Speech, 2013/14 by Minister of Basic Education, National Assembly, Cape Town: 7 May 2013*.
[26] Minister of Basic Education (2013), note 25 above;
Minister of Finance (2013) *2013 Budget Speech*. Pretoria: Ministry of Finance.

which offer vocational programmes. Responsibility for this band is shared by the DBE (Grades 10 – 12 at schools) and the Department of Higher Education and Training (DHET) which is responsible for FET colleges.

3. Taking stock of progress in realising the right to education

3.1 Enrolment, attendance, and retention rates

Enrolment rates at primary and junior secondary levels (compulsory education ages 7 – 15) are near-universal, having increased from 96% in 2002 to 99% in 2011.[27] The enrolment rate is lower at secondary level (combined for schools and FET colleges) and there has been no significant change between 2002 and 2011. In 2011, the national average was 85%, with significant provincial variations – in Limpopo a high of 93%, and a low of 76% in the Western Cape.[28]

Enrolment rates are comparatively lower in FET colleges than in Grades 10 – 12. In 2010 the total FET headcount was 326 970 learners and this rose by a nominal amount to 359 000 in 2011 (this number includes those older than 18 years, but current data is not disaggregated to allow for an accurate count of 16 – 18-year-olds at FET colleges).[29]

Gender and racial enrolment parity has largely been achieved, except for 16 – 18-year-olds, whose rate of enrolment is significantly lower amongst Coloured children (69%) than Black African and White children (86%).[30]

The converse of this data is that 1% of children in the compulsory age group (7 – 15 years) are not enrolled at, and do not attend school. Whilst this percentage has decreased since 2002 (3%), the number exceeds 100 000 children (111 042).[31] When one adds children in the non-compulsory age-group (16 – 18), a total of 376 000 children (who have not completed Grade 12) do not attend a school or FET college. The majority of out-of-school children thus fall in the 16 – 18 age group. The number of excluded children in this age group amounts to 15% of the total population in this age cohort. This is down from 18% in 2002, and the number is fairly equally distributed between boys (14%) and girls (16%).[32]

Whilst only 1% of 7 – 15-year-olds were not enrolled at school in 2011, the percentage of excluded children with a disability in this age cohort was significantly higher (8%), and the percentage of excluded 16 – 18-year-olds with a disability was 24%. Based on General Household Survey (GHS) data, there has been substantial improvement in enrolment rates amongst both cohorts since 2002, when 27% of 7 – 15-year-olds and 49% of 16 – 18-year-olds with disabilities were excluded.[33] Despite the

[27] Department of Basic Education (2013) *Annual Report 2011/12*. Pretoria: DBE.
[28] Department of Basic Education (2013), note 27 above.
[29] Department of Higher Education and Training (2012) *Green Paper for Post-School Education and Training*. Pretoria: DHET.
[30] Department of Basic Education (2013), note 27 above.
[31] Department of Basic Education (2013), note 27 above.
[32] Department of Basic Education (2013), note 27 above.
[33] Department of Basic Education (2013), note 27 above.

improvement, the DBE estimated that, in 2010, as many as 480 036 children with disabilities were out of school.[34] The DBE's estimates are based on GHS survey data rather than their own statistics as, by its own admission, their data is not always reliable and up to date and currently track only learners who are enrolled in special schools despite having introduced the Learner Unit Record Information Tracking System (LURITS) in 2008 to track individual learners (including learners with disabilities).[35] There is also no reliable system in place to track children with disabilities who are out of school and/or have been denied admission to school.[36] The insufficiency of the DBE's current Information Management System (IMS) to track children in the system is revealed by the massive discrepancy between the GHS and DBE data on the number of children with disabilities enrolled at schools. The DBE reports that a total of 223 123 learners with disabilities (1.7% of the school population) were enrolled in 2010, compared to the 2011 GHS's estimated 758 652 (6% of the school population). This translates into a discrepancy of 535 529 learners with disabilities which are unaccounted for through the IMS.[37]

Whilst enrolment rates are generally high, drop-out rates, especially at secondary level after completion of the compulsory phase of education, are unacceptably high. Whilst this is a poor reflection on the status of the policies and laws aimed at securing and supporting access to education among older children, it is also a reflection of the failure of the quality of education in the public education system. By Grade 11, the drop-out rate is almost 12% and rates have not improved since 2002.[38] As much as this figure is already a cause for concern, it does not reflect the actual scale and underlying causes of the problem. Spaull's analysis of enrolment data across the years reveals a drop-out rate of 50% between Grade 1 and 12. He observes that, of every 100 children who start Grade 1, only 50 will make it to Grade 12 (with the most children dropping out in Grades 10 and 11); only 40 will pass the final Grade 12 National Senior Certificate (NSC) examination; and only 12 will qualify for university. Whilst this is symptomatic of deficiencies in policies aimed at access and retention barriers common to older children, such as the learner pregnancy policy (discussed later in more detail),[39] it is mostly a symptom of the poor quality of education in South Africa, especially at primary school level.[40] Spaull observes that the failure of educational inputs at a primary level and the wide-spread practice of promoting learners despite their failure to acquire grade-appropriate skills result in the majority of learners entering high school without the necessary foundational literacy and numeracy skills to succeed academically. As children approach their final year and the NSC exams which are externally

[34] Department of Women, Children and People with Disabilities (2013) *First Country Report to the UN on the Implementation of the Convention on the Rights of Persons with Disabilities in South Africa (Final Draft, 26 February, 2013)*. Pretoria: DWCPD.
[35] South Africa follows an inclusive education policy in terms of which the majority of children with moderate developmental challenges and disabilities are entitled to attend ordinary public schools which are required to accommodate their learning needs. Children with severe disabilities are accommodated in more specialised schools.
[36] Department of Basic Education (2010) *Report on the Implementation of the Convention on the Rights of Persons with Disabilities (CRPD) in Education*. Pretoria: DBE;
Department of Women, Children and People with Disabilities (2013), note 34 above.
[37] Department of Women, Children and People with Disabilities (2013), note 34 above.
[38] Motala S & Dieltiens V (2010) *Educational Access in South Africa*. Johannesburg: CREATE;
Department of Basic Education (2012) *General Household Survey (GHS) 2010: Focus on Schooling.* Pretoria: DBE.
[39] Gustafsson M (2011) *The When and How of Leaving School: The Policy Implications of New Evidence on Secondary Schooling in South Africa.* Stellenbosch Economic Working Papers 09/11, Stellenbosch University & Bureau for Economic Research.
[40] Spaull N (2013) *South Africa's Education Crisis: The Quality of Education in South Africa 1994 – 2011*. Johannesburg: Centre for Development Enterprise.

assessed, "schools and teachers can no longer afford to promote pupils who have not acquired grade-appropriate skills, and consequently pupils fail and drop-out of schools in large numbers in Grades ten and eleven".[41]

While enrolment figures are showing progress, a problem is emerging with attendance rates. South Africa's schools are marked by poor attendance rates, caused largely as a result of illness, poverty, disinterest, school violence and work and domestic responsibilities.[42] In 2011, 57% of learners were absent for one day, 24% were absent for two days, and 9% for five days. Whilst it is common for children to be absent for a few days due to illness, many children in South Africa are absent for reasons that could be avoided through the development of appropriate support systems. The main reasons provided for being absent from schools include illness (38%), bad weather (20%), and did not want to go to school (9%).[43]

3.2 Quality of education outcomes

The South African education system has been dogged by poor education outcomes for children at primary and secondary levels. The majority of children in South Africa achieve poor educational outcomes for a multiplicity of reasons which cut across the four domains of availability, accessibility, acceptability and adaptability of South Africa's public education system. These include, inter alia, the inefficient use of education resources by national and provincial administrations who lack effective management and administrative capacity; poor accountability mechanisms and processes for education outcomes; low teacher–content knowledge; and poorly designed assessment and quality improvement systems.[44]

The impact of these and other policy and implementation challenges on the quality of education outputs is cause for serious concern. Based on the results of a number of independently conducted international assessments, South Africa has the worst education system of all middle-income countries and, indeed, performs worse than many low-income African countries.[45] Not only are the education outcomes for the majority of children worse than other countries, it is also one of the most inequitable systems in the world. In effect, South Africa has two public school systems with the smaller, better performing system accommodating the wealthiest 20 – 25% of children who achieve much higher scores than the larger system which caters to the poorest 75 – 80% of children.[46] The latter system (which accommodates the majority of children in the lowest economic quintiles, children in rural areas, children in certain provinces falling within the boundaries of the former apartheid "independent" homelands such as the Eastern Cape and KwaZulu-Natal, and African children) produces children that,

[41] Spaull N (2013), note 40 above.
[42] Motala S & Dieltiens V (2010), note 38 above.
[43] Department of Basic Education (2013) *General Household Survey (GHS) 2011: Focus on Schooling*. Pretoria: DBE.
[44] Spaull N (2013), note 40 above.
[45] Spaull N (2013), note 40 above.
[46] Spaull N (2013), note 40 above.

on the whole, cannot "read, write and compute at grade-appropriate levels [and who are] functionally illiterate and innumerate".[47]

Learners in South Africa are not acquiring their basic numeracy and literacy skills in their early years of schooling. This in turn is feeding a vicious cycle of insurmountably poor education outcomes at secondary level. Poor primary education quality is evidenced by the very low scores recorded in the Annual National Assessment (ANA) of Grade 3 learners each year. In 2011, the national average score for language was 35% and 28% for mathematics.[48] Whilst the 2012 ANA results reflect a significant improvement, Spaull and Van der Berg caution against interpreting this as a reflection of improvements in the quality of education in South Africa. They observe that the difficulty of the 2012 ANA tests was not calibrated against the 2011 tests, the results were not externally audited, and that these factors, together with the improbably and impossibly large improvement in results cast a pall of suspicion over the 2012 ANA results.[49] The poor outcomes in the early years start a cycle of progressive deterioration of outcomes as learners' education outcomes tend to decline as they progress through the grades, especially amongst disadvantaged learners. This indicates that learners are moving from one grade to the next without acquiring the necessary foundation skills and knowledge.[50] Thus, as time goes on, children fall further and further behind the curriculum. This generates poor secondary outcomes and creates an insurmountable challenge to improving the quality of outcomes at secondary level. The escalation in education deficits makes it impossible to remediate learning gaps at high school.[51]

It is no surprise therefore that education outcomes in key learning areas, especially amongst disadvantaged children at secondary level, are very poor. South Africa's performance in the Trends in International Mathematics and Science Study (TIMMS) is the lowest of all participating countries. For example, in 2011, 32% of Grade 9 pupils **performed worse than guessing** on the multiple choice questions and 76% had not acquired knowledge of fundamental mathematical concepts such as whole numbers, decimals and basic graphs.[52]

It is also no surprise that the final NSC examination pass rate (taken at the end of the last year of secondary school – Grade 12) has been persistently low. In 2009 it was as low as 60.6%. Subsequent improvements were recorded; however these are not an accurate reflection of improvements in the quality of education inputs and outcomes. Spaull and Taylor observe that, whilst the 2012 pass rate increased, on paper, to 74%, and outcomes in key subjects such as maths and science improved by between 7 – 8%, these increases are misleading. They only reflect the performance of the 50% of children who remained at school from Grade 1 to 12; they do not reflect the performance of the 50% who dropped out before writing the Grade 12 NSC. In addition, the DBE's often-lauded 7 – 8% improvement in the Grade 12 mathematics and science pass rates is undermined by the significant

[47] Spaull N (2013), note 40 above.
[48] Department of Basic Education (2011) *Report on the Qualitative Analysis of the ANA 2011 Results.* Pretoria: DBE.
[49] John V (2012) Vast improvements in pupils' national test results 'not possible'. *Mail & Guardian*; 7 – 13 December 2012, p. 14; Spaull N (2013), note 40 above.
[50] Department of Basic Education (2011), note 48 above.
[51] Spaull N (2013), note 40 above.
[52] Spaull N (2013), note 40 above.

drop in the proportion of matric pupils taking mathematics (as opposed to the easier maths literacy) from 56% in 2008 to 45% in 2011, and the drop in the proportion of children passing mathematics from 25.6% to 21%.[53]

These results clearly point to the conclusion that the sum of national financial investment in basic education is not commensurate with the outcomes. Moreover, the greater equity that has been achieved in the distribution of per-learner funding to favour previously excluded and marginalised Black children living in poverty has not succeeded in reversing the historical racial and socio-economic inequities in education outcomes. Whilst proportionally more of the public education budget is invested per capita in the education of poorer children, rural children and children living in households with low literate parents and caregivers, these categories of children continue to perform substantially more poorly than their wealthier counterparts.[54] The disjuncture between increased levels of funding and outcomes for disadvantaged children is attributable to a combination of inefficient use of funds as well as the fact that, whilst per capita expenditure by the state is lower for children in wealthier quintiles (notably those in quintile 5), their parents supplement the public investment in education with private funding via the payment of high school fees. This enables schools with a wealthy parent base to attract and employ more and better qualified teachers, and ensure good quality materials and infrastructure.

The inequitable patterns of exclusion and the poor and inequitable education outcomes in South Africa are driven by a range of factors which impact on the availability, accessibility, acceptability and adaptability of education. A selection of key gaps and challenges are discussed in the next section of this review.

4. Challenges limiting the *availability* of education

There are a number of gaps in the law and implementation challenges which limit the availability of education for all children in South Africa.

4.1 Inadequate number of education institutions and inadequate infrastructure

The provision of a sufficient number of educational institutions and infrastructure by the state is essential to the constitutionally protected right to education. These elements are necessary to make education universally available for all children. In addition, there is an abundance of research on education policy that recognises infrastructure as intrinsically linked to the provision of acceptable education of an adequately high quality. The National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (NPEP) acknowledges "a link between the physical

[53] Taylor S (2012) A note on South African performance in TIMSS 2003. Unpublished manuscript;
Spaull N (2013), note 40 above.

[54] Spaull N (2011) *A Preliminary Analysis of SACMEQ III South Africa*. Stellenbosch Economic Working Papers 11/11, Stellenbosch University;
SACMEQ III (2010) *The SACMEQ III Project in South Africa: A Study of the Conditions of Schooling and the Quality of Education in South Africa Country Report.* Pretoria: Department of Basic Education & SACMEQ.

environment learners are taught [in], and teaching and learning effectiveness, as well as learning outcomes. Poor learning environments have been found to contribute to learner irregular attendance and dropping out of school, teacher absenteeism and the teacher and learner's ability to engage in the teaching and learning process".[55]

South Africa's education system is marked by significant and highly inequitable infrastructural inadequacies which, as noted by the Constitutional Court in *MEC for Education in Gauteng v The Governing Body of Rivonia Primary*[56], are an infringement of the right to basic education. Justice Mhlantla described the situation as follows:

> *Section 29 of the Constitution guarantees everyone the right to basic education. That is the promise. In reality, a radically unequal distribution of resources – related to a history of systematic discrimination – still makes this constitutional guarantee inaccessible for the large numbers of South Africans.*

The United Nation's Special Rapporteur recently reflected on the status of the right to education and identified core barriers which have served to undermine its realisation and realisation of associated 2015 MDGs; he further provided direction on the remedial steps required to strengthen the enabling framework supporting the realisation of the right to basic education.[57]

The unequivocal message emerging from the Special Rapporteur's report is that the attainment of the right to education within the 2015 MDG framework was hampered by a tendency among member states not to effectively translate their political and developmental commitments into actionable laws, budgets and accountability mechanisms. He observed that making strong progress on the right to education, especially in the 2015 MDGs, neglected areas of quality, and that access for the most marginalised and vulnerable requires a much stronger human rights approach by governments to the realisation of their commitments to basic education. By this he means that broad and sweeping political commitments made by governments towards attainment of the MDGs, including education-related goals, were undermined by the failure to translate their commitments into clearly defined laws documenting state responsibilities and strong accountability mechanisms for holding states to account.

The remediation of this deficiency in the post-2015 agenda requires the development of stronger policies and laws documenting the state's specific responsibilities, especially those that impact on equity of access and quality, and equally strong accountability mechanisms holding governments accountable to the realisation of their commitments.

The Special Rapporteur's analysis may as well have been using the issue of education infrastructure in South Africa as a case in point. The provision of infrastructure, whilst widely recognised as essential to the attainment of accessible quality education in numerous policy documents, has failed to materialise at an operational level, especially in certain provinces, for children living in poverty, and for children

[55] National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (2010), note 17 above.
[56] *MEC for Education, Gauteng and Others v Governing Body of the Rivonia Primary School and Others* 2013 (6) SA 582 (CC), para 1.
[57] Singh K (2013), note 2 above.

with disabilities. The primary reason for this disjuncture between political commitments and realities on the ground is widely recognised as the lack of a sufficiently strong enabling and compelling legal framework detailing, with sufficient clarity, the responsibilities of the departments of basic education and mechanisms to hold them to account for the realisation of the rights of basic education through appropriate and adequate school infrastructure.

The Schools Act obliges provincial departments of education to ensure sufficient schools to accommodate all learners within the compulsory age band. In addition, the NPEP recognises the availability of adequate school infrastructure as a constitutional right and commits to the provision of infrastructure that is adequate for an enabling teaching and learning environment. The policy was developed to "more clearly and systematically define what constitutes an enabling physical teaching and learning environment for all South Africa's learners, and to ensure that future investments are aligned with that definition".[58]

The NPEP defines an enabling learning environment by reference to four grades of infrastructure provisioning – "basic safety", "minimum level of functionality", "optimum levels of functionality" and "enrichment", thus providing a sliding-scale of adequacy of infrastructure.[59] Provincial departments of education are obliged, in terms of the NPEP, to progressively realise optimum functionality, subject to the obligation to immediately ensure that all schools meet basic safety standards. Moreover, the policy calls for the prioritisation of schools serving poor and under-resourced communities.

Section 5A of the Schools Act empowers the Minister to prescribe minimum uniform norms and standards for school infrastructure, capacity of a school in respect of the number of learners a school can admit, and the provision of learning and teaching support material. The 2010 policy commits the Minister of Basic Education to exercise this power and to develop, by the end of the 2010/11 financial year, national norms and standards for school infrastructure and obliges provinces to comply with the promulgated norms and standards.[60] Subsequent to protracted litigation and various drafts and revisions, the Minister has published regulations relating to the minimum uniform norms and standards for public school infrastructure.[61] This process is discussed in greater detail in section 4.1.2 below.

4.1.1 Number of schools

Contrary to the legal obligations to provide a sufficient number of schools, the current number of schools and FET colleges are insufficient to meet demand, especially in a number of historically marginalised provinces. The GET band is made available through 25 850 public and private ordinary

[58] National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (2010), para 1.8, note 17 above.
[59] National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (2010), para 1.8 and 4.10.1 – 4.10.4, note 17 above.
[60] National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (2010), para 4.20, note 17 above.
[61] South African Schools Act 84 of 1996: Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure. *Government Gazette* 37081, Notice 10067 (29 November 2013).

schools catering for primary and secondary level learners (5.4% of which are independent).[62] The FET/vocational level of education is made available through 50 public FET colleges.[63]

The evidence of insufficiency is illustrated by the prevalence of overcrowded classrooms in the poorest provinces, such as the Eastern Cape and Limpopo (where, not coincidentally, education outcomes are also poorer by comparison to more urban and wealthier provinces such as the Western Cape and Gauteng). In 2011 about 15% of public schools had class sizes in excess of 50 learners, and approximately 40% exceeded the maximum 40 prescribed in the NPEP.[64] In Limpopo province, some schools have classes of up to 140 learners and it is common in overcrowded schools for different subjects to be taught to different groups of children in the same class at the same time.[65] The lack of sufficient classrooms means that some classes are held outside under trees, and when it rains, classes are often simply cancelled.[66] The number and capacity of FET colleges is also inadequate to absorb the full complement of potential post-school secondary students.[67]

4.1.2 Infrastructure inadequacies

In addition to having too few schools, there are large, inequitable and persistent infrastructure backlogs at public schools; an inadequacy which is pronounced in provinces with high poverty levels, large child populations, and which are predominantly rural, such as the Eastern Cape, KwaZulu-Natal and Limpopo.[68]

In 2010, out of the 24 793 ordinary public schools:

- 496 were inappropriately constructed, for example out of mud.[69] (395 were in the Eastern Cape.)
- 2 402 schools had no water supply and 2 611 had an unreliable water supply. 1 152 of these schools were located in the Eastern Cape; 1 580 in KwaZulu-Natal and just over 200 in Limpopo, Mpumalanga and the Free State provinces respectively.
- 913 had no sanitation facilities and 11 450 were using pit latrines. 551 of the schools with no sanitation were in the Eastern Cape and 160 were in KwaZulu-Natal.
- 2 730 had no fencing. More than half of these were located in the Eastern Cape (1 152) and KwaZulu-Natal (1 580).
- 409 had no communication facilities at all. Only 3 167 schools had internet access; 8 621 had a fax machine and 11 173 had a telephone or landline.[70]

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[62] Department of Basic Education (2011) *NEIMS Report*. Pretoria: DBE.
[63] Department of Higher Education and Training (2012), note 29 above.
[64] Department of Basic Education (2011) *Action Plan to 2014: Towards the Realisation of Schooling 2025.* Pretoria: DBE.
[65] Section 27 (2013) *Submission: Draft Regulations Relating to Minimum Norms and Standards for Public School Infrastructure, 15 October 2013*. Johannesburg: Section 27.
[66] Section 27 (2013), note 65 above.
[67] Department of Higher Education and Training (2012), note 29 above.
[68] Department of Basic Education (2011), note 62 above.
[69] Department of Basic Education (2012) *Report on Progress on Accelerated Schools Infrastructure Delivery Initiative (ASIDI)*, 6 February 2012. Presented to the Portfolio Committee on Basic Education, Parliament, 14 February 2012.
[70] Department of Basic Education (2011), note 62 above.

In addition, in 2011:

- 79% of schools did not have a library and only 7% of those that had a library were stocked;
- 85% of schools had no laboratories;
- 77% had no computer centres; and
- 17% of schools had no sports facilities.[71]

The DBE has responded to some of these backlogs with the development and implementation of the 2011 Accelerated Schools Infrastructure Delivery Initiative (ASIDI) which is funded from the Schools Infrastructure Backlog Grant (SIBG) to:

- replace 510 schools built with inappropriate structures;
- supply sanitation to 939 schools that previously did not have any access to sanitation;
- provide electricity to the 932 schools without electricity; and
- provide basic water supply to 1 145 schools.

It is not clear from the ASIDI what the date is for achieving these targets. The ASIDI does provide targets for the period 2011/12 to 2012/13, which are to:

- replace 49 inappropriate structures with new schools;
- connect 190 schools to an electricity supply;
- provide 231 schools with sanitation; and
- provide 173 schools with access to water.

By 2013, the DBE has made the following progress:

- 22 of the 49 inappropriate schools have been replaced.
- 144 schools have been electrified.
- 188 schools have been provided with sanitation.
- 156 schools have been provided with water.[72]

Table 1: Accelerated Schools Infrastructure Delivery Initiative (ASIDI) progress versus targets

Infrastructure needed	Target set in the ASIDI	Progress by 2013	Remaining backlog of schools in need
Replace/rebuild schools with inappropriate structures	510	22	508
Supply sanitation to schools without sanitation	939	188	751
Provide electricity to schools without electricity	932	144	788
Supply water to schools without water	1 145	156	989

[71] Department of Basic Education (2011), note 62 above.
[72] Department of Basic Education (2013) *Accelerated Schools Infrastructure Delivery Initiative*. Accessed July 2013: www.education.gov.za/Programmes/ASIDI/tabid/841/Default.aspx#.

As is evident from the gap between the programme's objectives and the rate of progress, there are persistent "serious challenges and backlogs regarding the delivery of proper and safe infrastructure in some of our schools".[73]

The DBE reported in February 2012 that significant delays in procurement processes for basic services had delayed the realisation of the 2011/12 targets and resulted in significant under-expenditure of allocated budgets in the Eastern Cape and Limpopo provinces.[74]

Only 63% of the total adjusted Basic Education budget of R9.1 billion allocated for infrastructure backlogs in 2010/11 was spent. The expenditure was significantly lower in the Eastern Cape where only 24% of the infrastructure budget was spent.[75]

In 2013, the eduction infrastructure budget was further augmented. The infrastructure budget transferred to the provincial education departments was R6.6 billion. This is set to increase to R10 billion over the 2013 Medium-Term Expenditure Framework. R1.9 billion was allocated to the School Infrastructure Backlog Grants in terms of which the Minister committed to replace inappropriate schools.[76]

It is clear that sufficient funds have been allocated to address backlogs. However, poor planning, poor financial management, poor general management and accountability at a school and provincial level underlie many of the persistent infrastructural backlogs.[77] The severity of generally poor management in the Eastern Cape and Limpopo provincial departments of education has resulted, in 2011, in the national government exercising its powers in terms of section 100 of the Constitution to take over management of the two provincial departments.

The 2010 infrastructure policy specifically seeks to equalise provisioning of infrastructure inputs across all the provinces. The rationale for the policy is concerned with the "[in]adequacy of [provincial] norms and standards and the extent to which they are actually applied. The current level of variation underpins the justification for this policy direction".[78]

In order to ensure provincial equity, the policy locates the authority for setting national norms and standards for the physical teaching and learning environment with the national Minister. It provides that these norms will explicitly define what constitutes minimum and optimum provisioning. The policy obliges all provinces to comply with the minimum norms. It further commits to developing and adopting norms and standards by the end of the 2010/2011 financial year, whereafter provinces are required to "adapt the National Norms and Standards to their contexts without prejudice to set

[73] Department of Basic Education (2013), note 27 above.
[74] Department of Basic Education (2012), note 69 above.
[75] Parliament of South Africa (2012) *Budget Vote Analysis – Vote 15: Basic Education*. March 2013. Cape Town: Parliament Research Unit.
[76] Minister of Basic Education (2013), note 26 above.
[77] Parliament of South Africa (2012), note 75 above;
Section 27 (2013), note 65 above.
[78] National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (2010), para 4.20, note 17 above.

minimums".[79] "Once finalised, these two paired policy and legislative instruments would serve as the DBE's authoritative pronouncements on what an enabling physical school environment ought to entail" – and what the specific responsibilities of government are, as well as provide mechansisms to hold provincial departments to account.[80]

Draft norms and standards were developed in 2008. However, they were not finalised. Instead, in 2012, on the instruction of the Council of Education Ministers, the 2008 draft norms and standards were converted and downgraded in legal status to unenforcable guidelines – the Guidelines Relating to Planning for Public School Infrastructure (2012).[81] These guidelines were complemented by the National Guidelines for School Library and Information Services (2012).[82] Together, these documents provide guidance on what constitutes an adequate teaching and learning environment in terms of building specifications; class sizes and teacher–learner ratios; basic services such as water, sanitation and electricity; libraries, communication and information technology; science laboratories; support spaces such as counselling rooms, sports and recreational facilities; and other essential education elements.

The downgrading of the status of the norms and standards from regulations to guidelines ignored the legal requirement in the Schools Act. Not only does the Schools Act empower the promulgation of norms and standards, but also introduces mechanisms to ensure that provinces comply with the norms, apply appropriate resources to ensure compliance and that Heads of Department report to the MEC on the state of compliance.[83]As observed by Equal Education, these provisions of the Schools Act "clearly indicate the conscious and deliberate intention of Parliament to ensure that all learners in South Africa attend schools where the infrastructure conditions meet the minimum standards required to enable effective teaching and learning".[84]

However, because the norms and standards were not promulgated as required, there was no clear obligation on the provincial departments to provide the minimum infrastructure, or to plan, spend, and account for the expenditure of their budgets against defined minimum standards. The legal status of the guidelines rendered them unenforceable in a court of law and provided insufficient legal compulsion to guarantee adherence to the prescribed standards by all provinces and all schools. As observed by the South African Human Rights Commission, the "downgrading of the norms into guidelines potentially frustrates the realisation of a key equity objective of the policy, given the weaker legal status of the guidelines".[85]

[79] National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (2010), para 4.25, note 17 above.
[80] Equal Education (2013) *Comment on the Draft Regulations Relating to the Minimum Uniform Norms and Standards for Public School Infrastructure GG 36062 GN 932 of 2013; 12 September 2013*. Khayelitsha: EE.
[81] Department of Basic Education (2012) *Annual Performance Plan 2012 – 2013*. Pretoria: DBE.
[82] Department of Basic Education (2012), note 23 above.
[83] s58(c).
[84] Equal Education (2013), note 80 above.
[85] South African Human Rights Commission (2012), note 3 above.

The failure of the Minister of Basic Education to promulgate norms and standards was challenged by Equal Education in the Bisho High Court.[86] The matter was settled and the Minister agreed to publish draft norms and standards for public comment by 15 January 2013 and to promulgate these by 15 May 2013. In January 2013 the Minister gazetted a set of draft regulations containing the norms and standards for comment.[87] However the draft norms, as compared to the 2008 norms (now guidelines) were inadequate in a number of respects. Numerous public submissions were made in response to the draft, with most rejecting them as essentially being void for vagueness. Section 27 and Equal Education argued that the norms did not set sufficiently clear and definable minimum standards or clear time lines for delivery, resulting in an unacceptably vague document. For example, the draft required the provision of "some form or energy"[88], compared to the 2008 draft which expressly required the provision of electricity. Similarly in the case of sanitation, whereas the 2008 draft prohibited the use of pit and bucket latrines, the draft norms did not, and they did not specify the number of students per toilet ratio. Furthermore, it said nothing about the number of learners per classroom, or how many classrooms should be in a school (as did the 2008 norms).[89]

The Minister gazetted a further set of revised norms for public comment on 12 September 2013. The revised norms provided substantially more detail in terms of prescribed standards and provided clear timelines for delivery of the minimum infrastructure. However, Section 27 and Equal Education expressed concerns about the inadequacy of the enabling and accountability mechanisms; the failure to honour the constitutional commitment to immediately, rather than progressively, realise the right to education; the failure to prioritise and provide for staggered time-bound delivery, starting with the basic infrastructure in the most severely disadvantaged schools and with basic safety and health requirements.[90]

A common concern with the revised draft norms was that they did not give effect to the obligation on the government to immediately, as opposed to progressively, realise the right to education as guaranteed by section 29(1) of the Constitution. The Constitutional Court has confirmed that the "right to basic education under S29(1)(a), unlike some of the other socio-economic rights … is immediately realisable, [that] there is no internal limitation requiring that right be **progressively realised** within **available resources** subject to **reasonable legislative measures**" [emphasis added].[91] Whilst recognising that it is not possible for the government to ensure delivery of the infrastructure overnight, Equal Education argued that the proposed periods for delivery of electricity, water, sanitation and perimeter security at all schools within 10 years (2023), and the delivery of all other prescribed

[86] *Equal Education (EE) and Two Others v Minister of Basic Education and 12 Others*, Eastern Cape High Court, 81/2012.
[87] South African Schools Act (84/1996): Call for Comments on Regulations Relating to Minimum Uniform Norms and Standards for Public Schools Infrastructure. *Government Gazette* 36062 (8 January 2013).
[88] Equal Education (2013) *Comment on the Draft Regulations Relating to the Minimum Norms and Standards for Public School Infrastructure GG 36062; GN 6 of 2013; 8 January 2013. 31 March 2013.* Khayelitsha: EE..
[89] Equal Education (2013), note 88 above.
[90] Section 27 (2013), note 65 above.
Equal Education (2013), note 80 above.
[91] *Governing Body of the Juma Musjid Primary School and Others v Essay N.O. and Others*, at para 37, note 1 above.

infrastructure within 17 years (2030), did not amount to a reasonable period of time and thus transgressed the right to immediate realisation.[92]

A further concern with the revised norms was that they did not embed an imperative to recognise and respond more urgently to infrastructural inadequacies which created a risk to the health and safety of learners, or to dire situations experienced by extremely vulnerable and marginalised learners who attend schools in the most appalling conditions. All schools and provinces were subject to the same 10- or 17-year deadlines, thus creating a very weak framework unable to compel the remediation of unsafe structures or absent services such as water and sanitation which pose a grave risk to learners' health and safety.[93]

Whilst the revised draft was substantially better in terms of the detail and appropriateness of the prescribed infrastructure specifications than the earlier 2013 draft, there were still gaps created by the vagueness of some of the specifications. Notably, whilst the revised draft prescribed that schools should comply with Universal Design standards to ensure accessibility for children with disabilities, there was little detail provided as to what this means in practice.[94] Other areas where there was insufficient detail include the location and topography of schools, the materials that may be used for constructing classrooms, and how much electricity should be supplied. In domains such as sanitation, library and laboratory specifications, the revised draft did not set sufficiently stringent specifications to ensure compliance with World Health Organisation and UNICEF standards.[95]

The Minister responded positively to the input received, and promulgated final regulations at the end of November 2013.[96] The regulations address a number of the concerns expressed regarding previous drafts. Notably they require that schools beset by dire infrastructural inadequacies, such as those built from mud and asbestos as well as those without sanitation and electricity, be prioritised. Furthermore, timeframes for the provision of adequate school infrastructure have been improved. For example, all mud and asbestos schools must be eradicated within three years; classrooms, electronic connectivity (telephones, fax machines and internet); fencing, as well as all other water, power and sanitation requirements must be provided to schools within seven years; and libraries and laboratories must be provided to schools within 10 years.

Recommendations

Now that the long-awaited norms and standards have finally been promulgated, it is critical that they be implemented, awareness raised about them, and responsible role-players be held accountable for timeous and adequate implementation.

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[92] Section 27 (2013), note 65 above;
Equal Education (2013), note 80 above.
[93] Equal Education (2013), note 80 above.
[94] Equal Education (2013), note 80 above.
[95] Equal Education (2013), note 80 above.
[96] South African Schools Act 84 of 1996: Regulations relating to Minimum Uniform Norms and Standards for Public School Infrastructure. *Government Gazette* 37081, Notice 10067 (29 November 2013).

This will require that:

- All role players within the national and provincial departments of basic education be made aware of the content of the norms and standards and their respective roles and responsibilities.
- Schools and school governing bodies should be informed of the responsibilities of the department and what they may legitimately expect in terms of delivery of adequate infrastructure and encouraged to hold the department to account.
- Equally, parents and children should be informed in plain and accessible communication about their rights in terms of the norms and standards, measures that are available to them to hold the education authorities to account for delivery, and be encouraged and supported to exercise their rights.
- Parliament and the provincial legislatures must exercise their oversight mandates and request rigorous reporting on progress against the commitments implicit in the norms and standards.

4.2 Availability of teachers

The state is obliged to not only provide a sufficient number of teachers that are qualified to teach all learners; it is also obliged to ensure that teachers are in the classroom teaching for seven hours per school day so as to cover the curriculum.

There are two key challenges impacting on the realisation of these obligations and these are key to the poor quality of education inputs and outcomes in South Africa.

The first is the lack of teachers' skills and competencies. The second is the high levels of absenteeism amongst teachers.

Teacher knowledge is an essential non-negotiable for quality education – you cannot teach what you do not know. Whilst there has been an improvement in the number of qualified teachers in South Africa from 53% to 94% between 1990 and 2008, this has not translated into a comparable increase in teacher competencies to teach their subjects.[97] The available evidence indicates that a large number of teachers know little more about the subjects they teach than the children they teach; some teachers know even less.[98] A study conducted by JET Education services in 268 schools in eight provinces found that in 2008 only 53% of Grade 4 maths teachers answered correctly a simple fraction question based on the Grade 6 curriculum. In 2009, only 72% of the Grade 5 maths teachers got the same question correct.[99] The 2007 Southern and Eastern African Consortium for Monitoring Quality Education (SACMEQ) study found that a high proportion of the groups of Grade 6 mathematics teachers that were tested for subject knowledge were unable to answer questions aimed for their pupils. Grade 6

[97] South African Human Rights Commission (2012), note 3 above.
[98] Spaull N (2011), note 54 above;
Taylor N (2011) *Priorities for Addressing South Africa's Education and Training Crisis: A Review Commissioned by the National Planning Commission*. JET Education Services;
SACMEQ III (2010), note 54 above;
National Education Evaluation and Development Unit (2013) *The State of Literacy Teaching and Learning in the Foundation Phase*. Pretoria: NEEDU & DBE.
[99] Grobbelaar R (2011) Teachers fail primary school simple fraction test. *Timeslive.co.za*, 10 October 2011.

teachers in the lowest quintile schools had the lowest content knowledge, which was lower than the knowledge of teachers in Kenya, Zimbabwe, Uganda and Tanzania. The top 5% of Grade 6 pupils in South Africa had higher scores than the bottom 20% of Grade 6 maths teachers on the same test.[100] A recent National Education Evaluation and Development Unit (NEEDU) evaluation found low levels of foundation teacher knowledge/competency in literacy comprehension and mathematics. In addition, it was found that many teachers are not following the prescripts of the official curriculum and many seem unsure of what these are.[101]

The problem lies in two deficiencies. The first is the lack of a meaningful and effective programme of pre-service and in-service training to support the content and professional development of teachers. The current programme is inadequate and questionable provincial in-service training has not made an impact on teacher qualifications and competence.[102] This situation is however likely to improve since the introduction of the Integrated Strategic Planning Framework for Teacher Education and Development for South Africa 2011 – 2025.

The second problem lies in the fact that teachers' subject knowledge is not regularly tested nor are their skills and competencies monitored. In addition, organised labour resistance has prevented the introduction of a system for monitoring and improving teacher content knowledge and competence. In a recent incident, organised labour prevented NEEDU from entering a Gauteng public school to conduct a study on the state of education in the foundation phase.[103]

In addition to the lack of knowledge, a further challenge in ensuring the availability of teachers is the high rate of absenteeism of teachers in South Africa. The problem is most pronounced in schools in the lowest four quintiles, although many schools in the highest quintile experience the problem too.[104] In addition, when teachers are at school, they spend only half their time, or less, in class teaching. Chisolm conducted a study which revealed that:

- Out of an expected 43 hours per week, teachers worked an average of 41.
- Only 41% of the 41 hours was spent on teaching. This amounts to only 3.4 hours per day.
- 28% of their time was spent on administration and preparation.[105]

A recent NEEDU evaluation quotes studies by the HSRC (2008) and SACMEQ (2007) which point to average rates of absenteeism of teachers of between 19 and 24 days per year per teacher, which is two and three times higher than other countries in the region. The NEEDU study found that they are absent as a result of sports meetings, training courses, union meetings, funerals and memorial services.[106] What is of particular concern is the report's observation that school principals tend to show a lack of concern to late coming and disruptions. They shrug off late coming and absenteeism and attribute the issues to unreliable public transport, lack of parental commitment and teacher militancy. However, the

[100] Spaull N (2013), note 40 above.
[101] National Education Evaluation and Development Unit (2013), note 98 above.
[102] Taylor N (2011), note 98 above.
[103] National Education Evaluation and Development Unit (2013), note 98 above.
[104] Centre for Development and Enterprise (2011) in Taylor N (2011), note 98 above.
[105] Taylor N (2011), note 98 above.
[106] National Education Evaluation and Development Unit (2013), note 98 above.

report observes that where principals take the issues seriously and take corrective measures, significant changes are brought about.

Recommendations

- An agreement should be negotiated with organised labour and other stakeholders in terms of which a national system of diagnostic teacher testing and training is implemented. All teachers should be required to take part in a system of diagnostic testing and capacity builidng. Teachers who do not have adequate knowledge and skills should be obliged to participate in mandatory training within a specified period of time, and where they fail to acquire the prescribed knowledge and skills, they should not be permitted to teach the subject in question.[107]
- NEEDU recommends that the DBE should amend its leave policies, especially its generous sick leave policies and systems to prevent abuse.
- In addition, principals and district offices should play a more active role in monitoring, reporting and remediating teacher absenteeism, and they should be capacitated to fulfil this role.
- There should be closer monitoring of Education Labour Relations Council (ELRC) disciplinary hearings of cases of extended absenteeism and improved implementation of dismissal where educators are absent for more than 14 days without justification.
- A curator should be appointed at ELRC hearings to ensure the best interests of children are taken into account.

4.3 Low capacity of school governing bodies

An important component of making schools available is to ensure that they are well managed in compliance with the laws and in furtherance of the rights of learners.[108]

Education in South Africa was democratised through the introduction of the school governing body (SGB) system as an essential element of the institutional management arrangements in schools. SGBs are representative structures made up of parents, educators, learners and the school principal and they are tasked, in terms of sections 20 and 21 of the Schools Act with:

- developing the school's mission statement;
- adopting a code of conduct;
- adopting the school's admission policy;
- adopting the school's language policy; and
- managing the school's finances (which include the setting of school fees).

Various studies have noted that the SGBs, especially in schools serving poorer, lower literate communities, lack the knowledge, skills and capacities to fulfil their management functions.[109]

[107] Spaull N (2013), note 40 above.
[108] South African Human Rights Commission (2012), note 3 above.
[109] Mestry R & Khumal J (2012) Governing bodies and learner discipline: Managing rural schools in South Africa through a code of conduct. *South African Journal of Education*, 32:97-110;

The studies note that many of the SGB members, especially the parents, lack the skills and knowledge, especially of the governing education laws and policies, which result in the development of poor school policies that, in a significant number of cases, transgress the rights of learners. As a result, decentralisation has created a governance system which is "strong in terms of devolution, but weak in terms of managing the disparate and often discriminatory proclivities and tendencies within local sites".[110]

It is notable that the more recent recorded incidents of SGB policies that contravene children's rights arise frequently in the context especially of the development of school codes of conduct and school learner pregnancy policies (the latter is discussed in more detail later), rather than in the case of school language policies. When one looks at the Schools Act there is a noticeable difference in the rigour of the legislative regulation of the language policies compared to the pregnancy policies. The Schools Act makes the development of school language policies expressly subject to the limitation that the exercise of that power is subject to the Constitution and that no racial discrimination may be perpetuated by the chosen policy.[111] In addition, the Minister is afforded and has exercised her power in terms of the Act to develop binding norms and standards for language policies which guide and must be adhered to by SGBs in the development of school language policies. However, SGBs' power to develop a school code of conduct (which includes learner pregnancy policies) is not made **expressly** subject to the same conditions, provisos and norms and standards. And whilst a set of guidelines for SGBs have been developed to support the development of codes of conduct, these do not have the stature of norms and standards and there is no express obligation on SGBs in terms of the Act to comply with these guidelines, as they must do with the language norms and standards.

The recent frequency of cases of codes of conduct and learner pregnancy policies that contravene children's rights not to be discriminated against on constitutionally outlawed grounds may well be driven, in part, by the lack of explicit legislative obligations on SGBs to comply with the Constitution and with norms and standards when developing these policies.

Recommendations

- To address lack of capacity of SGBs, there is a need for more systemic and frequent training of SGBs. Section 19 of the Schools Act requires that provincial Heads of Department should provide a programme of introductory and on-going training for SGBs members. Further research is needed to determine whether section 19 is being implemented and to evaluate the quality and effectiveness of any training that is provided.
- In addition, there is an urgent need for training district and provincial officials, including school principals so that they are aware of their duties under the Constitution to respect, protect and

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Davids J (2011) The Effectiveness of School Governing Bodies in Gauteng Public Schools. Mini-dissertation submitted for degree in Education Management. University of Johannesburg;
Matthew Goniwe School of Leadership and Governance (2008) *Evaluation Report on Governance Training*. Evaluation conducted for the Gauteng Department of Basic Education.

[110] Van Wyk N (2007) The rights and roles of parents on school governing bodies in South Africa. *International Journal about Parents in Education*, 1:132-139.

[111] s6(1), (2) and (3).

promote learners' fundamental rights. In particular principals need to be re-apprised of the fact that they serve as the provincial Head of Department's representative on SGBs. They have a particular obligation to ensure that learners' rights are respected, that the best interests of learners remain paramount, and to educate the rest of the SGB members on laws and policies.

- However, training alone will not suffice. There is a need to consider augmenting the provisions in the South African Schools Act regarding the power of SGBs to develop codes of conduct, so as to make the exercise of their powers in this regard **expressly** subject to the Constitution, and to forbid the development of policies that discriminate against learners on the basis of, for example, pregnancy (see later discussion under learner pregnancy). In addition, these provisions should be augmented to require the development, by the Minister, of norms and standards governing codes of conduct and pregnancy policies, as in the case of language policies, and a provision obliging SGBs to comply with any promulgated norms and standards.

5. Challenges limiting the *accessibility* of education

5.1 Schooling costs

Poverty has been, and continues to be, a key driver of educational exclusions in South African schools.[112] In 2011, as in 2002, "no money for fees" is the main reason given for not attending an educational institution, although, in 2011 it has decreased as a cited reason to 27% compared to 39% in 2002.[113]

This reduction in the fee barriers for children living in poverty is largely a result of the introduction by the DBE of no-fee and school-fee exemption policies (introduced through the National Norms and Standards for Public School Funding 1998, and as amended in 2006, 2008 and 2011, 2012 and 2013). In 2011, 60.8% of learners paid no fees, and 96% of these did not pay fees as they attended no-fee schools.[114]

Clearly the introduction of the no-fee policy has improved access to education for children living in poverty in schools in quintiles 1, 2 and 3. However, a number of studies note that there have been challenges with the ranking of schools to qualify for no-fee status.[115]

The criteria used for ranking schools into quintiles has the effect of excluding schools which have high numbers of poor learners yet are situated in the geographical boundaries of the higher quintiles.

[112] Gustafsson M (2011), note 39 above;
Strasburg S, Meny-Gibent S & Russell B (2010) *More than Getting Through the School Gates: Barriers to Participating in Schooling.* Findings from the Access to Education Study, Volume 3, November 2010. Johannesburg: Social Surveys Africa and Centre for Applied Legal Studies.
[113] Department of Basic Education (2013), note 43 above.
[114] Department of Basic Education (2013), note 43 above.
[115] Giese S, Hombakazi Z, Koch R & Hall K (2008) *A Study on the Implementation and Impact of the No-Fee and School-Fee Exemption Policies*. Cape Town: ACESS;
Portfolio Committee on Basic Education (2011) *Report of the Portfolio Committee on Basic Education on Public Hearings Concerning Access and Delivery of Quality Education*. Accessed at: www.pmg.org.za/docs/2011/comreports/110414pcbasicreport.htm.

Whilst the amended funding norms and standards make provision for schools to challenge their ranking, where schools have tried to challenge their quintile ranking, it often does not lead anywhere.[116]

The funding norms and standards do make provision for poor learners at schools that do not fall into the no-fee quintiles to be either partially or fully exempt from paying fees, and for the automatic exemption from fees for any child in receipt of a social assistance grant. However, access to the fee exemptions remains poor. Less than 1% (0.8%) of children that did not pay fees in 2011 did so because they received a fee exemption and, in total, only 5.9% of learners at fee-paying schools benefited from any kind of exemptions. [117]

A 2008 study attributed the low uptake on exemptions to an ongoing reluctance by many schools to implement exemption policies, effectively ignoring the law, largely because they did not receive any compensation from the provincial DBE for exemptions granted.[118] The funding norms and standards were subsequently amended in 2011.[119] Section 170A now makes provision for the payment of compensation by the provincial DBEs to schools that grant a fee exemption. However, the sum of the compensation paid does not cover the amount of lost fee revenue in schools charging higher fees. Whilst there have not been any studies on the implementation and impact of these compensation provisions, Veriava (an education rights expert) said she had found little information on the impact of the compensation amendments. She spoke to SGBs in KZN, Gauteng and the Western Cape about their knowledge and experience of the provisions. The SGB representative in the Western Cape did not even know that the provision was in place. In Gauteng the SGB did know about it but was only receiving from the department a small fraction of the amount lost as a result of the exemption policy.[120]

In addition to school fees, non-fee costs such as uniforms and transport costs constitute a significant barrier to school for children living in poverty. Many parents indicated that transport and uniform costs were greater barriers to education than school fees, with school uniforms being the most burdensome cost of children's education.[121] Veriava pointed out that school uniforms can take up to 10% of a household's income, so parents are inclined to send their children to schools with the cheapest uniforms.[122]

Whilst the department currently makes provision for assisting children with the cost of tuition fees through its no-fee and exemption policies, there is no comparable policy in place to subsidise the cost of school uniforms and transport. The Portfolio Committee on Basic Education has recommended that appropriate policies be developed to secure subsidisation of these costs.[123]

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[116] Legal Resources Centre (2012) *Report: Civil Society Education Conference*. Johannesburg: LRC.
[117] Department of Basic Education (2013), note 43 above.
[118] Giese S, Hombakazi Z, Koch R & Hall K (2008), note 115 above.
[119] South African Schools Act (84/1996): Amended National Norms and Standards for School Funding. *Government Gazette* 33971, Notice 47 (28 January 2011).
[120] Legal Resources Centre (2012), note 116 above.
[121] Strasburg S et al (2010), note 12 above.
[122] Legal Resources Centre (2012), note 116 above.
[123] Portfolio Committee on Basic Education (2011), note 115 above.

5.2 School transport

The NPEP recognises the need to address the distance barrier to access and commits to providing alternatives where physical access is not feasible.[124] Alternatives include the provision of transport and hostels. The Guidelines Relating to Planning for Public School Infrastructure (2012) recommend the provision of "either transport or hostel accommodation on a progressively phased and pro-poor basis" for learners that have to walk more than five kilometres to their closest public school.

It is clear from the data on the number of learners who live far from their schools, and the inequity in their usage and access to public, safe and affordable transport, that the preceding commitments have not been met, nor have the guidelines been followed. The lack of available safe and affordable transport remains a significant and common barrier preventing the most vulnerable and marginalised children from accessing schools, including children living in poverty, children in rural areas, very young children, and children with disabilities.[125]

These inequities and disparities are revealed by analysis of statistics on transport use and distance to schools. Three-quarters of learners walk to school and 9% use public transport; and very notably fewer than 2% use transport provided by the government. The majority of White children are driven to school in a private car while only 6% of Black children use this means of transport.[126] For the 1.184 million primary school children and 925 000 secondary learners who live far from their schools (more than 30 minutes), the lack of transport, poor roads, high cost of transport and risks to their safety along the routes to school impact on their safety as well as their ability to attend school and participate fully and effectively.[127] The Strassburg study found that 50% of participating households that paid for transport, paid more than R250 per month to cover these costs and that this cost had caused some learners to drop out of school or to be absent frequently.[128]

The DBE has developed a draft Hostel Policy and is in discussion with the Department of Transport in relation to the development of a national Learner Transport Policy. As yet, neither of these have been finalised or implemented. Equal Education observes that without the development of national norms and standards that set minimum travelling norms, the situation is not likely to improve.[129] This is borne out by the apparent ease and frequency with which the minimum distance guidelines have been ignored, leaving the many children and caregivers that testified at Equal Education's public hearings far from school without access to safe and affordable transport.

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[124] National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (2010), para 3.4, note 17 above.
[125] South African Human Rights Commission (2012), note 3 above;
Strasburg S et al (2010), note 112 above;
Equal Education (2013) *Comment on the Draft Regulations Relating to the Minimum Norms and Standards for Public School Infrastructure GG 36062; GN 6 of 2013; 8 January 2013*. 31 March 2013. Khayelitsha: EE.
[126] Murambiwa R & Hall K (2011) Children's access to education. In: Jamieson L, Bray R, Viviers A, Lake L, Pendlebury S & Smith C (eds) *South African Child Gauge 2010/11*. Cape Town: Children's Institute, University of Cape Town. Pp. 96-99.
[127] Murambiwa R & Hall K (2011), note 126 above;
Strasburg S et al (2010), note 112 above.
[128] Strasburg S et al (2010), note 112 above.
[129] Equal Education (2013), note 80 above.

Recommendations

- The UNCRC and other legal instruments call for universal free primary education. The governing policy on school fees should therefore be amended to make all primary education at public schools free.
- Until such time as all public schools are free, the funding norms should be amended to allow for ranking of no-fee schools based on their students' socio-economic demographics rather than geographical location.
- A review should be undertaken of the implementation of the revised funding norms and standards which allow for provincial departments to compensate schools for loss of funds caused by the granting of school-fee exemptions. This review should assess in particular whether schools are being compensated.
- Introduce a law or regulations to control the cost of, and subsidisation of, school uniforms, which will support parents.
- Amend the draft Minimum Uniform Norms and Standards for Public School Infrastructure to include minimum distances to and from school and the obligation to provide alternatives in the way of transport or hostels.
- The minimum distances set by the norms should differentiate between what constitutes an acceptable minimum distance for children with different mobility capacities, such as very young children and children with disabilities.
- The Hostel and Transport policies should be finalised based on the standards set by the minimum norms.

5.3 Lack of support for pregnant learners

UNESCO observes that as progress is made towards near-universal enrolment, attention must turn to including those who are most marginalised and hardest to reach.[130] South Africa is confronted with the challenge of ensuring the implementation of its compulsory enrolment and attendance policies for the most marginalised children – and one group that is particularly marginalised are girls who fall pregnant whilst at school.

In 2009, 4.5% of girls between the ages of 13 and 19 were pregnant. The rate increases incrementally with the age of the cohort. Among 13-year-olds, 0. 2% were pregnant compared to 7% of 17-year-olds, and almost 9% of 18-year-olds.[131] This improved somewhat in 2011 when the percentage of female learners attending schools who fell pregnant decreased to 1%, compared to 1.4% in 2010. However, the rate of learner pregnancy is higher than the national average in some provinces, with the highest rate in Limpopo. In 2011 the problem remained significant with over 51 000 learners attending schools across the country having given birth, and 13 000 learners were still pregnant.[132]

[130] United Nations Educational, Scientific and Cultural Organisation (2010) *EFA Global Monitoring Report: Reaching the Marginalised*. Oxford, United Kingdom: Oxford University Press.
[131] Department of Basic Education (2011) *Report on the 2009 General Household Report: Focus on schooling*. Pretoria: DBE.
[132] Department of Basic Education (2013), note 43 above.

Pregnancy creates a significant risk of educational exclusion. In 2009, 6% of out-of-school learners between the ages of seven and 18 were not at school because of pregnancy.[133] (This dropped to 5% in 2011.)[134] The data support the conclusion by Gustafsson that teen pregnancies are a key cause of girls dropping out of school.[135]

What is of particular concern is that, despite the prohibition by the Schools Act of any form of unlawful discrimination against learners, the decision to drop out is often as a result of pressure by the school.[136]

Schools have been able to put pressure on girls who fall pregnant through the development, by SGBs, of school policies on the management of learner pregnancy. The policies in question have been developed in compliance with the DBE's Measures for the Prevention and Management of Learner Pregnancy (2007). Whilst these measures prohibit schools from expelling or otherwise unfairly discriminating against pregnant learners, they also prohibit girls from returning to school in the same year that the infant is born and allow schools to require girls who become pregnant to take a period of absence of up to two years once the baby is born to fulfil their parenting responsibilities. The measures have been further criticised for use of conservative language, such as "strongly advocating abstinence".[137]

A number of schools, by using the measures and in terms of the power afforded by the Schools Act to SGBs to develop school codes of conduct, have developed and applied school policies on learner pregnancies to exclude girls from the period just before giving birth for a period of up to two years following the birth of the child. The policies treat the fathers of the infant differently in that they either require them to take a minimal period of paternity (leave) or do not require their absence from school at all. In addition, the school policies include provisions obliging pregnant learners to report to school authorities once they know they are pregnant, and oblige other learners to report pregnant learners to school authorities.

The Free State Department of Basic Education, Equal Education and others have challenged the ability of these policies to insulate schools from departmental intervention to ensure that pregnant learners are not discriminated against.[138] In addition, Equal Education and the Centre for Child Law, University of Pretoria, have intervened in a number of similar cases on behalf of pregnant learners.

The history of the litigation and the resultant precedents are complicated by the fact that the High Courts and Supreme Court of Appeal (SCA) did not directly rule on the issue of constitutionality of the

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[133] Department of Basic Education (2011), note 131 above.
[134] Department of Basic Education (2013), note 43 above.
[135] Gustafsson M (2011), note 39 above.
[136] Panday S, Makiwane M, Ranchod C & Lestoalo T (2009) Teenage Pregnancy in South Africa with a Special Focus on School-Going Girls. Child, Youth, Family and Social Development, Human Sciences Research Council. Pretoria: DBE;
Motala S & Dieltiens V (2010), note 38 above.
[137] Willan S (2013) *A Review of Teenage Pregnancy in South Africa – Experiences of Schooling, and Knowledge and Access to Sexual and Reproductive Health Services*. Durban: Health Services Trust.

[138] *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another*, CCT 103/12 [2013] ZACC 25.

policies or the associated obligations on SGBs when developing pregnancy policies. This was because the manner in which the issue was placed before the court did not permit a consideration of the constitutionality of the policies, but only on whether the process followed by the Head of Department (HOD) in revoking the said policies was lawful or not. On a point of administrative justice, both courts found the HOD's action to be unlawful and ordered that the policies be allowed to remain intact. The SCA did indicate, without further exploration of the issue, or making any order in this regard, that the policies were on the face of it unconstitutional.

The Constitutional Court (CC), whilst presented with similar technical limitations, exercised its statutory authority to consider matters not raised, but which will have a likely negative impact on protected rights and engaged with the question of the constitutional validity of the policies in question.[139] The CC did not grant an order of invalidity in respect of the offending school policies, but did rule that the policies had to be reviewed by the SGBs in light of the statements made by the Court and, that the SGBs, in consultation with the HOD, should develop revised policies and present these to the Court at a future date.

The key points during the course of the judgment which the policy revision process is required to consider includes the following:

- SGBs have the power to develop and implement learner pregnancy policies in terms of section 8 of the Schools Act which empowers them to develop a school code of conduct.
- The policies must be developed in accordance with the Constitution and the scope of the powers and limitations embedded within the Schools Act.
- The policies developed by the schools in questions contravened the rights of the pregnant learners to equality, basic education, human dignity, privacy and bodily and psychological integrity, and possibly the obligation to take into account the best interests of the affected children, and as such did not comply with constitutional prescripts. The offending provisions of the policy included the general measures treating pregnant girls different to other children (thus infringing the right to equality and freedom from discrimination on the grounds of pregnancy as provided in section 9(3) of the Constitution); provisions requiring girls who fall pregnant to stay away from school for an extended period of time (resulting in an infringement on their right to basic education); and the provisions requiring girls to report once they become pregnant, and other learners to report pregnant girls to school authorities.

Thus at this stage there is still no court judgment declaring the offending policies unconstitutional. The status of the judgment continues to leave some level of uncertainty and scope for the development of future unconstitutional pregnancy policies which could only be overturned by a court of law. This state of uncertainty and the potential protection afforded by the judgment could be addressed through strengthening of the provisions of the enabling Schools Act and/or the publication of a constitutionally

[139] *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another*, note 138 above.

compliant national policy on pregnant learners to provide clear limits and guidance to SGBs in the development of learner pregnancy policies.

A study commissioned by the Department of Basic Education on the link between pregnancy and education in 2009 found that there is a complex relationship between teen pregnancies and education and that dropping out often precedes pregnancy; therefore dropping out heightens the risk of early pregnancy. It is thus recommended that the education system develops a comprehensive programme of action which focuses on:

- the retention of girls;
- the prevention of pregnancy through education; and
- the inclusion of girls in school that fall pregnant in school as soon as possible after the birth as evidence shows that the longer they remain excluded, the less likely they are to return to school.

The study concluded that the Measures for the Prevention and Management of Learner Pregnancy were inadequate to ensure appropriate support for girls at risk of pregnancy and did not secure their education rights as schools were allowed to exclude girls for up to two years after birth.[140]

The department is in the process of developing a revised strategy and set of nationally applicable guidelines (the legal status of which is unknown at this stage as they have not been released for public comment) that will ensure the return of girls after giving birth, encourage the prevention of pregnancy through the focused provision of education on sexual and reproductive health rights, and ensure that returning girls receive the necessary levels of support to secure their ongoing retention.

Recommendations

- The DBE should expressly revoke/retract the 2007 Measures for the Prevention and Management of Learner Pregnancy and expedite the publication of binding national policy for the return and support of teen mothers.
- The Schools Act should be amended to expressly prohibit the discrimination and/or exclusion of girls from schools on the grounds of pregnancy.
- In addition, all schools should, in light of the Constitutional Court ruling discussed above, review their codes of conduct and/or policies on learner pregnancy to ensure they are respectful of learners' rights.
- There is a need for focused education of SGBs, provincial and district officials on their responsibilities in terms of the Constitution and the Schools Act, as well as on the oversight responsibilities of district and provincial officials to ensure there are no transgressions of pregnant learners' rights.

[140] Panday S et al (2009), note 136 above.

6. Challenges limiting the *acceptability* of education

6.1 Language of teaching and learning

Earlier in this review, the issue of the quality of teaching and teachers and the related impact on learning outcomes were covered in relation to the competencies and skills of teachers. A further issue which impacts on the quality of teaching and learning outcomes is the language of teaching and learning. It is well recognised that learning outcomes are improved where children are taught in their home language.

The Department of Basic Education's Language in Education Policy (1997) requires that learners be taught in their home language in the foundation phase and that they receive instruction in an additional language. Whilst the majority of children (80%) in the foundation phase received instruction in their home language, 20% (600 000) were still taught primarily in English.[141]

There are however a number of challenges impacting on the implementation of the policy, including difficulties in transitioning from Grade 3 to Grade 4 teaching in English, insufficient home language teachers and insufficient materials in relevant languages. This includes, but is not limited to, challenges such as the fact that workbooks and text books are not produced in all official languages, and there is a mismatch between the language of teaching and learning and the languages used by the children and educators, as well as the challenge of accommodating the huge diversity of languages in single schools, which is compounded in schools with sizeable linguistic minorities.[142]

Recommendations

The NEEDU recommends that: [143]

- additional language-trained subject advisors should be appointed;
- all workbooks and textbooks should be produced in all official languages; and
- provincial budget allocations for reading materials in the foundation phase should be increased.

6.2 School violence

One of the requirements for an "acceptable education" is that the necessary laws, programmes and budgets must be in place to ensure that the learning environment is not harmful to children. This requires that the necessary action is taken to ensure that all children are free from exposure to harmful behaviour at school, such as corporal punishment, bullying and sexual offences.[144]

South Africa has a well-developed legal framework which prohibits the use of violence and corporal punishment in schools by educators and children, and which imposes obligations on schools to screen

[141] Department of Basic Education (2010) *Language of Learning Report. The Status of the Language of Learning and Teaching in South African Public Schools*. Pretoria: DBE.
[142] National Education Evaluation and Development Unit (2013), note 98 above.
[143] National Education Evaluation and Development Unit (2013), note 98 above.
[144] South African Human Rights Commission (2012), note 3 above.

prospective school employees, and to report and prosecute all cases of violence committed by educators and other school employees. Key laws and related provisions include:

- the Schools Act which forbids the administration of corporal punishment to a learner by any person at a school;[145]
- the Children's Act obliges teachers to report cases of apparent abuse or neglect of a child to a designated child protection organisation, the provincial department of social development or a police official;[146] and
- the Children's Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act oblige schools to screen all educators against the National Child Protection Register and the National Register for Sex Offenders, and not to employ any person recorded in these registers, as well as to register the names of all educators convicted of sexual offences against children in the said registers.[147]

These laws are supported by the Code of Conduct for Quality Education, the Employment of Educators Act as well as the South African Council of Educator's Code of Professional Ethics which prohibit educators from engaging in any form of physical, sexual or other forms of abuse against children and which require the prosecution of all cases of violence committed by educators and other school employees.

Despite the clarity and consistency of the laws, violence against children in schools by both educators and other learners is rife in South Africa.

A recent study by the Centre for Justice and Crime Prevention (CJCP) found that in South Africa, one in five (22%) of learners had succumbed to some form of violence at school between 2011 and 2012. This translates into more than 1 million children, and the situation has not changed since 2008.[148] The 2011 GHS found that, in 2011, 2.6 million children (23%) of the country's 14 million learners had experienced violence at schools in the form of either corporal punishment or verbal abuse.[149]

Their experiences include violence against and by educators and include a number of forms of violence, such as assault, sexual violence, corporal punishment and bullying (including cyber-bullying).

Sexual violence is especially endemic at schools.[150] In 2011, 216 072 (4.7%) learners had experienced a sexual assault on school premises.[151] One can assume that the numbers are in fact higher, given the reluctance of children to report these cases.

The most prevalent form of violence is corporal punishment by educators. The CJCP study found that it was experienced by 50% of participating learners. The prevalence varied between provinces, ranging

[145] s10(10).
[146] s110.
[147] Act 38 of 2005, s126(1)(a); Act 32 of 2007, s45(1) and (2).
[148] Burton P & Leoschut L (2013) *School Violence in South Africa: Results of the 2012 National School Violence Study.* Cape Town: CJCP.
[149] Department of Basic Education (2013), note 43 above.
[150] Legal Resources Centre (2012), note 116 above.
[151] Burton P & Leoschut L (2013), note 148 above.

from 22 – 73%, with the highest levels experienced in KwaZulu-Natal (74%), Eastern Cape (70%), and Mpumalanga (63%). DBE analysis of the 2011 GHS data confirmed the widespread use of corporal punishment as a form of discipline in South Africa's public schools. 92% of the 2.6 million children who had experienced violence had experienced corporal punishment by a teacher.[152] Both the DBE's GHS analysis and CJCP studies found that the rate of use of corporal punishment had increased since 2008/9 and 2011 by an average of 1 – 2%.

This data is cause for serious concern as not only does the violence impact on children's right to be free from violence and protection from abuse, but also their right to education as violence contributes to poor attendance rates, early drop-out and poor academic performance.[153] The reasons underlying the high rates of school violence are diverse. They relate, on the one hand, to a failure to implement and respect the laws in question. There clearly is a failure to comply with the prohibition against the use of corporal punishment amongst teachers[154] as well as a wide-spread failure to use the national sex offender registers to screen teachers and a failure by the Department of Justice and Constitutional Development and the Department of Social Development to respond to schools' requests for screenings.[155] In addition, there is a common tendency on the part of educators not to intervene or take further action after a learner reports an incident of violence. Approximately 40% of reported cases are not actioned.[156] The failure to act or respect the laws are, in the case of corporal punishment, not caused by ignorance of the law. Instead it appears to reside in the prevailing attitudes of school educators and principals. Many of the school principals that participated in the CJCP study did not recognise the scope and seriousness of the problem of school violence – they took it very much in their stride – and most educators are aware of the prohibition against corporal punishment and violence, but continue to practice it based on their acceptance of violence and their lack of capacity to "employ non-violent means of discipline within the classroom".[157]

The underlying cause of the failure to implement the laws is deep-rooted; it is part of a broader culture of violence in South Africa, with school violence merely forming a link in the continuum of violence experienced and practiced by children and educators in their communities and homes.[158] It is arguable that the high levels of violence in homes and communities that serves to cultivate a culture and acceptance of violence that spills over into schools is allowed to flourish by the fact that the Children's Act fails to prohibit the use of corporal punishment in the home [see chapter 8 on the Right to be Protected from Violence]. The deep-seated drivers of school violence call for holistic responses that are not merely school-based, but which reach into the wider communities and households.

[152] Department of Basic Education (2013), note 43 above.
[153] Burton P & Leoschut L (2013), note 148 above.
[154] Burton P & Leoschut L (2013), note 148 above.
[155] Legal Resources Centre (2012), note 116 above.
[156] Burton P & Leoschut L (2013), note 148 above.
[157] Burton P & Leoschut L (2013), note 148 above.
[158] Burton P & Leoschut L (2013), note 148 above.

Recommendations

The DBE has recognised the need for a holistic and integrated response and is in the process of developing a National School Safety Framework which provides for a whole-school approach. The authors of the CJCP study argue that the whole-school approach must be expedited and strengthened to bolster and support the effective implementation of the governing laws. They recommend that:

- The finalisation of the DBE's National School Safety Framework should be expedited and include a roll-out and progress monitoring plan for all provinces.
- Adequate reporting mechanisms and response systems need to be developed at a school level to ensure that all reported cases are adequately responded to once reported.
- The education performance management system should include effective school management and safety key performance areas and obligations, and all principals and educators should be held accountable for safety within the classroom and school environment.
- An adequate and reliable set of school safety indicators should be developed to monitor progress at a national and provincial level annually.

In addition to strengthening the operational framework, the Children's Act should be amended to prohibit corporal punishment in the home to begin to address the culture of violence being viewed as an acceptable approach to dealing with conflict. [See chapter 8 on the Right to be Protected from Violence.]

7. Challenges limiting the *adaptability* of education: Focus on children with disabilities

The adaptability requirement translates into an obligation to ensure that the education system is inclusive, flexible and responsive to the different circumstances and needs of children often precluded from formal schooling, including children with disabilities. In short, it requires the development of an inclusive education system that is available, accessible and acceptable for all learners with disabilities.

At an international, regional and national level, South Africa has committed, in terms of a number of legal and developmental instruments, to promote, protect and realise the rights to basic education of all children with disabilities. Moreover, it has committed to securing these rights through the adoption of an inclusive education system.

Key international instruments include the UNCRC and the Convention on the Rights of the Persons with Disabilities (2006) (CRPD). Regionally, the right is protected by the African Charter on the Rights and Welfare of the Child (1999). The UNCRC and the ACRWC[159] oblige the state to ensure the dignity, promote the self-reliance and facilitate the active participation of a child with a disability in society, and to ensure that every child has effective access to, and receives education. The CRPD[160] recognises

[159] Art 23 and 13.
[160] Art 24.

the right of all persons with disabilities to basic education and requires that the right be realised through an inclusive education system.

South Africa's commitment to the attainment of the UNESCO's Education for All (EFA) goals includes the shared commitment to ensuring access to education for all, including the most marginalised and disadvantaged communities, which means children with disabilities. Moreover, the EFA commitments translate into an obligation to secure universal access for children with disabilities through inclusive education. More specifically, through a public education system that ensures that regular public "schools accommodate all children, regardless of their physical, intellectual, social, emotional, linguistic or other conditions [and that they should] include disabled and … children from other disadvantaged or marginalised areas or groups".[161] The rationale is that "regular schools with inclusive orientation are the most effective means of combating discrimination, creating welcoming communities, building an inclusive society and achieving education for all".[162]

The Constitution guarantees the right of all children (including those with disabilities) to basic education.[163] Furthermore, it guarantees equality;[164] that is the right of all children to equal enjoyment of all rights, services and benefits.

The two primary legal documents giving effect to these rights for children with disabilities are the Schools Act and Education White Paper 6 on Special Needs Education (2001). They lay a foundation for, and promote an inclusive education policy which seeks to secure the availability of mainstream education through ordinary public schools for children with mild to moderate disabilities. These are further supported by a number of special schools for children with severe disabilities.

The Schools Act provides that all public schools must admit learners without discriminating unfairly against them.[165] Section 12 obliges provincial departments of education to ensure that learners with special needs can access, where reasonably practicable, ordinary public schools. In deciding on the placement of learner with disabilities, the Head of Department and principal must take into account the rights and wishes of the parents of such learners and uphold the principle of what is in the best interests of the child in any decision-making.

White Paper 6 provides a policy framework articulating the state's recognition of the rights of children with disabilities (and other barriers to learning) through an inclusive education system. The White Paper commits to ensuring the availability and accessibility of education for all children, regardless of their learning abilities and barriers through the development of different institutions within the system based on the intensity of support needed to overcome the impact of the child's specific learning barriers. In short it recognises and commits to making available and accessible sufficient and appropriate educational institutions to realise the right of all children to reach their full potential by

[161] United Nations Educational, Scientific and Cultural Organisation (2003) *Overcoming Exclusion through Inclusive Approaches in Education. A Challenge and Vision. Conceptual Paper*. Paris: UNESCO.
[162] United Nations Educational, Scientific and Cultural Organisation (1994) Salamanca World Conference on Special Needs Education, Art 2. In: UNESCO (2003), note 161 above.
[163] s29(1).
[164] s9.
[165] s5(1).

being accommodated in the most appropriate education setting according to their level of support needs.

The White Paper commits to making education available for children requiring low levels of support through ordinary public schools where educators are trained and facilities are accessible to learners with disabilities; to making full-service schools available and adequately equipping them to accommodate the learners needing moderate support; and to making available special schools adequately equipped to meet the education needs and rights of learners needing high or intensive levels of support. Special schools are intended to accommodate children with severe and profound disabilities, as well as serving as supportive resources centres for full-service and ordinary public schools.[166]

In addition, the DBE has published a number of supportive legal documents such as the Guidelines to Ensure Quality Education and Support in Special Schools (2007); the Guidelines for Responding to Learner Diversity in the Classroom (2011); the National Strategy on Screening, Identification, Assessment and Support (2008); the Guidelines for Full Services and Inclusive Schools (2010); and the Guidelines for Responding to Learner Diversity in the Classroom (2011).

White Paper 6 commits to the realisation of a fully inclusive education system by 2021. Commitments include the development of 500 full-service schools, with one in each of the 50 school districts and the provision of sufficient special schools to accommodate all learners with high level needs in all nine provinces, especially in rural areas. In addition to full-service and special schools, all ordinary public schools are required to ensure sufficient infrastructure, transport, qualified teachers, and adapted curricula to accommodate a diversity of challenges to learning, including those associated with a child's disability. More specifically, schools are required to adapt differentiated teaching methodologies and assessments to ensure appropriate teaching to enable acquisition of skills and knowledge and to accurately assess progress of learners with barriers to learning.[167]

Furthermore, commitments have been made in terms of the National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (2010), the Guidelines Relating to Planning for Public School Infrastructure (2012), and most recently the Regulations Relating to the Minimum Uniform Norms and Standards for Public School Infrastructure (2013) to ensure that all public schools comply with Universal Design standards to ensure accessibility to all school buildings and facilities for children with disabilities. The documents commit to the provision of ramps,

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[166] Department of Basic Education (2013) *Inclusive Education: Department Briefing*. Parliamentary Monitoring Group. Accessed at: www.pmg.org.za/report/20130226-department-basic-education-inclusive-education-national-education-eva.

[167] Department of Basic Education (2012) *National Protocol for Assessment Grades R – 12, Government Notices No. 722 and No. 723, Government Gazette No. 34600 of 12 September 2011 and amended as Government Notices No. 1115 and No. 1116, Government Gazette No 36042 of 28 December 2012*. Pretoria: DBE;
Department of Basic Education (2012) *National Policy Pertaining to the Programme and Promotion Requirements of the National Curriculum Statement Grades R – 12, Government Notices No. 722 and No. 723, Government Gazette No. 34600 of 12 September 2011 and amended as Government Notices No. 1115 and No. 1116, Government Gazette No. 36042 of 28 December 2012.* Pretoria: DBE;
Department of Basic Education (2011), note 21 above.

automated doors, accessible toilets and technologies, and adequate spaces and resources to support teaching and learning, and infrastructure and furniture that allow for ease of access and movement.[168]

White Paper 6 further recognises the need for transport policies to make neighbourhood schools accessible.

White Paper 6 commits to the following support measures to enable and support the implementation of the envisaged Inclusive Education System:[169]

- Building capacity in all education departments.
- Establishing district support teams.
- Identifying, designating and establishing full-service schools to act as resources centres for surrounding schools.
- Establishing multi-disciplinary institution-level support teams.
- Establishing mechanisms for the early identification of learning difficulties.
- Developing the professional capacity of all educators in curriculum development and assessment.
- Mobilising public support.
- Developing an appropriate funding strategy.

7.1 Progress in realising the right to education for children with disabilities

The implementation of White Paper 6 has seen a number of positive developments, including:

- an increase in the number of special schools from 375 in 2002 to 423 in 2011;
- 553 ordinary schools were converted to full-service schools by 2013;
- more than 120 000 children with disabilities were in mainstream schools in 2011;
- assistive devices were provided at 226 special schools and 432 full-service schools by 2013;
- approximately 13 000 teachers had been trained across the provinces in inclusive education-related activities; and
- more than 120 000 children with disabilities were accommodated in mainstream schools in 2012[170];
- There has also been substantial improvement in enrolment rates. Between 2002 and 2011 there was an improvement of 19% in the enrolment rate amongst children aged 7 – 15 years with disabilities, and of 25% amongst children aged 16 – 18 years.[171]

[168] National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (2010), para 1.14.3, note 17 above;
Department of Basic Education (2012), para 16.2, note 22 above;
South African Schools Act: Regulations relating to the minimum uniform norms and standards for public school infrastructure. *Government Gazette* 37081, Notice 10067 (29 November 2013). Reg 6.
[169] Department of Basic Education (2013), note 166 above.
[170] Department of Basic Education (2013), note 166 above;
Schoeman M (2012) The Implications of the South African Education Policy for Parents and Children with Down Syndrome. Presentations at 11th Down Syndrome Congress, August, 2012, Cape Town, South Africa.
[171] Department of Basic Education (2013), note 27 above.

Despite the apparently comprehensive and sophisticated legal enabling environment supporting inclusive education in South Africa and the progress made to date, children with disabilities are disproportionately represented in the out-of-school cohort of children; with the rates of exclusion increasing substantially at secondary level. 8% of 7 – 15-year-olds with a disability were not enrolled at school and 24% of children aged 16 – 18 years with a disability were out of school in 2011. The DBE estimates that in 2010/11 this amounted to between 400 000 and 480 000 children with disabilities being out of school.[172] These numbers do not however present an accurate picture or the full extent of exclusions given the inadequacies in the department's IMS to track in- and out-of-school learners with disabilities described at the beginning of this review.

There are not enough special schools or full-service schools with appropriate facilities to accommodate children with disabilities. At present, there are insufficient special schools to meet demand, especially in rural areas. Special schools have long waiting lists and do not accommodate children with severe and profound disabilities. Likewise, special schools are ill-equipped to accommodate children with physical disabilities, incontinent children and children with autism.[173] This is because special school admission policies are often restrictive. For example, they exclude children who cannot go to the toilet on their own.[174]

The problem of insufficient schools is especially pronounced at secondary level. Whilst the current public education system makes secondary education available through both schools and FET colleges, these options are very limited for children with moderate to severe disabilities. Most special schools go no further than Grade 9.[175] There is no data available for the number of children with a disability in the post-school system (including FET colleges). The current IMS of the post-school system does not monitor the rate of enrolment or the number of adequate facilities for children with disabilities.[176]

The special school shortage is aggravated by the high levels of incorrect referral of children. Approximately 27 000 children are incorrectly referred to special schools as opposed to mainstream education, despite the right to access the education setting most appropriate to their support needs. This has frustrated the rights of these children, but also the many thousands more in need of special school but excluded from such schools being populated by learners with mismatched learning needs. Learners with high level needs are not accessing special needs schools and consequently the majority of them remain excluded from school.[177]

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[172] Department of Women, Children and People with Disabilities (2013), note 34 above;
Schoeman M (2012), note 170 above.
[173] Department of Basic Education (2013), note 166 above;
Schoeman M (2012), note 170 above;
Department of Basic Education (2011) *Access to Education and Support for Learners with Special Educational Needs, Teenage Pregnancy & Sexual Abuse in Schools & Programmes aimed at Curbing Violence in Schools.* Briefing to the Portfolio Committee on Women, Youth, Children and People with a Disability, August 2011. Pretoria: DBE.
[174] Right 2 Education for Children With Disabilities (2011) *Fact Sheet 6: Systemic Barriers to Inclusive Education.* Accessed at: www.saaled.org.za/R2ECWD/docs/Factsheet%206.pdf.
[175] South African Human Rights Commission (2012), note 3 above.
[176] Department of Higher Education and Training (2012), note 29 above.
[177] Right 2 Education for Children With Disabilities (2011), note 174 above.

Children with low to moderate level needs who are in mainstream schools are not receiving the quality of education they are entitled to, and are experiencing ongoing discrimination because of a failure to practise inclusive principles. For example, 17.6% of disabled learners admitted to ordinary schools in 2009 were accommodated in separate classes despite the fact that this is anti-inclusionary and causes learners to suffer stigma and discrimination.[178] This statistic points to a failure on the part of mainstream schools to embrace inclusive education. This situation has not only resulted in the creation of separate classes, but also a failure on the part of ordinary public schools to enrol children with low-level learning needs associated with their disabilities for a variety of reasons. These include the lack of resources, facilities and trained staff at the schools to provide the support needed by these children.[179]

Whilst there are no accurate statistics on the number or percentage of schools that provide disability-friendly infrastructure and facilities, the available data point to a severe lack of appropriate facilities. A 2006 survey of 25 156 ordinary schools revealed that 97.1% had no accessible toilets and 97.8% had no ramps.[180]

In addition, many children with disabilities are out of school because they have no transport to get them to special schools which are often a long distance from their homes.[181]

It is not only access that is problematic. Completion rates, and the associated quality of learning and teaching for children with disabilities are low. In 2011, only 847 learners with disabilities wrote the NSC exam, which represented a drop of 4.8% in the previous year, and in 2011 there was also a 6% drop in the pass rate at special schools.[182]

A recent evaluation found that in many mainstream schools there was no differentiated teacher to address the learning needs of children with different learning styles and barriers to learning.[183] The implementation of the inclusive education policy is hampered by the lack of teachers' skills, knowledge and ability to modify the curriculum to accommodate a diversity of learning needs in the classroom.[184] In addition, in 2013, "there were still many teachers who lacked proper qualifications in special schools, in 59 of the 66 schools for the blind, and 44 schools for the deaf … many teachers have a basic knowledge of Braille or a basic knowledge of sign language, but lacked qualification".[185] In addition, since 2008, only 5000 district and school-based officials have been trained on the Screening, Identification, Assessment and Support Strategy (SIAS).[186]

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[178] Department of Basic Education (2013), note 166 above.
[179] Department of Basic Education (2010), note 36 above.
[180] Department of Women, Children and People with Disabilities (2013), note 34 above.
[181] Right 2 Education for Children With Disabilities (2011), note 174 above.
[182] Department of Basic Education (2013), note 166 above.
[183] National Education Evaluation and Development Unit (2011) *Evaluation of Functionality of 100 Schools: Findings by National Education Evaluation and Development Unit*. Briefing to the Portfolio Committee on Basic Education, 12 November 2011.
[184] Dalton EM, McKenzie J & Kahonde C (2012) The implementation of inclusive education in South Africa: Reflections arising form a workshop of teachers and therapists to introduce Universal Design for Learning. *African Journal of Disability*, 1 (1): www.ajod.org/index.php/ajod/article/view/13/47.
[185] Department of Basic Education (2013), note 166 above.
[186] Department of Basic Education (2011), note 173 above.

In addition to the lack of adequately trained teaching staff, there is insufficient availability of, and access to, learning and teaching support materials such as workbooks and textbooks in Braille.[187] Whilst R28 million has been allocated in the 2012/13 financial year for the preparation of Braille master copies of textbooks for schools for the blind, this does not extend to the provision of these materials in ordinary schools.[188]

7.2 Underlying causes of the frustration of the rights of children with disabilities

The high numbers of children with disabilities who are out of school, who do not receive quality teaching and achieve quality learning outcomes, and who do not complete secondary education are attributable to a combination of factors. These include, on the one hand, a range of implementation challenges alluded to in the situational analysis above, such as insufficient schools, insufficient training, insufficient provision of infrastructure, and a failure to embrace inclusive practices at mainstream schools. Many of these challenges are in turn associated with lack of sufficient resource allocations or poor management and inefficient use of resources, especially at a provincial level, as well as an inadequate information management system that does not monitor or measure disability adequately, leaving a massive planning gap.

On the other hand, many of the implementation and resourcing challenges are attributable to a more deep-seated legal failure: the governing laws do not adequately compel the allocation and use of resources to ensure the right to basic education for children with disabilities, and do not compel appropriate and standardised conduct by parents, educators, schools, district, provincial and national departmental officials.

7.2.1 Insufficient funding allocated to inclusive education

The current backlog in, and availability of, appropriate schools, the failure by ordinary public schools to embrace inclusive education, the failure to train adequate staff and the failure to provide adequate infrastructure and teaching and learning materials are driven, in part, by the lack of funds to support inclusive education in South Africa, especially at a provincial level.[189]

An underlying problem is the current budget structure employed by the National Treasury (NT). Whilst the total inclusive education and special needs budget for 2012/13 was R5.5 billion, the current NT budget structure made provision only for special schools (and not the expansion of inclusive education within mainstream schools).[190]

The DBE does have funding principles, but not enforceable funding norms and standards, which direct and guide the allocation of funds by provincial departments to implement inclusive education. These principles were followed by four provinces (the Free State, KwaZulu-Natal, the North West and the Western Cape) but disregarded by the other provinces. The Eastern Cape, Gauteng, Limpopo,

[187] Legal Resources Centre (2012), note 116 above.
[188] Department of Basic Education (2013), note 166 above.
[189] Department of Basic Education (2013), note 166 above.
[190] Department of Basic Education (2013), note 166 above.

Mpumalanga and the Northern Cape never appropriated any funds for the implementation of the Inclusive Education Programme (phase 2 of the implementation of White Paper 6) which has resulted in serious implementation backlogs.[191]

The lack of funding norms and standards for inclusive education resulted in the allocation of more than 50% of the R2 billion allocated by the NT for expanding inclusive education being used for other purposes by the provincial departments of education.[192]

7.2.2 Slow implementation of White Paper 6

The timetable for the implementation of White Paper 6 is 20 years. The initial phase took place between 2002 and 2008, followed by phase 2 between 2009 and 2012, and phase 3 is scheduled to take place between 2012 – 2021. During the first phase, 30 ordinary schools were selected in the poorest parts of the country for conversion into full-service schools; 34 special schools were chosen for upgrading and conversion to resource centres; and district-based support teams were established in 30 districts. The state has recognised that the scale of implementation in the first phase was too slow and small, and the timeframe too extended to make a significant impact on improving the availability and accessibility of education for children with disabilities.[193]

The extended period of time for the realisation of the proposed timetable of activities (and the persistence of the exclusion of the many children with disabilities until full implementation is achieved) arguably contravene the obligation to immediately realise the right to education which is not subject to progressive realisation (as confirmed by the Constitutional Court in the cases of *Governing Body of Juma Masjid Primary School and another v Essay N.O., 2011*).

Alternatively, were it to be deemed constitutional, the length of time and the failure to develop the commitments made in the White Paper into enforceable obligations through the amendment/ promulgation of enforceable laws, norms and standards and/or budgets arguably fail the reasonableness test set by the Constitutonal Court in the *Grootboom* case. In the latter case, the Constitutional Court required that plans seeking to progressivley realise protected rights must "establish clear obligations … in respect of the full realization of the rights in question [and] impose an obligation to move as expeditiousy and effectively as possible towards the goal".[194]

7.2.3 Inclusive basic education is not compelled by law

White Paper 6 is not a law. A white paper is a broad statement of government policy; and a precursor to a law.[195] Until such time as the policy is reduced to law it is not actionable and it is difficult to hold government to account for specific commitments and deliverables. The implementation of White

[191] Department of Basic Education (2013), note 166 above.
[192] Department of Basic Education (2010), note 36 above.
[193] Department of Basic Education (2010), note 36 above.
[194] *The Government of the Republic of South Africa and Others v Irene Grootboom and Others* 2000 (11) BCLR 1169. Paras 44 and 45.
[195] Parliament of the Republic of South Africa (2013) *How a Law is Made.* Accessed at: www.parliament.gov.za/live/content.php?Item_ID=1843.

Paper 6 has not been supported through the development of appropriate laws, norms and standards and other regulations regarding funding, minimum qualifications, and related critical matters. Consequently there have been significant challenges, as described previously, in compelling provincial departments of education to allocate and disburse the necessary resources to implement the White Paper to:

- ensure that qualified teachers are employed in special schools;
- ensure that all teachers are trained in the SIAS strategy;
- ensure that adequate and accessible infrastructure is provided at all schools to make them accessible to learners with disabilities; and
- to ensure that an appropriate and adequate transport system is in place for children with disabilities.

In addition, inclusive education is frustrated at a school level, in part because of the lack of a law of general application obliging all schools to accept children with mild to moderate disabilities into mainstream schools and to provide appropriate infrastructure and teaching and learning materials. The lack of a law means that there is no legal foundation or associated legal sanctions that may be brought against a school refusing to admit learners with disabilities or failing to provide them with the support envisaged in White Paper 6.[196]

A similar gap emerges at secondary FET level where there is no national policy that guides education and training for children with disabilities at post-school FET level. All that currently exists is White Paper 3 on Transformation of the Higher Education System (2007) and White Paper 6: Special Needs Education. The focus of the former is largely on tertiary education and, whilst it sets as a goal the elimination of discrimination, including against students with disabilities, the White Paper has not been translated into concrete policies, laws or programmes of a general nature. Similarly with White Paper 6, the focus is on schooling and there has been little legal and operational translation of the commitments and goals into legally enforceable laws and programmes of general application across all provinces, districts and institutions.[197]

The availability of FET colleges for children with disabilities is thus a sorely neglected area and this has resulted in high levels of variation in the levels at which institutions are resourced to (and the extent to) accommodate learners with disabilities. The negative impact of the legal gap and resultant lack of guidance for planning and resourcing facilities are aggravated by the lack of data. The scale of disability across the post-school system has not been determined because of inadequate data and inadequate data collection systems. The current IMS of the post-school system does not monitor the rate of enrolment or the number of adequate facilities for children with disabilities.[198]

The DHET has committed to establishing a disability task team to assess the scale of the need and current resources and to develop the principles for the development of a National Disability Policy and

[196] Department of Basic Education (2010), note 36 above.
[197] Department of Higher Education and Training (2012), note 29 above.
[198] Department of Higher Education and Training (2012), note 29 above.

Strategic Framework and funding and resource principles and norms to create an enabling and empowering post-school environment for children with disabilities. In addition, the department has committed to commissioning a disability prevalence study across the post-school sector to inform future policy and to improve the current Higher Education and Training IMS to monitor disability better. These commitments were made in terms of the Green Paper on Higher Education which has not yet progressed to a White Paper and implementation stages.[199]

7.2.4 No compulsory age set for children with disabilities

Whilst section 3(1) of the Schools Act makes primary and lower secondary schooling compulsory for all children between the ages of 7 and 15 years (or until the completion of Grade 9, whichever occurs first), the compulsory ages for children with disabilities is not prescribed. Section 3(2) of the Act obliges the Minister to determine, by notice in the *Government Gazette*, the compulsory schooling ages for children with disabilities. The Minister has not yet done so in contravention of the obligation to make schooling compulsory for children with disabilities, specifically through a law of general application that ensures that "neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education".[200]

7.2.5 Weak legal framework contributes to parents' reluctance to embrace inclusive education

It is not only schools that have failed to embrace inclusive education. Parents too have failed to do so, with many parents choosing, at times inappropriately, to enrol their children in special, rather than mainstream schools. Whilst the failure of inclusive education at ordinary public schools drives parents to opt instead for special schools, there are further factors associated with their rejection of inclusive education. These include attitudes of the community, advice by professionals, assumptions about special schools, and lack of information on education policy.[201]

7.2.6 Education is not legally available for children with profound disabilities

Whilst White Paper 6 envisages that children with severe and profound disabilities be accommodated at special schools, this has not happened.[202] The Western Cape High Court recently ruled that the failure to provide and fund education facilities for children with severe and profound intellectual disabilities contravened their right to basic education.[203] It ordered that the government takes corrective measures and develops and implements a framework which would ensure that:

- Every child with a severe or profound intellectual disability has affordable access to quality basic education.

[199] Department of Higher Education and Training (2012), note 29 above.
[200] Committee on Economic, Social and Cultural Rights (1999) General Comment 11: *Plans of Action for Primary Education (Twentieth session, 1999), U.N. Doc. E/C.12/1999/4.* Geneva: United Nations. Para. 6.
[201] Schoeman M (2012), note 170 above.
[202] Department of Basic Education (2013), note 166 above.
[203] *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another* (2011) (5) SA 87 (WCC).

- Adequate funds are provided to organisations providing education for children who are severely or profoundly intellectually disabled to ensure the provision of adequately trained staff and facilities.
- Staff at special care centres receive proper training, accreditation and remuneration.
- All educators of children with severe or profound intellectual disabilities are trained.

The DBE has initiated a process for the development of a national strategy to address these requirements. It has developed a report of possible models of service delivery and possible funding models to ensure the realisation of the rights of these children.[204] This has however not yet been finalised or operationalised.

7.3 Recommendations

- White Paper 6 should be translated into a comprehensive law governing inclusive education in South Africa. This could be achieved by appropriate amendments to the existing South African Schools Act.
- Increase training of educators and other departmental officials to implement White Paper 6 and associated strategies.
- The NT budget structure must be reviewed to include expansion of inclusive education.
- National funding norms and standards for inclusive education must be developed and provincial departments of education must be held to account for prescribed allocations and expenditure. The funding norms must be crafted to ensure that sufficient resources are allocated, not just to expand and strengthen special schools, but also to ensure that ordinary public schools are able to provide the infrastructure, trained personnel and equipment necessary to provide the necessary levels of support to learners with additional learning needs.
- Develop minimum qualification requirements for educators in special schools.
- The September 2013 draft norms and standards for school infrastructure should be strengthened to provide detailed and uniform guidance on what is required, in terms of infrastructure and learning and teaching support materials to comply with the requirement that all schools adhere to the requirements of Universal Design. The Minister of Basic Education must set the ages of compulsory education for children with disabilities as required by the Schools Act.
- Strengthen sections 5(5) and 5(6) of the Schools Act which prohibit unfair discrimination by public schools in the admission of learners and which impose the vague obligation on principals and HODs to take into account the "rights and wishes of parents of children with special education needs". These sections should be amended to create a clear and unambiguous obligation on HODs, school principals and school governing bodies to recognise, respect and promote the right of admission of learners with disabilities with moderate to low-level learning support needs in their admission policies and practices.

[204] Department of Basic Education (2012) *Report on Actions taken by the Department of Basic Education to Develop a Framework for the Provision of Services to Children with Severe and Profound Intellectual Disabilities.* Pretoria: DBE.

- The DHET should develop a strategy and complementary IMS for the provision of adequately resourced FET colleges for children with disabilities to complete their basic education.
- The DBE should develop a costed and adequately resourced implementation plan to ensure that all special schools can and do accommodate children with severe and profound intellectual disabilities.
- The DBE's and DHET's IMS should be strengthened, at all levels of the education system, including schools and post-school FET levels, to accurately identify and count the number of children with disabilities in and out of school, and to regularly assess the number of schools and FET colleges and the adequacy of infrastructure and teaching and learning support materials to ensure meaningful access to education at all public schools and colleges for children with disabilities.
- A monitoring and evaluation system should be established to assess and to hold national and all provincial departments of education to account for laws, norms and standards.
- A communications and advocacy campaign targeting parents and caregivers of children with disabilities should be developed to inform and empower them to claim their and their children's rights to inclusive education.

8. Summary of recommendations for reform

8.1 To address the inadequate number of schools and infrastructure at schools

- A focused national communication and advocacy campaign should be developed and rolled out to raise awareness of roles, responsibilities, rights and entitlements implicit in the norms and standards for school infrastructure. This will assist in building the necessary foundation for accountability of responsible role-players for timeous and adequate implementation.
- The campaign should target:

    a) All role-players within the national and provincial departments of basic education to make them aware of the content of the norms and standards and their respective roles and responsibilities;
    b) Schools and school governing bodies who should be informed of the responsibilities of the department and what they may legitimately expect in terms of delivery of adequate infrastructure;
    c) Parents and children, who should be informed in plain and accessible terms about their rights in terms of the norms and standards and measures that are available to them to hold the education authorities to account for delivery;
    d) Parliament and the provincial legislature so that they may exercise their oversight mandates and request rigorous reporting on progress against the commitments implicit in the norms and standards.

8.2 To address the adequacy and sufficiency of educators

- An agreement should be negotiated with organised labour and other stakeholders in terms of which a national system of diagnostic teacher testing and training is implemented. All teachers should be required to take part in a system of diagnostic testing and capacity building.
- The DBE ought to amend its leave policies, especially its generous sick leave policies and systems to prevent abuse.
- Principals and district offices should play a more active role in monitoring, reporting and remediating teacher absenteeism.
- There should be closer monitoring of Education Labour Relations Council (ELRC) disciplinary hearings of cases of extended absenteeism and improved implementation of sanctions where educators are absent for more than 14 days without justification.
- A curator should be appointed at ELRC hearings to ensure the best interests of children are taken into account.

8.3 To improve the capacity of SGBs and the quality of school governance

- There is a need for more systemic and frequent training of SGBs as required by section 19 of the Schools Act. Further research is needed to determine whether section 19 is being implemented and to evaluate the quality and effectiveness of any training that is provided.
- In addition, there is an urgent need for training district and provincial officials, including school principals, so that they are aware of their duties under the Constitution to respect, protect and promote learners' fundamental rights.
- However, training alone will not suffice. There is a need to consider augmenting the provisions in the Schools Act regarding the power of SGBs to develop codes of conduct to make the exercise of their powers in this regard **expressly** subject to the Constitution, and to forbid the development of policies that discriminate against learners on the basis of, for example, pregnancy. In addition, these provisions should be augmented to require the development, by the Minister, of norms and standards and a provision obliging SGBs to comply with any such promulgated norms and standards.

8.4 To address the costs associated with school exclusions

- The governing policy on school fees should be amended to make all primary education at public schools free.
- Until such time as all public schools are free, the funding norms should be amended to allow for ranking no-fee schools based on their students' socio-economic demographics rather than geographical location.
- A review should be undertaken of the implementation of the revised funding norms and standards which allow for provincial departments to compensate schools for loss of funds caused by the granting of school fee exemptions.

- Introduce a law or regulations, or amend existing law, to support parents to regulate the cost of, and subsidisation of school uniforms.
- Amend the draft Minimum Uniform Norms and Standards for Public School Infrastructure to include minimum distances to and from school and the obligation to provide alternatives by means of transport or hostels.
- The minimum distances set by the norms should differentiate between what constitutes an acceptable minimum distance for children with different mobility capacities, such as very young children and children with disabilities.
- Hostel and Transport policies should be finalised based on the standards set by the minimum norms.

8.5 To ensure the inclusion of teen parents

- The DBE should expressly revoke the 2007 Measures and expedite the publication of binding national policy for the return and support of teen mothers.
- The Schools Act should be amended so as to expressly prohibit the discrimination and/or exclusion of girls from schools on the grounds of their pregnancy.
- In addition, all schools should, in light of the Constitutional Court ruling discussed above, review their codes of conduct and/or policies on learner pregnancy to ensure they are respectful of the learners' rights.
- There is a need for focused education of SGBs, provincial and district officials on their responsibilities in terms of the Constitution and the South African Schools Act, as well as on the oversight responsibilities of district and provincial officials to ensure there are no transgressions of pregnant learners' rights.

8.6 To strengthen the implementation of the Language in Education Policy

- Additional language-trained subject advisors should be appointed to support the effective implementation of the Language in Education Policy.
- All workbooks and textbooks should be produced in all official languages.
- Provincial budget allocations for reading materials in the foundation phase should be increased.

8.7 To strengthen the response to school violence

- The DBE has recognised the need for holistic and integrated responses and is in the process of a developing a National School Safety Framework which provides a whole-school approach. The whole-school approach should be expedited and strengthened to bolster and support the effective implementation of the governing laws.
- The finalisation of the DBE's National School Safety Framework should be expedited and include a roll-out and progress monitoring plan for all provinces.

- Adequate reporting mechanisms and response systems need to be developed at a school level to ensure that all reported cases of violence against children, including corporal punishment, are adequately responded to once reported.
- The education performance management system should include effective school management and safety key performance areas and obligations, and all principals and educators should be held accountable for safety within the classroom and school environment.
- An adequate and reliable set of school safety indicators should be developed to annually monitor progress in reducing school violence at a national and provincial level.
- In addition to strengthening the operational framework, the Children's Act should be amended to prohibit corporal punishment in the home to address the culture of violence in South Africa. [See chapter 8 on the Right to be Protected from Violence.]

8.8 To give effect to the education rights of children with disabilities

- White Paper 6 must be translated into a comprehensive law governing inclusive education in South Africa.
- Increase training of educators and other departmental officials to implement White Paper 6 and associated strategies.
- The NT budget structure must be reviewed to include expansion of inclusive education.
- National funding norms and standards for inclusive education must be developed and provincial departments of education must be held to account for prescribed allocations and expenditure.
- Develop minimum qualification requirements for educators in special schools.
- The September 2013 draft norms and standards for school infrastructure should be strengthened to provide detailed and uniform guidance on what is required, in terms of infrastructure and learning and teaching support materials for learners with disabilities to comply with the requirement that all schools comply with the requirements of Universal Design.
- The Minister of Basic Education must set the ages of compulsory education for children with disabilities as required by the Schools Act.
- Strengthen sections 5(5) and 5(6) of the Schools Act which prohibit unfair discrimination by public schools in the admission of learners and which impose the vague obligation on principals and HODs to take into account the "rights and wishes of parents of children with special education needs". These sections should be amended/supplemented to create a clear and unambiguous obligation on HODs, school principals and school governing bodies to recognise, respect and promote the right of admission of learners with disabilities with moderate to low level learning support needs in their admission policies and practices.
- The DHET should develop a strategy and complementary IMS for the provision of adequately resourced FET colleges for children to complete their basic education.
- The DBE must develop a costed and adequately resourced implementation plan to ensure that all special schools can and do accommodate children with severe and profound intellectual disabilities.

- The DBE and DHET IMS must be strengthened, at all levels of the education system, including schools and post-school FET levels, to accurately identify and count the number of children with disabilities in and out of school, and to regularly assess the number of schools and FET colleges and the adequacy of infrastructure and teaching and learning support materials to ensure meaningful access to education at all public schools and colleges for children with disabilities.
- A monitoring and evaluation system must be established to assess and to hold the national department and all provincial departments of education to account for laws, norms and standards.
- A communications and advocacy campaign targeting parents and caregivers of children with disabilities ought to be developed to inform and empower them to claim their and their children's rights to inclusive education.

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Chapter 7

Protecting the rights of children in conflict with the law: A review of South Africa's Child Justice Act

Morgan Courtenay and Zita Hansungule

Contents

1. Introduction

The Child Justice Act 75 of 2008 was put into force on 1 April 2010. This law is South Africa's primary legal framework for providing special protection for children in conflict with the law.

This chapter analyses whether the provisions of the Child Justice Act, and the manner in which they are being implemented, are in compliance with South Africa's obligations as set out in the relevant international human rights laws and the Constitution of the Republic of South Africa Act 108 of 1996.

The report concludes with recommendations with regards to further legal reform required, and implementation challenges in need of attention.

2. Rights analysis

2.1 Rights and obligations under international and regional law

South Africa has signed and ratified, or is otherwise a party to, several international and regional human rights instruments which deal with child offenders. These include the United Nations Convention on the Rights of the Child (1989) (UNCRC); African Charter on the Rights and Welfare of the Child (1990) (ACRWC); United Nations Guidelines for the Prevention of Juvenile Delinquency (1990)[1]; United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990)[2]; and United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985)[3].

The UNCRC has several substantive provisions dealing with child offenders. These provisions may be broadly sub-divided into two inter-related categories: those that articulate rights afforded to children in conflict with the law; and those that create obligations on the state. Article 37 is of particular importance in respect of the rights afforded to children. It provides, amongst other issues, that children have the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment[4]; not to be detained except as a measure of last resort and then only for the shortest appropriate period of time[5]; and if detained, kept in conditions that take into account their inherent dignity and status as children[6]. In respect of the obligations on the state, article 40 obliges the state to create a separate criminal justice system for children in conflict with the law that entrenches children's fair trial rights. It further requires the state to take steps to ensure that a child's privacy is fully

[1] United Nations General Assembly (1990) *Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines"). Resolution 45/112 adopted by the 68th plenary meeting, 14 December 1990*. New York: United Nations.
[2] United Nations General Assembly (1990) *Rules for the Protection of Juveniles Deprived of their Liberty*. *Resolution 45/113 adopted by the 68th plenary meeting, 14 December 1990*. New York: United Nations.
[3] United Nations General Assembly (1985) *Standard Minimum Rules for the Administration of Juvenile Justice (1985) ("The Beijing Rules"). Resolution 40/33 adopted by the 96th plenary meeting, 29 November 1985*. New York: United Nations.
[4] Art 37(a).
[5] Art 37(b).
[6] Art 37(c).

protected at all stages of the proceedings[7]; and to establish a minimum age below which a child shall be presumed not to have the capacity to infringe the criminal law[8].

2.2 Rights and obligations under South African constitutional law

Section 28 of the Constitution may be seen as the embodiment of, and commitment to, the rights articulated in the international and regional human rights instruments on children. Section 28(1)(g) provides that, in addition to the rights in sections 12 and 35 of the Constitution, a child in conflict with the law also has the right not to be detained except as a measure of last resort and then only for the shortest appropriate period of time. It further provides that children are to be detained separately from adults and kept in conditions conducive to their age. In addition section 28(2) of the Constitution provides that the best interests of the child are to be considered of paramount importance in all matters concerning that child.

The impact of section 28(1)(g) and section 28(2) is seen in their use and application in cases such as the Constitutional Court case of *Centre for Child Law v Minister of Justice and Constitutional Development & Others (NICRO as amicus curiae)*[9] and the Supreme Court of Appeal case of *S v BF*[10]. The applicants in both cases challenged provisions in the Criminal Law Amendment Act 105 of 1997 which subjected children to the same rigid minimum sentencing regime as adults. Both judgments emphasised the importance of courts taking an individualised and rehabilitative approach when sentencing child offenders to ensure that each child's best interests are held paramount.[11] This was highlighted by the recognition that children are more vulnerable, physically and psychologically, than adults and more constricted in their ability to make choices.[12] This makes them more vulnerable to the influence and pressure of others.[13] It was also recognised that children are more capable of rehabilitation[14] and therefore an approach to sentencing reflecting a strong rehabilitative component is required.[15] In circumstances where a court, in properly exercising its discretion, comes to the conclusion that a child offender must be detained, it must be done in a manner that prepares the child offender "from the moment of entering into the detention facility for his or her return to society".[16]

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[7] Art 40(2)(b)(vii).
[8] Art 40(3)(a).
[9] *Centre for Child Law v Minister of Justice and Constitutional Development & Others (NICRO as amicus curiae)* 2009 (6) SA 632 (CC).
[10] *S v BF* 2012 (1) SACR 298 (SCA).
[11] *Centre for Child Law v Minister of Justice and Constitutional Development & Others (NICRO as amicus curiae)*, para 32, note 9 above;
S v BF, para 8, note 10 above.
[12] *Centre for Child Law v Minister of Justice and Constitutional Development & Others (NICRO as amicus curiae)*, para 26, note 9 above.
[13] *Centre for Child Law v Minister of Justice and Constitutional Development & Others (NICRO as amicus curiae)*, para 26, note 9 above.
[14] *Centre for Child Law v Minister of Justice and Constitutional Development & Others (NICRO as amicus curiae)*, para 26, note 9 above.
[15] *S v BF*, para 8, note 10 above.
[16] *S v BF*, para 12 (which directly quotes *S v Brandt* [2005] 2 All SA 1 (SCA)), note 10 above.

3. Legislative measures to realise the rights – the Child Justice Act

3.1 Introduction

On 1 April 2010, after more than a decade of advocacy, deliberations, development and drafting, the Child Justice Act 75 of 2008 (the Act) was finally implemented.[17] This Act is South Africa's primary law for giving effect to its international and constitutional law obligations to provide special protection for children in conflict with the law.

3.2 Overview of the Act

The Act aims to establish a system that has, as a central feature, the possibility of diverting children's matters away from the criminal justice system; and that expands and entrenches the principles of restorative justice, whilst ensuring that children are held responsible and accountable for offences committed.[18] It further recognises the need to be proactive in crime prevention by placing increased emphasis on the effective rehabilitation and reintegration of children in order to minimise the potential for re-offending; and balances the interests of children and those of society, with due regard to the rights of victims.[19] The Act also provides a set of "guiding principles" which frame the paradigm of child justice in a manner that takes cognisance of the obligations placed upon it by both international and regional instruments and the Constitution.[20]

The Act has introduced a comprehensive system of dealing with children in conflict with the law that represents a decisive break with the traditional criminal justice system.[21] The traditional pillars of punishment, retribution and deterrence are replaced with continued emphasis on the need to gain an understanding of a child caught up in behaviour that results in the transgression of the law.[22] This is achieved by assessing her or his personality; determining whether the child is in need of care and protection; and correcting errant actions as far as possible by diversion, community-based programmes, the application of restorative justice processes and reintegration of the child into the community.[23]

With regards to sentencing of convicted child offenders, South Africa's courts have for a long time recognised the importance of treating child offenders differently from adults during sentencing.[24] The Child Justice Act has formalised the acceptance of nuanced sentencing of child offenders that is aligned with international standards. The Act aims to achieve the following in regards to sentencing: to

[17] Badenhorst C (2011) *Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008). Good Intentions, Questionable Outcomes*. Pinelands: Open Society Foundation for South Africa.
[18] Preamble.
[19] Preamble.
[20] s3.
[21] *S v CKM & Others 2013 (2) SACR 303 (GNP)*, para 7.
[22] *S v CKM*, para 7, note 21 above.
[23] *S v CKM,* para 8, note 21 above.
[24] Terblanche SS (2012) The Child Justice Act: A detailed consideration of section 68 as a point of departure with respect to the sentencing of young offenders. *Potchefstroom Electronic Law Journal,* 15(5):436-438.

encourage the child to understand the implications of and be accountable for the harm caused[25]; to promote individualised responses that strike a balance between the circumstances of the child, nature of the offence and interests of society[26]; to promote the reintegration of child offenders into families and communities with the necessary guidance and assistance[27]; and to use imprisonment as a measure of last resort and for the shortest period of time[28]. The Act places an increased emphasis on the use of non-custodial sentences and creates specific barriers to the use of imprisonment, which in the past was left at the discretion of courts resulting in child offenders often being imprisoned for relatively minor offences.

3.3 Reforming the minimum age of criminal capacity

The introduction of the Act also resulted in a series of wide-sweeping changes in the manner in which children who have contravened the law are treated. One area in particular was the age at which a child may be said to have criminal capacity.

In order for a person to have criminal capacity they must have the mental abilities to appreciate the wrongfulness of their conduct, and to conduct themselves in accordance with such appreciation.[29] Whilst adults are always presumed to have criminal capacity, children – given that they are still developing cognitively – are dealt with differently. In the South African context two distinctions are made. Firstly, children below the age of 10 years are irrebuttably presumed to lack criminal capacity. In other words they may never be held criminally liable.[30] Secondly, children between the ages of 10 and 14 years are rebuttably presumed to lack criminal capacity.[31] In other words, they can only be held liable if the state can prove that they had criminal capacity. This reform was based on a recommendation by the South African Law Reform Commission (SALRC) that was tasked with drafting the Child Justice Bill. Based on international law and scientific and developmental evidence reviewed; the Commission concluded that children under the age of 10 years could not be held criminally responsible.[32] Parliament agreed with the SALRC's proposal and adopted it into law.

Despite South Africa broadly conforming to its obligations under the UNCRC, it still unfortunately falls short of the standard articulated by the Committee on the Rights of the Child's (CROC). The CROC, in its General Comment 10[33] concluded that a minimum age of criminal capacity below the age of 12 years is not internationally acceptable.[34] Accordingly, it urged states to increase their minimum age of criminal

[25] s69(1)(a).
[26] s69(1)(b).
[27] s69(1)(c) and (d).
[28] s69(1)(e).
[29] Snyman CR (2002) *Criminal Law.* Durban: LexisNexis Butterworths. Pg 158.
[30] s7(1) of the Child Justice Act.
[31] s10 of the Child Justice Act.
[32] South African Law Reform Commission (1997) *Issue Paper 9. Juvenile Justice Report. Project 106.* Pretoria: SALRC. Pg 27.
[33] Committee on the Rights of the Child (2007) *General Comment No. 10: Children's Rights in Juvenile Justice. CRC/C/GC/10, 25 April 2007.* Geneva: United Nations.
[34] General Comment 10, para 32, note 33 above.

capacity to the age of 12 years.[35] Moreover, states should continually revise their minimum age of criminal capacity and increase it to a higher age level.[36]

General Comment 10, recommending 12 as the minimum age for criminal capacity, was released by the CRC in 2007 when the South African Parliament was in the final stages of deliberation on the Child Justice Act. Parliament opted for a dual criminal capacity determination (as explained above for children under 10 and those between 10 and 14 years) but built in a mechanism to enable the Act to be reviewed and amended within five years to respond to new developments in international law on this matter. Section 8 of the Child Justice Act therefore provides for a review of the minimum age of criminal capacity. The review must be carried out and a Cabinet-approved report tabled in Parliament within five years after the commencement of the provision (i.e. by 31 March 2015) for Parliament to consider whether or not the minimum age of criminal capacity should be raised.[37] The obligation to conduct the review rests with the Intersectoral Committee for Child Justice[38] and the outcome of the review in the form of a report must be tabled for consideration in Parliament by the Minister of Justice and Constitutional Development.

The report must, amongst others, contain:

- statistics on the number of 10 – 13-year-olds who have been accused of committing offences and the offences that they were alleged to have committed[39];
- the sentences imposed if convicted[40];
- the number of children aged 10 – 13 years whose matters did not proceed to trial on the basis that criminal capacity could not be proven[41]; and
- whether expert evidence was led, and the outcome of each matter regarding the establishment of criminal capacity[42].

Based on an analysis of these statistics, a recommendation must be made as to whether South Africa should retain its dual criminal capacity determination or simply adhere to the international standard on point and have a single cut-off age, namely 12 years.[43]

Despite this clear legislative instruction to conduct the review and to do so in an evidence-based manner, an assessment conducted in 2011 reported that it would appear from anecdotal evidence that the Intersectoral Committee for Child Justice had not yet begun compiling the statistics necessary for

[35] General Comment 10, para 32, note 33 above.
[36] General Comment 10, para 32, note 33 above;
See also: Gallinetti J (2009) Child Justice in South Africa: The realisation of the rights of children accused of crime. In: Boezaart CJ (ed) *Child Law in South Africa.* Cape Town: Juta. Pg 651;
Committee on the Rights of the Child (2000) *Concluding Observations of the Committee of the Rights of the Child: South Africa, UN Doc. CRC/C/15/Add 122 (2000)*. Geneva: United Nations. Para 17;
Committee on the Rights of the Child (2003) *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5.* Geneva: United Nations.
[37] s8 read with s96(4)(f) and s 96(5).
[38] s8.
[39] s96(4)(a).
[40] s96(4)(b).
[41] s96(4)(c).
[42] s96(4)(d).
[43] s96(4)(e)-(f).

conducting the review.[44] This delay will undoubtedly be compounded by the unreliability and unavailability of statistics.[45] Given that the report is scheduled to be placed before Parliament in 2015, unless drastic action is taken to begin the co-ordinated collection of statistics from the provincial child justice fora[46], the Minister will be unable to present the report to Parliament by the legislated due date.

4. Implementation challenges

The successful implementation and administration of the Act is largely dependent on two important conditions: firstly that each department fulfils its mandate; and secondly that there is close co-operation and collaboration between the implementing departments.[47] In the three years since the Act came into operation, various implementation-related challenges have emerged.

4.1 Training the police

The National Policy Framework for Child Justice (NPF) provides that training of those dealing with child justice is one of the key priority areas for the effective implementation of the Act. The Department of Justice's first annual report on the implementation of the Child Justice Acts also recognises the importance of training.[48]

The members of the South African Police Service (SAPS) are the gatekeepers to the child justice system because they are often the first port of call in circumstances when children are accused of committing offences. They also have the task of apprehending children suspected of having committed offences and are expected to deal with these children in a manner that is compliant with the Constitution and specifically the Child Justice Act.[49] They therefore need specialised training in dealing with children in conflict with the law. This need is emphasised in international law.[50]

The police do not have specialised units dealing exclusively with children in conflict with the law and child offenders are dealt with by all police stations. It is therefore imperative that all 157 518 members of the South African Police Service receive the requisite training on the Act.[51] This training should, in addition, be regularly audited in order to ensure that the SAPS are receiving the best quality training.

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[44] Skelton A & Badenhorst C (2011) *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review.* Cape Town: Child Justice Alliance (Community Law Centre). Pg 21.
[45] Badenhorst C (2011) at pg 33, note 17 above.
[46] The term "child justice fora" is used to describe the provincial structures that have been put in place to collect information – detailed in the National Policy Framework – on behalf of the Intersectoral Committee for Child Justice.
[47] Department of Justice and Constitutional Development (2010) *National Policy Framework for Child Justice*. Pretoria: DoJCD. Pg 8.
[48] Department of Justice and Constitutional Development (2011) *Annual Report on the Implementation of the Child Justice Act, 2008 (Act No 75 of 2008), 22 January 2011*. Pretoria: DoJCD. Pg 21.
[49] Badenhorst C (2011) at pg 9, note 17 above.
[50] United Nations Standard Minimum Rules for the Administration of Juvenile Justice, art 12.1, note 3 above.
[51] This figure is representative of the number of SAPS officials as at April 2013. Accessed on 27 June 2013: www.saps.gov.za/_dynamicModules/internetsite/buildingBlocks/basePage4/BP444.asp.

In the first year of implementation (2010/11) the SAPS provided training on the Act to 15 891 members.[52] The training was rolled out in three phases.[53] In the second year of implementation (2011/12) the SAPS provided training to approximately 14 060 members.[54] The training in the 2011/12 year took the form of both in-service training and basic training on the Vulnerable Children's Learning Programme which is offered to new recruits.[55] In the third year of implementation (2012/13) the SAPS provided training to approximately 5 888 members.[56] The manner in which such training was conducted is not readily apparent from the presentation made by the Intersectoral Committee for Child Justice to the Select Committee on Security and Constitutional Development on 23 October 2013.[57]

In total, only a small percentage of SAPS members have been trained on the Act; the overall figure is a mere 36 170 – or 23% – of the total members. The fact that so few SAPS members have been trained highlights a serious gap for the successful implementation of the Act.[58]

In addition, no evaluations or qualitative studies have been done on the training. It therefore cannot be ascertained with any degree of certainty whether the 23% of SAPS members already trained are in fact conversant in the Act and able to apply it in an informed and appropriate manner.

4.2 Securing the attendance of a child at preliminary inquiry

One of the primary aims of the Act is to prevent children from being exposed to the adverse effects of the formal criminal justice system.[59] One of the ways in which this is achieved is by providing for an increased emphasis on the use of various "non-traditional" ways of ensuring that the child attends his or her preliminary inquiry. Thus, where a child is suspected of committing an offence and is apprehended, his or her presence can be secured through, rather than arrest,[60] the handing of a written notice[61] or the use of a summons[62]. Whilst these alternatives have existed for some time in the Criminal Procedure Act 51 of 1977, their use has never been explicitly mandated, which in turn allowed the police to use arrest with impunity. Under the current dispensation, the inappropriate use of arrest may result in civil liability for the police. This has seemingly caused some confusion for police officers, resulting in fewer children being charged. This could be a likely reason why the numbers of children recorded as formally entering the system has dropped dramatically.

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[52] Department of Justice and Constitutional Development (2011) at pg 23, note 48 above.
[53] Badenhorst C (2011) at pg 15, note 17 above.
[54] Police Oversight Committee (2012) *Implementation of the Child Justice Act: Second Annual Report.* Presentation to the Portfolio Committee on Police, National Assembly, Parliament of South Africa, 12 September 2012.
[55] Department of Justice and Constitutional Development (2013) *Second Annual Report on the Intersectoral Implementation of the Child Justice Act 75 of 2008, July 2013*. Pretoria: DoJCD. Pg 23.
[56] Intersectoral Committee for Child Justice (2013) *The Intersectoral Implementation of the Child Justice Act.* Presentation to the Select Committee on Security and Constitutional Development, National Council of Provinces, Parliament of South Africa, 23 October 2013.
[57] Intersectoral Committee for Child Justice (2013), note 56 above.
[58] Department of Justice and Constitutional Development (2011) at pg 24, note 48 above.
[59] s2(c).
[60] Arrest should be used as a measure of last resort and only where clearly defined pre-requisites have been met. See s20 of the Act.
[61] s18.
[62] s19.

In the first year of implementation (2010/11) a total of 75 435 children were "charged"[63] by the police.[64] This translates to about 6 286 children per month, which is substantially lower than the approximately 10 000 children arrested per month that was reported to Parliament in 2008.[65] In the second year of implementation (2011/12) a total of 57 592 children were charged by the police.[66] This in turn translates to about 4 799 children per month; a decrease of 23% on the previous year's statistics and approximately a decrease of 52% on the 2008 statistics. In the most recent briefing to Parliament's Select Committee on Security and Constitutional Development, the SAPS reported that in the 2012/13 year, 57 721 charges were levelled against children. This translates to 4 810 children being brought into the system per month. Despite the nominal increase on the previous year's statistics, the SAPS reported that the 2012/2013 figures had decreased from the previous year (2011/12), which they had pegged at 68 078. This highlights a serious need for accurate reporting as the numbers presented by the SAPS in 2012 and those reported in 2013 for the same period (2011/12) differed significantly.

In the three years that the Act has been in operation various reasons have been advanced by the implementing departments for the decrease in the number of children entering the system. These include that the police are making use of "alternate methods of policing children"; that since the 2010 World Cup there had been a general decrease in crime; and that owing to the cyclical nature of crime there would be a natural drop in the winter months.[67] None of the reasons are convincing, especially considering the further decrease witnessed in the 2011/12 year. A more plausible explanation emanating from experts in the child justice sector is that the majority of the police have all been informed about the Act and its implementation but have not received training on its provisions, including the new options of a written notice and issuing of a summons instead of arresting the child.[68] The uncertainty about a new law and ignorance occasioned by the lack of training are in all likelihood the reasons for the drastic drop of numbers of children entering the system.[69] Most police officers may err on the side of caution and avoid arresting the child (so as to avoid criminal liability) and do not make an attempt to secure the child's attendance at the preliminary inquiry using the two alternative methods as they have not been trained on these alternatives. The result is that the child does not enter the child justice system and is not able to benefit from the restorative and rehabilitative aspects of the new approach.

4.3 Under-utilisation of diversion

Diversion is the channelling of children away from the formal court system into re-integrative programmes. If a child acknowledges responsibility for a wrongdoing, in certain circumstances, he or she can be diverted to such a programme, thereby avoiding the stigmatising and even brutalising

[63] The term "charged" is used interchangeably by SAPS to indicate both the number of children entering the system and the total number of charges levelled against children – which may include a child having several charges laid against him or her. The numbers reflected should therefore be seen as an approximation rather than a definitive number.
[64] Department of Justice and Constitutional Development (2011) at pg 46, note 48 above.
[65] Badenhorst C (2011) at pg 18, note 17 above.
[66] Department of Justice and Constitutional Development (2013) at pg 41, note 57 above.
[67] Badenhorst C (2011) at pg 16, note 17 above.
[68] Badenhorst C (2011) at pg 17, note 17 above.
[69] Badenhorst C (2011) at pg 17, note 17 above.

effects of the mainstream criminal justice system. Diversion gives children a chance to avoid a criminal record, whilst at the same time teaching them accountability and responsibility for their actions.[70] Prior to the enactment of the Act, the law did not specifically provide for diversion. Rather it was practiced on an *ad hoc* basis, generally in urban areas that were well resourced.[71] The introduction of the Act, however, made diversion a central feature in the child justice process. In terms of the Act a child may be diverted at any time before his or her conviction at the behest of a prosecutor or, where a prosecutor fails to act, by the child justice court itself.[72] In all instances where a child is diverted a child justice court is mandated to make an order to that effect, which in turn reduces the risk of discriminatory applications and practices relating to the provision of diversion.[73]

Despite the centrality of diversion in the new child justice system it appears from information available that there has been a sharp decline in the numbers of children being diverted. Analysis by the Intersectoral Committee for Child Justice revealed that when comparing the periods April – December 2009 and April – December 2010 there was a decrease in diversion of 24%.[74] This finding was confirmed by civil society organisations that provide diversion services and programmes.[75] The numbers further decreased in the second year of implementation (2011/12) by a staggering 44%.[76] The Intersectoral Committee for Child Justice reported to the Parliamentary Select Committee on Security and Constitutional Development that, in the 2012/13 year, the number of diversions had increased by 2 228 for that reporting period.[77] It is important to note that, despite the increase in the number of children being diverted, this number is still relatively low considering that only approximately 20% of all children entering the system are diverted.[78]

The reasons for the decrease in diversion are yet unknown. Anecdotal evidence would suggest that the decrease may be attributed to incompetence, as a result of a lack of training, by those implementing the Act in the various implementing departments – especially the National Prosecuting Authority and the courts who hold the primary responsibility for promoting the use of diversion. Another reason may be the drop in total numbers of children entering the child justice system as explained in section 4.2 above. A further reason may be the lack of availability of diversion programmes. Diversion programmes are mostly provided by non-profit organisations (NPOs) with partial funding from the provincial departments of social development. NPO service providers are struggling financially due to the funding models employed by the provincial departments and the recession which has led to a drop

[70] Badenhorst C (2011) at pg 5, note 17 above.
[71] Gallinetti J & Kassan D (2007) *A Baseline Study of Children in the Criminal Justice System in Three Magisterial Districts.* Cape Town: Child Justice Alliance (Community Law Centre).
[72] s41 and s52.
[73] Badenhorst C (2011) at pg 18, note 17 above.
[74] Department of Justice and Constitutional Development (2011) at pg 35, note 48 above.
[75] Badenhorst C (2011) at pg 19, note 17 above.
[76] The percentile is based on a comparison of the figures presented to Parliament in the 2010/11 and the 2011/12 years. See further: Badenhorst C (2012) *Second Year of the Child Justice Act's Implementation: Dwindling Numbers.* Pinelands: Open Society Foundation for South Africa. Pg 3-16.
[77] Intersectoral Committee for Child Justice (2013), note 56 above.
[78] The percentile is based on a comparison of the figures presented by SAPS on the number of children charged versus the number of diversions reported.

in available donor funding. They are also struggling to gain accreditation with the provincial departments of social development due to the accreditation process being too rigid.[79]

5. Recommendations for reform

5.1 Improve the collection and collation of reliable statistics

A detailed picture of progress in implementing the Child Justice Act is compromised due to a lack of reliable data. The review of the minimum age of criminal capacity is also being compromised due to a lack of reliable statistics. Presently the numbers supplied by the various departments simply do not add up.[80] This in part is owing to the different approaches the various departments use to compile statistical data.

All implementing departments are in the process of establishing an online integrated management tool to collate numbers. This could solve the challenge with regards to statistics. However, to ensure that reliable statistics are available in time for the minimum age of criminal capacity review, the implementation of this tool needs to be prioritised at an inter-departmental level. The integrated management tool should also aim to reconcile the different departments' manner of recording information into a single stream of data that accords with the statistics required by the Act.

5.2 Reform the minimum age of criminal capacity

In preparation for considering the Executive's report on the review of the minimum age of criminal capacity in 2015, Parliament should begin its own research on international trends on this issue. This will equip Parliament to engage with the Executive's recommendations from an informed perspective and ensure that South Africa's law is reformed in line with international law on children's rights. Consideration should also be given to whether the dual criminal capacity determination should be retained given the practical difficulties on a service delivery level. Difficulties are experienced due to the unavailability of properly trained psychologists and/or psychiatrists to undertake such assessments within the Department of Health. This causes significant expense for the state which has to outsource the assessments and results in various delays and complications at the hearing. Moreover, the dual criminal capacity determination is contrary to the conclusions of the United Nations Committee on the Rights of the Child in its General Comment 10.

5.3 Increase the number of officials receiving quality training

There is an urgent need to ensure that all persons involved in the child justice process receive quality training on the Act as a whole. The police need training in particular on the alternative methods of securing the child's attendance at the preliminary hearing. Prosecutors and magistrates need training

[79] Child Justice Alliance (2013) *Presentation to Select Committee on Security and Constitutional Development, National Council of Provinces, Parliament of South Africa, 23 October 2013*. Pg 5.
[80] Wakefield L (2011) Is the Act working for children? The first year of implementation of the Child Justice Act (2011) *SA Crime Quarterly,* 38:45-50.

to promote the use of diversion and probation officers need training on diversion and sentencing options available.

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Chapter 8

Children's right to be protected from violence: A review of South Africa's laws and policies

Paula Proudlock, Shanaaz Mathews and Lucy Jamieson

Contents

1. Introduction

International, regional and South African constitutional law place an obligation on the state and other duty-bearers to protect every child from violence. Children have the right to be protected from violence in all settings, including the home, crèches, schools, on the streets, within the alternative care system, and the justice system and prisons.

Evidence from studies of children's experiences highlights that violence is a large and pervasive problem in South Africa. Although most of the country's laws have been aligned with the requirements of international and constitutional law, important gaps remain in need of law reform and numerous implementation challenges require attention.

This review begins with a short situational analysis of violence against children in South Africa. We then identify the rights which oblige the state to protect children from violence, and describe the nature and extent of the state's duty to realise these rights. This is followed by an analysis of the laws and policies South Africa has adopted to give effect to these obligations. The analysis locates gaps in the legal framework and the main implementation challenges that prevent the country from making progress in reducing the high rate of violence against children. The review concludes with recommendations for law reform and improved implementation.

2. Situational analysis

Violence against children is considered a pervasive problem that affects large numbers of children in South Africa.[1] The precise magnitude of children exposed to violence is unknown, however, as there are no reliable national prevalence or incidence estimates. Currently, our knowledge base consists mainly of smaller-scale studies or retrospective studies conducted with the adult population.

Children's experience of violence occurs in a variety of settings, including the home, school, community, alternative care and the justice system, and has serious implications for their development and well-being.[2] In South Africa the most commonly reported forms of violence are physical and sexual violence in the home, community and school.

The following is a summary of the available evidence about violence against children in South Africa:

- South African Police Service (SAPS) statistics on numbers of crimes reported to SAPS, convey a sense of how large the problem is, even though most experts in the field regard the statistics as gross underestimates in view of the widespread under-reporting of incidents of violence against children. Among the factors contributing to low levels of reporting are young children's lack of capacity to report, their fear of being harmed if they report abuse by people close to them, and social acceptance of practices like corporal punishment and sexual harassment. SAPS statistics for 2011/2012 report 25 862 child victims of sexual offences, representing 40.1% of all sexual offences.[3] In the same period more than 23 000 children were physically assaulted, almost half of them having suffered grievous bodily harm. In other words, in 2011/12 more than 50 000 children were victims of violent assault. The contexts of these crimes are unknown.[4]
- A recently published national study on child homicide revealed that 1 018 children were murdered in 2009 and 45% of these homicides took place in the context of child abuse (incorporating both physical and sexual violence and infant abandonment).[5] Children under the age of five were more likely than older children (83% vs 19.3%) to be killed in the context of abuse. A large number (40.7%) of child abuse-related deaths in this age group were due to abandonment. These deaths were mainly in the first week after birth, but even if abandoned babies were removed from the sample, under-fives were still those most vulnerable to fatal abuse, with 61% of child abuse-related deaths occurring in this age bracket. The study also showed excessive rates of teenage male homicide, with these deaths frequently linked to the use of weapons in the context of interpersonal conflict.[6] Rape homicide was associated with a quarter of all girl homicides.

[1] Richter L & Dawes A (2008) Child abuse in South Africa: Rights and wrongs. *Child Abuse Review*, 17(2):79-93.
[2] Pinheiro P (2006) *World Report on Violence against Children: Report of the independent Expert for the United Nations Study on Violence against Children.* Presented at the sixty-first session, item 62(a) of the provisional agenda, promotion and protection of the rights of children. Geneva: United Nations (A/61/299).
[3] South African Police Services (2012) *Police Crime Statistics*. Pretoria: SAPS.
[4] South African Police Services (2012), note 3 above.
[5] Mathews S, Abrahams N, Jewkes R, Martin L & Lombard C (2013) The epidemiology of child homicides in South Africa. *Bulletin of the World Health Organization*, 91:562–568.
[6] Mathews S et al (2013), note 5 above.

- In a community-based study in the Eastern Cape, 89.3% of young women and 94.4% of young men said they had experienced harsh physical punishment before the age of 18. Thirty-eight per cent of young women and 17% of young men report having been sexual abused before the age of 18.[7]
- Domestic violence is a pervasive problem in South Africa. Three women a day are murdered in the context of domestic violence, and South Africa is estimated to have the highest reported rate of intimate femicide in the world.[8] Aside from statistics about the death of women in the context of domestic violence, there are no reliable national estimates of the numbers of women and children affected by domestic violence. Nevertheless, community-based studies estimate that between a third and half of women have experienced domestic violence, estimates which are supported by reports made by men.[9] Similarly, it is estimated that between 35 – 45% of children have witnessed their mothers being beaten and would be viewed as co-victims.[10]
- Physical or corporal punishment in the home is often meted out under the guise of discipline. More than one in four children experience a time when they are physically punished daily or weekly with sticks, belts and other instruments; many such children suffer physical injuries as a result.[11]
- Although corporal punishment is prohibited at schools, a recent study estimates that 50% of learners still experience it.[12] The General Household Survey 2011 reported more than two million incidents of corporal punishment in schools for children aged five years and older.[13]

Violence against children has major public health consequences. The most severe is premature death and the ultimate rights violation, loss of life. Life-long physical or mental disability is also a common consequence, one that places heavy financial burdens on the families who have to care for children with disabilities.[14] In addition, serious physical injury exacts a high toll on state resources in that it necessitates expensive trauma units[15] as well as follow-up health rehabilitation and social support to children and their families.

The impact of violence goes beyond physical injuries and visible scars: Evidence has shown long-lasting psychosocial consequences.[16] Where girls are victimised, these include depression, anxiety disorders, substance abuse, suicidality and unwanted pregnancy. Boys in turn are prone to manifesting behaviour

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[7] Jewkes R, Dunkle K, Nduna M, Jama N & Puren A (2010) Associations between childhood adversity and depression, substance abuse and HIV and HSV2 incident infections in rural South African youth. *Child Abuse & Neglect,* 34(11):833-841.
[8] Abrahams N, Mathews S, Martin J, Lombard C & Jewkes R (2013) Intimate femicide in South Africa: Repeat retrospective survey. *Plosmed*, 10(4), e1001412.
[9] Machisa M, Jewkes R, Lowe-Morna C & Rama K (eds) (2011) *The War at Home.* Johannesburg: GenderLinks & MRC.
[10] Seedat M, Van Niekerk A, Jewkes R, Suffla S & Ratele K (2009) Violence and injuries in South Africa: Prioritising an agenda for prevention. *The Lancet*, 374(9694):1011-1022, 19 September 2011.
[11] Jewkes R et al (2010), note 7 above.
[12] Burton P & Leoscutt L (2013) *School Violence in South Africa: Results of the 2012 National School Violence Study*. Centre for Justice and Crime Prevention monograph series no. 12, March 2013. Cape Town: CJCP.
[13] Statistics South Africa (2012) General Household Survey 2011. In: Department of Women, Children and People with Disabilities (2013) *The United Nations Convention on the Rights of the Child. South Africa's Combined Second, Third and Fourth Periodic State Party Report to the Committee on the Rights of the Child (Reporting period: 1998 – June 2012).* Pretoria: DWCPD. Table 22, pg 97.
[14] Pinheiro P (2006), at pg 337, note 2 above.
[15] Norman R, Matzopoulos R, Groenewald P & Bradshaw D (2007) The high burden of injuries in South Africa. *Bulletin of the World Health Organization*, 85(9):695-702.
[16] Maniglio R (2009) The impact of child sexual abuse on health: A systematic review of reviews. *Clinical Psychology Review, 29*(7):647-57.

such as truanting, gang involvement and crime.[17] Violence is intergenerational, with children who are exposed to violence in their early years being at risk of revictimisation as they get older.[18] Girls in particular are at risk of sexual assault in later years, facing a heightened danger of becoming victims of intimate partner violence; their victimisation as children also affects their emotional availability as parents.[19]

Boys have been shown to be at an increased risk of perpetrating violence, including rape and violence against their intimate partner, and of engaging in risky behaviour.[20] Exposure to neglect, physical and sexual abuse, and harsh parenting are important factors in their pathway to violent behaviour in the community and home during adolescence as well as adulthood.[21] Experiencing or witnessing violence in childhood has an enduring intergenerational effect: children learn violent ways of resolving conflict and come to valorise such behaviour in the community as it earns them the respect they seek.[22]

Several studies currently in the field will, once completed, shed more light on the extent and context of the problem of violence against children. A national epidemiological study on child abuse conducted by the Centre for Justice and Crime Prevention and the University of Cape Town will provide a national estimate of the numbers of children affected by different forms of violence, in particular physical and sexual violence. In addition, UNICEF has commissioned a root-cause analysis to inform the action plan of the Inter-ministerial Committee on Violence against Women and Children. These studies will constitute an important evidence base for reforming child protection services.

This chapter focuses on violence in the family environment and the state's obligations to protect children from violence in terms of the Children's Act 38 of 2005, Sexual Offences Act 32 of 2007 and Domestic Violence Act 116 of 1998. The Children's Institute's forthcoming 2014 issue of the *South African Child Gauge* will involve a range of experts in analysing the broader context of violence against children with a specific focus on prevention efforts in South Africa.

[17] Callendar T & Dartnall L (2010) *Mental Health Responses for Victims of Sexual Violence and Rape in Resource-Poor Settings*. Sexual Violence Research Initiative briefing paper, Medical Research Council. Pretoria: MRC.
[18] Callendar T & Dartnall L (2010), note 17 above.
[19] Bordin IA, Duarte CS, Peres CA, Nascimento R, Curto BM & Paula CS (2009) Severe physical punishment: Risk of mental health problems to poor urban children in Brazil. *Bulletin of the World Health Organization*, 87:336-344.
[20] Abrahams N & Jewkes R (2005) What is the impact of witnessing mother abuse during childhood on South African men's violence as adults? *American Journal of Public Health*, 95:1811-1816.
[21] Mathews S, Jewkes R & Abrahams N (2011) "I had a hard life": Exploring childhood adversity in the shaping of masculinities among men who killed an intimate partner in South Africa. *British Journal of Criminology,* 51(6): 960-977.
[22] Mathews et al (2011), note 21 above.

3. Rights analysis

3.1 International and regional law

Article 19 of the United Nations Convention on the Rights of the Child (1989) (UNCRC) obliges the state to:

> *… take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse … including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*

The measures which the state should take expressly include establishing social programmes to provide support for the child and his or her caregivers; other forms of prevention; and procedures and services for the identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment.[23] The African Charter on the Rights and Welfare of the Child (1990) (ACRWC) has a similar provision in article 16.

The UN Committee on the Rights of the Child has published a General Comment interpreting article 19.[24] The following points are especially pertinent to South Africa:

- "Primary prevention, through public health, education, social services and other approaches, of all forms of violence is of paramount importance."[25]
- "The Committee emphasizes in the strongest terms that child protection must begin with proactive prevention of all forms of violence as well as explicitly prohibit all forms of violence. States have the obligation to adopt all measures necessary to ensure that adults responsible for the care, guidance and upbringing of children will respect and protect children's rights. Prevention includes public health and other measures to positively promote respectful child-rearing, free from violence, for all children, and to target the root causes of violence at the levels of the child, family, perpetrator, community, institution and society. Emphasis on general (primary) and targeted (secondary) prevention must remain paramount at all times in the development and implementation of child protection systems. Preventive measures offer the greatest return in the long term. However, commitment to prevention does not lessen States' obligations to respond effectively to violence when it occurs."[26]
- "Educational measures should address attitudes, traditions, customs and behavioural practices which condone and promote violence against children …. They can be initiated and implemented by both State and civil society actors under the responsibility of the State. Specific examples include, but are not limited to:

[23] Art 19(2).
[24] Committee on the Rights of the Child (2011) *General Comment No. 13, The Rights of the Child to Freedom from All Forms of Violence. CRC/C/GC/13. Geneva: United Nations.*
[25] Committee on the Rights of the Child (2011), para 3, note 24 above.
[26] Committee on the Rights of the Child (2011), para 46, note 24 above.

> (a) … public information programmes, including awareness campaigns, via opinion leaders and the media, to promote positive child-rearing and to combat negative societal attitudes and practices which condone or encourage violence; ….
>
> (d) … Providing initial and in-service general and role-specific training … on a child rights approach … in practice, for all professionals and non-professionals working with, and for, children (including teachers at all levels of the educational system, social workers, medical doctors, nurses and other health professionals, psychologists, lawyers, judges, police, probation and prison officers, journalists, community workers, residential caregivers, civil servants and public officials, asylum officers and traditional and religious leaders) …".[27]

- States should implement "systematic and transparent budgeting processes in order to make the best use of allocated resources for child protection, including prevention".[28]
- States should provide "shelters and crisis centres for parents (mostly women) who have experienced violence at home and their children".[29]

Article 39 of the UNCRC obliges the state to take all appropriate measures to promote the physical and psychological recovery and social reintegration of child victims of abuse (including violence). Similarly, article 19 obliges the state to ensure that child victims of violence receive "treatment and follow-up".

In the statistical information section of the reporting guidelines for party states, the UN Committee on the Rights of the Child (CROC) requires states to report on "[t]he number and percentage of children who received special care in terms of recovery and social reintegration".[30] The United Nations World Report on Violence Against Children notes the importance of psychological and physical treatment for child victims of abuse:

> *The impact of violence can stay with its victims throughout their lifetime. Early access to quality support services can help to mitigate the impact of the event on the victim, including preventing longer term consequences such as becoming a perpetrator of violence.*[31]

3.2 South African constitutional law

The Constitution of the Republic of South Africa Act 108 of 1996 provides in section 12 that everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources. This means children have the right to be free from violence inflicted by the state as well as that inflicted in the home.

Section 28 (1)(d) affords additional protection for children by providing that every child has the right to be protected from maltreatment, neglect, abuse or degradation. The active phrasing ("to be protected from") in this section makes it clear that the state bears a duty to take proactive steps to prevent

[27] Committee on the Rights of the Child (2011), para 44, note 24 above.
[28] Committee on the Rights of the Child (2011), para 42, note 24 above.
[29] Committee on the Rights of the Child (2011), para 47, note 24 above.
[30] Committee on the Rights of the Child (2010) *Treaty-specific Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties under Article 44, Paragraph 1(b), of the Convention on the Rights of the Child. CRC/C/58/Rev.2.* Geneva: United Nations.
[31] Pinheiro P (2006), note 2 above.

violence from happening to children and to act swiftly to prevent further harm when a child has experienced violence.

3.3 Summary of the state's obligations

The state bears three levels of obligation to children:

*(a) The obligation to **prevent** violence against children*

This is given effect by, for example, providing a range of supportive and educative programmes for those who care for children; and programmes that equip caregivers and children with good interpersonal-relationship skills and non-violent forms of conflict resolution; and by taking measures to reduce the proliferation of weapons and the abuse of harmful substances such as alcohol and drugs.

*(b) The obligation to **protect** children **from further harm** if they have already experienced violence*

This obligation is given effect by, for example, providing a range of early intervention services (such as child and family counselling) and child protection services to identify, refer, and support children and families suffering from violence. It is also given effect by a functioning criminal justice system that aims to arrest, convict, sentence and rehabilitate perpetrators of violence against children.

*(c) The obligation to **support and treat** children who have experienced violence so as to restore them to physical and psychological health*

It is given effect by, for example, providing treatment and rehabilitation programmes for physical injuries and therapeutic services for psychological harm. This level of obligation is an oft-neglected aspect of the right to protection from violence but is essential for breaking the intergenerational cycle of violence.

Drawing on this conceptual framework, the chapter now proceeds to analyse the state's laws and policies.

4. Overview of laws and policies

4.1 Laws

Five laws provide the primary legal framework for realising children's right to be protected from violence:

The Children's Act 38 of 2005 provides the foundational layer of prevention and early intervention programmes to prevent violence as well as a system to identify, refer, support, care for and rehabilitate children who have suffered violence. The Minister of Social Development has prescribed

regulations[32] outlining the procedures that must be followed and the norms and standards to which service providers must adhere.

The Domestic Violence Act 116 of 1998 provides a mechanism for victims of domestic violence to obtain a protection order; for arrest of the perpetrator; and for police protection to prevent further domestic violence. The Act also requires the police to refer women and children to shelters.

The Criminal Procedure Act 51 of 1977, Sexual Offences Act 32 of 2007[33] and Child Justice Act 75 of 2008 establish and regulate the criminal justice system responsible for arresting, prosecuting, convicting and sentencing perpetrators of violence against children. The Acts also provide some protective measures for child victims and witnesses.

In addition, South Africa has strong gun control legislation. The Fire Arms Control Act 60 of 2000 restricts ownership of guns to adults over the age of 21, requires owners to keep guns in a safe, and forbids anyone who has a protection order or a record of violence from obtaining a licence.

4.2 Policies and strategic plans required in terms of the Children's Act

The Children's Act obliges the national and provincial ministers of social development to design and publish strategic plans for prevention and early intervention programmes as well as protection services for children and their families. The national strategy for protection services has been finalised but not yet approved or made available; the national strategy on prevention and early intervention programmes is still in development[34]:

- Draft Child Protection Strategic Plan 2010/2011 – 2014/15.[35]
- Draft comprehensive national strategy aimed at the provision of prevention and early intervention programmes to families, caregivers and children.[36]

4.3 Other relevant policies, strategic plans and guidelines

- National Policy Guidelines for Victim Empowerment (2009)[37]
- Minimum Standards for Service Delivery in Victim Empowerment (Victims of Crime and Violence) (2009)[38]
- Strategy and Guidelines for Children Living and Working in the Streets (2010)[39]
- Norms, Standards and Practice Guidelines for the Children's Act (2010)[40]

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[32] Children's Act 38 of 2005: General Regulations Regarding Children. *Government Gazette* 33076, Notice 26, Regulation 9256 (1 April 2010). [Hereafter Children's Act Regulations]
[33] Officially, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[34] E-mail correspondence from an official in the Chief Directorate for Children, national Department of Social Development, 27 January 2014.
[35] Department of Social Development (2013) Draft Child Protection Strategic Plan 2010/2011 – 2014/15.
[36] Department of Social Development (2013) Draft Comprehensive National Strategy Aimed at the Provision of Prevention and Early Intervention Programmes to Families, Caregivers and Children across the Republic of South Africa.
[37] Department of Social Development (2009) *National Policy Guidelines for Victim Empowerment*. Pretoria: DSD.
[38] Department of Social Development (2009) *Minimum Standards for Service Delivery in Victim Empowerment (Victims of Crime and Violence).* Pretoria: DSD.
[39] Department of Social Development (2010) *Strategy and Guidelines for Children Living and Working in the Streets.* Pretoria: DSD.

- National Guidelines for Statutory Services to Child-headed Households (2010)[41]
- Minimum Standards on Shelters for Abused Women (2011)[42]
- Integrated Social Crime Prevention Strategy (2011)[43]
- Information Guide on the Management of Statutory Services (2013)[44]

5. Measures aimed at preventing violence

5.1 Laws and policies

Measures aimed at preventing violence include laws and policies that provide for and regulate "social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention [of violence]".[45] This section describes and analyses the Children's Act, its regulations and the strategies it requires; the Integrated Social Crime Prevention Strategy; and the draft Action Plan to Address Violence Against Women and Children.

5.1.1 The Children's Act

The Children's Act has an explicit focus on prevention and early intervention programmes for vulnerable families and children in order to reduce the potential for abuse and neglect and the need for statutory services. Section 146(1) provides that the provincial Members of the Executive Council (MECs) for Social Development "must" provide and fund such programmes in each province.

Section 143 describes prevention programmes as those provided to families with children to strengthen their capacity to address problems that could occur and, if not attended to, lead to statutory intervention. Early intervention programmes are described as programmes "provided to families where there are children identified as being vulnerable to or at risk of harm or removal into alternate care".

Section 144 outlines the types of prevention and early intervention programmes which must be prioritised. These include family preservation, parenting skills development and therapeutic services, all of which aim, on the one hand, to reduce the risk of children becoming victims of violence and, on the other, to strengthen the capacity of families to function optimally.

The Act specifically mentions programmes to improve parenting skills and promote non-violent discipline and the provision of psychological, rehabilitation and therapeutic programmes for children.

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[40] Department of Social Development (2010) *Norms, Standards and Practice Guidelines for the Children's Act.* Pretoria: DSD. The status of this document is unclear as it is not publicly available unless specifically requested from the department.
[41] Department of Social Development (2010) *National Guidelines for Statutory Services to Child-headed Households*. Pretoria: DSD.
[42] Department of Social Development (2011) *Minimum Standards on Shelters for Abused Women*. Pretoria: DSD.
[43] Department of Social Development (2011) *Integrated Social Crime Prevention Strategy*. Pretoria: DSD.
[44] Department of Social Development (2013) *Information Guide on the Management of Statutory Services in terms of the Children's Act 38 of 2005.* Pretoria: DSD. The status of this document is unclear as it is not publicly available unless specifically requested from the department.
[45] Art 19(2) of the UNCRC.

In addition a Children's Court conducting a child care and protection inquiry can order a parent, caregiver or a child to undergo a prevention or early intervention programme to address issues that have been found to be a threat to the child's safety.[46] This includes ordering a parent to attend substance abuse rehabilitation, counselling, mediation or a parenting skills course on positive, non-violent forms of discipline. The court can also order that the child attend counselling or rehabilitation and that the state provide this service to the child and family.[47] If the service is not available in the public sector, the court can order the state to pay a private service provider to provide it.

The necessary legal framework is therefore in place to enable the provision and implementation of social programmes to prevent violence, or to respond to families showing signs of distress in order to prevent the probability or continuation of abuse. However, two serious gaps exist in the design of the law. The first (addressed later in this section) is that the law does not prohibit parents from using violence (corporal punishment) to discipline their children. The second is that while the state has a clear legislative mandate to ensure the provision and funding of prevention and early intervention programmes, the mechanism for funding the service providers who deliver these services is not legislated and is relegated instead to a policy document of unclear legal status, the Policy on Financial Awards for Services Providers.[48]

In terms of this policy, the government sub-contracts non-profit organisations (NPOs) to deliver the bulk of the prevention and early intervention programmes in South Africa, but only partially funds these NPOs. The result is that programmes are few and far between, varying in quality depending on whether the NPO could source top-up funding from a philanthropic donor – this in a context where donor funding is on the wane, partly because donors are reluctant to fund services the government is legislatively obligated to provide. [See section 5.2.1 below for more details on these challenges.]

5.1.2 National strategy on prevention and early intervention required by the Children's Act

The Act obliges the national Minister of Social Development to develop "a comprehensive national strategy aimed at securing the provision of prevention and early intervention programmes to families, caregivers and children across the Republic".[49] The strategy should outline a plan for addressing the key barriers preventing children and families from accessing quality prevention and early intervention services. In turn, this would include remedying the design flaw mentioned above, namely the under-funding of the service providers who provide the lion's share of such programmes.

As a first step towards this strategy, the Department of Social Development (DSD) and UNICEF conducted a scoping of existing prevention and early intervention services and programmes to identify best practice models and gaps in services.[50] This report suggested that the programmes should take

[46] s46(1)(g), sub-sections (i), (ii), (iii); and s46 (1)(h), sub-sections (iii), (vi) and (viii).
[47] s46(1)(h)(viii).
[48] Department of Social Development (2011) *Policy on Financial Awards for Services Providers.* Pretoria: DSD.
[49] s145(1).
[50] Department of Social Development & UNICEF (2011) *Identification and Assessment of Prevention and Early Intervention Programmes in South Africa: Research Summary Report.* Pretoria: UNICEF South Africa.

into account the root causes of violence (based on evidence of these causes) and adopt a rights-based and developmental approach.[51] The report highlights various challenges in funding the programmes:

- Late payment of tranches by provincial departments of social development results in closures of programme sites, the retrenchment of workers, and scaling down of operations.
- Due to funding being allocated on an annual basis, NPOs struggle to do long-term planning and ensure sustainability.
- Core components of programmes are under-funded.
- Because donors and departments have different reporting formats, excessive staff time has to be spent on fulfilling reporting requirements.[52]

The recommended reforms included:

- evaluating existing programmes to create an evidence base for rolling out successful programmes;
- costing programmes to gain an accurate picture of the actual costs of providing prevention and early intervention programmes;
- increasing the funding government allocates to prevention and early intervention programmes;
- standardising the funding of programmes across the provinces;
- reducing unnecessarily time-consuming reporting requirements; and
- prioritising funding in rural areas.[53]

The DSD commissioned consultants to develop the national strategy as required by the Children's Act. The consultants handed the final draft to the department in January 2012. Although the DSD announced in Parliament in August 2013[54] that the strategy had been completed, at the time of writing it was not listed on the department's website and subsequent e-mail correspondence with the DSD revealed that it is still in its developmental stages and not yet available for public distribution.[55]

5.1.3 Provincial profiles and strategies required by the Children's Act

The Children's Act obliges the provincial departments of social development to conduct provincial profiles to assess the needs of children and families relative to the current provision of prevention and early intervention services. They are required to devise provincial strategies based on this evidence and the framework supplied by the national strategy.[56] These strategies should ensure the provision of properly resourced, co-ordinated and managed prevention and early intervention programmes in each

[51] Department of Social Development & UNICEF (2011), note 50 above.
[52] Department of Social Development & UNICEF (2011), at pg 45-46, note 50 above.
[53] Department of Social Development & UNICEF (2011), at pg 46, note 50 above.
[54] Department of Social Development (2013*) Implementation of the Children's Act 38 of 2005 and the Second Amendment to the Act.* Presentation by Chief Director for Children to the Portfolio Committee on Social Development, National Assembly, Parliament of South Africa, 13 August 2013.
[55] E-mail correspondence from an official in the Chief Directorate for Children, national Department of Social Development, 27 January 2014.
[56] ss 145(2) and (3) of the Children's Act.

province. To date only one of the eight provinces has completed its needs profile, while none have drafted their strategies.[57]

5.1.4 Integrated Social Crime Prevention Strategy

The Integrated Social Crime Prevention Strategy[58] was developed by the national DSD in 2011 to outline the department's role in implementing the National Crime Prevention Strategy that was adopted by Cabinet in 1996.[59] The aim is to provide an integrated framework to prevent crime by addressing risk factors in the population, with the focus on strengthening families and building the capacity of children by means of awareness campaigns, community-based responses and family preservation. The areas of emphasis are programmes targeting the family, early childhood development, domestic violence, victim empowerment, and child abuse and neglect.

A limitation of this policy is that it conceptualises violence from a social crime perspective which stresses reducing crime and averting re-occurrence of criminal activities. This is a limited approach to preventing violence against children because it does not lead to engagement with the underlying causes of violence, which are rooted *inter alia* in social norms concerning patriarchy, gender and the use of corporal punishment in the home. If these underlying norms are not addressed, the cycle of violence will continue.

5.1.5 Towards an action plan to address violence against women and children

The state recently formed an inter-ministerial committee (IMC) to develop an action plan to address violence against women and children. The IMC was established in response to a number of rape homicides that featured prominently in the media in 2012 and 2013. The IMC's aim is to provide leadership at the highest political level to prevent violence through a holistic approach spanning the continuum from prevention and early intervention to response.

While the IMC appears to have adopted a similar agenda to that of the Integrated Social Crime Prevention Strategy, it has shifted the focus. Violence against women and children is conceptualised within a socio-ecological framework, one which emphasises identifying causal factors in order to shift patterns of violence, rather than within a crime-prevention approach, which would focus only on strengthening the criminal justice response. The IMC is in the process of commissioning research into the risk factors and root causes of violence against children to ensure that the action plan is based on evidence. This would suggest there is a move towards using evidenced-based approaches to inform the prioritisation of programmes, strengthen existing programmes and develop new ones.

The IMC is in its infancy and needs strong leadership to meet its mandate. The forthcoming action plan requires new ideas, innovation and adequate resourcing of programmes to enable South Africa to shift the embedded social norms and practices that drive violence.

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[57] E-mail correspondence from the Chief Directorate for Children, national Department of Social Development, 27 January 2014. The Western Cape has completed a comprehensive profile for all the service areas required in the Children's Act. However, it is not publicly available.

[58] Department of Social Development (2011) *Integrated Social Crime Prevention Strategy.* Pretoria: DSD.

[59] Department of Safety and Security (2006) *National Crime Prevention Strategy*. Pretoria: DSS.

5.2 Implementation challenges

5.2.1 Insufficient financial resources

All provinces rely heavily on NPOs to deliver the majority of social welfare services to all vulnerable groups, including children, but on average they transfer less than half their total social welfare programme budgets to NPOs to deliver these services.[60] Although allocations to the child care and protection sub-programmes increased in all provinces between 2012/13 and 2013/14, the increases were primarily for the expansion of early childhood development (ECD) and the roll-out of the Isibindi programme.[61] The latter programmes will undoubtedly assist in promoting the prevention agenda, but the problem is that there has been no increase in funding for a range of other prevention and early intervention programmes, such as parenting skills programmes, programmes equipping parents to use non-violent discipline, child and family counselling, diversion for child offenders, and non-violent conflict resolution programmes for boys.[62]

The government policy of only partially funding the NPOs that run prevention and early intervention programmes – coupled with diminishments in donor funding due to the global recession and donors' reluctance to foot the bill for services the government is obligated to provide – is resulting in staff lay-offs and programmes either been scaled back or closed down.[63]

5.2.2 Insufficient human resources

The Children's Act recognises that a range of social service practitioners working in multi-disciplinary teams are required to build integrated services that provide a continuum of care and support for children and families. One of the major barriers to service delivery is the scarcity of appropriately skilled social service practitioners. These include social workers, social auxiliary workers, child and youth care workers, and community development practitioners. As there is no data on the number of children in need, one can but estimate how many social workers are necessary to deliver the full range of prevention and protection services. In 2006, Barberton *et al* estimated that by the third year of implementation, South Africa would need 66 329 social workers and 48 660 social auxiliary workers[64] to implement the Children's Act. However, in March 2012 only 16 740 social workers were registered

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[60] Budlender D & Proudlock P (2013) *Are Children's Rights Prioritised at a Time of Budget Cuts? Assessing the Adequacy of the 2013/2014 Budgets of the Provincial Departments of Social Development*. Cape Town: Children's Institute, University of Cape Town. Pg 47-54.

[61] Isibindi is a community-based prevention and early intervention programme that responds to the needs of vulnerable children, youth and families in a holistic manner. Teams of child and youth care workers provide services in remote, rural areas with high rates of unemployment, poverty, HIV and AIDS, and large numbers of orphans.

[62] Budlender D & Proudlock P (2013), note 60 above.

[63] Financial and Fiscal Commission (2013) *The Provision and Funding of Child Welfare Services in South Africa*. Midrand: FFC. Pg 118;
Budlender D & Proudlock P (2013), note 60 above.

[64] Barberton C (2006) *The Cost of the Children's Bill – Estimates of the Cost to Government of the Services* E*nvisaged by the Comprehensive Children's Bill for the Period 2005 to 2010*. Report for the national Department of Social Development. Cornerstone Economic Research. Pg 94.

with the South African Council for Social Service Professionals. Of these, merely 9 289 were in public practice serving children and families; the rest were in private practice or no longer practising.[65]

An analysis of the 2013 provincial budgets shows that all of the provinces plan to expand the number of staff for social welfare programmes over the next three years.[66] The national department's budget shows annual budgetary allocations for bursaries for social work students leading to an estimated annual average of 1 760 graduates available to enter the labour market between 2012 and 2016.[67] The National Treasury has allocated an additional R938 million via the provincial equitable share to the provinces to enable the employment of these graduates in the next three years.[68] Even with these increases, there will not be enough social workers coming into the profession.

Although more conservative than the calculations of Barberton cited above, the DSD's estimates reveal that, in addition to the shortage of social workers, South Africa has insufficient social auxiliary workers and child and youth care workers with specialist training on child protection. The department estimated that, in 2012/2013, a further 13 820 social auxiliary workers and 16 523 child and youth care worker were required to meet the minimum norms and standards.[69] With regard to expanding the number of child and youth care workers, the DSD has committed funding to the Isibindi programme to recruit 9 000 community-based child and youth care workers over the next five years.[70]

5.2.3 Limited evidence is available to take successful programmes to scale

The World Health Organisation (WHO) and Centres for Disease Control and Prevention (CDC) promote evidenced-based programming, an approach many South African government departments have also adopted, notably the Department of Health and the National Planning Commission. However, numerous violence prevention programmes have not been evaluated to assess their effectiveness. Quality evaluation requires long-term follow-up of monitoring and evaluation indicators that have been built into programmes from inception. This is not possible if programmes are sporadically and only partially funded.

This lack of evidence makes it difficult to decide which programmes to scale up, and on what justifiable basis. South Africa needs to develop culturally appropriate tools for measuring programme impacts objectively because, with limited funds available to roll out programmes, it is critical that context-specific monitoring and evaluation indicators be used to identify those interventions that are the most promising.

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[65] National Welfare Forum (2012) *Social Worker Shortage Undermines Effectiveness of Social Welfare Legislation*. Accessed at: www.nwf.org.za/human-resources.

[66] Budlender D & Proudlock P (2013), at pg 43-46, note 60 above.

[67] Budlender D & Proudlock P (2013), at pg 43-46, note 60 above.

[68] R120 million in 2013/14, R305 million in 2014/15, and R513 million in 2015/16. Budlender D & Proudlock P (2013), at pg 46, note 60 above.

[69] Department of Social Development (2012) *Situational Analysis Report on the Social Service Workforce Servicing Children.* Pretoria: DSD.

[70] Budlender D & Proudlock P (2013), at pg 54, note 60 above.

5.2.4 Lack of political will and commitment

Despite the general dearth of evidence, a number of prevention and early intervention approaches and programmes have indeed been researched and found to be effective. For example, research shows the need to teach children, particularly young boys, non-violent conflict resolution in order to promote alternative notions of masculinity. Stepping Stones, a violence prevention and gender-transformative programme targeting adolescent girls and boys at school, has been rigorously evaluated and shown to make a difference in male violent behaviour.[71] Even so, the government has not yet used this evidence to take the intervention to scale.

The Child Justice Act promotes the use of diversion to prevent child offenders from being exposed to the criminal justice system and to foster rehabilitation and prevent re-offending. These programmes aim to promote the dignity and well-being of children in conflict with the law by developing their self-worth and promoting family and community reintegration. Diversion programmes are listed in the Children's Act as one of the early intervention programmes that the provincial departments of social development must provide and fund. However, despite this statutory obligation and the existence of evidence that diversion programmes successfully reduce re-offending rates for children[72], the past five years have seen instead a decline in the use of diversion for child offenders[73].

5.2.5 Poor planning by the national and provincial departments of social development

The national and provincial strategies required in terms of the Children's Act give the national and provincial DSDs a clear tool to enable them to plan the adequate provisioning and resourcing of prevention and early intervention programmes. However, none of these departments have finalised their strategy and (as discussed above) only one province has completed the provincial profile which is meant to furnish the evidence base for their strategy.

5.2.6 Legal and social norms that perpetuate violence: the case of corporal punishment

One of the strategies that the WHO recommends for preventing violence is changing social norms that support violence.[74] To engage with violence at its root, legal and social norms that accept and perpetuate violence therefore need to be identified and addressed. Using violence to discipline children is an entrenched social norm in South Africa. Moreover, it is also legally entrenched in that the common law allows a parent faced with the charge of assault to raise a defence of "reasonable chastisement" to avoid conviction. This provision in South African law is the last vestige of state-sanctioned violence in South Africa and is yet to be removed. If the WHO's advice is followed, preventing violence against children would include prohibiting corporal punishment and promoting a culture of non-violent discipline of children.

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[71] Jewkes R, Nduna M, Levin J, et al (2006) A cluster randomized-controlled trial to determine the effectiveness of Stepping Stones in preventing HIV infections and promoting safer sexual behaviour amongst youth in the rural Eastern Cape, South Africa: Trial design, methods and baseline findings. *Tropical Medicine and International Health*, 11(1):3-16.

[72] Mutingh LM (2001) *The Effectiveness of Diversion Programmes: A Longitudinal Evaluation of Cases.* Cape Town: South African National Institute for Crime Prevention and the Reintegration of Offenders.

[73] See chapter 7 on Protecting the Rights of Children in Conflict with the Law.

[74] World Health Organisation (2010) *Violence Prevention: The Evidence*. Geneva: WHO.

The case study below shows how the state has protected corporal punishment as a social and legal norm, and raises questions about its willingness to tackle the root causes of violence in South Africa.

Case study: Corporal punishment in the home – state-sanctioned violence against children

By Lucy Jamieson

South Africa has prohibited corporal punishment as a sentence for children convicted of crimes[75], in all forms of detention, and in all social services, from early childhood development centres to alternative care (foster care, temporary safe care and child and youth care centres)[76]. Similarly, section 10 of the South African Schools Act 84 of 1996 outlaws corporal punishment by teachers in both private and public educational institutions.[77] However, corporal punishment is still permitted in the home as a socially acceptable way of disciplining children, and parents charged with the common law crime of assault against their children may raise the defence of "reasonable chastisement".

A proposal to prohibit corporal punishment in the home was tabled and debated in Parliament in the Children's Amendment Bill process over the period 2006 to 2007, but was withdrawn from the Bill at the last minute. During the parliamentary hearings and deliberations on the Children's Amendment Bill, advocates for children's rights[78] clashed with a conservative lobby about the proposal to abolish corporal punishment.[79] The pro-corporal punishment lobby drew fuel from moral panic about the social consequences of relinquishing a traditional approach that keeps children in their place, a widespread (but erroneous) view that poor discipline and unruly behaviour in schools had resulted from the abolition of corporal punishment, and a misunderstanding perpetuated by the media that parents would face fines or imprisonment. A majority of the members of the Portfolio Committee on Social Development were in favour of the clause, and it appeared as if the prohibition would go through. However, at the last minute in the deliberations, the African National Congress leadership warned their Members of Parliament that Cabinet had not approved the prohibition. At the last stage of deliberations on the bill, the Portfolio Committee removed the clause prohibiting corporal punishment, citing a technicality to do with the drafting procedure.[80]

While stopping short of prohibiting corporal punishment in the home, the new Children's Act does promote positive non-violent forms of discipline by expressly listing positive non-violent parenting programmes as one of the prevention and early intervention programmes which the state "must" provide and fund.

Both Parliament[81] and the DSD[82] have committed to prohibiting corporal punishment in the future. However, a recent discussion paper by the DSD[83] appears to take a more cautious approach. It was

[75] *S v Williams and Others* 1995 (7) BCLR 861 (CC).
[76] Children's Act Regulations, regs 65(1)(h) and 76(2)(d), Norms and Standards for Early Childhood Development Programmes 3(b)(vi), and Norms and Standards for Drop-in Centres 1(j), note 32 above.
[77] See chapter 6 on the Right to Basic Education for more detail on the challenges South Africa faces in implementing the ban on corporal punishment in schools.
[78] These included: Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Centre for Child Law at the University of Pretoria; Children's Institute at the University of Cape Town; Community Law Centre at the University of Western Cape; Save the Children; Childline South Africa; South African Council of Churches; Mthatha Child Abuse Resource Centre; Quaker Peace Centre; Commission for Gender Equality; and the South African Human Rights Commission.
[79] They were the Christian Action Network, Justice Alliance South Africa (JASA), and Doctors for Life International.
[80] Portfolio Committee on Social Development (2007) *Children's Amendment Bill [B19B-2006] Report*. Accessed at: www.pmg.org.za/docs/2007/071024draft.htm.
[81] Portfolio Committee on Social Development (2007), note 80 above.
[82] Hansard (2012) Minister of Social Development *Response to Question 2023 or Written Reply, August 2012.* Cape Town: Parliament of the Republic of South Africa.

presented in May 2013 at the National Child Care and Protection Forum along with a presentation by the Working Group on Positive Discipline[84] calling for a ban[85] and another by a religious organisation defending parents' rights to use "appropriate corporal punishment"[86]. The DSD paper purports to engage a range of stakeholders in debate, but states that "[t]he proposal is that South Africa's policy initiatives should be modest and not overly ambitious".

The civil society Working Group on Positive Discipline, as well as its member organisations[87], have made numerous submissions[88] calling for a clear legal prohibition of corporal punishment and a mass, state-led education programme to equip parents with alternative, non-violent parenting skills.

Any changes to the Children's Act will be part of a comprehensive Amendment Bill that the DSD will publish for public comment in 2014. Tabling, debate and passage in Parliament are unlikely to be concluded before 2016.

6. Measures aimed at protecting children, who have experienced violence, from further harm

Children who have been subjected to violence or other forms of maltreatment are entitled to be protected from further harm. To enable this protection, the state needs to establish a system to identify, report, refer, investigate and follow up instances of child maltreatment and to provide support and protection where necessary.

In South Africa this system consists of the child protection system – regulated by the Children's Act – and the criminal justice system, which is regulated by the Criminal Procedure Act, Sexual Offences Act and Domestic Violence Act. The child protection system focuses on supporting and protecting the child, strengthening the child's family or securing alternative care if appropriate. The criminal justice system protects the child from further harm by arresting, charging, convicting, sentencing and rehabilitating the perpetrator in order to prevent and deter further crimes against children.

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[83] Department of Social Development (2013) *Discussion Document: Corporal Punishment and Discipline in the Home by Parents and Caregivers.* Pretoria: DSD.

[84] Members of the Working Group include Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Centre for Child Law at the University of Pretoria; Children's Institute at the University of Cape Town; Community Law Centre at the University of Western Cape; Save the Children South Africa; Childline South Africa; South African Council of Churches; Mthatha Child Abuse Resource Centre; Quaker Peace Centre; Commission for Gender Equality; South African Human Rights Commission; The Parent Centre and UNICEF South Africa.

[85] Working Group on Positive Discipline (2013) Raising the Next Generation: Corporal Punishment or Positive Discipline? Presentation by Carol Bower on behalf of the Working Group to the National Child Care and Protection Forum, 21 May 2013.

[86] Christian Action Network (2013) The Right of Parents to Discipline their Children. Presentation to the National Child Care and Protection Forum, 21 May 2013.

[87] Note 84 above.

[88] The submissions, as well as more information about the Working Group on Positive Discipline, can be accessed at: www.rapcan.org.za/wgpd and savethechildren.org.za/wgpd.

6.1 Laws and policies

6.1.1 The Children's Act

The Children's Act provides for and regulates the identification, reporting, referral, investigation and follow-up of instances of child maltreatment. In doing so, it provides for the first layer of investigation and support by social service professionals, and, where judicial intervention is necessary to secure the child's care and/or protection, the second layer of intervention by the children's court. Figure 1 on the next page gives an overview of how a case should flow within the child protection system.

Obligation to plan services based on evidence of need

Chapter 7, part 1, places an obligation on each of the provincial MECs to establish profiles of the demand for child protection services; audit the available services; and develop a provincial strategy to ensure that there are sufficient child protection services to meet the needs of children in the province.

Regulation of service providers

The Act defines designated child protection services; describes who can provide them; and gives the Minister of Social Development the authority to prescribe norms and standards which service providers must meet.

*"*Designated child protection services" are defined as:

(a) services aimed at supporting (i) the proceedings of children's courts; and (ii) the implementation of court orders;

(b) services relating to— (i) prevention services; (ii) early intervention services; (iii) the reunification of children in alternative care with their families; (iv) the integration of children into alternative care arrangements; (v) the placement of children in alternative care; and (vi) the adoption of children, including inter-country adoptions;

(c) the carrying out of investigations and the making of assessments, in cases of suspected abuse, neglect or abandonment of children;

(d) intervention and removal of children in appropriate cases;

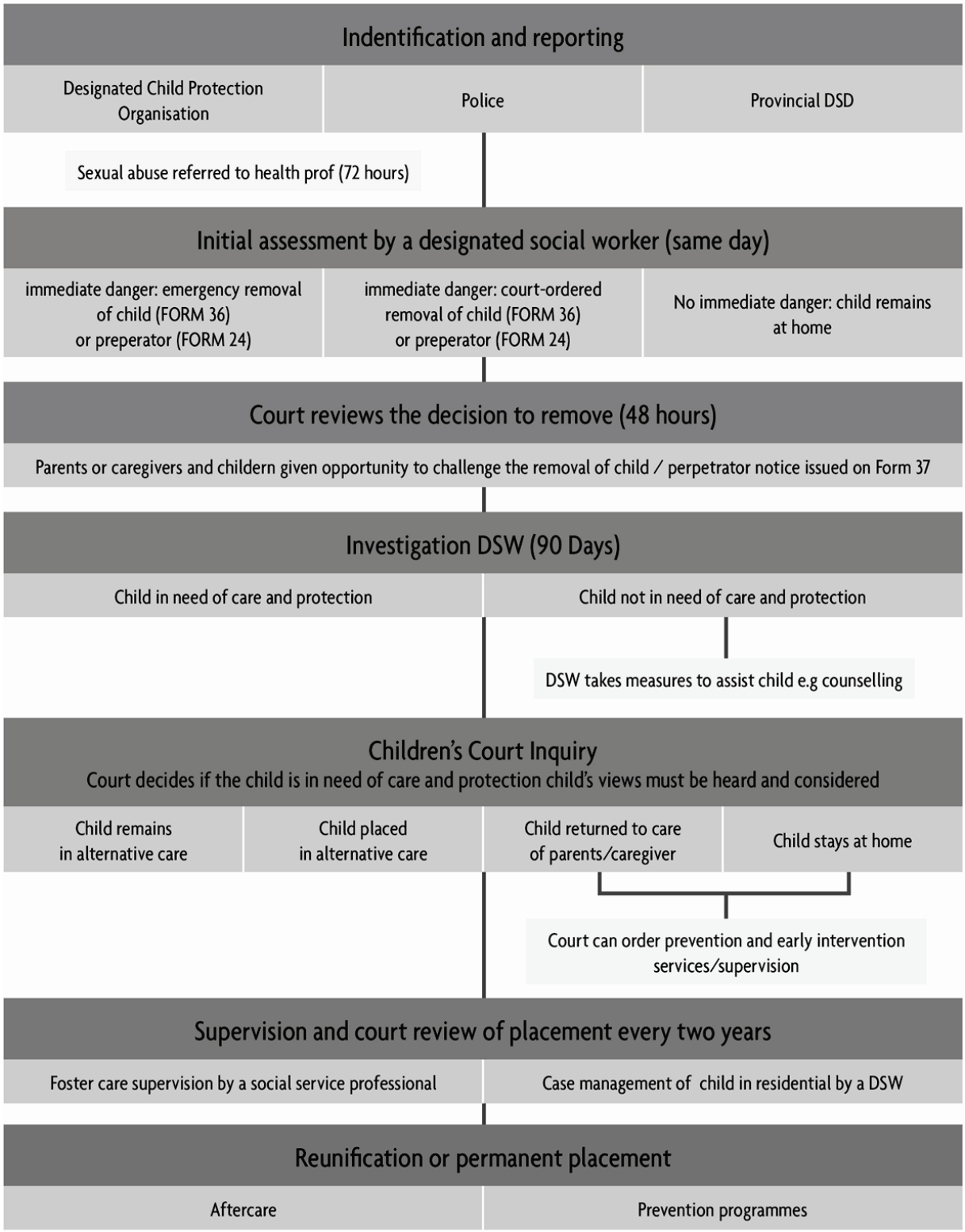
(e) the drawing up of individual development plans and permanency plans for children removed, or at risk of being removed, from their family; and

(f) any other social work service as may be prescribed.[89]

Designated child protection services can be provided only by the national or provincial DSDs or a designated child protection organisation, i.e. a registered NPO that has been given written approval by the Director-General or provincial Head of Department to perform child protection services.

[89] s105(5).

Figure 1: Overview of case flow within the child protection system



Source: Jamieson L (2013) *Children's Act Guide for Child and Youth Care Workers*. Cape Town: Children's Institute, University of Cape Town.

Identification of children in need of protection

The Children's Act identifies specific children as being in need of care and protection, including a child who:

- has been abandoned or orphaned and is without any visible means of support;
- is in a state of physical or mental neglect;
- is being maltreated, abused, deliberately neglected or degraded;
- has been exploited or lives in circumstances that expose him or her to exploitation;
- displays behaviour which cannot be controlled by the parent or caregiver;
- lives or works on the streets or begs for a living;
- has been trafficked;
- is addicted to a dependence-producing substance and is without any support to obtain treatment;
- lives in, or is exposed to, circumstances which may seriously harm that child's physical, mental or social well-being; or
- if there is reason to believe that the child will live in, or be exposed to, seriously harmful circumstances if he or she is returned to the parent, guardian or caregiver.[90]

Two of the Act's major weaknesses are the lack of clarity surrounding the phrase "without any visible means of support" in section 150(1)(a); and the lack of a mechanism to recognise and support family members caring for large numbers of orphans. As a result, section 150(1)(a) has been interpreted by the Executive and judiciary in a way not intended by Parliament. Judgments issued by the High Court[91] have interpreted "without any visible means of support" as including children living with family members in poverty. Therefore, an orphaned or abandoned child living with poor grandparents is deemed to be a child in need of care and protection and placed in "alternative care" with that grandparent.

Due to the very high number of orphans living with relatives in poverty in South Africa (more than 1.1 million based on 2011 statistics), this interpretation is placing undue pressure on the child protection system. The result is that children who have been abused or maltreated are waiting unacceptably long periods of time to access urgent child protection services[92], while caregivers of orphans are not able to access much-needed adequate social assistance timeously.[93] In many instances, orphaned children wait more than three years to get support due to the inability of the over-burdened child protection

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[90] s150(1).

[91] *SS v Presiding Officer of the Children's Court*: *District of Krugersdorp and Others.* SGH case no: A3056/11;
M and Others v Presiding Officer of the Children's Court: District of Krugersdorp and Others SGH case no: A3075/2011.

[92] National Welfare Forum (2008) *Use of the Statutory Foster Care System to Support Long-term Kinship Care: Impact on the Social Welfare System and the Social Work Profession*. Discussion document, March 2008 (revised). Pg 1;
Childline (2005) *Report on Children's Rights and Child Protection Management in South Africa.* Presentation to the Portfolio Committee on Social Development, KwaZulu-Natal Provincial Legislature*,* 14 January 2005.

[93] Proudlock P (2012) *The Case of Child SS and 1.1 Million Other Children in the Care of Relatives.* Paper presented at Strategies to Overcome Poverty and Inequality: Towards Carnegie III conference, University of Cape Town, 6 September 2012;
Proudlock P & Tilley A (2013) *Submission by the Children's Institute, University of Cape Town, on the Children's Amendment Bill, 2013* (as published for comment in the *Government Gazette* on 15 November 2013, Notice 1106 of 2013). Cape Town;
Loffel J (2013) *Comments by Johannesburg Child Welfare Society on the Children's Amendment Bill, 2013* (as published for comment in the *Government Gazette* on 15 November 2013, Notice 1106 of 2013). Johannesburg.

system to respond to the demand. Extended family members caring for orphans could be supported more effectively by the social assistance system, which is not reliant on the scarce resources of social workers and children's courts.

A strength of the Act is that it also defines children who **may** be in need of care and protection. Children who are victims of child labour, and children in child-headed households, are not automatically assumed to be in need of care and protection. The state must ensure that a designated social worker investigates the child's circumstances; however, it is not necessary to find the child to be in need of care and protection in order to provide support to the child or family. For example, section 137 authorises the provincial Head of Department to recognise child-headed households. It also allows for such children to stay in their own home under the supervision of an adult and access prevention and early intervention programmes. Section 155 allows the social worker to decide that, although a child is at risk, he or she will not be at further risk if the family is given support. This support could take the form of social services aimed at the child or family, or it could be rendered through other kinds of services aimed at the parent or caregiver, such as medical treatment for substance abuse.

These provisions give social workers the flexibility to determine what individualised support each child needs, whereas previously all orders had to go through the court. In theory this flexibility should give children greater protection; but in practice, if social workers are under time- and capacity-pressure (as is the case), the result could be that many vulnerable children do not get the support they need, especially since there is no accountability mechanism to monitor whether social workers are providing the family with the appropriate support.

Statutory obligation to report physical abuse, sexual abuse or deliberate neglect

The Children's Act compels a range of practitioners who work with children, who, based on sound reasons, conclude that a child has been physically or sexually abused or deliberately neglected, to report this conclusion to a designated child protection organisation, the provincial DSD or a police official.[94] There is no room for discretion on the basis of the child's best interests. The Children's Act also makes provision for anyone to report any form of harm or maltreatment that may render the child in need of care and protection.

Regulation 35 of the Children's Act sets out a broad risk-assessment framework for professionals to consider when assessing if a child has been abused or neglected. The indicators listed include physical, emotional, behavioural and developmental signs and indicators, as well as disclosure by the child or "*a statement relating to a pattern or history of abuse or deliberate neglect from a witness".* The Act requires that, in deciding if a child has been abused or neglected, these signs or indicators be considered in the "total context of the child's situation", which means the focus should not fall on only one factor or indicator. Professionals are expected to be familiar with these indicators and how to read them.

[94] s110.

Assessment of reports of abuse and neglect

Once a report is made, the DSD or designated child protection organisation must ensure the child's safety and well-being, make an initial assessment of the report, and, unless it is clearly frivolous or unfounded, investigate its truthfulness. Minimum norms and standards require that assessments of children who have been abused or deliberately neglected must be conducted within 48 hours of the receipt of a report.[95]

Assuming the child has sufficient maturity and mental capacity to do so, he or she or must consent, either verbally or in writing, to being examined or assessed. In addition, the Children's Act stipulates that the child must:[96]

- be addressed in a language he or she can understand;
- be accompanied by a support person of his or her choice, unless the child is of sufficient maturity and mental capacity to understand the reasons for the assessment or examination and expresses a wish not to be accompanied by such person;
- be treated with empathy, care and understanding, with due regard to the child's right to privacy and confidentiality;
- as far as possible be examined or assessed in a child-friendly environment;
- not be subjected to the presence of any other person who is not required to be present at the examination or assessment; and
- not be subjected to cruel or degrading language.

What are the options if the assessment reveals abuse or neglect?

The designated social worker is then in a position to decide on short-term measures to ensure the safety of the child. These include steps to support the family (such as counselling, mediation, prevention and early intervention programmes) as well as removing the offender or the child. The Children's Act expressly states that the child should be placed in a child and youth care centre only if another measure is not appropriate[97] and that, given the likelihood of secondary trauma, other options should be considered before removing a child from the family.[98]

(i) Court-ordered early intervention programmes

If the child is not in immediate danger the court can order that the family participate in an appropriate prevention and early intervention programme (for example, a parenting programme to assist the parent(s) to learn non-violent forms of parenting) until the social work investigation is completed. When a children's court orders prevention and early intervention programmes, a designated social worker must monitor the progress of the child and his or her family and submit reports to the court.

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[95] Children's Act Regulations, Part III: Norms and Standards for Child Protection, s2(b), note 32 above.
[96] Reg 38.
[97] s158(1).
[98] Reg 35(5).

(ii) Removal of the alleged offender

The Children's Act provides for the removal of the alleged offender to secure the child's safety and well-being, emphasising that entry into the formal child protection system is a last resort and that the child's removal is not the first option for consideration.[99] The alleged offender should be given the opportunity to appear before the children's court on first court day after he or she has been removed, and advance reasons why he or she should not be removed and permanently prohibited from entering the home or place where the child resides. The children's court may inquire into the circumstances of the child and issue an order prohibiting the alleged offender from entering the child's home or having any unsupervised contact with the child.

The use of this provision would reduce the potential for secondary trauma caused by removing the child. Research is required to establish whether or not it is being used to its maximum potential and if not – why not.

(iii) Immediate removal of the child to temporary safe care

Ordinarily the social worker has 90 days to complete his or her investigation into the circumstances of the child, whereafter the matter goes before the children's court to decide if the child is in need of care and protection. The court may then order the child to be removed from his or her home and placed in alternative care. However, when a child is in immediate danger he or she can be removed to temporary safe care before the investigation by the social worker starts, and with or without a court order.

Removing a child to temporary safe care with a court order

In a situation where the child's safety or well-being is in danger, the Children's Court can be approached before the social worker conducts his or her investigation to make an order that the child be removed and placed in temporary safe care. The magistrate can authorise any person to remove the child. It is the responsibility of the person removing the child to refer the case to a designated social worker for investigation.

Removing a child without a court order

In an emergency, the child can be placed in temporary safe care without a court order. Only a designated social worker or a police official can remove a child and put him or her into temporary safe care without a court order. They can remove the child only when there are grounds to believe that:

- the child is in need of care and protection;
- the child needs immediate emergency protection;
- any delay caused by waiting for a court order might result in harm to the child;
- removing the child from the home environment is the best way to secure the child's safety and well-being; and
- the danger to the child outweighs the potential trauma caused by the removal.

[99] Reg 35(5).

If a social worker has removed a child and placed him or her in temporary safe care, the social worker must inform the parent, guardian or caregiver of the child about the child's removal within 24 hours if they are traceable. The clerk of the Children's Court must be informed about the removal on the next court day. The matter must also be reported to the relevant office of the DSD.

It constitutes unprofessional or improper conduct if a social worker misuses his or her power to remove a child to temporary safe care without a court order. Likewise, if a police official misuses his or her powers to remove a child or an offender without a court order, it constitutes grounds for disciplinary proceedings against that official.

Review of an emergency temporary removal

In *C and others v Gauteng Department of Health and Social Welfare and Others*[100], the High Court declared sections 151 and 152 of the Children's Act (which regulate the temporary removal of children from their families) as unconstitutional because they fail to allow for a review of the decision to remove the child. There was no procedure for the child or his or her parents to contest the emergency temporary removal until the children's court hearing. Legally, this hearing could be up to 90 days after the removal, but in reality it could be even longer than that. The court held that the Act currently does not give enough protection to children and their families.

The judge recognised that it is sometimes necessary to limit some rights of the child to achieve a greater benefit – in this situation, limiting a child's right to family (by removing the child from the family environment) to protect him or her from abuse. He maintained, however, that a judicial review must be a critical part of the balancing of these competing interests. The Constitutional Court confirmed the order of unconstitutionality and ruled that all children who are removed from the care of their parents, guardians or caregivers should be brought before the children's court for review before the expiry of the next court day.[101]

Further research is needed to monitor the implementation of this judgment and assess its implications for practice.

Investigation

A designated social worker investigates whether the child is in need of care and protection. Many of the tools he or she needs to use in the investigation are outlined in the Information Guide on the Management of Statutory Services (2013).[102] After the investigation, the social worker must share the findings with the provincial DSD and the report must be submitted to the children's court.

The social worker's report must contain a detailed presentation of the prescribed information on form 38 (see regulation 55). Using the tool in annexure 2 of the Information Guide on the Management of Statutory Services (2013) this report must include an assessment of the developmental, therapeutic and other needs of the child. It should also include details of family preservation services that have

[100] *C and Others v Gauteng Department of Health and Social Welfare and Others.* Case: 47723/2010. North Gauteng High Court.
[101] *C and Others v Department of Health and Social Development, Gauteng, and Others 2012* (2) SA 208 (CC).
[102] Department of Social Development (2013), note 44 above.

been considered or attempted, as well as recommendations for assisting the child and family, "including counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation".[103] The report must state the social worker's conclusion as to whether the child is, or is not, in need of care and protection, and provide reasons for this conclusion.

Finally, the report must contain a permanency plan aimed at achieving stability in the child's life[104], one in which the ideal outcome is that the child enjoy the opportunity to grow up within his or her family. If this is not possible or in the child's best interests, the permanency plan should aim to have the child form lifelong relationships in a family or community setting. When drafting the permanency plan, the designated social worker must give due consideration to the child's views, age and developmental stage, and therapeutic, educational, cultural, linguistic, developmental, socio-economic and spiritual needs.

If the designated social worker finds the child to be in need of care and protection, that child must be brought before the children's court.[105]

Deciding if the child is in need of care and protection: Children's court inquiries

Children's court inquiries must be held in informal venues that are furnished and designed in a manner aimed at putting children at ease and which are accessible to disabled persons and persons with special needs. The Act states that the proceedings themselves must be "relaxed and non-adversarial". The child can choose to participate in the Children's Court inquiry if he or she has the maturity to do so. The court can also require that a child who is a party or witness in a Children's Court inquiry be questioned through an intermediary if this is in the best interests of the child. The inquiries are closed and the media may not report on the matter. The hearing may be adjourned for up to 14 days at a time but must be held within six months if the child is in temporary safe care.[106]

If the children's court finds that the child is not in need of care and protection, it can issue an order:

- to support the family to keep the child at home (for example, a partial care order to ensure that the child is cared for during the day whilst the parents or caregivers are at work);
- returning the child to the person who was caring for him or her before the removal to temporary safe care; or
- placing an obligation on the state to provide prevention and early intervention services, family reconstruction services or skills-building programmes.

[103] Department of Social Development (2013), at pg 127, note 44 above.
[104] s157(1)(b).
[105] s155(5).
[106] s167(2).

One of the improvements that the Children's Act introduced when it replaced the Child Care Act is that it gives the court a range of options if it finds a child is in need of care and protection. These orders include:

Child protection orders:

- Instructing a person to be removed from a child's home.[107]
- Preventing a person from having contact with a child.[108]
- Allowing contact only on specified conditions.

Treatment orders:

- Instructing a child or other person to participate in a professional assessment.[109]
- If the court finds that the child is in need of medical, psychological or any other treatment, an order can be made that the child receive appropriate treatment or that the child and family attend counselling, if needed, at the state's expense.[110]

Alternative care orders:

In more extreme cases the court can order the child's removal from the family. If a child is found in need of care and protection and has no parent or caregiver, or the parent or caregiver is unsuitable to care for the child, the child may be placed in alternative care – that is, foster care or a child and youth care centre (CYCC) providing a residential care programme suited to his or her needs. However, a Children's Court can place the child in a CYCC only if no other option would be appropriate.

6.1.2 The criminal justice system – as regulated by Criminal Procedure Act and Sexual Offences Act

The Sexual Offences Act 32 of 2007 reformed the law on sexual offences, redefining rape, criminalising child prostitution as well as defining a range of new sexual offences, including abduction for the purpose of sexual intercourse. The Act makes it easier for the police and the Department of Justice to arrest and prosecute offenders because it broadens the definitions of child sexual abuse. In turn, the Criminal Procedure Act 51 of 1977 regulates the arrest, conviction and sentencing of perpetrators.

Protective measures for child victims and witnesses

The Criminal Procedure Act provides for special protective measures, to reduce secondary trauma, by allowing the child victim to testify in private and through the use of an intermediary in a separate room linked to court via closed circuit television.[111] It also makes provision for *in camera* proceedings for child witnesses and victims.[112] The Sexual Offences Act has strengthened the use of these provisions for children by requiring courts to enter into the record reasons for refusing to use these protective

[107] s46(1)(h)(ix).
[108] s156(1)(k).
[109] s46(1)(h)(iv).
[110] s156((1)(i).
[111] s170A and s158.
[112] s15.

measures in respect of victims and witnesses under the age of 14 years.[113] If they are used by the courts, these mechanisms protect the child's dignity and privacy, reduce secondary traumatisation and psychological stress, and improve the child's ability to give credible evidence.[114]

A number of policy documents recognise the importance of providing support to child victims and witnesses of violent crime. The National Policy Guidelines for Victim Empowerment (2009)[115] set out a framework for the delivery of services to victims of violence and recognises children and women as a priority. Minimum Standards for Service Delivery in Victim Empowerment (Victims of Crime and Violence) (2009)[116] were developed by the DSD to prevent secondary victimisation. Neither of the policies places a firm obligation on the state to provide these services but place the responsibility of accessing services on victims.[117]

The Children's Act obliges the provincial DSDs to provide and fund therapeutic services for children.[118] However, this provision does not make it clear that these services must be provided to child victims and witnesses throughout the criminal trial. There are no clear obligations on the state in either the Criminal Procedure Act or the Sexual Offences Act to ensure that child victims and witnesses receive the therapeutic services, counselling, court preparation and support that are essential both to protect children from secondary traumatisation as well as ensure good case outcomes. In practice, therefore, these services are few and far between, and tend to be delivered by NPOs only if they are able to access donor or government funding.

6.1.3 How the two systems interface with each other

While the Children's Act requires a conclusion of abuse or neglect based on a set of established indicators, the Sexual Offences Act simply requires knowledge of an offence to trigger the reporting obligation. The Children's Act restricts the mandatory reporting obligation to a list of professionals, whereas under the Sexual Offences Act **any** person who has knowledge of an offence is obliged to report it.

There is also a discrepancy between the Acts in terms of where a report can be made. Under the Children's Act professionals can report sexual abuse to social services or the police; under the Sexual Offences Act everyone is obliged to report sexual offences to the police. Anyone who fails to report in terms of the Sexual Offences Act is guilty of a criminal offence, but the Children's Act reserves sanction for failure to report only for the professionals and practitioners listed in section 110(1).

The Children's Act also provides for inter-agency reporting. A social worker at the DSD or a designated child protection organisation must report the possible commission of an offence against a child to the

[113] Schedule to the Sexual Offences Act.
[114] Waterhouse S (2008) *The Impact of the Changing Criminal Justice Response to Child Victims of Sexual Abuse: Good Intentions, Questionable Outcomes*. Open Society Foundation of South Africa occasional paper 4. Cape Town: OSFSA. Pg 12.
[115] Department of Social Development (2009), note 37 above.
[116] Department of Social Development (2009), note 38 above.
[117] Waterhouse S (2008), at pg 13, note 114 above.
[118] s144(1)(e) read with s146(1).

police[119]; likewise, the police must report cases of alleged child abuse or neglect to the provincial DSD for investigation by a social worker.[120] However, while a SAPS National Instruction[121] gives precise details on the procedure to follow when a report of child sexual abuse is made, it makes no reference to the obligation in the Children's Act to report the case to social services. There is only an oblique reference to the Children's Act in respect of removals: "Where there are grounds for believing that it will be in the best interest of the child to be removed to a place of safe care, the provisions of the appropriate legislation relating to children must be applied".[122]

Although the SAPS National Instruction includes guidance on ensuring that children receive counselling, no mention is given to more comprehensive support services such as family reconstruction or prevention and early intervention services.

6.1.4 Shelters for women and children suffering from domestic violence

For women experiencing domestic violence, shelters offer sanctuary where they can avoid further harm to themselves and their children. Studies of five shelters in Gauteng found that in most cases the women accessing these shelters were doing so for the first time; moreover, 53% of women did not return to their abusive partners after having been in the shelter.[123] Shelters are viewed as the "critical point of crisis intervention", with counselling for women and children being a key element of the support services they offer.[124] Shelters are thus an important form of crisis intervention to protect women and children from further violence.

The Domestic Violence Act obliges police officers to refer victims of domestic violence to shelters. However, the Act does not specify whose statutory duty it is to provide and fund these shelters. In practice the majority of shelters are run by NPOs with partial funding from government. The provision, funding and regulation of shelters is thus currently not legislated for.

Policy-making on shelters has traditionally fallen under the victim empowerment programme (VEP) in the national DSD, with provincial departments of social development partially funding some of the shelters. The National Policy Guidelines for Victim Empowerment (2011)[125] provides a framework for the planning and establishment of shelters, but views this as a task undertaken in partnership with civil society organisations. According to the Minimum Standards on Shelters for Abused Women (2011)[126], however, the national DSD is required to fast-track the establishment of shelters.

In 2009, after parliamentary hearings on the implementation of the Domestic Violence Act, the Portfolio Committee on Women, Children and People with Disabilities called on the Minister of Social

[119] s110(8).
[120] s110(4).
[121] South African Police Service (2008) *National Instruction 3/2008: Sexual Offences*.
[122] South African Police Service (2008), at pg 22, note 121 above.
[123] Bhana K, Vetten L, Makhunga L & Massawe D (2012) *Shelters Housing Women who have Experienced Abuse: Policy, Funding and Practice.* Tswaranang Legal Advocacy Centre & The Heinrich Böll Stiftung Southern Africa.
[124] Nagia-Luddy F & Mathews S (2011) *Service Responses to the Co-victimisation of Mother and Child: Missed Opportunities in the Prevention of Domestic Violence.* Technical report. Cape Town: RAPCAN & MRC.
[125] Department of Social Development (2009), note 37 above.
[126] Department of Social Development (2011), note 42 above.

Development to write regulations to the DVA to govern the availability of shelters and support services at shelters[127], but this recommendation has not been applied.

In its introduction, the Minimum Standards on Shelters for Abused Women (2011)[128] acknowledges the need for the DSD to ensure the availability of shelters for women and their children. Nevertheless, the policy fails to recognise children as co-victims, given that it deals primarily with service provision for women and contemplates the needs of children in terms only of schooling and child care. It outlines programme "considerations" that include providing a programme for children, but does not define the focus of this programme. In addition, it refers to the need to link with local "child-care" services, yet without mandating the need for therapeutic or counselling services. Bearing in mind that all of the children in shelters have been exposed to violence, this is a missed opportunity for preventative and early interventions that could have a lasting, positive effect on violence prevention.

6.2 Implementation challenges

6.2.1 The Children's Act

Lack of evidence-based planning and co-ordination in implementing services

The Children's Act requires that national and provincial DSDs develop profiles and strategies on child protection and thereby plan to ensure that their services meet demand. However, as already noted, the national strategy is not yet finalised, only one of the nine provinces has completed its needs profile, and none have developed their strategies.[129]

Lack of information and guidance for service providers

The DSD has produced a number of policy documents and guidelines aimed at guiding services providers on how to interpret and implement the Act. These include the Information Guide on the Management of Statutory Services (2013)[130], the intent of which is to promote uniform interpretation of the Act among social service professionals. The guide outlines clear processes for the management of cases and introduces new forms that were absent in the regulations. The department has also produced Norms, Standards and Practice Guidelines for the Children's Act (2010).[131]

Both documents are available on request if one knows what to ask for. However they are neither available on the department's website, nor have they been published in the *Government Gazette*. They have been handed out to a select audience at the National Child Care and Protection Forum, but other than that there is nothing to alert service providers to their existence. In short, many service providers in need of guidance are unaware of them or unable to obtain a copy.

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[127] Portfolio Committee on Women, Children and People with Disability (2010) *Strategic Report on Public Hearings on Implementation of Domestic Violence Act*. 16 February 2010. Cape Town: Parliament Research Unit. Section 3.3.5.
[128] Department of Social Development (2011), note 42 above.
[129] E-mail correspondence from an official in the Chief Directorate for Children, national Department of Social Development, 27 January 2014.
[130] Department of Social Development (2013), note 44 above.
[131] Department of Social Development (2010), see note 40 above.

Inadequate funding for child protection services

The child care and protection sub-programme typically receives the largest share of every province's Social Development budget. However, this sub-programme covers not only child protection services but also child and youth care centres, adoption and foster care services, some prevention and early intervention services, and partial care and ECD programmes. While it is therefore difficult to determine spending allocations across these services and assess if each is adequately funded, comparisons between the predicted cost of implementing the child care and protection programme and the amounts allocated show that it has been continuously under-funded since 2007/08.[132]

This is compounded by the fact that, as reported by the Financial and Fiscal Commission (FFC), some provinces fail to spend their allocations. According to the FCC, "[t]otal unspent funds by Social Development Departments over the four-year period (2007/2008–2010/2011) amounted to R1.2 billion, with unspent funds in 2010/2011 accounting for more than half this amount (R690 million)".[133] The FFC report goes on to suggest that departments are failing in their responsibility to channel the funds available to the NPOs that deliver services on their behalf.

More than 50% of child protection services in South Africa are provided by designated child protection organisations (DCPOs), i.e. NPOs accredited by the DSD to provide these specialist services. The national funding policy[134] allows the state to "subsidise" the cost of the services rather than pay for it in full, and as a result DCPOs rely on donor funding to bridge the gap between the government subsidy and their overall running costs. Although government transfers have increased in real terms, the funding crisis in the NPO sector is especially severe because the increase in government transfers has not kept pace with the increase in demand and the decrease in donor funding. The Finance Minister acknowledged this in his 2013 budget speech when he allocated an additional R600 million for NPO transfers over the next three years.[135] However, according to Budlender, "the additional amount provided is far from sufficient and is too late to reverse the closure of some NPOs and retrenchments by others".[136] Furthermore analysis of provincial allocations for the 2013/14 financial year reveals that a number of provinces are taking funds earmarked for NPOs and diverting them to pay for government personnel costs.[137]

Insufficient social service professionals trained in child protection

As observed in section 5.2.2, South Africa has a general shortage of social service professionals. To address this, the DSD is providing bursaries for social work students while the National Treasury has allocated additional funding to the provinces to employ graduates.[138]

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[132] Budlender D & Proudlock P have analysed of the budget for children's social services every year since the Children's Act was enacted. The series can accessed at: www.ci.org.za/index.php?option=com_content&view=article&id=493&Itemid=185.
[133] Financial and Fiscal Commission (2013), at pg 13, see note 63 above.
[134] Department of Social Development (2011), note 48 above.
[135] Minister of Finance (2013) *Budget speech*. Pretoria: National Treasury. Pg 24.
[136] Budlender D (2013) *The Provision and Funding of Child Welfare Services in South Africa: Submission to Financial and Fiscal Commission*. Cape Town.
[137] Budlender D & Proudlock P (2013), at pg 47-54, note 60 above.
[138] Budlender D & Proudlock P (2013), pg 46, note 60 above.

However, child protection is not covered in detail in the undergraduate curriculum; consequently, most of these students do not graduate with knowledge of child protection and are expected to learn it on the job. Furthermore, few social workers in service have been trained to do a child-sensitive assessment in accordance with the guidance provided in regulation 38 of the Children's Act.

In overview, the Khusela Rapid Assessment found that "the existing workforce is poorly prepared and exposed to work in child protection, and that there is a need to build a base of knowledge and skills in child protection, and to build a cadre of highly specialised and proficient child protection specialists".[139]

The authors of the study above argued that child protection should be recognised as specialisation in social work, and were subsequently commissioned to develop accredited training for social workers, social auxiliary workers and child and youth care workers to enable them to specialise in child protection. The training will include in-service training and curriculum development for undergraduates, but is scheduled for completion only in 2016.

6.2.2 The criminal justice laws

The low conviction rate in the criminal justice system for crimes against children points to a number of implementation challenges. These include poor investigation by the police; a lack of specialised units in the police, prosecuting authority and the courts; and largely non-existent therapeutic support for child victims and witnesses involved in criminal trials. Further challenges are light sentences for crimes against children and insufficient rehabilitation programmes for offenders convicted of harming children.

A national study on child homicide found that only a quarter of cases identified in 2009 as child homicide had a court outcome[140], evidence which indicates that child murders are not properly investigated and prosecuted. A Gauteng rape attrition study provides insight into the outcome of rape cases. It found that only 22% of reported rape cases went to trial and only one in 10 (10%) of reported cases of rape of girls aged 0 – 11 years resulted in a conviction[141]; likewise, one in five reported cases of rape of older girls (12 – 17 years) went to trial, with convictions being secured in only 7.6% of cases.

Compared to sexual assault, little is known about case outcomes for reported physical assault of children. There is a need for research in this area to investigate the management and outcome of such cases.

Lack of specialised policing units, prosecutors and courts

A factor contributing to the low conviction rates is the lack of specialised units within the police, the prosecuting authority and the courts.

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[139] Department of Social Development (2012) *Conceptual Framework for Capacity Building of Social Service Professionals and Occupations in Child Protection.* Khusela Project. Pretoria: DSD. Pg 21.
[140] Mathews S et al (2013), note 5 above.
[141] Vetten L, Jewkes R, Sigsworth R, Chirstofides N, Loots L & Dunseith O (2008) *Tracking Justice: The Attrition of Rape Cases through the Criminal Justice System in Gauteng.* Johannesburg: Tswaranang Legal Advocacy Centre, Medical Research Council & the Centre for Violence and Reconciliation.

In 2006 the South African Police Services restructured the Family Violence, Child Protection and Sexual Offences (FCS) Units, resulting in the function being devolved to cluster and station level. This had a major negative impact on the quality of investigations and case outcomes, as cases of violence against women and children were no longer being investigated by specialised police officers. In response to advocacy by civil society, the Minister of Police reinstated the FCS units in 2010, acknowledging that specialised investigations are needed to improve case outcomes.

Similarly, the year 2008 saw the demise of specialised sexual offences courts. The government argued that, seeing as these courts were better resourced than other courts, there was an inequitable distribution of services that supposedly violated the constitutional rights of other victims of crimes to equal protection and benefit of the law.[142] The decision was widely criticised. Under pressure from international agencies, civil society as well as multiple media reports of horrific rape homicides, the government reconsidered the matter, and in 2013 the Minister of Justice and Constitutional Development acknowledged the need to revitalise specialised sexual offences courts to improve court outcomes for sexual assault cases. The intention is to introduce 22 specialised sexual offences courts in the 2013/2014 financial year.[143]

As a critical part of South Africa's anti-rape strategy, Thuthuzela Care Centres have been introduced with the aim of reducing secondary trauma for victims, improving conviction rates and reducing the cycle-time for finalising cases. There are 51 such centres, which operate as one-stop facilities for the medical, legal and psychosocial management of a rape survivor. Initiated with donor funding and now led by the National Prosecuting Authority, it is an innovative multi-departmental programme that has improved the medico-legal aspect of criminal cases. An important shortcoming, though, is that the majority of the centres do not provide counsellors specialised in child trauma[144], as a result children and caregivers have to be referred to under-resourced NPOs for therapeutic services. A further challenge is that the centres do not provide ongoing court support for child victims and witnesses during the lengthy criminal trials.

If these specialised policing units, courts and Thuthuzela Care Centres are to be successful, they need to be championed by the government as special programmes and adequately resourced.

Lack of therapeutic support for child victims and witnesses

Despite the special protective mechanisms in court for child victims and witnesses, the reality is that criminal courts are not child-friendly and child victims and witnesses are seldom provided with therapeutic support to endure the criminal process. This disadvantages the outcome of cases that are heavily dependent on the evidence of a child victim or witness.[145] The result is a low conviction rate,

[142] Department of Justice and Constitutional Development (2013) *Report on the Re-establishment of the Sexual Offences Courts.* Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters. August 2013. Pretoria: DJCD.
[143] Department of Justice and Constitutional Development (2013), see note 142 above.
[144] USAID (2007) *Final Report on the Compliance Assessment of the Thuthuzela Care Centres with National Department of Health Guidelines for Managing HIV in the Context of Sexual Assault.* The Research Triangle Park: USAID. Pg 5.
[145] Vetten L et al (2008), note 141 above.

with perpetrators not being held accountable and children being exposed to secondary trauma and the continued risk of violence and abuse.

Knowing how difficult it is to get a conviction in a case involving a child victim or witness, prosecutors weigh up the merits of cases and decide whether a child will be a credible witness. If the child is traumatised, fearful or very young and as a result not articulate, the prosecutor may very well decide not to proceed with the case. Decisions are often made to ensure a higher conviction rate rather than promote a broader agenda of preventing violence.[146]

Providing children and their caregivers with therapeutic support before and during the trial would greatly improve the child's ability to give credible evidence in court; in turn, this would improve the conviction rate as well as enable the child to heal from the ordeal.[147]

Low sentences for child sexual abuse

Although the statutory minimum sentence for rape of a child is life imprisonment, the court has discretion to reduce the sentence if mitigating circumstances justify a deviation. However, when sentencing the accused and weighing up the harm to the child victim, judicial officers often do not take psychological trauma into account, which results in lesser sentences being handed down.[148] Training judicial officers in order to give them a better understanding of the long-term psychological impact of sexual assault would enable better court outcomes.

Lack of rehabilitation programmes for offenders

Due to the high number of inmates and the scarcity of professionals who offer programmes in correctional facilities, perpetrators of crimes against children are often released from correctional facilities after serving just half of their sentence and without having undergone a rehabilitation programme.[149] The result is that many are likely to re-offend and cause further harm to children.

6.2.3 Inter-departmental collaboration

Police are not referring reported child abuse and neglect to social services

Evidence from the MRC child homicide study suggests that cases of murder or infant abandonment were poorly investigated and there was little attempt to hold anyone responsible for deaths caused by abuse, neglect of abandonment. Detectives usually lacked the ability and skills to investigate family circumstances adequately, given that cases are investigated by general detectives rather than a specialised unit, and there was scant evidence of them working with social services during

[146] Frank C, Waterhouse S, Griggs R & Rontsch R (2009) *Raising the Bar: A Review of the Restructuring of the SAPS Family Violence, Child Protection and Sexual Offences Units.* Research series no. 1, January 2009. Cape Town: RAPCAN

[147] Frank C et al (2009), note 146 above.

[148] Van der Merwe A (2004) Minimum sentences in child sexual abuse cases: The after-effects of rape as a factor in imposing life imprisonment. *Criminal Law Forum, XV:*3.

[149] Mathews S, Abrahams N, Jewkes R & Martin L (2013) Underreporting child abuse deaths: Experiences from a national study on child homicide. *South African Medical Journal,* 103(3):132-133.

investigations.[150] Cases of fatal abuse were found where no referral had been made to social services – referrals which could have prevented the death of second and third siblings.

Increased collaboration between the police and social services would improve the evidence available for investigations and prosecutions; it would also ensure that children in the family receive the necessary care and protection services.

6.2.4 Shelters for women and children suffering from domestic violence

Too few shelters for women and children experiencing domestic violence

Too few shelters are available to meet the high incidence of domestic violence. In 2011 about 98 shelters were operational in South Africa.[151] During parliamentary hearings on the implementation of the Domestic Violence Act, the scarcity of shelters for victims of domestic violence was identified as a major constraint on the effective implementation of the Act, and it was recommended that the numbers be increased.[152] The DSD has acknowledged that, in rural areas in particular, there are insufficient numbers of shelters.[153]

Limited government funding for shelters impacts on quality of services

With EU funding for shelters having ended in 2009 and many other donors withdrawing from South Africa, shelters face a funding crisis and have appealed to the national and provincial DSDs to increase government funding. However, analysis of the provincial budgets reveals severe under-funding of existing shelters. In 2011/2012 the Gauteng DSD allocated only 2% of its budget to Victim Empowerment Programmes (VEP), including shelters. Similarly, the Western Cape allocated less than 1% of its overall DSD budget to VEP, and the amount transferred to NPOs working on VEP was consistently less than the amount transferred to NPOs for each of the other welfare service areas.[154]

The inadequate funding of shelters impacts on the availability of services needed by women and children whilst housed in a shelter. The full costs of running a shelter far exceed the financial contribution made by the DSD, resulting in many shelters cutting back on programmes, staff and services.

Limited funding also impacts on the availability of dedicated services targeting children in shelters. Children accessing shelters have both health and psychosocial needs, which are not met.[155] Such

[150] Mathews S et al (2013), note 5 above.
[151] Department of Social Development (2011) Brief to Select Committee on the Implementation of the Domestic Violence Act. Presentation to the Select Committee on Women, Children and People with Disabilities, National Council of Provinces, Parliament of South Africa, 31 August 2011.
[152] Tshwaranang Legal Advocacy Centre & Gender Advocacy Programme (2009) Domestic Violence Act implementation: 10-Year Review. Public hearings before the Portfolio Committee on Women, Children and People with Disabilities, National Assembly, Parliament of South Africa, 8 September 2009;
Resources Aimed at the Prevention of Child Abuse and Neglect (2009) On impact of legislation in preventing violence against children Public hearings before the Portfolio Committee on Women, Children and People with Disabilities, National Assembly, Parliament of South Africa, 8 September 2009.
[153] Department of Social Development (2011), note 151 above.
[154] Bhana K et al (2012), note 123 above.
[155] Nagia-Luddy F & Mathews S (2011), note 124 above.

services are particularly important for assisting in violence prevention among boys, as research shows that witnessing a mother being abused increases the risk of boys becoming perpetrators of violence.[156] Early intervention through the provision of appropriate therapeutic counselling is therefore crucial while children are in shelters.

Lack of services for children as co-victims of domestic violence

Children's co-victimisation by domestic violence is not well recognised in South Africa, where services are geared only to the needs of adult women.[157] Shelters struggle to meet the material and psychosocial needs of children co-resident in the shelters, despite the evidence that the average woman arriving at a shelter is accompanied by two children.[158] Spaces and services for older male children are particularly lacking.[159]

7. Measures aimed at healing children after violence

Child abuse has profound mental health effects, especially as the perpetrator is most likely someone whom the child knows and the abuse therefore occurs within a relationship built on trust and affection. Child abuse is associated with an increased risk for long-term psychological consequences, ones which can continue into later life and impact on adult functioning.[160] Support to deal with the trauma associated with child abuse effectively is therefore extremely important, particularly to assist the child and their family to deal with their initial reaction to the abuse, to provide long-term healing, as well as to establish the safety of the child161 and ensure good outcomes in criminal investigations and trials.

7.1 Laws and policies

Section 144(1)(e) of the Children's Act, read with section 146(1), obliges the state to provide and fund therapeutic services for children. The provisions can be interpreted as placing a statutory obligation on the provincial DSDs to provide therapeutic support to child victims and witnesses of violence. In practice these services are rendered by NPOs partially funded by provincial DSDs, Thuthuzela Care Centres managed by the National Prosecuting Authority, and by some health facilities managed by the provincial departments of health.

[156] Abrahams & Jewkes (2005), note 20 above.
[157] Nagia-Luddy F & Mathews S (2011), note 124 above.
[158] Bhana K et al (2012), note 123 above.
[159] Nagia-Luddy F & Mathews S (2011), note 124 above.
[160] Maniglio R (2009) Severe mental illness and criminal victimization: A systematic review. *Acta Psychiatrica Scandinavica*, 119(3):180-191.
[161] Callendar T & Dartnall L (2010), note 17 above.

7.2 Implementation challenges

7.2.1 Lack of child-specialised counsellors at Thuthuzela Centres and health facilities

Health facilities and Thuthuzela Care Centres tend not to have professionals who are trained in counselling traumatised children.[162] Children and their carers are generally referred to outside service providers, mainly NPOs who have limited resources due to under-funding by government and decreases in donor funding.

7.2.2 Lack of funding for NPOs that provide therapeutic services

NPOs providing rape counselling services are under huge financial stress due to funding cuts by donors and insufficient funding from the state.[163] The government has a clear legislative duty to ensure these services are provided and funded, but is failing to do so.

7.2.3 Long waiting lists for therapeutic services

The under-funding of NPO service providers has led to a shortage of service providers available to assist caregivers and children who are victims of violence. As a result there are long waiting lists for children and carers wishing to access these specialised services. Lengthy waiting periods and other logistical barriers due to the scarcity of service providers deter many from following through with the therapeutic process.[164]

7.2.4 Limited long-term psychological healing

A study in the Western Cape found that most children received only an initial debriefing, with very few of them returning for longer-term therapeutic intervention.[165] Financial considerations and long waiting lists at service providers impacted on families' decisions to return or not for long-term counselling. Unsurprisingly, then, the study found that six months after first initial debriefing more than 70% of children still presented with partial or full-symptom post-traumatic stress disorder.[166]

7.2.5 Little psychological support for caregivers

As already noted, long waiting lists, logistical barriers and financial considerations discourage many families from seeking longer-term counselling. However, it has been argued that an even more significant factor is the psychological barrier that children and caregivers face in seeking help.[167] A number of studies find that that emotional support from a parent or significant adult is critical for the

[162] USAID (2007), at pg 5, note 144 above.
[163] Bauer N (2013) SA: A rape crisis, but no funds or will to fight. *Mail & Guardian Online,* 12 February 2013: mg.co.za/article/2013-02-12-f.
[164] Mathews S, Jewkes R & Abrahams N (2013) Exploring mental health adjustment of children post sexual assault in South Africa. *Child Sexual Abuse,* 22(6):639-657.
[165] Mathews S et al (2013), note 164 above.
[166] Mathews S et al (2013), note 164 above.
[167] Mathews S et al (2013), at pg 651, note 164 above.

child's healing after a sexual assault.[168] If the caregiver herself is emotionally distraught and not provided with psychological services to equip her to process her own emotions and support the child, then the child is less likely to heal.

According to a study in the Western Cape, caregivers' ability to support their children was compromised by their own unresolved experiences of trauma; their emotional reaction to the way in which service providers dealt with (or failed to respond to) the children; a culture of wanting the child and family to forget about the incident and move on; and a lack of understanding of children's "acting-out" behaviour post-sexual assault, which tends to result in children being blamed or punished rather than supported.[169]

Despite the fact that national and international evidence highlights the importance of the psychological intervention including the caregiver and following a family-centred approach, many interventions in South Africa remain exclusively child-focused.

7.2.6 Questionable political will and understanding

Although the government has a legislative duty to provide and fund therapeutic services – which would prevent long-term negative developmental outcomes for the child and society at large – traditionally they have not been prioritised by parents and public decision-makers. Emotional scars are neither visible nor well understood; moreover, social norms and South Africa's gendered nature do not encourage children (or their caregivers) to talk about their feelings or abuse they have suffered. South Africans, in general, and decision-makers in particular, do not yet understand the importance of therapeutic services to breaking the intergenerational cycle of violence.

8. Recommendations

8.1 To prevent violence

8.1.1 Ensure evidence-based planning

- The national DSD should finalise and publish the National Strategy on Prevention and Early Intervention Programmes as is required by the Children's Act. This strategy should specifically tackle the design and implementation challenges raised in this chapter.
- As required by the Children's Act, the provincial DSDs should finalise their profiles based on research into the need for prevention and early intervention services versus current provision in each province.
- The evidence gathered through these profiling exercises, together with the direction provided by the national strategy, should be used to draft the provincial strategies required in terms of the Act.

[168] Mathews S et al (2013), at pg 652, note 164 above.
[169] Mathews S et al (2013), note 164 above.

- Before being finalised, these provincial strategies should follow a transparent and inclusive consultative process with the current NPO service providers.

8.1.2 Take successful prevention and early intervention programmes to scale

- The state needs to invest in establishing which programmes are shown to make a difference and then take them to scale in order to have maximum impact in terms of preventing violence.
- Given the evidence showing that young children under five are most at risk of abuse in the care of their mothers, and that interpersonal conflict is high amongst adolescent boys, attention should be focused on rolling out interventions that have proven successful in supporting these two groups in particular.

8.1.3 Ensure adequate funding of NPOs providing prevention and early intervention programmes

- The DSD should legislate minimum funding norms and standards to ensure uniform and adequate provincial government funding of NPOs who provide prevention and early intervention programmes.

8.1.4 Prohibit the use of corporal punishment in all settings – including the home

- South Africa has an entrenched culture of violence. This culture cannot be successfully changed without changing society's attitudes about the acceptability of the use of violence as a method to discipline children. Furthermore, international and constitutional law obliges the state to prohibit the use of corporal punishment in the home. It is therefore recommended that the state prohibit corporal punishment in the home by amending the Children's Act.
- The civil society Working Group on Positive Discipline is committed to its campaign for a prohibition of corporal punishment in the home. However, the campaign is fighting an uphill battle because the state has not yet taken a clear child rights position and the majority of adults are in favour of retaining parents' rights to use violence as form of discipline. It is recommended that civil society, faith-based organisations, donors and businesses support this campaign to enable a shift in societal attitudes and practices with regards to child discipline.
- Parenting skills programmes, focusing on teaching parents alternatives to violent forms of discipline, are predominantly run by under-funded NPOs and are only reaching small numbers of parents. To equip parents with the necessary skills to shift their practices, the state should invest in funding these parenting programmes and thereby allow them to expand to reach more parents.
- The state should establish further mass-based campaigns that promote positive parenting using the media and international and national child rights days. High-profile government leaders should lead by example and publicly come out in support of non-violent forms of discipline.
- The state should support training that enables teachers to draw on a range of alternatives to corporal punishment within the school environment. [See chapter 6 on the Right to Basic Education for further recommendations on addressing corporal punishment in schools.]

8.2 To protect children, who have experienced violence, from further harm

8.2.1 Ensure evidenced-based planning

- The national DSD should finalise and publish the National Strategy on Protection Services as required by the Children's Act. The strategy should tackle the design and implementation challenges raised in this chapter.
- Provincial DSDs should finalise their profiles based on research into the need for protection services versus current provision in each province, as required by the Children's Act.
- The evidence gathered through these profiling exercises, together with the direction provided by the national strategy, should be used to draft the provincial strategies that are required in terms of the Act.
- Before being finalised, the national and provincial strategies should follow a transparent and inclusive consultative process with DCPOs and other relevant NPOs.

8.2.2 Support family members caring for orphans via the social assistance system rather than the child protection system

Family members caring for orphans should be provided with social assistance via the social assistance system and not the overburdened child protection system. The new mechanism should ensure that the 1.1 million orphans in the care of extended family carers who are living in poverty can access an adequately valued grant and other prevention services timeously without the need for an investigation by a designated social worker or a children's court inquiry. This requires amendments to the legal frameworks of the Children's Act and Social Assistance Act.

8.2.3 Promote removal of offenders in the best interests of children

Designated social workers and police officers should be trained and encouraged to use section 153 of the Children's Act to remove offenders, rather than children, from the household when abuse has taken place in the home.

8.2.4 Improve accountability mechanisms to ensure social workers provide families with adequate support

The lack of sufficient numbers of social workers, combined with a high demand for protection services, means that social workers are more likely to focus on the most serious cases that require Children's Court inquiries and have little time to provide support services to children and families at risk of harm. As a result, children in need of prevention and early intervention services could be neglected and not receive support services. Discussions and consultation are needed with children, families, service providers and relevant government departments on how to improve accountability mechanisms for these cases to ensure that families at risk receive support before the risk escalates to harm to the child.

8.2.5 Ensure adequate funding of designated child protection organisations

The DSD should legislate minimum funding norms and standards to ensure uniform and adequate provincial government funding of NPOs that provide designated child protection services.

8.2.6 Improve access to information and guidance on how the child protection system works

The department should make strategies, policies, guidelines and norms and standards accessible by publishing the documents on its website on a page dedicated to the Children's Act. All provincial departments of social development should also make the documents accessible on their websites.

8.2.7 Improve referrals and collaboration between the police and social services

Although the Children's Act places an obligation on the police to refer child abuse cases to the DSD, this obligation is not being implemented. To remedy the situation, the SAPS should issue a national instruction to all police offices, alerting them to the obligation to refer cases to social services for investigation, support, treatment and follow-up. The SAPS should also cover the Children's Act in the training curricula for new recruits as well as for members undergoing in-service training.

8.2.8 Train social workers to make child-sensitive assessments that avoid secondary trauma

- Regulation 38 sets out guidance for social workers on how to interview a child in a sensitive manner that preserves the child's dignity and avoids secondary traumatisation. However, few social workers have been trained in following these guidelines. The DSD should train social workers employed by the department and DCPOs on how to assess children who have been abused. Training should be accredited for continuous professional development with the Professional Board for Social Workers.
- Training on child abuse assessment should be part of the core undergraduate curriculum for social workers.

8.2.9 Establish and adequately resource specialised sexual offences courts

- The Department of Justice and Constitutional Development should finalise the amendment of the Sexual Offences Act in order to provide an enabling provision for the establishment of sexual offences courts. The enabling legislation must make provision for the necessary regulations to guide the designation and resourcing of sexual offences courts.
- However, the passing of the amendment should not delay the initial establishment of the 57 regional courts that have been identified as already being resourced closest to the sexual offences court model. In the interim, it is recommended that these courts be dedicated as sexual offences courts by the Chief Justice in consultation with the Minister. This is to ensure that immediate relief services are brought to the victims to improve response to the rising levels of sexual violence in South Africa.

- As soon as the amendment of the Act is finalised, the Minister may designate these regional courts as sexual offences courts in terms of the enabling provision of the amended Act.
- Adequate budget should be allocated to enable these courts to provide quality and child-friendly services to child victims and witnesses.

8.2.10 Sensitise magistrates and judges to the long-term psychological harm caused by sexual assault

Judicial officers should be trained to understand the long-term psychological impact of sexual assault on children. Training on how to question children sensitively is also necessary. Such training will contribute to improved conviction rates and appropriate sentencing of offenders.

8.2.11 Ensure that perpetrators of violence against children are rehabilitated before being released

Perpetrators of crimes against children should not be released on early parole unless there is evidence that they have successfully undergone a therapeutic programme.

8.2.12 Amend the Domestic Violence Act to place a clear obligation on government to fund shelters

The Domestic Violence Act obliges police officers to refer victims of domestic violence to shelters. However, the Act does not specify whose statutory duty it is to provide and fund these shelters. The government needs to accept clear responsibility for providing and funding shelters in legislation and ensure that NPO service providers are adequately funded to provide quality services both to women and children.

8.2.13 Policy, law and funding on domestic violence should recognise children as co-victims

Although many children stay in shelters with their mothers, the policy, laws and funding mechanism for shelters fail to fully recognise children as co-victims of domestic violence. This results in a lack of available spaces for children in shelters as well as missed opportunities in providing therapeutic services to children who have witnessed violence against their mothers or experienced it themselves.

8.3 To heal children after violence

8.3.1 Place a statutory obligation on the state to provide therapeutic services to child victims and witnesses throughout the criminal process

While there is a statutory obligation on the state to provide therapeutic services to children and families in general, there are no clear obligations on the state in either the Criminal Procedure Act or Sexual Offences Act to ensure that child victims and witnesses receive therapeutic services,

counselling, court preparation and support, which are essential to protect children from secondary trauma as well as ensure good case outcomes.

Amending the Sexual Offences Act and Criminal Procedure Act to place such an obligation expressly on the state would help to ensure that such services are prioritised for delivery and budget allocations.

8.3.2 Ensure adequate funding of NPOs providing therapeutic services

The DSD should legislate minimum funding norms and standards to ensure uniform and adequate provincial government funding of NPOs that provide therapeutic counselling to child victims and witnesses and their carers.

8.3.3 Ensure that caregivers also receive appropriate psychological support

In recognition of the pivotal role that caregivers play in a child's healing process:

- policy, law and minimum standards that regulate therapeutic services for children who have experienced violence should recognise and promote the importance of a family-centred approach;
- service providers that build caregiver support into their programmes should be prioritised for funding from government; and
- logistical, psychological and economic barriers deterring caregivers from following through with counselling for themselves and their children should be investigated and addressed.

8.3.4 Roll out successful service models that reach children and caregivers in rural areas

Children in rural areas need greater access to therapeutic services as there are few NPOs and government service providers in these areas. To meet this challenge, several NPOs have collaborated to develop an innovative programme that provides quality therapeutic support. Childline South Africa and the National Association of Child Care Workers, via its Isibindi programme, have created a short-term intensive residential programme for sexually abused children and their caregivers living in rural areas. The programme is currently funded by donors with some state funding, but needs to be rolled out to reach larger numbers of children. To support the roll-out, the programme requires ongoing evaluation to provide the necessary evidence on the core components of the programme that should be replicated.

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Chapter 9

Children's rights to appropriate alternative care when removed from the family environment: A review of South Africa's child and youth care centres

Lucy Jamieson

Contents

1. Introduction

The Constitution of the Republic of South Africa Act 108 of 1996, states that every child has the right "to family care or parental care, or to appropriate alternative care when removed from the family environment".[1] This right combines several rights in international and regional law: the right of every child to family care, the right not to be separated from the family except when necessary for the child's best interests, and the rights of children deprived of their family environment to alternative care by the state. When read together these rights impose a duty on the state to ensure that:

- measures are in place to support families to care for children in order to prevent children from being separated from their families unnecessarily;
- removal of children from their families by the state is only done as a measure of last resort and for the shortest period possible;
- children deprived of a family environment are provided with alternative care and therapeutic services; and
- both the child and the family are provided with social services to promote reunification or long-term placement in another family environment.

The Children's Act 38 of 2005 provides for and regulates alternative care for children. The Act recognises three forms of alternative care: temporary safe care, foster care, and care in child and youth care centres.[2]

This chapter focuses on care in child and youth care centres (CYCCs). The chapter begins with a situational analysis of the child and youth care sector, after which the rights to alternative care are identified in international, regional and constitutional law. This is followed by a description of the laws

[1] s28(1)(b).
[2] s167(1).

and policies South Africa has adopted to give effect to these rights and by an analysis identifying gaps in the legal framework. The focus shifts thereafter to the main implementation challenges preventing South Africa from realising the rights of children to, and in, alternative care. The chapter concludes by recommending reforms to the law, measures to address key implementation challenges, and research into particular areas in need of further data.

2. Situational analysis

A CYCC is defined in the Children's Act as "a facility for the provision of residential care to more than six children outside the family environment".[3]

A CYCC can accommodate one or more of the following categories of children:

- children who have been temporarily removed from their families pending a social work investigation;
- abandoned or orphaned children and children on the streets whose circumstances are being investigated by a social worker;
- children who have been found in need of care and protection by a children's court;
- child offenders awaiting trial or sentence; and
- children who have been convicted of a crime.[4]

Facilities where children are cared for with the consent of their parents – such as partial care facilities, drop-in centres, boarding schools or other residential facilities attached to schools – are not considered as CYCCs.[5] Similarly, children in correctional facilities and prisons managed by the Department of Correctional Services are not legally regarded CYCCs.[6] Safe homes or "safe parents" providing temporary care to six or fewer children at a time are, likewise, not deemed to be CYCCs.[7]

In addition to their residential (i.e. "care") programmes, all CYCCs are expected to offer therapeutic and developmental programmes tailored to the needs of the children they accommodate.[8] Each centre can offer a range of programmes. Previously, facilities were classified as places of safety, children's homes, shelters for children on the streets, schools of industry, reform schools or secure care facilities. These classifications were based on the type of children being accommodated, and also restricted centres in terms of the programmes they could offer. Such classifications are no longer recognised in the Children's Act. However, they are referred to in this chapter because they are still in use on the ground and because the most recent studies providing data on CYCCs used them in their data collection and analysis.

[3] s191(1).
[4] s191(2).
[5] s191(1)(a)-(d).
[6] s191(1)(e).
[7] They must, however, be approved to provide temporary safe care.
[8] s191(2).

The law requires that all CYCCs must register as a CYCC with the relevant provincial department of social development.[9] South Africa's initial country report to the African Union on the African Charter on the Rights and Welfare of the Child states that, excluding centres caring for children in conflict with the law, there were 355 registered alternative care facilities in the 2011/2012 financial year, accommodating 21 047 children.[10] A survey by the Community Agency for Social Enquiry (CASE) commissioned by the national Department of Social Development (DSD) and UNICEF found that, in the same financial year, there were at least 115 unregistered facilities accommodating 2 144 children[11] and 72% of these facilities had attempted to register but were awaiting the result[12]. The study is not a complete audit but a rapid survey undertaken to gain insight into the numbers and reasons for unregistered facilities, and it acknowledges that there are unregistered facilities which would not have been captured by the survey.

A CASE survey in 2010 found that more than 90% of registered CYCCs were run by non-profit organisations (NPOs).[13] Similarly, the 2012 CASE survey of unregistered CYCCs found that most were run by NPOs.[14] When analysed into types of CYCCs, the survey of registered CYCCs revealed that 96% of "children's homes", 96% of "shelters" and 48% of "places of safety" were operated by NPOs.[15] These three types of centres house the majority of children within the child and youth care system. Schools of industry, reform schools and secure care centres, which together house a smaller number of children, are run mainly by provincial departments of social development or are contracted out to for-profit companies.

Eighty percent of registered CYCCs reported that they received a subsidy from the DSD for all the children in their care, while 5% reported that they received a subsidy for some of the children in their care.[16] Twenty-eight percent of unregistered CYCCs reported that they received some funding from the DSD.[17] The subsidies and other types of funding from the DSD only partially cover the costs of running centres, and the NPOs have to fundraise to make up the difference.[18]

Table 1 shows that, according to the two surveys by CASE, most children are admitted to CYCCs due to abandonment, maltreatment or neglect. Orphaning and abuse are the next largest categories of reason for admission. The surveys also reveal that proportionately more children are admitted to unregistered facilities than to registered facilities due to orphaning or the illness of a parent or guardian.

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[9] s197(a).
[10] Department of Women, Children and People with Disabilities (2013) *South Africa's Initial Country Report to the African Committee of Experts on the Rights and Welfare of the Child on the African Charter on the Rights and Welfare of the Child (Reporting Period: January 2000 – April 2013).* Pretoria: DWCPD.
[11] Community Agency for Social Enquiry (2012) *Unregistered Child and Youth Care Centres and Temporary Safe Care*. Pretoria: Department of Social Development & UNICEF. Pg 3. [Hereafter CASE (2012)]
[12] CASE (2012) at pg 3, note 11 above.
[13] Community Agency for Social Enquiry (2010) *Baseline Study on Registered Child and Youth Care Centres*. Pretoria: Department of Social Development & UNICEF. Pg 20. [Hereafter CASE(2010)]
[14] CASE (2012) at pg 17, note 11 above.
[15] CASE (2010) at pg 21, note 13 above.
[16] CASE (2010) at pg 31, note 13 above.
[17] CASE (2012) at pg 20, note 11 above.
[18] CASE (2010) at pg 30-37,note 13 above;
CASE (2012) at pg 20-21, note 11 above.

Table 1: Reason for admission by type of centre

Reason for admission	Registered CYCCs	Unregistered CYCCs
Abused	14%	12%
Abandoned, maltreated or neglected	44%	45%
Orphaned	13%	21%
Unaccompanied minor	3%	1%
Living and working/begging in street	5%	3%
Illness of parent/guardian	3%	9%
In trouble with the law	1%	0%
Other	15%	9%
Unspecified	2%	–
Total	**100%**	**100%**

Source: Community Agency for Social Enquiry (2012) *Unregistered Child and Youth Care Centres and Temporary Safe Care*. Pretoria: Department of Social Development & UNICEF**,** Table 20, pg 40.

The studies by CASE indicate that abandonment is the most frequently cited reason for admission into CYCCs (see Table 1). However, the fact that these children make up a large proportion of all children in CYCCS does not necessarily mean that the demand for services is being met. A study by the Medical Research Council reveals that, in 2009, 161 babies died due to abandonment at birth.[19] This clearly shows that some abandoned babies and their mothers fall through the child protection net and do not receive social services. In the absence of reliable data on the total numbers of still-living babies and older children who have been abandoned, the adequacy of provision by CYCCs cannot be accurately assessed.

Likewise, there is no reliable data on the incidence and prevalence of child abuse or neglect in South Africa. Data sources are contradictory. South Africa's second and third combined country report on the United Nations Convention on the Rights of the Child puts the total number of reported abuse and neglect cases (sexual, physical, emotional and neglect) at 1 348 for 2010/11 based on data from the national DSD.[20] However, in the same year the police recorded 27 417 reports of sexual offences against children, as well as 24 405 cases of common assault or assault with intent to do grievous bodily harm against children.[21] Although these statistics are not directly comparable, the police data suggests that the DSD is almost certainly under-reporting levels of abuse. The government admits that "[t]hese data gaps hamper an accurate analysis of the extent to which the full spectrum of protective rights is being realised".[22] In view of the fact that the police have an obligation to notify either the provincial DSD or a designated child protection organisation (DCPO) of reports of abuse and neglect, the discrepancies in the data point also to a lack of co-operation between government departments.

[19] Mathews S, Abrahams N, Jewkes R, Martin L J & Lombard C (2013) The epidemiology of child homicides in South Africa. *Bulletin Of The World Health Organization*, 91(8), 562-568. doi:10. 2471/BLT. 12. 117036. Derived from Table 3, pg 565.
[20] Department of Women, Children and People with Disabilities (2013) *The United Nations Convention on the Rights of the Child. South Africa's Combined Second, Third and Fourth Periodic State Party Report to the United Nations Committee on the Rights of the Child. (Reporting period: January 1998 – April 2013)*. Pretoria: DWCP Disabilities. Table 31, pg 101.
[21] South African Police Service (2012) *Crime Report 2010/2011*. Pretoria: South African Police Service.
[22] Department of Women, Children and People with Disabilities (2013), note 10 above.

Data on the numbers of orphans is available in South Africa from a range of sources. In 2011 the country had approximately 1.5 million maternal and double orphans.[23] Almost all of these orphans live with relatives. The majority are in "informal kinship care", with a smaller proportion (approximately 460 000) having being formally placed by the courts into statutory foster care with relatives.[24] This indicates that the majority of orphans are currently being cared for in a family environment and only a very small proportion are in CYCCs.

Not all children found to be in need of care and protection will be placed in CYCCs. Depending on the individual child's needs, many will be placed in foster care while others might remain in the family under supervision. By implication, even if there was accurate data on levels of abuse, neglect and abandonment, it would remain a challenge to establish the actual need for places in CYCCs.

3. Rights analysis

3.1 International and regional law

The provisions of the United Nations Convention on the Rights of the Child (1989) (UNCRC) and the African Charter on the Rights and Welfare of the Child (1990) (ACRWC) are similar. Both treaties protect the rights of children to know and be cared for by their parents[25], as well as to be protected from: all forms of violence, abuse, neglect and maltreatment[26]; sexual and economic exploitation[27]; abduction, sale and trafficking[28]; and drug abuse[29].

These treaties also impose duties on the state to support parents to care for their children[30], to protect the family[31] and to ensure that children are separated from their parents only when it is in the child's best interests[32]. In order to balance the right to family and the protection rights, the state has a duty to establish effective procedures for identification, reporting, referral, investigation, treatment and follow-up.[33] Moreover, any separation from parents must be effected by competent authorities who are subject to judicial review[34], and must be for the shortest period of time. If the child and parents are separated due to an action by the state, the ACRWC imposes a duty on the state to provide them with essential information about the other party.[35]

[23] Meintjes H & Hall K (2013) Demography of South Africa's children. In: Berry L, Biersteker L, Dawes A, Lake L & Smith C (eds) *South African Child Gauge 2013*. Cape Town: Children's Institute, University of Cape Town. Pg 88.
[24] K Hall, Children's Institute, University of Cape Town, analysis of the *General Household Survey 2011.*
[25] Art 7 UNCRC and Art 19 ACRWC.
[26] Art 19 UNCRC and Art 16 of the ACRWC.
[27] Arts 32 and 34 UNCRC and Arts 15 and 27 ACRWC.
[28] Art 35 UNCRC and Art 29 ACRWC.
[29] Art 33 UNCRC and Art 28 ACRWC.
[30] Art 18(2) UNCRC and Art 20 ACRWC.
[31] Art 16 UNCRC and Art 18 ACRWC.
[32] Art 9(1) UNCRC and Art 19 ACRWC.
[33] Art 19(2) UNCRC and Art 16(2) ACRWC.
[34] Art 9(1) UNCRC and Art 19(1) ACRWC.
[35] Art 19(4) and (4) ACRWC.

Children who are deprived of family care have the right to alternative care, to maintain contact with their families[36] and to continuity in upbringing[37]. The state has a duty to provide programmes to ensure children's physical and psychological recovery as well as social reintegration.[38] Every placement must be reviewed periodically to ensure that children are returned to a family environment as soon as possible.[39]

3.2 South African constitutional law

The rights in the South African Constitution are based on international law and provide strong protection for children's rights, including the right to family care and alternative care. The Constitution provides that every child has the right:

- to family care or parental care, or to appropriate alternative care when removed from the family environment[40];
- to social services[41];
- to be protected from maltreatment, neglect, abuse or degradation[42];
- to be protected from exploitative labour practices[43]; and
- to have his or her best interests considered of paramount importance in every matter concerning him or her[44].

3.3 The meaning of these rights and obligations

The United Nations has published Guidelines for the Alternative Care of Children[45] to assist states in correctly interpreting their obligations to children who are deprived of parental care or are at risk of being so. The South African courts have also interpreted the constitutional rights and elaborated on the state's obligations in relation to children in alternative care.

3.3.1 Right to family care and parental care

The state is obliged to develop measures to reduce "rates of institutionalization of children by supporting family preservation and community-based alternatives".[46] These measures should address the root causes of abuse and maltreatment, empower families with "attitudes, skills, capacities and

[36] Art 9(3) UNCRC.
[37] Art 20 UNCRC and Art 25(3) ACRWC.
[38] Art 39 UNCRC.
[39] Art 25 UNCRC.
[40] s28(1)(b).
[41] s28(1)(c).
[42] s28(1)(d).
[43] s28(1)(e).
[44] s28(2).
[45] United Nations General Assembly (2010) *Guidelines for the Alternative Care of Children: Resolution/adopted by the General Assembly*, *24 February 2010, A/RES/64/142*. Geneva: United Nations. [Hereafter UN Guidelines for the Alternative Care of Children]
[46] Pinheiro P (2006) *World Report on Violence against Children: Report of the Independent Expert for the United Nations Study on Violence against Children. Presented at the sixty-first session, item 62(a) of the provisional agenda, promotion and protection of the rights of children.* Geneva: United Nations (A/61/299). Para 112.

tools" to care for and protect children, and be culturally sensitive.[47] In particular, South Africa has been advised by the UN Committee on the Rights of the Child (CROC) to develop "training for parents [in order to] to discourage the abandonment of children".[48] Other supportive social services that the state should provide include "day care, mediation and conciliation services, substance abuse treatment, financial assistance, and services for parents and children with disabilities".[49]

To ensure that children are removed from their families only when it is in the child's best interests, the state has an obligation to provide child protection services to investigate the circumstances of the child and his or her family. Any decision to remove a child must be made by "suitably qualified and trained professionals … in full consultation with all concerned"[50] and be subject to judicial review[51].

The child's right to participation is a key principle which must be respected in all matters affecting the child; these matters include the assessment, investigation and court proceedings that determine if he or she needs to be placed in alternative care.

The child should be placed in a centre as a close as possible to his or her community. Family members should be able to visit the child in the centre and be supported to keep in contact between visits. When it is safe to do so, the child should be supported to visit members of his or her family; however, the child should be able to return to the centre at any time if he or she feels unsafe.

According to the CROC, "[l]imits must be placed on the length of time children spend in these institutions, and programmes must be developed to support any children who stay in these institutions … to successfully reintegrate them into their communities".[52] Multi-disciplinary teams must work to rehabilitate both the child and the family and conduct ongoing assessments[53] so that the child can be reunified with his or her own family or a suitable alternative as soon as possible. In the case of older children, "psychosocial assistance should be provid[ed] for the children and the education provided should seek to prepare children for an independent life in adulthood".[54]

3.3.2 Right to alternative care

The right to alternative care for children who are removed from the family environment means that the government must provide CYCCs and community-based alternatives. This right is not subject to progressive realisation in the Constitution and therefore any failure to realise it will be assessed against the high standards contained in the "limitation of rights" section of the Bill of Rights.[55]

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[47] UN Guidelines for the Alternative Care of Children, para 14, note 45 above.
[48] Committee on the Rights of the Child (2000) *Concluding Observations of the Committee on the Rights of the Child: South Africa CRC/C/15/Add.122.* Geneva: CROC. Para 25.
[49] UN Guidelines for the Alternative Care of Children, para 33, note 45 above.
[50] UN Guidelines for the Alternative Care of Children, para 39, note 45 above.
[51] Art 9(1) of the UNCRC and Art 19 of the ACRWC.
[52] Committee on the Rights of the Child (2003) *General Comment No. 3, HIV/AIDS and the Rights of the Child. CRC/GC/2003/3*, Geneva: CROC. Para 35.
[53] UN Guidelines for the Alternative Care of Children, para 48, note 45 above.
[54] Committee on the Rights of the Child (2006) *Concluding Observations of the Committee on the Rights of the Child: Hungary CRC/C/HUN/CO/2.* Geneva: CROC. Para 33.
[55] s36 of the Constitution.

The state also has a responsibility to ensure proper planning and co-ordination:

> *It is a responsibility of the State or appropriate level of government to ensure the development and implementation of coordinated policies regarding formal and informal care for all children who are without parental care. Such policies should be based on sound information and statistical data.* [56]

All plans should be accompanied by indicators and goals; furthermore, the state has a duty to establish monitoring and evaluation systems, including budgetary analysis, to gauge its progress against these goals.

The CROC recommended that South Africa develop additional programmes to facilitate alternative care as well as provide extra training for social service professionals working in the child and youth care sector.[57]

Range of programme in small centres

The UN Guidelines state that "[t]he use of residential care should be limited to cases where such a setting is specifically appropriate, necessary and constructive for the individual child concerned and in his/her best interests".[58] This means there should be a range of placement options and that CYCCs should offer programmes suited to the child's therapeutic needs. Globally, states are expected to draft a "deinstitutionalization strategy, with precise goals and objectives, which will allow for their [large residential facilities] progressive elimination".[59]

All CYCCs must meet specific standards of care, health and safety[60], and "comply with legal protection safeguards".[61] States should regularly assess centres to ensure they meet appropriate standards, and link quality-assurance mechanisms to training and capacity-building so that standards can be constantly improved. In addition, the CROC recommended that South Africa should establish independent complaint and monitoring mechanisms for alternative-care institutions.[62] These mechanisms should be easily accessible to children, parents and those responsible for children without parental or family care. The monitoring mechanism should:

- investigate alleged violations of children's rights;
- seek to improve the treatment of children deprived of parental care by recommending appropriate policies and/or laws based on research into child protection, health, development and care; and
- contribute independently to the reporting process under the UNCRC.[63]

[56] UN Guidelines for the Alternative Care of Children, para 69, note 45 above.
[57] Committee on the Rights of the Child (2000) para 25, note 48 above.
[58] UN Guidelines for the Alternative Care of Children, para 21, note 45 above.
[59] UN Guidelines for the Alternative Care of Children, para 23, note 45 above.
[60] UN Guidelines for the Alternative Care of Children, para 90, note 45 above.
[61] Committee on the Rights of the Child (2003) para 35, note 52 above.
[62] Committee on the Rights of the Child (2000) para 25, note 48 above.
[63] UN Guidelines for the Alternative Care of Children, para 129, note 45 above.

Special measures for vulnerable groups

All children have the right to alternative care without discrimination. However, to ensure equitable access by all vulnerable groups, states must adopt special measures for them.[64] The High Court has ruled that foreign children, irrespective of their legal status, have the right of access to the same services and special measures of protection as South Africa nationals[65], further to which the CROC advises that special measures should be taken to ensure they are properly documented[66]. In respect of children with disabilities, the state has an obligation to ensure that there are sufficient child and youth care centres adapted to provide care for children with disabilities and that these are staffed with specially trained personnel.[67]

3.3.3 Rights of children when they are in alternative care

If a child is in the care of a parent or his or her family, the parent or family has the primary responsibility to provide for the basic needs of the child.[68] However, if the child is in alternative care, the state is primarily responsible for providing for the needs of the child.[69]

In *Centre for Child Law and Others v MEC for Education Gauteng and Others* [70] the court found that children in a school of industry were being neglected because they had neither adequate clothing and bedding nor access to psychosocial services. Justice Murphy clarified that in respect of children in alternative care the state has an unqualified and immediate obligation[71] to provide for their basic needs[72] as well as psychological and therapeutic needs[73]. He proclaimed that these are a fundamental component of the rights to care and protection:

> *What message do we send to the children when we tell them that they are to be removed from their parents because they deserve better care, and then wholly neglect to provide that care? We betray them, and we teach them that neither the law nor state institutions can be trusted to protect them … in the final analysis we hypocritically renege on the constitutional promise of protection*.[74]

Whilst the state proposed to approach the Red Cross and other donors to assist in the provision of sleeping bags for the children, the judge ruled that the state had a direct responsibility for the children's needs.[75] Proudlock argues that this judgment should be interpreted to mean that the state

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[64] Committee on the Rights of the Child (2005) *General Comment No. 6, Treatment of Unaccompanied and Separated Children outside their Country of Origin. CRC/GC/2005/6*. Geneva: CROC.
[65] *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 (T).
[66] Committee on the Rights of the Child (2005) at paras 39 and 40, note 64 above.
[67] Children's Act s192(1) read in conjunction with s11.
[68] *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), Constitutional Court, para 77; as cited in Proudlock P (2009) Children's socio-economic rights. In: Boezaart T (2009) *Child Law in South Africa*. Claremont: Juta. Pg 300.
[69] *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 (T), para 17; as cited in Proudlock P (2009) Children's socio-economic rights. In: Boezaart T (2009) *Child Law in South Africa*. Claremont: Juta. Pg 301.
[70] *Centre for Child Law and Others v MEC for Education Gauteng and Others 2008 (1) SA 223 (T),* at 227 I-J.
[71] *Centre for Child Law and Others v MEC for Education Gauteng and Others 2008,* at 227 I-J, note 70 above.
[72] *Centre for Child Law and Others v MEC for Education Gauteng and Others 2008,* at 228 F-G, note 70 above.
[73] *Centre for Child Law and Others v MEC for Education Gauteng and Others 2008,* at 229 B-C, note 70 above.
[74] *Centre for Child Law and Others v MEC for Education, Gauteng and Others 2008*, at 229 D-E, note 70 above.
[75] *Centre for Child Law and Others v MEC for Education Gauteng and Others 2008*, at 228 F-G, note 70 above.

should be funding CYCCs at a level adequate to provide children with nutritious food, health care services, shelter and social services.[76] The UN Guidelines also make it clear that the state bears this responsibility in respect of nutrition, specifying that the child should have "wholesome and nutritious food in accordance with local dietary habits and the child's religious beliefs".[77] Moreover, the Guidelines say that children should have access to counselling[78] and that the state has a duty to provide formal, non-formal and vocational education.[79] Children in alternative care also have the right to continuity in their upbringing, which is why it is usually in the child's best interests for the child to remain in the same school where he or she was enrolled prior to being placed in alternative care.

Any child who is the victim of "any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts" [80] or "drug and alcohol abuse"[81] has the right to rehabilitation services that promote psychological recovery and social reintegration. Essentially, all children placed in alternative care are entitled to rehabilitative treatment. International law sees this in terms of "therapeutic programmes"; however, the accepted wisdom in the child and youth care sector is that centres should create a "therapeutic environment" in which staff respond at every moment to the needs of the child.[82] This requires skilled staff and low ratios of staff to children.

Part of creating a therapeutic environment is ensuring that children's rights are respected at all times. Both the UNCRC and ACRWC prohibit "cruel, inhuman or degrading treatment or punishment"[83]; in the same vein, the UN Guidelines require strict rules to ensure that disciplinary measures are not cruel or degrading and do not constitute psychological violence[84].

Children have a right to have their views taken into consideration whenever a decision is being taken on their behalf or when plans are being developed about their care. This means that children must be present at review panels or in court proceedings.[85]

The UN Guidelines deal extensively with the many dimensions of children's right to privacy and confidentiality.[86] They call for domestic legislation to place strict controls on searches of children's personal possessions and communications[87], indicating, too, that boys and girls must have separate sleeping areas and bathroom facilities and that there should be private spaces or consulting with family

[76] Proudlock P (2009) Children's socio-economic rights. In: Boezaart T (2009) *Child Law in South Africa*. Claremont: Juta. Pg 303.
[77] UN Guidelines for the Alternative Care of Children, para 82, note 45 above.
[78] UN Guidelines for the Alternative Care of Children, para 83, note 45 above.
[79] UN Guidelines for the Alternative Care of Children, para 85, note 45 above.
[80] Art 39.
[81] Senegal CRC/C/SEN/CO/2, paras. 57, 59, 65 and 67; quoted in United Nations Children's Fund (2007) *Implementation Handbook for the Convention on the Rights of the Child*. Geneva: UNICEF.
[82] Trieschman AE, Whittaker JK & Brendtro LK (1969) *The Other 23 Hours: Child-care Work with Emotionally Disturbed Children in a Therapeutic Milieu.* Chicago: Aldine.
[83] Art 37.
[84] UN Guidelines for the Alternative Care of Children, para 96, note 45 above.
[85] Art 12 UNCRC.
[86] Art 16 UNCRC.
[87] UN Guidelines for the Alternative Care of Children, para 88, note 45 above.

or professionals[88]. Furthermore, "[c]hildren in care should be offered access to a person of trust in whom they may confide in total confidentiality".[89]

Children also have a right to information.[90] As such, they and their families must be kept informed of what is happening to them. Children in CYCCs are entitled to know what information about them is kept on record and why, and who controls or has access to their files; in addition, they are entitled to know that they are "able to challenge and, if necessary, correct [the content of these files], if necessary through recourse to an independent body".[91] Similarly, children should be able to make complaints or raise concerns regarding their treatment or conditions of placement to an independent body.[92]

4. Analysis of the legal framework

The Children's Act, along with its regulations and norms and standards[93], is the primary legislation governing the provision of social services to children, services which include prevention and early intervention programmes, child protection services and alternative care in CYCCs. Every chapter in the Act that regulates services places an obligation on the Member of the Executive Committee (MEC) for Social Development in each province to draft profiles (which include an overview of the need for services and the services available)[94] and strategies to ensure that all services are accessible to all children who need them[95]. This means each province should ensure that there are sufficient numbers of beds in CYCCs, that the CYCCs are spread across the province so that children are close to their families and communities, and that the CYCCs offer the range of therapeutic programmes that are required. Provincial profiles and strategies are meant to inform a national strategy for each service.

4.1 Provisions aimed at realising the right to family care

4.1.1 Legislative measures to prevent removal from the family

The Children's Act obliges the state to provide prevention and early intervention services to support families to care for children[96] and empowers the court to issue orders obliging the child or any member of the family to participate in a prevention and early intervention programme or therapeutic service offered by a professional[97]. Where children are found to be in need of care and protection, the Act allows children to be placed in foster care or cluster foster care schemes; it states that children should

[88] UN Guidelines for the Alternative Care of Children, para 88, note 45 above.
[89] UN Guidelines for the Alternative Care of Children, para 97, note 45 above.
[90] Art 17 UNCRC.
[91] United Nations Children's Fund (2007) *Implementation Handbook for the Convention on the Rights of the Child*. Geneva: UNICEF. Pg 209.
[92] UN Guidelines for the Alternative Care of Children, para 98, note 45 above.
[93] Children's Act 38/2005: General Regulations Regarding Children. *Government Gazette* 33076, Notice 26, Regulation 9256 (1 April 2010). [Hereafter the Children's Act Regulations (2010)]
[94] Reg. 2 requires the MEC to compile provincial profiles for every service within one year of the incorporation of the relevant provincial strategy into the relevant national strategy and every year thereafter.
[95] s192 requires the MEC for Social Development to compile profiles and write strategies for child and youth care centres.
[96] s146 read with s143, 144 and s2(a) and (b)(i).
[97] s156.

be placed in a CYCC "only if another option is not appropriate"[98], thereby promoting placement in a family environment.

4.1.2 Judicial review of the removal

The Children's Act requires that any decision to remove a child from the family must be taken by a court or, that in emergency cases where children are deemed to be in immediate danger, the decision be confirmed by a court.[99] This requirement protects children from arbitrary removals and gives them and their families the opportunity to argue against the removal.

4.1.3 Participation

The views of the child must be sought at all stages of the assessment, investigation and placement.[100] Furthermore, the Children's Act requires that children attend, and participate, in the children's court inquiry unless it is not in the best interests of the child.[101]

4.1.4 Services to foster reintegration

In order to maintain family bonds and foster reintegration, children must be placed in centres located as close as possible to their families or homes. The Act provides for family reunification and after-care both in Chapter 7, which regulates child protection services, and Chapter 8, which defines prevention and early intervention services. The aim is to ensure that these services are shared between the designated social worker and the care team at the CYCC and NPOs.

Chapter 8, which deals with prevention and early intervention services, does not specify who can provide prevention and early intervention services, nor does it outline a procedure for registering the service providers. This was a deliberate measure to minimise bureaucracy and maximise the number of service providers who could provide prevention and early intervention services.[102]

However, the repetition of some of the prevention and early intervention services in the protection chapter has caused confusion about who can provide them. The DSD has interpreted the Act to mean that family preservation and reunification services may be rendered only by designated child protection organisations (DCPOs).[103] This interpretation limits the availability of such services, given that many of the current service providers are not DCPOs but simply NPOs.

A concern expressed by both government and NPO service providers is that designated social workers (attached either to DCPOs or provincial DSDs) lack the time to provide family reintegration services owing to high case loads and a lack of cars, or transport money, to enable visits between the child and

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[98] s158(1).
[99] The Constitutional Court added the requirement for an automatic review to the Act as part of the judgment in *C and Others v Department of Health and Social Development, Gauteng, and Others* 2012 (2) SA 208 (CC).
[100] s10.
[101] s61.
[102] Personal communication with Dr Jackie Loffell, 21 November 2013. Dr Loffell was a member of the Review of the Child Care Act Project Committee and the Children's Bill Working Group steering committee.
[103] Department of Social Development (2013) *Draft Assessment Tool for Prevention and Early Intervention Programmes.* Presented at the National Child Care and Protection Forum, 21 November 2013.

family, and by the social worker to the family.[104] To ensure that children and families do receive services, there is hence a need to interpret the Act as it was originally intended so as to include all professionals and organisations which provide family preservation and reintegration services.

4.1.5 Periodic review of placement in a CYCC

To ensure that children are in institutional care for the shortest period of time, court orders placing children in a CYCC cannot be for longer than two years and must be reviewed by a court after each period of two years.[105] This provides a transparent accountability mechanism aimed at ensuring that family reintegration services are being provided and that children are placed back with their families if the reason for their removal has been addressed. In addition, the norms and standards require that "[t]here must be a review of each child's placement and independent development plan at least once every six months while the child remains in the centre".[106] This internal review allows the team caring for the child to assess if the programme should change or whether the child can be reunified with his or her family.

4.2 Provisions aimed at realising the right to alternative care

4.2.1 Which children can be placed in alternative care?

The categories of children in need of care and protection in terms of section 150 of the Children's Act correspond closely to the vulnerable groups identified in the UN Guidelines. The Children's Act directs the court to place children in centres offering therapeutic programmes that cater for the needs of the individual child. Therapeutic residential programmes listed in the Act include programmes for:

- children who cannot live with their family (e.g. due to abuse, neglect, abandonment or orphaning);
- children awaiting trial or sentence;
- children who have been trafficked or commercially sexually exploited;
- children with behavioural, psychological and emotional difficulties;
- children living on the street;
- children addicted to dependence-producing substances; and
- children with psychiatric conditions. [107]

4.2.2 Access to child and youth care centres

The Act obliges government to develop strategies to ensure that there are sufficient facilities, appropriately spread, offering the required range of programmes to meet the needs of children in

[104] Interview with the Director of the National Association of Child Care Workers (NACCW), Merle Allsopp, December 2013.
[105] s159 of the Children's Act.
[106] Children's Act Regulations (2010) Annexure B, Part V, National Norms and Standards for Child and Youth Care Centres, para 5(f), note 93 above.
[107] ss191(2) and (3).

every province. The Act also requires the provincial MECs to compile a profile which assesses the need for and provision of CYCCs in every province.[108]

However, there is no logic in the sequencing of these processes. The 2010 Children's Act Regulations state that the provincial profiles should be compiled "within one year of the incorporation of the relevant provincial strategy into the relevant national strategy and every year thereafter".[109] This is problematic, first, in that there are no deadlines for the writing of the national or provincial strategies; second, if the strategies are to address the gaps in service provision, they should be based on the analysis in the profiles and thus follow after the profiles have been completed. At the time of writing, only one of the nine provinces had completed its profile and strategy for CYCCs; the national strategy had also not been completed. To address this dilemma, the regulations should be amended to dictate a clear timeframe within which the provincial profiles must be completed.

The Act requires the national Minister to give due consideration to the needs of children with disabilities when writing the national strategy for CYCCs.[110] However, there is no obligation on the MECs to prioritise funding to make this a reality, unlike the case in the chapters relating to early childhood development programmes, partial care facilities, prevention and early intervention services and drop-in centres.[111]

Although the general principles of the Act state that children should be treated equally and the High Court has ruled that foreign children are entitled to care and protection services, the Act makes no explicit provision that foreign children are entitled to social services (including alternative care). Refugee rights organisations[112] believe this is a gap that should be addressed by amending the Act to prevent discrimination against foreign children.

4.2.3 Range of therapeutic programmes

The Children's Act establishes a regulatory framework that defines alternative care and redefines residential care. All centres are now called child and youth care centres, and must provide a therapeutic programme in addition to their residential programmes. Calling all facilities "child and youth care centres" has several implications:

- It allows greater flexibility in that centres can run more than one specialist programme. For example, secure care centres can now accommodate both awaiting-trial children and sentenced children in the same facility.
- It avoids the "stigmatisation caused by children being placed in certain facilities to deal with their 'problems'".[113]

[108] s192.
[109] Children's Act Regulations (2010) reg 2, note 93 above.
[110] s192.
[111] ss78, 93, 146 and 215.
[112] Oral input by Scalabrini and the University of Cape Town Refugee Centre at consultative workshops on the Children's Third Amendment Bill, June 2013.
[113] Skelton A (2010) Child and youth care centres. In: Davel C & Skelton A (eds) *Commentary on the Children's Act*. Pretoria: Juta. Pg 13–7.

- The classification of shelters for street children as child and youth care centres means that all children in alternative care are afforded the same quality of care; previously, shelters had lower norms and standards (with many still receiving lower per-capita subsidies). There has been intense debate about whether or not shelters should be classified as child and youth care centres, given the difficulty of applying the absconding provisions in the alternative care chapter to street children who come and go. However, it is not necessary to place a child in alternative care for the first six months of his or her stay at a shelter; consequently, the absconding provisions do not need to be applied until the child has been through a stabilisation process.[114]

4.2.4 Deinstitutionalisation and community-based care

Children's rights instruments regard residential care as an alternative to family- and community-based care and require that children are placed in residential care institutions only as a measure of last resort. The implication is that residential care separates children from their communities and customs. Internationally, there is a movement towards reducing the size of CYCCs and organising them around the needs of the child. The Children's Act attempts to provide individualised care by, on the one hand, obliging CYCCs to develop specialist programmes and, on the other, obliging magistrates in children's court inquiries to place children in programmes adapted to their needs.

In South Africa the concept of cluster foster care has been introduced in the Children's Act as one way to encourage "deinstitutionalisation".[115] Cluster foster care allows for the placement of children in a cluster foster care scheme run by an NPO. In theory this should allow more children to be cared for in their communities. The Act and the regulations do not detail how these schemes should operate, nor do they establish norms and standards, and there are concerns that in reality such schemes will operate as unregistered CYCCs without having met the norms and standards required for CYCCs.[116]

4.3 Provisions aimed at realising children's rights when they are in alternative care

South Africa's domestic legal framework meets most of the requirements placed on the state by the UNCRC and the ACRWC, with the result that, with a few exceptions, the rights of children in alternative care are clearly spelt out and legislative measures are in place to ensure they are fulfilled.

Regulation 73 of the Children's Act Regulations (2010) lists the rights of children in CYCCs. These include rights to:

- equality, participation and privacy;
- care, nutrition and clothing;
- an education appropriate to the child's level of maturity and capability;

[114] Jamieson L (2013) *Children's Act Guide for Child and Youth Care Workers*. Edition 2. Cape Town: Children's Institute, University of Cape Town. Pg 46-47.
[115] UN Guidelines for the Alternative Care of Children, para 123, note 45 above.
[116] Moses S & Meintjes H (2007) *Submission from the Children's Institute, University of Cape Town on Residential Care in the Children's Amendment Bill [B19B of 2006].* Cape Town: Children's Institute, University of Cape Town.

- information in a language the child understands concerning the reasons for his or her admission, expectations in respect of behaviour, and the consequences of any failure to meet the standards;
- not to be subjected to cruel and degrading punishment, including corporal punishment (the regulations also describe acceptable forms of behaviour management);
- protection from abuse and exploitation;
- respect for religious beliefs and cultural practices, as well as the right to participate in community activities;
- communication with, and visits to or from, his or her family; and
- communication with supportive professionals, including legal representatives, and privacy during these consultations.

While the right to play and leisure is omitted, this is not necessarily a concern, given that regulation 75 lists recreational programmes alongside developmental and therapeutic programmes.

4.3.1 Registration and quality assurance

To ensure quality care, all CYCCs must be registered; non-compliance with the registration requirement is an offence, as is failure to comply with a notice of enforcement.[117] The Children's Act provides a detailed registration process and introduces the requirement for CYCCs to re-register every five years from 2015 onwards.[118]

The Act sets out a quality assurance process based on a developmental approach and provides for the conditional registration of CYCCs that do not meet the full norms and standards. The intention of the conditional registration mechanism is to make it easier for unregistered facilities to obtain financial support from the state to enable them to meet all the norms and standards. The conditional registration is valid only for one year, but this is problematic because delays in obtaining the supporting documentation from local government and other agencies can take much longer than that. There is thus a need to consider amending the Act to allow conditional registration to be renewable for a further period so that unregistered centres and the children they house are not disadvantaged by factors beyond their control, such as delays by local governments in respect of rezoning applications.

4.3.2 Trained staff and individual care

The Act places an obligation on the CYCC to appoint a manager and sufficient staff to assist in operating the centre.[119] The regulations detail the appointment process and required skills. The manager must have specialised knowledge of child and youth care work, proven leadership and management skills, while the child and youth care workers must able to run developmental, therapeutic and recreation programmes.[120]

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[117] ss197 and 305(1)(f) of the Children's Act;
See also: UN Guidelines for the Alternative Care of Children, para 105, note 45 above.
[118] Children's Act Regulations (2010) reg 80, in compliance with UN Guidelines, para 105, see note 93 above.
[119] s109.
[120] Children's Act Regulations (2010) regs 82 and 83, note 93 above.

Staff-to-children ratios are published in the Norms, Standards and Practice Guidelines for the Children's Act and stand at 10:1.[121] Some believe these are too low to create a therapeutic environment.[122] At 3:1, staff ratios (during the day) are higher for centres caring for young. The UN Guidelines state that there should be "sufficient carers … to allow individualised attention, and give the child, where appropriate, the opportunity to bond with a specific carer".[123] In practice, the South African child and youth care sector recognises the value of each child having a "key worker", but this is not required by legislation.

One area of potential non-alignment with international guidelines relates to the requirement to develop appropriate criteria for assessing the professional and ethical fitness of child and youth care workers for their accreditation, monitoring and supervision.[124] Whilst the Children's Act requires that all persons who "work with, or have access to children", including volunteers, should be "fit and proper" persons[125] and must be screened against both the National Child Protection Register and the National Register of Sexual Offenders[126], there is no definition of "fit and proper" in the Act. At present child and youth care workers are not able to register with the South African Council for Social Service Professionals (SACSSP), their code of conduct is voluntary, and there are no legal requirements for education and training. However, the Professional Board for Child and Youth Care Workers has drafted regulations and a code of ethics. In September 2013 the SACSSP published these draft regulations for public consultation.[127] It is expected that the regulations will be finalised in the near future, allowing child and youth care workers to register and be held accountable for maintaining professional standards.

The Children's Act Regulations require staff to report situations to the management of the centre in which, inter alia, prohibited behaviour management is practised against children (for example, solitary confinement or corporal punishment), children are abused or injured, or staff members behave inappropriately (for example, by reporting for duty under the influence of alcohol or drugs).[128]

4.3.3 Privacy

The designated social worker managing the child's case and the facility social worker providing therapeutic support are bound by the social work code of conduct to keep their records confidential and to notify the child of their reporting requirements if they need to breach confidentiality. With regards to space, there are detailed norms and standards for the infrastructure of CYCCs offering

[121] Department of Social Development (2010) *Norms, Standards and Practice Guidelines for the Children's Act.* May 2010. Pretoria: DSD. Pg 306.
[122] Interview with the Director of NACCW, Merle Allsop, note 104 above.
[123] UN Guidelines for the Alternative Care of Children, para 126, note 45 above.
[124] UN Guidelines for the Alternative Care of Children, para 55, note 45 above.
[125] s200(2).
[126] Children's Act Regulations (2010) reg 78(2)(p).
[127] Accessed at: www. sacssp. co. za/website/wp-content/uploads/2012/08/PBCYC-Consultation-letter-10-Sept-2013.pdf.
[128] Children's Act Regulations (2010) reg 77, note 93 above.

secure care[129] but similar details for CYCCs offering other types of programme have not been developed.

4.3.4 Participation

The norms and standards require that children are assessed by a multi-disciplinary team within 48 hours of their arrival at a CYCC. The process must allow for the participation of the child, as must the drafting of individual development, care and permanency plans as well as decisions about reunification. CYCCs must have documented complaints procedures of which children have to be informed when they arrive at the centre; complaints submitted in terms of these procedures must be addressed.[130] As part of its management board each CYCC must have a children's forum that facilitates the participation of children in the operation of the centre.[131]

4.3.5 Access to education

In 2010 the vast majority of school-going age children in registered centres (between 93% and 98%) were attending school or an education programme.[132] For children in unregistered centres, the attendance was between 85% and 95%.[133] According to the CASE studies, children in registered CYCCs were slightly more likely to attend a school or educational programme than those in unregistered ones. The law states that children in CYCCs should receive free education[134], but many schools ignore this and try to charge fees or exclude children because they cannot pay[135].

4.3.6 Access to health care

Provisions in the Children's Act make it possible for children over the age of 12 to consent to their own health care, and allow for staff at CYCCs to consent to medical treatment of children who lack the capacity to consent due to their young age.[136]

Section 4(3) of the National Health Act 60 of 2003 outlines certain categories of people who are entitled to receive free health care services at state health facilities. Children below the age of six who are not members of medical aid schemes are entitled to "free health services" (from any public health facility)[137]; all persons (including children) without a medical aid are entitled to "free primary health care services" (meaning services that are available only at clinics and day hospitals and not at tertiary hospitals)[138]; and all pregnant women, including pregnant adolescents, are entitled to free

[129] Department of Social Development (2010) *Blueprint, Minimum Norms and Standards for Secure Care Facilities in South Africa*. Pretoria: DSD.
[130] Children's Act Regulations (2010) reg 74, note 93 above.
[131] s208(6) of the Children's Act.
[132] CASE (2010) at pg 66, note 13 above.
[133] CASE (2010) at pg 47, note 13 above.
[134] South African Schools Act 84/1996: Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools. *Government Gazette* 29311, Notice 1052, Regulation 8566 (18 October 2006).
[135] Personal communication with Director of Durban Children's Home, Mandy Goble, 31 October 2013; Interview with Director of NACCW, Merle Allsopp, note 104 above.
[136] ss 129-134.
[137] s4(3)(a).
[138] s4(3)(b).

termination-of-pregnancy services[139]. The Act also empowers the Minister of Health to pass regulations making additional categories of people eligible for free health care services and specifying the conditions for eligibility.[140]

It appears that the Minister has not prescribed any regulations in terms of section 4. However, the national Department of Health publishes a Uniform Patient Fee Schedule (UPFS) which prescribes the fees hospitals can charge for fee-paying patients. Appendix H to the User Guide to the UPFS 2009 clarifies that certain categories of people do not have to pay hospital fees. Appendix H, written in 2002, provides that children who have been "committed to the care of a children's home, industrial school or foster parents" in terms of section 15 of the Child Care Act No 74 of 1983 are entitled to free state health care services.[141] The appendix is problematic in that it refers to the repealed Child Care Act and excludes places of safety, shelters, secure care facilities and reform schools; moreover, it does not explain the proof required to access free tertiary care. Consultations in the field reveal that a court order normally suffices. This should be possible for most children in CYCCs, but will result in the exclusion of those who do not have court orders (16% of children in registered CYCCs) or whose court orders have expired.

5. Implementation challenges

5.1 Challenges in realising the right to family care

5.1.1 Are families getting support?

Given that the provinces have not completed their profiles and strategies for prevention and early intervention services and protection services, no data is available for determining the level of access to family support services in comparison to the need for them. However, other proxies can be used to gauge how many families are vulnerable:

- Despite the provision of social assistance in the form of the Child Support Grant, 12 million children (58%) still live below the lower poverty line (an income of R604 per capita per month in 2011).[142]
- South Africa's child homicide rate is far above the international average. This is due partly to high rates of abandonment of infants and fatal child abuse for children under five, which suggest that mothers of young children are not getting sufficient social support.[143]
- 21% of children in unregistered centres are placed there by biological parents or other family members.[144] This suggests that the families are not receiving adequate support from the state to care for their children.

[139] s4(3)(c).
[140] s4(1), (2) and (3).
[141] Department of Health (2009) *User Guide – Uniform Patient Fee Schedule 2009.* Version 1. Pretoria: DOH.
[142] Hall K (2013) Income poverty, unemployment and social grants. In: Berry L, Biersteker L, Dawes A, Lake L & Smith C (eds) *South African Child Gauge 2013*. Cape Town: Children's Institute, University of Cape Town. Pg 90.
[143] Mathews S et al (2013), note 19 above.

5.1.2 Is the decision to remove subject to judicial review?

No child should be in a CYCC without a court order for longer than six months if he or she has been admitted voluntarily, or for more than 24 hours if removed from the care of their family. However, the CASE surveys revealed that 56% of children in unregistered centres, and 16% in registered ones, did not have a court order placing them in care.[145]

5.1.3 Are placement orders reviewed periodically?

Although children are supposed to remain in alternative care only for the shortest period possible, the government recognises that some children remain in care too long.[146] In certain cases the reason is that their court orders have failed to be reviewed. At a minimum, orders are meant to be reviewed every two years.[147] However, in 2010, 43% of children in registered CYCCs had court orders or extensions that were dated 2008 or earlier, i.e. that were older than the two-year minimum, while 9% of orders had a date of 2003 or earlier – meaning that those children had not had their placements reviewed in more than seven years.[148]

5.1.4 Are children in care supported to maintain contact with their families?

Half (50%) of the registered centres surveyed by CASE estimated that none of the children have homes or families outside the province where the CYCC is situated; 45% said fewer than half of the children have homes or families outside the province; and 6% estimated that more than half of the children in their centre have homes outside the province.[149] This problem is less acute in unregistered centres, where 64% report that none of the children in their care have family outside of the province.[150] However, distances within provinces in South Africa are vast and transport is costly; consequently, this data does not tell us whether children are being placed close enough to their families to enable continual contact and relationships.

The CASE survey revealed that 50% of the children in registered CYCCs in 2010 had not visited their homes in the three months prior to the survey; 75% did not have any visits from family or kin; and 75% did not have telephone conversations with them.[151] This is a clear violation of the right to maintain contact with family, and further research is needed to establish the underlying reasons for it.

5.1.5 Are children and families receiving reunification services?

Young people in alternative care have expressed concerns about the lack of family reunification work done by social workers:

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[144] CASE (2012) at pg 40, note 11 above.
[145] CASE (2012) at pg 38, note 11 above;
CASE (2010) at pg 61, note 13 above.
[146] Department of Women, Children and People with Disabilities (2013), note 10 above.
[147] s159 of the Children's Act.
[148] CASE (2010) at pg 61, note 13 above.
[149] CASE (2010) at pg 27, note 13 above.
[150] CASE (2012) at pg 16, note 11 above.
[151] CASE (2010) at pg 65, note 13 above.

> *They put us back in places where we were abused and they expect us to leave and say nothing. They tell us people have changed. … After they have forced us to go back, just because they believe family is family. They don't check up on us. They promise that they will but they don't. And the same situation takes its course again, you being abused. We have to suffer for their mistakes they don't do their job properly.* (Girl, 18, KwaZulu-Natal)
>
> *We want to know that when we are in children's homes you [social workers] are doing something to help our families. We don't want to go back to the same problems.* (Girl, 17, Western Cape)[152]

As previously noted (see section 4.1), the government and NPO service providers have voiced concerns that, for various reasons, designated social workers often lack the time to provide family reunification services.

5.2 Challenges in realising the right to alternative care

5.2.1 Co-operation and co-ordination

The DSD established the National Child Care and Protection Forum in 2006 to promote intersectoral and inter-governmental co-ordination and co-operation. The forum brings representatives from civil society organisations together with officials from provincial departments of social development as well as national departments involved in the implementation of the Children's Act. Although this forum meets regularly at a national level, there are still areas where co-ordination is lacking, particularly in relation to data-sharing. In addition, each of the provinces has a provincial forum, but the frequency of their meetings varies from province to province.

5.2.2 Planning to meet the need – profiles and strategies

The Children's Act requires the national Minister and the provincial MECs to write strategies to ensure that there are sufficient CYCCs offering programmes to suit the needs of children in each province and across the country. The national strategy for CYCCs is under development, but at the time of writing it had not been finalised. The national DSD reported that only one province, the Western Cape, had written a provincial profile and strategy.

In the absence of these provincial profiles and strategies, it is unclear on what basis provincial departments are making decisions to approve or reject either applications for registration made by unregistered CYCCs or applications for renewal of registration made by existing CYCCs.

5.2.3 Are there enough child and youth care centres?

In 2005, Barberton *et al* used orphan data and estimates of the numbers of children on the streets to calculate the potential demand for beds in CYCCs when costing the Children's Bill. One of their models

[152] Jamieson L (2011) Our voices are all we have! NACCW Youth Conference presentation. *Child and Youth Care Work,* July/ August 2011, 29(4):29-31.

predicted that by 2010/11 South Africa would need in excess of 280 000 places in CYCCs to accommodate all children in need of alternative care including orphans.[153] As predicted, there were approximately 1.5 million maternal and double orphans in South Africa in 2011.[154] However, the vast majority of orphans are being cared for by relatives, and only a small proportion are in CYCCs.[155]

Comparisons of the number of children accommodated in all registered CYCCs versus the bed capacity of these CYCCs consistently reveal that there are empty beds in CYCCs:

- Skelton reported in 2005 that there were 14 795 children in registered centres with a capacity for 17 426 children. [156]
- CASE reported that in 2010 there were 345 CYCCs registered with the department. The total was made up of 238 children's homes, 35 places of safety, and 71 shelters (catering primarily for street children). These centres had approximately 17 500[157] beds but accommodated fewer than 14 000 children[158].
- The Department of Women, Children and People with Disabilities reported to the United Nations and African Union that in the 2011/12 financial year, there were 355 (registered) alternative care facilities in South Africa accommodating 21 047 children, while bed capacity in those facilities was 24 495.[159]
- In 2013 the Department of Justice and Constitutional Development reported to Parliament that, in 2011/12, the CYCCs catering for children in conflict with the law (i.e. reform schools, schools of industry or secure care centres) had a bed capacity of 3 272, and that by 2012/13 this had decreased to 2 100.[160]

In 2011, 115 unregistered CYCCs with a reported capacity for 3 938 children accommodated 2 144 children.[161] At the same time there were more than 3 000 empty beds in registered CYCCs.[162] A crude analysis of the figures suggests there is sufficient capacity in registered facilities to absorb these children. Why, then, are so many placed in unregistered facilities by social workers and the courts? One possibility is that CYCCs are not located where they are needed.

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[153] Barberton C (2006) *The Cost of the Children's Bill – Estimates of the Cost to Government of the Services* E*nvisaged by the Comprehensive Children's Bill for the Period 2005 to 2010.* Report for the national Department of Social Development. Table 4.16: FC High: Demand variables – provincial social development, pg 36.

[154] Meintjes H & Hall K (2013) Demography of South Africa's children. In: Berry L, Biersteker L, Dawes A, Lake L & Smith C (eds) *South African Child Gauge 2013*. Cape Town: Children's Institute, University of Cape Town.

[155] K Hall, Children's Institute, University of Cape Town, analysis of the *General Household Survey 2011.*

[156] Skelton A (2005) Situational analysis: The provision of alternative care in child and youth care centres. In: Barberton C (2006) *The Cost of the Children's Bill – Estimates of the Cost to Government of the Services Envisaged by the Comprehensive Children's Bill for the Period 2005 to 2010.* Report for the national Department of Social Development.

[157] CASE (2010) at pg 22, note 13 above.

[158] CASE (2010) at pg 55, note 13 above. The report does not give the total number of children accommodated in CYCCs. However, it states: "Profile forms were completed in respect of a total of 13 282 children. This number is equivalent to only 76% of the total number of children for which the 306 centres are registered, but 95% of the total number of children accommodated on the last weekday night, 13 981 children were accommodated in the centres on the last week day night."

[159] Department of Women, Children and People with Disabilities (2013) para 166, note 10 above.

[160] Department of Justice and Constitutional Development (2013) *The Inter-sectoral Implementation of the Child Justice Act.* Presented to the Select Committee on Security and Constitutional Development, National Council of Provinces, Parliament of South Africa, 23 October 2013.

[161] CASE (2012) at pg 3, note 11 above.

[162] Department of Women, Children and People with Disabilities (2013), note 10 above.

5.2.4 Are CYCCs located where they are needed?

In 2000 the UN Committee on the Rights of the Child expressed concerns to the South African government that there are an insufficient number of alternative care facilities "in previously disadvantaged communities".[163] More than a decade later this concern is still pertinent. Table 2 shows that 31% of beds in registered CYCCs are in Gauteng, which has 16% of the child population; conversely, Limpopo has only 5% of the beds in CYCCs, yet 14% of the child population. However, the fact that 41% of the known unregistered centres are based in Gauteng[164] may indicate that there is still insufficient capacity in areas which historically have had the largest share of resources. The authors of the CASE report venture an opinion that the high numbers of unregistered centres in Gauteng and Western Cape (high in relation to the smaller size of the provinces' child population) may be due to extended family members being less available in urban centres.[165] Alternatively it could be due to other factors such as the differential implementation across provinces of the moratorium on registration of new children's homes in the 2000's.

Table 2: Number of children by province and type of CYCC

Province	Home	Place of Safety	Shelter	Total	% of total	Share of the child population
Eastern Cape	1 469	290	375	2 134	12%	16%
Free State	1 056	63	208	1 327	8%	6%
Gauteng	3 844	1 057	522	5 423	31%	16%
KwaZulu-Natal	2 816	335	285	3 436	20%	22%
Limpopo	506	340	95	941	5%	14%
Mpumalanga	652	106	57	815	5%	8%
Northern Cape	488	65	69	622	4%	2%
North West	425	0	130	555	3%	7%
Western Cape	1 925	189	119	2 233	13%	9%
Total	**13 181**	**2 445**	**1 860**	**17 486**	**100%**	**100%**

Source: CASE (2010) *Baseline Study on Registered Child and Youth Care Centres*. Pretoria: Department of Social Development & UNICEF. Pg 23.

The CASE survey showed that 48% of all children in unregistered facilities were placed by a social worker[166] and that 44% of all children in unregistered CYCCs had court orders[167]. Assuming that courts and social workers are making their decisions in the best interests of the child and are aware that it is illegal for anyone to operate an unregistered centre, they must have compelling reasons for placing children in such centres. Research is needed to find out why children are being placed in unregistered facilities and to determine the most appropriate social service response to their needs.

[163] Committee on the Rights of the Child (2000) para 25, note 48 above.
[164] CASE (2012) at pg 12, note 11 above.
[165] CASE (2012) at pg 13, note 11 above.
[166] CASE (2012) at pg 40, note 11 above.
[167] CASE (2012) at pg 38, note 11 above.

Given that 21% of children are admitted by family members (parents or other relatives), it is possible that if the families were provided instead with prevention and early intervention services as well as assistance to access other appropriate state programmes, their children could remain in their care. On the other hand, alternative care might itself be the most appropriate option for these children. If this is so, the government needs to take steps either to register the centres and support them in meeting the norms and standards for CYCCs, or to move children to registered facilities. The latter, however, may damage children psychologically if they have formed a primary attachment to caregivers in the unregistered CYCC. This debate highlights the importance of each province completing its provincial profiles to assess the need for alternative care versus current provision and geographical spread. The national strategy should address the matter of how the DSD will assess demand against provision and, furthermore, outline a plan for unregistered centres and the children therein.

Only four of the unregistered CYCCs in the survey were not registered as NPOs, and 72% of the centres had attempted to register as a CYCC with the DSD.[168] Most were in the process of supplying the supporting documentation or awaiting the result of the application. Twelve percent were still operating after the DSD had rejected their applications.[169]

The common reason for rejecting applications for registration is that the centres do not meet the norms and standards. However, the registration and funding process has a catch 22 in that many centres cannot meet the registration standards without financial support, yet at the same time cannot access government funding unless they are registered. Testimony from unregistered CYCCs underlines this dilemma:

> *We do not comply with all the requirements of registration. The requirement of us having to have social workers is not financially viable or sustainable. We have asked for volunteers with this skill. But there were no takers.* (Unregistered CYCC in North West)
>
> *The main issue is about finance. We should get proper funding, so we can meet the requirement standard for child care like afford professional training of staff members.* (Unregistered CYCC in Mpumalanga) [170]

If it were to use the conditional registration provisions in the Act, the DSD could support the centres to meet the requirements, but there is little evidence that this innovative mechanism is being utilised.

5.2.5 Funding

In the CASE surveys, 80% of registered CYCCs reported that they received a subsidy from the DSD for all the children in their care, while 5% reported that they received a subsidy for some of these children.[171] Twenty-eight percent of unregistered CYCCs said they received some funding from the DSD.[172] The

[168] CASE (2012) at pg 17, note 11 above.
[169] CASE (2012) at pg 18, note 11 above.
[170] Quoted in CASE (2012) at pg 19-20, note 1 above.
[171] CASE (2010) at pg 31, note 13 above.
[172] CASE (2012) at pg 20, note 11 above.

subsidies and other type of funding from the DSD only partially cover the costs of running the centres, with the result that the NPOs have to fundraise to make up the difference.[173]

Other funding problems relate to the frequency of payments, inequalities between subsidies that are paid to different types of centres, and discrepancies between provinces. In 2010 shelters in Gauteng were given a subsidy of R26 per child per day (R780 per month), whereas the children's homes received R1 938 per month. By contrast, shelters in Limpopo had a subsidy of R900 per child per month, while children's homes received R3 600.[174] These variations create inequality between children situated within different provinces and different CYCCs.

Section 4 of the Children's Act's obliges organs of state in all spheres of government to take reasonable measures to the maximum extent of their available resources to achieve the realisation of the objects of the Act. This includes the provision and funding of CYCCs. The UN Guidelines add that it should be done in a "timely manner".[175] However, in practice the government appears not to be meeting its legal obligations in respect of the sufficiency of the allocations and timing of payments. For small CYCCs, the late payment of subsidies threatens their financial stability and leads to a risk of closure.[176]

In 2010 the National Association of Welfare Organisations and Non-Governmental Organisations (NAWONGO) brought a case against the Free State provincial department of social development on the grounds that the province's funding policy for NPOs was unfair. The department allocates up to R6 750 per month per child to CYCCs operated by the government, whilst the subsidy to NPOs is only about R2 000.[177] The court ruled that the funding policy does not meet the government's constitutional and legal obligations, with the judge calling it a "deficit-sharing" model because the DSD expects NPOs partly to fund the services. A supervisory order is in place, and in 2013 the DSD presented a third draft of the policy to the court. At the time of writing (four years later), the case had not yet been resolved.

As a result of the government's failure to pay the full cost of caring for children, there is genuine concern that currently registered CYCCs will not meet the norms and standards when they are required to re-register in 2015.[178]

The state is constitutionally and statutorily obliged to provide and fund CYCCs. In accordance with these obligations, the DSD should be covering at least the basic operational costs of CYCCs, including the cost of staff and programmes. The current state subsidies are clearly insufficient to meet the Children's Act's norms and standards, and the court has ruled that the discrepancies between subsidies to NPO versus payments to government centres are unfair. Arguably, the difference in per-child subsidies across provinces and between types of CYCCs violates section 4(1) of the Act, which requires uniformity in implementation of the Act. To remedy these inequities, the national department should

[173] CASE (2010) at pg 30-37, note 13 above.
CASE (2012) at pg 20-21, note 11 above.
[174] CASE (2010) at pg 32 and 33, note 13 above.
[175] UN Guidelines for the Alternative Care of Children, para 24, note 45 above.
[176] Interview with Director of NACCW, Merle Allsopp, note 104 above.
[177] *National Association of Welfare Organisations and Non-Governmental Organisations and Others vs the Member of the Executive Council for Social Development, Free State and Others*. Free State High Court, case no: 1719/2010.
[178] Interview with the Director of NACCW, Merle Allsopp, note 104 above.

set funding norms and standards for state funding of CYCCs that guarantee adequate funding, promote uniformity across the provinces and ensure parity for NPO-, government- and corporate-run centres.

5.2.6 Non-discrimination

The Children's Act includes special protection for foreign children, including tracing and repatriation, but refugee rights organisations claim that "[f]oreign children are frequently denied the protection and services they are entitled to under the Constitution and in terms of International law on the basis of their nationality or their lack of 'documentation'".[179] These organisations maintain that such discrimination could be avoided by clarifying foreign children's entitlements in the Act. Representatives from the child and youth care sector argue that lack of documentation causes multiple exclusions:

> *Child and youth care centres who are already in dire straits struggle to take in children who lack ID documents as they cannot get them into schools, or get them medical attention.*[180]

Without documentation, foreign children become an extra cost burden for the already under-funded CYCCs. Government departments need to collaborate to ensure that foreign children get the documents they need in order to avoid multiple service exclusions. [See chapter 2 on Children's Rights to Birth Registration.]

5.2.7 Do all CYCCs accommodate children with disabilities?

Just over one quarter (28%) of children in registered centres are said to have one or more special needs or disabilities; 21% have only one type; and 7% of children have two or more special needs or disabilities.[181] The lack of provincial audits and profiles makes it impossible to determine whether the needs of children with disabilities are being met. However, the survey evidence suggests that there is a gap. Ramps for wheelchairs were available only in a quarter of all registered centres.[182.] The CASE reports conclude that as "centres are not equipped to cater for children with special needs, such children may be under-represented among centre residents".[183]

5.2.8 Sufficient spread of programmes

CYCCs offering a range of different programmes are supposed to be spread according to need across the country. All provinces have what were previously known as children's homes, i.e. child and youth care centres that run programmes for children who have been removed from the family environment.[184] A majority of CYCCs offer life-skills, family preservation, after-care and community outreach programmes.[185] Within the range of programmes on offer, the gaps appear to relate to

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[179] Scalabrini Centre of Cape Town (2011) *Submission to the Department Social Development: Proposed Amendments to the Children's Act 38 of 2005 and the Children's Amendment Act 41 of 2007*. Cape Town: Scalabrini.
[180] Interview with Director of NACCW, Merle Allsopp, note 104 above.
[181] CASE (2010) at pg 60, note 13 above.
[182] CASE (2010) at pg 38-39, note 13 above.
[183] CASE (2010) at pg 61, note 13 above;
CASE (2012) at pg 37, note 11 above.
[184] s191(2)(a) of the Children's Act.
[185] CASE (2012) at pg 17, note 11 above.

independent living; programmes for children with severe behavioural issues; treatment for substance abuse; and services for children with disabilities or special needs. Until they re-register in 2015 it will not be known whether these centres are offering any specialist programmes.

An area of programming where records are indeed available concerns programmes for children with behavioural, psychological and emotional difficulties (offered at CYCCs previously known as schools of industry)[186] and those for sentenced children (offered at CYCCs previously known as reform schools)[187]. Historically, both kinds of programmes have been unevenly spread[188], with a recent report suggesting that there are 15 schools of industry in seven provinces and six reform schools in four provinces[189].

Another problem is that section 196(3) of the Children's Act provides that all reform schools and schools of industry, managed by provincial departments of education, had to be transferred to the provincial departments of social development by 1 April 2012. The objective of the transfer is to stop "the numerous human rights abuses found in these facilities"[190] and ensure that children in conflict with the law as well as those with severe behavioural, psychological and emotional difficulties receive developmental and therapeutic programmes from social service professionals. Whilst negotiations have begun, it appears that few of these centres have been transferred.[191] In the Eastern Cape no funding has been allocated from the Department of Basic Education to the DSD to cover the transfer of these responsibilities. The Department of Justice and Constitutional Development recently reported to Parliament that "[n]ot all Reform Schools and Schools of Industry have been transferred from DBE to DSD" and that "legislative amendments are required to allow the proposed transfers".[192]

5.3 Challenges in realising children's rights when they are in alternative care

5.3.1 Are there sufficient social service professionals?

In 2012 the DSD commissioned a situational analysis of the social service workforce to establish the numbers of social service professionals available to implement the whole of the Children's Act. The analysis showed that South Africa has a chronic shortage of social workers, social auxiliary workers and child and youth care workers.[193] The 2010 CASE survey found that more than a third of CYCCs had an insufficient number of child and youth care workers.[194]

[186] Now registered as CYCCs providing secure care in terms of the Children's Act, s191(2)(a)(i).
[187] Now registered as CYCCs providing secure care in terms of the Children's Act, s191(2) (a)(j).
[188] Skelton A (2005), note 156 above.
[189] Budlender D & Proudlock P (2013) *Are Children's Rights Prioritised at a Time of Budget Cuts? Assessing the Adequacy of the 2013/14 Social Development Budgets for Funding of Children's Act Services.* Cape Town: Children's Institute, University of Cape Town. Pg 60.
[190] Skelton A (2010) at pg 13-16, note 113 above.
[191] Budlender D & Proudlock P (2013), note 189 above.
[192] Department of Justice and Constitutional Development (2013), slide 30, note 160 above.
[193] Department of Social Development (2012) *Situational Analysis Report on the Social Service Workforce Servicing Children.* Pretoria: Department of Social Development. Pg 60.
[194] CASE (2010) at pg 53, note 13 above.

5.3.2 Plans for addressing the shortage

Although large sums of money are being invested in strengthening the social welfare workforce in general, there are no plans for addressing the shortages in CYCCs. The national DSD's annual budgetary allocations for bursaries for social work students are estimated to deliver 1 760 graduates per year into the labour market between 2012 and 2016.[195] Moreover, the National Treasury has allocated an additional R938 million to provinces via the provincial equitable share to enable the employment of these graduates over the next three years.[196] Provinces have not released plans explaining how they will deploy these social workers, but it is common practice for social workers in DSD service centres to do generic social work; by implication, the number of designated social workers who are available to provide child protection and family reunification stands to increase.

There is also a plan to train and recruit an additional 9 000 child and youth care workers to work in the Isibindi community outreach programme. While this will increase the total number of child and youth care workers available to do community-based work, it will not alleviate the shortages in CYCCs. In fact, if the Isibindi sites fail to reach their training targets, they may try to recruit child and youth care workers from the CYCCs, a move which would exacerbate the shortage in CYCCs.

5.3.3 Do staff in child and youth care centres have appropriate qualifications?

Section 200 of the Children's Act states that each person employed at, or engaged in, the CYCC must have "the prescribed skills to assist in operating a child and youth care centre". The regulations do not specify levels of training, but state that child and youth care workers should have some training in delivering developmental, therapeutic and recreational programmes.[197] In 2007 Meintjes *et al* found that in more than two-fifths of the 34 homes they studied none of caregivers had any formal training[198], whereas the 2010 study by CASE states that "74% of all staff are said to have some sort of relevant qualification" [199], suggesting an improvement over time. These figures, however, need to be interrogated.

An analysis of the records of the National Association of Child Care Workers indicates that, since 2001, 11 833 individuals have attended one or more of their training courses. Table 3 below shows that only 2 341 have completed the full Further Education and Training Certificate, whereas 10 904 have completed at least one module.[200] According to the NACCW, most of the child and youth care workers with the full qualification are working in the Isibindi programme rather than CYCCs.

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[195] Budlender D & Proudlock P (2013) at pg 46, note 189 above.
[196] R120 million in 2013/14; R305 million in 2014/15; and R513 million in 2015/16. See Budlender D & Proudlock P (2013) at pg 46, note 189 above.
[197] Regs 82 and 75(1).
[198] Meintjes H, Moses S, Berry L & Mampane R (2007) *Home Truths: The Phenomenon of Residential Care for Children in a Time of AIDS.* Children's Institute, University of Cape Town & Centre of the Study of AIDS, University of Pretoria. Pg 38.
[199] CASE (2010) at pg 53, note 13 above.
[200] Jamieson L (2013) *Child and Youth Care Workers in South Africa.* Technical brief no. 5, March 2013. Arlington: Aidstar-Two. Pg 7.

Table 3: Training completed, 2004 – 2013

Training completed, 2004 – 2013	Number
BQCC registered learners	1 876
1 or more modules of FETC	10 904
Full FETC: all modules completed	2 341
Full FETC: verified by HWSETA	1 033

Source: Jamieson L (2013) *Children's Act Guide for Child and Youth Care Workers*. Edition 2. Cape Town: Children's Institute, University of Cape Town. Pg 19.

At present, child and youth care workers are not regulated; consequently, there are no legal requirements governing the qualifications a person should have to be recognised as a child and youth care worker. This situation is due to change, given that the Professional Board for Child and Youth Care Workers has published draft regulations stating that workers must have a professional (i.e. four-year) degree. Furthermore, to be recognised as an auxiliary child and youth care worker, an individual must have:

> *(a) FET Certificate in Child and Youth Care equivalent to an NQF Level 4 qualification registered with SAQA; or*
>
> *(b) theoretical and practical learning obtained prior to the commencement of compulsory registration in terms of these Regulations approved by the Council equivalent to 1650 notional hours: provided that the applicant submits a portfolio of evidence, which must include an assessment proving that the candidate meets the outcomes reflected in the FET Certificate in Child and Youth Care Work.*
>
> *(c) the qualifications referred to in (a) and (b) may be obtained partially or as a whole through RPL.*[201]

If these standards are applied, very few child and youth care workers in CYCCs would currently be qualified at the auxiliary level. However, once the Regulations are promulgated individuals are to have a three-year period of grace in which to obtain the necessary qualifications.

5.3.4 Working conditions

The UN Guidelines recommend that the conditions of work at CYCCs, including remuneration, "should be such as to maximize motivation, job satisfaction and continuity, and hence [workers'] disposition to fulfil their role in the most appropriate and effective manner".[202] All child and youth care workers are paid less than their counterparts in social work, and a big gap exists between workers employed in government CYCCs and those in CYCCs run by NPOs.[203]

[201] Department of Social Development (2013) *Social Service Professions Act, 1978 (Act No. 110 of 1978) Draft Regulations Regarding the Registration of Child and Youth Care Workers*. 9 September 2013.
[202] UN Guidelines for the Alternative Care of Children, para 113, note 45 above.
[203] Jamieson L (2013) at pg 24, note 200 above.

5.3.5 The therapeutic environment

Currently there is no data about the provision of therapeutic programmes as required in section 191(2) of the Children's Act. However, for every 30 children, each CYCC is required to have one social worker[204] who is supposed to provide individual and group therapy sessions. The CASE report on unregistered centres revealed that "[o]ver four-fifths (82%) of centres did not record any social workers, while 18 centres reported one social worker and three centres said that they had two social workers each".[205] In addition to the therapeutic programmes offered by social workers, child and youth care worker are trained to create a therapeutic milieu. Measuring this is a complex task, but given the overall lack of training and insufficient numbers of child and youth care workers, it is likely that few centres are able to create such an environment.

The UN Guidelines call on states to prepare children for life on their own by providing them with life-skills and connecting them with appropriate support in their local community. On leaving care, these young adults should hence be provided with ongoing support, preferably from a "specialized person who can facilitate his/her independence".[206] However, a study in the Western Cape revealed that children are staying in care for too long and are inadequately prepared to live independently.[207]

5.3.6 Individual care

The CROC has emphasised the principle of individualised solutions, which "means more tailored solutions based on the actual situation of the child, including his/her personal, family and social situation".[208] Whilst the Children's Act and its regulations state that children must be placed in the programme "best suited" to their particular needs and that they should all have care plans and individual development plans (IDPs), only 59% of them in CYCCs had IDPs and only 47% had both IDPs and care plans.[209]

5.3.7 Education

Most of the children placed in CYCCs through the child protection system attend schools in their local community[210], but children in schools of industry and reforms schools have to be taught in the centre itself. The Children's Act places a specific obligation on the Department of Basic Education to continue providing education after handing over control of these facilities to the DSD.[211] While anecdotal evidence suggests that some such children are not receiving any education[212], there is no official data or academic research on this.

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[204] Department of Social Development (2010*)* at pg 306, see note 121 above.
[205] CASE (2012) at pg 29, note 11 above.
[206] UN Guidelines for the Alternative Care of Children, para 133, note 45 above.
[207] Mamelani Projects (2012) *Discussion Paper Transitional Support: The Experiences and Challenges Facing Youth Transitioning out of State Care in the Western Cape*. Cape Town: Mamelani Projects.
[208] Committee on the Rights of the Child (2005) *Report on Fortieth Session, September 2005, CRC/C/153.* Geneva: CROC. Para 667.
[209] CASE (2010) at pg 61, note 13 above.
[210] Skelton A (2010) at pg 13-15, note 113 above.
[211] s196(2).
[212] Personal communication with child and youth care workers at the 19th NACCW Biennal Conference, 2 – 4 July 2013.

5.3.8 Access to health care services

A 2007 study found that CYCCs were providing care to "an exceptionally high ratio of HIV-positive children" (34% of children whose status was known)[213], making it critical that children enjoy their rights to access health information and treatment. The CASE studies asked centres to list the reasons for children leaving care in the previous 12 months: worryingly, death was the reason given for 8% of children who left unregistered centres. A comparison of the numbers shows that 63 children died in registered centres caring for approximately 14 500 children, against 81 in unregistered centres caring for 2 100 of them. The proportionately higher number of deaths in unregistered centres could be due to the fact that a greater proportion of children in unregistered centres are HIV positive. The high number of deaths suggests that children are not receiving appropriate health care. Research is required to understand the nature of this problem and the services that these children require.

The state has an obligation to pay for HIV-testing for the purposes of placing children in foster care or adoption.[214] However, Designated Child Protection Organisations organising long-term placements of children report that public health facilities refuse to pay for other health screening tests required pre-adoption or foster care. As adoptions and foster placements cannot be finalised without these tests, the result is that children stay in places of safety and children's homes for longer than is necessary.[215]

5.3.9 Compliance with norms and standards

Unregistered centres were less likely than registered ones to comply with the norms and standards. They had higher staff-to-child ratios[216], while 28% of those surveyed lacked emergency exits[217]. Social workers are employed in only 18% of unregistered centres.[218] Children in unregistered centres are less likely to be involved in daily routines such as cleaning and cooking (70%), compared with 82% of children in registered facilities, which suggests that less developmental work is being done in the former than the latter.

Table 4 below shows how unregistered and registered centres are both performing well in respect of the key indicators for the right to privacy.

[213] Meintjes H et al (2007) at pg 20, note 198 above.
[214] s131 of the Children's Act.
[215] Input by the Director of Pietermaritzburg Child Welfare, Julie Todd, at the consultative workshop on the Children's Amendment Bill, July 2013, and e-mail correspondence following the consultation.
[216] CASE (2012) at pg 25, note 11 above.
[217] CASE (2012) at pg 23, note 11 above.
[218] CASE (2012) at pg 29, note 11 above.

Table 4: Respecting children's privacy

Percentage of CYCCs that report that each child:	Registered CYCC (2010)	Unregistered CYCC (2012)
Has a key worker	71%	79%
Has a safe private space to keep their belongings	92%	89%
Has their own clothing	97%	96%
Separate sleeping rooms/areas for boys and girls	79%	84%

Source: CASE (2012) *Unregistered Child and Youth Care Centres and Temporary Safe Care*. Pretoria: Department of Social Development & UNICEF**,** Figure 1, pg 13 and Figure 7, pg 23.

5.3.10 Are institutional placements regularly monitored?

The CROC expressed concern about the insufficient monitoring of placements and the limited number of qualified personnel in this field.[219] Unregistered centres are not assessed. The CASE study revealed that most registered centres report some form of assessment: Developmental Quality Assurance as provided for in the Children's Act (25%); monitoring and evaluation (38%); inspections (25%); and other (4%). However, 8% reported no form of assessment at all.[220] According to CASE, "[m]ore than half (57%) of centres who responded to this question record the last assessment as happening in 2009, with a further 14% in 2008 and 8% in 2010".[221] This suggests that the remaining 21% had been assessed more than two years previously or not at all.

6. Recommendations

6.1 To improve availability and accessibility of family reunification services

This review has identified problems in the accessibility and availability of prevention and early intervention programmes to children in CYCCs, especially in the case of family reunification services. One of the reasons advanced for this is that the existing pool of DCPOs is too small and under-resourced to keep up with the need. A further reason is that other service providers such as NPOs and CYCCs, who are otherwise able to offer family reunification services, are prevented from doing so because the DSD interprets the Children's Act narrowly to restrict the provision of family reunification services to DCPOs. A number of possible solutions to this dilemma need to be debated:

- The national Minister could issue a directive clarifying that NPOs and CYCCs can indeed provide family reunification services and other related prevention and early intervention programmes.
- The Children's Act could be amended to clarify any confusion and make it expressly clear that NPOs and CYCCs can provide prevention and early intervention programmes, including family reunification services.

[219] Committee on the Rights of the Child (2000), para 25, see note 54 above.
[220] CASE (2010) at pg 41, note 13 above.
[221] CASE (2010) at pg 40, note 13 above.

- Provinces need to increase their funding to DCPOs, NPOs and CYCCs to enable them to cover the costs of family reunification programmes. In particular, the funding needs to cover the costs of staff time and transport in order to enable visits both to the family and between the child and family.

6.2 To support unregistered CYCCs to meet the norms and standards, where appropriate

Many unregistered centres are operating in South Africa. The majority have tried to register or are in the process of doing so. A common barrier they report is an inability to meet the registration requirements and norms and standards due to delays by government agencies (for example, municipalities or provincial DSDs). To ensure that these centres can be legalised and regulated, it is recommend that:

- The Minister should issue a directive to the provincial DSDs referring them to the mechanism of conditional registration and encouraging its use in appropriate cases. The directive could also guide provinces on what minimum norms and standards should be in place before conditional registration can be granted and what support the province should provide to centres with conditional registration.
- The Minister should amend section 201 of the Children's Act to provide for an option for renewal of conditional registration beyond one year, for a further year, if the centre is unable to meet the norms and standards and/or other registration conditions due to delays caused by a government agency.

6.3 To ensure sufficient places in CYCCs and an appropriate spread of therapeutic programmes across the country

The Children's Act provides for the necessary planning processes and tools to ensure that there are sufficient places in CYCCs across the country and that the required range of therapeutic programmes is provided. However, the review shows that these processes and tools have not yet been implemented. It is therefore recommended that:

- The national department should draft, consult on, and finalise its first national strategy on CYCCs. This strategy should be based on the best available evidence.
- The Minister should urgently amend regulation 2 of the Children's Act to set a due date by which provinces must complete their provincial profiles.
- The provincial DSDs need to complete their provincial profiles as a matter of urgency to ensure that their decisions about registration and funding are based on evidence.
- All provinces need to draft, consult on and finalise their provincial strategies to transform child and youth care centres based on the evidence identified through their profiling exercise and the national priorities set out in the national strategy.

6.4 To ensure that all CYCCs provide developmental and therapeutic care

- The provincial strategies should include specific measures that the DSD intends to implement to assist CYCCs to meet the norms and standards set by the Children's Act. Transformation efforts need to be directed towards the provision of the range of different programmes envisaged in the Children's Act, taking into account the identified provincial requirements.
- Assistance should be targeted at unregistered centres and those registered centres with the most danger signs as identified by the baseline study conducted by CASE.
- Provincial departments should use the quality-assurance process defined in the Children's Act to assess the readiness of registered and conditionally-registered child and youth care centres to meet the norms and standards prior to the mass re-registration in 2015. The resulting organisational development plans should inform the provincial strategies.

6.5 To ensure that CYCCs are adequately funded to provide quality care and programmes

While the Children's Act, its regulations and norms and standards require CYCCs to deliver care and therapeutic programmes of good quality, the provincial DSDs only partially fund the NPOs that run the majority of South Africa's CYCCs. Such partial funding does not enable CYCCs to meet all the requirements of the law. To address this disjuncture, it is recommended that:

- The Minister should prescribe national funding norms and standards for CYCCs across the country. This should set a minimum level of funding based on a realistic costing of providing care and programmes according to the law. These funding norms should ensure that funding covers the cost of providing care and creating a therapeutic environment, as well as the cost of specialist programmes and fully-funded posts for child and youth care workers, social workers and managers. All provinces should be obliged to adhere to the minimum, with scope being given for increases if their resources allow it. National funding norms and standards would also ensure uniformity in the funding of CYCCs across provinces as well as parity between CYCCs run by NPOs, government and for-profit companies.

6.6 To increase the number of qualified child and youth care workers

The evidence shows that there are not enough qualified child and youth care workers in South Africa. To address this challenge, it is recommended that:

- The Minister should publish the final regulations to the Social Service Professions Act so as to enable child and youth care workers to register and be regulated.
- The DSD should provide bursaries to support child and youth care workers to meet the levels of education and training required by the Regulations to the Social Service Professions Act.

6.7 To ensure free health screening for children awaiting foster care or adoption

Refusals by public health facilities to conduct and pay for health screening tests, which are required prior to placements of children in foster care or adoption, are causing delays in adoption and foster care placements. To address this, it is recommended that:

- The Ministers of Social Development and Health should issue a combined directive to all DCPOs and all state health facilities clarifying that the Department of Health is responsible for providing and funding the health screening tests that are required in terms of the Children's Act before a child can be placed with a foster parent or adoptive parent.

6.8 To ensure that children in CYCCs can access free public health care services

Whilst all children under six are entitled to free health care services at public health facilities, there is no clarity in the law that children older than six who are in CYCCs are also entitled to free health care services. To remedy this, it is recommended that:

- The Minister of Health should draft regulations in terms of section 4 of the National Health Act to clarify that children in CYCCs are entitled to free health care services at any public health facility. These regulations should also clarify that free health care services at any public health facility include any medical tests required in terms of the Children's Act or its regulations prior to an adoption or foster care placement.

6.9 To address gaps in evidence

The completion of the provincial profiles will provide much needed data on the demand for services, both in respect of the number of children in need of residential care and the specialist programmes they require. In addition, there is a need for qualitative research to understand why children are remaining in CYCCs longer than they should. Key questions to be asked include:

- What are the barriers to effective family reunification?
- What inputs are required to transform CYCCs into therapeutic environments?
- Why do so many children in both registered and unregistered CYCCs not have court orders or have court orders that have expired?
- Why are social workers and courts placing children in unregistered facilities?

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The year 2014 marks 20 years of democracy for South Africa. Children born in 1994, at the start of democracy, are now 20 years old and entering the next phase of their lives as young adults. It is a good moment to take stock of South Africa's progress in realising children's rights.

To realise rights, the state needs to design and implement a range of measures which include strategic plans, policies, laws, programmes, budgets and services. These measures together make up the state's overall plan for the realisation of children's rights.

This book focuses on a selection of laws and examines whether they have been designed and are being implemented in compliance with international and constitutional law. Where design flaws or implementation challenges are identified, the authors make recommendations for reform. The aim of the book is to provide an evidence-based resource for government officials, Members of Parliament, judges, magistrates, lawyers and representatives from civil society to use in their work for and with children.

Each chapter, written by an expert on child law and peer reviewed, deals with a different right and examines the laws and policies aimed at realising that particular right. Rights examined include children's rights to birth registration; basic nutrition; social assistance; basic education; special protection when in conflict with the law; protection from violence; and appropriate alternative care when removed from the family environment.

ISBN 978-0-7992-2504-4