PART ONE

Children and Law Reform

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

- developments in international child law
- the Refugees Amendment Bill and the Green Paper on International Migration
- the National Minimum Wage
- the Social Assistance Amendment Bill
- a revised Traditional Courts Bill
- the Eastern Cape Customary Male Initiation Practice Act
- amendments to the Children's Act.

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Legislative and policy developments 2016/2017

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This chapter summarises and analyses policy and legislative developments between August 2016 and July 2017. These include:

- developments in international child law
- the Refugees Amendment Bill and the Green Paper on International Migration
- the National Minimum Wage
- the Social Assistance Amendment Bill
- a revised Traditional Courts Bill
- the Eastern Cape Customary Male Initiation Practice Act
- amendments to the Children's Act.

Developments in international child law

The thematic focus of the *South African Child Gauge 2017* – survive, thrive, transform – is at the heart of South Africa's obligations under international law. The African Charter on the Rights and Welfare of the Child (ACRWC) and the United Nations Convention on the Rights of the Child (UNCRC) both protect the right to life, survival and development, alongside many other rights. The ACRWC and UNCRC are important for promoting children's rights because they require governments to report regularly on their progress in realising children's rights.[1] Civil society organisations can participate in the monitoring process by submitting so-called "shadow" reports that add to or challenge information provided by governments.

In 2016, the UN Committee on the Rights of the Child (UNCROC) released its concluding observations on South Africa's most recent country report.[2] The concluding observations acknowledge that South Africa has made significant progress in realising children's rights. The Committee welcomed, for instance, the reductions in infant and child mortality and in mother-to-child transmission of HIV/AIDS, as well as improvements in the legal and policy framework to combat violence against children.[3] However, the concluding observations raise numerous concerns, particularly the lack of implementation of legislation. The UNCROC also rebuked the government for its failure to follow some of the Committee's previous recommendations.[4] In terms of the right to life, survival and development, the UNCROC asked government to:

- address poverty and structural inequalities underlying the high child mortality rate;
- enhance its efforts to reduce infant and child mortality by addressing, amongst others, high levels of violence against children, child malnutrition, HIV/AIDS and other preventable diseases;
- provide support to families to prevent violence, abuse, neglect and abandonment of children; and
- strengthen its efforts on firearm control.[5]

In January 2017, the government submitted its second country report to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). Subsequently, various civil society organisations, including a large coalition of children's organisations, submitted shadow reports to the ACERWC.[6] Oral presentations by both government and civil society organisations are expected to take place in late 2017 and concluding recommendations by the ACERWC will be released in 2018.

In addition to the report submitted to the African Committee, South Africa also submitted its initial report on the UN Convention on the Rights of Persons with Disabilities and on the International Covenant on Economic, Social and Cultural Rights. While these conventions are not child-specific, they both have relevance for children's rights.[7]

Refugees Amendment Bill and Green Paper on International Migration

In its concluding observations, the UNCROC highlighted the need to prevent statelessness of migrant and refugee children. To ensure that such children are properly documented and have access to a nationality, the Committee recommended, amongst others, that South Africa:

- consider providing migrant, asylum-seeking and refugee children with an option of permanent settlement in South Africa;
- amend legislation and regulations relevant to birth registration and nationality, where necessary, to ensure their full conformity with the UNCRC; and
- ensure that the Refugees Amendment Bill (RAB) is fully consistent with the UNCRC.

The RAB was passed by the National Assembly in 2017 and at the time of writing was being considered by the National Council of Provinces.[8] If passed, the Bill will amend the Refugees Act. The RAB reduces the legal protection of separated refugee and asylum-seeker children and fails to address legal gaps in relation to such unaccompanied children.

In its current version, the Refugees Act entitles "dependants" of refugees or asylum seekers to the same status as those they are deemed to be dependent on. The definition of who a "dependant"

was initially included "any unmarried dependent child … of such asylum seeker or refugee".[9] This implied that they would have to be the biological child of the adult asylum seeker or refugee to qualify as a dependant. However, the definition of "dependant" was expanded in 2015 to ensure that children who were separated from their biological parents and were seeking asylum with adults who were their primary caregivers ("separated children") were also recognised as dependants – of the primary caregiver.[10]

Unfortunately, the RAB does away with this protection by redefining dependants to exclude separated children. The definition once again only includes the biological children of refugees and asylum seekers. The planned amendment therefore leaves separated children without a pathway to obtaining documentation. Without documentation, they are unable to access basic services like health care, social assistance and education, and are at risk of statelessness.

The RAB also fails to protect children who are unaccompanied by their parents or any adult, and who seek asylum alone ("unaccompanied minors"). Currently, the Refugees Act requires that unaccompanied minors whose circumstances indicate that they have a claim for asylum must be referred to the children's court, which in turn "may" (rather than "must") make an order that such children are assisted to apply for asylum.[11] These children will then be assisted by a social worker to submit their applications for asylum. However, if the court does not grant this order, then there is no obligation on a social worker (or any other adult) to assist the children with their applications. The children would consequently remain undocumented as they cannot apply for asylum without adult assistance.

Despite this gap, the RAB does not create a mechanism for unaccompanied minors to apply for asylum themselves during the children's court enquiry – leaving it to the discretion of the court to order that a child is assisted by an adult to apply for asylum. Thus, unaccompanied minors are likely to remain undocumented and unable to access essential basic services. Furthermore, because unaccompanied children often reside in the country of asylum for long periods and lose (or never had) ties to their country of origin, the risk of statelessness grows.

In addition to unaccompanied minors who have travelled to South Africa alone to seek asylum, it sometimes happens that children are in South Africa as dependants of their asylum-seeking or refugee parents who then pass away or abandon their child. These children lose their status as dependants, and are often too young or immature to recount the events that led to their parents leaving their country of origin. Despite this, there is currently no mechanism under the Refugees Act to ensure that these children remain documented – something which the RAB fails to remedy. This leaves this group of children undocumented, and subject to the same exclusion and risks described above.

Considering these shortcomings, the Bill is not fully consistent with the UNCRC and fails to comply with the UNCROC's concluding observations relating to the prevention of statelessness of migrant and refugee children.

Around the same time as the introduction of the RAB, the Department of Home Affairs introduced the Green Paper on International Migration (the Green Paper).[12] Ideally, the Green Paper should have informed the drafting of the RAB but the law reform process was not halted. The Green Paper is worryingly silent on child migrants and refugees. Despite its purpose, part of which is to inform legislation, the Green Paper does not provide any guidance on the "management" of separated or unaccompanied minors, the birth registration of children born to undocumented migrants in South Africa, and the ability of children who are long-term residents of South Africa to naturalise.

Most worryingly, the Green Paper introduces "asylum-seeker processing centres" and "administrative detention centres".[13] These centres are meant to accommodate certain asylum seekers while assessing their eligibility for asylum. Although the Green Paper envisions that these centres be used for asylum seekers who present a security or public health risk, it also provides for "vulnerable groups and those whose identity needs to be established" to be detained at these centres.[14] While the Green Paper does not define "vulnerable groups", children could certainly be considered "vulnerable". This means that, if passed into law in its current form, it would allow officials to detain children. Civil society submissions addressing these concerns will hopefully be considered in the White Paper, which is currently being drafted.

National Minimum Wage

The agreement on a national minimum wage is a noteworthy development in addressing poverty and inequality as recommended in the UNCROC's concluding observations. The National Economic Development and Labour Council (NEDLAC) has agreed to introduce a national minimum wage of R20/hour, which translates to R3,500 and R3,900 per month for workers working 40 hours and 45 hours per week, respectively.[15] The national minimum wage will create a "floor" below which no worker in South Africa may be paid, with limited exceptions for certain sectors[i].[16] The national minimum wage will come into effect after the necessary legislation has been developed and passed by Parliament, which, according to NEDLAC, will happen by May 2018.

The national minimum wage is contentious, but some researchers argue that it can contribute to reducing poverty and inequality and, if set at an appropriate level, it can support economic growth and not lead to job losses.[17] Caregivers of children who earn the minimum wage of R3,500 would still be eligible to receive the Child Support Grant (CSG), which, as of April 2017, is available for caregivers who earn less than R3,800 per month.[18] Continued access to the grant is important because the minimum wage was set relatively low and below the subsistence level of living.[19] The minimum wage may have a positive effect on some, but not all children living in poverty. It will not make a difference

i Domestic workers will be paid 75% and agricultural workers will be paid 90% of the national minimum wage, respectively, for the first two years. Furthermore, certain businesses, for instance small businesses and start-ups, will be allowed to apply for exemptions.

for children who live in households where the caregiver is working in the informal sector, or is unemployed. In 2015, 31% of children were living in households where no adult was working;[20] although, these children might benefit from remittances of extended family who are employed in the formal sector.

Social Assistance Amendment Bill

A further development that may help mitigate child poverty is the proposed amendment of the Social Assistance Act. At the end of 2016, the Minister of Social Development gazetted a Social Assistance Amendment Bill for comment.[21] The Amendment Bill gives the ministers of Social Development and Finance the authority to add additional amounts to an existing grant, based on need. If enacted, the Bill will allow for the payment of a top-up amount to the CSG to relatives caring for orphans (colloquially called a "CSG top-up").[22] The CSG top-up is aimed at ensuring that orphans in the care of relatives receive an adequately valued social grant without delay. The reform is needed because the Foster Child Grant (FCG) is not reaching the majority of orphans in need.[23] This is primarily because the FCG application process involves a social worker investigation and a court order and these cause long delays in accessing the grant. A further potential positive impact of the reform would be a reduction in foster care caseloads, which would give social workers and children's courts more time to provide child protection services for children who have been abused and neglected.[24]

The Amendment Bill does not provide any details about the CSG top-up because these will be dealt with in the regulations which are expected after the Bill is passed. Key details still to be determined via the regulation process include:

a. *The amount of the top-up*: The Department of Social Development has proposed a top-up that is 50% of the CSG value. This would mean that orphans in the care of relatives would receive a CSG of R570 per month in 2017 Rands, while children on the standard CSG would receive R380. Whether this top-up amount is adequate needs further debate.
b. *The targeted orphan category(s)*: The Department of Social Development has indicated an intention to first target double orphans (where both parents are deceased) and to consider extending the top-up to maternal orphans later. This would be problematic as maternal orphans living with relatives currently do qualify for the FCG in terms of the Children's Act and therefore the grant proposed to replace the FCG needs to include them. Furthermore, in many cases it is impossible to distinguish between double and maternal orphans because proving or disproving paternal death is a challenge: many children do not know the whereabouts of their fathers or if they are alive, and over two-thirds of births registered with Home Affairs do not contain details of the father.[25]
c. *Proof of orphanhood*: Many applicants may not be able to produce death certificates of the child's biological parents. For example, analysis of the 2014 General Household Survey shows that at least one-third of double orphans will not be able to produce death certificates for their fathers as their fathers' identity or vital status is unknown to their family.[26] Furthermore, because over two-thirds of births registered with Home Affairs do not contain any details of the father, it will be impossible in most cases to verify that the death certificate submitted is in fact the child's father.[27] Therefore it is important that the regulations are flexible and allow caregivers to submit an affidavit instead of a death certificate.

The Bill is expected to be tabled in Parliament in early 2018. Once tabled, there will be a call for submissions, followed by public hearings.

The Bill also contains other important amendments, including the establishment of an independent tribunal to hear appeals against decisions of the South African Social Security Agency, and a government fund to provide funeral benefits to beneficiaries (and possibly other benefits) to prevent them being exploited by private insurance companies.

Traditional Courts Bill

2017 saw the re-introduction of the Traditional Courts Bill (TCB) to Parliament.[28] Many civil society organisations, including child rights experts, had expressed serious concerns over the two previous versions of the TCB[29] on the grounds that they violated women's and children's rights, preserved patriarchal norms, and did not accurately reflect the nature of customary law.[30] The 2017 version of the TCB is a vast improvement as it includes an express commitment to the Bill of Rights and prohibits conduct which infringes on individuals' dignity, equality and freedom.[31]

The TCB furthermore acknowledges that customary law is based on the principle of voluntary affiliation and that people have a choice whether or not their dispute is heard by a traditional court.[32] Despite these improvements, the TCB fails to address a number of critical issues relating to children's rights. The jurisdiction of traditional courts is now defined by a list of matters that can be heard by traditional courts. This list includes property-related offences (e.g., theft and damage to property, but only if the amount involved is below R5,000), *crimen injuria*, and altercations between members of the community.[33] Although the jurisdiction includes children who perpetrated any of these offences, the Bill fails to provide principles for dealing with child offenders, and lacks ages of criminal capacity. This undermines the objectives of the Child Justice Act, which creates guiding principles for proceedings involving child offenders to protect them from the adverse effects of the formal criminal justice system. These principles provide, for instance, that:

- the punishment of the child offender should be proportionate to the offence;
- a child should not be treated more severely than an adult would be treated in the same circumstances;
- participation of children in the proceedings needs to be ensured;
- unnecessary delays in the proceedings should be avoided; and
- parents, appropriate adults and guardians should assist children in proceedings.[34]

These principles should also be adhered to in traditional court proceedings because they protect fundamental children's rights. There is further tension between the TCB and the Child Justice Act, the Children's Act and the Criminal Procedure Act. These laws provide protection for child victims, witnesses and offenders, for instance, by allowing or prescribing that proceedings be held *in camera* (in closed court). In contrast, the TCB stipulates that traditional court proceedings must be open to all members of the community.[35] While transparency of proceedings is an important legal principle, the TCB should create exceptions for matters involving child victims, witnesses and offenders to protect them from stigma and discrimination by community members. If, however, the procedural concerns are addressed, traditional courts would have an advantage over formal magistrate's courts for child offenders because the adjudication before a traditional court would avoid a criminal record.

A further concern is that the TCB allows traditional courts to hear matters involving assaults without grievous bodily harm.[36] This means that traditional courts can adjudicate assaults against children, which would include corporal punishment and physical child abuse. Children experience high levels of physical abuse which is mostly perpetrated by the child's caregiver, relative or teacher.[37] It is questionable whether traditional courts are the right forum to deal with cases of physical child abuse, particularly given that the Children's Act requires traditional leaders to report cases of physical child abuse to the formal child protection system. The Bill, however, is silent on how traditional courts are meant to engage with the formal child protection system, including social workers and the police.

The TCB stipulates that traditional courts are "competent" to give "advice" on customary law practices such as *ukuThwala*.[38] It is unclear what the term "advice" refers to. This uncertainty is concerning because, in some instances, *ukuThwala* involves sexual offences against children. Additional concerns include the failure to set an age from which a child can initiate proceedings before a traditional court, or can "opt out" if summoned before it. Opting out may be challenging for children in any case due to pressure from parents or other community members. In addition, the provision outlining prohibited court orders fails to prohibit court orders involving cruel, inhuman and degrading punishment, including corporal punishment.[39]

At the time of writing, public hearings on the 2017 version of the Bill had not yet taken place.

Eastern Cape Customary Male Initiation Practice Act

The Children's Act provisions on male circumcision allow customary and traditional circumcisions of boys older than 16 years.[40] Circumcisions may only be undertaken if the male child has been counselled and has subsequently provided consent, and the Children's Act Regulations set out requirements for performing circumcisions (e.g., use of sterile surgical gloves, safe disposal of instruments used for circumcision, etc.).[41] The Children's Act does not regulate other initiation practices or initiation/circumcision schools. Given that national legislation has not yet been enacted – public hearings on the Customary Initiation Bill have not yet taken place[42] – customary initiation practices continue to be regulated by provincial legislation.

Despite the provisions in the Children's Act and provincial legislation, botched circumcisions are reported every year. In the Eastern Cape – the province worst affected – a total of 936 circumcision initiates were admitted to hospitals, and 114 deaths and 47 penile amputations were reported between June 2012 and June 2013.[43] While a national framework on prevention and early intervention programmes to address unsafe circumcisions is still in the making, the Eastern Cape Provincial Legislature has attempted to respond to botched circumcisions by enacting new provincial legislation. The Eastern Cape Customary Male Initiation Practice Act, enacted in December 2016, replaces earlier provincial legislation to improve the safety of initiation rituals, including circumcisions.[44]

The Act creates several mechanisms to monitor and formalise traditional initiation, particularly in relation to initiation schools.[ii] It sets out minimum qualifications for traditional surgeons and nurses, and creates a number of obligations for families of prospective initiates to ensure a safe initiation process. For instance, families must ensure that a prospective initiate is examined by a medical practitioner three months and again 14 days before going to an initiation school.[45]

Neither traditional surgeons, who are meant to perform traditional circumcisions, nor other persons may perform circumcisions on individuals under the age of 18 years, i.e. children.[46] Children may also not attend initiation school.[47] In other words, only adults can undergo customary circumcision and attend initiation schools. In this respect, the Eastern Cape legislation is stricter than the Children's Act, which allows boys over the age of 16 years to undergo traditional circumcision – if they are appropriately counselled and if both the boy and his parents consent to the circumcision. The Eastern Cape legislation is also stricter than the proposed Customary Initiation Bill, which aims to regulate different initiation practices as well as initiation schools, and which allows boys between 16 and 18 years to undergo traditional circumcision, if certain requirements (e.g. consent, medical checks) are fulfilled.

The provincial Act furthermore regulates the opening of initiation schools by requiring the schools to obtain written permission from the provincial Minister for Health and the relevant traditional leadership.[48] Failure to obtain these permissions attracts a fine and/or imprisonment up to 12 months.[49] In light of the numerous injuries and deaths of children and young adults due to botched circumcisions, the provincial law is a welcome step to create strict and clear guidelines for the traditional practice of initiation. Provincial government and traditional leadership will need to work together closely to ensure the law's successful implementation, particularly to ensure that children are not traditionally circumcised.

ii For instance, it sets up a multi-sectoral provincial initiation coordinating committee, a provincial technical task team, district initiation forums and local initiation forums.

Amendments to the Children's Act

The Children's Amendment Act and Children's Second Amendment Act, which were discussed in the *South African Child Gauge 2016*, have not yet come into effect at the time of writing because the President has not yet proclaimed them. The envisioned amendments include changes to the National Child Protection Register, the removal of a child to temporary safe care, adoption, and foster care.[50] The drafting of a Child Care and Protection Policy, which will pave the way for the Third Amendment Bill to the Children's Act has been finalised by the Department of Social Development, but has not yet been made available to the public.

Conclusion

Addressing child poverty and inequality is essential if children are to survive, thrive and reach their full potential. It is therefore positive to see that South Africa is undertaking steps to reduce poverty and inequality, but the reach and impact on children remain unclear. For instance, a large proportion of children will not benefit directly from the national minimum wage because they live in households where the adult caregiver works in the informal sector or is unemployed. Similarly, the effects of proposed changes to the Social Assistance Amendment Bill are unclear given that key decisions – the amount of the CSG top-up, the target group and eligibility criteria – have yet to be determined. What is clear though is that orphans are merely a sub-group of children living in poverty and the proposed changes will not affect the much larger group of children who are not orphaned but who also live in poverty. These children will continue to rely on the meagre CSG.

The proposed policy and legal changes in relation to migrant and refugee children are particularly concerning. If the RAB is enacted in its current form, migrant and refugee children will continue to be at risk of statelessness and will be unable to access basic services. Opportunities to survive, thrive and reach their full potential will remain limited for many children in South Africa until significant progress has been made in improving access to quality services, curbing poverty and inequality, and effectively addressing violence.

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