

# Legislative developments in 2010/2011

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2010 saw the enactment of two laws aimed at protecting and regulating services for children: the Children's Act and the Child Justice Act. Both came into operation in April that year. Since then, no new laws have been passed that focus specifically on children. However, some general laws were amended, and some new Bills were drafted that will affect children either directly or indirectly.

## Births and Deaths Registration Amendment Act

The ability to access birth certificates is central to children's right to a name and nationality, and the procedure for accessing such certificates is outlined in the Births and Deaths Registration Act<sup>1</sup> (the principle Act). At the end of 2010, the Births and Deaths Registration Amendment Act<sup>2</sup> (Amendment Act) was passed and, once it comes into operation, it will amend the principle Act. Some of the amendments will have a direct effect on children and families who need birth or death certificates to access a range of services to which they are entitled constitutionally, such as health care and education services.

The most relevant changes introduced by the Amendment Act are:

### Restrictions on who may register a birth

The principle Act says that either the mother or father can register a child's birth. If they are unable to do so, a caregiver, guardian or any other person asked by the parent can register

the birth. The Amendment Act changes this principle so that, apart from the mother or father, only a prescribed list of persons (to be announced in future regulations) will be able to register the birth of the child, and only in circumstances where both parents are deceased. For example, a social worker could register the birth of an orphaned child.

In commenting on the Amendment Act, civil society organisations like the Alliance for Children's Entitlement to Social Security (ACCESS) strongly objected to this amendment and warned that it could prove counterproductive and burdensome for both the Department of Home Affairs and for applicants wanting to register children. If caregivers such as grandparents and aunts are unable to register a birth without the involvement of a third party like a social worker, then they might give up and not register the birth at all. ACCESS also argued that there are many legitimate reasons why parents may be unable to register a child themselves, for example if the mother is too ill or has died during child birth, and the father is untraceable or working in another province. If the department's primary objective was to prevent fraudulent birth registrations, it was suggested that other less restrictive measures could be used to achieve that objective.<sup>3</sup>

Despite these objections, the Amendment Act still contains this provision, which could be challenged constitutionally in future if it creates unreasonable limitations on children's right to a name and nationality, their right to access services or their right to administrative justice.

### Streamlined requirements for late birth registrations

The principle Act currently allows the birth of a child to be registered after the first 30 days but outlines different procedures for registering a birth before the age of one, between one and 15 years, and older than 15. In an attempt to ensure that all live births are registered within 30 days, the Amendment Act streamlines the requirements for all late registrations done after the first 30 days. ACESS supported this amendment, which emphasises the importance of registering births as soon as possible. However, it cautioned that this amendment could conflict with cultural practices around the naming of children which may delay the registration of the child. ACESS has called for further investigation and consultation on this issue.

### New provisions on registering the birth of an abandoned child

The Amendment Act also changes the principle Act's provisions for the registration of the birth of an abandoned child. Firstly, it provides that similar procedures will apply to an orphaned child. Secondly, it notes the application of the Children's Act in such cases. In other words, if the birth of an abandoned or orphaned child was not registered, a social worker must register the birth after an enquiry has been conducted in terms of the Children's Act.<sup>i</sup> The social worker must also give a name and surname to the child, if these were not assigned to the child at the enquiry. Given the shortage of social workers, this amendment could prove to be an unnecessary restriction because it does not allow other social service professionals (who are recognised by the Children's Act) to register the birth of an abandoned or orphaned child.

### Recording an adoption

The Amendment Act includes a provision confirming the requirements of the Children's Act to record an adoption in the birth register. This means that after a children's court has issued an adoption order, the adoptive parents of a child whose birth has already been registered must apply to the Director-General of the Department of Home Affairs to record the adoption and any change in the child's surname on the birth register. When making the application the adoptive parents must have:

- the relevant adoption order as registered by the adoption registrar;
- the birth certificate of the child;
- the prescribed birth registration form; and
- a fee prescribed in terms of any applicable law, if any.

## Policy on Learner Attendance

The National Education Policy Act<sup>4</sup> provides for the publication and implementation of national education policies. In 2010 the

Department of Basic Education introduced the Policy on Learner Attendance.<sup>5</sup> The policy came into operation on 1 January 2011 and applies to all public schools.

### The objectives of the policy

The policy aims to promote punctual and regular school attendance at all public schools. This followed concerns about learners not attending schools regularly as a result of poverty and other social problems. The policy argues that regular learner attendance is important for realising a child's right to education, for improving learner retention and performance, and preventing learners from taking part in risky sexual behaviour resulting in teenage pregnancy or contracting HIV. The policy also aims to strengthen the monitoring, management and recording of learner attendance in order to identify and respond to learners and their parents who might need assistance.

### Acceptable reasons for absenteeism

A list of valid reasons for learners to be absent from school are set out in the policy. This includes a child being ill; a pregnant learner giving birth (which must be confirmed by a medical practitioner or a midwife); an appointment at court, social services or other official agency (a principal may ask for documentary proof of the appointment); and also exceptional circumstances for which (in the principal's view) a temporary absence from school is in the best interest of the learner, or was unavoidable.

### Responsibilities of all role-players

Details of the responsibilities of learners, parents, schools, teachers and principals to ensure regular learner attendance are covered in the policy. It recommends a zero tolerance approach (amongst other things) to absence without valid reasons, and that "schools and social agencies give appropriate support to learners whose families struggle under the burden of poverty, serious illness and bereavement, especially learners who are compelled by circumstances to be caregivers or to head their own households".<sup>6</sup>

The policy gives guidance on what a principal is required to do if a learner is absent for three consecutive days without a valid reason, including the need to – where necessary – seek intervention from government and non-government social development agencies to assist the learner and his/her family. In cases of continuous absence, a learner's record in the class register can be cancelled as an administrative action. Such cancellation is not meant to be a disciplinary action and does not mean the child is expelled or suspended. The policy is explicit that female learners' records may not be cancelled on the grounds that they are pregnant or have given birth.

<sup>i</sup> The Children's Act requires social workers to investigate the situation of children in need of care and protection. This includes orphaned or abandoned children who are without visible means of support.

## Social Assistance Amendment Act

The Social Assistance Act<sup>7</sup> (the principle Act) was again changed by an Amendment Act<sup>8</sup> which came into operation in September 2010. The main amendments stipulate how the South African Social Security Agency must inform an applicant who was not successful in applying for a social grant of his/her right to request the agency to reconsider the application (or to appeal a reconsidered decision to the Minister of Social Development). These amendments do not appear to have been the main cause of controversy at the time the Amendment Bill was introduced. However, there were other amendments in the tabled Bill that would have had an impact on children if Parliament decided to include them in the Amendment Act.

The principal Act allowed those who cared for children with physical or mental disabilities to access the Care Dependency Grant, and the Amendment Bill<sup>9</sup> proposed to remove the words “physical” and “mental” from this eligibility requirement. This was seen as a positive development that would have allowed a wider range of children with impairments to access the grant.

The Bill also proposed including the following definition of “disability” in the general list of definitions:

*...disability in respect of an applicant means a moderate to severe limitation to his or her ability to function as a result of a physical, sensory, communication, intellectual or mental disability rendering him or her unable to –*

- (a) obtain the means needed to enable him or her to provide for his or her own maintenance; or*
- (b) be gainfully employed.*<sup>10</sup>

This definition would have impacted negatively on children and their families as it could have prevented people (ie parents and caregivers) who were sick with HIV and other chronic illnesses from accessing the Disability Grant.<sup>11</sup> Restricting access to the grant in this way could also have had serious consequences for child-headed households where children caring for terminally ill adults are particularly vulnerable.

In the end, Parliament decided to remove the definition of disability primarily because the Department of Health said it lacked the capacity to implement it. So the definition does not appear in the current Amendment Act; however, the words “physical” and “mental” remain part of the eligibility requirements for the Care Dependency Grant, which is disappointing.

## Basic Conditions of Employment Amendment Bill

In December 2010 the Department of Labour published various draft Amendment Bills<sup>12</sup> intended to amend a range of labour laws, including the Basic Conditions of Employment Act<sup>13</sup>. One

of the Bills is the Basic Conditions of Employment Amendment Bill, which aims to protect workers from exploitation and prohibit certain abusive practices like employers requiring payment from prospective employees to secure employment.

The draft Bill also proposes to amend the provisions relating to children who work. The current Act states that no-one may “employ” a child under the age of 15 or under the minimum school-leaving age (which is the last school day of the year in which the child turns 15 or the end of grade 9, whichever comes first).<sup>14</sup> The Bill proposes that no person may “require or permit” a child to work as an employee or independent contractor if the child is under 15 or below the minimum school-leaving age.<sup>15</sup> Whereas the principle Act uses the word “employ”, the Bill proposes to change this to “require or permit” the child to perform work or provide services.

This will mean that even parents and extended family members cannot “require or permit” children to work in violation of these new provisions. The Bill also extends protection to children working legally as employees or independent contractors who may not be permitted or required to do work which is inappropriate for their age or that will jeopardise their health, well-being or development.

These amendments aim to bring the provisions of the principle Act in line with the Constitution (which uses the terms “required or permitted to perform work or provide services” in section 28). The Bill has also increased the term of imprisonment from three to six years for someone who violates these provisions.

## Protection from Harassment Bill

Tabled in Parliament in early 2010, the Protection from Harassment Bill<sup>16</sup> sets out the procedures for obtaining and issuing protection orders against harassment. Harassment is defined as:

*...directly or indirectly engaging in conduct that causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably –*

- (a) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;*
- (b) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or*
- (c) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving it where it will be found by or given to, or brought to the attention of, the complainant or a related person...*<sup>17</sup>

The protective provisions of the Bill also apply to children who can be complainants, persons related to a complainant (for example where a parent is being harassed), or child witnesses.

When it comes to the procedure for getting a protection order, there are various similarities between the provisions in the Bill and those in the Domestic Violence Act (DVA)<sup>18</sup>. The Bill makes it clear that people who could apply for relief against harassment or stalking in terms of the DVA will not be prevented from applying for relief in terms of the Protection from Harassment Bill. Just like the DVA, the Bill also allows for a child (or for someone acting on behalf of a child) to apply for a protection order without requiring assistance from a parent, guardian or any other person.

The DVA allows explicitly for any other person, including “a counsellor, health service provider, member of the South African Police Service, social worker or teacher”<sup>19</sup> who has a material interest in the well-being of the complainant to apply for a protection order on behalf of the complainant.

The Bill also allows other people to apply for a protection order on behalf of a complainant. It must be someone who has a material interest in the well-being of the complainant “or a related person”. Such a person is “any member of the family or household of a complainant or any other person in a close relationship to the complainant”.<sup>20</sup> What the Bill also shares with the DVA in this regard is the vagueness of the concept “material interest” as it is not clear how it will be determined.

Both the Bill and the Domestic Violence Act require the complainant to give written consent that another person may apply on his/her behalf, unless the court is of the opinion that the complainant is unable to give consent. In the case of the DVA, consent is not required if the complainant is a child. This may be because the Act only applies to domestic relationships and the child may be reluctant to lay a complaint if the alleged perpetrator is a parent or family member. This exception to the consent requirement does not apply to the Protection from Harassment Bill.

The Bill will contribute to curbing violence against women and children. While the DVA covers only harassment and stalking cases where the complainant and the respondent are in a domestic relationship, the Protection from Harassment Bill will extend protection to cases of harassment where there is no domestic relationship between the victim and perpetrator.

## **Prevention and Combating of Trafficking in Persons Bill**

In March 2010, the Department of Justice and Constitutional Development tabled the “Trafficking Bill”<sup>21</sup> in Parliament. The Bill is intended to give effect to a United Nations Protocol<sup>22</sup> (Palermo Protocol) and aims to prevent and combat the trafficking in

persons within and/or outside South Africa’s borders. It criminalises trafficking in persons and other associated offences, and contains measures to protect and assist victims of trafficking. It also seeks to establish an inter-sectoral committee to prevent and combat trafficking in persons.

### **Limitations of existing legislation**

Currently, the law addressing trafficking in persons in South Africa is scattered across the Criminal Law Sexual Offences and Related Matters Amendment Act<sup>23</sup> and the Children’s Act<sup>24</sup>. The former makes it an offence to traffic people for sexual purposes, while the Children’s Act addresses the trafficking of children.

The two statutes have a limited operational scope. The Sexual Offences and Related Matters Amendment Act criminalises the trafficking in persons only in the context of sexual exploitation (including pornography and prostitution), sexual grooming and/or sexual abuse.<sup>25</sup> The Act does not make provision for child trafficking (although there is a reference to trafficking by means of abuse of power of a position of vulnerability). Neither is there provision for reintegration or victim assistance, nor is there any discussion of repatriation or the possibility of determining whether repatriation is in the best interests of the child. Although the Act criminalises trafficking, it does not provide specific sanctions for the commission of this crime.

The definition of “trafficking” of children in the Children’s Act’s is more expansive than that in the Palermo Protocol, and whilst the Act was initially hailed by the trafficking sector as being comprehensive, its major shortcoming is the lack of a provision for prevention (as is also the case with the “Sexual Offences Act”). The Children’s Act also does not provide for a long-term reintegration process or psychological and medical assistance for victims.

If the Prevention and Combating of Trafficking in Persons Bill becomes law, it will be the most comprehensive statute on human trafficking in South Africa. It repeals the relevant sections of both the Children’s Act<sup>26</sup> and the Sexual Offences and Related Matters Amendment Act,<sup>27</sup> but does not provide for services for children who are the victims of trafficking as these provisions remain in force in the Children’s Act.

### **Prevention strategies**

The Bill includes a number of strategies to prevent and combat trafficking in persons. This includes awareness programmes to inform and educate the public (locals and foreigners) about trafficking; their rights as victims; who to approach for help; and the legal remedies available to ensure their safety, recovery and repatriation. These programmes also aim to discourage the demand for (and supply of) victims of trafficking – especially women and children. The draft law says the programmes and other measures “must”:

- (a) include appropriate measures aimed at reaching rural communities;
- (b) where possible, be provided in a language understood by the persons at whom they are directed; and
- (c) be reviewed every second year in order to determine their effectiveness.<sup>28</sup>

### Offences and mandatory sentencing

The Bill outlines offences such as trafficking in persons; acts aimed at committing, acquiring another person to commit, or conspiring to commit a trafficking offence; debt bondage; using the services of victims of trafficking; and engaging in conduct that facilitates trafficking in persons. This includes the possession, destruction, confiscation, concealment of, or tampering with, identity or passport documents. The Bill provides for mandatory sentences ranging from fines to life imprisonment for people found guilty of these offences.

### Reporting and referral procedures

The “Trafficking Bill” provides for procedures for the reporting and referral of child and adult victims of trafficking, including foreign child victims of trafficking found in South Africa. Any person – in addition to an “immigration officer, labour inspector, social worker, social service professional, medical practitioner, nurse, teacher, traditional health practitioner, traditional healer or leader” – who suspects that a child has been trafficked, must report this to the police. The police must then make a further report within 24 hours to a designated child protection organisation or the provincial Department of Social Development. The Bill suggests a maximum sentence of one year’s imprisonment for people found guilty of failing in their duty to report.<sup>29</sup>

The Children’s Act on the other hand, provides that an “immigration official, police, social worker, social service professional, medical practitioner or registered nurse” who comes into contact with a child victim of trafficking must report to a designated social worker for investigation.<sup>30</sup> Failure to comply with these reporting requirements is a crime that attracts a sentence of up to 10 years in prison if committed once (or up to 20 years if committed more than once).

The “Sexual Offences Act” makes provision for the reporting of sexual offences against children to a police official, failure of which would attract a fine or custodial sentence of up to five years. However these provisions would only apply to trafficking for the purposes of sexual exploitation. While the Children’s Act and “Sexual Offences Act” offer stiffer penalties, the new Bill is wider in scope than these two Acts as it places an obligation on a wider group of people to report and ensure the child is protected from further harm.

### Jurisdiction to try acts committed outside South Africa

The Bill also gives South African courts the jurisdiction to try acts committed outside the country’s borders if, amongst other reasons:

- the act would have constituted an offence if it had been committed in South Africa, regardless of whether or not the act constitutes an offence where it took place;
- the accused is a South African citizen or a resident of the country; or
- the accused has committed the offence against a South African citizen or a resident of the country.<sup>31</sup>

### Services for victims of trafficking

The Bill entitles foreign victims of trafficking to access health care services that are available to citizens.<sup>32</sup> However, it does not provide for specialised care for children who are victims of trafficking, or for specialised training for their carers. The Bill prohibits the criminal prosecution of adult and child victims of trafficking, for instance those forced into prostitution.

Although the Bill has been hailed as very comprehensive, it is disappointing that it does not adequately protect child victims of trafficking, particularly those of foreign origin. For instance, while it addresses the repatriation of child victims and provides for the investigation of whether or not the child will be safe and cared for if returned to its country of origin,<sup>33</sup> the Bill does not provide for ways of locating the family members of such children. While children in some instances may not be returned to their country of origin for safety reasons, there is little provision in the Bill to protect children trafficked into South Africa. For instance, there is no mention of the integration of a child victim of trafficking into the community. The identity and privacy of child victims are also not protected under the Bill.<sup>34</sup> While the Bill regulates organisations which offer services to adult victims of trafficking, it is conspicuously silent on similar regulations for children.

### Compensation and residential status

The Bill addresses the residential status of foreign victims of trafficking in South Africa, and their compensation. It seeks to protect victims from summary deportation and repatriation, and victims of trafficking may apply for a renewable visitor’s permit for temporary residency.<sup>35</sup> However, without representation, in at least the form of a guardian *ad litem* (a person appointed by a court to act in a lawsuit on behalf of the child), these provisions may prove to be a dead letter for child victims.

## Repatriation of child victims

In taking decisions on repatriating a child victim, the Bill requires due consideration of the best interests of the child, their safety during the process and the availability of care arrangements, and the possibility of harm in the country of origin. But it is silent on the provision of an adult escort where parents are not in a position to come to South Africa to collect the child. Here the Bill may be said to have regressed from the provisions in the Children's Act, which requires the Director-General of Foreign Affairs to pay for an adult escort for the child if the parents cannot afford to journey to South Africa to accompany the child home.<sup>36</sup>

## Conclusion

Although no major laws directed at children were passed recently, 2010 did see the introduction of new Bills and amendments which should protect children from abuse and neglect and improve the realisation of children's socio-economic rights. In some cases the laws introduced are extremely beneficial to children.

For example, the amendments to the Births and Deaths Registration Act stress the importance of registering the birth of a child as soon as possible, giving effect to children's right to a name and nationality, and improving children's access to services such as health care or education. Similarly, the Policy on Learner Attendance aims to ensure that children attend school and benefit from their right to education. The Protection from Harassment Bill and the Prevention and Combating of Trafficking in Persons Bill clearly serve the protection rights of children. The former will play a major role in the fight against women and child abuse and the latter should prevent trafficking and offer better support to child victims.

On the other hand, some of these new laws or amendments appear to limit children's rights. For example, the Births and Death Registration Amendment Act is overly restrictive – and may make it harder for vulnerable children (in particular orphans and abandoned children) to access birth certificates and related services. Similarly, proposed changes under the Social Assistance Amendment Bill could have prevented adults with chronic illnesses from accessing the Disability Grant, and had an adverse effect on the lives of children and their families, if they had been left intact. Although these amendments did not make it into the finalised Act, they show a particular intention from the legislature which requires a level of awareness in case they make their way back into future amendments of the Social Assistance Act.

While the laws introduced in 2010 should generally help advance children's constitutional rights, some provisions could also limit children's rights and this could lead to constitutional challenges in future.

## References

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- 2 Births and Deaths Registration Amendment Act 18 of 2010.
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- 4 National Education Policy Act 27 of 1996.
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- 8 Social Assistance Amendment Act 5 of 2010.
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- 13 Basic Conditions of Employment Act 75 of 1993.
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- 15 Republic of South Africa (2010) *Basic Conditions of Employment Amendment Bill [B-2010]*. Section 4. Pretoria: Department of Labour.
- 16 Republic of South Africa (2010) *Protection from Harassment Bill [B1-2010]*. Pretoria: Department of Justice and Constitutional Development.
- 17 See no. 16 above, section 1.
- 18 Domestic Violence Act 116 of 1998.
- 19 See no. 18 above, section 4(3).
- 20 See no. 16 above, section 1.
- 21 Republic of South Africa (2010) *Prevention and Combating of Trafficking in Persons Bill [B7-2010]*. Pretoria: Department of Justice and Constitutional Development.
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- 23 Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007.
- 24 Children's Act 38 of 2005 (as amended by the Children's Amendment Act 41 of 2007).
- 25 See no. 23 above, section 65(2)(g).
- 26 See no. 24 above, chapter 18: "Trafficking in children".
- 27 See no. 23 above, part 6: "Transitional provisions relating to trafficking in persons for sexual purposes".
- 28 See no. 21 above, section 3(2).
- 29 See no. 21 above, section 12.
- 30 See no. 24 above, section 288.
- 31 See no. 21 above, section 10.
- 32 See no. 21 above, section 15.
- 33 See no. 21 above, section 30.
- 34 Kreston SS (2007) Trafficking in children in South Africa: An analysis of pending legislation. *Child Abuse Research in South Africa*, 8(1): 35-50.
- 35 See no. 21 above, section 18.
- 36 See no. 21 above, section 286(2)(b).