Legislative developments in 2011/2012

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Legislative power is vested in Parliament and the provincial legislatures (collectively known as legislatures). This means that legislatures are responsible for the final decision on the content of the law. The executive is responsible for compiling draft laws for consideration by the relevant legislature, and for preparing sub-ordinate legislation such as regulations or norms and standards, which contain the fine detail of how a law must be implemented. The executive is also responsible for implementing the laws and making sure services reach the people.

The judiciary (courts) interprets a law when disputes arise, and assesses whether the law complies with the Constitution. Once a court has made a ruling, the executive must comply with the court's interpretation when implementing the law. The Constitutional Court can also instruct Parliament to change any law that it finds to be unconstitutional.

Many of the key 2011/2012 legislative developments affecting children came about as a result of civil society calling on the courts to interpret various laws.

Children's Act

The Children's Act[1] came into full effect on 1 April 2010. It provides for a comprehensive range of social services for children and their families and introduces a new developmental approach to South Africa's child care and protection system. The Act affects a number of government departments who need to re-train their staff and work together in new ways. This major conceptual shift for the child care and protection system has resulted in a number of implementation challenges and teething problems that should hopefully resolve with time.

However, some of the challenges have arisen because the policy choice made in the law is not reasonably conceptualised to deliver the service to the target group, or the policy choice was not clearly made by the legislature, which has left the law open to multiple interpretations. This is the case with the mechanism designed to provide social services and grants to orphaned children living with family members. In one place the Act says such children cannot be placed in foster care and in another it says that they can. Being placed in foster care determines whether or not a child can apply for the Foster Child Grant (FCG). The ambivalence in the Act has led different government departments and magistrates to interpret and apply the Act differently, resulting in unequal treatment of children and unconstitutional delays in access to both grants and services.

One way of getting clarity when there are varying interpretations of a law is to approach a High Court to interpret the Act. When all affected parties admit there is a problem, a solution can be achieved by the applicants (eg a civil society organisation, a child or caregiver) and government negotiating and agreeing on a detailed court-ordered settlement. All parties are then bound by what has been agreed in the settlement because it is an order of the court. When no agreement can be reached, the applicants and government department will argue their interpretations in the High Court, and the court will determine the meaning of the Act via a judgment.

Lapsing grants

In *Centre for Child Law v Minister of Social Development and Others*[1] the Centre for Child Law (CCL) and the government worked together on a court-ordered settlement. This resulted in the re-instatement of a large number of FCGs that had lapsed due to court orders not being extended in time. The Children's Act requires most foster care orders to be renewed and extended by the courts every two years, while the Social Assistance Act requires the South African Social Security Agency (SASSA) to stop a grant payment if the extended court order is not submitted to SASSA in time. But social workers and magistrates courts are not able to extend children's foster care orders timeously because of the large number of children in the foster care system. As a result, over 113,000 children lost their FCGs between 1 April 2009 and 31 March 2011.[3] This constitutes a serious violation of these children's constitutional rights to social assistance, nutrition, social services, health care services and education.

The settlement order between the CCL and the government allowed SASSA to re-instate the lapsed grants despite their expired court orders. As a result, approximately 80,000 lapsed grants were reinstated between 1 January and 30 November 2011.[4] More grants are likely to have been reinstated since then. The settlement order also extended the expired court orders to May 2013. However, the settlement applies only to foster care orders granted between 1 April 2009 and 1 April 2010. Orders granted after this date, the majority of which expire in 2012, all have to go back to court to be extended. Taking into account the temporary nature of the settlement and its application only to some foster care orders, the parties agreed in the settlement that the Minister of Social Development must design and implement a comprehensive solution to address the foster care crisis by December 2014.

Backlog in applications for orphans living with extended family

While approximately 80,000 lapsed grants were reinstated between January and November 2011, only 20,000 new FCG applications were added to the system over the same period.[5] This shows that, while the settlement addressed the problem of lapsed FCGs, the backlog in new FCG applications for the estimated 1.1 million orphans in need of social assistance is getting worse.

A second court case on foster care, *SS v The Presiding Officer of the Children's Court, District Krugersdorp and Others*,[6] was heard

in the South Gauteng High Court in April 2012 and involved an appeal against a Children's Court ruling that a 10-year-old orphaned child (identified only as 'SS') could not be placed in foster care with his great-aunt and uncle. As a result they could not be foster parents and therefore could not get the FCG for the child. The family was receiving the lower valued Child Support Grant (R280 per child per month in April 2012) but wanted to apply for the higher FCG (R770 per child per month in April 2012) due to the poverty faced by the family.

To access the FCG they had to approach the Children's Court to have child SS declared a child "in need of care and protection". Section 150(1)(a) of the Children's Act requires a child to be orphaned and "without any visible means of support" before the court can find the child to be "in need of care and protection". The Children's Court found that child SS was already in the care of his extended family and had been in such care for the past eight years. He thus had "visible means of support" and did not qualify as a child "in need of care and protection". The Children's Court therefore ruled that he could not be placed in foster care, meaning the family could not apply for the FCG.

Towards an equitable and comprehensive solution

Currently there are approximately 1.1 million orphaned children living with extended family in similar conditions of poverty as child SS.[i] Some Children's Courts are interpreting section 150(1)(a) in a way that allows orphaned children living with extended family to be placed in foster care, while others are interpreting it in the opposite way, or in variations between the two extremes. This results in unequal treatment, with approximately 600,000 of these children getting the Child Support Grant (CSG), others getting the FCG (approximately 400,000), and a smaller number getting neither grant.[7] The large number of families applying for foster care to access the higher grant amount is also putting strain on social workers and the courts. This has resulted in lengthy delays for children in receiving their grants as well as delays and inadequate services for abused and neglected children who require support and intervention from the same social workers and courts.

In the judgment in the case involving child SS, the High Court distinguished between orphan children who have an enforceable claim for support against relatives bearing a common law duty of support and those who do not. Child SS was living with his great-aunt and uncle who do not have a common law duty to support him – therefore the High Court upheld the appeal and ruled that SS could be placed in foster care with them. If they had been his grandparents or his adult siblings the final result could have been the opposite as the court stated that grandparents and adult siblings do have a common law duty to support. However, the court re-iterated that, when making decisions on foster care, Children's Courts should be guided by the spirit and purpose of the Constitution, the Children's Act and, in particular, by the principle of the best interests of the child. The appeal binds all Children's Courts in Gauteng and is of persuasive force for Children's Courts in other provinces.

A comprehensive solution to the foster care crisis for the many orphans living with extended family requires the government to choose the most efficient and rights-based mechanism to provide an appropriate and adequate social grant, as well as a mechanism

i There are approximately 1.6 million maternal and double orphans living with family members. Of these, 1.1 million are living in similar conditions of poverty as child SS, and are in need of an adequately valued social assistance grant. (Statistics South Africa (2010) General Household Survey 2009. In: Hall K & Proudlock P (2011) *Orphaning and the Foster Child Grant: Return to the 'Care or Cash' Debate*. Children Count brief, July 2011. Cape Town: Children's Institute, UCT.) The GHS 2011 shows a small increase in the number of maternal and double orphans (see p. 84).

to link these families to prevention, early intervention and protection services where needed. The Department of Social Development has finalised a commissioned study, with a costing, on this social assistance question and is in the process of reviewing the Children's Act towards amendments. However, this reform needs to be fast-tracked if the department is to make the deadline for a comprehensive solution to be in place by December 2014. The judgment in the case of child SS also heightens the urgency for an alternative solution as it potentially creates an inequitable situation where orphans living with aunts and uncles qualify for the FCG while those living with grandparents and adult siblings will generally have to rely on the lower CSG.

In September 2012, the Department has recently announced an intention to create a kinship grant that family members caring for orphans will be able to access directly from SASSA as a "top-up" to the Child Support Grant.[8] This will ensure that orphans living with extended family can access an adequate grant timeously and it will also improve services for abused children because it will reduce the load on social workers and the courts. At the time of publication the department had not yet announced the timeframes for the reform.

Criminal Law (Sexual Offences and Related Matters) Amendment Act

The Criminal Law (Sexual Offences and Related Matters) Amendment Act[9] defines and categorises sexual offences, and details prosecution procedures. The Act recognises that children and adolescents are vulnerable to the psychological influence of adults. It tries to protect them from abuse and exploitation by creating ages of consent to sexual activity – it is unlawful to perform a sexual act on a child younger than 16 years. The Act is commonly known as the Sexual Offences Act.

Consensual teenage sexual activity

The Act makes consensual sexual penetration between children aged 12 to 16 a crime. Other consensual sexual acts like kissing and caressing are also offences. This means that children between the ages of 12 and 16 who engage in sexual activities with other children can be charged, arrested, prosecuted and sentenced. Prosecutions must be authorised in writing by the national Director of Public Prosecutions, who may not delegate this power. Furthermore, all the children involved must be charged. However, in the case of non-penetrative consensual sexual acts it is a valid defence if the age difference between the children was not more than two years at the time of the offence.

Criminalising teenage sex potentially violates a number of children's rights enshrined in the Constitution and international law, namely, the best interests principle, the right to bodily and psychological integrity, and the right to privacy.[10]

The criminalisation of teenage sex is also ethically problematic for professionals providing support for these children, as the Act obliges anyone with knowledge of a sexual offence to report it to the police, and failure to report constitutes a crime. Doctors and nurses working with young people find this requirement extremely challenging as reporting is in contravention of their obligation to respect the confidentiality of their patients, and to realise children's rights to health. This makes it harder for teenagers to access support like reproductive and counselling services, which in turn increases the likelihood of them engaging in risky behaviour.

Sexual experimentation is a normal developmental stage – in 2008, 38% of learners reported having had sex.[11] While children who experiment inappropriately require guidance from their caregivers or a social service professional, putting them through the criminal justice system that is designed to deal with serious criminals risks violating their right to dignity and best interests.

Although the Child Justice Act allows for diversion out of the criminal justice system, even diversion programmes potentially expose these children to harm and may bring them in contact with child sex offenders. Children engaging in consensual sex are neither victims, nor offenders, and they don't fit into sex offender or victim programmes psychologically and developmentally. Placing them in either programme has the potential to damage their sexual development.

In April 2012, the Teddy Bear Clinic and Resources Aimed at Protecting Children from Abuse and Neglect (RAPCAN) challenged the constitutionality of the criminalisation of consensual teenage sexual activity, and the reporting and registration as sex offender requirements. They also argued that the Act violates children's right to equality: "Because so many children engage in the conduct which the provisions criminalise, there is an intrinsic unfairness in the selection of which children are to be charged."[12] The judgment was still pending at the time of publication.

Lack of penalty clauses

The Sexual Offences Act lists 29 sexual offences that have no specific penalty. The offences include compelled rape, sexual assault, sexual grooming of children, exposing one's genitalia to children, and sexual exploitation of children. In May 2012 the Western Cape High Court ruled (in an appeal from a magistrate's court) that, in the absence of specific penalties, these offences do not constitute crimes and cannot be prosecuted.[13] This ruling meant the courts could not send someone to prison when they commited any of these serious sexual offences.

Parliament responded quickly by passing an Amendment Bill[14] on 7 June. The Amendment Act[15] gives courts the power to use their discretion to apply a sentence where no penalty is specified in the Sexual Offences Act. This means that sexual offenders can be convicted and sentenced in future.

The Constitution prohibits criminal law from operating retroactively,[16] so the 2012 amendments do not apply to people prosecuted under the original Act. Since the Act came into operation, there have been over 12,000 convictions for sexual offences, many of which were potentially vulnerable to legal challenge if the High Court judgment of invalidity stood.[17]

To prevent the mass release of convicted sexual offenders, the National Prosecuting Authority appealed the ruling, and children's

and women's organisations made submissions as *amici curiae* (friends of the court). The Supreme Court of Appeal heard the case as a matter of urgency in June 2012. The court had to consider the human rights of the people charged with the offences – who are protected by the principle of *nulla poena sine lege* (no punishment without a law) – as well as the rights of children and women as victims of sexual offenders:

> *No judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity and, in the case of children, the right to be children; to grow up in innocence and, as they grow older, to awaken to the maturity and joy of full humanity. The rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone.*[18]

On 15 June the Supreme Court of Appeal ruled that the penalty provisions in section 276(1) of the Criminal Procedure Act empower courts to impose sentences upon people convicted of offences under the Sexual Offences Act,[19] and the fact that the Act does not contain penalty provisions does not justify nullifying charges laid or convictions secured under the Act.

Social Assistance Act regulations

There are three social grants for children: the Child Support Grant (CSG), the Foster Child Grant (FCG) and the Care Dependency Grant (CDG). Originally these grants were available only to caregivers who were South African citizens or permanent residents. However, the Refugees Act[20] states that a refugee enjoys full legal protection, including the rights set out in Chapter 2 of the Constitution.[ii]

Following litigation[21] the Minister of Social Development amended regulations to the Social Assistance Act in 2008 to grant refugees access to certain social grants, including the FCG, but not the CSG or the CDG. Civil society continued to advocate for the full realisation of the right to social security for the children of refugees. However, there was no progress in this regard until Lawyers for Human Rights brought a High Court application in June 2011.[22] The Minister of Social Development opposed the application but issued new amendments to the Social Assistance Act regulations, in August 2011 and March 2012 respectively, to allow refugees to claim the CDG and CSG.[23]

National Health Act

Section 71 of the National Health Act[24] came into force in April 2012. This section specifies the requirements for therapeutic and

ii The Constitution provides that everyone has the right to have access to "social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."

non-therapeutic research on children. Therapeutic research is research which aims to cure the disease or to ease the pain of a child. Such research, or experimentation, must be in the best interests of the child, with the expectation that the therapy will do more good than harm. The parent or guardian of the child must give consent and the child can also consent if s/he is capable of understanding the procedure. However, caregivers[iii] cannot consent to therapeutic research.

Non-therapeutic research is research that is unlikely to produce a diagnostic, preventive, or therapeutic benefit to children who are part of the study, but that aims to help patients with a similar condition in the future. Non-therapeutic research or experimentation requires the consent of the Minister of Health in addition to the parent and the child, if the child has the capacity to consent. The minister cannot consent to non-therapeutic research on children if:

- the objectives can be achieved by conducting the research on an adult;
- the research does not significantly improve scientific under standing of the child's condition, disease or disorder to such an extent that it will result in a significant benefit to the child or other children;
- the reasons for the consent by the parents or the child are contrary to public policy; or
- the potential benefit of the research does not significantly outweigh any risks to the health or well-being of the child.

Even when they cannot legally consent, children should be given information about any research or experimentation and the opportunity to express their views. The Department of Health guidelines recommend that children should be asked if they are willing to take part and that "a child's refusal to participate in research must be respected, i.e. such refusal settles the matter".[25]

Non-therapeutic research includes descriptive and observational research; and qualitative research where subjects are interviewed about health services. The Act has come under criticism for being overly protectionist. For example, requiring ministerial consent for all non-therapeutic research with children will prevent even low-risk research with children. The requirement for parental or legal guardian consent is also problematic for the approximate 5.5 million children who live with relatives.[26] Children who have lost parents to AIDS are an extremely vulnerable group that need psycho-social support and health services, yet these provisions will make it almost impossible to conduct research with these children to determine their needs.

Traditional Courts Bill

The Traditional Courts Bill[27] regulates the traditional justice system, outlines the roles and responsibilities of traditional leaders, and provides for the structure and function of traditional courts. The Bill also sets out the penalties which traditional courts may hand down, such as fines, damages or orders for specific performance. While the Bill aims to align the traditional justice system with the Constitution, women's and children's advocacy groups have criticised it for opening up opportunities for the violation of women's and children's rights. These include children's rights to have their best interests considered of paramount importance in matters that affect them; to participate in decisions that affect them; to legal representation; and to be protected from child labour; and the right of child offenders to be treated in a manner consistent with the promotion of the child's sense of dignity and worth.

The Bill was tabled in Parliament in early 2012 and was being debated in the National Council of Provinces at the time of publication.

Jurisdiction of traditional courts

Controversially, the Bill uses old apartheid boundaries to determine the geographic jurisdiction of the courts. Furthermore, the Bill does not provide adequate guidance on which legal system applies in what area and which court's decisions hold precedence. For example: Which law would apply if a respondent in a case lives in an urban area, holds modern values or is of European origin – African customary law or common or civil law? Experts have suggested that the jurisdiction of the courts should be governed by a person's consent, and that individuals voluntarily submit themselves to the jurisdiction of the court.[28] For children it is not clear who should have the right to decide which court or system of law has jurisdiction over the child. Will the child be given the choice or will an adult make the decision on the child's behalf? If the latter – what system of law governs who the adult should be? This is an important question to answer especially in rural areas and HIV-affected communities where many children are living with relatives.

Why type of cases can traditional courts hear?

Traditional courts have jurisdiction over a range of issues affecting children. They can hear civil disputes but not cases involving the care and guardianship of children, or the interpretation of wills. They can also hear a limited number of criminal matters in which children are victims or offenders: assault (where grievous bodily harm has not been inflicted), theft, malicious damage to property, and *crimen injuria* (the act of unlawfully, intentionally and seriously impairing the dignity of another).

Legal representation

The draft Bill suggests that no-one, including children, can have legal representation during traditional court proceedings. This is regarded by some as a violation of children's right to a fair trail. Others argue that allowing legal representation would change the nature of traditional courts, and that children can be represented by family members.

Child protection

The Traditional Courts Bill does not set standards to ensure the protection of children during court processes especially when it

iii Caregivers include grannies, aunts or other relatives who care for the child with the consent of the parents or guardian of the child; foster parents; someone offering temporary safe care; the head of a shelter or a child and youth care centre; a child and youth care worker supporting children in the community; and a child (16 years and older) heading a child-headed household.

comes to publicity; the protection of child witnesses; and psychosocial support or counselling services for children who are witnesses, offenders and victims.

The Bill permits penalties such as performing "some form of service without remuneration"[29] for the benefit of the community. This extends to children and could open the door to abuse, forced labour or child labour. Only a limited number of a traditional court's sentences can be appealed which leaves children open to potentially abusive sentences, and with no recourse.

The best interests principle

The Bill of Rights entrenches the principle that "a child's best interests are of paramount importance in every matter concerning the child".[30] The Traditional Courts Bill states that the Bill of Rights must be observed and respected during trial, and in judgment and penalties. However, without an explicit reference to the best interests principle there is a danger that presiding officers will not apply it.

Child offenders

The Child Justice Act makes provision for children to be diverted from the formal criminal justice system towards restorative justice programmes. The Act recognises the particular vulnerability of children in conflict with the law and the importance of a strong coordinated response to this. While allowing for diversion, it requires the engagement of state prosecutors, probation officers, defence lawyers and magistrates on all cases, including less serious matters. The Traditional Courts Bill, however, provides for none of these safeguards for children accused of crimes, thereby creating a lower standard for children under the jurisdiction of these courts than for those tried under civil law.

Different standards for children based on where they live

The Bill creates different standards for children living within the primarily rural jurisdiction of traditional courts. Children living in areas unaffected by the Bill on the other hand will have access to legal representation; enjoy the rights to participate in court decisions that affect them; may participate *in camera* (in closed court sessions) and will be protected against sentences that amount to forced and/or child labour.

The Constitution makes it clear that while everyone has the right to enjoy their culture, this right may not be exercised in a manner inconsistent with any provision of the Bill of Rights. The Traditional Courts Bill therefore needs to perform a delicate balancing act by providing forums for people to exercise their rights to practise and live within their preferred cultural norms but at the same time ensuring it does not violate children rights to equality, dignity, justice, protection and participation.

Conclusion

Laws are not static – they are living documents that evolve after Parliament passes them. This natural cycle of law-making ensures that ambiguities in laws are clarified and that laws continue to be relevant and practical to implement. When a law is not clear it becomes open to multiple interpretations – as has happened with the Children's Act. Sometimes the original law contains errors or omissions that need to be corrected, as was the case with the Sexual Offences Act. Changes to the laws by interpretation or amendment should help improve services for children.

References

1 Children's Act 38 of 2005.
2 *Centre for Child Law v Minister of Social Development and Others.* Case no: 21726/11, North Gauteng High Court, May 2011. [amended June 2011]
3 South African Social Security Agency (2011) SOCPEN database – special request. Analysis by Katharine Hall, Children's Institute, UCT.
4 See no. 3 above.
5 See no. 3 above.
6 *SS v The Presiding Officer of the Children's Court, District Krugersdorp and Others.* SGJ case no: A3056/11
7 Statistics South Africa (2012) *General Household Survey 2011*. Pretoria: Stats SA. Analysis for the Children's Institute, UCT, by Debbie Budlender, August 2012.
8 Jehoma S (2012) *Policy options for social security for children*. Presentation by the Deputy Director-General of the Department of Social Development, Strategies to Overcome Poverty and Inequality: Towards Carnegie III conference, UCT, 6 September 2012.
9 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
10 McQuoid-Mason D (2011) Mandatory reporting of sexual abuse under the Sexual Offences Act and the 'best interests of the child'. *South African Journal of Bioethics and Law,* 4 (2), December 2011: 74-78.
11 Reddy SP, James S, Sewpail R, Koopman F, Funani NI, Sifunda S, Josie J, Masuka P, Kambaran NS & Omardien RG (2010) *Umthente Uhlaba Usamila – The South African Youth Behavioural Survey 2008*. Cape Town: Medical Research Council.
12 *Teddy Bear Clinic for Abused Children and Others v Minister of Justice and Constitutional Development and Others*. Case no: 73300/10 North Gauteng High Court, April 2011 [Applicants' heads of argument, para 19]
13 *Director of Public Prosecutions, Western Cape v Prins* (A134/08) [2012] ZAWCHC 42 (11 May 2012).
14 Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B19-2012].
15 Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 6 of 2012.
16 Section 35(3)(l).
17 *DPP v Prins (Minister of Justice and Constitutional Development & two amici curiae intervening)* (369/12) [2012] 106 ZASCA (15 June 2012): para 1, footnote 3.
18 See no. 17 above: para 1.
19 See no. 9 above.
20 The Refugee Act 130 of 1998, section 27(b).
21 *Scalabrini Centre of Cape Town and Five Others v The Minister of Social Development, the Minister of Finance, the Minister of Home Affairs and Another.* Case no. 32054/ 2005, Notice of Motion, High Court of South Africa, Transvaal Provincial Division, 19 September 2005.
22 Lawyers for Human Rights (no date) *Social relief is made available for vulnerable refugees*. See: www.lhr.org.za/news/2012/social-relief-made-available-vulnerable-refugees. [press release]
23 Department of Social Development (2011) Social Assistance Act, 13/2004. Amendment: Regulations relating to application for and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance. *Government Gazette* 34529, regulation 9572, 15 August 2011;
Department of Social Development (2012) Social Assistance Act, 13/2004. Amendment: Regulations relating to application for and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance. *Government Gazette* 35205, regulation 9728, 30 March 2012.
24 National Health Act 61 of 2003.
25 Department of Health (2006) *Guidelines for Good Practice in the Conduct of Clinical Trials with Human Participants in South Africa*. Pretoria: DoH: 18.
26 Statistics South Africa (2010) *General Household Survey 2009*. Pretoria: Stats SA. Analysis by Katharine Hall, Children's Institute, UCT.
27 Traditional Courts Bill [B1-2012].
28 Parliamentary Monitoring Group (2012) *Traditional Courts Bill [B1-2012]: Briefings by UCT and Deliberations on Process*. Minutes of the Select Committee on Security and Constitutional Development, National Council of Provinces, 30 May 2012. Available: www.pmg.org.za/report/20120530-traditional-courts-bill-briefings-uct-and-deliberations-process
29 Section 10(2)(g).
30 Section 28(2).