

CHILDREN'S ACT GUIDE

FOR CHILD AND YOUTH CARE WORKERS

FIRST EDITION

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Written by Prinslean Mahery, Lucy Jamieson and Kathy Scott
Children's Institute, University of Cape Town, and National Association of Child and Youth Care Workers



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This guide was researched and written by Prinslean Mahery (senior legal researcher, Children’s Institute, University of Cape Town), Lucy Jamieson (senior advocacy co-ordinator, Children’s Institute, University of Cape Town) and Kathy Scott (national training manager, National Association of Child Care Workers – NACCW).

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Design and layout by Randy Williams, Amy Nightingale and Sandra Oosthuizen, National Association of Child and Youth Care Workers.

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Contact details

Children’s Institute, UCT

46 Sawkins Road, Rondebosch, 7700

Tel: + 27 21 689 5404

Fax: + 27 21 698 8330

E-mail: info@ci.org.za

Web: www.ci.org.za

National Association of Child and Youth Care Workers

220 Ottery Road, Unit 9, Ottery, 7800

Tel: +27 21 762 6076

Fax: +27 21 762 5352

E-mail: headoffice@naccw.org.za

Web: www.naccw.org.za

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ABBREVIATIONS AND FORMS

HSD	Head of Social Development
CYCC(s)	Child and Youth Care Centre(s)
CYCW(s)	Child and Youth Care Worker(s)
CHH(s)	Child-Headed Household(s)
DCP	Designated Child Protection
DG	Director-General
MEC(s)	Member(s) of the Executive Council
NPO(s)	Non-Profit Organisation(s)
NGO(s)	Non-Governmental Organisation(s)
NN&S	National Norms and Standards
DoSD	Department of Social Development
DoE	Department of Education
DSW	Designated Social Worker
QA	Quality Assurance
NCPR	National Child Protection Register
P&EI	Prevention and Early Intervention
PO	Presiding Officer

RELEVANT FORMS REFERRED TO IN THIS GUIDE

DEPARTMENT OF JUSTICE FORM

Form 14 – *Application to vary, suspend, rescind or revive a contribution or attachment of wages order*

DEPARTMENT OF SOCIAL DEVELOPMENT FORMS

Form 22 – *Reporting of abuse or deliberate neglect of child*

Form 27 – *Particulars of person found unsuitable to work with children*

Form 28 – *Notification of finding of unsuitability to work with children for inclusion in Part B of NCPR*

Form 29 – *Inquiry by employer to establish whether person's name appears in Part B of NCPR*

Form 36 – *Authority for removal of child to temporary safe care*

Form 38 – *Report by designated social worker to be considered by children's court*

Form 39 – *Approval to provide temporary safe care*

Form 40 – *Reporting of serious injury, abuse or death of child in alternative care*

Form 42 – *Application for the registration of a cluster foster care scheme*

Form 43 – *Certificate of registration of a cluster foster care scheme*

Form 44 – *Rejection of application for the registration of a cluster foster care scheme*

Form 45 – *Notice of intention to deregister cluster foster care scheme*

Form 46 – *Representation to provincial HSD by cluster foster care scheme regarding notice of deregistration*

Form 47 – *Notice of deregistration after consideration of representation*

Form 48 – *Application for the registration/conditional registration/renewal of registration of a CYCC*

Form 49 – *Certificate of registration/conditional registration/renewal of registration of a CYCC*

Form 50 – *Refusal of an application for the registration/renewal of registration of a CYCC*

Form 51 – *An appeal against a decision of a provincial HSD in terms of section 207 of the Act in respect of a CYCC*

INTRODUCTION

The Children's Act 38 of 2005 (as amended by the Children's Amendment Act 41 of 2007) and the associated Regulations came into force on 1 April 2010. This guide provides an overview of the provisions of the Act that are most relevant for child and youth care workers.

The main objective of the Children's Act is to give effect to children's constitutional rights to:

- family care, parental care or appropriate alternative care when removed from the family environment;
- social services;
- protection from maltreatment, neglect, abuse or degradation; and
- have their best interests considered to be of paramount importance in every matter concerning the child.

The Act aims to support families with children to promote well-being and prevent abuse or neglect, as well as to increase the options for the care of children found to be in need of care and protection. These and other objectives are achieved through the provision of a range of social services for children and families that include:

- crèches and early childhood development programmes;
- prevention and early intervention programmes (including home-based care for families affected by chronic illnesses such as HIV/AIDS, parenting programmes, and child and family counselling);
- drop-in centres;
- protection services (identifying, reporting and supporting abused and vulnerable children);
- foster care and cluster foster care;
- adoption; and
- child and youth care centres (children's homes, schools of industry, places of safety and shelters for street children).

This guide explains the sections of the Act that affect child and youth care workers; it should be read in conjunction with the relevant sections of the Act and it is not intended to replace it. All social service professionals with a responsibility of implementing the Act are strongly encouraged to attend a training course on the Act.

WRITING THE ACT

All **Bills** have to be checked by Parliament, and thereafter approved by the President, before they can become law. The Children's Act is very long and covers a range of different services, so Parliament split it into two parts before it began its work of consulting with the public and making decisions about what should be in the law. Parliament worked on the first half,

What is a Bill? A Bill is a proposed new law. Once the Bill goes through the parliamentary processes and it is signed by the President, it becomes a law and it is then called an Act.

called the Children’s Bill, from 2003 to 2005 – this part covered services that are the responsibility of national government (e.g. children’s rights, adoptions, parenting rights, and courts). Parliament finished the first Bill in December 2005; when it was signed by the President it officially became the Children’s Act 38 of 2005. The President made an announcement in the **Government Gazette**, saying that some sections of the Children’s Act would come into force on 1 July 2007.

What is a government gazette? It is an official government publication where all its laws, regulations or policies are published.

The second half of the Bill was called the Children’s Amendment Bill; it covers services that are provided by provincial governments (e.g. child and youth care centres, early childhood development programmes and protection services). Parliament finished with it in November 2007 and the President signed it the following year – it is now called the Children’s Amendment Act 41 of 2007. The two Acts have now been combined into one Act called the Children’s Act 38 of 2005 (as amended by Act 41 of 2007). The President made another announcement in the **Government Gazette**, saying that the whole Act (as amended) and a comprehensive set of Regulations and forms would come into operation on 1 April 2010. (See www.ci.org.za for a copy of the Act and its Regulations.)

OLD LAWS THAT HAVE BEEN REPLACED BY THE CHILDREN’S ACT

The Children’s Act is a comprehensive law on matters affecting children. It has **repealed** various laws affecting children including the:

- Child Care Act of 1983;
- Children’s Act of 1960;
- Age of Majority Act of 1972;
- Children’s Status Act of 1987;
- Guardianship Act of 1993;
- Natural Fathers of Children born out of Wedlock Act of 1997; and
- Section 4 of the Prevention of Family Violence Act of 1993.

What does ‘repeal’ mean? A law that is ‘repealed’ is one that is no longer operational or in force.

DEFINITIONS IN THE ACT THAT ARE RELEVANT TO CHILD AND YOUTH CARE WORKERS

The Act includes definitions to assist in the interpretation, understanding and application of the Act. In this guide the definitions are organised in four categories: definitions relating to the child; definitions relating to adults; definitions relating to services; and also definitions relating to new concepts and terms. Definitions are generally set out in section 1 of the Act unless it is stated otherwise.

DEFINITIONS RELATING TO THE CHILD

CHILD-HEADED HOUSEHOLDS (SECTION 137)

A child-headed household is a household where the parent, guardian or care-giver is either terminally ill, has died or has abandoned the children and there is no adult family member available to care for the children and a child has taken on these responsibilities. So the definition includes a family where the parent is very sick, with for example AIDS, and a child (often the oldest sibling) is looking after the adult and the other children in their own home.

STREET CHILD

A street child is any child who *“lives, begs or works on the streets”*. This includes children who have left home and sleep on the streets, and children who work or beg on the streets during the day but go home at night – ‘day strollers’ as some people call them.

CHILD IN NEED OF CARE AND PROTECTION (SECTION 150)

This section makes a distinction between a child who is definitely in need of care and protection and a child who **may** be in need of care. A statutory intervention is required if a child:

- has been abandoned or orphaned and is without any visible means of support;
- displays behaviour which cannot be controlled by the parent or care-giver;
- lives or works on the streets or begs for a living;
- is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
- has been or is at risk of serious physical or mental harm; or
- has been abused, neglected, or exploited.

If a child is found to be a victim of child labour or is living in a child-headed household, a designated social worker must investigate to find out if the child is in need of care and protection.

DEFINITIONS RELATING TO ADULTS

CARE-GIVER

A care-giver is anyone who cares for a child, and includes:

- grannies, aunts and other relatives who care for the child with the consent of the parents or guardian of the child;
- a foster parent;
- someone who cares for the child whilst the child is in temporary safe care;
- the head of a shelter where the child receives services;
- the head of a child and youth care centre where the child was placed, or a child and youth care worker supporting children in the community without care in the family; and
- a child (16 years and older) heading a child-headed household.

SOCIAL SERVICE PROFESSIONAL

A social service professional includes a probation officer; development worker, child and youth care worker, youth worker, and a registered social auxiliary worker and social security worker.

DESIGNATED SOCIAL WORKER

A **designated** social worker is any social worker that works for the Department of Social Development (DoSD), a municipality or a designated child protection organisation. There are many instances where the Act clearly stipulates that a certain task should be done by a designated social worker.

What is meant by 'designated'? In the context of the Children's Act, 'designated' generally means to be specially and officially 'selected'. It can be either a person, an organisation or a service that is officially 'designated' (selected) in terms of the Act.

DEFINITIONS RELATING TO SERVICES

CHILD AND YOUTH CARE CENTRES (SECTION 191)

A child and youth care centre (CYCC) is a facility that provides residential care for more than six children who are not living with their biological families. This definition covers not just children's homes but also places of safety, secure care centres, schools of industry, reformatories and shelters for street children. Every child and youth care centre must offer a therapeutic programme – this could be a programme for children with behavioural, psychological and emotional difficulties, or a programme for children who have been abused (a list of the types of programme is found in section 191(2)).

CHILD-HEADED HOUSEHOLDS (SECTION 137)

The Children's Act allows for the legal recognition of child-headed households by the provincial head of social development (HSD) in the following circumstances:

- “(a) the parent, guardian or care-giver of the household is terminally ill, has died or has abandoned the children in the household;*
- (b) no adult family member is available to provide care for the children in the household;*
- (c) a child over the age of 16 years has assumed the role of care-giver in respect of the children in the household; and*
- (d) it is in the best interest of the children in the household.”*

The law requires that an adult is appointed to assist in the financial care of and to give support to children in a child-headed household. This appointment can be made by the provincial DoSD, a children's court, or a non-governmental organisation (NGO) approved by the DoSD.

CLUSTER FOSTER CARE (SECTION 183)

In some cases, groups of children are placed in the care of a non-profit organisation (NPO) rather than a foster parent. Each 'cluster' can house up to six children, but a scheme can provide care for multiple clusters. Care is awarded to the scheme, not the foster parents, who are contracted to the NPO. In theory, grants should be paid to the scheme, which then pays foster parents, but the South African Social Security Agency cannot pay grants to organisations. The care order does not change if the foster parents change.

CLUSTER FOSTER CARE SCHEME

An NPO can apply to the provincial HSD to foster children in groups or clusters.

DESIGNATED CHILD PROTECTION ORGANISATION

A child protection organisation that has been given written approval by the Director-General (DG) or provincial HSD to perform child protection services is a designated child protection (DCP) organisation. An organisation has to apply in writing to the DG or provincial HSD to be recognised as a DCP organisation. The organisation will only be recognised if it complies with the prescribed criteria to perform all or any specific child protection service in the relevant province.¹ Current child welfare organisations that were registered as designated welfare organisations under the Child Care Act (like Child Welfare) are regarded as DCP organisations for the purposes of the Children's Act.

The National Association of Child Care Workers is currently not a DCP organisation and will have to apply to the DG to register as a DCP organisation in order to provide designated child protection services.

¹ See Regulation 31.

DESIGNATED CHILD PROTECTION SERVICES

These include services aimed at supporting children's court proceedings and the implementation of court orders, for example assessment services to determine if a child is in need of care and protection. Other DCP services are services relating to:

- prevention and early intervention;
- the reunification of children in alternative care with their families;
- the integration of children into alternative care arrangements;
- the placement of children in alternative care; and the adoption of children, including inter-country adoptions;
- the carrying out of investigations and the making of assessments in cases of suspected abuse, neglect or abandonment of children;
- intervention and removal of children in appropriate cases;
- the drawing up of individual development plans and permanency plans for children removed, or at risk of being removed, from their family; and
- any other social work service as may be prescribed.

Only organisations that are registered as designated organisations can provide DCP services. So services provided through, for example, the Isibindi programmes (see below) will only be considered to be DCP services if the organisations using the Isibindi programmes are DCP organisations.

All child protection services must be supplied by designated child protection organisations. When it comes to children in need of care and protection, the Act in most instances requires specific functions to be performed by a designated social worker.

DROP-IN CENTRE (SECTION 214)

A drop-in centre is a facility which provides basic services to meet the emotional, physical and social development needs of vulnerable children. Basic services are food, home work support, laundry and personal hygiene – home work clubs and soup kitchens would count as drop-in centres. In addition to providing one of the basic services, the centre can offer any of the **prescribed** programmes which are appropriate for the developmental needs of the children attending the centre.

Whenever the word 'prescribed' is used it refers to provisions or forms which are set out in the Regulations of the Act.

These are programmes like:

- social and life skills;
- school holiday and educational programmes;
- primary health care in collaboration with local health clinics;
- reporting and referral of children to social workers or social service professionals; and
- prevention and early intervention programmes (these must be registered separately).

The definition still includes what is known in the street children sector as a drop-in centre – drop-in centres for children working, living and begging on the streets offer more than just basic services; they usually run outreach programmes and family reunification programmes. The Isibindi safe park is an example of a drop-in centre which provides social and life skills as well as school holiday and educational programmes.

PREVENTION AND EARLY INTERVENTION PROGRAMMES

Prevention programmes are provided to strengthen and support families with children to address problems that could or will eventually occur in the family environment (and if those problems are not dealt with it could lead to statutory intervention like the removal of the child from the family). An example is an after-care programme at a school or a parenting skills programme.

Early intervention programmes, such as the **Isibindi programme**, are provided to families with children who have been identified as being *“vulnerable to or at risk of harm or removal into alternative care”*.

The Isibindi programme is community-based and responds to the needs of vulnerable and at-risk children, youth and families in a holistic manner. Trained child and youth care workers provide care and development opportunities to the children/youth and families. They work in the life-space of the children and youth. The programme is based on the family preservation approach as well as processes and methods of community development.

SECURE CARE

Children with behavioural and emotional challenges and children who are in conflict with the law are placed in secure care facilities which are meant to be a safe and healthy environment for such children.

TEMPORARY SAFE CARE

This entails caring for a child *“in an approved child and youth care centre, shelter or private home or any place where the child can be safely accommodated”* while waiting for a final placement order from a children’s court. Approval to provide temporary safe care is certified on **Form 39** by the provincial HSD. A child cannot be cared for in prison or police cell as a form of temporary safe care. According to norms and standards for child and youth care centres, every centre must provide temporary safe care to children if appropriate and if the centre allows for it. This must be for the shortest period possible, i.e. a developmental assessment must be done as soon as the child is received by the centre to establish the options for a permanent placement.

DEFINITIONS RELATING TO CONCEPTS AND TERMS

The Act introduces new terms to signal the shift from concepts which were founded on principles of parental power. The new approach is child-centred and prefers concepts of parental responsibilities and rights and the recognition of the child as an independent being who also has rights. The child has the right to care from the parent and the parent has a corresponding obligation to provide that care. In light of this new approach the Act does away with terms like ‘custody’ and ‘access’ and replaces it with new terms. ‘Custody’ is replaced with the term ‘care’ and ‘access’ is replaced by the term ‘contact’. Any law that used the old terms must be read now to refer to the new terms as defined in the Children’s Act.

CARE

Section 1 provides a list of what falls within the scope of the responsibility and right to care for a child, but the essence of care is respecting and promoting a child’s rights; protecting him or her from abuse; maintaining a sound relationship with the child; providing a home and an environment in which the child can develop and flourish.

CONTACT

In relation to a child, ‘contact’ means *“maintaining a personal relationship with the child”*, communicating regularly and visiting the child if they live with someone else.

PARENTAL RESPONSIBILITIES AND RIGHTS (SECTION 18)

A person can have full or specific parental responsibilities and rights in respect of a child. Parental responsibilities and rights include the responsibility and the right to:

- “(a) care for the child;*
- (b) maintain contact with the child;*
- (c) act as guardian of the child; and*
- (d) contribute to the maintenance of the child.”*

A person who acts as a child’s guardian must administer and safeguard the child’s *“property and property interests; assist or represent the child in administrative, contractual and other legal matters; or give or refuse any consent required by law in respect of the child”*, including:

- “(i) consent to the child’s marriage;*
- (ii) consent to the child’s adoption;*
- (iii) consent to the child’s departure or removal from the Republic;*
- (iv) consent to the child’s application for a passport; and*
- (v) consent to the alienation or encumbrance of any immovable property of the child”.*

The Child Care Act did not define terms like ‘abuse’ ‘neglect’ and ‘sexual abuse’. The Children’s Act provides the necessary guidance to understand these terms and creates uniformity in their understanding by detailing their meanings.

The Act defines 'abuse' 'neglect' and 'sexual abuse' as follows:

ABUSE

In relation to a child, abuse means any form of harm or ill-treatment deliberately inflicted on a child, and includes:

- “(a) assaulting a child or inflicting any other form of deliberate injury to a child;*
- (b) sexually abusing a child or allowing a child to be sexually abused;*
- (c) bullying by another child;*
- (d) a labour practice that exploits a child; or*
- (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally”.*

SEXUAL ABUSE

In relation to a child, sexual abuse means:

- “(a) sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted;*
- (b) encouraging, inducing or forcing a child to be used for the sexual gratification of another person;*
- (c) using a child in or deliberately exposing a child to sexual activities or pornography; or*
- (d) procuring or allowing a child to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial sexual exploitation of a child”.*

What is the general meaning of 'molesting'? It generally means to subject the child to unwanted or improper sexual activity, for example touching or fondling the child on his or her private parts.

NEGLECT

Neglect in relation to a child means “a failure in the exercise of parental responsibilities to provide for the basic physical, intellectual, emotional or social needs” of the child.

TERMS AND CONCEPTS NOT DEFINED IN SECTION 1 BUT USED CONTINUOUSLY IN THE ACT

FIT AND PROPER PERSONS AND PERSONS UNSUITABLE TO WORK WITH CHILDREN

WHAT IS A FIT AND PROPER PERSON?

The Act does not give a definition of a 'fit and proper person'. It does give some examples of people who you should consider **not** fit and proper such as a person who was found to be unsuitable to work with children i.e. his or her name appears on part B of the National Child Protection Register (NCPR). However, if a person's name is not on the register it does not mean that such a person is automatically a fit and proper person. The name of a person on a register is not the only criteria for determining whether that person is a fit and proper person. Those responsible for determining if a person is a fit and proper person will have to develop additional criteria or factors to consider.

PERSONS UNSUITABLE TO WORK WITH CHILDREN

A person who is found to be unsuitable to work with children is automatically deemed not fit and proper to operate or assist in the operation of, or to be employed at, a child and youth care centre.

HOW WILL YOU KNOW IF SOMEONE IS FOUND UNSUITABLE TO WORK WITH CHILDREN?

The names of persons found to be unsuitable to work with children will appear in the NCPR. Even child perpetrators can be declared unsuitable to work with children. A perpetrator's name must be included in the register even if an appeal or review process is pending, but if the appeal or review is successful, the person's name must be removed. The particulars of that person are set out on **Form 27** of the Regulations.

WHO DECIDES WHETHER SOMEONE IS UNSUITABLE TO WORK WITH CHILDREN?

Only a court or a quasi-judicial tribunal or panel (like the Commission of Conciliation, Mediation and Arbitration – CCMA) can decide whether a person is unsuitable to work with children. A criminal conviction is not required to come to a finding that a person is unsuitable to work with children. In certain cases a perpetrator must be found to be unsuitable to work with children if he or she committed certain serious offences against a child.

Notifications of a finding that a person is unsuitable to work with children and that his or her details should be included in the NCPR is done on **Form 28** and sent to the Director-General (DG) of social development.

WHO HAS ACCESS TO THE INFORMATION IN THE REGISTER?

Access to the register is very restricted. Besides government officials, people who have access to the information on the register are only those who are obliged to determine whether any of their staff or prospective staff are on the register, or someone who wants to find out if his or her name is on the register by submitting a personal enquiry. So the details in the register are not available to the general public.

WHO SHOULD BE SCREENED AGAINST THE REGISTER AND HOW IS THIS DONE?

All staff working at child care facilities must be screened against the child protection register. It includes everyone working at child and youth care centres (CYCCs) (including volunteers) and not only those who work directly with the children. All facilities, whether publicly or privately owned, will have to undergo the screening process. An inquiry as to whether a staff member's name is on the register is done through an application to the DG of social development on **Form 29**.

It is an offence to allow someone declared unsuitable to work with children access to children. A person found unsuitable to work with children could be dismissed if he or she does not disclose that information to an employer. A person found to be unfit to work with children and who operates or assists in the operation of a child and youth care centre or shelter, or assumes the temporary safe care of a child, or applies for the temporary safe care of a child can be sentenced to imprisonment of up to 10 years, or be given a fine, or both.

At the moment the NCPR is not operational; therefore employers are unable to screen employees. However, to ensure children's protection at centres, employers are advised to create effective criteria to determine if prospective employees are "fit and proper" persons to work or assist at the centres.

However, the National Sexual Offences Register is partially in operation and contains the details of persons currently convicted of sexual abuse against a child. The Department of Justice and Constitutional Development is still adding the names of offenders with past convictions. Thus prospective and current employees at CYCCs can be screened against this register.



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GENERAL PRINCIPLES (SECTION 6)

The Act sets out general principles to guide its own implementation and also the implementation of all other laws that apply to children. These principles also guide every proceeding, action and decision made by **organs of state** in any matter concerning a child or children in general.

According to the general principles all proceedings, actions and decisions concerning a child must:

- respect, promote, protect and fulfil children's constitutional rights, the best interests standard and the rights and principles set out in the Children's Act;
- respect the child's dignity and treat the child fair and equitably;
- protect the child from unfair discrimination on any ground including the ground of the health status or disability of the child or his or her family members;
- recognise a child's disability and responds to the special needs of the child.

The general principles further state that, in any matter concerning the child,:

- the child's family should be given an opportunity to express their views if that would be in the child's best interests;
- a restorative and problem-solving approach should be followed and a confrontational approach should be avoided;
- delays in actions or decisions to be taken must be avoided as far as possible; and
- where decisions or actions are taken which significantly affect the child, then the child, depending on his or her age, maturity and stage of development, and the person who has rights and responsibilities in respect of the child, must be informed of those actions or decisions to be taken, and be made part of the decision-making process.

What is an organ of state? It refers to any government department (like the DoSD), or a government administration or institution performing powers and functions in terms of the Constitution or national or provincial legislation.

This excludes courts but includes for example a school or a child and youth care centre run by the state.

APPLICATION OF THE ACT (SECTION 8)

The Act contributes to the existing constitutional rights of children by recognising additional children's rights not explicitly covered in the Bill of Rights (like children's right to participate). The Act applies to natural as well as **juristic** persons (like organisations).

What does 'juristic' mean? It refers to an entity with legal personality like a company or an association that enjoys and is subjected to rights and responsibilities.

All organs of state and their employees and government representatives and officials must respect, protect and promote the rights of children set out in the Act.

- The duty to respect: means not to interfere with the enjoyment of the right, e.g. child and youth care workers must respect children's right to freedom and security of the person by, for example, not smacking them.
- The duty to protect: means the state has to take active steps to prevent third parties from interfering with and violating children's right, e.g. the state has to run programmes to prevent people from abusing children. Anyone who cares for a child is expected to protect children from abuse.
- The duty to promote and fulfil children's rights: means that the state must take positive steps and put measures in place to facilitate the enjoyment of the rights, e.g. the state must provide child and youth care centres (CYCCs) to fulfil the right to alternative care.

THE BEST INTERESTS PRINCIPLE (SECTIONS 7 & 9)

Section 9 says that, in all matters concerning the care, protection and well-being of a child, "*the standard that the child's best interest is of paramount importance, must be applied*". This means that the child's best interest is the most important factor when making decisions about any protection, prevention and early intervention services provided to the child and his or her family.

HOW DO YOU KNOW WHAT A CHILD'S BEST INTERESTS ARE?

Section 7 contains a long list of the factors to consider when deciding on the "*best interests of the child*". The following factors are most pertinent for child and youth care workers:

- the child's age, maturity and stage of development;
- the child's gender;
- the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- any disability or chronic illness that a child may have;
- personal relationships with the parents, family or care-givers;
- the attitude of the parents, or any specific parent, towards the child;
- the capacity of the parents, or of any other care-giver, to provide for the needs of the child;
- the likely effect on the child of any change in the child's circumstances;

- the practical difficulty and expense of a child having contact with the parents;
- the need for the child to maintain a connection with his or her family, extended family, culture or tradition;
- the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment; and
- the need to protect the child from any physical or psychological harm, or even witnessing harmful behaviour towards another person.

Please consult the Act for the full list.

CHILDREN'S PARTICIPATION (SECTION 10)

There is no express constitutional right for children to participate in decisions affecting them. However such a right is stipulated in international instruments like the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child (both these instruments apply in South Africa). The Children's Act followed these child rights instruments to contain an express right of participation for children. Section 10 states that:

*“Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child **has the right to participate** in an appropriate way and views expressed by the child must be given due consideration.” [Emphasis added]*

This principle allows for the child's opinion to be heard and taken into account in all matters that would affect the child. Thus where decisions are to be made about possibly removing the child from the family environment, the child must be given an opportunity to participate in the process. This goes hand in hand with the general principle that the child must be informed of any action or decision taken in a matter concerning the child that would significantly affect the child.

The work that child and youth care workers do allows them to make sure that children's opinions are heard and taken into account. Child and youth care workers can ensure children's participation by being with them in their life-spaces and working with them in every day routines.

Every child at a child and youth care centre has a right to a permanency plan. In accordance with the right to participation, the Regulations to the Act note that a child must participate in the development of a permanency plan being drafted to create stability in the child's life and that the child must be informed about the plan and any changes made to the plan. This means that the child must be present and take part in any developmental assessment about him or her. The child must be supported in this process and assisted to ensure that he or she understands the process and the implication of any decisions made.

The right to participation also extends to collective decision-making, policy-making and planning, including decisions about the operation of child and youth care centres. The management board must create a children's forum to ensure the participation of resident children.

ACCESS TO INFORMATION ON HEALTH STATUS AND TREATMENT (SECTION 13)

All children have a right to sufficient information about their health to enable them to make informed decisions about testing, treatment and contraception. Section 13(1) of the Act provides that every child has the right to:

- “(a) have access to information on health promotion and prevention and treatment of ill-health and disease, sexuality and reproduction;*
- (b) have access to information regarding his or her health status;*
- (c) have access to information regarding the causes and treatment of his or her health status; ...”*

Child and youth care workers or the head of a CYCC will need to assist children to obtain general information about health and information about their own health. Receiving such information *“in a format accessible to children, giving due consideration to the needs of disabled children”* (section 13(2)) will also facilitate children’s effective participation in matters affecting their health and well-being.

CHILDREN WITH DISABILITY OR CHRONIC ILLNESS (SECTION 11)

The Act recognises the needs of children with disabilities or chronic illnesses. Section 11 says that, in any matter concerning a child who is disabled or chronically ill, consideration must be given to:

- providing the child with parental, family or special care as and when appropriate;
- providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community;
- providing support services to the child and his or her care-giver; and
- creating opportunities for the child to participate in social, cultural, religious and educational activities.

The aim of section 11 is to ensure that these children are treated with dignity, that their right to participation is respected and to provide necessary support services to ensure that they are not further discriminated against or neglected due to their chronic illness or disability. Children with disabilities or chronic illnesses have an express right not to be subjected to medical, social, cultural or religious practices that are harmful to their health, well-being or dignity.

Section 11 is one of the general principles, which means that it should guide all proceedings, actions and decisions involving children with disabilities or suffering from chronic illnesses.

AGE OF MAJORITY (SECTION 17)

The Act states that the age of majority is now 18 years, and not 21 years as was the case previously. The age of majority is the age at which a person is considered responsible and liable for actions or omissions under the law. Persons under the age of 18 generally need their parents’ consent to bind themselves legally. A child placed in a child and youth care centre through a court order is entitled to leave the facility after turning 18. (See provisions of remaining in alternative care after turning 18 on page 42.)

COMPULSORY REPORTING OBLIGATIONS FOR CHILD AND YOUTH CARE WORKERS

MANDATORY REPORTING OF ABUSED OR NEGLECTED CHILDREN (SECTION 110)

The Children's Act has increased the range of professionals who are legally obliged to report abuse of children, but limits what must be reported:

- sexual abuse²;
- physical abuse causing injury; and
- deliberate neglect.

Section 110 reads:

*“(1) Any correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or **member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes** that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form [Form 22] to a designated child protection organisation³, the provincial department of social development or a police official.” [Emphases and footnote added]*

If a child and youth care worker (CYCW) or volunteer comes across a child that shows signs of having been abused or neglected then the matter must be reported after taking certain factors into account. A conclusion that a child has been abused or neglected must be substantiated and, if the report was made in good faith, the person reporting will not be liable to civil action based on the report.

Regulation 35 sets out guidelines and indicators to consider when coming to a conclusion whether or not a child has been abused or neglected to report the incident in terms of section 110. If a child and youth care worker suspects the abuse or neglect of a child, then the CYCW must look to the guidelines in the Regulations to assist in substantiating a conclusion that there has been abuse or neglect.

2 Child and youth care workers must also be aware that the Sexual Offences Act of 2007 requires anyone who has knowledge of a sexual offence committed against a child to report the incident to a police official.

3 Child Welfare South Africa is an example of a “designated child protection organisation”.

Here are the indicators set out in the Regulations:

- Indicators of physical abuse: “... including bruises in any part of the body; grasp marks on the arms, chest or face; variations in bruising colour; black eyes; belt marks; tears around or behind the ears; cigarette or other burn marks; cuts; welts; fractures; head injuries; convulsions that are not due to epilepsy or high temperature; drowsiness; irregular breathing; vomiting; pain; fever or restlessness”;
- Emotional and behavioural indicators of physical, psychological or sexual abuse: “... including aggression; physical withdrawal when approached by adults; anxiety; irritability; persistent fear of familiar people or situations; sadness; suicidal actions or behaviour; self-mutilation; obsessive behaviour; neglect of personal hygiene; age of child demonstrating socially inappropriate sexual behaviour or knowledge; active or passive bullying; unwillingness or fearfulness to undress or wearing layers of clothing”;
- Developmental indicators of physical, psychological or sexual abuse: “... including failure to thrive; failure to meet physical and psychological developmental norms; withdrawal; stuttering; unwillingness to partake in group activities; clumsiness; lack of coordination or orientation or observable thriving of children away from their home environment”;
- Indicators of deliberate neglect: “... including underweight; reddish scanty hair; sores around the mouth; slight water retention on the palm or in the legs; extended or slightly hardened abdomen; thin and dry skin; dark pigmentation of skin, especially on extremities; abnormally thin muscles; developmental delay; lack of fatty tissue; disorientation; intellectual disability; irritability; lethargy, withdrawal, bedsores and contractures”;
- “... a disclosure of abuse or deliberate neglect by the child”; or
- “... a statement relating to a pattern or history of abuse or deliberate neglect from a witness relating to the abuse of the child”.

The conclusion must be based on an assessment of the “total context of the child’s situation”. This means that focus must not only be given to one factor or indicator but different things must be taken into account to formulate a conclusion of abuse or neglect. The child’s total situation needs to be assessed and understood.

The report should be made on **Form 22** and sent to one of the three agencies (a designated child protection organisation like Child Welfare South Africa, the Department of Social Development (DoSD), or the police). Failure to report is an offence with a penalty of a fine or imprisonment for 10 years, or both.

Social workers employed by child and youth care centres are generally not permitted to do statutory work. However, if an organisation running a child and youth care centre is registered as a designated child protection (DCP) organisation providing DCP services, then the social workers employed by that centre can have statutory powers.

Once a report has been made to one of these three agencies, a social worker should be appointed to investigate the case and make recommendations on the kind of support needed by the child or family.

The Children's Act requires government departments to work together to provide a holistic range of services. Due to the high level of demand for protection and prevention services it can take a long time before children receive the help they need from a social service professional. This is why it is a good idea for child and youth care centres to employ their own social workers or to network with the nearest office of the DoSD and local non-governmental organisations that provide child protection, prevention and early intervention services.



RULES REGARDING CHILDREN FOUND TO BE IN NEED OF CARE AND PROTECTION

CHILD IN NEED OF CARE AND PROTECTION (SECTION 150)

In certain circumstances a child is considered to be in need of care and protection, based on the fact that the child:

- (a) has been abandoned or orphaned and is without any visible means of support;*
- (b) displays behaviour which cannot be controlled by the parent or care-giver;*
- (c) lives or works on the streets or begs for a living;*
- (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;*
- (e) has been exploited or lives in circumstances that expose the child to exploitation;*
- (f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;*
- (g) may be at risk if returned to the custody of the parent, guardian or caregiver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;*
- (h) is in a state of physical or mental neglect; or*
- (i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is".*

The Children's Act has expanded the list of circumstances under which a child is considered to be in need of care and protection to include for example instances where the child lives or works on the streets or begs for a living or where the child is addicted to a dependence-producing substance but does not have any support to obtain treatment for his or her dependency. It is interesting to note that the Act indicates the fact that, if a child is abandoned or orphaned, it is not enough to conclude that a child is in need of care and protection. The child must also be without visible means of support to be considered in need of care and protection. There has been much debate about how to interpret section 150(1)(a): the key question is what does "*without any visible means of support*" mean – in many instances it boils down to the question "should granny get the grant?" One side of the argument is that, if a child is living with relatives who can claim the Child Support Grant, then precious social worker and court time should not be used to process a foster care placement; on the other hand most social workers are in favour of giving granny the grant because it helps to alleviate poverty in the family.

Regulations⁴ to the Act set out all the factors that a presiding officer (the magistrate in a children's court) should consider to come to a conclusion that a child has been abandoned or orphaned before making a decision whether such a child is in need of care and protection.

4 Regulation 56.

The assumption is that a child found in any of the circumstances above will be in need of care and protection; however, social workers argued during the drafting of the Bill that this is not always the case and that in such cases holding a children's court inquiry is not in the best interests of the child.

A child who is a victim of child labour or a child in a child-headed household **may** be a child in need of care and protection and a designated social worker must investigate the matter to see if the child is indeed in need of care and protection. Here the Act recognises that, despite being for example a child in a child-headed household, the child might not need state intervention if the child has sufficient support structures. The Act allows for a social worker to write a report explaining to the court why she believes that the child is not a child in need of care and protection and what measures she has taken to support the child and the family. Measures that can be taken include, "... *counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organization*".

OTHER CHILDREN IN NEED OF CARE AND PROTECTION (SECTION 154)

If a court has made an order for the temporary removal of a child to certain premises or a place of safety and there are other children at that premises or place of safety who might also be in need of care and protection, then the person in whose care the child is placed or the provincial head of social development (HSD) may refer that other child to a designated social worker to investigate the matter and compile a report on whether the child is in need of care and protection.

REMOVAL OF CHILD TO TEMPORARY SAFE CARE BY COURT ORDER (SECTION 151)

If a child is found in circumstances that indicate that he or she is in need of care and protection the person who finds the child can bring this to the attention of a children's court. The presiding officer (PO) (the magistrate) must make an order that a designated social worker investigate. The PO can at the same time order that the child is removed and placed in temporary safe care if this is necessary for the safety and well-being of the child. A CYCW can play a critical role in these situations by providing support to the child throughout the process.

Once the child is removed, the person who removed the child must inform the parent, guardian or care-giver of the child about the child's removal within 24 hours, if they are traceable. The person who removed the child must within 24 hours refer the matter to a social worker for investigation to determine if the child is in need of care and protection and that person must furthermore report the matter to the relevant provincial Department of Social Development (DoSD).

The PO can authorise any person to remove the child. So if a CYCW came across a child that might be in need of care and protection and has brought this to the attention of a PO, then the PO could authorise that CYCW to remove that child. Once the CYCW has an order for removing a child he or she can, either alone or accompanied by a police official, enter any premises mentioned in the order and remove the child from the premises.

The best interests of the child must be the determining factor in any decision whether a child in need of care and protection should be removed and placed in temporary safe care, and all relevant facts must for this purpose be taken into account, including the safety and well-being of the child as the first priority.⁵

REMOVING A CHILD WITHOUT A COURT ORDER (SECTION 152)

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 in instances where there are grounds to believe that:

- the child is in need of care and protection; and
- needs immediate emergency protection; and
- that any delay caused by waiting for a court order might result in harm to the child; and
- that removing the child from his/her home environment is the best way to secure the child's safety and well-being.

The prescribed **Form 36** must be completed by the police official or social worker and must be submitted to the person or place of temporary safe care as soon as is practical.

The Child Care Act allowed an “*authorised official*” to make an emergency removal of a child without a warrant. That authorised official could have been any person “*authorized in writing by a commissioner of child welfare, social worker or policeman to perform that act*”. **However, the Children's Act now only authorises the social worker and the police official to do an emergency removal.**

If the social worker removed a child and placed him or her in temporary safe care, the social worker must inform the parent, guardian or care-giver of the child about the child's removal within 24 hours if they are traceable. The clerk of the children's court must also be informed about the removal on the next court day and the matter must be reported to the relevant Department of Social Development.

If a police official removed the child and placed him or her into temporary safe care, the official must inform the parent, guardian or care-giver of the child about the child's removal within 24 hours if they are traceable. The matter must then be referred to a designated social worker and the provincial DoSD must be notified within 24 hours of the child's removal and the place where the child has been placed. The clerk of the children's court must also be informed about the child's removal no later than the next court day.

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. If a police official misuses his powers to remove a child without a court order it constitutes grounds for disciplinary proceedings against that official.

Once the child has been placed into temporary safe care the child's relatives, the relevant health or legal professionals, the relevant child and youth care worker or any other person authorised by the designated social worker must be given access to the child at all reasonable times while the child is at a place of safety if it is in the child's best interests and in line with the terms of the court order.⁶

⁵ Section 151(8).

⁶ Regulation 53(2).

DECIDING WHETHER A CHILD IS IN NEED OF CARE AND PROTECTION (SECTION 155)

WHAT HAPPENS BEFORE THE CHILD IS BROUGHT BEFORE THE CHILDREN'S COURT?

A designated social worker investigates the matter and writes a report within 90 days on whether the child is in need of care and protection. The report must contain a detailed description of the prescribed information on **Form 38** (see Regulation 55). Following the investigation the social worker must report the matter to the relevant provincial DoSD. If the social worker finds that the child is not in need of care and protection the reasons must be set out in a report which must be submitted to the children's court for review.

WHAT HAPPENS IF THE SOCIAL WORKER FINDS THE CHILD IS IN NEED OF CARE AND PROTECTION?

Only a children's court can decide ultimately whether a child is indeed in need of care and protection. If the social worker comes to a conclusion after the investigation that the child is in need of care and protection, the child must be brought before the children's court to make the final decision. The parent, guardian or care-giver of the child must be notified to attend the children's court proceedings.

The court must consider the social worker's report before coming to a final decision. If the court confirms the social worker's finding, it can make an appropriate order which is in the best interests of the child. If the court decides that the child is not in need of care and protection, the court must order the child who was removed to a temporary safe care to be returned into care of the person where he or she was before being removed; the court can also make an order for prevention or early intervention services if that is what the child needs. If the child was not in temporary safe care, the court is not obliged to make an order, but can order prevention and early intervention to support the child and his or her family. So, for example, if a child is brought before the court because they are abusing substances, the court may find that it is in the best interests of the child to remain at home with his or her parents but that the whole family needs to go for counselling.

ORDERS THE CHILDREN'S COURT CAN MAKE INVOLVING CHILD AND YOUTH CARE CENTRES (SECTIONS 156, 157 & 158)

There are various orders that a court can make after it finds that a child is in need of care and protection. One of the advances of the Act is that it introduces a range of options for the courts, which was not the case with the Child Care Act:

- The court can make orders that do not require the child to be separated from the family in less extreme cases, for example a partial care order to prevent further neglect of a child or an order that keeps the child at home but orders the abuser to leave the family home.
- In the more extreme case the court can make orders which require the removal of the child from the family and the placement of the child in a child and youth care centre. For example, if a child is found to be in need of care and protection and the child has no parent or care-giver or if the parent or care-giver is unsuitable to care for the child, the child can be placed in temporary safe care (in a child and youth care centre, shelter or private home) pending the child's placement in

foster care or adoption, or the child can be placed in a child and youth care centre that provides a residential care programme suited to the needs of the child.

- The child can also be placed at a child and youth care centre which provides a secure care programme suited to the needs of the child if the parent or care-giver of the child cannot control the child's behaviour or the child displays criminal behaviour.
- A children's court can only order a child to be placed in a child and youth care centre if no other option is appropriate.

Before making an order to remove the child from the care of his or her parents or guardian, the court must obtain and consider a social worker's report on the conditions of the child's life. This report must include an assessment of:

- “...the developmental, therapeutic and other needs of the child;*
- details of family preservation services that has been considered or attempted; and*
- a documented permanency plan ... aimed at achieving stability in the child's life...”*

If the court decides to place the child in a child and youth care centre, it must determine the residential care programme that the child needs and order that the child be placed at a centre which offers that particular programme. The provincial HSD is then responsible for actually placing the child at a centre offering the programme determined by the court. For example, a child who has been sexually abused should be placed in a centre that provides counselling and support programmes.

DURATION AND EXTENSION OF ORDERS (SECTION 159)

The court order lapses after two years unless the order indicates that the placement will be for less than two years. The court must review the order every two years and decide to extend the order or release the child. This is different from provisions under the Child Care Act which provided that the provincial HSD reviewed and granted extensions to court orders where necessary. According to the Children's Act, the orders cannot extend beyond a child's **18th** birthday.

A child and youth care worker can play a role in the order extension process by for example reminding the social worker that the court order is about to expire and needs to be extended.

While this is the general rule, there are provisions made in the Act where a child can remain in alternative care after turning 18. See note on section 176 of the Act on page 42.

CHILD AND YOUTH CARE CENTRES (CYCCs)

DEFINITION OF A CYCC (SECTION 191)

HOW DOES THE CHILDREN'S ACT DEFINE A CYCC?

A child and youth care centre is a facility that provides residential care to more than six children outside of the child's family environment according to a residential programme suitable for the children in the facility.

WHICH FACILITIES FALL OUTSIDE THE SCOPE OF CYCCs?

There are some facilities that are **not** considered to be child and youth care facilities according to the Act, they include:

- “(a) a partial care facility;*
- (b) a drop-in centre;*
- (c) a boarding school;*
- (d) a school hostel or other residential facility attached to a school;*
- (e) a prison; or*
- (f) any other establishment which is maintained mainly for the tuition or training of children other than an establishment which is maintained for children ordered by a court to receive tuition or training”.*

SOME TRANSITIONAL PROVISIONS (SECTION 196 & 198)

Since 1 April 2010, existing government children's homes, places of safety, secure care facilities, schools of industry or reform schools are classified as child and youth care centres established in terms of section 195 and providing residential care programmes in terms of section 191(2). All these facilities must be registered as child and youth care centres within two years from 1 April 2010.

The Department of Education (DoE) remains responsible for providing education to children in government schools of industry and reform schools. However, while these schools are currently the responsibility of the DoE, the Act provides that these schools will become the responsibility of the Department of Social Development in two years' time (i.e. 2012).

From 1 April 2010, existing privately operated children's homes registered or deemed to have been registered in terms of the Child Care Act must now be regarded as being registered as a child and youth care centre providing residential care programmes set out in section 191(2)(a) of the Act. The children's home will be regarded as being registered as a child and youth care centre for the next five years, unless the registration is withdrawn before the expiry period.

An existing shelter registered in terms of the Child Care Act must register as a child and youth care centre within five years from 1 of April 2010.

CHILDREN PLACED IN CYCCS

A child must be assessed before⁷ and after⁸ he or she is admitted to a child and youth care centre.

“[A]ssessment of a child’ means a process of investigating the developmental needs of a child, including his or her family environment or any other circumstances that may have a bearing on the child’s need for protection and therapeutic services ...”

The child and youth care worker can play a role here in supporting the child and gathering information from the child.

In accordance with the principle of child participation, the child must be involved in the assessment process.

Regulation 73 sets out the rights of all children in child and youth care centres.⁹ Over and above these rights, each child should have an individual development plan that describes what programmes and services he or she needs.

RIGHTS OF CHILDREN IN CHILD AND YOUTH CARE CENTRES (REGULATION 73)

“Every child who is cared for in a child and youth care centre has the right to:

(a) be informed promptly, in a language which he or she understands, of the reason for his or her admission or detention, as the case may be;

(b) have his or her parent, guardian, next of kin or significant other person informed, within 48 hours of admission, of the place to which he or she has been admitted or in which he or she is being detained, as the case may be, and of the reason for his or her admission or detention, as the case may be;

(c) regular communicate with and be visited by his or her parent or parents, guardian, next of kin, social worker, probation officer, case manager, religious counsellor, health care professional, psychologist, legal representative, child and youth care worker, unless a court order or his or her care or development programme indicates otherwise or unless he or she chooses otherwise;

(d) adequate nutrition, clothing, nurturing and to be given the same quality of care as other children in the child and youth care centre;

(e) be consulted and to express his or her views, according to his or her abilities, about significant decisions affecting him or her;

(f) reasonable privacy, possession and protection of his or her personal belongings;

(g) be informed that prohibited items in his or her possession may be removed and withheld;

(h) be informed of the behaviour that is expected of him or her by service providers, the consequences of his or her failure to meet the expectations of service providers, and assistance that he or she can expect from the service providers regarding the attaining of such behavioural expectations;

7 When a children’s court still has to decide whether the child should be placed in alternative care, the social worker must assess the child and produce a report.

8 Once admitted, a multidisciplinary team must assess the child within 48 hours of the child’s admission.

9 See also norms and standards for child and youth care centres prescribed in the Regulations which serve to further protect children who use the services of child and youth care centres.

- (i) care and intervention which respects, protects and promotes his or her cultural, religious, linguistic heritage and the right to learn about and maintain this heritage;*
- (j) positive discipline appropriate to the his or her level of development;*
- (k) education or training appropriate to his or her level of maturity, aptitude and ability;*
- (l) respect and protection from exploitation and neglect;*
- (m) opportunities of learning and developing his or her capacity to demonstrate respect and care for others;*
- (n) the necessary support and to an interpreter if language or disability is a barrier to consulting with them on decisions affecting his or her custody or care and development;*
- (o) privacy during discussions with people referred to in paragraph (c) unless a court order or his or her care or development programme indicates otherwise or unless he or she chooses otherwise; and*
- (p) have access to community activities and structures unless a court order or his or her care or development programme indicates otherwise."*

PROGRAMMES OFFERED AT CYCCs (SECTION 191)

WHAT ARE THE PROGRAMMES THAT CAN BE PROVIDED AT CHILD AND YOUTH CARE CENTRES?

The Children's Act places a strong emphasis on the provision of appropriate programmes that respond to the developmental and therapeutic needs of children in the centre, as opposed to the approach of the Child Care Act that emphasised a facility-based approach and meeting of the material needs of children.

A child and youth care centre must offer therapeutic programmes for the residential care of children outside the family environment. These could include programmes that are designed for (amongst others):

- The reception, care and development of children outside the family environment or on a shared basis with the parent or other person with parental responsibilities in respect of the child.
- The reception and temporary safe care of children under these circumstances:
 - children awaiting decisions regarding their placement;
 - children who are victims of trafficking or commercial sexual exploitation;
 - to protect children from abuse or neglect; or
 - to observe and assess children, provide them counselling and other treatment or assisting them with reintegration into their families and communities.
- The reception, development and secure care of children who are awaiting trial or sentence or because they have behavioural, psychological and emotional difficulties or because a court ordered their placement in a child and youth care centre because of criminal activity or because they were transferred from an alternative care placement.
- Early childhood development.
- The reception and care of street children.

In addition to residential care programmes, a CYCC may also offer the following programmes either for children in their care or children living at home:

- providing appropriate care and development for children with disabilities or illnesses;
- additional therapeutic and developmental programmes;
- programmes for treating children with addictions or treating children with psychiatric conditions;
- transitional programmes to assist children leaving the facility after they reach the age of 18; or
- any other service that may be prescribed.

Child and youth care centres should specialise in the provision of particular programmes. For example, not all centres will offer the appropriate treatment and support for children with psychiatric conditions. However, if a centre does not offer a programme suited to a child's developmental or therapeutic needs, they are required to refer the child to a suitable centre, or failing this, provide appropriate care as far as possible.

The provincial head of social development (HSD) must authorise a suitably qualified person to assess the contents of the programmes offered by the centre, whereafter the HSD approves those particular programmes. The assessment is done to determine whether the programmes comply with prescribed national norms and standards. The Regulations detail the core components of programmes aimed to meet the developmental, therapeutic and recreational needs of children in centres.¹⁰

NATIONAL NORMS AND STANDARDS FOR CYCCS (SECTION 194)

The Regulations set out detailed national norms and standards (NN&S) for child and youth care centres on the following:

- residential care, therapeutic and developmental programmes;
- permanency and individual development plans of children;
- temporary safe care and after-care support;
- protection from abuse and neglect;
- assessment of children, family reunification and reintegration;
- children's access to and provision of health care, schooling, education and early childhood development;
- security measures for child and youth care centres; and
- measures for the separation of children in secure care programmes from children in other programmes.

¹⁰ See Regulation 75 for more detail.

MANAGING THE BEHAVIOUR OF CHILDREN IN CYCCS¹¹

The Act promotes the approach of positive discipline as a way to manage the behaviour of children at child and youth care centres and expressly prohibits certain behaviour management actions such as:

- physical punishment (including smacking);
- verbal, emotional or physical harm;
- deprivation of basic rights and needs such as food and clothing; and
- deprivation of access to family members or significant other persons.

Strict provisions are set out regarding the isolation of children such as that a register must be kept detailing the reasons for the isolation, how long it lasted and a report must be compiled on the support and counselling provided and the response of the child during the period of isolation.

THE STATE'S OBLIGATIONS REGARDING THE PROVISION AND FUNDING OF CYCCS

STRATEGIES TO ENSURE SUFFICIENT PROVISION OF CYCCS (SECTION 192)

The Minister of Social Development has to produce a national strategy to ensure an appropriate spread of child and youth care centres throughout the country. Based on the national strategy, each Member of the Executive Council (MEC) for Social Development must produce a provincial strategy for the establishment of properly resourced, co-ordinated and managed CYCCs throughout the provinces and which provides the required range of residential care programmes. The provincial HSD must keep a record of all available CYCCs in the province, and of the programmes that each centre offers. The Act also requires the national Minister and the MECs to ensure that there are enough facilities for children with disabilities.

PROVISION AND ESTABLISHMENT OF CYCCS (SECTIONS 193,195 & 197)

Each MEC for Social Development must provide and fund CYCCs for that province from money obtained from the relevant provincial legislature. Accredited organisations operating CYCCs can qualify for funding from money obtained from the provincial legislature provided they comply with the prescribed NN&S and other requirements that may be prescribed.

The provincial HSD can assist persons or organisations that operate CYCCs to comply with the norms and standards and the other requirements.¹² In addition to the obligation to provide and fund CYCCs in a province, MECs for Social Development are also compelled to establish and operate centres using money appropriated from their provincial legislatures.

11 See Regulation 76.

12 See section 200(5) of the Act.

The national DoSD or any provincial DoSD, municipality and accredited organisation may establish and operate CYCCs provided that the centres are properly registered, managed and maintained; comply with the prescribed NN&S and such other requirements and comply with the structural, safety, health and other requirements of the municipality where the facility is located.

REGISTRATION REQUIREMENTS AND PROCEDURES

APPLICATION FOR CYCC REGISTRATION OR RENEWAL OF REGISTRATION (SECTION 199)

An application to register a child and youth care centre or an application to renew the registration must be lodged with the provincial HSD by completing **Form 48**, which must be accompanied by all the prescribed documentation including:

- a certified copy of the constitution or founding document of the centre; and
- a certificate from the municipality where the centre is or is to be situated that states that the premises complies with all the structural, safety, health and other requirements of the municipality and other legislation.

The provincial HSD can also request additional information relating to the application.

An application for renewal must be made at least 90 days before the registration expires, but the provincial HSD can allow a late application on good grounds. If the application was lodged at least 90 days before the registration was due to expire, then the provincial HSD must review the application before the registration expires.

CONSIDERATION OF APPLICATION FOR REGISTRATION OF A CYCC (SECTION 200)

An application for registration or for renewal of registration must be considered and be either refused or granted with or without conditions by the provincial HSD within six months of receiving the application, or before the existing registration expires.

In considering the application, all relevant factors must be taken into account, including whether:

- the centre complies with the required norms and standards and such other prescribed requirements and also the structural health, safety, health and other requirements of the municipality;
- the applicant is a fit and proper person to operate the centre; and
- the applicant has the skills, funds and resources available to operate the centre.

The provincial HSD must consider a report of a designated social worker before deciding on a registration application. The applicant must receive a certificate of registration or renewal of registration on the prescribed form (**Form 49**) if the application is granted and the certificate must indicate the period for which the registration is valid. In terms of the Regulations, the application is only valid for five years.¹³ If the application is refused, the provincial HSD must inform the applicant of the refusal on **Form 50** set out in the Regulations.

¹³ Regulation 80(3).

The registration of a centre can also be amended by the provincial HSD following an application by the registration holder. The application for registration amendment must be made within 30 days of the registration holder becoming aware of a deviation from the conditions and requirements for the registration.¹⁴ For example, a change of physical location, change of management, or significant changes to the programmes offered and clients served.

CONDITIONAL REGISTRATION (SECTION 201)

The registration application can also be granted on certain conditions set by the provincial HSD, including conditions:

- specifying the type of residential care programme that may or must be provided in terms of the registration;
- stating the period for which the conditional registration will remain valid, but it may not be longer than one year; and
- providing for any other matter that may be prescribed.

CANCELLATION OF REGISTRATION (SECTION 203)

The registration of a CYCC may be cancelled by written notice to the registration holder. Registration can be cancelled if:

- the centre is not maintained in accordance with the prescribed NN&S;
- there is a breach of the conditions on which the original registration was granted;
- the registration holder or management of the centre fails to comply with the provisions of the Act; or
- the registration holder becomes a person who is not a fit and proper person to operate the centre; or
- a person who is not fit and proper is employed at or involved in activities at the centre.

The Director-General or the provincial HSD can assist the registration holder to comply with the norms and standards and with the specific municipality's health, structural and safety requirements. The provincial HSD can suspend the cancellation for a period to allow the registration holder to correct the cause of the cancellation and reinstate the registration if the holder corrects the cause of the cancellation within that period. However this rule does not apply where cancellation is due to the fact that the registration holder is no longer considered a fit and proper person to operate the centre.

If the registration was cancelled and the cancellation was not suspended, then the cancellation takes effect from the date specified in the cancellation notice, but not earlier than 90 days from the date on which the notice was given. There are certain exceptions to the 90 days rule: if an agreement is reached between the provincial HSD and the registration holder that the cancellation will take effect sooner or if the safety or protection of the children in the centre makes it necessary for the cancellation to take effect earlier.

14 Section 202 and Regulation 81.

INSPECTION OF CHILD AND YOUTH CARE CENTRES (SECTION 304)

A person authorised by the Director-General, a provincial HSD or a municipality can enter any child and youth care centre or shelter suspected of being used as an unregistered facility. That person can inspect the facility and its management, observe or interview any child or also cause a child to be examined or assessed by a medical officer, social worker, psychologist or psychiatrist. To determine if the facility is being operated illegally the person inspecting the facility may determine if the facility is complying with the prescribed norms and standards, any structural safety, health and other requirements prescribed by law and the provisions of the Children's Act. The inspector must send a report to the body that authorised the inspection.

NOTICE OF ENFORCEMENT (SECTION 204)

If a person or organisation operates an unregistered child and youth care centre, the provincial HSD can in writing instruct them to stop operating the centre or to apply for registration of the centre within a given period. The organisation or person instructed to apply for registration within a given period can be given permission to continue operating the centre until the end of the given period. If the person or organisation decides to apply for registration, they can be allowed to operate the centre until a final decision is made regarding the registration application. The provincial HSD can also send a notice of enforcement to a person operating a registered centre if the centre is contravening the Act or the conditions of registration to comply with the provisions or conditions. If a person operating an illegal child and youth care centre has been instructed by a notice of enforcement to stop operating the centre and he or she fails to do so, they are committing an offence which may lead to imprisonment of up to 10 years, or a fine, or both.

OPERATION AND MANAGEMENT OF CYCCs (SECTIONS 208 – 210)

WHAT ARE THE OPERATIONAL AND MANAGEMENT REQUIREMENTS AND PROCEDURES FOR CYCCs?

Each centre must have a management board of no less than six people and a maximum of nine members. Board members are appointed by the MEC if the centre is operated by the provincial government. If the centre is privately operated, the registration holder appoints the board members. The procedures for the board appointments are set out in the Regulations.¹⁵ There must be equitable representation of all stakeholders on the board, including community members, but a person considered not to be a fit and proper person may not be a member of the board. Thus everyone elected on the board must have submitted a clearance certificate indicating that his or her name does not appear on the National Child Protection Register or the National Register for Sex Offenders. Furthermore, the board must create a children's forum as part of the management board to ensure that resident children have the opportunity to participate in the operation of the centre, taking into account the age, maturity and stage of development of such children.

¹⁵ See Regulation 84.

The person or organisation operating the centre must appoint or designate a manager and other staff for the centre following interviews and after ensuring that the person to be appointed has the prescribed skills and training and that the person is a fit and proper person to assist in operating the centre. A person unsuitable to work with children cannot assist in operating or serving at a child and youth care centre.

The manager and other staff at the centre must be recruited through an advert in at least one local newspaper. An interview panel must screen the curriculum vitas of the applicants and create a shortlist of candidates. The interview panel should include:

- two members of the management board;
- one person with a qualification in child and youth care work; and
- one representative from the community where the centre is situated.

The panel should consider whether the candidate is a registered professional from an appropriate discipline, has specialised knowledge of child and youth care work, has proven leadership ability, has management and administration skills and has knowledge and experience of the particular programme(s) that the child and youth care centre is registered to provide.

The centre must be managed within a system that allows for the division of responsibilities between the management board and the manager, and interaction in the exercise of those responsibilities. However the manager is responsible for the day-to-day functioning of the centre. The centre must also be managed according to the organisational development plan established for the centre in terms of its quality assurance process and in a manner that allows for the implementation of the residential care and other programmes offered at the centre.

The Regulations require the management board of centres to approve written complaint procedures which are fair and allow all children to complain about certain incidents or staff.¹⁶ Further functions and responsibilities of the management board are detailed in the Regulations¹⁷.

QUALITY ASSURANCE PROCESS (SECTION 211)

The provincial HSD must ensure that each child and youth care centre undergoes a quality assurance (QA) process and may also assist a centre to conduct the QA process. The QA process must be undertaken within two years of registration of the centre and thereafter periodically every three years. However, this does not stop the provincial HSD from ordering a QA process at any time if there are reasons to believe that the centre has failed to comply with the Act or the Regulations. The quality assurance process must be done in the following manner:

16 Regulation 74.

17 Regulations 85 and 86.

- an internal assessment of the centre must be done by a team connected to the centre;
- an independent assessment must be made by a team not connected to the centre;
- the teams must then establish an organisational development plan by agreement, containing the required particulars for the centre; and
- a mentor must be appointed by the team not connected to the centre to oversee the implementation of the plan by the management of the centre.

After completing the QA process, the management board of the centre must give the MEC for Social Development a copy of the organisational development plan for the centre.

CLOSURE OF CYCCs (SECTIONS 205 & 206)

WHAT ARE THE RULES REGARDING THE CLOSURE OF CHILD AND YOUTH CARE CENTRES?

If the registration holder of a CYCC voluntarily closes the centre, he or she must give written notice of closure to the provincial HSD and surrender the registration certificate for cancellation. If the centre is closed voluntarily by the registration holder or following a decision by the provincial HSD to cancel the registration due to the holder's non-compliance with registration requirements, then every child placed in that centre must be transferred in terms of section 171 to other child and youth care centres or into the care of their parents, guardians or former care-givers.

APPEAL AGAINST AND REVIEW OF CERTAIN DECISIONS (SECTION 207)

WHAT IF YOU ARE NOT SATISFIED WITH A DECISION REGARDING THE CHILD AND YOUTH CARE CENTRE?

Decisions taken by the provincial HSD in terms of the provisions in the chapter on child and youth care centres can be appealed to the MEC for Social Development by using **Form 51**. The appeal must be lodged within 90 days following the original decision and the MEC must decide on the appeal within 90 days after it was received.



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ALTERNATIVE CARE

There is a dedicated chapter in the Children's Act that deals with the placement of children in alternative care. This chapter must be read together with the chapter on child and youth care centres (CYCCs) to understand how the Act regulates CYCCs and the children placed at such facilities. This section of the guide explains the chapter on alternative care.

According to the Act, a child is in alternative care if the court has ordered that he or she is placed in foster care, in a CYCC or in temporary safe care. A child cannot be in temporary safe care or be kept at a child and youth care centre for more than six months without a court order. Existing places of safety registered in terms of the Child Care Act are regarded as being approved as temporary safe care in terms of the Children's Act. New applications should be made to the provincial head of social development (HSD) who must give approval in writing. A person, facility, place or premises can be approved for temporary safe care.

It must be noted that there are different ways a child can end up at a CYCC. The child can be placed there through a court order, or by a social worker or police official to ensure the child is in temporary safe care. The child can also be referred to a centre or go to a centre voluntarily (for example to get treatment for substance abuse).

The provisions on alternative care only apply to the child who was placed at the centre through a court order or by a social worker or police official as a temporary safe care measure. **These provisions do not apply to the child that voluntarily goes to the centre or was referred to the centre privately.** For example, when a street child who is abusing substances voluntarily goes to a centre to get treatment, that child is not regarded as being in alternative care and the provisions of this section do not apply to that child.

LEAVE OF ABSENCE (SECTIONS 168 & 169)

WHAT IS LEAVE OF ABSENCE?

Leave of absence is when a child temporarily leaves the care of the person, scheme or centre that was appointed by the court to look after the child. The child may be returning to the care of the parents or a family member. Leave of absence cannot exceed six weeks at any given time.

WHO AUTHORISES A LEAVE OF ABSENCE?

Who authorises the leave of absence depends on where the child is, and under what conditions. Leave of absence is granted by:

- the manager if the child is in a child and youth care centre;
- the foster parent or the head of a cluster foster care scheme if the child is in foster care; or
- the provincial HSD if the child was placed into temporary safe care.

The child must return to the centre or to persons where the child was placed after the leave of absence period expired or after the leave of absence was cancelled. It is an offence to assist or persuade a child not to return or to prevent a child from returning. The penalty for not complying with this provision is imprisonment of up to 10 years, or a fine, or both.

A child in alternative care cannot leave the country without the approval of the provincial HSD. It is also an offence to remove a child in alternative care from the Republic without written approval of the child's removal. The penalty for not complying with this provision can be imprisonment of up to 10 years, or a fine, or both.

ABSCONDING FROM ALTERNATIVE CARE (SECTION 170)

If a child absconds from a child and youth care centre, or if the child's leave of absence has been cancelled or it expired and he or she does not return, then a police official or designated social worker can apprehend the child. They can enter and search places without a search warrant if they believe the child to be on the premises. If a child who absconded is apprehended, the police official must ensure the safety of the child. The provincial Department of Social Development (DoSD) or a designated child protection (DCP) organisation must also be informed that the child has been apprehended.

The child must appear before the children's court as soon as possible after the child has been apprehended or after he or she returns voluntarily. The child may be placed into temporary safe care by a social worker or a police official until he or she appears before the children's court, if for example the child claims that he or she was abused at the centre or if the child needs a different programme. When the child appears before the court, the presiding officer must ask the child why he or she absconded or failed to return to the centre. The presiding officer has to decide what happens to the child in the short term (until the proceedings are completed) and can order that the child either remain in, or be placed in temporary safe care; or return to the centre or the person in whose care the child was before he or she absconded.

The court can order at the end of the proceedings that the child be placed in another form of alternative care. If the presiding officer is of the opinion that there are good reasons why the child should not be returned to the centre or person from whom he or she escaped, the court can order that the child is not returned to the centre or person until the provincial HSD has considered the matter. After considering this order made by the court the provincial HSD can decide either to transfer the child to another child and youth care centre or person, remove or discharge the child from alternative care or order the child to be returned to the centre where the child was placed before absconding.

A person who knows that a child has absconded from alternative care commits an offence if that person assists or induces the child not to return to the centre or person where the child was placed, or if they provide accommodation for that child or prevent the child from returning to the centre or person. If found guilty, the penalty for committing this offence is imprisonment of up to 10 years, or a fine, or both.

TRANSFER AND DISCHARGE OF A CHILD IN ALTERNATIVE CARE (SECTIONS 171 – 175)

Only the provincial HSD can transfer a child in alternative care if the provincial HSD makes a decision to change a child's residential care programme.¹⁸ The child can be transferred from one child and youth care centre or temporary safe care placement to another centre or placement. If the child is to be transferred to a centre in a different province, the HSD of that province must approve the transfer. When a child is transferred to a child and youth care centre or person in temporary safe care, the fees which the provincial DoSD must pay in respect of the child must be paid to that centre or person where the child is transferred.¹⁹

If the child is being transferred into the care of parents, guardians or former care-givers, the transfer order must specify what is required of the parents or care-givers. If those requirements are not met, the designated social worker responsible for supervising the placement can bring the child before the children's court again. The court can then either vary the order of the provincial HSD or make a new order. Before the provincial HSD makes a transfer order, a designated social worker must consult with the child, parents or guardians, if they are available, as well as with the staff of the child and youth care centre or person in whose care the child was placed. However, the children's court must approve an order of the provincial HSD that the child is transferred from the care of a person to a child and youth care centre, or from a centre to a secure care or more restrictive placement.

PROVISIONAL TRANSFER

A child in alternative care can also be provisionally transferred to another form of care as long as that care is not more restrictive, is in the child's best interest and is not for longer than six months. For example, a child who is in foster care could be provisionally transferred into the care of his or her parents as the start of a family reunification process. Regulation 60 sets out the procedure for assessing the child's best interest before deciding on a provisional transfer. The transfer must be managed by a designated social worker to determine if it would be feasible to reintegrate the child with his or her family or into another family, or to transfer the child to another centre or placement. However, the transfer must be withdrawn if the child requests and the social worker agrees to it. The provincial HSD may also confirm the placement during or at the end of the trial period.

DISCHARGE FROM ALTERNATIVE CARE

The provincial HSD can discharge a child that was provisionally transferred from one alternative care placement to another and can also at any time decide to discharge any child in alternative care if that would be in the child's best interest. The procedure in Regulation 60 for assessing the best interest of the child and for reuniting the child with his family also applies before a child can be discharged from alternative care. The Regulations also spell out the manner in which children in alternative care must be transferred or be removed or permanently discharged from alternative care. These include specific provisions on who should accompany the child, who must make the travel arrangements and how the child is to be transported.²⁰

18 See section 172.

19 See Regulation 59.

20 See Regulation 62

REMAINING IN ALTERNATIVE CARE BEYOND THE AGE OF 18 YEARS (SECTION 176)

A child is entitled to stay in alternative care until the end of the year in which he or she turns 18 years. After turning 18, the person who was placed in alternative care can be allowed to remain in alternative care until the age of 21 years if he or she makes an application to the provincial HSD. The HSD can allow the extension if the current alternative care-giver agrees and is able to care for the applicant and if the extension is necessary to enable the applicant to complete his or her studies or training.

APPEAL AND REVIEW (SECTION 177)

Any decisions or actions in terms of the alternative care chapter can be appealed with the Member of the Executive Council (MEC) for Social Development. The appeal must be lodged on the prescribed form within 90 days and the MEC must decide the appeal within 90 days of receiving it. If the MEC's decision is not satisfactory, the High Court can be approached to review that decision.

Note: There is currently no prescribed form to use for a review or appeal in terms of section 177, but nothing stops an aggrieved person to request an appeal or review from the MEC through a formal letter.

SERIOUS INJURY, ABUSE OR DEATH OF A CHILD IN ALTERNATIVE CARE (SECTION 178)

Section 110 of the Act sets out general compulsory reporting obligations for child and youth care workers or volunteers to report cases of child abuse or neglect. Section 178 describes the reporting obligations for when the child was in alternative care at the time that the serious injury or abuse took place. If a child is seriously injured or abused, the matter must be reported to the provincial HSD. The manager of the child and youth care centre or the person or organisation in whose care the child was placed must make the report. The report must be done on **Form 40**.

An investigation must be conducted into the circumstances of the injury or abuse. If a child dies in alternative care, the death must be reported (by the manager of the CYCC or the person in whose care the child was placed) to the parents or guardians, if they can be traced. It must also be reported to a police official, the provincial HSD as well as the social worker dealing with the matter. If the police official is satisfied that the child died of natural causes there will be no further investigation; however if he or she is not satisfied that the child died of natural causes, the official must ensure that the police conduct a full investigation into the circumstances surrounding the child's death.

PROVISIONS REGARDING CONTRIBUTION ORDERS (SECTIONS 161 – 166)

A contribution order is an order made by a children's court against a parent or guardian or any other person with parental rights and responsibilities to maintain a child who is placed in alternative care or temporarily removed from the family for treatment, rehabilitation or counselling. If the child was placed at a child and youth care centre the court can make an order that the parents, guardians or other person must pay money to contribute towards the maintenance or treatment for the child while at the centre. A short-term emergency contribution order can also be made to contribute towards costs as a result of the special needs of a child.

The presiding officer intending to make a contribution order against, for example, one of the child's parents, must request the clerk of the court to issue a summons to the parent requesting him or her to appear before the court and indicate reasons why the court should not make the contribution order. If the court still decides to make the order following the appearance of the parent, then the order must instruct the parent to pay the money to the centre where the child is placed.

The court can change, suspend or withdraw the order – or even revive the order after it has been withdrawn.

WHICH COURT CAN MAKE A CONTRIBUTION ORDER?

The children's court in the area where the respondent lives, conducts business or is employed; or the court situated in the area where the child normally lives.

CAN A CONTRIBUTION ORDER APPLY OUTSIDE THE COUNTRY?

The court in the area where the child is ordinarily resident can also make a provisional contribution order against a respondent who lives in another country, if South Africa has a reciprocal agreement with that country.

WHAT IS THE EFFECT OF A CONTRIBUTION ORDER?

A contribution order and a provisional contribution order are similar to a maintenance order and a provisional maintenance order and it is an offence not to comply with such an order. The court can also order the employer of the respondent to deduct the amount of the contribution from the respondent's wages, salary or remuneration and make the payments to the centre where the child was placed. Such an order can also be changed, suspended or withdrawn by the court.

The respondent also has a right to apply for the variation, suspension or withdrawal of the order to attach their wages on **Form 14** of Children's Act Regulations from the Department of Justice and Constitutional Development. If the respondent is moving from his residential address or place of work, he or she must give a written notice of that change to the clerk of the children's court that made the contribution order and indicate the new residential address or address of the new employer.

THE ROLE OF THE CHILD AND YOUTH CARE WORKER IN FOSTER CARE

FOSTER CARE (SECTIONS 180 – 190)

A child is in foster care when the child has been placed in the care of a person other than a parent or guardian. Foster care is supposed to recreate the family environment, and normally only six children can be placed with one family. This placement is done through a court order or through a decision to transfer a child who is in alternative care in terms of section 171 of the Act (see page 41 for information on transferring a child to alternative care).

A possible role for a child and youth care worker in the Isibindi programme could be to identify children who could be placed in foster care and to approach a designated social worker to arrange for the foster placement of the child. Other roles could include gathering information for the reports, supervision of placements, case conferencing as well as the tracing of family members.

It's not regarded a foster care placement when a child is placed in temporary safe care or in the care of a child and youth care centre. The court can place a child in the care of a non-family member, or a family member other than a parent or guardian, or in a registered cluster foster care scheme. Depending on the circumstances of the case, a children's court will first decide if the child is in need of care and protection before making a decision to place a child in foster care. (See the section of the guide dealing with children in need of care and protection on pages 24 – 28).

The purpose of foster care is to:

- “(a) protect and nurture children by providing a safe, healthy environment with positive support;*
- (b) promote the goals of permanency planning, first towards family reunification, or by connecting children to other safe and nurturing family relationships intended to last a lifetime; and*
- (c) respect the individual and family by demonstrating a respect for cultural, ethnic and community diversity”.*

A prospective foster parent and anyone working for or involved in an NPO that manages a cluster foster care scheme must:

- “(a) be a fit and proper person to be entrusted with the foster care of the child;*
- (b) be willing and able to undertake, exercise and maintain the responsibilities of such care;*

“Fit and proper person”: As indicated earlier, the Act does not define a ‘fit and proper person’. If a person's name is on the National Child Protection Register (NCPR) or the National Sexual Offences Register that person is definitely unsuitable to work with children and is not considered a fit and proper person to foster children. However, this should not be the only check on a person's suitability; the court making a foster care placement order must consider all relevant factors before deciding who is deemed a fit and proper person to be a prospective foster parent.

- (c) have the capacity to provide an environment that is conducive to the child's growth and development; and*
- (d) be properly assessed by a designated social worker for compliance with the above requirements".*

DETERMINATION OF PLACEMENT OF CHILD IN FOSTER CARE (SECTION 184)

The court must consider the report of a designated social worker before it places a child in foster care. That report must indicate *"the cultural, religious and linguistic background of the child"* and whether someone suitable and with a similar background to the child is available, willing and able to foster the child. A child can only be placed in foster care with someone with a different cultural, religious and linguistic background to the child if an existing bond exists between that person and the child, or if there is no suitable or willing person with a similar background to the child that is readily available to foster the child.

DURATION OF FOSTER CARE PLACEMENT (SECTION 186)

Usually a children's court order relating to a child found to be in need of care and protection expires after two years, or even earlier. The order is reviewed after it expired and can be extended for another two years (see section 176, page 42). However, if a child has been in the care of a foster parent (who is not a family member) for more than two years, the court can order that no further social worker supervision or social worker report is required for that placement and that the placement extends until the child turns 18. This is done to create stability in the child's life.

The court also has the option of placing a child in foster care with a family member for more than two years or extending the placement for more than two years at a time or making an order that the foster placement extends until the child turns 18 if:

- the child has been abandoned by his or her biological parents or those parents are deceased; or
- reunification between the child and his or her biological parents is not possible; and
- it is in the best interest of that child.

If a court makes an order that no social work supervision or report is required and that the foster care placement extends for more than two years, the Act still requires a social service professional to visit the child in foster care at least once every two years to monitor and evaluate the placement. Child and youth care workers could play a role here by monitoring the placement and reporting to the social worker.

REUNIFICATION OF CHILD WITH BIOLOGICAL PARENT (SECTION 187)

If reunification between biological parents and the child who is being placed in foster care is possible and in the child's best interest, the children's court can make the foster care order subject to certain conditions that will allow a designated social worker (DSW) to facilitate reunification services for the child and the parents. However, if the child and parents have not been reunited before the order expires, then the social worker facilitating the reunification must submit a report to the court, indicating why the child was not reunited with the biological parents, and giving recommendations about any steps to be taken to stabilise the child's life. Following this report the court can either order the social worker to continue to facilitate the reunification process or order that reunification services should be discontinued if there is no prospect of success. Child and youth care workers could also assist here in supporting the child in the reunification process as part of the family preservation services that they provide.

RESPONSIBILITIES AND RIGHTS OF FOSTER PARENTS (SECTION 188)

The rights and responsibilities of foster parents are detailed in different places:

- in the court order (it can be the foster care order or an order assigning parental rights and responsibilities to a foster parent);
- in a foster care plan between the child's parent or guardian and the foster parent; or
- in any applicable provision of the Children's Act and its Regulations. For example, the Act indicates that a foster parent is also considered to be a care-giver of a child. Thus a foster parent has all the rights and responsibilities of a care-giver under the Act including, for example, the right to consent to the foster child's medical treatment or HIV testing. The Regulations²¹ detail more rights and responsibilities for foster parents, including:

RIGHTS TO:

- be informed by a DSW or designated child protection (DCP) organisation of any occurrence that may substantially affect the foster placement;
- apply for the adoption of the foster child and to be informed of any application to adopt the foster child; and
- ongoing training and support from a social worker to enable the foster parent to deal effectively with a foster child and the child's biological parents.

RESPONSIBILITIES TO:

- cooperate with a DCP organisation or DSW in the reunification process with his biological parents or family members if that is part of the permanency plan for the child;
- cooperate with the DCP organisation or the DSW in any review process to extend the foster care order; and
- allow a DCP agency or DSW to access his home and to have access to the child in order to monitor the placement, provide reunification services, and review the foster care order, or for any other matter relevant to the foster placement.

²¹ See Regulations 65 and 66 for the full list of rights and responsibilities of foster parents.

MAKING MAJOR DECISIONS INVOLVING THE FOSTER CHILD (SECTION 188(2) READ WITH SECTION 31)

Before making any major decisions involving the child, the foster parent must consider the views and wishes of the child depending on the age, maturity and stage of development of the child, and any views and wishes expressed by the child's guardian or parent. Note, however, that the foster parent is only required to give due consideration to such views and wishes and does not have to act in accordance with those wishes or views. The foster parent does not need the consent of the child, parent or guardian before making a **major decision**, but the foster parent must consider their views seriously.

Major decisions include decisions that would affect contact between the child and the parents or decisions that are likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relation with a parent or family member or, generally, on the child's well-being.

If the foster child was abandoned, is an orphan, or cannot be reunified with family because such reunification would not be in the child's best interest, then the children's court can give the foster parent additional parental rights and responsibilities (through a court order). The court can also monitor the foster care placement by for example requiring social worker reports to be submitted from time to time or ordering the child and/or foster parent to appear before it to inform the court about compliance with its order or to allow the court to vary or withdraw the order.

The Act says that any person may report any alleged non-compliance with a children's court order, or any alleged worsening of the circumstances of a child following a court order, to the clerk of the children's court (section 65).

TERMINATION OF FOSTER CARE

A children's court can terminate a foster care order at any time if it is in the best interest of the child. Before the court terminates the order it must consider all relevant factors, including the existing bond between the child and his or her biological parents (if the parents want to reclaim the child); the bond that has developed between the child and the foster parent and the family of the foster parent, and also the prospects of achieving permanency in the child's life by:

- “(i) returning the child to the biological parent;*
- (ii) allowing the child to remain permanently in foster care with the foster parent;*
- (iii) placing the child in any other alternative care; or*
- (iv) adoption of the child.”*

CLUSTER FOSTER CARE SCHEME (SECTIONS 183, 185, & REGULATIONS)

WHAT IS A CLUSTER FOSTER CARE SCHEME AND HOW IS IT ESTABLISHED AND MANAGED?

This is a scheme that allows children to be taken into foster care and is managed by a non-profit organisation (NPO) registered for that purpose by the provincial head of social development. The provincial HSD must monitor the management of the cluster foster care scheme. Foster care usually does not permit more than six children to be placed with a single foster parent or two people sharing a household unless the children are siblings or related or if a court considers it to be in the best interests of the children. However, more than six children can be placed in foster care in terms of a registered cluster foster care scheme.

An organisation that wants to manage and provide cluster foster care must be registered as an NPO and be approved by the provincial HSD. The requirements for registration as a cluster foster care scheme are set out in Regulation 68. An application to the provincial HSD to register a foster care scheme must be made on **Form 42**. When an organisation wants to register more than one scheme, a form must be completed for each scheme. If the application is granted, the applicant must receive a certificate of registration (**Form 43**). The registration can have conditions attached. If the application is unsuccessful the applicant must be informed of the rejection and the reasons for the rejection on **Form 44**.

A cluster foster care scheme can be deregistered if the conditions of registration have not been complied with or if any of the registration requirements were not complied with. However, before deregistration can take place, the cluster foster care scheme must be given 90 days notice of the intention to deregister the scheme on **Form 45**. After receiving a notice of intention to deregister, the cluster foster care scheme can make representations to the HSD of the relevant province within the 90 days notice, on **Form 46**. If the scheme is still deregistered after considering the representations, then the scheme must be notified of deregistration and be given reasons for the decision on **Form 47**.

FUNCTIONING AND MANAGEMENT OF CLUSTER FOSTER CARE SCHEMES (REGULATIONS 69 – 71)

An organisation managing or operating a cluster foster care scheme must:

- keep a financial record of social assistance and other funds received to provide social services for the support of the children they are fostering; and
- operate or be managed according to a written plan or agreement detailing prescribed information.²²

The best interests of the children in cluster foster care must be promoted through the provision of prescribed types of services.²³ These are services that:

22 Regulation 69(b) read with Regulation 70.

23 See Regulation 71.

“(a) provide support, mentoring, supervision and advice to active members of an organisation to whom responsibility for foster care of a child or children in the cluster foster care scheme has been assigned;

(b) require the active members of an organisation to whom responsibility for foster care of children has been assigned to:

(i) ensure that the children in cluster foster care benefit from educational and health services, including early childhood development services;

(ii) fulfil the special needs of any child in cluster foster care, including chronic illness or a disability, by providing psychological, rehabilitation and therapeutic programmes for children with such needs;

(iii) ensure that the rights of children in cluster foster care are respected, protected, promoted and fulfilled; and

(iv) fulfil the social, cultural and religious needs of any child in cluster foster care.

(c) assist the active members of an organisation to whom responsibility for foster care of children has been assigned to obtain the basic necessities of life themselves, including by providing access to income-generation projects and skills development programmes as appropriate;

(d) ensure that a foster care plan as contemplated in section 188(1);

(e) of the Act is compiled in respect of each child in cluster foster care, as soon as possible, but not later than 21 days after the child’s placement in the cluster foster care scheme;

(e) develop appropriate parenting skills and the capacity of active members of an organisation to safeguard the well-being of the children, including the promotion of positive, non-violent forms of discipline;

(f) prevent the neglect, exploitation, abuse, inadequate supervision of children or other failures to meet children’s needs on the part of active members of an organisation;

(g) assist a young person with the transition when leaving cluster foster care after reaching the age of 18; and

(h) involve active members of an organisation, as well as the children in cluster foster care, in identifying and seeking solutions to their problems.”

An annual report must be provided to the provincial HSD containing a range of different reports and information such as (amongst other things) a financial report; the number of children and duration of each placement over the year; number of children per active member of the organisation; the number of active members; details of child protection services rendered and which children in the scheme received these services; details concerning the provision of services for children with special needs who are part of the scheme; and the extent to which the rights of children in the scheme have been met. The organisation managing or operating a cluster foster care scheme must ensure that all members of the scheme who are providing foster care to children have clearance certificates indicating that their names do not appear on the NCPR or the National Sexual Offences Register.

The organisation operating or managing the scheme must employ at least one registered social worker (not specifically a designated social worker) for every 50 children served by the scheme or must have entered into a formal agreement with a designated child protection organisation to provide required social work services. The transfer of children between foster parents who are members of the organisation managing the scheme must be carried out in accordance with the provisions on the transfer of children in alternative care (see section 171 dealt with on page 41).



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GENERAL PROVISIONS IN THE ACT ON: CHILD-HEADED HOUSEHOLDS, PREVENTION AND EARLY INTERVENTION PROGRAMMES, AND PROTECTIVE MEASURES RELATING TO THE HEALTH OF CHILDREN THAT ARE OF RELEVANCE TO CHILD AND YOUTH CARE FACILITIES AND WORKERS

CHILD-HEADED HOUSEHOLDS (CHH) (SECTION 137 & REGULATIONS)

The Act provides for the recognition of child-headed households and prescribes how such households must operate. A household can be recognised as a child-headed household by the provincial HSD if:

- “(a) the parent, guardian or care-giver of the household is terminally ill, has died or has abandoned the children in the household;*
- (b) no adult family member is available to provide care for the children in the household;*
- (c) a child over the age of 16 years has assumed the role of care-giver in respect of the children in the household; and*
- (d) it is in the best interest of the children in the household”.*

The child will have to undergo a developmental assessment to determine if he or she will be able to take on the responsibility of the head of the household.²⁴ Once recognised as a CHH, the household must be supervised by an adult who was appointed by the children’s court or an organ of state, or by a non-governmental organisation (NGO) as determined by the provincial head of social development (HSD). The adult must be suitable to work with children, i.e. must be screened against the National Child Protection Register. A child and youth care worker could also be appointed as a supervising adult for children in a child-headed household.

The role of the supervising adult is to support the child heading the household to care for the other children. The adult must perform the following duties set out in Regulation 50:

- “(a) facilitate psychological, social and emotional support to all members of that household when required;*
- (b) ensure that all members of that household who are by law required to attend school or who are required to attend an appropriate education programme, do so;*
- (c) assist with the supervision of homework of members of that household;*
- (d) educate the members of that household with regard to basic health and hygiene and, if possible, sexually transmitted infections depending on the age and maturity of the child;*
- (e) assist with the health care requirements of any member of that household, including the supervision of the taking of medicine and assistance to members with disabilities and ensuring that the children access health care facilities and that their health needs are met;*
- (f) assist the members of that household with legal documentation when required;*

24 DoSD Practice Note 1, page 17.

- (g) compile a roster indicating the responsibility of various members of that household in relation to domestic chores in consultation with the members of the household to prepare children for independent living;*
- (h) in consultation with a social worker or a social service professional, attempt to reconnect the members of the household with their parents or relatives and supervise contact between the children and relatives or parents where it is deemed appropriate by the social worker or social service professional;*
- (i) engage the members of that household in issues that affect the household;*
- (j) ensure proper provision of resources due to that household, if any, in terms of section 137(5)(a) of the Act for that household's basic needs;*
- (k) ensure, subject to paragraph(j), proper utilisation of available resources and adherence to a financial budget;*
- (l) keep record of all expenditure of that household;*
- (m) utilise available and applicable child protection services to ensure the safety and well-being of the members of that household if and when required;*
- (n) assist the member heading that household with his or her responsibilities;*
- (o) be available to a child when the child requires services after hours;*
- (p) report incidents of abuse to the relevant authority in a form identical to **Form 22**; and*
- (q) report any death within that household to a police official and to the provincial head of social development". [Emphasis added]*

An Isibindi mentor could be appointed to act as a supervising adult for a child headed household

The Act recognises the child heading the household as the care-giver of the younger children; he or she has all the rights and responsibilities of a care-giver including for example the right and responsibility to consent to the medical treatment or HIV testing of the younger children. The supervising adult cannot take decisions concerning the household or the children in the household without consulting the child that heads the household as well as the other children depending on their age, maturity and stage of development. All the day-to-day decisions relating to the household or the children in the household can be taken by the child heading the household. The Act only requires consultation with the children in the household, but if there is a sick adult in the household steps should be taken to include them in any dialogue.

Social grants or other benefits which the household is entitled to can be collected by the child heading the household, or by the supervising adult. If the adult collects money for the household he or she must report to the body that appointed him or her. The supervising adult must also draw up a monthly expenditure plan in consultation with the members of the household. The expenditure plan must be signed by the child heading the household and must be submitted with proof of expenditure (such as receipts, invoices, etc) to the body that appointed the supervising adult. If the plan was not signed by the child heading the household or there is reason to believe that the finances are mismanaged, the organ of state or NGO that appointed the supervising adult can investigate the matter and take appropriate steps including laying charges against the supervising adult and replacing him or her.²⁵

The Act says that the supervising adult must consult the children in the household but it does not say that the adult must act in accordance with the views of the children. However, if the children are not satisfied with the way that the supervising adult is performing his or her duties, they can report him or her to the organ of state or the NGO that made the appointment.

The Regulations set out national norms and standards (NN&S) for child protection, which include detailed NN&S for child-headed households.²⁶ These focus on:

- general NN&S regarding the promotion of siblings remaining together; promoting independent functioning of such households and also support to be given to such households;
- safe and nurturing environments for children living in child-headed households;
- benefits and assistance for children in CHH regarding official birth registration, social assistance, social and community services, access to education and development of skills;
- protecting property or possessions belonging to children in CCH;
- preventing children in CHH from being exposed to harm and protecting them from community risk factors;
- support and assistance to children with disabilities living in CHH;
- the rights of children in CHH to be consulted and to participate in decisions affecting the household;
- monitoring and supervision of CHH; and
- obligation on the child heading the household to give effect to the norms and standards “*to the maximum extent reasonably possible*” bearing in mind his or her age, maturity and stage of development to ensure the other children in the household enjoy their rights to survival and development and to protection from harm.

25 Regulation 51.

26 See section 11 of the National Norms and Standards for Child Protection.

PREVENTION AND EARLY INTERVENTION PROGRAMMES (SECTIONS 143 – 144, 147 – 148, & REGULATIONS)

Child and youth care centres may provide prevention and early intervention (P&EI) services to children and families. Such services could also be provided in accordance with a court order requiring a centre to provide early intervention services or a prescribed family preservation programme to a child and the family, parent or care-giver of the child in cases where the child's safety and well-being is not at risk.

P&EI programmes are aimed at (amongst other things):

- preserving family structures, and strengthening the capacity;s and skills of parents and care-givers to deal with problems that could lead to state intervention unless it is dealt with;
- developing parenting skills and capacity of parents and care-givers to protect the well-being and best interests of their children including the promotion of non-violent forms of discipline;
- promoting interpersonal relationships within families and diverting children from the criminal justice system and avoiding the removal of children from their family environment;
- preventing child neglect, exploitation, or abuse; or
- providing psychological, rehabilitation and therapeutic programmes for children.

These programmes may include (amongst other things):

- supporting and assisting families with a chronically ill or terminally ill family member;
- assisting and empower families to obtain the basic necessities of life; or
- early childhood development and promoting the well-being of children and the realisation of their full potential.

P&EI programmes must involve and promote the participations of families, parents, care-givers and children in identifying and seeking solutions to their problems.

The national norms and standard for the provision of prevention and early intervention programmes are set out in the Regulations and relate to:

- “(a) outreach services;*
- (b) education, information and promotion;*
- (c) therapeutic programmes;*
- (d) family preservation;*
- (e) skills development programmes;*
- (f) diversion programmes;*
- (g) temporary safe care; and*
- (h) assessment of programmes”.*

PROTECTIVE MEASURES RELATING TO THE HEALTH OF CHILDREN (SECTIONS 129 – 134)

The national norms and standards for child and youth care centres indicate that all children, including children with disabilities or chronic illnesses, in child and youth care centres must have access to health care services. The Children's Act makes provision for care-givers to consent to certain health care services on behalf of children they care for. A care-giver is defined in the Act and includes the head of a child and youth care centre or shelter as well as a child and youth care worker supporting children without appropriate family care in the community. The Act says

care-givers can consent to the medical treatment, HIV testing and disclosure of the HIV status of children they support and who have no appropriate family care. However, care-givers cannot consent to the surgical operation of those children. For a full discussion of the provisions relating to consent to these health care services, child and youth care workers are urged to consult the Guide to the Children's Act for Health Professionals²⁷ for more details.

The Act appears to distinguish between child and youth care workers who work in a CYCCs and child and youth care workers who work in communities. If a child in a CYCC needs medical treatment then the head of the centre must consent and not a child and youth care worker working at the centre. However, a CYCW working with children in an Isibindi programme in the communities for example can consent to the medical treatment of the children who have no family care and to whom they are giving support.



Photograph © NACCW

27 Mahery P, Proudlock P & Jamieson L (2010) *A guide to the Children's Act for health professionals*. Edition 4. Children's Institute, University of Cape Town. [Available at: www.ci.org.za]

For more information on issues discussed in this guide, or to comment, contact:

Children's Institute, University of Cape Town

Prinslean Mahery : Prinslean.Mahery@uct.ac.za

Lucy Jamieson : Lucy.Jamieson@uct.ac.za

Tel: 021 689 5404

National Association of Child and Youth Care Workers

Kathy Scott : Kathy@naccw.org.za

Tel: 021 762 6076

