Law reform and case law affecting children 2023/24

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In this chapter we summarise and comment on recent law reform and court cases that affect children. We have chosen to focus on a few notable reforms relevant to young children, and have clustered the developments according to service categories to enable readers to locate the issues most relevant to their area of interest.

Maternal and child health services

- Section 4 (3) of the National Health Act on free health care services for pregnant women and children under six years old has been interpreted by the High Court to include all women and children under six, irrespective of their nationality or documentation status.
- The National Health Insurance Act was passed by Parliament in 2023 and signed by the President in 2024 but is not yet in effect.

Birth registration, identity and nationality

- Regulation 12 (2)(c) of the Births and Deaths Registration Act has been declared unconstitutional for discriminating against children of unmarried fathers who do not have valid visas.
- Sections 22 (12) & (13) of the Refugees Act have been declared unconstitutional for deeming asylum seekers to have abandoned their refugee application if their asylum seeker visa had expired.
- The National Identification Registration Draft Bill has been published for public comment and is being prepared for tabling in Parliament.

Child nutrition

- Draft regulations of the Foodstuffs, Cosmetics and Disinfectants Act on the labelling and advertising of foodstuffs were published for comment in 2023 and are being finalised for promulgation.

Early childhood development programmes

- The Children's Amendment Draft Bill was published for comment in 2024 and is being prepared for tabling in Parliament.

Basic education

- The Basic Education Laws Amendment Bill was passed by Parliament in 2024 but is not yet signed by the President.

Family care and protection from abuse and neglect

- The Children's Amendment Act was partially put into effect in 2023 and regulations were promulgated at the same time.
- The Traditional Courts Act was signed by the President in 2023 but is not yet in effect as regulations are still being drafted.

Maternal and child health services

Section 4 (3) of the National Health Act: Pregnant women and children under six are entitled to free health care irrespective of nationality or documentation status

In *SECTION27 and Others v MEC of Gauteng Department of Health and others*,[1] the High Court interpreted the right to free healthcare for pregnant women and children under six years of age, provided by section 4 (3) of the National Health Act,[2] to include all women and children, irrespective of their nationality and documentation status. The case was brought to court by SECTION27 and three women who had been required to pay a fee at hospitals in Gauteng before being allowed access to health services for their pregnancy or their child.

The Court order declares that Gauteng policy and regulations,[vi] which excluded non-citizens and undocumented pregnant women or children under six years, or required them to pay fees prior to accessing health care services, are unlawful. To ensure that the court order would be implemented at health

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vi These included the Implementation Guidelines on Patient Administration and Revenue Management (2020); and General Notice 1426 in Provincial Gazette 414 of 24 November 2021, Regulations on the classification of and fees payable by patients at provincial hospitals, issued in terms of the Gauteng Hospitals Ordinance 14 of 1958.

facilities, the National Minister of Health was ordered to issue a circular to all provinces and ensure that all health facilities displayed posters which made these rights known to health facility staff and patients.

The court specified that the posters must state that:

> "ALL pregnant women,
> ALL women who are lactating, and
> ALL children below the age of six
> Are entitled to free health services at any public health establishment,
> irrespective of their nationality and documentation status, unless:
> - They are members or beneficiaries of medical aid schemes, or
> - They have come to South Africa for the specific purpose of obtaining health care."

The High Court further ordered that the respondents appear before the court in October 2023 to provide a comprehensive report on their compliance with the order.

Compliance with the order

The respondents returned to the Court for the compliance hearing in October 2023.[3] They reported that the Policy had been amended[4] and that they had sent posters to all the provinces and all health facilities in Gauteng, and that a number of health facilities in Gauteng had displayed posters on their notice boards and in wards. They admitted there were some facilities that were not displaying the posters including the Charlotte Maxeke Hospital, Hillbrow Community Health Centre, Helen Joseph Hospital, South Rand Hospital, Kalafong Hospital and Thelle Mogoerane Hospital.

The Court gave the respondents until 6 November 2023 to fully comply with the court order. Should there be non-compliance, Judge Sutherland undertook to personally attend the relevant hospitals to monitor compliance. The respondents subsequently fully complied with the court order.

SECTION27 continues to monitor compliance with the court order and reported that it has experienced a huge drop in complaints, indicating that the Department of Health (DoH) is complying. Any non-compliance with the order can be reported to SECTION27 or the Centre for Child Law. This will enable them to continue to ensure that the court order is implemented.

National Health Insurance Act

The National Health Insurance (NHI) Act[5] has been passed by Parliament and signed by the President.[vii] It will take a few years before it can be put into effect because regulations still need to be drafted and financial laws amended. The NHI has the potential to improve child health outcomes for over 80% of the population who are currently reliant on an under-resourced public health care system.[6]

Children entitled to a broadly defined package of basic health care services

The Act explicitly provides in section 4 (3) that "[a]ll children, including children of asylum seekers and illegal foreigners, are entitled to basic health care services as provided for in section 28 (1)(c) of the Constitution". This ensures that the law is aligned with section 28 (1)(c) of the Bill of Rights which guarantees every child the right to basic health care services.

The term 'basic health care services' has never previously been defined and child health experts have been advocating for many years for legislation to define what the basic package should contain.[7] In response to submissions, Parliament agreed to add a definition of 'basic health care services'. The Act defines 'basic health care services' in section 1 as:

> *"services provided by health care service providers which are essential for maintaining good health and preventing serious health problems including preventative services, primary health care, emergency medical services, diagnostic services, treatment services and rehabilitation services".*

This broad definition extends beyond medical treatment and emergency medical care to include primary health care services such as sexual and reproductive health services, antenatal care, nutrition services and immunisation that are essential in promoting health and preventing childhood and lifelong illnesses and disability. The inclusion of rehabilitation services is a welcome addition as they are essential in helping children recover from illness or trauma, and in enhancing the functioning and participation of children with disabilities, long term conditions and developmental delays. However, it remains to be seen exactly which health care services under these categories, basic and beyond, will be included in the NHI baskets of care for children and adolescents.

Unfortunately, palliative care (for terminally ill children and children with severe health-related suffering) is not explicitly included in the definition. This omission is concerning given that palliative care is considered an essential element of the definition of health care by the World Health Organization (WHO)[8] and the United Nations Committee on the Rights of the Child.[9] Paediatric palliative care remains a weakness and a source of suffering in South Africa's health care system. Its

vii It was passed by Parliament at the end of 2023 and signed by the President in May 2024.

exclusion from the definition is likely to further marginalise these already under-resourced services.

Undocumented children and children of asylum seekers and 'illegal foreigners' are entitled to basic health care services

The Act clarifies explicitly in section 4 (3) that all children, including the children of asylum seekers and 'illegal foreigners' are entitled to basic health care services. This means that the NHI may not exclude any child from accessing basic health care services based on the immigration status or lack of documentation of their parents or themselves. This section will also protect South African children who do not have birth certificates and whose parents do not have identity documents (IDs), from exclusion.

However, other sections of the Act may pose a practical barrier to child asylum seekers, illegal foreigners, South African children without birth certificates, and South African parents without IDs: Section 4 (4) requires all users to positively identify themselves and be registered with the fund in order to access services. Undocumented parents and children will not be able to positively identify themselves as they have no documentation. They will also not be able to be registered because the registration requirements set out in section 5 provide no exceptions for adults or children unable to produce the listed documents which are limited to IDs, birth certificates or refugee identity documents. This oversight could be rectified by amending the Act to clarify how an undocumented person can register using alternative proof of identity.

Pregnant and lactating adult women who are asylum seekers or illegal foreigners are excluded

While the Act explicitly provides that children who are asylum seekers or illegal foreigners are entitled to basic health care services, section 4 (2) restricts access for adult asylum seekers and illegal foreigners to "emergency health care services" and "services for notifiable public health concerns". This is a step backwards for the rights of pregnant women who, under the National Health Act, have the right to free health care services, irrespective of their nationality or documentation status.[10] This could result in some pregnant women being denied access to antenatal and obstetric services which will not only put their health and lives at risk, but also the lives and health of their infants. Such an approach will increase the risk of birth complications, resulting in increased maternal and neonatal deaths and more infants born with disabilities and long-term health conditions. This is likely to cost the NHI more as emergency obstetrics and health care services for at-risk newborns and children with disabilities (which the NHI is legally obliged to fund) will be more costly than providing basic maternal health care services to all women.

Birth registration, identity and nationality

Court orders to enable unmarried fathers to register their children are not being implemented

In previous issues of the Child Gauge,[6, 11] we reported on the *Naki (2018)*[12] and *Centre for Child Law (2021)*[13] judgements in which the High Court and the Constitutional Court declared regulations and a section of the Births and Deaths Registration Act (BDRA)[14] to be unconstitutional because they discriminated against children born to unmarried fathers by preventing their births from being registered.

In August 2020, when opposing the Centre for Child Law's appeal in the *Naki* case, the Department of Home Affairs (DHA) told the Constitutional Court that it had started the process of amending the regulations of the BDRA to enable unmarried fathers to give notice of birth for their children.[15] However, nearly four years later, the DHA has not amended the BDRA regulations or its internal documents to guide officials on how to implement the various judgments. As a result, the judgments are generally not being implemented by local offices and the children of unmarried fathers (whether South African citizens or foreign) remain unable to be registered.[viii]

Regulation 12 (2)(c) of the Births and Deaths Registration Act declared unconstitutional

In the recent case of *UJ and Another v Minister of Home Affairs and Another*[16], the High Court has found another Regulation of the BDRA to be unconstitutional because it prohibits a father from being added to his child's birth certificate if he is not a citizen and does not have a valid visa.

Section 11 (4) of the BDRA allows for an unmarried father wishing to acknowledge himself to be the father of a child who already has a birth certificate, to apply to amend the birth certificate by including the father's details. Regulation 12 prescribes the manner in which an application ought to take place (for example the mother must be present and consent) and sub-regulation (2)(c) specifies that if the person is not a South African citizen, he must submit a valid passport and valid visa.

In the *UJ case*, the parents of the child were unmarried yet lived together as if married. The mother is a South African citizen and the father is a Bulgarian citizen. The child's birth was initially registered by the mother and did not include the father's details. When the parents attempted to add the father's details

viii Experiences of public interest law firms and academic units assisting such families, including Centre for Child Law, Children's Institute, and the Legal Resources Centre.

to the child's birth certificate at the Gqeberha Home Affairs office, the officials refused to add his details, citing the reason that the father was a non-South African citizen without a valid visa. He was informed that if he wanted to add his details, he would need to do a paternity test at his own cost and provide a court order declaring him the father. The parents launched court proceedings against the Minister and DHA, seeking an order declaring regulation 12 (2)(c) unconstitutional. They argued the regulation discriminated against their child, as well as many other children in similar situations with non-citizen fathers who do not have valid visas.[17]

The Court held that the regulation discriminated against children who were born outside of marriage and whose fathers were in South Africa illegally or were undocumented citizens of another country, and that there was no convincing justification for the discrimination.[18] The discrimination was also irrational as it disadvantaged the child (for example, it could deprive him of obtaining Bulgarian citizenship) based on something over which the child had no control[19] and there were other lawful means of addressing the father's unlawful presence in the country without having to infringe the rights of the child.[20] When interpreting section 11 (4) of the Act, the Court remarked that Parliament used the words 'any person' and therefore made no distinction between South African citizens and non-South African citizens, or between non-citizens who are legally or illegally in the country.[21] Because Parliament elected not to discriminate between children based on the citizenship or immigration status of their parents, the Minister was not authorised to restrict the application of section 11 (4) based on the father's status as he had done in Regulation 12 (2)(c).[22] The Regulation was therefore declared unconstitutional.

With multiple Regulations to the BDRA with regards to children of unmarried fathers having been declared unconstitutional or amended by the Courts over the past six years, there is a dire need for the Regulations and Application Forms to be amended by the Minister to correctly reflect the law.

Sections 22 (12) & (13) of Refugees Act declared unconstitutional

The Refugees Act[23] sets out the procedure for asylum applications and defines the standards to obtain refugee status in South Africa. The Act specifies that the applicant needs to complete an asylum application form in person at one of the Refugee Reception Offices (RRO). They will then be issued with an asylum seeker visa while the process to determine their refugee status is under way. Asylum seeker visas are valid for between six to 12 months. While the refugee status determination process is supposed to only take six months, in reality it takes many years. Asylum seekers must continue to renew their asylum seeker visas until a final decision is made. If successful, they will be issued with a refugee certificate of recognition which is valid for four years.

Refugees Amendment Act introduces the abandonment rule

In 2020, an Amendment Act introduced section 22 (12) and (13) into the Refugees Act, and the regulations were also amended.[ix] The effect of these amendments was that asylum seekers who failed to renew their visas within one month of their expiry dates were considered to have 'abandoned' their applications for refugee status ('the abandonment rule').

This new abandonment rule adversely affected many asylum seekers and their children who had been unable to keep up with the six-monthly renewals of their visas due to circumstances outside their control, such as a lack of money to travel to one of the few RROs every six months. The Scalabrini Centre launched a constitutional challenge to the automatic presumption of abandonment as it would lead to many asylum seekers and their children, who have genuine claims to refugee status, being deported back to circumstances in which they face further persecution.[24] It would also lead to many being undocumented which would restrict their access to normal life functions.[25]

Principle of individualised decision-making in all matters concerning children

The Consortium for Refugees and Migrants in South Africa (CoRMSA), admitted as a friend of the court, submitted that the provisions violated the principle that there should be individualised decision-making in all matters concerning children.[26] Children who were listed as dependents on asylum applications by their parents were at the mercy of the bureaucratic process governing their parent's claim. This meant that when a parent's claim is deemed abandoned, all their children's applications will also be automatically deemed abandoned.[27] This has led to children being exposed to the severe consequences of being undocumented for long periods of time as well as the risk of refoulment (deportation to the country from which they have fled) as a result of circumstances beyond their control.[28] CORMSA also argued that unaccompanied and separated children were particularly vulnerable and experienced great difficulty in accessing documentation, and that the abandonment rule introduced a

ix Regulation 9 and Form 3.

further barrier that made it harder for these children to legalise their stay in South Africa.[28]

Backlog of asylum applications

DHA argued that the provisions served the legitimate government purpose of addressing the backlog of inactive asylum applications by incentivising applicants to take an interest in completing their applications.[29] They also argued that the provisions were necessary to help prevent recalcitrant asylum seekers (asylum seekers who have no valid claims) from abusing the asylum system.[30] DHA informed the Constitutional Court that they had 737,315 'inactive' applications for refugee status[31] and that these 'inactive' cases disproportionately exceeded the number of active cases, creating a massive backlog and resulting in delays in finalising asylum applications. An application is considered 'inactive' if the asylum seeker's visa has expired and not been renewed in time. According to the Auditor General, it would take 68 years to clear the refugee status determination backlog – excluding any new applications.[32] Scalabrini argued that DHA failed to acknowledge and accept that the major contributing factors to the backlogs in the asylum application system lay within their own control. These factors included the respondent's decision to close RROs in certain urban areas and its lack of capacity to process asylum applications timeously.[33]

High Court declares the abandonment rule unconstitutional

These sections, and their associated regulations, were declared unconstitutional by the Western Cape High Court in 2023.[24] The court held that the provisions severely limited asylum seekers' rights to non-refoulment and deprived them of the protection of the asylum system. There was no defensible and logical connection between this limitation and the alleged purpose of reducing the backlogs in the asylum application system. And even if there was a connection, the sanction imposed on asylum seekers was grossly disproportionate to the purpose of reducing backlogs, since deported refugees could face torture or death just for being late in renewing their visas.[34]

The court held that the abandonment rule violated the fundamental rights of asylum seeker's children for the sake of alleged administrative convenience. Their basic rights to food, health and education could not be sacrificed and surrendered in this way, without individualised determination.[35]

The state was directed to amend the sections without delay[36] and the declaration of invalidity was referred to the Constitutional Court for confirmation.

Constitutional Court confirms the High Court finding

In a unanimous decision, the Constitutional Court confirmed the High Court's finding of constitutional invalidity[37] which was made retrospective to 1 January 2020, the date on which subsections 22 (12) and 22 (13) came into operation.[38]

The Court held that the sections violated a number of constitutional rights including the right to dignity, by cutting asylum seekers off from essential services needed for a dignified life such as banking, education and healthcare.[39] The asylum seekers and their children were also exposed to the constant risk of arrest, detention, and deportation, in contravention of the rights to life and personal liberty.[40]

The Court also stressed that the deemed abandonment of parents' asylum applications has drastic consequences for their children. One child had spent an entire year out of school due to their parent's visa being expired and deemed abandoned, while another could not register to write matric exams. The deemed abandonment of an asylum application disregards the constitutional recognition of children as individuals, with distinctive personalities and their own dignity, who are entitled to be heard in every matter concerning them.[41]

National Identification Registration Draft Bill

The DHA published the National Identification and Registration Draft Bill[42] for public comment in April 2023. Once passed, the Bill will repeal the Identification Act[43] which currently governs the National Population Register (NPR) and applications for IDs.

Inclusive National Identification System

The Bill gives effect to the Official Identity Management Policy[x] and seeks to provide a single, inclusive and integrated digital National Identification System (NIS) for all people who live or have lived in the country. It provides for the compilation and maintenance of a population register for citizens and permanent residents, and the creation of an identification database for certain non-South African citizens who live temporarily in the country. While the concept of a register of citizens and permanent residents is not new, the creation of an identification database for non-citizens is a new development.

Table 1: National identification system

National Identification System (NIS)	
National population register	**Identification database**
Citizens & permanent residents	Non-SA citizens who live temporarily in SA

x The final policy is not available on DHA's website. A draft of the policy prior to public comments is available at https://www.gov.za/sites/default/files/gcis_document/202101/44048gon1425.pdf

The NIS will be based on biometrics and will enable a single view of a person on either the population register or the identification database. It will also be able to interface digitally with other government and private sector identity systems.

Aims to ensure the universal registration of all vital events

The first object of the Bill is "to ensure universal registration of all vital events … including births, marriages and deaths".[44] Universal registration of births would ensure that all children born in South Africa are able to obtain a birth certificate. However, the Bill does not have any sections aimed at addressing the reasons why many children currently do not have birth certificates.[45, 46]

Birth registration is currently provided for by the BDRA, which the Identification and Registration Bill does not propose to amend or repeal, despite the BDRA and its regulations being outdated and containing multiple sections that have been declared unconstitutional by the courts.[45] It is therefore not clear how the objective of universal birth registration will be achieved by this draft bill.

Age for first ID application to be lowered to 10 years

A significant proposed change is the lowering of the age at which a child should apply for an ID from 16 to 10 years of age.[47] The rationale is to enable biometrics to be captured earlier, curb identity theft, and ensure matriculants have a smart ID card before they write their matric examinations.[48] In addition, the previous Minister stated that this amendment will enable access to children's fingerprints to aid the fight against crime.[49]

Child applicants must be assisted by a parent or guardian

In practice, DHA requires first time ID applicants to be accompanied by their parents or guardians, although this requirement is not in the law. The bill proposes to make this practice a legal requirement by legislating that a child applying for an ID must be assisted by a "parent or guardian or any person who is duly authorised" to submit such an application on behalf of the child.[47] The Bill does not clarify what is meant by "any person who is duly authorised".

This current practice and future legislative requirement poses an inflexible barrier for many children and youth who do not have parents, legal guardians or "duly authorised" persons to assist them.[45, 46] This gap could perpetuate the growing difficulties in obtaining IDs that are being experienced by adolescents and young adults who have lost the link to their biological parents.

A rigid requirement to produce a parent or legal guardian fails to acknowledge that over four million children are not living with either of their biological parents, and many of these children are separated geographically from their biological parents.[45] The majority of their caregivers are relatives who are not legal guardians and do not have court orders placing the children in their care.[xi] The Bill therefore needs to make provision for family members to assist children in their applications for IDs if they have been orphaned or abandoned by their biological parents. For children and parents living in different provinces, the Bill needs to provide the option for the parent and child to each visit their closest DHA offices in the province where they live to do the ID application and verification processes. As DHA is a national agency, its NIS should enable such a function.

No provisions to ensure IDs can only be cancelled after following fair procedures

The Bill has been critiqued for the lack of provisions setting out procedures to verify, investigate and cancel certificates and ID cards in line with the Promotion of Administrative Justice Act (PAJA).[46] DHA was recently in the High Court defending its practice of 'blocking' IDs of people with duplicated IDs, errors on their IDs, or who are suspected of obtaining their IDs fraudulently.[50] The applicants in the case argued that the practice of blocking IDs is unconstitutional because it has no basis in law and is not done in terms of PAJA. The DHA conceded this point in its papers and in court, effectively admitting that it is acting outside of the law when blocking IDs. The Court ruled that ID blocking is unconstitutional because it does not follow fair procedure in terms of PAJA.[50] This Bill represents an opportunity to legislate a fair and transparent process for dealing with suspected ID fraud, duplicates and clerical errors.

Modernisation likely to entrench systemic exclusion unless underlying reasons for exclusions are addressed.

One of the central aims of the Bill is to create an 'inclusive' NIS. Modernisation and digitalisation are often posited as means to promote inclusivity. However, if the new system does not account for people already excluded from the current registration systems and entrenches the rigid requirements that have caused these exclusions, it will not achieve the aim of inclusion. The World Bank estimated that in 2018 there were approximately 15 million unregistered people in South Africa.[51] Since COVID-19, this number is likely to have grown significantly. DHA needs to address the underlying reasons for

xi Legal guardianship has required an application to the High Court, making it inaccessible for the majority of relatives caring for orphaned children. Since December 2023, relatives can apply for legal guardianship to the Children's Court, but this change in the law it not well known and there is no information available on government websites advising relatives on how to apply.

these exclusions if it is to realise the vision of inclusion promised in the preamble of the Bill. Introducing a new modernisation project without addressing such gaps is likely to entrench the systemic exclusion of those who are already marginalised and will compromise the completeness and accuracy of the new NIS.

Child nutrition

Draft regulations on the labelling and advertising of foodstuffs

Draft regulations to the Foodstuffs, Cosmetics and Disinfectants Act,[52] relating to the labelling and advertising of foodstuffs, were published by the National Department of Health (NDoH) for public comment in 2023.[53] Once finalised, the regulations will replace the 2010 regulations.[54]

The draft regulations propose a Nutrient Profiling Model for Foodstuffs to identify products that contain excessive amounts of nutrients of concern – including if the products exceed the cut-offs for sugar, salt and saturated fat, or contain non-sugar sweeteners. Such products will be required to carry a front-of-package warning label (FOPwL). The warning labels aim to assist consumers to make healthier decisions at a glance, which is especially important for parents selecting foods for their children. They also may not carry any health or nutrition claims and may not be marketed or advertised to children.

Figure 1: Front of pack warning labels

Alignment with global health guidance, human rights frameworks and scientific evidence

The draft regulations are a low-cost intervention and grounded in a strong scientific evidence base,[55] including the nutrient profiling model to identify unhealthy foods, the recommendation of mandatory FOPwL on unhealthy foods,[56, 57] the prohibition of health and nutrition claims on products with FOPwL and restrictions on child-directed marketing.[58]

The use of FOPwLs has been proven effective in discouraging consumption of unhealthy products,[59-61] and the labels have been tested to ensure they are easily understood in South Africa.[62-65]

The implementation of mandatory restrictions on the marketing of unhealthy foods and drinks will contribute to realising children's constitutional rights to food, nutrition, health, survival, and development. In addition, the FOPwL upholds children's rights to information (consistent with principles in the Consumer Protection Act)[66] and protection from harmful business practices (as outlined in the UNCRC's General Comment 16)[67]. The draft regulations also align with guidelines issued by the WHO which recommended mandatory, government-led regulations to protect children from the harmful impact of food marketing.[68]

Calls for restrictions to be strengthened and expanded

Submissions from health and food rights organisations have welcomed the draft regulations and called for marketing restrictions to be strengthened and expanded to cover the full range of marketing strategies used by companies to target children as consumers across both traditional and digital marketing platforms.[69-72] For example, submissions have called for the following marketing strategies to be prohibited for products carrying FOPwLs:

- the sale or advertisement of such products in schools and other child-centred settings;
- the depiction of children and adolescents on packaging, advertising or marketing materials; and
- the provision of nutrition education to the public or sponsorship of educational and scientific events by the food and beverage industry that produces such unhealthy products.

Submissions also called for restrictions on point-of-sale or location-based marketing (such as displaying sweets and chips in the checkout queues) and for the regulations to be expanded to restrict the marketing of unhealthy fast foods. A robust monitoring and enforcement mechanism will be needed to ensure compliance and implementation.[69]

Child overweight and obesity has nearly doubled since 2016, and now affects nearly one in four children under five.[73] Finalising the regulations and ensuring their effective enforcement could contribute to reversing this concerning trend. The previous draft regulations that were disseminated for comment in 2014 were never finalised due to a strong lobby against them from the food and beverage industry. Government will therefore need to withstand efforts from the food and beverage industry to delay and dilute the regulations.

Early childhood development programmes

Children's Amendment Draft Bill

In 2021, Parliament's Portfolio Committee on Social Development rejected the early childhood development (ECD) related amendments in the Children's Amendment Bill of 2020.[74] This decision came after 1,600 submissions[75] highlighted how the Bill failed to address the challenges of the ECD sector.[76]

Subsequently, the Department of Basic Education (DBE) led a Task Team, composed of government and civil society, to develop new amendments to the ECD chapter of the Children's Act.[77] This resulted in the Children's Amendment Draft Bill (2023) which was published by the DBE for public comment in May 2024.[78] The Bill is expected to be tabled in Parliament later in 2024, with further opportunities for public participation at that stage.

The draft bill reflects the shift of responsibility for ECD programmes from the Department of Social Development (DSD) to the DBE[79] and is aimed at improving the legal framework for ECD programmes under the Children's Act, while DBE works on drafting a more holistic integrated 'ECD Act'.[80]

Supporting young children and their caregivers in their early years is essential for reducing poverty and inequality and is recognised as a "fundamental and universal human right".[81] The recent steps taken by the DBE are welcomed by many in the sector who have long been advocating for an enabling legal framework to ensure universal access to inclusive, holistic and quality ECD programmes.[82]

Definition of ECD programmes

The Bill removes the concept of an 'ECD service' from section 91 of the Children's Act and re-defines 'ECD programme' expansively as "any type of programme that provides one or more forms of care, development, early learning opportunities and support to children from birth to school going age". As currently worded, this could be interpreted to mean every programme must provide all the components – care, development, early learning, *and* support. This may not be typical of some types of ECD programmes such as some parent support groups, for instance, and thus the definition should be framed in the alternative ('or' instead of 'and'). Further, the starting point of 'birth' in the proposed definition does not align with the National Curriculum Framework[83] and the National Integrated Early Childhood Development Policy[81] which define ECD interventions as starting before birth or upon conception and including maternal health services. The rationale behind the choice of birth as the starting point for the definition in this Bill should be made clear in the memorandum to the Bill.

A one-step registration process for all ECD programmes

Currently, ECD programmes must register as partial care facilities under Chapter 5 and as ECD programmes under Chapter 6 of the Children's Act. This dual registration system is burdensome and unnecessary.[84, 85] The Bill aims to create a one-step registration process by removing ECD programmes from the definition of partial care in section 76 of the Act (and removing partial care from the definition of ECD programmes in section 91 of the Act), thereby ensuring that ECD programmes no longer need to register as partial care facilities. This proposed change will provide significant relief to overburdened ECD providers, as well as regulators.

ECD programmes attended by four or more children will be required to register, comply with any conditions attached to their registration, adhere to the norms and standards published under the Act, and meet the structural safety, environmental health and other municipal requirements.[86] Currently, partial care facilities of six or more children are required to register.[87] The rationale behind changing the threshold from six to four is seemingly to ensure that more children benefit from attending regulated ECD programmes. On the other hand, there are concerns about the administrative capacity to register these additional programmes given that there are already thousands of unregistered ECD programmes caring for large numbers of children that should rather be prioritised for regulation. The streamlined registration process proposed in the Bill, combined with yet-to-be-prescribed registration requirements and norms and standards for different types of ECD programmes, could help ameliorate the administrative load.

Recognition of different types of ECD programmes

Different types of ECD programmes are recognised in the Bill, including parent support groups, play groups, child-minders, toy-libraries, mobile programmes, outreach programmes and ECD centres. The Bill proposes a new definition for ECD centre in section 91 of the Act: "An early childhood development centre means an early childhood development programme provided to more than six children from birth to school going age, on behalf of their parents or caregivers, for more than 16 hours per week." The Bill also paves the way for other types of ECD programmes to be further defined through regulations. This should enable different types of ECD programmes to be regulated differently.

If effectively resourced, this change could extend state funding to all the different types of ECD programmes and contribute towards a more systemic approach to the delivery of ECD programmes. However, the Bill does not mandate the state to effectively resource the ECD sector: the state's obligation to provide or fund, which is currently discretionary under section 93 the Act, will unfortunately remain discretionary. There are currently 1.3 million children aged 3 – 5 years not accessing any form of ECD programme,[88] yet despite this, there are no positive obligations on the state to expand access to ECD services (whether through direct state provision or funding

of programmes managed by private individuals or non-profit organisations). This makes achieving universal access highly unlikely within this proposed framework.

The proposed amendments to section 93 of the Act clarify that other departments or municipalities may provide ECD programmes, provided the programmes comply with the legislated norms and standards and other registration requirements. However, it remains unclear whether these programmes will also be required to register with the DBE. For instance, will the DoH's Side-by-Side postnatal support programme need to register with the DBE?

Simplification of registration requirements

The Bill introduces a tailored approach to simplify and streamline the registration requirements for different types of ECD programmes by amending section 94 of the Act. It does not make sense for a two-hour playgroup to have the same registration requirements as a full-day ECD centre. The Bill removes the one-size-fits all approach, which is overly burdensome.

In addition, current registration requirements are overly complex, requiring compliance with multiple national laws (Children's Act and the National Health Act) and municipal by-laws on structural safety and environmental health. This Bill cannot change the many municipal by-laws, but it innovatively aims to promote the streamlining of municipal requirements by permitting the development of a model draft by-law on ECD that municipalities can follow.

The model by-law will be consistent with the norms and standards contained in the Children's Act, adopt a developmental approach, take into account different socio-economic contexts and promote "consistent approaches by municipalities to the regulation of ECD programmes" by amending section 103 of the Children's Act.[89] Municipalities are an autonomous sphere of government and therefore cannot be legally obliged to adapt their by-laws to align with the model by-law but they can be guided to do so.[89, 90] The model by-law will therefore be a useful advocacy tool for local communities.

Potential challenges

- The National Environmental Health and Safety Norms and Standards (NEHNS) published under the National Health Act would need to be simplified and aligned with the Bill's proposed approach. Currently, ECD programmes must comply with the norms and standards under both the Children's Act, as well as the NEHNS. The overlapping, and sometimes conflicting standards, are confusing and burdensome.[84] The DoH's current review of the NEHNS is a welcome development and a real opportunity for the DBE to give input to try and ensure alignment between the two national sets of regulations.
- Since draft regulations and norms and standards have not been published with the Bill, there is no guarantee that the registration and compliance standards will be simpler than the current requirements. It is important for the draft norms and standards to be published when the Bill is tabled in Parliament to enable Parliament and the public to properly assess the impact that these norms and standards will have on the ECD sector.
- The Bill makes compliance with the structural safety, environmental health and other requirements of a municipality a requirement for all types of ECD programmes. It is suggested that this be revised and applied only to ECD centres. For example, a mobile toy-library or a home visiting programme should not have to comply with municipal by-laws on structural safety.

An enabling conditional registration framework

Forty-two percent of early learning programmes remain unregistered, and only one-third receive an ECD government subsidy.[91, 92] The Bill clarifies that if an ECD programme cannot meet all the requirements in the Children's Act, and its regulations and norms and standards, yet poses no health and safety risks to young children, they can be conditionally registered and will be eligible for funding.[93] It also allows for a framework to be published to guide conditional registration which will ensure consistency across the provinces.[94] These are positive steps that will aid the growth of regulated and funded programmes. Unfortunately, the Bill does not clarify that ECD programmes who are unable to comply with municipal standards will also qualify for conditional registration. This will limit the usefulness of conditional registration as a tool to bring more programmes into the regulated and funded pool.

Curriculum requirements

The Bill intends to ensure that ECD centres "provide structured early learning and development opportunities in line with a national curriculum framework as approved by the Minister of Basic Education".[95] The impetus behind this is seemingly to ensure that all providers caring for young children implement a learning programme. Some have raised concerns that this provision could limit some types of pedagogical approaches, such as Montessori. All providers should be required to implement a curriculum that meets the intended outcomes of the National Curriculum Framework, but the Bill should clearly permit different pedagogical approaches to achieving those outcomes.

Strategic planning, data collection and infrastructure needs of the sector

Encouragingly, the Bill strengthens and mandates strategic planning and data collection at the national, provincial and municipal levels.[96] This is vital for informed decision-making and resource allocation for the ECD sector. By enhancing data collection mechanisms, policymakers can gain deeper insights into the needs of children and caregivers, identify gaps in service delivery, and develop targeted interventions to address them effectively.

The Bill proposes amendments that require provinces to ensure the operation of sufficient ECD programmes and to prioritise "those types of early childhood development programmes" that are most urgently required.[97] The emphasis on provinces prioritising "different types" of ECD programmes strongly suggests a shift towards a more systemic approach to ECD provisioning, moving away from a purely centre-based model.

Real Reform for ECD, supported by over 200 organisations, has long called for it to be made clear that municipalities are required to build and maintain sufficient and appropriate infrastructure in terms of their 'childcare facilities' mandate under the Constitution.[89, 98] They have also called for ECD providers to receive infrastructure support, including on private land. The Bill emphasises the importance of municipalities ensuring the availability and maintenance of facilities for ECD programmes, including private and public facilities.[99] These strategies must be incorporated into municipal integrated development plans and budgets.[100] While this is a positive step, clearly laying out the obligations of municipalities in terms of their constitutional function would better ensure the sector's infrastructure requirements are appropriately supported by the state.

Inclusive ECD programmes, child protection and parent and caregiver support

The proposed amendments require the development of norms and standards that ensure support for children with disabilities,[92] promote child protection, and ensure support and information for parents and caregivers. This should hopefully create environments that are safe, nurturing, and inclusive for all children.

Conclusion

The Bill represents a significant step forward in the journey towards improving access to ECD programmes. Its amendments reflect years of advocacy aimed at promoting a more systemic approach to ECD programming and establishing an enabling and developmental regulatory framework. While celebrating these gains, it is crucial to recognise that the Bill marks just the beginning of a longer reform process. The ECD sector will need to continue to push for comprehensive legislation that not only streamlines regulations but also places positive obligations on the state to ensure universal access to ECD programmes.

Basic education

Basic Education Laws Amendment Bill

The Basic Education Laws Amendment Bill (BELA)[101] was introduced in Parliament in 2022 by the Minister of Basic Education. It proposes amendments to the South African Schools Act (SASA)[102] and the Employment of Educators Act (EEA)[103]. This piece focuses on contentious issues, raised in submissions made before the Portfolio Committee on Basic Education (the Portfolio Committee) in the National Assembly[104] as well as the Select Committee on Education (the select committee) in the National Council of Provinces (NCOP).[105]

The Portfolio Committee began the public participation process in 2022 with a call for submissions. It then held national and provincial oral hearings.[106] After deliberating, the Portfolio Committee proposed further amendments[107] and the amended Bill was passed by the National Assembly and sent to the NCOP for further deliberations. The NCOP Select Committee held public hearings,[108] finalised its proposed amendments to the Bill, and returned it to the National Assembly for concurrence, where it was again passed by the National Assembly and then sent to the President for signature in May 2024 just before the national elections. At the date of writing, it had not been signed by the President and was not yet in force.

Definition of basic education

A definition of "basic education" is inserted into section 1 of SASA to be "grade R to grade 12". The definition clarifies that basic education continues until the end of grade 12 even though a learner who has completed grade 9 is no longer subject to compulsory school attendance.[109] This is in keeping with a recent Constitutional Court judgment which clarified that despite compulsory education ending at age 15 or grade 9, this does not mean that the right to basic education does not extend to grade 12.[110]

Compulsory school-going age lowered to 6 years and Grade R

Amendments to section 3 (1) make school attendance compulsory from grade R, when a learner turns six years old, until the learner has completed grade 9 or turned 15 years old, whichever comes first. This effectively changes the grade and age at which children must start attending school, i.e., from Grade 1 to Grade R, and from seven to six years old.

Civil society submissions welcomed the move to include Grade R within DBE's responsibility for basic education and made recommendations aimed at ensuring DBE puts in place adequate resources, learning support materials and qualified teachers, including:[111]

- the need for Grade R to have a strong focus on play-based learning as it has proven to be the most effective strategy for supporting the education of young children.
- additional amendments to section 5A (2)(c) of SASA, which deals with the publishing of norms and standards on learning and teaching support material, to ensure this includes age-appropriate play material and equipment.[112]
- adequate provision for Grade R teachers in the education budget and the Post Provisioning Norms.[113]
- a phased-in approach to compulsory Grade R to allow parents enough time to make the necessary arrangements.[98]

Admission age for Grade R

Amendments to section 5 provide that the admission age for grade R is four, turning five by 30 June in the year of admission. However, schools with constrained capacity must give preference to learners subject to the compulsory age (i.e. learners turning six years old in the year of admission).

The amendments imply that despite school attendance being compulsory for children aged five and turning six in the year of admission, a parent may, subject to a few conditions, enrol a child in Grade R at a younger age (four turning five years old). Concerns were raised regarding the maturity levels of children starting Grade R at this age.

Harsher penalties for parents whose children are not attending school

Section 3 (6) has been amended to increase the penalties imposed on parents who fail to ensure their children, who are of compulsory school-going age,[xii] attend school. The duration of imprisonment has been extended from a maximum of six months to 12 months, and the Bill also makes it possible to impose both a fine and imprisonment. The DBE's rationale for these amendments is to penalise parents who refuse to take their children to school even when conditions allow them to.[114]

Submissions on the Bill generally did not support this amendment and called for doing away with criminalisation as a method to ensure children attend school. Instead, they proposed the Bill adopt a more nuanced, supportive and intervention-oriented strategy to guarantee children's school attendance. Submissions highlighted how criminalisation is contrary to the best interests of children because children of imprisoned parents/caregivers would be left without care and fines would exacerbate the difficulties faced by families living in poverty.

The Portfolio Committee opted not to make any changes, citing that imposing penalties on parents for keeping their children away from school is not a novel practice and that the new penalties have been introduced to ensure accountability. Meanwhile, the Select Committee in the NCOP made additional amendments that allow the courts to impose a sentence within their discretion as an alternative to fines and imprisonment.[115] While the NCOP's amendments offer greater judicial discretion, the fact that fines and imprisonment remain available options means punitive responses are still a concerning possibility.

Admission of undocumented learners

A definition of "required documents" has been inserted into section 1 to provide clarity in respect of the documents which must be submitted for the purpose of the admission of learners to schools.[116] This includes a birth certificate for the child and identity documents if one or both parents are SA citizens; or a birth certificate and study permit for the child, and passports and visas of the parents if both parents are foreigners. Previously these documents were only listed in the National Admission Policy and not in law or regulations.

An exception to the rule of "required documents" is included by the insertion of a new sub-section 1A in section 5, which stipulates that in cases where a learner's parent or guardian who is applying for admission has not provided any of the required documents, either concerning the learner or themselves, the learner must still be permitted to attend school. Once admitted, the school principal should advise the parent or guardian to obtain the required documents.[117] These new sub-sections are aimed at giving effect to the court order in *Centre for Child Law and others v Minister of Basic Education and others*[118] where the High Court ruled that undocumented learners may not be denied admission to schools.

However, a number of submissions pointed out that creating a legislated obligation to submit "required documents" may worsen the barriers to education for undocumented learners because the term "required" gives the impression that the documents must be provided. DBE, school officials and on-line admission portals are likely to insist on the submission of the required documents as the default, despite the law providing for exceptions.[119]

School admissions and admission policies

Section 5 of SASA has been amended to clarify the roles of School Governing Bodies (SGBs) and Heads of Department

xii Grade R to Grade 9 or age 15 years, whichever comes first.

(HODs) with regards to decisions on school admissions and admission policies.

The final decision on admitting individual learners will lie with the HoD, in consultation with the relevant SGB. With regards to admission policies; the Bill that was passed by the National Assembly for the first time in October 2023 granted SGBs the authority to set admission policies, and the HOD the power to approve the admission policies. The NCOP amended the Bill to remove the oversight role of the HOD in relation to approving admission policies. Instead, SGBs are now required to consider transformative rights-based criteria when drafting or amending their admission policies. These criteria include the best interests of the child with an emphasis on equality; if there are other accessible schools in the community for the learners concerned; the available resources of the school and the efficient and effective use of state resources; and space available at the school for learners.[120, 121]

School language policies

Section 6 has been amended to align the law with jurisprudence such as that arising from the case of *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others*[122] in which the court held that the power of a school to determine its language policy must be exercised in accordance with the Constitution.

The Bill that was first passed by the National Assembly in October 2023 allowed SGBs of public schools to determine language policies within the limits of the Constitution, SASA, and applicable provincial laws. The HoD had the power to approve the language policy developed by the SGB, considering the language needs of the community, the best interests of the child, and the right to equality. There was also a process of engagement between the HoD and the SGBs for any necessary amendments. The NCOP removed the oversight role of the HOD and instead directed SGBs to consider factors such as the bests interests of the children with an emphasis on equality, the changing number of learners who speak the language of learning and teaching at the public school; and the enrolment trend of the public school.

The HoD can direct a public school to adopt more than one language of instruction where practicable. This decision is to be made after certain factors are considered and engagements have been conducted with the school, the SGB, the parents, and the community within which the school is situated.

While certain stakeholders embraced these amendments, viewing them as an effort to avoid the recurrence of practices in which language and admission policies marginalised certain learners and perpetuated historical discrimination, others opposed them, arguing that they unjustly restrict or reduce the authority of SGBs and fail to foster a collaborative relationship between HoDs and SGBs.

Alcohol being sold on school premises

The tabled bill[101] proposed an amendment to section 8 of SASA to grant the HoD the authority to grant permission to SGBs to allow the possession, consumption or sale of alcohol during school activities or during other private or religious functions held on the school premises (outside of school hours).

Stakeholders, including children and young people,[123] expressed concern about allowing alcohol during school activities, fearing that it would be challenging to ensure safety at such events and that monitoring learners' access to alcohol would be difficult. Regarding alcohol at private or religious functions on school premises, there's a need for more clarity to safeguard the safety and well-being of learners. The National Assembly decided to remove these provisions from the Bill in their entirety, resulting in the Bill not dealing at all with the sale and use of alcohol on school premises.

Regulating home-schooling

Section 51 of SASA, which deals with home-schooling, has been amended to provide for the application and registration of learners to receive home education. It sets out what the HoD will look at when considering an application, the process for registering a learner for home education, and for appeal processes to the MEC when an application is denied by the HoD.

Advocates of home education[124] expressed their opposition to the proposed application and registration requirements and advocated for a mere notification process, further arguing that monitoring by the Department should only be conducted in cases of potential educational neglect. Additionally, they recommended allowing private tutoring for small groups of six or fewer children without the need for institutional registration. Lastly, they urged flexibility regarding the requirement of adherence to the Curriculum Assessment Policy Statements (CAPS). Those who supported the amendments affirmed that home-schooling should be regulated to ensure the best interests of the learners concerned.

The Portfolio Committee's deliberations about this clause and its proposed amendments saw a range of viewpoints expressed by different Committee members, both in favour of and opposed to the provisions. In the end, the clause was mostly retained in its original form.

Family care and protection from abuse and neglect

Children's Amendment Act and Regulations to solve the foster care crisis

The Children's Amendment Act[125] is primarily aimed at solving the decade-long crisis in the foster care system that occurred when the child protection system was used to provide poverty relief to relatives caring for orphaned children. Due to the high numbers of orphans in the foster care system, compared to the shortages of social workers, hundreds of thousands of foster care court orders expired because they were not reviewed and extended in time, as required by section 159 of the Children's Act. In 2010 and 2011 this resulted in the payment of over 110,000 children's foster child grants (FCG) being cancelled because the South African Social Security Agency (SASSA) is not allowed by the law regulating social grants to pay FCGs if the court order placing the child in foster care is no longer valid.[126]

In 2011, the Centre for Child Law (CCL) approached the High Court to ensure the 110,000 grants were re-instated and no more grants were cancelled. This resulted in a court ordered settlement between CCL and the Minister of Social Development that required the Minister to design and implement a comprehensive legal solution to the foster care crisis.[127] While giving the Minister time to come up with the solution, the court order protected children from losing their grants by 'deeming' all expired foster care orders to be valid. The High Court order had to be extended six times until the end of 2023 when the Children's Amendment Act and regulations were partially put into effect.

Has the Children's Amendment Act and its Regulations commenced?

In November 2023, the President announced the commencement of 10 clauses.[128] This was closely followed by the Minister publishing amendments to the Regulations to provide guidance to social service practitioners and courts on some of the changes to the Act.[129] The Department decided not to put four of the clauses into operation at this time due to the need for further consultations on the draft regulations related to these amendments.[xiii]

On 26 June 2024, after the National Elections and the inauguration of the President, the ex-Minister of Social Development gazetted regulations relating to the remaining four clauses of the Amendment Act.[130] However, in terms of section 94 of the Constitution, the ex-Minister was no longer the Minister when she signed or gazetted the regulations. Furthermore, the clauses of the Amendment Act that authorise the Minister to make these regulations have not yet been commenced by the President. Due to this legal uncertainty, we have not elaborated in detail on this second set of regulations.

A comprehensive legal solution to the foster care crisis

Some of the amendments that are in force are aimed at preventing orphaned children, who are already in the care of extended family members, from being unnecessarily placed in foster care when other options exist to recognise and support their caregiver to continue to care for them. This shift in the law is in line with the National Child Care and Protection Policy (NCCPP)[131] and the Social Assistance Amendment Act of 2020[132] which introduced the CSG Top-Up for relatives caring for orphans to replace the use of the FCG.[xiv] The NCCPP and the two amended Acts are aimed at promoting a developmental approach that strengthens and supports the extended family to care for orphaned children. They do this by recognising and respecting that the extended family is already caring for the child, acknowledging the existing family bond and psychological attachment between the family member and the child, ensuring as the first priority that the family has enough income to provide for the child's basic needs, and freeing up social worker time to assist extended families and orphaned children with prevention and early intervention programmes.

Definition of orphan

The definition of orphan has been amended to make it clear that both single and double orphans are included: "'orphan' means a child whose parent or both parents are deceased".[133] The inclusion of the two categories of orphaned children affirms that the comprehensive legal solution should cater to both groups – including 'single orphans' and not only 'double orphans'. The CSG Top-Up therefore cannot be restricted to a narrow definition of 'double orphan'.[134] This is important in the context of many maternal orphans having fathers who are unknown, not recorded on the child's birth register, or who have never been involved in the child's upbringing and

xiii The clauses that were not put into effect were 4, 5, 11 & 12 which amend sections 105, 142, 160 & 183 of the Children's Act. These amendments to s105(6) require the Department of Social Development to conduct a quality assurance process for the evaluation of child protection organisations and child protection services; the amendments to s142 authorise the Minister to draft regulations prescribing the conditions for the examination or assessment of children who have been abused, abandoned or neglected; and the criteria for the establishment and resourcing of designated childcare and protection units. The amendments to s160 (cA) authorise the Minister to make regulations prescribing the procedure, form and manner that a social service practitioner must follow when assessing, screening, investigating, referring and placing a child who is in need of care and protection. The amendments to s183 require organisations operating cluster foster care schemes to register as designated child protection organisations within two years of the amendment coming into effect, and to manage and operate a cluster foster care scheme in the prescribed manner.

xiv The CSG Top-Up is a grant of R790 (in 2024) for family members caring for orphans. It can be accessed directly from SASSA by submitting proof that the parents of the child are deceased. This proof is two death certificates or one death certificate and an affidavit attesting to a lack of knowledge about whether the other parent is dead or alive.

their whereabouts are unknown. There are also many cases of paternal orphans having mothers who have never been involved in their upbringing and whose whereabouts are unknown to the paternal family.

Clarifying when orphaned or abandoned children need state care and protection

Section 150 (1)(a) has been amended to provide clarity on when an orphaned or abandoned child should be considered by social workers and the court to be 'in need of care and protection'. An orphaned or abandoned child is now defined to be 'in need of care and protection' if the child "has no family member who is able and suitable to care for that child". This means that an orphaned or abandoned child who is already in the care of a family member, should not automatically be considered a child in need of care or protection, unless their circumstances fall under other criteria in sections 150 (1)(b) to (l). This means that:

- An orphaned or abandoned child who is found on their own (e.g. an abandoned baby) is 'in need of care and protection' and will need to be placed in alternative care, be it foster care or in a child and youth care centre.
- An orphaned child who is already in the care of a family member, is not a child 'in need of care and protection' and does not need to be placed in alternative care because they are already in family care.
- An abandoned child who is already in the care of a family member may be 'in need of care and protection' and placed in foster care if there is a likelihood that the parent who abandoned the child may re-emerge. In which case a foster placement can be made with the relative in terms of s150 (1)(g) as the child could be at risk if returned to their parent's care. However, if the parent has been gone for a very long time and their whereabouts are unknown, there is no need for a care and protection order.
- If there are allegations that the family member who is caring for the orphaned or abandoned child, is abusing or neglecting the child, then one of the other criteria listed in section 150 (1) is applicable[xv] and the child can be found to be in need of care and protection in terms of those criteria, and removed from the care of that family member. The reason for finding the child to be in need of care and protection in such an example, is not because the child has been orphaned or abandoned, but because their caregiver is abusing or neglecting him or her.

Submissions to Parliament on the amendments noted concerns around the requirement that family caregivers must be "able and suitable".[135] This could result in family members already caring for orphaned or abandoned children being assessed by social workers and the courts to determine if they are "able and suitable" before they could be supported with prevention services.[135] This could potentially delay the family's receipt of the CSG Top-Up due to the Department's lack of capacity to conduct such assessments timeously.[135]

Draft regulations gazetted for comment in 2023[136] did not elaborate on the implication of the amendment to section 150 (1)(a). Instead, they proposed a new screening and assessment process that explained to social workers how to support children in need of care and protection. They did not elaborate on how to support children who are not in need of care and protection but are in need of prevention and early intervention services such as the CSG Top-Up, or referral for such services. The draft regulations therefore continued to promote a residual approach to child welfare services, rather than the developmental and preventative approach required by the NCCPP.[137] The proposed screening and assessment process also did not explain the meaning of the new words in section 150 (1)(a) and therefore fail to provide sufficient guidance to social workers on how to change their practice.[138]

The final regulations[129] omitted the proposed screening and assessment process, but still do not explain the significance of the shift in practice required by the amendment to section 150 (1)(a). This is likely to lead to varying interpretations by social workers and magistrates which will cause injustice and inequity across the system.

Enabling family members caring for orphans to obtain guardianship orders

Many relatives are currently caring for orphaned children and they have de-facto caregiver rights in terms of section 32 of the Children's Act to make certain decisions on behalf of the child, for example consenting to medical treatment. However, there are instances when they may need a formal document to prove to a government department or third party that they have parental responsibilities and rights; for example, assisting the child to obtain their ID when they turn 16, or administering the child's inheritance. To provide relatives an accessible route to acquire parental responsibilities and rights the Amendment Act has amended sections 24 and 45 of the Act to devolve jurisdiction for guardianship to the Children's Court. Previously, only the High Court could adjudicate guardianship applications which meant that it was inaccessible to the majority of the population who cannot afford a lawyer or the transport to a High Court in a faraway city.[135] The Children's Court by comparison is at

xv For example, section 150 (1)(e), (f), (h), or (i).

magistrate court level and is accessible in most small towns and can be approached directly by a family member without the need for a lawyer.

In terms of section 29 (5) of the Children's Act, the court dealing with the guardianship application has the discretion to order that a report by a family advocate, social worker or other suitably qualified person be submitted to the court. Furthermore, the court has the discretion to appoint and order a person to investigate certain matters, and call for evidence to be given or produced. Children's Courts must be encouraged to explore the different options granted by this discretion and to call for social worker reports only when necessary, for example if there is a dispute within the extended family about the child's care arrangement.

Ensuring orphans who are already in foster care do not lose their FCGs

The Children's Court will be bound by the new section 150 (1)(a) which means they have no legal authority to extend a foster care placement of an orphan who is already in the care of a family member. Approximately 80% of all the children in foster care are orphaned children in the care of family members[126] and so approximately 200,000 children could have their FCGs stopped if a transitional clause to prevent magistrates refusing to extend their foster care placements was not included in the law.[135] The Portfolio Committee agreed to include a transitional clause, section 159 (2B), to allow magistrates to extend foster care orders of orphaned children who were placed in foster care with family members prior to 8 November 2023, despite the amendment to section 150 (1)(a).

Most of these 200,000 orphans will gradually 'age out' of the foster care system when they turn 18, or 21 if they are still in education. This ageing out of existing orphans in foster care, combined with fewer orphans coming into the foster care system, should reduce the total number of orphans in foster care over time. This in turn should reduce social worker and Children's Court high foster care caseloads, freeing up capacity and time to provide families caring for orphans with prevention services (e.g. grief counselling and parenting programmes) and to provide timeous and quality protection services to children who have been abused or neglected.

A missed opportunity to empower unmarried fathers to care for maternal orphans

Amendments to section 21 in the tabled comprehensive bill, together with the recommended additions from civil society, would have provided many unmarried fathers who are caring for maternal orphans with an option to obtain a section 21A certificate from the family advocate or a Children's Court.[135] This certificate would have provided clear confirmation of the fact that the unmarried father had parental responsibilities and rights for their child. It would have provided such fathers with a legal document that many need to assist their children to access essential and basic services. However, the Portfolio Committee failed to see the connection between section 21 and the many maternal orphans who have fathers willing and able to care for them. They decided that the amendments to section 21 should be rejected and require more consultation.[139]

Transitional regulation to replace the protection provided by the 2011 High Court order

The regulations included a transitional provision[140] which stated that "all foster care orders that may lapse after 11 November 2023 but before 30 June 2024 due to not being extended in terms of section 159 of the Children's Act, 2005 as amended, shall be deemed to be valid until 30 June 2024 or until they are extended by the children's court, whichever occurs first."

This was aimed at providing a transitional replacement for the temporary solution that had been provided by the High Court order in 2011 when it deemed all expired foster care orders to be extended while a comprehensive legal solution was being developed. The High Court's protection was due to end on 11 November 2023, yet at the end of October 2023 the Department still had a backlog of nearly 34,000 expired foster care orders[141] and these children stood to lose their FCGs.[142] The transitional regulation was aimed at providing SASSA with the legal authority to continue paying these children's grants, despite their court orders being expired.

Last minute new regulation to replace the transitional regulation

The protection provided by the transitional regulation lasted until 30 June 2024 by which time the Department planned to have eliminated the backlog and reduced the number of orphaned children coming into the foster care system so that the backlog does not continue to grow. By the end of May 2024, some progress has been made and the backlog had been reduced but there were still 18,000 expired foster care orders[143] and the children behind these orders were at risk of losing their FCGs after 30 June 2024.

On 26 June, the ex-Minister gazetted a second set of regulations[130] which included a replacement for the transitional regulation that ends on 30 June. Regulation 56H 10(5) provides that: "All foster care orders that were valid on 30 June 2024 which would have lapsed if not extended by the court shall be deemed valid after 30 June 2024 until extended by the court". This wording effectively extends the approximate 18,000 expired foster care orders (and possible also future expired

orders) indefinitely and removes the Children's Court's ability to hold social workers accountable for regularly reviewing all foster care placements. This puts children who are in need of care and protection at risk of languishing for many years in foster care with no family re-unification services or monitoring of their placement by social workers.

It is unfortunate that this regulation has been hastily inserted at the end of a decade of the Department working hard to gradually reduce the backlog and amend two laws to bring about a sustainable and accountable foster care system. The legality of this last-minute regulation is also uncertain as it was gazetted by the ex-Minister at a time when she was no longer Minister.[xvi]

Challenges preventing the comprehensive legal solution from being effectively implemented

In the absence of regulations or a directive explaining how the amendment to section 150 (1)(a) should shift their practice, social workers in the field are currently uncertain about how to provide services and support to orphaned or abandoned children in the care of family members.

Some social workers have shifted to using the CSG Top-Up as they have observed how quickly families receive the income support via the CSG Top-Up as opposed to how long it takes before the family receives the FCG. The CSG Top-Up was started in June 2022 and by the end of March 2024 it was reaching just over 67,000 orphans. Over a similar time-period (1 April 2022 to end March 2024), the total FCG numbers continued to decline and dropped by approximately 32,000 children.[144] The CSG Top-Up is therefore already demonstrating that it is more accessible for families caring for orphans than the FCG.

However, many social workers continue to recommend foster care and the FCG for orphans in the care of relatives. After two decades of using the foster care system and FCG for orphans in the care of family members, many social workers are unlikely to shift their practice unless clearly directed to do so by regulations in terms of the Children's Act and an express directive from the National Department.

Traditional Courts Act

The Traditional Courts Act[145] aims to provide a uniform legislative framework for the structure and functioning of traditional courts which are customary law dispute structures that operate in areas of the country that have traditional leadership structures. The Act has been signed by the President[xvii] but is not yet in effect due to the regulations still being drafted.[146]

This law has been the subject of much controversy, resulting in its journey, from a bill to an Act, taking more than 15 years.[xviii] Many improvements were made along the way to address some of the concerns raised. However, substantive issues remain of concern to interest groups promoting the constitutional rights of children and women.

The right to opt-out removed by the National Assembly

When tabled in 2017,[147] the Bill recognised the consensual and voluntary nature of customary law by allowing people to opt out of traditional court processes and use the civil and criminal courts if this was their preference. The right to opt-out was important for two reasons: (1) It ensured that all people living in areas under traditional authorities had the same choice to use the civil and criminal courts as people living in other areas of the country that do not have traditional authorities.[148, 149] (2) Women and children have additional protections under the criminal and civil law[xix] that are generally not practiced in traditional courts and are not provided for in the Traditional Courts Act.

Despite support for the opt-out clause from interest groups representing women, children and rural communities[150] the majority of the members of the Portfolio Committee on Justice did not support the clause on the basis that traditional law should have the same stature as common and civil law and traditional courts should have equal recognition.[151] The National Assembly therefore removed the op-out clause and the National Council of Provinces later agreed with this decision.

Persons unhappy with the decisions of a traditional court must first exhaust all traditional court system appeal procedures before they can refer the decision to the Magistrate's court.[152] They can also take the proceedings on review to the High Court, but this route will not be economically or geographically accessible for the majority of women and children in rural areas.[153]

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xvi See section 94 of the Constitution which provides that Ministers cease to be Ministers once the new President assumes office, which in this case occurred on 18 June 2024, yet the regulations were gazetted by the ex-Minister on 26 June 2024 and there is no date under her signature to provide proof that she signed them at an earlier date when she was still Minister.

xvii In September 2023

xviii The 2008 bill was withdrawn from Parliament in 2011 and the 2014 version failed to win a majority vote in the NCOP and lapsed between Parliaments. A new version was tabled in 2017. The Act emerged from Parliament 6 years later in 2023. See the following resource for a detailed explanation of the different stages of the Bill: Sonke Gender Justice "The Traditional Courts Bill, explained" https://genderjustice.org.za/card/the-traditional-courts-bill-explained/a-history-of-the-bill/

xix For example, the Criminal Procedure Act 51 of 1977 allows children to give evidence Ω intermediaries if it appears to the court that they would be exposed to undue psychological, mental or emotional stress, trauma or suffering. The Domestic Violence Amendment Act 14 of 2021 provides Magistrates' Courts with the power to grant protection orders to complainants experiencing domestic abuse.

Matters affecting children that a traditional court may hear

The Act lists what matters a traditional court may hear.[154] This includes:

- common assault,
- theft with a value below R15,000, and
- damage to property with a value below R15,000.

A traditional court may also give advice relating to customary law practices in respect of ukuThwala, initiation, and custody and guardianship of children.

If a traditional court is of the opinion that it is not competent to deal with a matter before it, or if the matter involves difficult or complex questions of law or fact that should be dealt by a Magistrate's Court, the traditional court may transfer the dispute to the Magistrate's Court.[155]

The Act does not align with Children's Act or Child Justice Act

Concerns were raised as to how the traditional courts would ensure that child offenders, victims and witnesses are afforded the protections provided by the Children's Act, Child Justice Act and Criminal Procedure Act.[118] While the Act refers to the importance of protecting the rights of vulnerable groups like children,[xx] it falls short of fully aligning with constitutional principles and legislation that uphold children's rights:

- The Act makes no mention of the need to protect the best interests of children as required by section 28 (2) of the Constitution and the Children's Act.
- In criminal and civil courts, children have the right to legal representation at state expense and the support of social workers if necessary, whereas in traditional courts, legal representation is not allowed. A party may however be assisted by a person they choose in whom they have confidence.[156]
- The civil and criminal law protect the identities of child victims, witnesses and offenders, whereas the Traditional Courts Act does not and child victims and witnesses are at risk of secondary trauma due to the public nature of the proceedings.
- The Children's Act[157] places a mandatory reporting obligation on a number of duty bearers, including traditional leaders, to report the suspected physical abuse of a child to the police, a Children's Court or the department of social development. This activates a social work investigation and a Children's Court inquiry to ensure the safety and protection of the child. It was recommended to Parliament, that cases of physical abuse of children (common assault) should not be heard by traditional courts but should be transferred to the Children's Courts.[158] However, this proposal was not supported by Parliament.
- Traditional courts may give advice relating to the customary practice of ukuThwala and customary law marriages. UkuThwala, which is a precursor to marriage, can involve sexual offences and other crimes like assault and kidnapping, as well as forced child marriages which fall under the criminal justice system. Yet the Act does not cross-refer to the mandatory reporting obligations in relation to such crimes in the Children's Act and Sexual Offences Act.
- Traditional courts are competent to give advice on "custody and guardianship" of children. This outdated terminology ignores the Children's Act, which changed the term "custody" to "care" in 2005. The Children's Act also has provisions and procedures aimed at ensuring decisions about care and guardianship are based on the best interests of the child, while no such provisions exist in the Traditional Courts Act.

Lack of meaningful participation

The finalisation of the Bill in Parliament was criticised for ignoring concerns raised by numerous stakeholders and for public participation processes occurring at short notice.[159]

One of the aims of the Act is to provide for women's participation and protection of their rights in traditional courts by requiring that traditional courts are constituted of both women and men,[160] and by recognising that women – as parties to proceedings or members of the court – should be afforded full and equal participation in proceedings.[161] However, the Act lacks guidance on how to ensure meaningful participation happens in practice in an environment where cultural and social norms tend to restrict women and children's participation and agency.[162] Commentators asked for the Act to include specific guidance on the integration of women into the courts and accountability mechanisms to ensure their meaningful and respected participation.[163]

Language of the local community

The singular use of English in the criminal and civil courts results in many women and children feeling alienated and their evidence being misinterpreted.[164] Traditional courts on the other hand are

xx Section 5 (3)(a)(ii): "(a)The Cabinet member responsible for the administration of justice must—(ii) put measures in place in order to promote and protect vulnerable persons, with particular reference to the elderly, children …"; Section 7(3)(a)(ii): "During its proceedings, a traditional court must ensure that— (a) the rights contained in the Bill of Rights in Chapter 2 of the Constitution are observed and respected, with particular reference to the following: (ii) that vulnerable persons, with particular reference to children … are treated in a manner that takes into account their vulnerability"; Section 11 (1)(d)(ii): "A party to any proceedings in a traditional court may, in the prescribed manner and period, take those proceedings on review to a division of the High Court having jurisdiction on any of the following grounds: (d) the provisions of section 7 (3)(a), affording— (ii) vulnerable persons treatment that takes into account their particular vulnerability".

conducted in the language of the local community and do not have to be conducted in English like the criminal and civil courts. This makes the proceedings of traditional courts more familiar and accessible than the civil and criminal courts. However, it is practice in some traditional courts that women and children need to be accompanied, represented and spoken for by a male family member. The benefits of the use of a language accessible to the affected woman or child in such a case would be negated if they are not allowed to speak for themselves.

Conclusion

The NHI Act, BELA Bill and Children's Amendment Draft Bill are aimed at advancing equality in access to health care services, basic education and early childhood development programmes. However, the status and implementation timeframes of the NHI Act and BELA Bill remain in limbo while the political parties in the newly established Government of National Unity negotiate policy positions. The much-needed reforms to the ECD chapter of the Children's Act will hopefully be tabled in Parliament in 2024 for priority attention.

An inclusive, digital and modernised National Information System is promised by the National Identification Registration Draft Bill. The underlying reasons why millions of children, youth and their parents remain excluded from birth certificates and IDs need attention or else 'modernisation' risks compounding the growing exclusion of poor and rural people; not only from documents, but also from the NHI, basic education and social protection.

Front of package warning labels on unhealthy food could assist parents and children to make healthier food choices and encourage the food and beverage industry to invest more in healthy products: A much needed intervention at a time of increasing child food poverty, stunting and obesity. Continued public support for these draft regulations could ensure they are finalised and effectively enforced.

The comprehensive legal solution required by the High Court to address the crisis in the foster care system is finally in the law after a decade of law reform. However, clear regulations, directives and training are urgently needed to address inconsistent interpretations of the new laws by social workers and Children's Courts.

The Traditional Court's Act does not ensure that traditional courts will include the protections for child victims of physical abuse that are available in the Childrens Court and criminal courts; and does not require such cases to be transferred to the Children's Court, nor give children the option to choose to have their matter heard by the Children's Court. Amendments to the Act will need to be made to deal with the contradictions between this Act and the Children's Act.

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