

# Rights in Brief

## Children

28. (1) Every child has the right –

- (a) to a name and a nationality from birth;
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services;
- (d) to be protected from maltreatment, neglect, abuse or degradation;

## Defining children's constitutional right to social services

By Mira Dutschke

May 2007

- (e) to be protected from exploitative labour practices;
  - (i) are inappropriate for a person of that child's age; or
  - (ii) are likely to result in the child's physical or mental health or spiritual, moral or social development being harmed;
- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
  - (i) kept in a separate institution, or, if over the age of 18 years; and
  - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
- (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
- (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years.



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## 1. Introduction

The Constitution of South Africa grants every child the right to social services in section 28(1)(c). However, this right is somewhat neglected as it is seldom referred to in policy or legislation, and few legal writers have written about its meaning. In order to determine what children's entitlements are under this right, and what obligations it puts on government, the Children's Institute (CI), University of Cape Town, conducted legal research to define the scope and content of children's right to social services. This research was published in July 2006 in a working paper entitled *Defining children's constitutional right to social services*. [1] This rights brief is a short, colloquial summary of the main arguments in the working paper.

Parliament is currently deliberating on the Children's Amendment Bill. [2] Once passed, the Bill will amend the Children's Act, which was passed in 2005. [3] Combined, these pieces of legislation will form the primary legislative framework to give effect to three specific constitutional rights of children: their right to social services; to family care or parental care, or to appropriate alternative care when removed from the family environment; and their right to be protected from maltreatment, neglect, abuse or degradation. [4]

Until the new law is passed, the Child Care Act of 1983 is still the primary legal framework for these three rights. [5] But currently, seventy-five percent of the costs required for the full implementation of the Child Care Act are not provided for by government. [6] In reality, many of the services that government is obliged to provide in terms of this law are delivered by civil society. Failure by government to fund this law fully is an indication of the State's progress (or lack thereof) in meeting its obligations towards children. The new Children's Act and Children's Amendment Bill offer an opportunity to rectify this situation by providing and funding the services that are required constitutionally, and by ensuring that these services are implemented.

In deliberating on the Children's Amendment Bill, members of Parliament are by implication deciding which services to include in the new law. These decisions should be informed by a sound understanding of the obligations that government has towards children in terms of the

Constitution and international law, in particular regarding the three rights that the new law aims to give effect to. The CI's legal research aims to inform decision-makers about these rights and the obligations they place on government. This research conceptualises and interprets the right to social services from a human rights perspective, using the Constitution as a starting point to define government's obligations towards realising this right.

Using international law and related commentary, the research provides a provisional list of services as an example of what would be required to give effect to the three constitutional rights referred to earlier. Finally, this brief poses some guiding questions that decision-makers could use when determining the new legislative framework for children.

## 2. Legal interpretation of rights

The interpretation of the right to social services follows the interpretation theories that have been developed by the Constitutional Court. The Court uses a combination of these theories to determine the meaning of rights.

The starting point for interpreting the right to social services is the ordinary meaning of the word. If this is not conclusive, the right must be read in its context. As with ordinary language, words take on meaning when they are understood in context. Related rights and the historical understanding of the rights make up the context for constitutional interpretations. Children's right to social services is related to other children's rights found in section 28, as well as to other socio-economic rights applicable to everyone, and should therefore be read in the context of these other rights.

In addition, international law is extremely relevant in the interpretation of rights. Firstly, the Constitution states in section 39 that international law must be considered when any right in the Bill of Rights is interpreted. Secondly, the drafters of section 28 relied heavily on the international law, in particular the United Nations Convention on the Rights of the Child (UNCRC).

Previous court judgments in which the contextually related rights were interpreted are also vitally important and were therefore considered in the interpretation of the right to social services.

**Diagram 1:**  
**Different definitions of terms related to social services as used in policy papers and in the Constitution**

TERM	DEFINITION USED IN THIS PAPER	OTHER DEFINITIONS
<b>Social services</b>	Interventions that help people deal with social problems arising from social, economic or political change. [7] This definition is in line with the Constitution drafters' understanding of the term ' <i>social services</i> '. <b>Constitutional drafting documents indicate what this right means for children specifically:</b> "The right to social services is important for children because it implies the provision of social workers and other services necessary for the welfare of children. Social services should be distinguished from social security because social services are based on social work and contribute to the welfare and development of both individuals and groups in the community." [8]	<b>Treasury uses '<i>social services</i>' as the umbrella term</b> covering arts, culture, education, health, labour, social development, sports and recreation. [9]
<b>Welfare system</b>	The overall system put in place by the State to protect the well-being or 'welfare' of its citizens through a variety of programmatic interventions such as housing, education, health care and social security. The type of welfare system that must be in place in South Africa is dictated by the Constitution. [10]	<b>Department of Social Development (DSD):</b> ' <i>welfare</i> ' refers to the core business of the DSD, i.e. social security and social services delivery. [11] <b>Treasury:</b> The budget for the DSD uses the terms ' <i>social security</i> ' and ' <i>welfare</i> ' to refer to the business of the department. [12]
<b>Social welfare programmes and services</b>	Services and programmes that are delivered as part of a welfare system (as defined in this column above). The type of services provided depends on the type of social welfare system the country has adopted. [13] The Constitution grants a number of socio-economic rights such as access to housing, health care, etc. Programmes to give effect to these rights are social welfare programmes.	<b>Constitutional Court <i>Grootboom</i> case [14]:</b> Social welfare programmes are interventions providing social security grants and other material assistance such as access to adequate housing, health care, food and water. This rights brief uses the above Constitutional Court definition.
<b>Social development</b>	A process of planned social change designed to promote the well-being of the population in conjunction with the dynamic process of economic development. [15] This is also referred to as ' <i>developmental social welfare</i> '.	<b>Treasury: '<i>Social development</i>'</b> includes ' <i>social security</i> ' and ' <i>welfare</i> '. ' <i>Social development</i> ' refers to the overall commitment of government to become a ' <i>welfare state</i> '. [16]

### 3. Definitions of the key concepts

**Diagram 1** lists the definitions of terms related to social services that are used in government policy papers and in the Constitution. In practice these terms are not used consistently and this is one of the problems in the implementation of law and policy. The definitions of terms listed in the middle column set out terminology used in this paper which corresponds to the way in which these terms are used by the Constitution and by the Constitutional Court. The column on the right provides information on how the terms are defined by different government departments. The CI research attempts to align the understanding of the terms by the different role players.

Based on the Constitution and the Constitutional Court's use of the above terminology, this paper interprets children's right to social services to refer to interventions that help children and their caregivers deal with social problems arising out of social, political or economic circumstances in order to promote the overall welfare of the community. The term '*social services*' refers to services that are delivered as part of the welfare system of the country as a whole. [17] There are varieties of welfare systems, and the social services that are delivered depend on a country's type of welfare system. [18] In South Africa, the Constitution dictates the type of welfare system the country must adopt.

### 4. Contextual interpretation

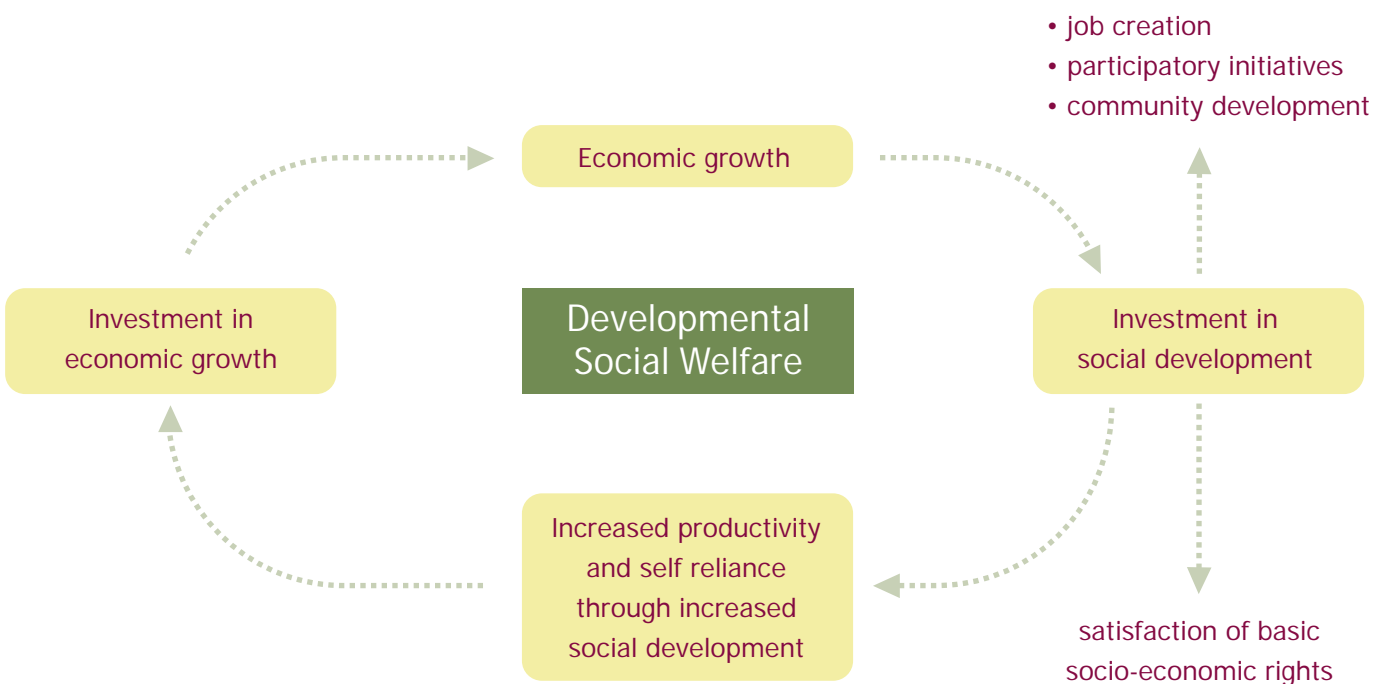
#### a. The social welfare system in South Africa – where we come from and where we are going

South Africa adopted a residual approach to social welfare during the apartheid years. [19] In terms of this model personal welfare was the responsibility of the individual, while the State only had a very 'residual' role. This means that social services were delivered only to a small selected sector of the population. This approach focused mainly on ensuring the social functioning of the individual once social problems had manifested. It also relied on individual case-by-case work and placed a lot of emphasis on the curative elements of social work. [20] While South African welfare policy has moved away from this model, it is still largely applied in practice.

Families and societies in South Africa were systematically destroyed by relocation and migrant labour policies. Combined with the deplorable poverty that the majority of people in the country were (and still are) living in, the ability of families and communities to absorb the social shocks caused by apartheid was extremely impaired. [21]

One of the reforms that the democratic government committed itself to was a welfare policy that ensured basic welfare rights for all citizens. In the face of the massive poverty and under-development caused by apartheid,

**Diagram 2: The interaction between social development and economic development as determined by the developmental approach to social welfare**



this developmental approach to social welfare was the most attractive option in the redesign of the overall social welfare policy. Policy documents such as the *White Paper for Social Development* [22], the *Financing Policy* [23] and the *Integrated Service Delivery Model* [24] theoretically endorse the developmental approach to social welfare. Furthermore, the resolute inclusion of justiciable socio-economic rights in the Constitution mandates a welfare system in which the alleviation of poverty is a key facet. But, even though these policies and the Constitution endorse the developmental approach to social welfare, it is not yet implemented in practice.

The social development approach aims to harmonise social policy with economic development, as illustrated in **Diagram 2** on the previous page. It focuses on interventions that directly or indirectly make positive contributions to economic growth.

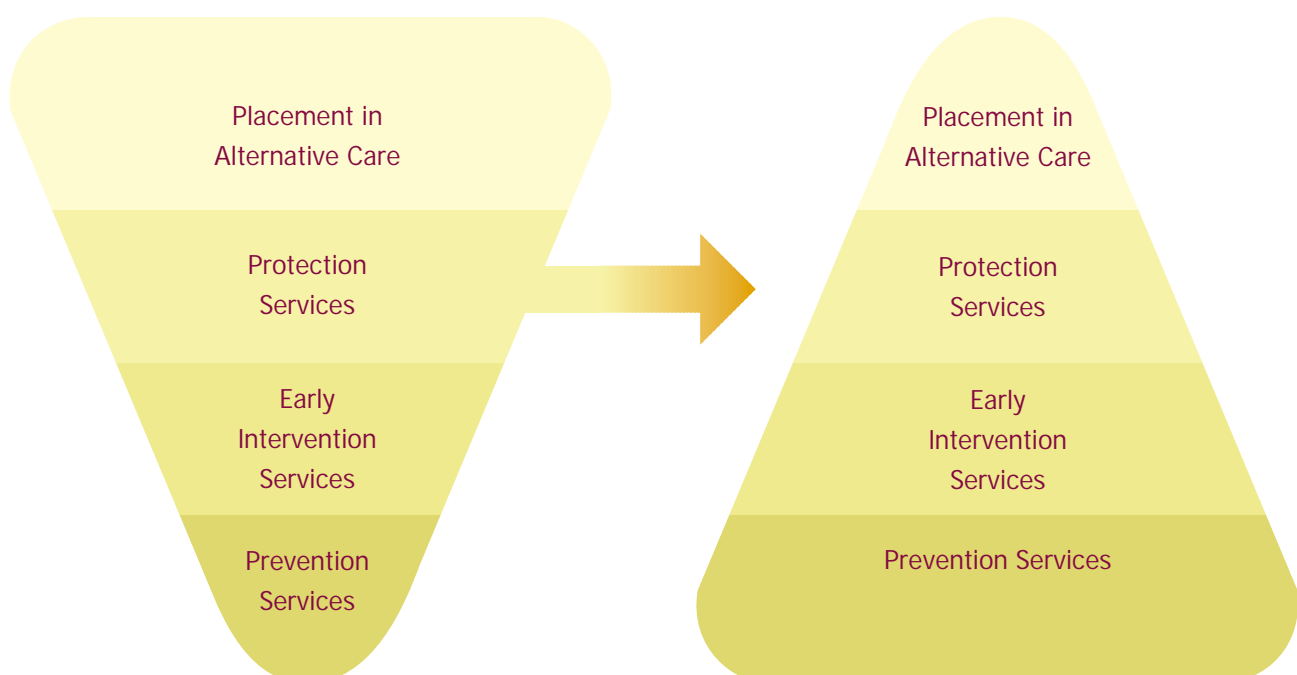
The rationale for redistribution is that collective resources are allocated for social investments that in turn benefit the economy, for example through interventions that mobilise human capital (through education, nutrition and health care). Developmental social welfare complements other welfare approaches and services, such as case-by-case interventions and the delivery of statutory services. While these services are still important, the

need for them will be reduced as less and less people depend on statutory service interventions.

### **b. Social services for children in a developmental social welfare system**

Developmental social welfare focuses on interventions that make positive contributions to economic growth by enhancing the economic independence of individuals. This decreases the need for costly service interventions for social problems arising out of poverty, and saves the State resources. Children are, however, by their very nature economically dependent on adults and the concept of developmental social welfare needs to take into account children’s constitutional rights to protection and care, such as the right to family care and parental care. [25] By for example supporting families in their efforts to care for and protect their children, social services can contribute to economic development indirectly, thereby avoiding costly alternative care options. Social services such as community-based day-care centres for example promote economic development because they free up parents’ time to engage in money-generating activities, enable the healthy development of the child, and provide for employment in the community. [26]

**Diagram 3:**  
The shift in emphasis of types of service interventions in the residual and the developmental welfare systems



Source: Financing Policy Notice 463 of 1999:14.

A commitment to developmental social welfare in terms of children's rights to social services therefore implies a shift from the previous system in terms of the emphasis it placed on the different forms of service interventions.

**Diagram 3** illustrates this shift by comparing the developmental welfare system to the residual one.

The diagram illustrates the difference in emphasis on the various levels of service interventions in the two welfare systems. The residual model places most emphasis on curative services such as alternative care, provided through for example children's homes. This layer is emphasised because the residual model only intervenes once family problems have reached levels that make the removal of the child from the family for his or her protection necessary.

The developmental model works the other way around: Most emphasis is on the prevention of and early intervention against social problems. The need for curative services such as residential care is therefore greatly reduced because the number of children who will need such services would be smaller. The emphasis on the protective services layer is similar in both systems as they are equally important in both models.

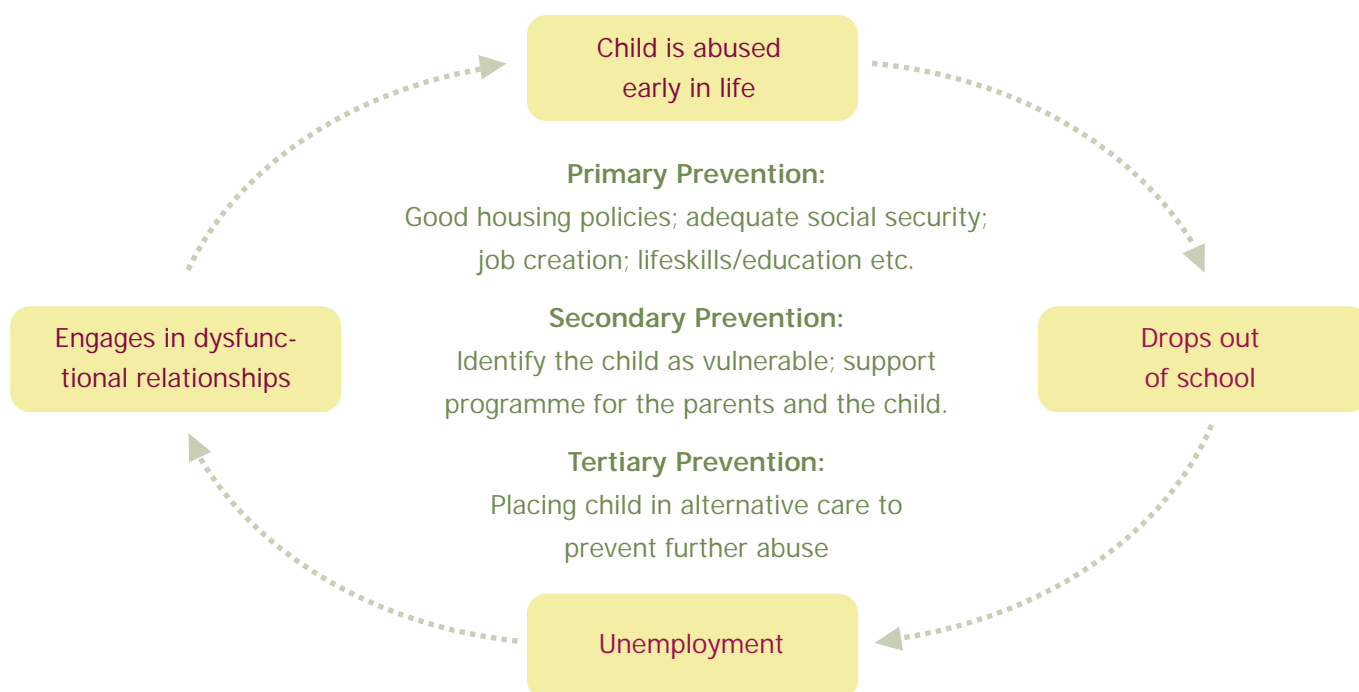
### c. Focus on prevention

The policy commitment to developmental social welfare has specific implications for service delivery to children because it focuses on the preventative elements of social services, while retaining the existing services needed to address social problems. Social problems can be illustrated in a circular form, as in **Diagram 4**, and preventative services can intervene at any point in this cycle through primary, secondary and tertiary intervention.

The diagram represents an example of a possible 'cycle of abuse'. This is not an official model of service delivery, but many practitioners prefer this model to be read in conjunction with the triangles represented in **Diagram 3**. In terms of this model, prevention can happen at any point in the cycle with the aim to break the sequence of abuse. Consider the following (fictional) case of a girl child that suffered abuse at a young age:

*She struggles to form good relationships and has bad impulse control. She drops out of school and fails to gain employment later in life. Due to her inability to interact positively with her peers, she enters into a dysfunctional relationship at a young age. She has children of her own but cannot look after them properly because of the trauma she experienced in her childhood.*

**Diagram 4: The role of preventative services in the cycle of abuse**



Source: Personal communication with Jackie Loffell, 22 May 2006.

There can be preventative interventions at any point in this cycle:

**Primary prevention** could have stopped the child from getting abused in the first place. It could have addressed issues such as the poverty of her parents, their parenting skills, and possible alcohol or drug addictions that may have perpetuated the abuse.

**Secondary prevention** could have occurred when the child displayed behavioural problems at school. Teachers and school support staff should have noted these and identified the child as vulnerable. They should have linked the child and the family with social services programmes.

Assuming none of the above happened, tertiary prevention could have stopped more harm being done to the child by placing her in care with her extended family or in alternative care such as foster care, adoptive care or in a children's home.

To ensure that each level of prevention functions properly, it is important that resources are spread adequately between the different levels.

#### **d. Section 28: Other children's rights related to the right to social services [27]**

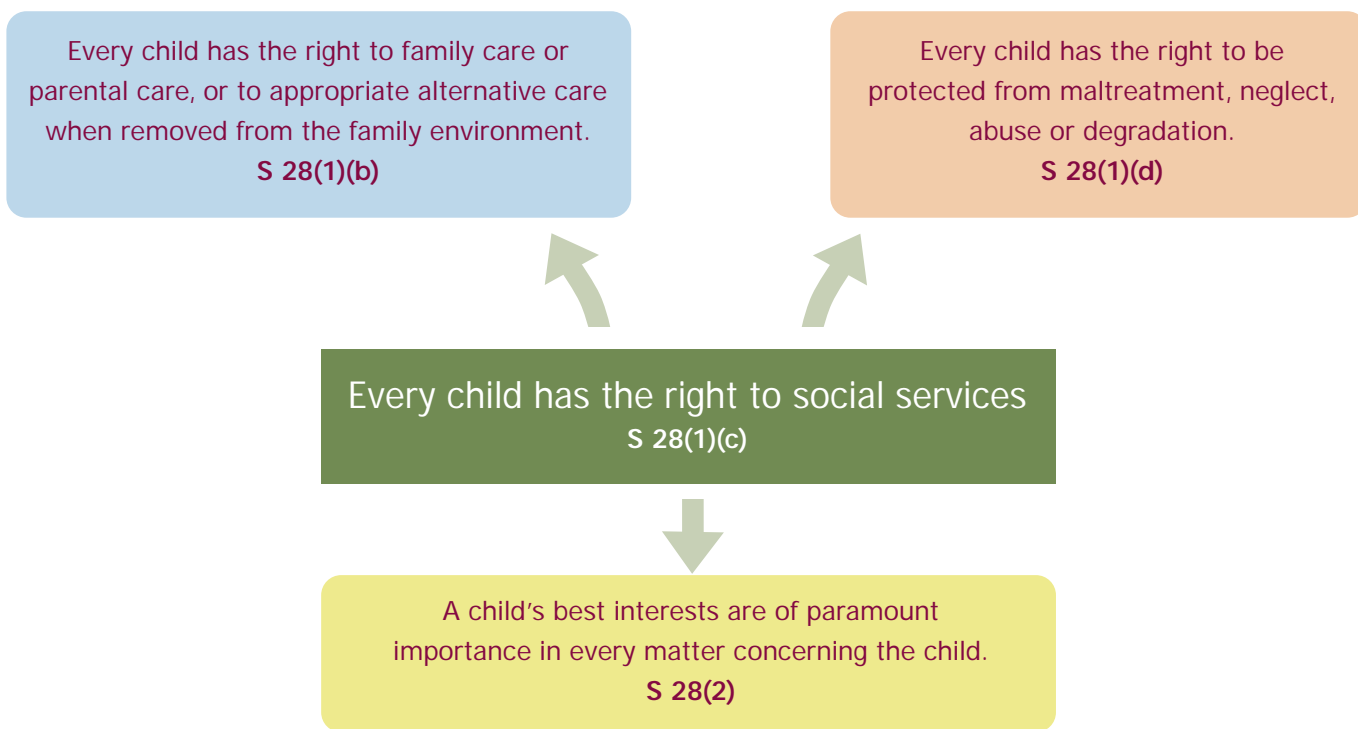
**Diagram 5** illustrates that children's right to social services must be understood in the context of the other rights in section 28 in the Constitution.

The Constitutional Court, in the landmark *Grootboom* case, stated that children's right to parental care, family care or appropriate alternative care when removed from the family environment, as well as children's right to be protected against abuse, neglect, maltreatment and degradation, form the matrix within which children's right to social services must be interpreted [27]. This is in line with international law, which is discussed later.

#### **e. Socio-economic rights and the right to equality, which are applicable to everyone**

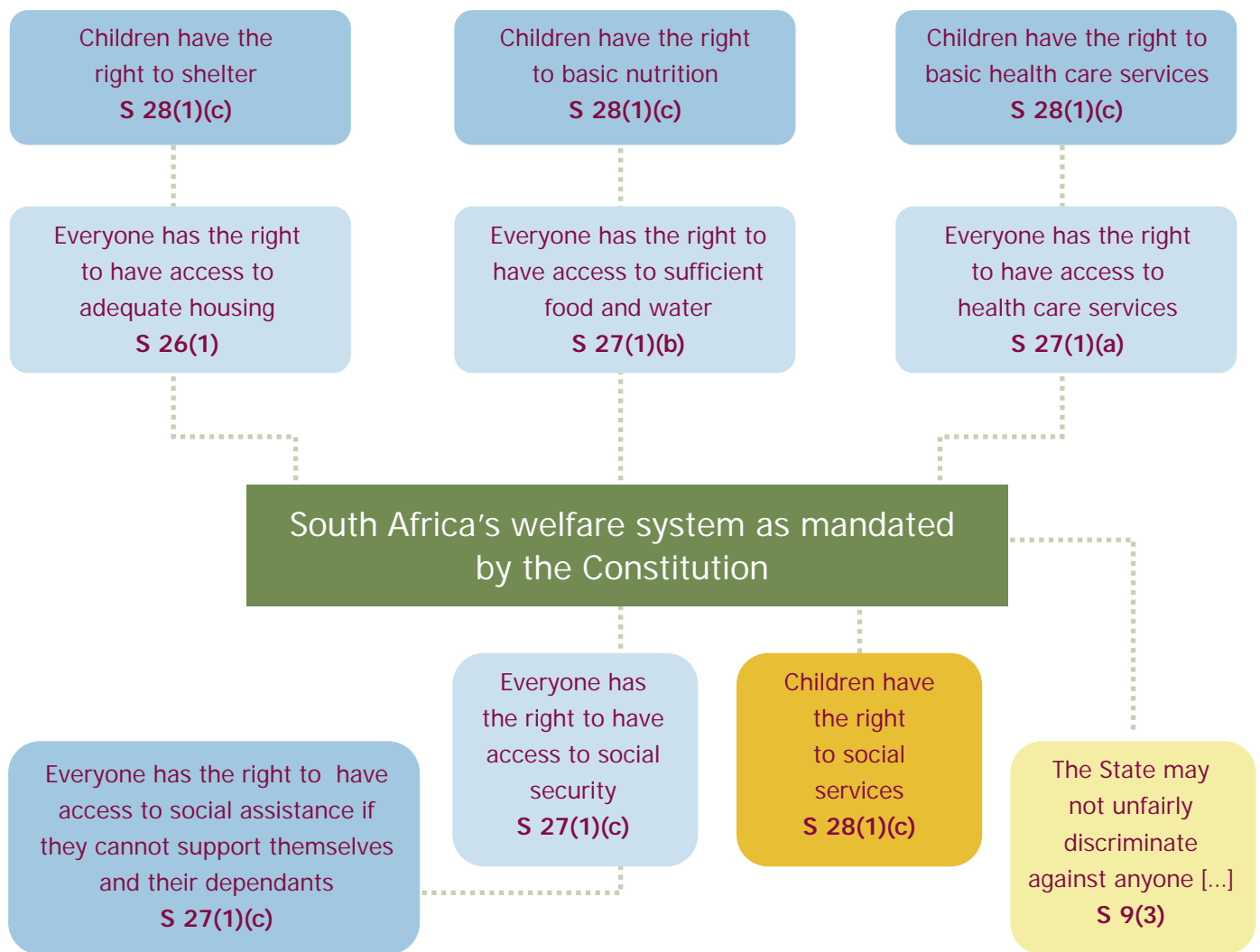
Children's right to social services must be read in the context of all rights related to the overall welfare system, namely the socio-economic rights applicable to everyone.

**Diagram 5:**  
**The relation between children's rights to social services and other constitutional rights in section 28**





**Diagram 6: The relation between children's right to social services and other relevant constitutional rights**



The Constitution commits the State to provide a welfare system that entitles everyone to have access to a number of broad socio-economic rights that are realised progressively as resources become available. In addition, the Constitution specifies certain basic, unconditional socio-economic rights for children. These rights (everyone's and children's) to a large degree correspond to each other and are illustrated in blue in **Diagram 6**.

Everyone has, for example, the right to have access to adequate housing, whereas children have the additional right to shelter. Everyone has the right to have access to health care services, whereas children also have the right to basic health care services. But children also have the right to social services (in orange in the diagram), whereas there is no similar mirror right for everyone in the Constitution.

All the socio-economic rights applicable to everyone

have internal limitations because the Constitution requires that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of [these] right[s]". No such limitation applies to the socio-economic rights of children.

Note also the inclusion of the right to equality: South Africa has committed itself to substantive equality, which means that people who suffer from any form of disadvantage are entitled to extra protection. In relation to the socio-economic rights outlined in Diagram 6, this means that the State has to ensure that the most vulnerable members of society are prioritised in service delivery. In relation to children's right to social services this means that vulnerable groups of children (e.g. children suffering from disabilities and refugee children) are entitled to special protection.

The right to social services is related to the right to family care, parental care and appropriate alternative care. In terms of Constitutional Court jurisprudence and the policies of developmental social welfare, children primarily have the right to be cared for and protected by their parents or their family. Social services must also provide protection for children against any forms of abuse or neglect, regardless of the kind of care setting that children live in.

Children's right to social services is a right that children have in addition to the other socio-economic rights such as shelter, nutrition, health care services and social security. The Child Support Grant for example is not a measure giving effect to children's right to social services – it gives effect to the right to social security. [28]

In the *Grootboom* case, the Constitutional Court ruled that the right to shelter is not an unqualified right since it must be read in relation to everyone's right to have access to housing. Therefore, the right to shelter, like the right to housing, is dependent on the availability of resources and should be implemented progressively. [29] But, as was illustrated in Diagram 6, children's right to social services does not have a mirror right applicable to everyone. The right to social services is therefore free of the internal limitation of progressive realisation and availability of resources that applies to the socio-economic rights in section 26 and 27. [30] The right to social services gives effect to the right to family or parental care or appropriate alternative care as well as the right to protection from any form of abuse and neglect – both of which are not socio-economic rights.

This is particularly relevant in relation to section 4(2) of the Children's Act, which states:

***Implementation of the Act***

*[...] (2) recognising that competing social and economic needs exist, organs of state in the national, provincial and local spheres of government must, in the implementation of this Act, take reasonable measures to the maximum extent of their available resources to achieve the realisation of the objects of this Act."*

When this section is interpreted it must be kept in mind that, firstly, children's socio-economic rights in the Constitution are phrased without limitations of progressive realisation and the availability of resources. The Children's Act does not refer to 'progressive realisation', which follows the trend set by the UNCRC, but states that, in the

implementation of the Act, government must use the maximum of the resources available. The limitations attached to the socio-economic rights applicable to everyone state simply that the rights must be implemented using the resources available. The socio-economic rights in the Act are therefore not subject to the same limitations as the constitutional socio-economic rights applicable to everyone.

The delivery and implementation of the social services in the Act are thus immediate obligations. It is also crucial to remember that the right to protection from any form of abuse and neglect as well as the right to family care, parental care, or appropriate alternative care are NOT socio-economic rights and therefore place immediate obligations on the State to implement and deliver services aimed at realising these two rights.

## 5. International instruments

Children's rights are addressed in a number of international and regional legal instruments. The United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child are two very important instruments in this regard. They must be read together with international commitments such as the Millennium Development Goals and UN General Assembly resolutions such as *A world fit for children*, which South Africa has signed and therefore agreed to abide by. These instruments, like the South African Constitution, address children's right to protection against any forms of abuse, neglect and degradation and also emphasise the importance of protecting and strengthening the family as the social unit that is best placed to provide such protection. [31]

There is no direct counterpart to the constitutional right to social services in the major children's rights treaties. Both the rights to family care, parental care and appropriate alternative care as well as the right to be protected against maltreatment, abuse, neglect or degradation are, however, well represented in all the instruments mentioned above. The commentary and supporting materials to binding international law indicate what types of services are recommended.

The Committee on the Rights of the Child, the body overseeing the implementation of the UNCRC, requires

state parties to report in a very specific format. These requirements are set out in the *Guidelines for Periodic Reports* (the Reporting Guidelines). [32] According to these, reports should be presented under eight different headings, one of which is the heading of “Family Environment and Alternative Care”. This assists in the interpretation of rights because these groupings indicate how the rights relate to one another.

**Diagram 7** lists on the left the UNCRC articles that are to be reported on under the heading of “Family Environment and Alternative Care”. The articles are grouped and colour-coded to illustrate that they correspond

to the rights in the Constitution discussed earlier. The constitutional rights that the articles correspond to are set out on the right hand side. The diagram shows that the link between children’s constitutional rights also exists in international law. The Reporting Guidelines show that the Committee on the Rights of the Child also links the issues related to children’s rights to grow up in a family or a family-like environment with their right to protection from any forms of abuse and neglect. A strong reliance on the UNCRC and its related provisions is therefore appropriate in the interpretation of the constitutional rights such as children’s right to social services.

**Diagram 7: UNCRC reporting guidelines on “Family Environment and Alternative Care” and the corresponding rights in the South African Constitution**

Reporting Guidelines by the Committee on the Rights of the Child:  
**SECTION 5 FAMILY ENVIRONMENT AND ALTERNATIVE CARE**

**Corresponding rights in the SOUTH AFRICAN CONSTITUTION**

**Art 5:** Parental guidance / duty to respect rights of parents  
**Art 9:** Separation from parents / no separation unless abuse or intentional neglect / right of child to make his/her views heard / right to remain in contact  
**Art 10:** Family reunification  
**Art 11:** Abduction  
**Art 18:** Parental responsibilities of both parents / duty to assist parents in the exercise of parental responsibilities  
**Art 27 (4):** Right to adequate standard of living / the recovery of maintenance for the child

**S 28(1)(b)** Every child has the right to family care or parental care.

**Art 20:** Children deprived of their family environment are entitled to special care and protection / have a right to alternative care, e.g. foster care  
**Art 21:** Adoption  
**Art 25:** Periodic review of placement

**S 28(1)(b)** Every child has the right to appropriate alternative care when removed from the family environment.

**Art 19:** Protection against abuse and neglect / all measures must be taken to ensure protection of any form of maltreatment regardless of the child’s care arrangements / protective measures include support for the child and those who care for the child  
**Art 39:** Right to physical and psychological recovery and social integration services

**S 28(1)(d)** Every child has the right to be protected from maltreatment, neglect, abuse or degradation.

**Art 22:** Child refugees must receive appropriate care and protection\*  
**Art 23:** Children with disabilities have the right to enjoy a full and decent life and they have the right to special care and assistance

**S 9(3)** Everyone is equal before the law.

\*Note that the right of children with disabilities and the rights of refugee children are not addressed under the category of family environment and alternative care in the Reporting Guidelines. They are added by the author because of the issues around equality which are addressed elsewhere in the Reporting Guidelines. This corresponds with the South African constitutional framework, which focuses on the right to equality as illustrated in Diagram 6.

### *a. A list of specific services*

**Diagram 8** on the next page presents a list of specific services that were summarised from the UNCRC Reporting Guidelines, with related commentary to give examples of the types of services that should be in place to give effect to the relevant constitutional rights. This analogy is appropriate since the South African Constitution relates directly to the rights in the UNCRC. These services could also be classified according to different layers: Preventative, protective, remedial and special needs services. Note that the same colour-coding was used in Diagrams 7 and 8 to illustrate how the rights in the South African Constitution correspond with the articles of the UNCRC and the recommended social services.

As the list of specific services is a summary of international law and related commentary, it does not address the particular needs and realities faced by children in the South African context. It is therefore only a guideline for possible services to realise the relevant children's rights. The last (dark blue) section (services giving effect to the right to equality) relates to children who have been identified as particularly vulnerable. While specific services have been summarised in relation to foreign unaccompanied children and for children with disabilities, a list of services for other vulnerable groups such as children who live and work on the streets, children who have suffered from the worst forms of child labour; children who have been trafficked, children in trouble with the law and children with chronic illnesses has not yet been developed. The present list will be adjusted to apply to the South African reality at a future CI workshop, where a list of services for the other vulnerable groups will also be developed. The current list in Diagram 8 therefore only serves as a starting point to enable the development of a full 'basket of social services' for all children, including all the categories of vulnerable children.

The role of preventative services in the cycle of abuse that was discussed earlier indicates that broad socio-economic interventions for children and their caregivers have great potential to prevent the abuse and neglect of a child. For example, a comprehensive antiretroviral programme for HIV-positive persons would assist parents

infected and affected by the disease to provide for and protect their children better, which in turn would prevent the State from having to take on this obligation. These type of interventions are, however, not listed here as they do not fall under the category of 'social services' as defined in this paper. They are still none the less of crucial importance.

## **6. What does the interpretation of children's right to social services mean for the Children's Amendment Bill?**

The Children's Act regulates matters over which the national government bears legislative competence. The Children's Amendment Bill addresses matters that affect the provinces' competencies, such as the actual delivery of services. Deliberations on the Children's Amendment Bill must therefore focus on how the provinces can best give effect to the right to social services. This means ensuring that all the layers of services (set out in Diagram 3) that make up the right to social services will be implemented.

### *a. Funding and adequate resources*

The Child Care Act was formulated under the old welfare system and therefore does not adequately provide for preventative services. A costing of the Children's Bill revealed however that, even under the Child Care Act, the government is only fulfilling 25 percent of its budgetary obligations in terms of that Act. There are also gross discrepancies of service delivery between the provinces. [33] Hence, social service provisioning is said to be operating in constant crisis mode. [34]

This situation makes the delivery of preventative and early intervention services a challenge – especially in the face of gross under-funding. However, the constitutionally mandated welfare system obliges an investment in preventative social services. Preventative and early intervention services are also regarded as more cost effective in the long run. The Children's Amendment Bill should therefore legally oblige the proper allocation of resources from the relevant spheres of government towards all the layers of services, especially prevention

**Diagram 8: Examples of social services recommended by the UNCRC in relation to relevant constitutional rights of children**

Constitutional right	Examples of social services recommended by the UNCRC, with commentary
<p>Services giving effect to the right to family care or parental care: <b>S 28(1)(b)</b></p>	<p>Existing care arrangements must be respected and protected by the State. Common responsibility between parents must be encouraged. Children should not have to be removed from parents for reasons of poverty or homelessness:</p> <ul style="list-style-type: none"> <li>■ Education and support programmes for parents, children, caregivers and professional groups;</li> <li>■ Support for single parents or caregivers;</li> <li>■ Support programmes for families at the risk of breaking down;</li> <li>■ Drug and alcohol counselling for parents;</li> <li>■ Early Childhood Development services;</li> <li>■ Participation of children and all interested parties in debates on the removal of children.</li> </ul>
<p>Services giving effect to the right to appropriate alternative care when removed from the family environment: <b>S 28(1)(b)</b></p>	<p>Children removed from the family environment are entitled to special care and assistance and have a right to a variety of services. Social workers should have the authority to co-ordinate these services. A hierarchy of placements dictates that first the child must be kept in the extended family, then in a family-like environment and, only if that fails, should the child be placed in a suitable institution:</p> <ul style="list-style-type: none"> <li>■ Foster care (including training and supervision of parents and placements and periodic review);</li> <li>■ Adoption or <i>kafallah</i>;</li> <li>■ Periodic review of placements;</li> <li>■ Placement in suitable institutions;</li> <li>■ Special assistance and reunification services for children living and working on the streets;</li> <li>■ Special assistance to unaccompanied foreign children;</li> <li>■ Collection of data on child abandonment and all other children removed from the family environment.</li> </ul>
<p>Services giving effect to the right to be protected against abuse, neglect, maltreatment and degradation: <b>S 28(1)(d)</b></p>	<p>Services directed at the protection against all forms of abuse and neglect are directed at children in any care arrangement the child find him/herself in. Parents and family have the primary duty to protect the child against any forms of abuse and neglect and the State has a duty to assist the parents in this. For children who do not live in the family environment, the State has to fulfil the role of the parents and family:</p> <ul style="list-style-type: none"> <li>■ Social programmes supporting the child and the person caring for the child;</li> <li>■ Measures to identify, report, refer, investigate, treat and follow up on instances of abuse and neglect;</li> <li>■ Advice and counselling for children who have suffered abuse and neglect;</li> <li>■ Services directed at women and children suffering from domestic violence;</li> <li>■ Reintegration services for abused, neglected or exploited children;</li> <li>■ Rehabilitation for children who are abusing drugs or narcotics;</li> <li>■ Community-based day-care centres;</li> <li>■ Training of specialised personnel to deal with child abuse cases;</li> <li>■ Recovery and reintegration programmes for children who have suffered any abuse or neglect;</li> <li>■ Psychological counselling for families and their children where abuse and neglect has occurred;</li> <li>■ Gender-sensitive training for professionals dealing with child abuse and neglect.</li> </ul>
<p>Services giving effect to the right to equality: <b>S 9(3)</b></p>	<p>Services for children with disabilities:</p> <ul style="list-style-type: none"> <li>■ Access to rehabilitation services for children with disabilities;</li> <li>■ Services enabling maximum social integration;</li> <li>■ Family support for families with children who have disabilities;</li> <li>■ Information campaigns about disability and prevention methods;</li> <li>■ Vocational training for children with disabilities.</li> </ul> <p>Services specifically for unaccompanied foreign children:</p> <ul style="list-style-type: none"> <li>■ Humanitarian assistance for children and their families;</li> <li>■ Registration of the child and appointment of a guardian;</li> <li>■ Reunification and family-tracing services.</li> </ul> <p>Other categories of children needing special care and protection: children who live and work on the streets, children who have suffered from the worst forms of child labour; children who have been trafficked and children with chronic illnesses:</p> <ul style="list-style-type: none"> <li>■ List of services still to be developed.</li> </ul>

and early intervention. [35] The Bill must also find innovative and cost-effective ways to deliver services through maximising the existing resources. 'Resources' in this sense refer to more than just money and include economic, organisational and human resources. [36]

The following questions can guide decision-makers when determining the funding and other resources for the Children's Amendment Bill:

- *Does the Bill provide for compulsory funding of all the layers of social services?*
- *Does it promote equality between the provinces by including compulsory provisioning clauses?*
- *Are existing resources, such as money, skilled labour and energy, used in a sustainable and cost-efficient way?*

### **b. Roles and responsibilities**

The implementation of the final Children's Act will require the co-operation of a number of government departments, all three spheres of government and a range of services providers. The Children's Amendment Bill must therefore clearly set out and define all the duty-bearers responsible for implementation. Government departments, service providers and civil society are currently not well integrated and therefore do not co-operate as well as they could be. This wastes a lot of resources and impacts negatively on the functioning of the system.

The following questions can guide decision-makers when determining duty-bearers' roles and responsibilities in the Children's Amendment Bill:

- *Does the Bill adequately define the roles and responsibilities of all the duty-bearers?*
- *Does the Bill adequately co-ordinate the responsibilities and actions of the different government spheres and departments?*
- *Does it ensure they co-operate with each other in the most cost-effective manner?*
- *Are communities and civil society organisations supported and encouraged to be an active part of the welfare system?*

### **c. Comprehensive services**

The Children's Amendment Bill should provide for a comprehensive list of social services that honour all the layers of services, with special attention to the preventative and early intervention services layers. The prevention layer of services, even though expensive to initiate, is economically viable because it aims to ensure that children remain with their families, thereby avoiding the need for the State to provide such care at its expense. In the face of HIV/AIDS, however, it can be assumed that many children will lose one or both their care-givers. HIV/AIDS has been cited as one of the biggest cost drivers of the new law for children. [37] In the face of the HIV/AIDS pandemic, the Children's Amendment Bill needs to provide a safety net of services for children and families affected by the disease. In particular, the Bill needs to find innovative and affordable ways to ensure the care and protection of children when the parents are unable to do so.

The following questions can guide decision-makers when determining a list of comprehensive social services in the Children's Amendment Bill:

- *Does the Bill provide for all the layers of social services?*
- *Does the Bill give effect to equality by adequately protecting the most vulnerable children, e.g. children living and working on the street, children with chronic illnesses and children with disabilities?*

## 7. References

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- [2] Children's Amendment Bill B[19B-2006].
- [3] Children's Act No. 38 of 2005.
- [4] Section 28(1)(b), (c) and (d) of the South African Constitution (1996).
- [5] Child Care Act No. 74 of 1983.
- [6] C Barberton 'The Cost of the Children's Bill' (2006) Cornerstone Economic Research. For a summary of this report, see <[www.ci.org.za/depts/ci/plr/pdf/subs/CBFinalCostReport.pdf](http://www.ci.org.za/depts/ci/plr/pdf/subs/CBFinalCostReport.pdf)>.
- [7] Dutschke op cit note 1, 4.
- [8] Technical Committee 4 'Supplementary Memorandum on Bill of Rights and Party Submissions' (1995) [unpublished on file with the CI].
- [9] Treasury 'Budget 2006 – National Medium-Term Expenditure Estimates' (2006), <[www.treasury.gov.za](http://www.treasury.gov.za)>.
- [10] Dutschke op cit note 1, 4.
- [11], [12], [13] Ibid.
- [14] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), para. 78.
- [15] Note: The Court does not use the term 'social security grants' but refers to 'maintenance grants'. The Court is however speaking about the obligations in relation to section 27 of the Constitution, which deals with social security (amongst others). It is therefore assumed that the term 'maintenance grants' refers to 'social security grants'.
- [15] Dutschke op cit note 1, 4; J Midgley 'Involving Social Work in Economic Development' (1996) 39 *International Social Work* 13- 25, 25.
- [16] Dutschke op cit note 1, 4.
- [17] AJ Bernstein 'Social Work and a new South Africa: Can Social Workers meet the Challenge?' (1991) 27 *Maatskaplike Werk/Social Work*, 222-230; M Grey 'The Role of Social Workers in Developmental Social Welfare: Is there a place for them?' (1996) 2 *Social Work Practice* 8-13, 9; L Patel 'The Challenges of Restructuring Social Welfare in Post Apartheid South Africa' (2003) 15 *The Social Work Practitioner Researcher*, 1-11, 2.
- [18] For an expanded explanation of these definitions, see Dutschke op cit note 1, 8-26.
- [19] W McKendrick 'The Future of Social Work in South Africa' (1990) 26 *Maatskaplike Werk/Social Work* 10-18, 10; L Patel & C de Beer *Transforming Health and Welfare Services* (1990), 4; AJ Bernstein 'Redefining Social Work's Emphasis on the 'Social': the Path to Development' (1995) 38 *International Social Work* 53- 67, 56.
- [20] Dutschke op cit note 1, 10.
- [21] Ibid.
- [22] White Paper for Social Welfare of 1997, <[www.polity.org.za/govdocs/white\\_papers/social971.html](http://www.polity.org.za/govdocs/white_papers/social971.html)>.
- [23] Financing Policy Notice 463 of 1999, Department of Welfare.
- [24] Service Delivery Model (2006) Department of Social Development.
- [25] Section 28(1)(b) of the South African Constitution (1996).
- [26] J Midgley 'Growth, Redistribution, and Welfare: Towards Social Investment' (1999) *Social Service Review* 3-21, 13.
- [27] J Sloth-Nielsen 'The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*' (2001) 17 *SAJHR* 210-231.
- [28] Note: Not all children who need a social security grant are receiving one. A means test, an age limit of 14 years and inhibiting administrative requirements make full implementation of this right difficult.
- [29] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), para. 74. This case dealt with the right to adequate housing and children's right to shelter. In relation to shelter and housing, it seems undesirable to grant children a right separate from their parents because children should as far as possible remain in the care of their parents or family.
- [30] The right is still restricted, like all constitutional rights, by the limitations clause found in section 36.
- [31] Dutschke op cit note 1, 28.
- [32] Committee on the Rights of the Child Reporting Guidelines Regarding the Form and Contents of Periodic Reports to Be Submitted by States Parties Under Article 44, Paragraph 1(B), of the Convention (1996).
- [33] Barberton op cit note 6.
- [34] J Loffell 'Review of Legal Research Paper: "Developmental Social Welfare: Defining Children's Constitutional Right to Social Services"' (2005) [unpublished on file with the CI].
- [35] Proudlock P 'Submission from the Children's Institute (University of Cape Town) to the Department of Social Development on the draft Children's Amendment Bill (June 2006).
- [36] 'Human resources' refers to components such as time, energy and motivation. 'Organisational resources' include an active civil society. See G v Bueren (2002) 'Of Floors and Ceilings: Minimum Core Obligations and Children' in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 183-200, 185.
- [37] Barberton op cit note 6, 6.

# Rights in Brief

This rights brief is an output of *Project 28* at the Children's Institute, University of Cape Town. *Project 28* defines the scope and content of children's constitutional rights using current jurisprudence, academic commentary and international law. The purpose of defining the rights of children is to inform discussions on and analysis of legislative measures needed to give effect to these constitutional rights.

The rights brief defines children's right to social services – a right which is currently under discussion in relation to the Children's Act. This new legislation in-the-making will focus on giving effect to three constitutional rights: children's right to social services; their right to family care, parental care or appropriate alternative care; and the right to be protected from all forms of neglect and abuse. This brief therefore outlines the scope and content of these rights in order to feed into the deliberations on this new law.

The author would like to thank Paula Proudlock and Lucy Jamieson (both from the Children's Institute), Patrick Smith (UCT School of Social Development), Ann Skelton (Centre for Child Law, University of Pretoria), and Ashley Theron (Child Welfare South Africa) for their insightful comments on earlier drafts of this rights brief. A special word of thanks to Jackie Loffel (South African Society for the Prevention of Child Abuse and Neglect) who commented on the original working paper on social services quite extensively, and who has advised on the compilation of some of the diagrams used in this rights brief.

Thank you to the Open Society Foundation of South African and Atlantic Philanthropies for providing the funding for the working paper and this rights brief. The opinions expressed and conclusions arrived at are those of the author and are not necessarily to be attributed to the funders.

We welcome feedback and comments on this paper – please send to [Mira.Dutschke@uct.ac.za](mailto:Mira.Dutschke@uct.ac.za). For more information on *Project 28* please contact the project manager [Paula.Proudlock@uct.ac.za](mailto:Paula.Proudlock@uct.ac.za).

Edited by Charmaine Smith and Paula Proudlock.

ISBN 978-0-7992-2327-9

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