

Key legislative developments in 2008/2009

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Following the first democratic elections in 1994, South Africa ratified various international treaties, including the UN Convention on the Rights of the Child (UNCRC). Shortly after that South Africa adopted a new Constitution, which includes a dedicated children's rights section that is based on the provisions of the UNCRC. The State is obliged to take legislative and other measures to make all of these rights a reality. This includes passing laws and regulations, developing policies and establishing programmes that "protect, respect, promote and fulfil" the rights of children.

International law is constantly evolving as new treaties are written and states are obliged to bring domestic laws and policy in line with international law when they ratify new treaties. Expert panels established to monitor the implementation of various treaties also publish General Comments that explain how international treaties should be interpreted. Although General Comments are non-binding, they nevertheless set international standards of best practice which states are expected to adhere to.

All laws must be consistent with the Constitution and international law, and laws that do not comply with the Constitution and international law can be challenged in court. Hence, the Constitution, international law and General Comments collectively assist in the drafting and development of new laws and policies for children.

Part one of this publication discusses some of the key legislative developments during 2008/2009 that affect children, reflecting on whether these give effect to children's rights as outlined in the Constitution and international law.

The Child Justice Act

Article 40 of the UNCRC states that every child in conflict with the law has the right "to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society". In addition, section 28(1)(g) of the Constitution states that children should be: detained only as a measure of last

resort and for the shortest appropriate period of time; kept separately from adults; and treated in a manner and kept in conditions that take account of the child's age. Parliament passed the Child Justice Bill (B49D of 2002) in November 2008 to give effect to these rights. The Bill was signed by the President in May 2009 and is now called the Child Justice Act 75 of 2008. The Act takes a rights-based approach to dealing with children who are accused of committing a crime. It provides for a criminal justice system appropriate to the needs and protection of children. The Act entrenches the principles of restorative justice and recognises that the offender should work to repair the harm done. The Act also recognises the need for crime prevention and aims to minimise the child's contact with the criminal justice system.

Assessment

All children alleged to have committed a crime will be assessed by a probation officer before appearing in court, and within 48 hours of the arrest. During the assessment, the probation officer must determine the probable age of the child; establish the prospects for diversion; determine whether the child is in need of care; and formulate recommendations for the release of the child that, where possible, will avoid pre-trial detention. Assessment increases the prospects for children's early release and gives children a greater chance to be considered for diversion.

Preliminary inquiry

All children will appear before a preliminary inquiry during which the court must consider the probation officer's assessment report and all relevant factors before making an appropriate order for the future management of the child's case, based on the child's individual needs. During the preliminary inquiry a number of matters will be decided: can the child be diverted; should the case proceed to trial or be transferred to a children's court; and should the child be released or detained during the pre-trial period?

Children accused of less serious crimes should as far as possible first be released into the care of their parents, a guardian or an appropriate adult, or in some instances even on their own recognisance. Where this is not possible, the child may be



detained in a child and youth care centre, or even prison under certain circumstances. The preliminary inquiry procedure safeguards the 'last resort' and 'shortest possible period of time' principles of child justice through provisions relating to where the child must be detained if he or she cannot be released. The proceedings also allow for child participation and a neutral chair (ie a presiding officer) to ensure a power balance between the interests of the State and the interests of the child.

Diversion

The Act aims to divert cases out of the criminal justice system and into programmes that reinforce children's respect for human rights and that allow children to be held accountable for their actions without obtaining a criminal record. Diversion from the criminal justice system is an internationally accepted best practice which aims to limit children's contact with the criminal justice system and channels them into appropriate intervention programmes aimed at reducing the risks of re-offending. However, the diversion of children who are accused

of committing serious offences will only be considered under exceptional circumstances. This once again illustrates the Act's approach to balance the rights of children in conflict with the law against the interests of society.

Sentencing

For those found guilty, the Act provides various sentencing options to promote the effective rehabilitation and reintegration of children and to minimise the potential for re-offending. These include community-based sentences, restorative justice sentences (such as referring a child to a family group conference or victim-offender mediation), correctional supervision and detention in a child and youth care centre (where adequate programmes meeting the needs of the child are offered). For serious offences, children over 14 years may be sent to prison.

These procedures and measures bring South Africa in line with international best practice. However, there are some areas where the Child Justice Act does not conform to international law.

Minimum age of criminal capacity

For example, the Act stipulates that the minimum age of criminal capacity is 10 years, as opposed to the international standard of 12 years, set by the UN Committee on the Rights of the Child (CROC) in General Comment 10. The Act provides that children below the age of 10 years may not be arrested or prosecuted. Children aged 10 – 14 years may be arrested and prosecuted, but the prosecutor must prove to the court that the child had criminal capacity when s/he committed the offence. The CROC has observed that this kind of discretionary age limit can be discriminatory and has recommended that one minimum age is used. Although the Act is not currently in line with this recommendation, it requires the Minister of Justice to report to Parliament in five years as to whether the minimum age of criminal capacity should be raised.

Expungement of criminal record

The CROC has also recommended “an automatic removal” of criminal records upon reaching the age of 18 years for all but the most serious crimes. The Act sets out a procedure whereby the offender or his/her parents may apply for the removal of criminal records after five or 10 years for less serious crimes. However, the Act does not allow for the removal of records of serious offences (namely, schedule 3 offences, such as rape or murder), even when committed by a child.

Criminal Law (Sentencing) Amendment Act

Article 37(b) of the UNCRC states that the arrest, detention or imprisonment of a child shall be used “only as a measure of last resort and for the shortest appropriate period of time”, and section 28(1)(g) of the Constitution contains a similar provision. However, the Criminal Law (Sentencing) Amendment Act 38 of 2007 obliges a judge to sentence to imprisonment children aged 16 and 17 years who are convicted of very serious crimes. In such cases, detention in prison is the only choice available to a judge, and is an option of ‘first resort’.

In September 2008, the Centre for Child Law challenged this provision in the Pretoria High Court. Judge Potterill ruled that under the Amendment Act minimum sentencing is used as a measure of first and only resort, and that this is not consistent with children’s rights in the Constitution and international law. This High Court judgment must be confirmed by the Constitutional Court in order to declare an Act of Parliament invalid. The case was heard by the Constitutional Court in March 2009; at the time of writing the judgment was still pending.

The UN Convention on the Rights of Persons with Disabilities (CRPD)

This convention was ratified by Parliament in 2007 and came into effect in May 2008. The CRPD does not define disability but recognises that it is an evolving concept that results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their “full and effective participation in society on an equal basis with others”. The section on the rights of children with disabilities says: “State Parties shall take all necessary measures to ensure the full enjoyment by children of all human rights and fundamental freedoms on an equal basis with other children”. In short, children with disabilities should have equal access to education, basic services, and to participate in play, recreation and leisure.

Once an international treaty is in effect, each state must take legislative and other measures to meet their commitments in the treaty. Some legislative measures are already in place in South Africa: The Constitution enshrines the right to equality and prohibits discrimination on the grounds of disability. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) promotes equality in respect of race, gender and disability, and specifically prohibits unfair discrimination on the grounds of disability. The Equality Act requires the State to establish specialised equality courts, and offers legal remedies to people if they have suffered discrimination. However, it is not sufficient to put regulations and laws in place to protect people from harm; the CRPD also puts a positive obligation on government to take pro-active steps to create an enabling environment.

The CRPD says governments must use the maximum extent of available resources to progressively realise socio-economic rights. This means that government needs to show that it has a budget and plan to realise these rights. All laws and policies in South Africa therefore should be reviewed to assess whether they comply with the positive obligation on the State to create an enabling environment. The General Principles of the Children’s Act provide that the State must in all matters “recognise a child’s disability and create an enabling environment to respond to the special needs that the child has”. These principles cover the implementation of all legislation relating to children, which effectively means that the State has to make provision for children with disabilities when planning any services for children.

The CRPD must be read together with the UNCRC. Where the UNCRC outlines general children’s rights, the CRPD reiterates that children with disabilities are entitled to the same rights and that they need special assistance to realise those rights. For example, the UNCRC states that children have a right to education (article 28); the CRPD adds that children

with disabilities must “receive the support required, within the general education system, to facilitate their effective education” including “effective individualized support measures”. This means that government must employ teachers who are qualified in sign language and/or Braille; and must eliminate barriers to access by providing transport, and adapting the physical environment in schools.

Attitudinal barriers often prevent children with disabilities from participating fully in society. Therefore the CRPD requires that the education system fosters “an attitude of respect for the rights of persons with disabilities”. The State must also provide early childhood development programmes that help prevent disability and that assist children with disabilities and their families to participate fully in society from the earliest age.

South Africa already has a strong legal framework to give effect to the provisions of the CRPD. However, the domestic legislation has not yet been implemented and principles have not been translated into policy and practice. This includes the education policies and laws discussed below.

Education policy

Recognising that education is a pre-requisite for individual and societal development, government enshrined the right to basic education in the Constitution (section 29). Yet according to the Department of Education’s report on the National Education Infrastructure Management System (NEIMS), many schools still do not have electricity, safe water, decent toilets or adequate teaching resources. The National Policy on School Infrastructure states that overcrowding is commonplace and 80% of schools do not have libraries or science laboratories. Poor learning environments are linked to low levels of teacher morale, poor learner performance and high drop-out rates. The lack of decent infrastructure infringes on children’s right to education, and educational opportunities remain bound to historical patterns of inequality. Children with disabilities in particular continue to experience discrimination.

The South African Schools Act 84 of 1996 states that no learner may be denied admission to an ordinary school on the grounds of disability or learning difficulty. However, a Department of Education report presented to Parliament in 2008 indicated that children with disabilities continue to experience significant barriers to education, and that only 10 of the 37 schools for deaf children offer education beyond grade 9. NEIMS 2007 also reports that less than 3% of ordinary schools have facilities for learners with disabilities, such as access ramps.

The government passed the Education Laws Amendment Act 31 of 2007 to redress the inherited inequities in school infrastructure provision and to ensure that all schools provide an enabling physical, teaching and learning environment. The Department of Education thereafter published two policy papers

in late 2008 to support the implementation of this Act: the National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (National Policy); and the National Minimum Norms and Standards for School Infrastructure (Norms and Standards).

The National Policy requires the national and provincial departments of education to assess existing resources systematically; to identify targets for investment; and to write development plans. The targets channel resources so that children with disabilities get access to education. The policy stipulates that 80% of all schools are to be resourced to provide inclusive education by 2012; that 500 primary schools are to be developed into full-service schools; and that 400 special schools are to be upgraded.

Although the National Policy requires that new buildings must be accessible and that the architectural norms should refer to access to people with special needs, the Norms and Standards are silent on the issue of disability and access.

Regulations to the Children’s Act (as amended)

The Children’s Act 38 of 2005 and the Children’s Amendment Act 41 of 2007 are now referred to as the Children’s Act (as amended). In March 2009, Parliament approved the regulations to the Act, which will assist its implementation. However, the regulations will only become law once published in the *Government Gazette*, and the Act will come into force when the President issues a proclamation announcing the implementation date.

The Act establishes the framework for a holistic range of social services and interventions for children and their families, based on a developmental model of social welfare. Some of these services prepare children for general education, ie early childhood development (ECD) programmes. Others provide support for vulnerable children and their families to keep children in school (such as adult mentors to assist child-headed households and to ensure that all children in a household attend school). Drop-in centres in vulnerable communities will run after-school programmes to assist vulnerable children with homework, and provide nutritious meals in areas where food insecurity is high. In addition, programmes will be established to combat the worst forms of child labour.

The regulations elaborate on the provisions of the Act and give the technical detail needed to support the Act’s implementation, for example the ratios of staff to children in ECD programmes.

One of the major constraints to the implementation of the Act is the critical shortage of all types of social service practitioners. The Children’s Act provides for probation officers, development workers, child and youth care workers, youth workers, social auxiliary workers and social security workers

("social workers" are listed separately). Other practitioners required by the legislation, for example ECD practitioners and volunteers, are also in short supply. Another complication is that only those practitioners who are registered under the Social Service Professions Act 110 of 1978 may perform functions under the Children's Act — currently the only practitioners that can register are social workers and auxiliaries.

Social Service Professions Bill

The Social Service Professions Act of 1978 regulates professional practice and establishes the South African Council for Social Service Professionals. The Social Service Professions Bill, which will replace the 1978 Act, was gazetted for comment in January 2008. The Bill aims to "advance social justice by promoting developmental social services". It defines the categories of practitioner who are to be registered, requirements for registration, and disciplinary procedures. The Minister of Social Development is expected to table the Bill in Parliament late in 2009.

Regulations to the Social Assistance Act

The responsibility for the material well-being of children rests firstly on parents. At the same time, article 27 the UNCRC obliges states to assist parents and, in case of need, to provide material assistance. Children in South Africa have a right to social assistance under article 26 of the UNCRC and section 27 of the Constitution. This right is realised mainly through a set of targeted social grants.

According to the database of the Department of Social Development, the Child Support Grant (CSG) had over 8.8 million child beneficiaries in April 2009. Although small (R240 per month from April 2009), the grant is associated with improved nutrition, health and education outcomes for children and their families.

Receipt of a grant automatically entitles the child beneficiary to free schooling and free health care. Grants are therefore a pivotal part of an integrated poverty alleviation strategy, and it is crucial that they do not exclude children in need.

There were flaws in the conceptualisation of the CSG and children were excluded on the basis of age, income and lack of identity documents. These limitations have been highlighted through advocacy campaigns over a number of years, and each was subject to litigation in 2008. In August 2008 the Minister of Social Development published new regulations to the Social Assistance Act 13 of 2004. These replaced the 2005 regulations and contained some important changes. These developments suggest that litigation is a powerful tool for improving social policy.

Age threshold

The regulations increase the age threshold for the CSG to children under 15, effective from 1 January 2009. According to an analysis by Debbie Budlender of the Community Agency of Social Enquiry, this one-year increase potentially extends social grants to around 700,000 children. There is no provision in the regulations for further extension to older children. In fact the wording suggests the opposite: A CSG may be awarded to a child "not older than 15 years". Judgment is still pending in a High Court case (*Mahlangu v Minister of Social Development and Others*) where the age limit is being challenged as unconstitutional.

Means test

Following many years of research, advocacy and finally litigation (*Ncamile and Children's Institute v South African Social Security Agency, Eastern Cape Regional Office and Others*), the regulations have done away with the static income threshold used to determine if an applicant is poor enough to qualify. Instead, a formula which links the threshold to the grant amount is provided so that the means test is automatically adjusted as the value of the grant increases. The calculation is simple:

$$A = B \times 10$$

(where A is the income threshold and B is the value of the grant)

In 2009, the grant amount is R240 per month, so the income threshold is R2,400 per month for a single person and R4,800 for a couple. This effectively doubles the previous threshold (set at R1,100 or R800 depending on the area or dwelling type), and brings it in line with inflation.

Proof of identity

Section 11(1) of the Social Assistance Act regulations specify that all applications for social grants must be accompanied by identity documents in the case of adults, and identity books or birth certificates in the case of children, "... provided that if no valid proof is obtainable, a sworn statement or an affidavit ... may be accepted". This reiterates a similar discretionary clause contained in section 10(6) of the 2005 regulations, but not implemented until a High Court order in 2008 (*Alliance for Children's Entitlement to Social Security v Minister of Social Development*) declared those regulations to be in force, compelling the department to implement them.

Other grants and inclusion of refugees

There are three social grants for children: the CSG, the Foster Child Grant (FCG) received by foster parents, and the Care Dependency Grant (CDG), designed to supplement 'lost' income of caregivers whose children have severe disabilities

and need permanent care. While the CSG and the CDG are available only to caregivers who are South African citizens or permanent residents, the 2008 regulations have extended the FCG to refugees. Refugees may also apply for disability grants and social relief of distress. This reform was also the result of litigation (*Scalabrini Centre and Others v Minister of Social Development, the Minister of Finance, the Minister of Home Affairs and Another*).

Conclusion

Over the past year, there have been a number of positive legislative developments relating to children spanning child justice, education, social security and social services, but the question remains: Do these developments take South Africa any closer to fulfilling children's rights?

The Child Justice Act respects the rights of children to be protected and treated in a manner appropriate to their age. It not only respects children's dignity and their rights but introduces measures and procedures that will encourage children to respect the human rights of others. The finalisation of the regulations to the Children's Act brings it one step closer to implementation. Where new laws, such as the Criminal Law (Sentencing) Amendment Act, have fallen short of the standards set by the Constitution and international law, they have been successfully challenged in court and the government has been ordered to bring the legislation into compliance. Hence, it could be stated that, in general, South Africa has put in place a comprehensive legislative framework that respects children's rights.

However, international law obliges government to take legislative *and other measures* to fulfil children's rights. This is because legislation only provides a broad framework — and regulations and policies are required to detail the exact nature of the commitment. Through the Education Laws Amendment Act, the government has made a commitment to make schools accessible to children with disabilities. But, unless the proposed Norms and Standards provide for access ramps, schools will remain closed to children with physical disabilities.

Commitments in law or policy must be translated into budgets and actual services, otherwise they remain empty promises. Legislative measures alone are not enough to fulfil children's rights. Four years after being passed by Parliament, the Children's Act is still not in force.

However, children's rights are justiciable and the court cases referred to in this chapter show that once a commitment is enshrined in law, civil society can take government to court if it fails to implement legislation. The court must also consider international law, which means any case challenging the government for non-delivery is strengthened by the ratification of UN treaties such as the CRPD.

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