

Submission from the Children's Institute (University of Cape Town) to the Department of Social Development on the draft Children's Amendment Bill (7 April 2006 draft)

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1. Lack of clear legislative duty on relevant sphere of government

The objects clause of the Children's Act 38 of 2005 make it clear that the Children's Bill is the primary legal framework aimed at giving effect to children's constitutional rights to:

- social services,
- protection from abuse and neglect, and
- family care or parental care or appropriate alternative care when removed from the family environment.

In order to ensure that the Bill provides the necessary legal framework to enable the state to realise these rights, it is important to clearly place the necessary legislative duties on the state to provide the services and programmes aimed at realising the right. Furthermore, given that "welfare services" is a schedule 4 matter, it is also important to clearly express which sphere of government is responsible for setting policy and which sphere is responsible for delivering the service.

With the exception of section 194, the draft Children's Amendment Bill does not clearly place legislative duties on the national or provincial ministers to provide or ensure the provision of the necessary programmes and services (eg crèches; early childhood development programmes; child and youth care centres including places of safety, reform schools, children's homes and shelters for street children; foster care placement services; and services aimed at the protection of children from abuse and exploitation.) The provisioning clauses (sections 77, 93, 106, 145, 193, and 214) in each chapter merely say that an organ or state or ngo "*only qualify for money appropriated by a provincial legislature if it complies with the national norms and standards*". However, what happens if a provincial legislature decides not to appropriate any money to that particular service or programme?

If a right does not have a law providing for the programmes and services necessary for the realisation of the right, adequate budget is unlikely to be attached to those programmes or services. Services and programmes which have legislative mandates have a higher priority in the budget allocation process at a national, provincial and local level. Therefore, if we want to strengthen the bargaining power of the national and provincial departments of social development to obtain adequate funding for the delivery of social services, **it would be wise to ensure that the Children's Amendment Bill places clear legislative duties on the national and provincial ministers to provide the relevant programmes and services.**

The various “strategy clauses” [s87(2), 92, 104, 146, 192] could be understood to be placing such obligations to provide, on the Minister, however in legal terms these clauses only place an obligation on the Minister to draft a strategy. They do not place an obligation on the Minister to actually provide the service or programme.

Examples of comparable laws which place clear legislative duties on the state to provide a service or programme include the following:

(1) The Bill of Rights provides that everyone has the right to have access to social security. In order to realise this right, government needs to provide social grants. The **Social Assistance Act of 2004**¹ therefore places a legislative duty on the Minister of Social Development to “*make available a child support grant*”².

(2) The Bill of Rights provides that everyone has the right to have access to health care services. In order to realise this right, government needs to provide health care services, hospitals, clinics, ambulances etc. The **National Health Act of 2003**³ therefore places a legislative duty on the Minister of Health to “*ensure the provision of such essential health services, which must at least include primary health care services, to the population of the Republic...*”⁴ and places a legislative duty on the national and provincial departments to “*establish such health services as are required in terms of this Act, ...*”⁵

(3) The Bill of Rights provides that everyone has the right to basic education. In order to realise this right, government needs to provide schools. The **South African Schools Act of 1996**⁶ therefore places a legislative duty on the provincial MECs to “*provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature*”⁷.

The provisioning and norms and standards clauses in the draft Children’s Amendment Bill create the impression that the Children’s Bill is “national framework” legislation in line with section 146 of the Constitution. This makes the Bill comparable to the National

¹ No 13 of 2004

² Section 4(a)

³ No 61 of 2003

⁴ Section 3(1)(d)

⁵ Section 3(2)

⁶ No 84 of 1996

⁷ Section 12(1)

Health Act, South African Schools Act, and the Housing Act⁸. All these Laws give clear indications as to what duties are being placed on the state and which sphere of government is responsible for setting policy and/or providing the service.

Examples of provisioning clauses in comparable laws:

National Health Act 61 of 2003

Responsibility for health

3. (1) The Minister *must*, within the limits of available resources –
- (c) determine the policies and measures necessary to protect, promote, improve and maintain the health and well-being of the population;
 - (d) ensure the provision of such essential health services, which must at least include primary health care services, to the population of the Republic as may be prescribed after consultation with the National Health Council;
- (2) The national department, every provincial department and every municipality *must* establish such health services as are required in terms of this Act, ...

General functions of national department

- 21 (1) The Director-General *must* –
- (a) ensure the implementation of national health policy in so far as it relates to the national department; and
 - (b) issue guidelines for the implementation of national health policy.
- (2) The Director General *must*, in accordance with national health policy –
- (b) issue, and promote adherence to, norms and standards on health matters, including –
 - (i) nutritional intervention;
 - (iv) sterilisation and termination of pregnancy
 - (v) the provision of health services, including social, physical and mental health care;

⁸ No 107 of 1997

(j) facilitate the provision of indoor and outdoor environmental pollution control services;

Provincial health and general functions of provincial departments

25(1) The relevant member of the Executive Council *must* ensure the implementation of national policy, norms and standards in his or her province.

(2) The head of a provincial department *must*, in accordance with national health policy and the relevant provincial health policy in respect of or within the relevant province –

(a) *provide* specialised hospital services;

(f) plan, co-ordinate and monitor health services and must evaluate the rendering of health services;

etc

Housing Act 107 Of 1997

Functions of national government

(2) For the purposes of subsection (1) the Minister *must* –

(a) determine national policy, including national norms and standards, in respect of housing development

(b) set broad national housing delivery goals and facilitate the setting of provincial, and where appropriate, local government housing delivery goals in support thereof

Functions of provincial government

7(1) Every provincial government must after consultation with the provincial organisations representing municipalities as contemplated in section 163(a) of the Constitution, do everything in its power to promote and facilitate the provision of adequate housing in its province within the framework of national housing policy.

South African Schools Act 84 of 1996

Provision of public schools

12(1) The Member of the Executive Council *must provide* public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature.

(4) The Member of the Executive Council *must, where reasonably practicable, provide* education for learners with special education

needs at ordinary public schools and provide relevant educational support services for such learners.
(5) The Member of the Executive Council *must take all reasonable measures to ensure* that the physical facilities at public schools are accessible to disabled persons

The above examples show a precedent in law of making it clear that with respect to areas that fall within schedule 4, but which require national framework legislation:

- (a) The National Department must set the policy and issue the norms and standards (after consultation)
- (b) The Provincial Departments must provide the service within the national policy, and national norms and standards.

In order to promote clarity for all spheres of government, the Children's Bill therefore needs to expressly say:

- (a) Which sphere of government is responsible for developing policy
- (b) which sphere of government is responsible for delivering the services,
- (c) whether they (e.g. MECs) are being expressly given that duty by the law whether they can be assigned or delegated⁹ that authority, and
- (d) that all spheres of government are bound to act within the national policy and national norms and standards.

A further consideration to take into account are sections 307 and 308 in the Children's Act which give the Minister the power to delegate or assign a function to the MECs. These clauses create the impression that all the duties placed in the state to deliver in terms of the Act are placed on the National Minister first. Delegations and assignment will then happen by agreement with each MEC. If this is the intention, then all the provisioning clauses should place the obligation on the National Minister. However, this would not be in keeping with the precedents set in the National Health Act and South African Schools Act where the provincial departments were clearly allocated duties in the laws and not later by delegation or assignment.

Taking into account the above comparable laws, we recommend that all the provisioning and strategy clauses in the Children's Bill should be drafted as follows. This would require amendments to sections 77, 93, 106, 145, 193, 214 and 87(2), 92, 104, 146, 192, and 224(2):

⁹ Note the distinction between assign and delegate as set out in the Mashava judgement

Provisioning clause

- (1) The MEC for social development of a province must, from money appropriated by the relevant provincial legislature, provide and fund child and youth care centres for that province.
- (2) Such child and youth care centres –
 - (a) must be managed and maintained in accordance with this Act; and
 - (b) must comply with -
 - (i) national policy and the minimum norms and standards prescribed by the national Minister in section X ; and
 - (ii) the structural, safety, health and other requirements of the municipality of the area in which the child and youth care centre is or is to be situated.

Strategy clause

- (1) The Minister, after consultation with the Ministers of Education and of Health, must include in the departmental strategy a strategy aimed at ensuring an appropriate spread of child and youth care centres throughout the Republic providing the required range of residential care programmes in the various regions.
- (2) The MEC must –
 - (a) maintain a record of all child and youth care centres in the province concerned; and
 - (b) within the national strategy provided for in sub-section (1) above, plan a provincial strategy to ensure an appropriate spread of child and youth care centres in the province providing the required range of residential care programmes.

Norms and Standards

- (1) The Minister must determine and prescribe norms and standards for child and youth care centres.
- (2) An organ of state or non-governmental organisation only qualifies for funding if they comply with the norms and standards prescribed in terms of section (1).

2. Chapter 8: Prevention and early intervention

Clause	Amendment	Discussion/motivation
143	Query with regards to prevention and early intervention services provided by other Departments.	<p><i>Question 1:</i></p> <p>The bill refers to “social development services”. Will this include prevention services rendered by other departments, e.g.</p> <ul style="list-style-type: none"> • screening for disability in young children • rehabilitation post abuse or injury (provided by occupational therapists, social workers and psychologists in hospitals and child and youth care centres) • counselling for abuse victims <p>The above services are sometimes provided by the Department of Health however it is not clear if there is a legislative framework that mandates the provisioning and regulation of these services.</p> <p><i>Question 2:</i></p> <p>In the general principles chapter of the Bill, the need for affirmative action for children with disabilities is explicitly acknowledged. Children with disabilities are more vulnerable to abuse and neglect if their parents are not adequately supported to care for their children’s extra needs as caring for a child with a disability places extra strain on a family.</p> <p>In order to ensure that children with disabilities are adequately provided for in chapter 8, we need to consider and mention the particular prevention and early intervention needs of children with disabilities and chronic illnesses. In particular, the following programmes and services are needed and are currently chronically under funded:</p>

		<ul style="list-style-type: none"> • parent support groups, • parent advice services, • counselling services, • referral services, <p>The question therefore that needs to be asked is whether the list in section 144 adequately covers such programmes or whether such programmes will continue to struggle to qualify for funding.</p>
144	<p>Insert a sub-section to include programmes aimed at assisting parents to develop positive discipline skills.</p> <p>144 (1) Prevention and early intervention services or programmes must focus on:</p> <p>(a) preserving a child’s family structure;</p> <p>(b) developing appropriate parenting skills and the capacity of parents and care-givers to safeguard the well-being and best interests of their children;</p> <p>(c) promoting non-violent positive forms of discipline of children;</p> <p>etc</p>	<p>In order to assist parents to move away from using violence (corporal punishment) to discipline their children, programmes that provide information and support to parents on alternative non-violent positive forms of discipline should be provided and funded.</p>
145		<p><i>Question:</i></p> <p>Will the funding for prevention and early intervention services be explicitly costed and provided via the equitable share?</p> <p>The obligation on the national Minister to develop national norms and stds and the provision that all funding of government and ngos is dependent on</p>

		<p>compliance with national norms and stds, gives the impression that the money will be explicitly costed and included in the equitable share.</p> <p>Is this a correct interpretation?</p>
146	<p>146. (1)The Minister must include in the departmental strategy a comprehensive national strategy aimed at securing the provision of prevention and early intervention services to families, parents, care-givers and children across the country.</p> <p>(2) In order to give effect to section 5 of this Act, the Minister must consult with the Minister’s of Education, Health and Justice, when developing the strategy.</p> <p>(3) In order to promote the participation of civil society in the development of national strategy, the Minister must publish the national strategy for public comment before finalisation.</p>	<p>Section 5 of the Bill deals with inter-sectoral implementation of the Act and provides as follows:</p> <p>5. “To achieve the implementation of this Act in the manner referred to in section 4, all organs of state in the national, provincial and, where applicable, local spheres of government involved with the care, protection and well-being of children must co-operate in the development of a uniform approach aimed at co-ordinating and integrating the services delivered to children. “</p> <p>In order to give effect to this section, the Minister should be explicitly obliged to consult with all other relevant Ministers (but not be beholden to them) when developing the national prevention strategy. We may also want to think about placing an obligation to consult with the provincial MEC for Social Development, Education and Health.</p> <p>Section 195(1) (e) of the Constitution sets out the basic values and principles governing public administration.</p> <p>(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: (e) peoples needs must be responded to, and the public must be encouraged to participate in policy- making.</p> <p>Many national policies and strategies are developed without sufficient public participation, often resulting in being un-implementable due to the public not</p>

		<p>accepting the policy or not understanding the policy. Due to the fact that the majority of service providers in relation to prevention and early intervention services are NGOs, it is essential that they should participate in the development of the policy. This can help ensure their buy-in and also ensure that the policy/strategy is relevant and implementable.</p>
147	<p>Insert an additional clause obliging all Local Government's to take children's needs into account when developing their IDPs particularly in the areas of:</p> <ul style="list-style-type: none"> - Water, sanitation and refuse removal - Electricity - Housing - District level health services - Partial care facilities (crèches) - Road building and maintenance - Traffic control and road safety enforcement - Safety at public entertainment facilities 	<p>Local governments develop their Integrated Development Plans (IDPs) on a 5 yearly basis. In these plans they specify their vision for the next 5 years and their plans for improving service delivery in relation to local government services. These services include:</p> <ul style="list-style-type: none"> - Water, sanitation and refuse removal (very important for preventing children from dying from gastro infections – the second biggest cause of deaths in the age group of children under 1 years of age) - Electricity (many children dies in shack fires or get badly burnt due to families having to use unsafe energy supply sources such as paraffin and open fires because they do not have electricity). - Housing - District level health services - Partial care facilities (crèches) - Road building and maintenance - Traffic control and road safety enforcement (eg near schools) - Public entertainment facilities (eg public swimming pools, beaches, play parks) <p>All these services impact significantly on children's general well-being, health and protection from abuse and neglect. In particular these services provide the first layer of prevention services that assist families to care for and protect their children.</p> <p>Furthermore, local government is best placed to collect statistics and conduct needs analysis in relation to children in their areas.</p>

<p>New clause on role of schools</p>	<p>Schools to assist in identifying children in need of prevention and early intervention services</p> <p>(1) The principal of a school must –</p> <p>(a) compile and maintain a referral list of service providers in the area who provide prevention and early intervention services</p> <p>(b) on a confidential basis, identify children in need of prevention and early intervention services,</p> <p>(c) where appropriate, assist such children and their families to access prevention and early intervention services.</p>	<p>While s105 places an obligation on teachers to report abuse and deliberate neglect, there are many instances when teachers come across children in especially difficult circumstances that do not fall under the ambit of s105 or 150 yet who need assistance. Placing a duty on schools to identify such children, keep a database of prevention services and refer children to these services would assist children and their families to obtain help early before the problem escalates into a problem requiring statutory intervention.</p> <p>Such a system would also facilitate teachers and schools having close links with community structures such as NGOs providing prevention services which would help reduce the heavy “social work” burden currently borne by teachers.</p> <p>Previous versions of the Bill specifically referred to the role of schools in relation to identifying and referring vulnerable children to prevention, early intervention and protection services and programmes.</p> <p>Such a clause acknowledges the role that schools can (and do already) play in:</p> <p>(a) providing a gateway for prevention services, and</p> <p>(b) in responding to the psychosocial needs of learners</p>
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