

Media guide to the Children's Act no 38 of 2005 and the Children's Amendment Bill [B19D of 2006]

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Introduction

On 06 November the National Assembly votes on the Children's Amendment Bill [B19D-2006]. This is the latest version of the Bill which contains the amendments passed by the Portfolio Committee on Social Development on 23 October. After the National Assembly has voted, the Bill will go to National Council of Provinces (NCOP) and then on to the President for signing. If all goes well, the Bill could be finally passed by Parliament by the end of 2007. The Bill was first tabled in the NCOP in 2006 and has gone through several rounds of public hearings.

Once the President signs the Amendment Bill, it will amend the Children's Act 38 of 2005 and we will have a new comprehensive Children's Act providing for the full range of social welfare services needed to support vulnerable children and their families.

Why is a new Children's Act needed?

Widespread poverty, social fragmentation, a culture of violence and unemployment inherited from apartheid is now compounded by HIV/AIDS resulting in a vast number of vulnerable children in dire need of social welfare services. Unfortunately, social welfare services have been neglected over the past ten years and the absence of a new legislative framework in line with the Constitution has contributed to this neglect. The new Children's Act and the Children's Amendment Bill are aimed at filling this gap and providing clarity on what services need to be delivered, by whom and to whom.

The Children's Act and the Children's Amendment Bill bring South Africa's child care and protection law in line with the Bill of Rights and International law. Every child has the right to family care, parental care or appropriate alternative care; the right to be protected from abuse, neglect, maltreatment and degradation; and the right to social services. These rights are contained in section 28 of the South African Bill of Rights and have their roots in international law treaties which South Africa has ratified. These rights are interlinked and inter-dependent and a range of social welfare programmes and services are required to make them a reality for children. This range includes:

- 1) Community services to prevent abuse and neglect – called prevention programmes
- 2) Services to support families where a child is identified as being at risk of abuse or neglect – called early intervention programmes
- 3) Services to protect children who have suffered abuse or neglect from further harm – protection services
- 4) Alternative care for children who cannot live with their families due to abuse, neglect, orphaning or abandonment.

The full range of services is required to give effect to the rights mentioned above. The new Children's Act together with the Children's Amendment Bill creates the primary legislative framework for ensuring that these services are provided.

Why two separate bills?

In 2003 the Children's Bill was split into two Bills for technical reasons. The first Bill dealt with matters over which national government is primarily responsible. This Bill was passed in 2005 and signed into law by the President as the Children's Act No 38 of 2005. The second Bill deals with matters which national and provincial government share responsibility. It was tabled in the NCOP in Parliament in 2006 and is called the Children's Amendment Bill [B19B-2006]. On 06 November the National Assembly is scheduled to vote on amendments to the Bill during the second reading debate. The Bill will then go back to the NCOP and the Provinces for final acceptance and then be sent to the President for signing.

What's in the Children's Act 38 of 2005?

The Act contains all the founding provisions including the preamble, the objects clause and clauses requiring all spheres of government to implement the Act in a co-ordinated manner to the maximum extent of available resources. The General Principles chapter elaborates on how the principle of the best interests of the child should be interpreted, changes the age of majority from 21 to 18, and obliges government to ensure substantive equality and equal access to services for children with disabilities and chronic illnesses. The clauses prohibiting virginity testing and circumcision of children under the age of 16 years are also in this chapter.

The Parental Responsibilities and Rights chapter sets out the rights and responsibilities of parents and caregivers. The Courts chapter outlines the procedures and functions of Children's Courts. These civil courts, situated at a magisterial level, are primarily responsible for assessing whether a child is in need of care and protection and for making orders to ensure that the child receives the necessary care and protection. The chapter also provides for family group conferencing, mediation and lay forums to promote the resolution of family challenges outside of the court system.

The Child Protection chapter contains the National Child Protection Register aimed at ensuring better management of child abuse cases and ensuring that people who harm children are prevented from being able to work with children. This chapter also sets out the process for giving consent to medical treatment, contraception and HIV testing

The Act also contains chapters on Adoption, Inter-country Adoption, Child Abduction, Trafficking in Children and Surrogate Motherhood.

The clauses on virginity testing, circumcision and access to contraception have been the topic of much debate in the media over the past year. It is important to note that these clauses are part of the Act, and have not been up for debate in the Children's Amendment Bill. The clause giving children aged 12 access to contraception is already in effect (operational) while the virginity testing and circumcision clauses are not yet operational as they are awaiting regulations.

Certain sections of the Act were put into effect in July 2007 but the bulk of the Act is not yet in effect. Once the Children's Amendment Bill has been passed by Parliament and the regulations have been finalized then the Act will be put into effect. This could happen in 2008.

What's in the Children's Amendment Bill [B19D-2006]?

The Amendment Bill provides for and regulates a range of child care and protection services. This range includes:

- Partial care (crèches and nursery schools)
- Early childhood development programmes
- Prevention and early intervention services for vulnerable children
- Protection services for children who have suffered abuse, neglect, abandonment or exploitation. This includes a system to identify, report, refer and support vulnerable children.
- A support programme for children living in child headed households
- Foster care and child and youth care centres for children in need of alternative state care
- Drop in centres for vulnerable children to access basic services and support during the day

How does the Children's Amendment Bill aim to address challenges facing vulnerable children?

Strategy and Provisioning clauses

Each chapter, relating to each area of service delivery has strategy, provisioning, and norms and standards clauses. Parliament has strengthened these clauses further. Read together, these clauses place a legislative duty on the national minister and the provincial MECs of Social Development to ensure:

- a sufficient spread of each service (e.g. child and youth care centres) in every province;
- that there is an updated record of the services available in every province for planning, monitoring and budgeting purposes;
- that budgets are allocated at a national and provincial level for the provision of these services by the state and non-governmental organisations, community based organisations and faith based organisations; and
- that national norms and standards are set in regulations and that community based organisations are assisted to achieve these norms and standards

These clauses are new in our law for social welfare services. Social welfare services have tended to be viewed as charity that is done by the faith based organizations and non-profit sector. The Children's Bill shifts the country to an approach which recognizes that children have a constitutional right to social services and therefore the State bears the primary duty to ensure that these services are delivered. This does not mean that the state is obliged to provide all of the services itself but that it is obliged to ensure that the services are provided and accessible to all vulnerable children. This requires a good partnership

between government and the non-profit sector with government playing the lead role and non-profit organizations being paid full cost by government for services rendered.

For further information please contact Paula Proudlock on 083 412 4458

Priority spending in poor communities and for children with disabilities

Funding for service provision must be prioritised:

(a) in communities where families lack the means of providing proper shelter, food and other basic necessities of life to their children, and

(b) to make facilities accessible and programmes available to children with disabilities, for the following services:

- Partial care (section 78 (4));¹
- Early childhood development (section 93 (4));²
- Prevention and early intervention (section 146 (4));³ and
- Drop-in centres (section 215(4));⁴

Recognising that resources are limited and that marginalised categories of children do not have equal access to child care and protection facilities and programmes, the Portfolio Committee inserted these clauses in order to ensure that children in poor communities and children with disabilities will be prioritised.

For more information contact Paula Proudlock on 083 412 4458

Disability

The strategy clauses for the chapters on partial care, early childhood development, child and youth care centres and drop-in centres all place an obligation on the Minister to ensure that children with disabilities and chronic illnesses have equal access to these services.

For partial care; early childhood development; prevention and early intervention and drop-in centres the provisioning and funding clauses oblige government to prioritise delivery of these programmes for children with disabilities.

Children with disabilities have been neglected in social welfare services. These provisions will contribute towards ensuring that they are provided with equal opportunities.

For further information contact - Nonceba Meyiwa 073 273 1126

Registration fees and conditional registration

¹ Children's Amendment Bill [B19C of 2006] – Amendments proposed by the National Assembly 31 October 2007, clause 4

² Children's Amendment Bill [B19C of 2006] – Amendments proposed by the National Assembly 31 October 2007, clause 4

³ Children's Amendment Bill [B19C of 2006] – Amendments proposed by the National Assembly 31 October 2007, clause 7

⁴ Children's Amendment Bill [B19C of 2006] – Amendments proposed by the National Assembly 31 October 2007, clause 9

NPOs no longer have to pay a fee to register a facility or programme. The removal of this requirement along with a provision for conditional registration allows struggling community based organisations to access state funding.

Human Resources

Recognising the acute shortage of social workers in the country to deal with the increasing demands on the child protection system and the valuable role played by a range of other social services professionals and para-professionals (e.g. child and youth care workers, auxiliary social workers, and community workers), Parliament has amended the Bill and where possible replaced references to social workers with the term “social service professionals”. This means that many of the tasks that were restricted to social workers can now be carried out by a range of social service professionals. This may also reduce the total cost of implementing the bill and will help ensure that each category of workers is appropriately used according to their particular training and skills. This will also make services more accessible in poor and rural communities where social workers are scarce.

For further information contact – Zeni Thumbadoo 082 418 7915

Reporting of child in need of care and protection

Section 110 list a range of people who work with children who are obliged to report cases of sexual abuse, physical abuse and deliberate neglect of children. Additions to the list include correctional service officials; homeopaths; midwives; traditional leaders; immigration officials and volunteers. The criterion for reporting has changed from the tabled Bill from “on personal observation” to on “reasonable grounds”. The requirement of “on personal observation” was too strict a criterion and could have the effect of preventing people from reporting cases for investigation.

For further information contact – Megan Briede – 084 551 1751

Reporting of an offence

If, having conducted their investigation, either the department of social development or the designated child protection organisation finds the child in need of care and protection they “must report the possible commission of an offence to a police official” (section 110(8)).⁵

This last amendment introduces quite a major change in practice. Currently social workers exercise a discretion whether or not to report the matter to the police. Sub-section 110(8) takes that discretion away and obliges them to report the matter to the police if a criminal offence or an offence created under the Children’s Act has allegedly been committed.

For further information contact – Megan Briede – 084 551 1751

Child headed households

⁵ Children’s Amendment Bill [B19C of 2006] – Amendments proposed by the National Assembly 01 November 2007, clause 5

The Portfolio Committee shared the public's concerns about children having to head households and take on responsibilities usually shouldered by adults. However, they agreed they should be legally recognised and supported with services to reduce the burden. The National Assembly made the following amendments to improve access to support:

- Children living alone and whose parents are still alive but who have been **abandoned** are now also considered to fall under the definition of child headed households (section 137 (1)(a)).
- The age limit has been changed – a child heading a child-headed household must be at least 16 (section 137 (1)(c)).
This change was made because the Social Assistance Act defines a primary care giver as a person 16 years or older which means that only children aged 16 can qualify as primary caregivers of their siblings for the purposes of social grants. However, the support envisaged under the mentorship scheme for child headed households goes beyond the provision of social grants and includes the foster child grant and other non-cash related benefits and services such as home based care for terminally ill parents.
- The requirement of a social work investigation before the provincial Department of Social Development can recognise the child headed household has been removed. Therefore assistance can be rendered immediately..
- It has been recognised that the child heading a child-headed household is not taking on full adult responsibilities and must be assisted and supported by a 'supervising adult'. (section 137 (2))
- A complaint mechanism has been added for children to lay complaints (section 137 (9)).⁶

The Committee remains concerned about the challenges facing child headed households and in its report of the proceedings recommends that "the practical management and monitoring of child-headed households be further investigated, particularly their access to social protection and adult supervision".⁷

For further information contact – Zeni Thumbadoo on 082 418 7915 or Jackie Lingalo 073 143 4666

Duration of foster care placements

Section 186 allows the court to extend a foster care placement until the child is 18 and to remove the requirements of two yearly social work reports and court reviews.⁸ The effect of this provision is to make foster care a permanent placement option for children who cannot live with their biological parents. The court can also give the foster parent full authority to take major decisions affecting the child and any other parental responsibilities and rights (section 188 (3)). While in law the child remains in foster care, in effect the placement resembles "subsidised adoption".

⁶ Children's Amendment Bill [B19C of 2006] – Amendments proposed by the National Assembly 01 November 2007, clause 5

⁷ Portfolio Committee on Social Development Report. Parliament of the Republic of South Africa, Announcements, Tablings and Committee Reports, Wednesday, 24 October 2007, [No 126 - 2007], Fourth Session, Third Parliament

⁸ Children's Amendment Bill [B19C of 2006] – Amendments proposed by the National Assembly 01 November 2007, clause 9

In recognition of the burden on the foster care system and the rapid growth in uptake of the foster child grant, the Committee have request that the Department of Social Development “conduct an urgent comprehensive review of the social security policy for children and the foster-care system”⁹.

For more information please contact Jackie Loffel on 082 454 0991

Discipline of a child (ex s139)

Section 139 *Discipline of a child* has been deleted in its entirety from the Children's Amendment Bill. However, new provisions were introduced in section 144 *purposes of prevention and early intervention programmes*, to ensure that parenting programmes promoting positive forms of discipline are rolled out:

144(1)(b) developing appropriate parenting skills and the capacity of parents and care-givers to safeguard the well-being and best interests of their children, including the promotion of positive, non-violent forms of discipline;¹⁰

In the report of the Committee emphasised its commitment to ensuring that the debate was continued when the next amendment bill is tabled:

“The Committee excised clause 139, dealing with the discipline of children, from the Bill in recognition of the need for further investigation of the matter and anticipates this matter being finalised in a proposed amendment bill to be introduced in 2008.

For further information contact - Sam Waterhouse 084 552 9646 or Carol Bower on 083 777 3793

Child Labour and exploitation of children

“Slavery or practices similar to slavery including but not limited to debt bondage, servitude and serfdom, and forced or compulsory labour or provision of services” has been added to the prohibitions under s141. The use of children in crime is also prohibited and a concomitant offence has been created to deal with people who infringe the prohibition.

For further information contact - Dawie Bosch on 082 557 8597

Prevention and early intervention

Section 144 outlines the types of prevention and early intervention programmes that government will provide funding for. These include:

- programmes aimed at preserving a child’s family structure;
- Programmes aimed at developing appropriate parenting skills including the promotion of positive, non-violent forms of discipline

⁹ Parliament Of The Republic Of South Africa, Announcements, Tablings And Committee Reports, Wednesday, 24 October 2007, [No 126 - 2007], Fourth Session, Third Parliament

¹⁰ Children’s Amendment Bill [B19D of 2006] – Amendments proposed by the National Assembly 01 November 2007, clause 7

- Programmes aimed at developing the capacity of parents to safeguard the well-being and best interests of children with disabilities and chronic illnesses
- Psychological, rehabilitative and therapeutic programmes for children who have suffered abuse, abandonment or grief
- Diversion programmes for children in trouble with the law
- Programmes helping children and families to access other government services e.g. health care services, social grants, school fee exemptions, water and electricity

All these programmes are much needed by many families. The inclusion of “*psychological, rehabilitation and therapeutic programmes for children.*” is a very positive move and also addresses a major gap in the Sexual Offences Bill. The Sexual Offences Bill does not provide funding for the many non-governmental organisations and community based organisations providing counselling and treatment for survivors of sexual abuse. Through the inclusion of this provision in the Children’s Bill, organizations providing this essential service to child victims of abuse and neglect will be able to access government funding.

Many community based projects provide services that are aimed at linking vulnerable families with all the available government services such as health care services, schooling; assistive devices for disabled children; and social grants. These projects which provide an invaluable service especially in rural areas need government funding in order to continue. They also tend to be run by women and youth. The Amendment Bill will help facilitate the funding of such community projects.

For further information contact - Nokuku Sipuka 083 276 4339 or Carol Bower 083 777 3793

Child and Youth Care Centres

Child and Youth Care Centres is the new umbrella term for all children’s homes, places of safety, schools of industry, reform schools and secure care facilities.

In addition to residential care programmes, child and youth care centres may now offer after care services to children and young adults leaving residential care, and programmes for the treatment of children with a psychiatric conditions.

For further information contact - Zeni Thumbadoo 082 418 7915

Shelters for children on the street

In the original draft of the Bill shelters for children on the streets were in chapter 14. There were differences between the level of protection given to children placed into child and youth care centres (chapter 13 of the Bill) and the protection given to children living on the streets who use shelters (chapter 14) . The level of protection offered to children on the street was lower. Parliament reclassified shelters as child and youth care centres by moving them into chapter 13, to ensure the highest standards of care and protection for this vulnerable group. This approach still allows for a flexible approach to street children’s particular needs while ensuring that they receive the highest standard of protection services.

For further information contact - Sam Mokgopha 083 488 0955

Drop-in centres

The definition of a drop-in centre has been substantially changed because the committee wanted to ensure that community workers and grannies in rural communities can get support to provide basic services, i.e. food and homework provision. They also did not want to associate children on the streets with basic services, believing that services to children on the streets are children in need of care and protection and therefore that specialist services rendered to such children would be covered under the protection chapter, the prevention and early intervention chapter or the child and youth care centre chapter.

For further information contact – Sidarkie Mpikwa 083 370 5337

If you want spokespersons with a general overview of the whole Bill, please contact:

Lucy Jamieson (Children's Institute UCT) 021 – 689 8303 or 083 458 9075

Paula Proudlock (Children's Institute UCT) – 083 412 4458

Joan Van Niekerk (Childline) – 083 303 8322