

Children's rights to participate in social dialogue

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Childrenⁱ are entitled to participate in decisions and dialogues that affect them as individuals, and as a group. This publication uses the term “social dialogue” to refer to any dialogue that takes place between children and adults outside of the family context. This includes everything from dialogue with professionals about children’s own care, treatment or education, to discussions about policy development and budget allocation. (See the next essay on pp. 30 – 35 for details on how the terms “participation”, “children’s participation” and “social dialogue” are understood and used in this book.)

Children’s entitlement to be part of social dialogue is protected by a set of rights that are found in international and regional law, the South African Constitution and South African legislation. This essay examines these different provisions and explains children’s participation rights to ensure that people who make decisions that affect children understand their responsibility to include children in decision-making processes.

The essay addresses the following questions:

- What are the origins of participation rights?
- What are children’s participation rights?
- Where are these rights found?
- How do the participation rights link to other rights?
- Who is responsible for fulfilling the participation rights?

What are the origins of participation rights?

Participation rights were first given to citizens in ancient Greece around 2,500 years ago during early experiments with democracy. Granting participation rights to citizens enabled them to be included in decisions about the actions of the state, and allegedly protected them from abuses of power. Today, political and civil rights form the bedrock of modern democracies and the right to participate in the governance of the state is protected in international, regional and domestic law. Over time, the meaning

ⁱ The Constitution defines a “child” as “a person under the age of 18 years”.

of “participation” has evolved: Participation rights now cover being involved in the social and cultural life of one’s community and the opportunity for individuals to be active citizens.

In ancient Greece only rich, white men were citizens – poor men, slaves and women had no rights. Since then, these other groups have gained recognition as rights-holders. Today, all human beings are equally entitled to the rights regardless of colour, gender, religion or level of income. The one exception to this list is children. Some of their political rights are limited because their capacity to express themselves and make decisions evolves as they grow. However, their participation rights are strengthened in other areas.

What are children’s participation rights?

Children do not have the right to vote or hold political office; so many people assume that they have no political rights. In fact, children share many civil and political rights with adults: They have the right to freedom of expression,¹ the right to join or form a political party,² the right to be part of political campaigns, the right to demonstrate and protest, and the right to participate in the development and implementation of laws and policies³. Therefore, they are entitled to participate in social dialogue at all levels.

Whilst learning to take responsibility for their own well-being, children rely on parents and other adult duty-bearers such as teachers, social workers and health professionals to fulfil their rights and make decisions on their behalf. This dependency, together with limiting beliefs about children’s status in society, often leads adults to see children as objects of protection rather than individuals with rights. As a result, they do not allow children to participate meaningfully in adult decision-making.⁴ Yet children are individuals with their own views and opinions, and these should be respected when other people are deciding what happens to them. Bearing this in mind, children’s right to participate is defined broadly to include not only decision-making by the state and at community level, but also the day-to-day decisions that adults make on children’s behalf. As children grow and develop, they should take greater responsibility for decision-making in matters that affect them.

The law requires that anyone taking a decision that affects a child or group of children has to make sure the best interests of the child are the key – or one of the key – considerations. A child’s best interests are influenced by many factors, including a child’s experiences, opinions and wishes. Therefore, it is essential that the decision-maker consults the child to determine the child’s best interests. That does not mean that adults must follow children’s wishes but that they must listen to children, consider what they say, take their opinions seriously and give them feedback on what they have decided, and why.



Art workshop: Discussing children’s experiences of participation

Some people argue that all decisions affect children, whether they are about the building of roads, global warming, or even armed conflict and that, as a consequence, the best interests principle applies and children should have a say in all decisions.⁵ Whilst acknowledging that virtually all laws, policies and social actions have an impact on children, the Constitutional Court recognises that:

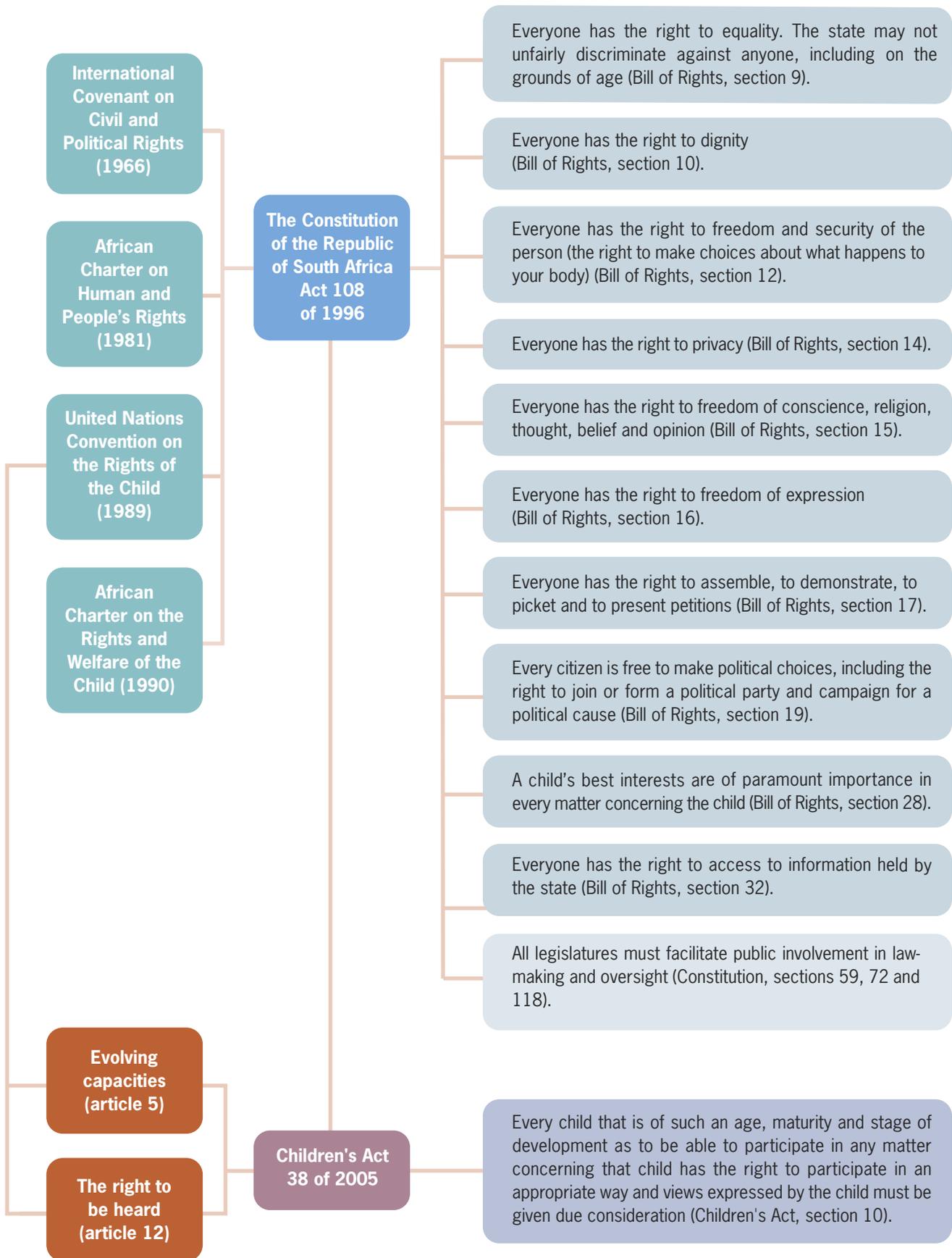
...the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited.⁶

So, children’s rights have to be balanced with other rights when determining what is best for society as a whole.

Participation is not just a right, it is also a responsibility. For example, child representatives on a school governing board or on the management forum of a child and youth care centre are not just exercising their rights, but sharing responsibility for the governance of the institution (see the essay on school governance on pp. 43 – 48). Children who participate in public hearings in Parliament (see the case on p. 50) are aware of the responsibility they have to other children when commenting on laws that affect children.

Children’s rights are not dependent on the fulfilment of their responsibilities; instead, the two are complementary. For example, children and adults have a right to express their opinions, but they have a corresponding responsibility to ensure that they do not harm others with their words. They must ensure that they do not belittle children or incite people to violence. Children have a right to information in accessible formats, but they have a matching responsibility to become informed before taking decisions.

Figure 1: How South African law gives effect to international rights



To participate effectively in social dialogue, children need:

- to know about their participation rights;
- information about the decision being made;
- the opportunity to express their opinions; and
- decision-makers that listen to them, respect their opinions, and give them feedback about the outcome.

Each aspect of this dialogue is protected in law by a combination of rights and responsibilities, as illustrated in figure 1.

Although each right is written individually, all rights are interdependent and indivisible. This means that all rights are related to one another and must be fulfilled together.

Where are these rights found?

Children's rights are defined internationally and regionally by the United Nations Convention on the Rights of the Child (CRC)⁷ and the African Charter on the Rights and Welfare of the Child (African Children's Charter);⁸ while the Constitution and the Children's Act⁹ protect rights at a national level. Most of the participation rights are found in international law, regional law and the Constitution, and the wording and meaning are similar in each case. These are the rights to:

- non-discrimination or equality;
- freedom of expression;
- information;
- protection of privacy;
- freedom of thought, religion and conscience; and
- participate in cultural life.

Best interests

The best interests principle is found in the CRC, the African Children's Charter and the Constitution. Subtle changes in the wording show how the significance of the principle varies across the three rights documents. The CRC says that the best interests of the child shall be "a" primary consideration in all actions concerning children;¹⁰ the African Children's Charter says it should be "the" primary consideration;¹¹ and the Constitution says "a child's best interests are of paramount importance in every matter concerning the child"¹². The Constitution is the supreme law in South Africa, so this higher standard must be applied.

Consideration of a child's views

Other rights related to children's participation are only found in international and regional law. This includes children's right to be heard and have their views taken into consideration. The CRC says:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age



Artists at work: Drawing participation in different settings

*and maturity of the child ... the child in particular [should] be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child.*¹³

The drafters of the CRC wanted children to have the right to influence people who are taking decisions that have the potential to affect them.¹⁴

The CRC also says that parents and other adults responsible for children must give the child appropriate direction and guidance "in a manner consistent with the evolving capacities of the child".¹⁵ This means adults must support children to make their own decisions. The level of support will depend on the child and the situation, but as a rule children should be given more responsibility for decision-making as they grow and mature.

The African Children's Charter links the right to participate with the child's best interests. Article 4(2) says that the child must be consulted and his or her views taken into consideration when the best interests are being decided in judicial and administrative proceedings. Similarly, the United Nations Committee on the Rights of the Child (CROC) says that the best interests of the child must be established in consultation with the child:

*There can be no correct application of article 3 [best interests] if the components of article 12 [the right to participate] are not respected.*¹⁶

In both cases the right is restricted to children who have the capacity to either form an opinion (CRC) or communicate it (African Children's Charter). The Committee also makes it clear that:

*States parties should presume that a child has the capacity to form her or his own views and recognise that she or he has the right to express them; it is not up to the child to first prove her or his capacity.*¹⁷

Information and feedback are essential: Children need full information about the issue being discussed so that they can respond appropriately;¹⁸ and it is only through feedback that children can assess if their rights have been given “due weight”¹⁹ and “consideration”²⁰ (been taken seriously).

Active participation

There are questions about what decision-making processes children’s participation rights apply to – do they simply cover judicial and administrative proceedings or do they extend to policy, law-making and other levels of social dialogue? The public’s right to participate in governance is protected internationally by the Universal Declaration of Human Rights,²¹ the International Covenant on Civil and Political Rights,²² and regionally by the African Charter on Human and Peoples’ Rights (ACHPR)²³.

The CRC and the African Children’s Charter contain most of the political rights listed in the International Covenant and the ACHPR. Freedom of expression; freedom of thought, conscience and religion; and freedom of association are copied almost verbatim, but not the right to participate in governance. So was this a deliberate exclusion?

The International Covenant gives states the discretion to apply reasonable age restrictions to the right to participate in governance. Article 12 of the CRC spells out children’s right to participate, but fails to clarify which children have the right to participate in governance and under what circumstances. However, the CROC advises that:

*If the best interests of large numbers of children are at stake, heads of institutions, authorities, or governmental bodies should also provide opportunities to hear the concerned children from such undefined groups and to give their views due weight when they plan actions, including legislative decisions, which directly or indirectly affect children.*²⁴

The guidance is very clear: Children have a right to participate in law- and policy-making in order to protect their best interests.

At a national level, the Constitution obliges the national and provincial parliaments and government departments to involve the public in legislative processes and the development of policy. Arguably children are part of the “public” and are therefore entitled to participate in public debates about laws and policies that affect them. Participation is more than an opportunity for children to express their views, and decision-makers must also inform children of the outcome of the process and explain how their views were considered.

The African Children’s Charter requires children to become active citizens and to participate in family life, their local communities, country and the African Union.²⁵

The right to participate

The Children’s Act is the only place, in either national or international law, that actually uses the words “the right to participate”. Section 10 says:

*Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.*²⁶

The Act says that the rights it contains “supplement the rights in the Bill of Rights”²⁷ and that the general principles of the Act apply to all legislation in South Africa. Therefore, section 10 applies to all children in South Africa in all circumstances, including foreign children.

The right to participate described in the Children’s Act is restricted to children who are of such an age, maturity and stage of development that they are able to participate. So what about young children or children who cannot express themselves verbally? The CROC advises that restrictions on age and maturity should only be taken into consideration when deciding what weight to give to a child’s opinion, but that all opinions should be heard. The Committee also notes that adults have a duty to give children appropriate support so that their age or developmental capacity does not become a barrier to being included in decision-making. The development of the Irish National Children’s Strategy included children as young as three, showing that, with appropriate support, even young children can engage in social dialogue.²⁸ There is even evidence that babies are capable of expressing an opinion, if only adults know how to interpret it.²⁹

It is important to remember that children’s rights are not about taking power away from adults, but about ensuring that adult decisions are truly responsive to children’s needs and protect their best interests. The Children’s Act recognises that children’s participation does not exclude the involvement of adults, and requires that “the child’s family must be given the opportunity to express their views”.³⁰

How do the participation rights link to other rights?

The right to participate allows children to influence decisions that adults take on their behalf and protects children’s freedom of choice (which is central to civil rights such as the right to practice one’s culture or religion, freedom of movement, etc). The right to participate is central to children’s recognition as rights-holders:

Table 1: Key laws that give effect to the right to participation

Context	Law	Specific provisions
General	Children's Act 38 of 2005	Promotes children's right to participate in all matters affecting the child, subject to capacity.
Education	South African Schools Act 84 of 1996	Contains inclusivity as an important principle in the Act: <ul style="list-style-type: none"> • Learners must be consulted during the development of a code of conduct. • Learners facing suspension have a right to present their views to the school governing body (SGB)ⁱⁱ • All public schools enrolling children in grade 8 or higher are required to: <ul style="list-style-type: none"> – have a representative council of learners; and – have learners from the eighth grade or higher as representatives on the SGB.
	National Education Policy Act 27 of 1996	Specifies that the Minister of Basic Education must consult with national organisations representing students on national education policy.
	Children's Act 38 of 2005	Requires anyone holding parental rights and responsibilities to consult children before taking major decisions that affect the child's education, eg changing schools.
Health care, medical procedures and treatment	Children's Act 38 of 2005	Requires that children participate in decisions about health care procedures and gives them the power to consent at different ages: <ul style="list-style-type: none"> • Medical treatment – from 12 years (if they are mature enough to understand the risks and benefits of the decision). • Surgical operations – from 12 (if they are mature enough to understand the decision and with guidance from their parents). • HIV testing and disclosure – from 12, or earlier (if they are mature enough to understand the decision). • Virginity testing and male circumcision – from 16. • Access to contraception – from 12.
	Choice on Termination of Pregnancy Act 92 of 1996	Provides that a girl of any age can consent to an abortion, provided that the medical practitioner advises her to consult with her parents, guardian, family members or friends before the pregnancy is terminated. A termination cannot be denied because the child did not consult anyone.
	Prevention of and Treatment for Substance Abuse Act 70 of 2008	<ul style="list-style-type: none"> • Requires prevention and early intervention programmes to include children in discussions to identify solutions to substance abuse problems. • Allows children to apply for voluntary admission to a child and youth care centre that offers a programme for substance abuse. However, it also allows parents to apply for admission of a child of any age. The Act provides no guidance on what should happen if there is a conflict between a parent and a child who is at least 12 and mature enough to understand the risks and benefits of the treatment. Yet such a child has the right to refuse treatment.
	National Health Act 61 of 2003	<ul style="list-style-type: none"> • Says children must be included in local health planning. • Requires that consent to research and experimentation on a child must be given by the parent and the child if the child is capable of understanding.

ii SGBs are responsible for the governance of schools. They determine a range of school level policies, from language and religion to admission.

Table 1 (Continued): Key laws that give effect to the right to participation

Context	Law	Specific provisions
Marriage	Children's Act 38 of 2005	Bans forced marriage and/or engagement, protects children's right to participate in decisions about marriage.
Adoption	Children's Act 38 of 2005	Requires that children over 10 years (or younger if they have the capacity) consent to their own adoption.
Justice	Child Justice Act 75 of 2008	Requires an individualised response to children in conflict with the law. Children's participation is a general principle of the Act: Children must be encouraged to participate in the assessment procedure and the preliminary inquiry.
Family law	Children's Act 38 of 2005	Requires that children must be consulted about major decisions affecting guardianship, care, and contact with holders of parental rights and responsibilities, eg in divorce proceedings and in the drafting of parenting plans.
Social services	Children's Act 38 of 2005	<ul style="list-style-type: none"> • Requires that child and youth care centres must have a children's forum and children on the management board. • Says that children in a child-headed household must be consulted when the supervising adult makes any decision on the children's behalf. • Gives children the right to participate in children's court inquiries.
Municipal services	Local Government Act 32 of 2000	Affords local communities the right to participate in the planning of municipal services. Children are part of the local community.
Democracy	National Youth Development Agency Act 54 of 2008	Requires that youth are included in all democratic decision-making processes and defines youth as people between the ages of 14 and 35.

*The new and deeper meaning of this right is that it should establish a new social contract, one by which children are fully recognised as rights-holders who are not only entitled to receive protection but also have the right to participate in all matters affecting them, a right which can be considered as the symbol for their recognition as rights-holders.*³¹

Rights also define the relationship between the individual, groups and communities, and the state. Political rights define the way that citizens participate in how the state is structured, how leaders are selected and removed, how laws and policies are made and how the government is run. Children cannot select leaders but they have a constitutional right to have a say about laws, policies and services that affect them. Since children do not vote, their other participation rights need to be taken even more seriously for them to be active citizens. Participation in social dialogue allows children a voice in how services such as health, education and social services are planned and delivered,

and gives them an opportunity to claim their socio-economic rights, or alert people to rights violations (see the essay on effective children's participation on pp. 30 – 35).

To give effect to these rights, Parliament has passed a number of laws that place an obligation on various role-players to include children in different forms of social dialogue. The most important laws are summarised in table 1, starting on the previous page.

Who is responsible for fulfilling the participation rights?

The Constitution says that Parliament, the Executive,ⁱⁱⁱ the Judiciary, and all organs of state must respect, protect, promote and fulfil the rights in the Bill of Rights. This includes the best interests principle; the political rights; and the rights to freedom of expression, freedom and security of the person, privacy, dignity and equality.

ⁱⁱⁱ The Executive includes all the elected members of government from the president, the national ministers and their deputies, to the provincial premiers and members of the executive councils (provincial ministers), and the local government (mayors and members of the municipal cabinets). It also includes all the people that work for government, from the director-generals of national government departments through to the staff in district offices.

As one of the general principles of the Children's Act, the right to participate applies to "all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general".³² "Organs of state" include government departments and government employees such as doctors, nurses, teachers, police officers, magistrates, etc. Representatives of organs of state include any organisation that provides services for government, such as social workers in private practice performing statutory work, child and youth care workers, researchers and even those in public relations.

Professionals often work in teams that have a shared responsibility for delivering services to children. In these instances everyone should understand their personal responsibilities so that children's rights are respected and that the team members do not think that one of the others will deal with children's participation.

In short, everyone who works with children has a responsibility to respect children's right to participate, and anyone – including parents – making decisions or taking actions that affect children has a duty to listen to their views and consider these seriously.

Conclusion

The CRC requires states to take all "legislative, administrative and other measures" to the maximum extent of available resources to give effect to all rights in the convention. South Africa scores high on the legislative front: The Constitution contains the rights in the CRC, including the best interests principle; the Children's Act enshrines a specific right to participation; and a number of other laws deal with participation in specific circumstances. But to what extent are these rights being fulfilled?

Children frequently complain that "no-one listens" to them, takes them seriously, or tells them what is going on. Most adults have a deep-seated reluctance to recognise children's capacity to participate meaningfully in dialogue and decision-making. These attitudes can be traced to religious beliefs, cultural practices or simply adults' own experiences of being excluded as children.

These attitudes are a major obstacle to the acceptance of the child as a holder of rights.³³ Ignorance of how to facilitate children's participation is another. Despite these challenges, children's participation is beginning to be taken seriously, and people are starting to experience the advantages. The other essays in this issue of the *South African Child Gauge* explore how participation rights are being fulfilled in South Africa and give examples of how to begin to translate the legislative provisions into an active social dialogue with children as equal partners.

References

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- 3 See no. 1 above, sections 59, 72, 118 and 195.
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- 13 See no. 7 above, article 12.
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- 18 See no. 16 above, para 45.
- 19 See no. 7 above, article 12.
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- 25 See no. 8 above, article 31.
- 26 See no. 9 above, section 10.
- 27 See no. 9 above, section 8.
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- 30 See no. 9 above, section 6(3).
- 31 Committee on the Rights of the Child (2006) *Report on the forty-third session, September 2006, Day of General Discussion on the Right of the Child to be Heard, Recommendation*. Geneva: Office of the UN High Commissioner for Human Rights Para 988.
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