



Guide to the Children's Act no 38 of 2005 (as amended by the Children's Amendment Act no 41 of 2007)

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Introduction

Child Protection Week starts on Monday 26 May and ends on 1 June which is International Children's Day. This year, South Africa has something to celebrate: After 10 years in the making, the Children's Act is now complete and will soon be implemented. A conference, organised by the national department of Social Development, to discuss and plan for the implementation of the Children's Act, runs for most of this week in Gauteng. The Minister of Social Development will be opening the conference on the morning of the 27th.

"Instances of child abuse and vulnerability are reported in the media every day, so there can be no doubt that South Africa needs comprehensive and achievable child care and protection legislation. The Act certainly is comprehensive and introduces the full range of social services that are so desperately needed by vulnerable children and their families. The challenge now is to ensure that government provides adequate funding to enable the implementation of all its components.

Currently, the availability of social services falls far short of the needs of children and families, and the demand increases every day as social stresses continue unabated. In South Africa, it is Non Profit Organisations (NPOs) that provide the bulk of these services, relying on funding from philanthropic donors and government and on the passion and dedication of their staff and volunteers.

The battle to raise funding often results in a constant turn over of staff, projects having to close down or prevents organisations from expanding their services to reach more families. In rural areas the lack of these services is most apparent and in dire need of funding from government. The state therefore radically needs to increase funding to these organisations if the level of service provision is to meet demand."*

*Extracted from: Proudlock P, Smith C & Jamieson L (2008) Families need government's support to protect children from abuse. In: *Sunday Argus*, 25/05/08, p. 29.

While increased budget is essential, equally so is the need to ensure that the chronic shortage of social service practitioners is addressed as a priority. The Act requires a range of social service practitioners to implement the many services. These include early childhood development practitioners, child and youth care workers, social workers and probation officers. There is a shortage of all these practitioners and some of them, such as child and youth care workers are not yet fully recognised by the Council for Social Service Professionals thereby preventing their ability to grow in numbers and develop their skills.

While attention is being paid to addressing the salaries and conditions of service for state employed social workers, the challenges faced by the other categories of workers and workers employed by NPOs are not been adequately addressed. This is a problem because the majority of services in the Act are currently being provided by NPOs and therefore the majority of practitioners in the country are employed by NPOs. Attention therefore needs to turn to ensure full cost funding of NPOs so that these workers can be paid decent salaries and the NPOs can ensure retention of staff, sustainability and expansion into under serviced areas.

These challenges will be discussed at the conference this week with approximately 350 delegates from both government and civil society.

The rest of this document provides background information on the Act and the key debates and areas of reform.

Why is a new Children's Act needed?

Families are the best place for children to develop and be nurtured to their full potential. "However, many families struggle every day against poverty, unemployment, HIV/AIDS and violence. To assist such families, the state is firstly responsible for addressing the root causes of these stresses, such as providing medication to HIV-positive parents to stop them from dying; and addressing the high rate of unemployment so that parents can provide for their children's basic needs. Secondly, the state must assist families facing social stresses to care for, develop and protect their children by offering a range of social services tailored to the family's social needs."*

Unfortunately, social 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 is aimed at filling this gap and providing clarity on what services need to be delivered, by whom and to whom.

The Children's Act brings 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 programmes and services are required to make them a reality for children.

*Extracted from: Proudlock P, Smith C & Jamieson L (2008) Families need government's support to protect children from abuse. In: *Sunday Argus*, 25/05/08, p. 29.

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.
- 5) Services for children with special needs, e.g. children with disabilities, refugees and children who have been trafficked.

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

Why were two separate Bills passed by Parliament?

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 by Parliament in 2005 and signed into law in 2006 by the President as the Children's Act No 38 of 2005. The second Bill dealt with matters which national and provincial government share responsibility. It was passed by Parliament in 2007 and signed into law by the President in March 2008 as the Children's Amendment Act No 41 of 2007.

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.

For further information on these clauses please contact Daksha Kassan (Community Law Centre, UWC) – 083 458 4218.

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.

For further information on the Register contact Joan Van Niekerk (Childline) – 083 303 8322.

This chapter also sets out the process for children and their caregivers giving consent to medical treatment, contraception and HIV testing.

For further information on the health consent clauses please contact Lucy Jamieson (Children's Institute, UCT) on 083 458 9075.

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

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 regulations have been finalized then the Act will be put into effect. This is probably going to happen in early 2009.

What's in the Children's Amendment Act 41 of 2007?

The Amendment Act 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, cluster foster care and child and youth care centres (children's homes, places of safety, secure centres and shelters) 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 Act aim to address challenges facing vulnerable children?

Strategy, Provisioning and Norms and Standards clauses

Each chapter, relating to each area of service delivery has strategy, provisioning, and norms and standards clauses. Parliament made these clauses very strong in recognition of the fact that they are the key to ensuring that service delivery is improved and that adequate budget is allocated to the services.

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 NPOs
- that national norms and standards are set in regulations and that NPOs are assisted by government with capacity building and funding 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 treated as an equal partner and paid full cost by government for services rendered.

See the beginning of the following chapters to find the clauses:

- Partial Care
- Early Childhood Development
- Prevention and Early Intervention
- Protection
- Child and Youth Care Centres
- Drop in centres

For further information on these clauses please contact Paula Proudlock (Children's Institute, UCT) 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));
- Early childhood development (section 93 (4));
- Prevention and early intervention (section 146 (4)); and
- Drop-in centres (section 215(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 further information on these clauses please contact Paula Proudlock (Children's Institute, UCT) on 083 412 4458

Children with disabilities to receive priority attention and equal access to all services

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 national and provincial ministers of social development 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 funding 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 (Disabled Children's Action Group) on 073 273 1126

Registration fees and conditional registration

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. However, we need to actively promote the use of the mechanism of conditional registration and ensure that conditional registration is accompanied by funding and capacity building from government to assist the NPO to reach the norms and standards and therefore to qualify for full registration and continual government funding.

For further information on these clauses please contact Paula Proudlock (Children's Institute, UCT) on 083 412 4458

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 practitioners (e.g. child and youth care workers, auxiliary social workers, and community workers), Parliament made amendments to replace 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 practitioners. This may also reduce the total cost of implementing the Act 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 Merle Allsopp (National Association of Child and Youth Care Workers) on 082 375 2477, Zeni Thumbadoo (National Association of Child and Youth Care Workers) on 082 418 7915., or Jackie Loffell (Johannesburg Child Welfare) on 082 454 0991.

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 by Parliament 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 Briedé (Child Welfare South Africa) on 084 551 1751

Reporting of an offence to the police

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)).

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 Briedé (Child Welfare South Africa) on 084 551 1751

Child headed households

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 therefore 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)).

The Portfolio 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”.

For further information contact Zeni Thumbadoo (National Association of Child and Youth Care Workers) on 082 418 7915 or Jackie Lingalo (Matjabeng HIV Consortium) on 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. 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”.

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” .

For more information please contact Patricia Martin (Alliance for Children’s Entitlement to Social Security) on 083 399 3879 or Jackie Loffell (Johannesburg Child Welfare) on 082 454 0991

Discipline of a child (ex s139)

Section 139 *Discipline of a child* was deleted in its entirety from the Children's Amendment Act. 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;

In its report, the Portfolio 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 - Carol Bower (South African Society of the Prevention of Child Abuse and Neglect) on 083 777 3793 or Keith Vermeulen (South African Council of Churches) on 082 523 0701

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 (TECL) on 082 557 8597

Prevention and early intervention of abuse and neglect

“The Act recognises that families are the best place for children to develop and be nurtured to their full potential. However, many families struggle every day against poverty, unemployment, HIV/AIDS and violence. To assist such families, the state is firstly responsible for addressing the root causes of these stresses, such as providing medication to HIV-positive parents to stop them from dying; and addressing the high rate of unemployment so that parents can provide for their children’s basic needs. Secondly, the state must assist families facing social stresses to care for, develop and protect their children by offering a range of social services tailored to the family’s social needs.

While the state’s plans to address the root causes span a range of laws and policies, the provision of social services for struggling families is now mandated in the Children’s Act. For the first time in South Africa’s history provincial Ministers of Social Development now have an obligation to provide and fund a comprehensive range of prevention and early intervention programmes. These include programmes that empower parents to use positive discipline (i.e. non-violent discipline); support groups for parents of disabled children; diversion programmes for children in trouble with the law; counselling for children and families who have suffered trauma or grief (e.g. the services offered by Childline); home-based care and material support for families affected by HIV/AIDS and other chronic illnesses; and programmes helping children and families to access other government services (e.g. health care, social grants, school fee exemptions, water, electricity).

Currently, the availability of prevention and early intervention services falls far short of the needs of children and families, and the demand increases every day as social stresses continue unabated. In South Africa, it is small, local non-profit organisations that provide the bulk of these services, relying primarily on philanthropic donors and on the passion and dedication of their staff and volunteers.

The battle to raise funding often results in projects having to close down or prevents organisations from expanding their services to reach more families. In rural areas the lack of these services is most apparent and in dire need of funding from government. The state therefore radically needs to increase funding to these organisations if the level of service provision is to meet demand.”*

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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
- 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 Act. The Sexual Offences Act does not provide funding for the many NPOs providing counselling and treatment for survivors of sexual abuse. Through the inclusion of this provision in the Children's Act, 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 Act will help facilitate the funding of such community projects.

For further information contact – Paula Proudlock (Children's Institute, UCT) on 083 412 4458; Nokuku Sipuka (Umtata Children's Resources Centre) on 083 276 4339 or Carol Bower (South African Society for Prevention of Child Abuse and Neglect) on 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 (National Association of Child and Youth Care Workers) on 082 418 7915 or Merle Allsopp (National Association of Child and Youth Care Workers) on 082 375 2477.

Shelters and protection services 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 Mokgopa (Kids Haven) on 083 488 0955 or Pam Jackson (OnsPlek shelter for girls) on 072 247 8127.

Drop-in centres

The definition of a drop-in centre has been substantially changed because Parliament wanted to ensure that community workers and grannies in rural communities can get support to provide basic services, i.e. food and homework assistance. They also did not want to associate children on the streets with basic services, believing that children on the streets are children in need of care and protection and that the specialist services that must be 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 (Siyakhana) on 083 370 5337

Assistance for unaccompanied foreign children

When foreign children are found on their own without their parents, by the police or Home Affairs, they tend to be put into deportation centres and then deported back to their country of origin, often just dropped on their own at the border. These children have travelled thousand of kilometres on their own under traumatic circumstances. The Children's Act should create clarity that whenever foreign children are found in South Africa on their own, they should be referred immediately to social services for care and protection and they should not dealt with through the immigration system. Social Services should then be clearly responsible for giving the children accommodation, support, care and assistance. Some of the children will need refugee documentation, others will need to be returned to their country of origin and provided with assistance to find their parents. Others will need foster care or accommodation in a children's home.

Unfortunately the new Act does not create this absolute clarity. While it does provide that all foreign unaccompanied children must be assessed by a social worker, it doesn't provide for the necessary follow up services.

For more information, contact Dr Ann Skelton (Children's Litigation Project, UP) – 082 443 2702

If you would like to speak to civil society spokespersons with a general overview of the whole Bill, please contact:

Lucy Jamieson (Children's Institute, UCT) - 083 458 9075
Nonceba Meyiwa (Disabled Children's Action Group) – 073 273 1126
Paula Proudlock (Children's Institute, UCT) – 083 412 4458
Dr Jackie Loffell (Johannesburg Child Welfare) – 082 454 0991
Dr Ann Skelton (Children's Litigation Project, UP) – 082 443 2702
Daksha Kassan (Community Law Centre, UWC) – 083 458 4218
Nokuku Sipuka (Umtata Children's Resources Centre) on 083 276 4339
Joan Van Niekerk (Childline) – 083 303 8322

Government spokespersons:

Dr Maria Mabetoa (Chief Director of Children and Families, National Department of Social Development) – 082 809 0675
Advocate Mike Masutha (Chairperson of the Portfolio Committee on Social Development, Parliament) – 082 496 8837