



Briefing Paper 153

February 2006

THE CHILDREN'S ACT

1. Introduction

The National Assembly and the National Council of Provinces passed the new Children's Act on 15th December 2005 during last year's final sitting of Parliament. The swiftness of its final formal reading belied the slow passage of the Bill, which was nearly a decade in preparation.¹ The Child Care Act, 74 of 1983, as amended from time to time, was long regarded as narrow and inadequate to the task of protecting and promoting the rights of children. Furthermore, the Act had its genesis in apartheid past, and as such was out of step with the requirements of the Constitution,² section 28 of which is specifically devoted to the rights of children. While it is regrettable that it has taken so long for the Act to be finalised, it must be acknowledged that there was an extensive process of consultation with other national departments including Justice, Education, Health, Labour, Safety and Security, the provinces, non-governmental organisations and service providers.

The Act endeavours to provide a comprehensive and co-ordinated approach to address past inequalities, to take into account current social difficulties, and to ensure a better and brighter future for our children. Moreover, South Africa has acceded to various international conventions including the UN Convention on the Rights of the Child and the African Charter on Children's Rights, the principles of which have to be incorporated into local legislation.

This Briefing Paper provides a short overview of the main features of the Act. We intend to publish two longer Research Papers in due course, the first dealing with the position of children in South Africa in general, and the second focusing on an in-depth analysis of the Children's Act.

[As this paper was being prepared for distribution it appeared that further procedural difficulties had arisen regarding the Act. It now seems that it will not be brought into operation in the near future or, at best, that only certain provisions will be. This further delay will be a source of frustration for the many organisations that have worked hard to contribute to it over the years, not to mention, of course, that it effectively deprives children of many of the rights that should long ago have been accorded them. As far as we can see, however, the delay does not affect the information contained in this paper.]

¹ During 1997 the Minister of Welfare requested the South African Law Reform Commission to make recommendations regard the reform of legislation pertaining to children. The Commission submitted a draft of the New Bill in January 2003.

² The Child Care Act of 1983 is discussed in some depth in the Research Paper on the Children of South Africa.

2. The Guiding Principle

All children in South Africa enjoy special protection under the Constitution and the provisions of the Children's Act confirm this:³ 'The rights which a child has in terms of this Act supplement the rights a child has in terms of the Bill of Rights'; 'All organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children as contained in this Act';⁴ 'In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance must be applied'.⁵

Taking the concept of 'the best interests of the child' as its starting-point, the Act sets out that the rights of children must be promoted, respected and promoted so as to fulfil the promise of the Bill of Rights. The inherent dignity of the child must be respected, and the child must be treated with fairness and equity and be protected from unfair discrimination. The needs of a child in terms of recreation, play and psychosocial development appropriate to that child's age must be taken into account. Particular emphasis is placed on the recognition of a child's disability and on the creation of an enabling environment to respond to the special needs of that child. Whenever possible the family of the child and, when appropriate, the child concerned must be involved in the decision making process in matters which impact significantly on that child. The views expressed by the child must be given due consideration.

Whenever a provision of this Act requires the 'best interests of the child' standard to be applied, various factors must be taken into account where relevant. These include the personal relationship between the child and the parents or primary care-giver, the proper exercise of parental obligations and responsibilities, the capacity to meet the physical, emotional and intellectual needs of the child, the ability to sustain inter-familial relationships and the health and/or disability of the child. The need of the child to be brought up in a family is emphasised, and where this is not feasible, the child must be placed in an environment resembling as closely as possible a caring family environment.⁶ The need to protect the child from any family violence involving the child or a family member of the child, and action or intervention to ameliorate the impact thereof on the child; the need to protect from any physical or psychological harm that may be caused by subjecting the child to abuse or neglect or by exposure to violence, exploitation or other harmful behaviour, are all highlighted.

- **Main Provisions**

3.1. Children with Disability or Chronic Illness

The rights of children with disability or chronic illness, over and above the rights pertaining to all children, are dealt with specifically.⁷ In any matter concerning such a child, due consideration must be given to providing the child and child's primary care giver with the necessary support services to facilitate the child's care in the family environment.⁸ Provision must be made to make it possible in to allow the child to participate social, cultural, religious and educational activities; the dignity of the child must ensured and self-reliance encouraged. A child with a disability or chronic illness has

³ These rights extend to refugee and/ or unaccompanied foreign minors, not only South African citizens.

⁴ Chapter 2, Section 8

⁵ Chapter 2, Section 9

⁶ The relevance is discussed in the briefing paper on Orphaned Vulnerable Children. Briefing Paper No.147

⁷ Link to the National Disability Strategy in the Office of the President.

⁸ Link to social grants for parent or care-giver to help making it possible to care for the child at home until the age of 18. There after the child would be eligible for a disability grant.

the right not to be subjected to medical, social, cultural or religious practices that are detrimental to his or her health, dignity and well-being.⁹

3.2. Social, Cultural and Religious Practices

This was a particularly controversial section of the Bill,¹⁰ and the stipulations of the Act are the result of considerable debate and consultation. A child below the minimum age set for a valid marriage may not be given out in marriage or engagement. Genital mutilation, such as the 'circumcision' of female children, is prohibited, as is virginity testing of children under the age of 16. Virginity testing of children older than 16 may only be performed subject to various criteria, including the informed consent of the child.

The circumcision of male children under the age of 16 is prohibited, unless the circumcision is performed for religious purposes in accordance with practices of that religion,¹¹ or for medical reasons. The circumcision of male children over the age of 16 is subject to the same restrictions as those pertaining to virginity testing, and must take into account the child's age, maturity and stage of development. Every male child has the right to refuse circumcision.

3.3. Access to Information

Every child has the right to have access to information on health promotion and the prevention and treatment of ill-health and disease, sexuality and reproduction. Furthermore, a child has a right to information regarding her or his health and treatment, and to confidentiality except when this would not be in the 'best interests' of the child.

3.4. Access to Courts and the Enforcement of Rights

Every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court.

3.5. Age of Majority

The age of majority is lowered from 21 to 18. This is in keeping with international trends and with the Constitution. However, children in institutional care who have obtained their majority but are completing their studies may remain there and continue to receive state support.¹² Rights involve responsibilities and the Act provides that every child has responsibilities, appropriate to the child's age and ability, towards his or her family, community and the state.

3.6. Parental Rights and Responsibilities

The Act seeks to regulate parental rights and responsibilities, and these are dealt with at some length.¹³ They include the responsibility to care for the child, to maintain contact with the child, to act as guardian of the child, and to contribute to the maintenance of the child. The parent or guardian has the right give or refuse any consent required by law in respect of the child.

The biological mother of a child, whether married or unmarried, has full parental responsibilities in respect of the child.¹⁴ The biological father of a child has the same responsibilities and rights if he is married to the child's mother. Fathers of children born out of wedlock are provided with an opportunity to play a major role in their children's lives, should they so choose, by being assigned rights and responsibilities under specific circumstances.

⁹ Examples would include denial of a blood transfusion.

¹⁰ See Briefing Paper No. 145 on 'Virginity Testing'.

¹¹ The circumcision of infant boys in accordance with the precepts of the Jewish and Muslim faiths is not prohibited.

¹² Previously such support would be terminated on the eighteenth birthday of the child concerned.

¹³ The most salient points are outlined in this paper.

¹⁴ This does not apply in respect of a child who is the subject of a surrogacy agreement. Surrogacy is discussed below.

3.7. Contact and Care

'Contact' and 'care' are the terms used in the Act to replace the traditional legal terms 'custody' and 'access' in matters relating to the care of and contact with the child. Due consideration must be given to the views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development. This is particularly pertinent in divorce and guardianship matters and in the development of parenting plans that are in the best interests of the child¹⁵. The Act attempts to promote child participation and enables children to have a say in their own situation and arrangements.

3.8. Protection of Children

The protection of children is a priority. The Act introduces various measures to protect children and promote their safety and their well-being. These include the establishment and keeping of a National Child Protection Register.

Part A of the Register will contain a record of abuse and/or neglect inflicted on specific children. This information will be used to protect these children from further abuse and/or neglect, and to ensure that appropriate services are provided for them. All convictions involving the abuse or deliberate neglect of a child, and all the findings of a children's court hands down such convictions, will be recorded.

The purpose of Part B of the Register is to have a record of persons who are unsuitable to work with children and to use the information in the Register to protect children against abuse from these persons. No person whose name appears on the register may work with or have access to children, or be considered as an adoptive or foster parent. Access to the Register is restricted and the information is available only when appropriate. Provision for the removal of a name from the Register is made should an error have occurred.

3.9. Protective Measures Relating to the Health of Children

The age of consent to medical treatment and surgical operations for children was a controversial area and the subject of much debate. A child may consent to his or her own medical treatment or surgical procedure if the child is over the age of 12 years of age and is of sufficient maturity and has the mental capacity to understand the benefits, risks and implications of the treatment. The Act provides for the HIV testing of children for foster care and adoption purposes to ensure that children who are living with AIDS are provided with appropriate family care. Provision is made for counselling before and after HIV-testing as well as for the confidentiality of information on the HIV/AIDS status of children. Controversially, provision is made for children over the age of 12 to have access to condoms and other contraceptives, on the basis that this will help to protect children from sexually-transmitted diseases and prevent teenage pregnancies. Furthermore, it was felt that these provisions are a realistic response to the realities in which many teenagers find themselves – those of sexual vulnerability, sexual abuse, peer pressure and the consequences of unwanted pregnancy. Apart from the fact that condoms are readily available at public places such as railway stations, the Act now provides that a child over the age of 12 is entitled to request contraceptives from health-care professionals.

The issue of abortion is dealt with briefly. The provisions of the Children's Act regarding consent are subject to the provisions of section 5(2) of the Choice on Termination of Pregnancy Act 92 of 1996, which stipulates that 'no consent other than that of the pregnant woman shall be required for the termination of a pregnancy'. This effectively means that a girl child can consent to have an

¹⁵ Such plans and agreements may be registered with the office of the Family Advocate, the High Court or the Divorce Court.

abortion performed without parental consent and/or knowledge, although she must be advised to consult with them beforehand.

3.10. Children in Need of Care and Protection

Guidelines are given for the identification of children in need of care and protection. These include children who have been abandoned or orphaned; those who display uncontrollable behaviour; those addicted to a dependence-producing substance; and those who live in circumstances which may seriously harm their physical, mental or social well-being, or is in a state of physical or mental neglect. A child who is a victim of child labour, or who lives in a child-headed household may be in need of care and protection and must be referred to a social worker for further investigation and assistance.

The Act makes provision for the removal of a child to temporary safe care if, following an investigation, it is so ordered by the Children's Court. Such removal of children from their homes and families is, however, a measure of last resort. Wherever possible the child should remain in familiar surroundings and, to this end, provision is made that an alleged offender may be removed from the home or place where the child resides, rather than removing the child.

3.11. Adoption

A child may be adopted if this is in the best interests of the child, if the child is adoptable, and if the provisions of the act are followed. A child is adoptable if he or she is an orphan with no guardian or caregiver who is willing to adopt the child; if the child's parent or guardian has abused or deliberately neglected the child; or if the child is in need of a permanent alternative placement.

Categories of persons who may adopt a child have been extended. A child may be adopted not only by married couples but also by partners in a permanent domestic life-partnership, by other persons sharing a common household and forming a permanent family unit, and by single persons. Provision is made for the consent of the child's natural parents in certain circumstances, as well as for that of the child, subject to certain conditions. Adoptions are formalized through the Children's Courts, and the Hague Convention on Inter-country Adoptions is incorporated into the Act.

3.12. Trafficking in Children

The Act includes a chapter on Trafficking in Children that gives the force of law to the UN Protocol to Prevent Trafficking in Persons. Trafficking in children is prohibited, as is any behaviour facilitating trafficking in children. Every assistance must be made available to a child who is a victim of trafficking and the child must be referred to a designated social worker for investigation and may, pending investigation, be placed in temporary safe care.

3.13. Surrogate Motherhood

A Surrogate mother is a woman who bears a child on behalf of another woman, either from her own egg fertilized by the other woman's partner, or from the implantation in her womb of a fertilized egg from the other woman.¹⁶ The new Act makes provision for formal agreement between the surrogate mother and the 'commissioning parent', that is a person who enters into a surrogate motherhood agreement with a surrogate mother. The agreement must be confirmed by the High Court, and various requirements are set out for the validity of such an agreement.

Any child born of a surrogate mother in accordance with a valid agreement is for all purposes the child of the commissioning parent or parents from the moment of its birth. Conversely, a child born as a result of an invalid agreement will be deemed to be the child of the woman that gave birth to that child.

¹⁶ cf The Concise Oxford Dictionary.

4. Conclusion

The successful implementation of the new Act will depend heavily on the co-operation of all levels of government and civil society. The Act has yet to be costed¹⁷ and the Section 76 Bill has yet to be drafted; the necessary regulations must also be formulated. While the adoption of the Act is thus only the beginning of a long process, certain sections of the Act may be fast-tracked to avoid prejudicing children¹⁸.

The Act puts children's issues squarely on the agenda: it emphasises that services to children must be prioritised by government at all levels, and that all spheres of government should review their services and budgets, and co-operate with each other, to ensure that children get the services they need. All of this is most welcome and, although there are certain provisions with which the Church must take issue¹⁹, the Act has the potential to have a strongly positive impact on the lives of children, especially the most vulnerable. But this will require much vigilance on the part of civil society. As Dr Mabetoa of the Department of Social Development emphasised during the parliamentary hearings: "Dialogue between government and civil society forms a sound basis for the protection of children and service delivery...Government cannot deliver services without the support of civil society and so make a difference in children's lives. Together we [must] protect and care for our children".²⁰

Lois Law
Contract Researcher

¹⁷ It is hoped that the costing of the Act will be completed by April 2006.

¹⁸ For example the provisions of the Hague Convention on Inter-Country Adoptions.

¹⁹ These will be dealt with more fully in the forthcoming research paper on the Act.

²⁰ Submission to the National Council of Provinces Public Hearings, 10th October 2005.