

# A Media Guide to the Children's Act 38 of 2005

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# Children's Act Media Guide: Contents

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# 1. Introduction

The new Children's Act has been a decade in the making. The long process reflects the fact that reviewing the laws affecting children in the face of problems like HIV/Aids, widespread poverty, domestic violence, abuse and the emergence of child-headed households is a complex task. Although the Constitution provides for the protection and promotion of children's rights, many children still live in communities that labour under the difficulties of unemployment, poverty, violence and crime, all of which have contributed to the increased neglect and abuse of our children.

The legislation that was already on the statute book proved ineffective to respond to the everyday struggles facing children and their families, particularly as post-1994 the state was obliged to provide social assistance and social services to all its citizens, on a wider scale than ever before.

The new Children's Act (Act no 38 of 2005), has been designed to help the South African child care and protection system, and the judicial framework in which it operates, to cope with the realities of South Africa's society.

In a memorandum that was attached to the Children's Amendment Bill when it was introduced to Parliament, it states that 'Over the past few years, it has become clear that existing legislation is not in keeping with the realities of current social problems and no longer protects children adequately.'<sup>1</sup>

The memorandum goes on to say: 'In addition thereto, the Republic of South Africa has acceded

to various international conventions, such as the United Nations Declaration on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, the principles of which have to be incorporated into local legislation.'<sup>2</sup> The Children's Act serves to cement the principles of these international conventions into our law.

South Africa's Constitution, founded on principles enshrining human rights and dignity clearly outlines the rights of children in Section 28. The Act clarifies and builds on these rights, providing a comprehensive and broad legal framework governing the rights and protection of South Africa's youngest citizens.

## The chief objectives of the Act are:

- To promote the preservation and strengthening of families.
- To give effect to certain constitutional rights of children, including the right that a child's best interests be considered of paramount importance in all matters concerning that child
- To give effect to South Africa's obligations concerning the well being of children in terms of international instruments binding in the country
- To make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children
- To strengthen and develop community structures which can assist in providing care and protection for children
- To protect children from discrimination, exploitation and any other physical, emotional or moral harm or

<sup>1</sup> Children's Amendment Bill, B19F- 2006, Memorandum on the objects of the Children's Amendment Bill, 2006

<sup>2</sup> Children's Amendment Bill, B19F- 2006, Memorandum on the objects of the Children's Amendment Bill, 2006

hazards

- To provide care and protection to children who are in need of care and protection
- To recognise the special needs that children with disabilities may have
- Generally to promote the protection, development and well being of children.

The steps taken to protect the rights of children in the Act are intended to cause a corresponding improvement in the circumstances of families and communities in which those children will grow up and mature.<sup>3</sup> It is to be hoped that children who realise their potential as a result of the services provided to them and their families will grow into well-adjusted, productive community members and citizens.

## 2. The Children's Act and the Children's Amendment Act: An Overview

When the new children's statute was presented to Parliament, it was decided by the State Law Advisors that it be split into two documents. Those documents would become the Children's Act and the Children's Amendment Act. A brief technical background to this process is given in section 3. The Act covered legislation at national levels of competency and the Amendment Act dealt with legislation at provincial and national levels of competency.<sup>4</sup>

The Children's Act was signed into law in 2006 and certain sections of the Act came into force in July 2007.<sup>5</sup> Some sections of the Act

remain inactive until the regulations required to implement them have been finalised by the Department of Social Development. The Amendment Act was passed by parliament on 22 November 2007 and was signed by the President on 13 March 2008.<sup>6</sup> The Amendment Act automatically amends the Children's Act to include its provisions, so the Children's Act 38 of 2005 is now one complete Act, comprising the Amendment Act. The guide, when referring to the Children's Act, refers to the Act as a whole. The legislation in its entirety will not come into effect until all the regulations are drawn up and finalised by government, probably towards the end of 2008.

### *What the Children's Act includes in its ambit*

The Children's Act outlines the general principles that guide its interpretation and application in court. It deals with parental responsibilities and rights, including parental rights issues in cases of surrogate motherhood, artificial insemination and the parental responsibilities and rights of unmarried fathers. It governs all the functions of children's courts including their increased powers and jurisdiction. It also provides for adequate child protection systems and enforcement, and it creates the framework necessary to identify any children in need of care and protection. It legislates for all adoptions, including inter-country adoptions. The Act also includes provisions on the civil aspects of child abduction and child trafficking.

The Act deals with the provision of a range of care services to ensure the well-being,

3 Children's Act, No 38 of 2005, Preamble.

4 Children's Amendment Bill, B19F- 2006, Memorandum on the objects of the Children's Amendment Bill, 2006.

5 Commencement of certain sections of the Children's Act 2005 (Act No. 38 of 2005). (Proclamation No.

13,2007) GG 30030 3, July 29.

6 It is called the Children's Amendment Act 41 of 2007.

protection and development of children, especially vulnerable children. Through strategy and provisioning clauses, it obliges the state to provide, plan and budget for these services.<sup>7</sup> This means the state must not only protect and provide for children in legislation but that these provisions must be realised and implemented on the ground.

When strategising for or regulating the national norms and standards, for partial care, through to drop-in centres, the Minister for Social Development must consult with a number of other ministers. They include the Ministers of Justice and Constitutional Development, Education, Finance, Health, Provincial and Local Government and Transport. This consultative process is aimed at ensuring inter-sectoral participation across government departments.

Increased departmental co-operation will hopefully ensure that services for children are easier to access and have a better reach across the country's vulnerable communities. Each of the relevant sections focuses on children with disabilities and chronic diseases to ensure they are prioritised when services are planned for and put in place.

### 3. A case for the Children's Act

'Child protection is the core goal of the Children's Act'

These words form the crux of an article that appeared in the Mail & Guardian, just after certain sections of the Children's Act came into force,

and when public debate on the new legislation was at its most heated. In it Dr Ann Skelton of the Centre for Child Law at the University of Pretoria argues why the Children's Act, while perhaps a controversial piece of legislation is in fact a realistic, pro-active law that is relevant to present day South Africa.

The Act has been criticised by a range of religious organisations, individuals and parents for a number of reasons. It gives children as young as 12 years access to contraception, both in the form of condoms and other alternatives, the right to consent to medical treatment, as well as the right to request an HIV/Aids test without the consent of a parent. The Act has also been wrongly criticised as a law that allows girl children to request abortions without parental consent. The Choice on Termination of Pregnancy Act, 1996 is in fact the law that allows for this. It had already been in operation for over a decade when the Children's Act was signed by the President.

These are all provisions in the law that have perhaps been interpreted as 'freedoms' given to children at the expense of parental authority. But as Skelton points out, the Act is not aimed at children from comfortable homes, who have caring, competent parents, willing to offer them love, advice and guidance when they need it and who support them into adulthood. The Act protects the great many children who live of the fringes of such comfortable society. It ensures that children with parents who cannot care for them, whatever the reason, as well as children without parents, can access the help and services they need to not only survive, but develop and grow. The Act, according to Skelton recognises and responds to the realities that many children in South Africa face.

<sup>7</sup> Jamieson L and Proudlock P, 2007, Children's Bill Progress Update: Changes to the Children's Amendment Bill by the National Assembly, 5 November 2007, Children's Institute, University of Cape Town, Cape Town.

She argues that there are different ways of promoting child protection:

‘One is to take an idealistic approach: children’s sexual encounters should be delayed as long as possible. Therefore, we should frame laws that reflect that ideal -- do not provide them with services when they are very young, lest this be misinterpreted as an invitation to have sex. Another is a practical one: children should not be having sex when they are very young but, unfortunately, some of them -- especially the most vulnerable ones -- are doing so. To protect them from further dangers, such as HIV/Aids and early pregnancies, we need to provide them with services. To recognise and respond to realities is not to endorse or approve of them.’<sup>8</sup>

The Act genuinely works to address the problems that many South African children face. It puts systems and protective measures in place that channel vulnerable children towards assistance or it gives adults the room to equip children with the tools to better protect themselves, whether it be through information or direct access to social grants. If the Act did not address problems such as HIV/Aids, child headed households, abuse and the pressure on children regarding sex; it would have been to deny the effect of these realities on our children and our society. To do that would mean South Africa could never work towards improving the lives of some of its most vulnerable people.

The Act also places a burden on the state to see that child protection measures that it provides for are realised. It requires that the state build institutions and provide services across provinces that will ensure the protection and development

of children. These include drop-in centres, partial care centres, early child hood development programmes and child and youth care centres. The Act obliges a range of government departments who have a role in implementing the Act, to not only budget for, but plan, monitor, assess and re-assess the establishment and running of these services.

## 4. The Cost of the Children’s Act

To enable government to plan for the services provided for by the Act, the legislation was costed by external consultants and an extensive costing report completed in September 2006. It was vital while the new law was being reviewed that Parliament was aware of what the different services instituted through the Act, would cost. In the executive summary to the report it states:

‘It is critical for Parliament to be aware of the likely cost of these services when deliberating on the Bill so that it can make informed decisions regarding trade-offs between different priorities given the resource constraints that exist, and ensure that the Bill directs the allocation of resources to meet the needs of children in especially vulnerable circumstances.’<sup>9</sup>

It goes on to say: ‘It is also important for Parliament to be aware of the budgetary implications of the Children’s Bill prior to passing it into legislation, so that when the government begins to implement the future Act, Parliament and the provincial legislatures will be prepared to allocate funds appropriately.’<sup>10</sup>

<sup>9</sup> Barberton C (2006) ‘The Cost of the Children’s Bill – Estimates of the cost to Government of the services envisaged by the Comprehensive Children’s Bill for the period 2005 to 2010’. Report for the national Department of Social Development, pg I

<sup>10</sup> Barberton C (2006) ‘The Cost of the Children’s Bill – Estimates of the cost to Government of the services envisaged by the Comprehensive Children’s Bill for

<sup>8</sup> Skelton, A, 2007 July 13-19, ‘Condoms for kids?’ Mail & Guardian, pg 32

The highly detailed report involved the assistance of many levels of government and projects the costs of the Act through to 2010/2011. In crunching the numbers, the report provided a great deal of insight into various problems that remain key issues of concern when it comes to catering to the needs of vulnerable children. These issues will all need to be addressed over time, if children are to see the real benefit of the services the Act outlines for them.

The Children's Institute at the University of Cape Town offers a simple breakdown of the costing methods that were used to get to the final amounts. The report explains that the costing approach used the following formulae to establish possible costs:

$$\text{Cost of Service} = \text{Quantity} \times \text{Inputs}_n \times \text{Price}_n$$

Quantity relates to the number of children who need the service; inputs are the things needed to provide the service to the child and the price is the cost of these inputs.<sup>11</sup>

The team then considered four scenarios, ranging from the lowest to the highest scenarios. These consisted of two 'Implementation Plan' scenarios (IPs), one low and one high; and two Full Cost scenarios (FCs) – one low and one high.

The IPs measured different government department's levels of delivery for each service plus how they planned to increase delivery in line with the Act and as such these scenarios do not measure total demand or actual need for the services. The FCs used various calculative methods to estimate demand or how many

children actually need a service.<sup>12</sup>

The low/ high scenarios attempt to measure the quality of service delivery. The high scenario incorporated 'good practice' standards for all services into calculations. Low scenarios incorporated good practice standards into services deemed essential while lower standards were applied to services deemed non-essential.

The final cost by 2010/2011 by scenario ranges from R15, 151.9 billion (IP low scenario) to R85, 054.0 billion (FC High scenario). The report indicates however that despite these apparent large amounts of money, national expenditure on children's services is still a fraction of what it should be.<sup>13</sup>

Alongside the continued failure to spend money on welfare for children, the report raised a number of concerns that will need to be addressed as the implementation of the Act commences.

The report<sup>14</sup> points out that within government departments, far better information gathering is required to fathom the extent of the demand for services to children. It also points out that the information needs to be better used 'to ensure that the delivery of services is properly planned, funded and managed.

It also points out that while much more needs to be spent on social welfare to meet the requirements that are created by the Act, the

12 Ibid.

13 Ibid.

14 Barberton C (2006) 'The Cost of the Children's Bill – Estimates of the cost to Government of the services envisaged by the Comprehensive Children's Bill for the period 2005 to 2010'. Report for the national Department of Social Development, pg 109.

11 the period 2005 to 2010'. Report for the national Department of Social Development, pg 1  
Budlender, D, November 2006, Summary of the Children's Bill Costing, Children's Institute and Centre for Actuarial Research, University of Cape Town, pg 2.

state is still failing to meet its current obligations towards social welfare. It highlights the extremely problematic inequalities in services and distribution of facilities like children's homes, across provincial lines.

The 'critical shortage' of trained social workers is flagged as one of the biggest potential hindrances to the implementation of the Act. The report calls on government to 'develop a comprehensive human resources strategy for the social welfare sector'.

It advises that a number of steps be taken to address the situation including: 'actively recruiting students to study social work as well as addressing the current poor working conditions for social service professionals.'<sup>15</sup>

It requires that different government departments particularly the Department of Social Development and the Department of Justice and Constitutional Development work together more effectively to ensure children get the care they need and do not get stuck in the system, while inter-departmental administration is dragged out.<sup>16</sup> As is seen in the Act, the provisions for services such as early childhood development, partial care, child protection and the provision of child and youth care centres, require that a great deal of planning and consultation between government departments takes place.

As government resources are scarce and skilled professionals are few and far between, more cost effective services need to be developed. In particular emphasis needs to be placed on things like early intervention services to address the needs of children as soon as possible before their circumstances deteriorate to the point

where drastic action such as removal from their parents is required.<sup>17</sup> In cases where this is not a possibility, adoption is highlighted as the most cost-effective manner in which to help a child who cannot remain with their family and therefore more strategies need to be in place to promote domestic adoption.<sup>18</sup>

The report emphasises the fact that government is stretched when it comes to providing welfare services and will not be able to implement the Act alone. It must seek out, facilitate and fund the assistance of non-profit organisations that can provide services to children. This way government is more likely to meet its obligations as set out by the Act.

Very importantly the report does not ignore the effect of HIV/Aids. The pandemic will impact heavily on costing outcomes, and hamper the implementation of the Act. The report recommends that the 'allocation of resources ... take into account the differential impact of HIV/AIDS on the demand for social welfare services across the provinces' and that government must find 'innovative approaches to address the specific needs of children impacted by HIV/AIDS in a way that takes the capacity constraints of the sector into account'.<sup>19</sup>

As this very detailed document suggests, there remain significant challenges to implementing the Act and while the legislation itself is proactive and expansive, a good deal is required of government to ensure that it does provide for vulnerable children, given current capacity constraints.

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17 Barberton C (2006) 113.

18 Barberton C (2006) pg 107 & 113.

19 Barberton C (2006) 103

15 Barberton C (2006) 111.

16 Barberton C (2006) 112.

## 5. International Instruments

### *The United Nations Convention on the Rights of the Child*<sup>20</sup>

The United Nations Convention on the Rights of the Child (UNCRC) is the primary international instrument guiding a child rights approach to law for countries around the world.<sup>21</sup> South Africa ratified the UNCRC in 1995 and by doing so has committed itself to improving the circumstances of children in this country.

The UNCRC outlines some extremely important principles that are incorporated into the Children's Act. The third article of the Convention is perhaps the most important. It outlines the 'best interests of the child' principal, which guides the application of all the articles set out in the Convention. Article 3 states that in all actions involving a child, whether they are performed by the state, the judiciary, public or private welfare institutions or administrative authorities the best interests of the child is a primary consideration.

The Children's Act follows in the footsteps of the UNCRC, enshrining the best interests of the child principle in chapter 2.

The UNCRC, through article 2, also enshrines a child's rights to non-discrimination, whatever a child's or his parent/guardian's race, colour, sex, language, religion, political opinion, national, ethnic or social origin, property or disability.

The Convention provides for a child's right to

protection from all forms of abuse and neglect and to express his or her opinion (if he is capable of forming his own views) and have it considered in matter concerning the child.

Article 17 of the Convention also says that countries 'must recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health'. As such the media is obliged to provide children with information that will be in their best interests.

It should be noted that the Convention obliges states, through article 4, to make the rights set out in the UNCRC a reality. In creating the Children's Act, South Africa has embarked on this process. Full delivery of the rights will depend on effective implementation of the new law.

### *African Charter on the Rights and Welfare of the Child*<sup>22</sup>

South Africa is also party to the African Charter on the Rights and Welfare of the Child, and as with the UNCRC, the Charter outlines the rights of children but with a focus on African children and their specific needs born of living on this continent.

The Charter acknowledges in its preamble that the situation of most African children remains critical due to 'the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger', placing them in need of special

<sup>22</sup> A copy of the charter can be found at [www.childlawsa.com](http://www.childlawsa.com) or [www.chr.up.ac.za](http://www.chr.up.ac.za). See also [www.africa-union.org](http://www.africa-union.org).

<sup>20</sup> A copy of the UNCRC can be found at [www.childlawsa.com](http://www.childlawsa.com). Other useful international websites are: [www.crin.org](http://www.crin.org); [www.unicef.org.uk](http://www.unicef.org.uk).

<sup>21</sup> Sloth-Nielsen J and Gallinetti J (eds), 2004, 'Child Justice in Africa: A Guide to Good Practice', Community Law Centre, University of the Western Cape, pg 22.

safeguards and care.

As with the UNCRC the Charter outlines children's rights to education, the right to protection from torture, child abuse, trafficking, forced labour and the right to humanitarian protection during armed conflict. In article 13 the Charter makes provision for special protective measures for children with disabilities to ensure their dignity, social development and integration into the community.

The Charter also focuses on parents. It emphasizes their duty to ensure that their children's rights are safeguarded and realized, including the duty to administer discipline in a humane manner. The Charter also confers certain duties on children to their families and societies, their State and other legally recognized communities and the international community. These duties include; the duty to assist the family, to be of service to the community and to preserve and strengthen the independence and integrity of his country. However, these "duties" are not directly enforceable, and are subject to the rights and protections included in the Charter.

As with the UNCRC the Charter obliges African states to make the provisions of the Charter a reality in their domestic law.

the principles relating to their care and protection, extending provisions for children's courts and creating new offences in relation to children. The preamble also recognises the international treaties that inform South African law, like the United Nations Declaration on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

### **Chapter 1:**

#### *1. Interpretation, objects, application and implementation of the Act*

Section 1 defines the terms used in the Act and how they should be understood in the interpretation of the law. The South African Law Commission began the process of reviewing legislation affecting children and forming a new children's statute more than a decade ago. In its first discussion paper the Commission argued for the inclusion of certain definitions to entrench a non-traditional understanding of concepts like 'family member'. This it argued would better reflect the realities of life for children. According to the Commission, South Africa incorporates a 'diversity of family forms' and the traditional view of a nuclear family, premised on the relationship between a husband and wife, 'does not reflect the reality of South African society'.

The Act has given a broader definition to the term family member. It no longer pertains exclusively to a blood relative but it includes anyone with whom the child has developed a significant psychological or emotional attachment.

This is just one example of how the interpretation of terms in the Act is broadened to incorporate a more inclusive view of South African society. There are others. The terms 'contact' and 'care' in relation to a child are outlined in the definition section, indicating the shift from a parent-centred

## **6. The Children's Act: Chapter by chapter breakdown**

### *Preamble and Long Title*

The preamble outlines the main purposes of the Act and legislative areas that it will cover. It introduces the functions that the Act is intended to perform. These include among other things, promoting the constitutional rights of children and

approach of the parent's right to custody, towards a child-centred approach of the child's right to care and contact with certain people. The use of the words 'responsibilities and rights' in the Act also heralds an important shift from the notion of parental power over children. Now parents are seen as having responsibilities towards children, in addition to their rights.<sup>23</sup>

The Act also includes a definition for 'social services professionals'. This extends to development workers, auxiliary social workers, youth workers and child and youth care workers. Where possible the term social workers has been replaced with social service professionals, which means that many tasks performed exclusively by social workers can now be performed by other social service professionals, easing the burden on over-extended social welfare services.<sup>24</sup>

In instances of conflicts with other legislation, the Act takes precedence over either provincial or municipal legislation if it meets certain criteria. In terms of provincial legislation these criteria are outlined in section 146 of the constitution, in terms of municipal laws the criteria are outlined in section 156 of the constitution.<sup>25</sup>

The Act recognises that a number of social and economic pressures compete for the attention of authorities. With this in mind the Act obliges organs of state to implement the provisions of the Act to the maximum extent of their available resources. This provides some prioritisation of

the needs of children. It obliges authorities to give full consideration to children's needs in their budgetary and planning decisions.<sup>26</sup> It also cements the need for all spheres of government – at national, provincial and local level, to co-operate in the development of integrated services for children.

## Chapter 2: General Principles

This chapter outlines the general principles intended to guide the implementation of laws affecting children. It also defines the 'best interests of child' standard and ensures that this standard is viewed as being of paramount importance in deciding all matters relating to children. It prioritises the needs of children with disabilities or chronic illnesses and provides children with the right to protection from cultural or religious practises that might harm them.

### Talking point

A question that is frequently asked by children is: "At what age can I ...?" They want to know when they can start working, when they can leave home, when they can consent to having sex. For a list of answers to these questions go to [www.childlawsa.com](http://www.childlawsa.com) and click on "children" in the left hand column, and then on "Ask yourself this". Once a child is a major he is considered an adult in all things. The age of majority was 21 years of age prior to the Children's Act. That meant that a person had to be 21 years of age before he or she could marry without parental consent or enter into any kind of contract without parental assistance. It is now possible to do these things at 18 years. Young people are generally positive about this, but there are some protections that have been lost, that they should be made aware of. Previously, if a person under 18 years entered into a contract without parental assistance, the minor would not be liable for any debts arising from that contract. Now, once you turn 18 a person can enter contracts by themselves, and be fully liable.

23 Harries, G, (ed) 2005, A Resource Kit for Journalists, chapter 1, Children's rights and South African Law, Media Monitoring Project and the Institute for the Advancement of Journalism, pg 10.

24 Jamieson L and Proudlock P, 2007, Children's Bill Progress Update: Changes to the Children's Amendment Bill by the National Assembly, 5 November 2007, Children's Institute, University of Cape Town, pg 7.

25 Children's Act 38 of 2005, section 3.

26 Harries, G (ed), 2005, A Resource Kit for Journalists, chapter 1, Children's rights and South African Law, Media Monitoring Project and the Institute for the Advancement of Journalism, pg 8

This chapter also promotes a child's right to access information on health care, the prevention and treatment of disease, sexuality and reproduction. It paves the way for the much publicised and often misinterpreted sections of the Act in Chapter 7, that grant children access to contraception and HIV-testing without their parents consent. The age of majority is given as 18 years old.<sup>27</sup>

### *Principles governing processes and decisions about children*

According to the general principles, all proceedings or actions that affect children must safeguard their rights and best interests, treat them fairly and protect them from any form of discrimination. If it is in the best interest of the child the child's family must have a say in matters affecting the child and a conciliatory, non-confrontational approach should be adopted in matters concerning children. It is important that delays in deciding children's matters should be avoided wherever possible and a court should avoid any decisions or actions that prolong legal and administrative proceedings regarding a child. A child, taking into account his or her age, maturity and state of development, has the right to be informed of any major decisions affecting him or her.

### *Section 7. Best interests of child standard*

This section lists all the elements that inform the 'best interests of the child' standard. It encompasses a range of factors that must be considered when a court is determining what the best interests of a child might be. The Act requires that in all instances the best interests of

the child be the paramount consideration when deciding matters concerning a child.

The elements that inform the 'best interests' standard include the relationship the child has with his or her parent or caregiver, and the attitude of the parent, guardian or caregiver towards their responsibilities regarding the child.

A court must consider the ability of a parent, guardian or caregiver to provide for the child and meet their emotional and intellectual needs. The child's need to live with and maintain contact with their family and extended family must be considered, as well as the effect any change in a child's circumstances, will have on the relationship with his or her family. A court must also take into account the needs of a child; his or her age, gender, background, physical and emotional security and development, and any disability or chronic illness the child may have. It must also recognise a child's need for a stable family environment, and for protection against physical, psychological harm or family violence.

### *Section 10. Child Participation*

A child has the right to participate in any matters that affect him or her, given his or her age and level of maturity. Any views expressed by the child must be considered when deciding a matter that affects the child.

### *Section 11. Children with disability or chronic illness*

The Act also makes special provision for children with chronic illnesses or disabilities, recognising the special needs of this particularly vulnerable group of individuals. It requires consideration to be given to enabling these children to participate

<sup>27</sup> This corresponds with the repeal of the Age of Majority Act, 57 of 1972 in Schedule 4 of the Children's Act.

in and be self-sufficient in their community, as well as providing them with the necessary support services.

### *Section 12. Social, cultural and religious practices*

Any social, cultural and religious practises that could harm a child are prohibited by the Act. This includes forced marriage, female circumcision or non-consensual virginity testing.

No child below the minimum age set for marriage (i.e 12 years for girls and 14 years for boys)<sup>28</sup> may be given away in marriage or engagement. If they are legally capable of concluding a marriage then they cannot be given out in marriage or engagement without their consent.<sup>29</sup>

The cultural practise of female circumcision or genital mutilation is outlawed entirely. Male circumcision is carefully regulated. Boys under 16 may not be circumcised unless it is for religious or medical purposes. Boys who are 16 years or older can only be circumcised if they consent to the circumcision after undergoing counselling.

#### Male circumcision

The issue of traditional male circumcision was hotly debated when parliament was passing the Children's Act. Some people felt that outlawing traditional circumcisions and not religious circumcisions was marginalising the rights of traditional cultures within South African society. The National House of Traditional Leaders for instance, felt that traditional rights were not receiving equal standing in the law.<sup>1</sup> Nevertheless, parliament decided in favour of giving male children the right to choose circumcision for themselves, provided they understand the implications of that choice.

<sup>1</sup> Gallagher, C., 2005 December 24, 'Bill puts clamp on virginity testing', The Star, pg 1.

The practise of virginity testing, while not outlawed, is governed by certain stipulations in the Act. No one under 16 may undergo virginity

testing and it may only be performed on a child older than 16 if the child consents, after undergoing proper counselling. A child who has undergone virginity testing has the right to confidentiality and no markings revealing that they have undergone testing may be left on their body.

### *Sections 14-15. Access to court and enforcement of rights*

Every child may bring a matter to court and can be assisted in bringing a matter to court. Furthermore, anyone who believes that a right or a provision in this Act has been infringed can approach a court. This includes a child, a person acting in the interests of a child, a person acting on behalf of a group or class of people or someone acting in the public interest.

### *Section 16. Responsibilities of children*

Taking its cue from article 31 of the African Charter on the Rights and Welfare of the child, the Act includes a clause on the responsibilities of children. It states that every child has a responsibility to his or her family, community and the state, with due consideration given to his or her age and ability.

## **Chapter 3: Parental Responsibilities and Rights**

The Law Reform Commission recommended that the concepts of parental power be replaced by the concept of parental responsibility.<sup>30</sup> This is intended to strike a balance between the authority parents have over their offspring and the corresponding responsibilities they have towards

<sup>28</sup> These ages are set in South African common law  
<sup>29</sup> In terms of the Marriage Act girls below 15 years of age and boys below 18 years of age can only get married with the consent of their parents and the Minister of Home Affairs.

<sup>30</sup> South African Law Commission December 2002, Review of the Child Care Act Report, Project 110, Chapter 7, pg 60-61

them.<sup>31</sup> The Commission also recommended that the terms access and custody be replaced with contact and care.<sup>32</sup> The new Act has adopted these changes to make for a more inclusive vision of parent-child relationships.

Parental responsibilities and rights are outlined in detail in this chapter. It is divided into four parts. Part one covers the acquiring and losing parental responsibilities and rights. Part two concerns the co-exercise of parental responsibilities and rights. Part three regulates parenting plans. Part four regulates the rights of children conceived through artificial insemination.

Parental responsibilities and rights include caring for, maintaining or contributing towards the maintenance of a child and functioning as the guardian of a child. Where more than one person is the guardian of a child then they can act independently and without consulting one another in exercising their rights and responsibilities regarding the child. There are however certain matters where all co-holders of rights and responsibilities must consent to certain issues affecting the child

### *Section 19-20 Parental responsibilities and rights of biological mothers and married fathers.*

The biological mother of a child is automatically accorded guardianship and parental responsibilities and rights over a child. If the biological mother is herself a child (under 18 years) then her guardian will also be her child's guardian. If, however, the unmarried father of her child is over the age of 18 years, then he may qualify for guardianship in terms of section 21 (see below). The biological father of a child automatically gets awarded parental rights over the child if he is married to the child's mother, or was married to her between the conception and birth of the child.

### *Section 21. Parental responsibilities and rights of unmarried fathers*

Under the Act the rights of unmarried fathers are better provided for than they have been in the past.

If a man lives or lived with a child's mother in a permanent life partnership at the time of a child's birth, he automatically acquires parental rights and responsibilities with regard to that child.

A man is also recognised as having parental rights and responsibilities if-

- He agrees to be identified as the child's father, **or** successfully applies to be identified as the child's father

by a court, **or** pays damages in terms of customary law for fathering a child; **and**

- He contributes or has, in good faith, attempted to contribute to the

What are the things on which both guardians of the child must agree?

- Consent to child's marriage
- Consent to child's adoption
- Consent to the child's departure or removal from the Republic
- Consent to the child's application for a passport
- Consent to the sale of any immovable property.

31 South African Law Commission, 2002, Review of the Child Care Act Report, Project 110, Chapter 7, pg 60-61,

32 South African Law Commission, 2002 Review of the Child Care Act Report, Project 110, Chapter 7,pg 60-61,

child's upbringing **and** maintenance for a reasonable length of time

The "or" and "and" conjunctions have been highlighted to show what the father will have to demonstrate. It will be sufficient if he is or was living with the mother at the time. If that does not apply, then the father must be identified as the father of the child in one of the 3 ways mentioned in the first bullet point above, and in addition must also show that he has, or has attempted to contribute to the child's maintenance and the upbringing. Paying maintenance will not be sufficient if it is the only way that the father has been involved.

It is likely that there will be cases where the mother and unmarried father cannot agree on whether the father qualifies in terms of the above requirements. In these cases the Act provides that the dispute can be solved through mediation by a family advocate, social worker, social service professional or other suitably qualified person.

A man claiming to be the biological father of a child can apply to a court for an order confirming his paternity. He can do this if the child's mother

refuses to acknowledge him as the father; she is mentally ill, untraceable or dead.<sup>33</sup>

### *Section 25. Certain applications regarded as inter-country adoption*

Related to guardianship orders granted through the High Court, is the matter of inter-country adoption. Prior to the advent of the Act it was possible for foreign couples to apply for the guardianship of a child through the High Court. This provided a loophole that enabled them to remove the child from South Africa and apply for adoptive rights over the child in their home state. In addition to concerns that this exposed children to the dangers of human trafficking, it was problematic as South Africa is a signatory to the Hague Convention on Inter-country adoption. The Convention clearly outlines a set of processes countries must follow with regards to international adoptions. Section 25 has now closed this loophole, by stating that any foreign national applying for the guardianship of a child should be viewed as attempting inter-country adoption and must follow the procedures outlined in Chapter 16 of the Act. This chapter provides for inter-country adoption, placing it firmly in the jurisdiction of the children's courts and aligns our law with the terms of the Convention.

### The question of guardianship

Guardianship orders over children remain the jurisdiction of the High Court. Guardianship rights govern the safeguarding of a child's property and the assistance of a child in legal matters, a child's marriage, adoption or his or her removal from the country. These can be assigned to either a parent or another person. The fact that these powers remain with the High Court is considered by some as a possible problem, as caregivers in rural areas who need to protect the property rights of orphans in their care cannot obtain guardianship rights without a High Court order.<sup>1</sup> The primary concern is that access to the High Court comes at a great deal of cost and difficulty for poor, rural caregivers. See further Harries, G (ed), 2005, A Resource Kit for Journalists, chapter 1, pg 10.

The case of "Baby R" caught the attention of the media in 2006 and 2007 as her case limped its way through the hierarchy of South African Courts. It ended up in the Constitutional Court which ruled that the children's court is the correct forum for inter-country adoptions. The case was referred to the Johannesburg children's court and the child was adopted by the American couple. Go to [www.constitutionalcourt.org.za](http://www.constitutionalcourt.org.za) for the judgments of 2007. The case is called AD and Another v DW and Others.

<sup>1</sup> Harries, G (ed), 2005, A Resource Kit for Journalists, chapter 1, Children's rights and south African law, Media Monitoring Project and the Institute for the Advancement of Journalism, pg 10

<sup>33</sup> This is in terms of section 26 of the Act.

#### *Section 40: Rights of child conceived by artificial insemination*

In instances where a couple or a single woman, uses the sperm or ovum of a donor, to conceive a child through artificial insemination, the child is considered to belong to that couple or woman.

A child born through artificial insemination has no claim regarding parental rights and responsibilities, on that donor.

### **Chapter 4: Children's courts**

This chapter sets out the powers and jurisdiction of all children's courts. It is divided into four parts. Part one establishes and regulates the jurisdiction of children's court. Part two governs court proceedings. Part three regulates out of court settlements, pre-hearing conferences, family group conferences and other lay forums. Part four deals with miscellaneous matters.

Jurisdiction is the legal way of describing which cases a court can hear. There are two kinds of jurisdiction: The first is geographical. For example, the children's court can hear a case regarding any child who is in or normally resides in the area that the court covers. It is where the child is that founds the jurisdiction. The other kind of jurisdiction is what kind of cases can a court hear? For example, a children's court can hear applications to determine if a child is in need of care, adoption and inter-country adoptions. It cannot hear divorces or any matters arising from divorce (such as deciding who the children will live with after divorce), nor can it decide a question of guardianship. These cases have to go the High Court.

#### *Part 1 – Section 42-47. Children's Courts and presiding officers*

A children's court has the same status as a district magistrate's court. Any magistrate's court can operate as a children's court and every magistrate becomes the presiding officer of the children's court. A children's court can adjudicate

and give orders on most matters concerning children. These may include instances of abuse or neglect of a child, cases concerning a child's support, the temporary safe-care of a child, a child's placement in alternative care, the provision of prevention and early intervention programmes and inter-country and local adoption.

When a court (other than a children's court) is dealing with a matter in which it appears that a child who is involved or affected in that matter has been abused or neglected or is in need of care and protection then that court is obliged to order a social worker to investigate whether the child is indeed in need of care and protection and the court may also make an order to the effect that the child be placed in temporary safe care if it is necessary.

#### *Section 50. Investigations*

Under section 50 the Act allows children's courts to order an investigation into a matter to enable it to make an appropriate decision regarding a child's particular case. The person conducting an investigation may enter any premises to ascertain the circumstances of a child, as well as remove the child, if necessary. He or she may be accompanied by a police officer who, in addition to the normal powers he or she has in the course of duty, has the power to enter the premises, conduct a search, question anyone, as well as remove a person from a child's home if they reasonably suspect that the person is harming or could harm the child.

#### *Part 2 – Section 55. Legal representation of children*

A children's court may order legal representation

for an unrepresented child involved in a matter, if it's in the child's best interest.. Representation is to be provided by the Legal Aid Board.

#### *Section 61. Participation of children:*

A children's court is obliged to let a child involved in a matter express his or her views and participate in proceedings if it finds that the child is fit to do so and the child chooses to do so. If a child is unable or does not want to participate in proceedings the court must ascertain why, and record the reasons of finding the child unwilling or unable to participate in the proceedings. If a child is a witness in a matter heard at a children's court, he or she must be questioned through an intermediary, if it is in the child's best interests.

What is an intermediary? Since 1991 the law has allowed children to testify via an intermediary, who is a trained person who "translates" the questions from personnel into child friendly language for the child. The intermediary and the child sit in a separate room where they can be seen either through a one-way mirror or through close-circuit television.

However if the court finds that it is in the best interests of a child, it may also order that proceedings take place without the child's attendance.

#### *Part 4 –Section 74 (read with section 56).*

##### *Publication of information relating to proceedings*

Children's court proceedings are closed to the public. A person not directly involved in the proceedings, may only attend a hearing if the presiding officer gives them specific permission to do so. Section 74 outlaws the publication of any details which reveals or may reveal the identity of a child involved in children's court proceedings, if

it is done without the permission of the court.

It is very important that journalists take note of this particular section. Contravening it is deemed an offence and a journalist who commits this offence once is liable to a fine and/or possible imprisonment for up to 10 years and those contravening this section more than once may face a fine or imprisonment of up to 20 years or both. <sup>34</sup>

However, the section does not provide an immovable bar to ever reporting on such matters. Where it would be in the public interest, a journalist could approach the presiding officer in the court and ask for his her permission to report on the matter, whilst keeping the identity of the child secret.

## **Chapter 5: Partial care**

Partial care is defined as caring for more than six children on behalf of their parents or care-givers, for a specified, temporary period during the day or night. Crèches or day-care facilities are examples of partial care services.

It excludes any services by a school as part of tuition or training, residential facilities provided by a school, such as boarding houses, and services by any medical facility providing treatment to a child.

#### *Section 77. Strategy concerning partial care.*

Giving due consideration to children with disabilities and chronic illnesses, the Minister must create a national strategy, in consultation with the ministers of Education, Transport, Finance, Health and Provincial and Local

<sup>34</sup> See section 305 of the Act.

Government that ensures an even spread of partial care facilities across the country. At a provincial level, the MEC for social development must record all the registered partial care facilities in the province, create a provincial strategy for the spread of partial care facilities in the province as well as provide a provincial profile with information on partial care facilities. This information can then be used to develop and review the national and provincial plans for partial care, on a regular basis.

According to section 87 the provincial strategy must include measures to establish and operate enough partial care facilities in the province and measures which prioritises the types of facilities most urgently needed and liaise with municipalities on the identification and provision of suitable premises.

#### *Section 78. Provision of partial care:*

MECs for social development may provide and fund provincial partial care services and facilities. These facilities must comply with the Act and must adhere to the national norms and standards set out for partial care. Any facility must also comply with the health and safety laws of the municipality in which it is based.

To qualify for funding a partial care facility must comply with the national norms and standards and any other prescribed regulation for partial care. Funding must prioritise poor and vulnerable communities that lack the necessities to provide for their children. Funding must also be prioritised to make partial care facilities accessible to children with disabilities.

#### *Section 79. National norms and standards for partial care*

National partial care norms and standards must be determined by the Minister for Social Development. The norms and standards must relate to or provide for the following:

- A safe environment for children, including sufficient space, ventilation, clean water and adequate toilet facilities, hygienic food preparation areas adequate emergency plans
- Proper care for sick children
- Safe storage for substances dangerous to children
- Adequate access to refuse removal
- Measures to separate children of varying ages
- Drawing up of health care policies and procedures

In addition to these national norms and standards any partial care facility that cares for children with disabilities or chronic illnesses must be accessible to such children and meet their specific needs. It must employ staff trained to care for disabled children; or it must train its staff to address the children's health, safety and learning requirements. They must also be trained to provide basic therapeutic interventions to such children.

#### *Section 82. Consideration of application:*

Partial care facilities must be registered, in accordance with the Act and provincial departments have 6 months within which to process an application to run a partial care facility. They must also decide on the renewal of registrations and the conditional registrations of partial care facilities within the same time frames.

The Act does allow the provincial head of social

development to aid a person in becoming compliant with the requirements for a successful application.

*Section 88. Assignment of functions to municipality:*

The provincial head of social development can assign a range of powers and duties, to a municipal manager. These powers and duties cover the registration processes of partial care applications, their consideration, cancellation, enforcement and inspection. The assignment of powers can only take place on condition that the municipality has the resources and capacity to carry out these duties. The municipal manager can then in turn delegate these functions to a social service professional within the municipality.

*Section 89. Serious injury, abuse or death of child in partial care facility*

Should a child be injured or abused at a partial care facility, it must be reported to the provincial head of social development immediately, and he or she must initiate an investigation into the matter.

If a child should die while at a partial care facility the death must immediately be reported to the child's parent, guardian or caregiver, the police and the provincial head of social development. A police official must carry out an investigation unless he or she is satisfied that the child died of natural causes.

**Chapter 6: Early childhood development**

The Act defines early childhood development (ECD) as the process of 'emotional, cognitive, sensory, spiritual, moral, physical, social and

communication development of children from birth to school going age'. ECD services are intended to promote a child's development and are provided to a child on a regular basis, before they start school, by someone other than the child's parent or caregiver.

An ECD programme is structured within an ECD service and provides learning and support appropriate to a child's developmental age and level.

*Section 92. Strategy concerning early childhood development*

The Minister is obliged to strategise and provide for a properly resourced, co-ordinated and managed ECD system for South Africa, and must consult with the ministers of Education, Transport, Finance, Health and Provincial and Local Government in doing so. Forming part of this provision, the provincial MECs for social development must provide for a provincial strategy for a properly resourced, co-ordinated and managed ECD system and must compile a provincial profile, enabling the review and development of ECD strategies..

*Section 93. Provision of early childhood development programmes*

The MEC for social development may provide and fund ECD programmes and these must comply with the Act and meet national norms and standards. Funding can only be granted if the provider of an ECD programme complies with these regulations and any other requirements that might be prescribed. Funding must also prioritise ECD programmes in poor, disadvantaged communities as well as programmes catering to children with disabilities. Both partial care

facilities and child and youth care centres, working with children up to school going age, must provide ECD programmes.

#### *Section 94. National norms and standards for early childhood development programmes*

The Minister must determine ECD national norms and standards and they must relate to the following:

- provision of appropriate developmental opportunities
- programmes aimed at helping children realise their potential
- caring for children in a constructive manner, and providing support and security
- developing positive social behaviour
- respect for and nurture of the culture, spirit, dignity, individuality, language and development of each child
- meeting the emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of children.

As with partial care the Act includes detailed provisions for the registration of ECD programmes, and also allows for certain functions to be delegated to the municipal manager.

### **Chapter 7: Protection of Children**

The state is obliged to strategise and provide for the regulation of child protection systems and organisations in Part one. National norms and standards governing child protection must also be provided for.

Everyone who has good cause to believe that a child is being abused may report it to the relevant authorities. However this chapter lists people operating in their official or professional capacity who are obliged to report suspected abuse if they

come across it.

Part two provides for the creation and maintenance of a national child protection register (NCPR). The Director – General of Social Development is obliged to keep the register and to protect the information that it contains. The NCPR is divided into two parts – A and B. Part A records specific incidents of abuse involving a child. Part B is a record of all individuals found to be unfit to work with children.

Part three governs the protective measures regarding children's health. Sensitive issues regarding children's rights to request information about and receive access to contraception as well as consent to HIV testing, without parental consent are covered here.

Processes governing the termination of parental rights and responsibilities, child headed households, the unlawful removal or detention of a child, or his or her removal from South Africa and child labour and exploitation are also included in Part four.

#### *Part 1: Child protection system*

##### *Section 105. Provision of designated child protection system*

Within the national and provincial strategies for a comprehensive child protection system, the provincial MEC's for social development must fund and provide child protection services in their province. These designated child protection services must be managed in accordance with the Act and comply with national norms and standards, and only qualify for funding if they achieve compliance.

The national department of social development, a provincial department of social development and a designated child protection organisation may provide designated child protection services.

These services include services supporting the proceedings of children's courts and the implementation of court orders.

They also include services relating to:

- prevention and early intervention
- reunification of children with their families
- the placement and integration of children into alternative care
- the adoption and inter-country adoption of children
- investigations and assessments into suspected child abuse or neglect;
- intervention and removal of children
- the drawing up of development and permanency plans for children removed or at risk of being removed from their families
- any other prescribed social work services.

#### *Section 106. National norms and standards for child protection*

The Minister must establish norms and standards in consultation with interested persons; the Ministers of Education, Finance, Health, Justice and Constitutional Development, as well as the South African Police Service.

They must pertain to:

- prevention and early intervention services
- child assessments
- therapeutic programmes
- after care

- family reunification and reintegration
- foster care services
- integration into alternative care
- adoption services
- permanency plans
- education and information
- child-headed households

#### *Section 107. Designation of child protection organisation*

The Director- General or provincial head of social development may designate an appropriate body as a child protection organisation to perform any or all provincial child protection services. The criteria that determine which organisations can be designated as child protection organisations however, have yet to be set out in the regulations.

#### *Section 110. Reporting of abused or neglected child and child in need of care and protection*

Any person, who on reasonable grounds, suspects a child is being abused or neglected can report their suspicion to the provincial department of social development, a child protection organisation or a police officer. They must substantiate their report but are not liable to any civil action by the suspect(s), if the report is made in good faith.

A range of people, operating in their official or professional capacity are obliged to report suspected child abuse or neglect to the provincial department of social welfare, a child protection organisation or police officer. They include amongst others teachers, medical practitioners, physiotherapists, psychologists, religious or traditional leaders, dentists, immigration officers and staff or volunteers at partial and child-care facilities.

In instances where a report is made to a police officer, he or she must ensure the safety of the child if the child's safety is at risk. Within 24 hours the police official must notify the provincial department of social development or a designated child protection organisation.

If a report of abuse or neglect is made to a provincial department of social development or child protection organisation, it must ensure that the child is safe, then assess the report and investigate its truthfulness. If the report is substantiated, the department must initiate proceedings to protect the child and submit the relevant details to the DG for inclusion in part A of the NCPR.

After the investigation of a report the department or the child protection organisation must inform the police of the possible commission of an offence. The inclusion of this clause is a big departure from current practise, as social workers were previously not required to report their findings to the police.<sup>35</sup>

Once an investigation into the matter has been completed, the department or the child protection organisation can decide to leave the child in their home but provide a range of interventions that address the matter. These interventions include counselling, mediation, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another professional or organisation. If it is found to be in the child's best interests a police official may be asked to remove the alleged offender from the child's home.

However, if the case requires it the child can be removed from his or her home in accordance with procedures governing the removal of children set out in Chapter 9.

## *Part 2 - National Child Protection Register*

### *Part A of Register*

This section of the Register is a record of specific incidents of abuse against children. It must contain the circumstances surrounding the neglect or abuse of a child, and is intended to protect children from further abuse or neglect. The creation of the Register will enable authorities to share information in the interests of child protection as well as establish patterns and trends of abuse.

Part A records reports of child abuse or neglect, convictions of neglect or child abuse and the findings of any children's court that a child is in need of care and protection because of abuse or neglect. It must record all the details of the child concerned, including his or her name, address, the details of his or her parents or care-giver and the details of an institution or alternative care facility like a child and youth care centre, if the incident took place there. In the case of records concerning a conviction, Part A must also contain a short account of the charges and information on the relationship between the perpetrator and the child. Where a child is found to be in need of care and protection because of abuse or neglect Part A must contain information on the child, the court's reasons for its decision that the child is in need of care and protection, the parent or care-givers details and the assistance that has been given the child.

Access to Part A of the NCPR is limited to

35 Jamieson L and Proudlock P, 2007, 'Children's Bill Progress Update: Changes to the Children's Amendment Bill by the National Assembly', 5 November 2007, Children's Institute, University of Cape Town, pg 9

relevant officials allowed to gain access to the information by the DG, and may include members of the SAPS tasked with child protection, designated child protection organisations and people conducting research on child abuse, provided they do not reveal certain details regarding a child. The disclosure of any information held in the register is also forbidden except in special circumstances such as the investigation of child abuse or in accordance with a court order to that effect.

Anyone has the right to find out whether their particulars are contained within the Register and if so why. To do this however they must provide proof of their identity.

### *Part B of Register*

#### *Section 119: Contents of Part B of Register*

This section of the Register serves as database of information on individuals found to be unsuitable to work with children. It must contain all the particulars of a person deemed unfit to work with children, including where possible their finger prints and a photograph and in the cases of a conviction of an offence against the child, like child abuse, details of their offence, their sentence and the case number.

#### *Section 120. Finding person unsuitable to work with children*

A children's court, a court deciding a criminal or civil matter and any disciplinary forum legally established to deal with a person's conduct towards a child, may find a person unsuitable to work with children.

A person convicted of the murder, attempted

murder, rape or assault of a child cannot work with children. This includes someone who is deemed mentally ill and incapable of understanding court proceedings and so cannot present a proper defence of their case in relation to such offences. It also includes someone deemed to be mentally ill at the time of the act and as such is not criminally responsible for his or her actions. A finding that someone may not work with children does not depend on the outcome of the criminal or civil proceedings involving him or her. A person may be found to be unsuitable to work with children, and have their particulars included in the Register regardless of whether they are convicted or not. If a person wishes to have their name removed from the register, they can appeal the decision or apply to have the finding reviewed in terms of section 121.

#### *Section 123. Consequences of entry of name in Part B of Register*

A person who has been listed in Part B may under no circumstances work in a position that puts them in contact with children. This includes as a volunteer or employee at any centre, facility, shelter or school that provides services to children; or as an employee of the police, local government or child protection organisation where contact with children is likely. Furthermore, section 124 requires a person whose name appears in Part B of the Register and who is employed or volunteers in a role that allows them contact with children to inform the institution they work for that their name is included in the NCPR.

#### *Sections 125; 126 and 127 Establishing, disclosing and access to information in Part B of Register*

The Act also obliges managers of child care and

other related institutions and any government office hiring a person for a role that involves contact with children, to check that the candidate is not listed in part B of the NCPR. Furthermore, anyone can apply to establish if his or her details are recorded in part B of the Register and if so, why if that person provides proof of identity.

The information contained in part B is protected in terms of access and disclosure. Only the Director – General, a provincial head of social development and designated officials and managers of designated child protection organisations dealing with foster care and adoption may have access to Part B of the Register and only certain people like people operating under the auspices of the Act or with the permission of a court may disclose information held in Part B of the Register.

### *Part 3 – Protective measures relating to health of children*

This section must be read with section 13 of the Act which allows children to access information regarding their health and the prevention and treatment of ill-health and disease, sexuality and reproduction. Part 3 provides children with the right to consent to medical treatment or procedures, HIV testing and to access contraceptives without a parent's permission on condition certain requirements are met. Without the right to access health care information children's ability to give informed consent to their own treatment will be hampered.

There has been criticism voiced in the media, that children's ability to consent to treatments and access contraceptives without parental assistance undermines the role of parents

and promotes sexual promiscuity in children. However, it is argued by some that the Act, through these provisions, addresses the realities that many South African children face. Children living in a child-headed household for instance, need access to information and treatment that will safeguard their health. Preventing their access to assistance because they have no adult carer only leaves them more vulnerable.

In response to circumstances like these, section 129 of the Act allows a child as young as 12 to consent to medical treatment and in the case of surgery, provided further that they are assisted by a parent or guardian. This section is not yet in operation

There has been much confusion in the media that this part of the Act also relates to abortions thus putting the age of consent to abortions at 12. This is however not the case as abortions are governed by the Choice on Termination of Pregnancy Act, 92 of 1996 which sets no age limitation for girls needing to terminate their pregnancy. In terms of the latter Act a minor may request an abortion but the medical professional treating her must advise her to consult with her parents or guardian. The medical professional may not refuse to terminate the child's pregnancy, if she does not want to consult her caregivers.<sup>1</sup> Thus, a pregnant girl of any age may consent to an abortion provided she can give valid consent which requires her to fully understand what she is consenting to, that she gives consent freely and that she gives informed consent. If the child does not have the capacity or the competence to give informed consent then an abortion without parental assistance may be refused on this ground. Go to [www.constitutionalcourt.org.za](http://www.constitutionalcourt.org.za) and click on the judgments from 2005. See *Christian Lawyers Association v Minister of Health and Others (Reproductive Health Alliance as Amicus Curiae 2005 (1) SA 509 (T)*

<sup>1</sup> Choice on Termination of Pregnancy Act, no 92 of 1996, section 5.

*Section 129 of the Children's Act also outlines the circumstances under which someone other*

than a child or their parent or guardian may consent to the medical treatment or surgery of a child. For example the superintendent of a

hospital may consent to the medical treatment or a surgical operation on a child, in an emergency situation where it is necessary to save the child's life and time cannot be wasted in order to get parental consent. The Minister of Social Development may consent if a parent or guardian unreasonably refuses consent; is incapable of giving consent; cannot be traced or is deceased. Furthermore the High Court or a children's court may consent to surgery or medical treatment for a child, if anyone who has the power to consent (i.e. the child or their parent or guardian, caregiver) withholds consent or refuses consent. for the operation or treatment. As always, all allowances made in the Act require that the best interests of the child be the paramount consideration when deciding on a matter.

*Sections 130; 132 and 133: HIV-testing: (sections are in operation)*

No child may be tested for HIV except if it is in their best interests or if it is to determine whether a medical worker or another person, may have contracted HIV after coming into contact with a child's bodily fluids. In the latter instance, if the person is not a medical professional, a test can only be done with an order of court.

A child may consent to an HIV test, without parental consent if they are 12 years old. A child under 12 can also consent to a test provided that they have the capacity to understand the implications of the test.

Where a child is under 12 and is not sufficiently mature to understand the implications of an HIV test, consent can be given by the child's parent or guardian, the provincial head of social development, the head of a hospital and a children's court.

Although the Act does not make this explicitly clear, but if a child is above 12 and incapable of giving informed consent then the persons indicated above can also consent on behalf of the child. This interpretation of section 130 results from South Africa's common law requirements of giving valid consent.

Before and after an HIV test is conducted however, the child must undergo counselling. If a child's parent or guardian gave consent for a test, they too must be given counselling.

No one may reveal a child's HIV/Aids status without consent by the child or other authorised person unless it is required to implement the Act or is required in the course of legal proceedings or a court order has been obtained to that effect.

*Section 134. Access to contraception (section is in operation)*

Children have the right to access condoms, and no one may refuse to sell condoms to a child above 12 or to prevent a 12 year old from accessing condoms where they are available for free. Children may also request and access other forms of contraception, without parental consent, if they are over 12 and they have been given medical advice and a medical examination. It is a child's right to have his or her request for contraception kept confidential, however this is subject to section 110 of the Act which requires certain professionals to report suspected abuse of a child. So although a child's right to confidentiality must be respected, if a 12 year old child goes to a clinic and requests contraceptives and the nurse suspects that the child is being sexually abused the nurse must notify the relevant people.

*\*\*Part 4: Other protective measures*

*Section 135. Application to terminate or suspend parental responsibilities and rights*

The DG, provincial head of social development or a designated child protection organisation can apply to a High Court, divorce court or a children's court to have a parent's rights and responsibilities over a child, terminated, suspended, transferred or curtailed.

Such an application can be brought without the parent or care-giver's consent if the child:

- is older than seven and has been in alternative care for 2 or more years;
- is older than three, younger than seven and has been in alternative care for more than a year; or
- is three or younger than three and has been in alternative care for more than 6 months.

*Section 136. Consideration of application to terminate or suspend parental responsibilities and rights.*

When deciding whether or not to suspend or terminate a parent's or other person's rights over a child the court must be guided by the general principles outlined in chapter 2. This includes the best interests of the child principle and children's right to participate in matters affecting them.

The court must also consider: the child's need for a stable, permanent family environment; the success or failure of any prior attempts to reunify the child and the person whose rights and responsibilities over the child is challenged; and their relationship with one another. It must also consider what, if any, contact between the child and parent or caregiver has occurred in the year preceding the application. The likelihood of the child being adopted or placed in another form of alternative care must also be taken into account when deciding the matter.

These provisions are quite far-reaching, and there was no similar set of provisions under the law prior to this Act.

*Section 137. Child-headed households*

The Act ensures that child headed households can access social assistance. No-one may exclude child-headed households from collecting any grant, subsidy, aid or other assistance based on the fact the household is headed by a child.

Rather than separate children living in the care of an older sibling and placing additional strain on the welfare system, child headed households may be recognised in certain circumstances.. For example, if the parent/guardian or care-giver has died or has abandoned the children in the household or the role of caregiver is assumed by a child 16 years or older and it is in the best interests of all the children in the household. An adult must be designated by a children's court, an organ of state or an NGO to supervise and guide the household. The adult must perform their prescribed duties and be deemed fit and proper to work with children. The child heading the household or its supervising adult may collect and administer any social security grant or any social assistance that the children are entitled to.

The child heading the household can make all the day-to-day decisions for the household. The adult supervisor cannot make any major decision affecting the household without consulting the child heading the household or the other children taking into account their age and maturity.

The children may report their supervising adult if they feel he or she is not fulfilling their duties.

Child-headed households are a South African reality. When these provisions were debated in parliament, there was ambivalence about whether recognition should be given to child-headed households, because children caring for children is not a model that should be promoted. However, children who are orphaned are sometimes left with a house to live in, and this is likely to be the major part of their inheritance. If they are moved to live with other relatives or foster carers, they may lose the house. These kinds of situations have given rise to the idea that children could remain in the house under the care of an older child. The original draft of the Bill did not include the requirement that the child-head of the household should be at least 16 years, and the inclusion of this age limit at parliament is an indication of the politicians' unease. However, the provision is a pragmatic demonstration of the law reflecting reality and responding in a creative way to orphans and vulnerable children.

### *Section 141. Child labour and exploitation*

No one may use, procure or offer a child for slavery or similar practises including debt bondage servitude, serfdom, forced or compulsory labour.

No one may use procure, offer or employ a child for commercial sexual exploitation, trafficking or child labour. A social worker or social services professional that becomes aware of any of the above must report it to the police and any occurrences of child labour must be reported to the labour department. Any contraventions of this section are viewed as an offence and liable to prosecution.

## **Chapter 8: Prevention and early intervention**

Prevention programmes are intended to assist families in addressing problems that occur in a family environment, which if not dealt with can lead to statutory intervention. If a family is struggling to cope with the needs and behaviour of their children, prevention and early intervention programmes are intended to help them find ways to cope and circumvent harsh discipline, abuse

or neglect. It should be noted that the previous section 139, which dealt with the discipline of children and banning corporal punishment has been deleted and replaced. The clause in section 144, 'promoting positive, non-violent forms of discipline' has been added in its stead.<sup>36</sup>

Early intervention programmes are aimed at families with children who are vulnerable to or at risk of harm or removal to alternative care.

### *Section 144. Purposes of prevention and early intervention programmes:*

Prevention and early intervention programmes must focus on:

- Preserving a child's family structure
- Developing the skills and capacity of parent's and caregivers, including parents of children with chronic illness or disabilities, to protect the best interests of their children, including promoting positive, non-violent forms of discipline.
- Promoting appropriate interpersonal familial relationships
- Providing psychological, rehabilitation and therapeutic programmes for children
- Preventing neglect, exploitation, abuse or inadequate supervision of children and prevent any other failures to meet children's needs
- Preventing the recurrence of family problems that may harm or hinder a child's development.
- Diverting children from alternative care systems and the criminal justice system

<sup>36</sup> Jamieson L and Proudlock P, 2007, Children's Bill Progress Update: Changes to the Children's Amendment Bill by the National Assembly, 5 November 2007, Children's Institute, University of Cape Town, pg 10

- Avoiding the removal of children from their families

Such programmes must encourage the participation of parents and caregivers and give them the tools to identify and seek solutions to their problems. Programmes can include helping families obtain basic necessities, as well as empowering them to obtain necessities for themselves. They can also include helping families gain information on accessing services and assisting families who have a terminally ill family member.

In terms of sections 145 and 146 of the Bill the state is obliged to strategise and provide for prevention and early intervention programmes at both nation and provincial level. This includes funding of such programmes and prioritising services in poor, disadvantaged communities.

*Section 147. National norms and standards for prevention and early intervention programmes*

National norms and standards, still to be drawn up by the Minister, must relate to:

- Outreach services
- Education, information and promotion
- Therapeutic programmes
- Family preservation
- Skills development programmes
- Diversion programmes
- Temporary safe care
- Programmes assessment

*Section 148. Court may order early intervention programmes*

In line with concerns over the need to keep children in a stable, family environment, the

Act allows a children’s court to order early intervention programmes, in a bid to avoid the removal of a child from their home. Intervention services may be provided by the department of social development, a designated child protection organisation or any other suitable person or organisation. The court can also order the child and his or her family to participate in a family preservation programme. However the court cannot make such orders if the child’s safety and well-being is at risk.

The order to provide or participate in an intervention programme is only for a period of 6 months. Once the expire date is reached and the case resumes, the court must decide whether the child should be removed or whether the family should continue with the programme.

A designated social worker must file a report detailing all the prevention and early intervention programmes that the child and their family have participated in, which the court must consider when reviewing the matter.

**Chapter 9: Child in need of care and protection**

This chapter is divided into two parts. Part one outlines the identification of a child ‘in need of care and protection’. Part two covers children’s court processes and the orders the court may make regarding a child in need of care and protection.

*Part 1 – Section 150. Child in need of care and protection:*

A child is in need of care and protection if the child

- has been orphaned, abandoned,

exploited, abused or neglected

- exhibits uncontrollable behaviour
- lives or begs on the streets
- is addicted to drugs, alcohol or medication and without access to treatment or psycho-social support
- lives in or is exposed to circumstances that may harm their physical, mental or social well-being.

A child may be in need of care and protection if the child

- is a victim of child labour
- is a child in a child headed household

#### *Section 151. Removal of child to temporary safe care by court order*

If a court is concerned that a child may be in need of care and protection it is obliged to order an investigation by a designated social worker to determine whether the child is in fact in need of care and protection. The court can also order the child to be removed to a temporary safe care facility if it is necessary for the child's safety and well-being.

#### *Section 152 Removals without a court order*

In terms of the Act a designated social worker is a social worker in the employ of the department of social development, a municipality or a government sanctioned child protection organisation.

To prevent abuses in the law the removal of a child without a court order is carefully regulated.<sup>37</sup>

Only a designated social worker or police officer may remove a child, without a court order, if he or she believes the child is in serious danger of harm and circumstances do not allow the social worker or police official time to obtain a court order. The relevant authorities and the child's parent or guardian must be informed of the removal by the social worker or police official. Any misuse of this power by a social worker or police officer constitutes unprofessional and improper behaviour. If such an abuse of power takes place in the name of a child protection organisation, then this is grounds for an investigation and can result in the withdrawal of the organisation's designation.

#### *Part 2 – Section 156. Orders when child is found to be in need of care and protection*

A children's court, after considering the report of the social worker and other evidence, will decide whether a child is in need of care and protection (on one of the grounds listed in section 150). If this child is in need of care and protection, the court may order a range of interventions that can aid the child. These include placing the child in temporary safe care, foster care or in a child and youth care centre if the child has no parent or care-giver or they are unable or unsuitable to care for the child. The court can also order that a child be placed in a child and youth care centre providing a secure care programme designed for children who cannot be controlled by their parent or caregiver or if they exhibit criminal behaviour. The court can also order the child be placed in partial care, ostensibly crèche or day care, if it finds that a parent cannot care for the child during

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children from their homes. South African Law Commission, 2001, Discussion Paper 103, Project 110, Review of the Child Care Act, Executive Summary, ix - x

37 The SA law commission noted with concern in its report on the Child Care Act, that in some instances officials even in non-emergency situations were conducting 'emergency' removals of

certain times of the day. If a child is chronically ill or disabled the court can order the placement of that child in a facility that can provide the child with the relevant care. Children addicted to drugs or alcohol may also be placed in a drug rehabilitation programme by an order of court. The court may also order that a child remain within the child headed household provided that it is in the best interest of the child and that adult supervision is provided.

*Section 157. Court orders to be aimed at securing stability in a child's life*

All children need stable meaningful relationships with parents or other significant people in their lives to grow and develop properly. With this premise in mind, before a children's court makes a decision to remove a child from his or her parent or guardian, it must consider alternatives that would secure stability in that child's life.

The court may consider amongst other things, the temporary removal of a child to alternative care but with a view to eventual reunification of the child with his or her family, if it is in the child's best interests. It may also consider leaving a child in the care of his or her parents or caregiver under the supervision of a social worker. Another option is to make a child available for adoption.

Before the court can order a child be removed from his or her carers, it must obtain and consider a report by a designated social worker. This report must assess the needs of the child, list any interventions that the family has previously undergone and contain a documented permanency plan for that child. A permanency plan documents measures to achieve stability in a child's life, considering their age and developmental needs.

In all of these circumstances the court must consider what the best interests of the child are and what would achieve the greatest level of stability in his or her life, to ensure their well-being and emotional and intellectual development.

*Section 158. Placement of child in child and youth care centre*

Placing a child into an institution like a child and youth care centre should be a last resort for the court. If it is necessary however, the court must first determine which residential programme would suit the child best and then place the child in the centre that offers such programmes to best meet the needs of the child. The head of social development must then place the child in the centre as ordered by the court taking into account, among other things, the permanency plan for the child..

The order given by a children's court in section 156 lapses after 2 years or after a shorter period as indicated in the court order and can be extended but such an order does not apply once a child has exceeded 18 years of age..

**Chapter 10: Contribution orders**

One of the orders that a children's court is empowered to issue is a contribution order. A contribution order has the same effect as a maintenance order issued in terms of the Maintenance Act, of 1963, and the Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act of 1989.

A respondent can be ordered to pay a lump sum or recurrent sum of money towards the

maintenance and care of a child removed from their family and placed in alternative care.

## **Chapter 11: Alternative care**

Alternative care means foster care, placement in a child and youth care centre or temporary safe care. A child cannot remain in temporary safe care for longer than six months, without a court order placing them in alternative care. Places of safety established under the Child Care Act, are deemed to be providers of temporary safe care under this Act.

### *Section 168. Leave of absence*

A child must get permission for a leave of absence from alternative care from the manager of a child and youth care centre where they have been placed, or the person into whose care they have been placed, a foster parent for example. A child in temporary safe care may only be granted a leave of absence by the provincial head of social development. If a designated social worker is supervising a child in alternative care only that social worker may grant the child time away. Those authorised to grant the child a leave of absence may at any time cancel that child's leave of absence, and must request the child's immediate return to their place of alternative care.

### *Section 170. Child absconding from alternative care*

A police official or designated social worker may apprehend a child who has run away from alternative care, or who has not returned from a leave of absence. If they have reason to believe a child is being hidden at certain premises, they are allowed to enter and search the place without a warrant.

On apprehending a child, a police officer must ensure that they are safe and free of potential harm. They must then notify the department of social development that the child has been found and what has been done with regard to the child.

The child must immediately be brought before the presiding officer of a children's court (in the area where he or she is), and may be placed in temporary safe care until such time as the child can appear before a presiding officer. The presiding officer must inquire into why the child absconded from alternative care. If the presiding officer believes there is good cause for the child to have escaped alternative care, he or she may order that the child not be returned to their former carer pending action by a provincial head of social development.

### *Section 171. Transfer of child in alternative care:*

Provincial heads of social development may transfer a child from one youth care centre to another or from one person in whose care the child has been placed to another person. This must however be done in writing. If the transfer is across provinces it must be done with the approval of the head of social development in the receiving province. Before a transfer order can be made, a designated social worker must consult with the child; their parent, guardian or caregiver; the centre or person with whom the child has been placed; and the centre or person to whom the child is being transferred.

If the provincial head of social development is transferring a child to a less secure form of alternative, he or she must be sure that the transfer will not compromise the safety or well-being of other children staying there.

Any transfer order that moves a child from the care of a person to a child and youth care centre, or to a more secure or restrictive centre, may only be done with the approval of a children's court.

*Section 172. Change in residential care programme*

A provincial head of social development may decide that a child in a child and youth care centre may be released from a residential programme; that another residential programme be applied to the child; or that an additional programme be applied to the child.

As with transfer orders, any such order must be ratified by a children's court if the residential programme includes secure care or an increase in the security level of the child current programme.

*Section 174. Provisional transfer from alternative care*

If it is in the best interests of a child, a provincial head of social development may order that a child be transferred from one form of alternative care to another less restrictive form of care, for a 6-month trial period. A provisional transfer can only be ordered if the best interests of the child have been assessed and, if applicable, procedures to reunite the child with his or her family have been followed. A report by a designated social worker on the assessment and reunification procedures must be submitted and examined by the provincial head of social development before a transfer can be made.

Provisional transfer must be managed by a designated social worker to ascertain the

feasibility of family reunification for the child; integration into another family or transfer into any other type of alternative care.

The provincial head of social development must revoke the transfer if the child requests it and the social worker on the case advises it. The placement can be confirmed, or the child's discharge from care be ordered, at any time during the trial period.

*Section 175. Discharge from alternative care*

If it is in the child's best interest the provincial head of social development may discharge a child from alternative care. This can only be done after consideration of a designated social worker's assessment and report on the child's best interests and processes undertaken to reunite the child with his or her family.

*Section 176. Remaining in alternative care beyond age of 18 years*

A child is entitled to remain in alternative care until the end of their eighteenth year. Following an application by the person placed in alternative care the provincial head of social development can allow him or her to remain in alternative care until the age of 21, if the current alternative caregiver is willing and able to care for the applicant and it is necessary for the person to remain in care to complete their education or training.

*Section 178. Serious injury, abuse or death of child in alternative care*

If a child is abused or injured while in alternative care, the management of the child and youth care centre or organisation, or the person with whom the child has been placed, must report

the incident to the provincial head of social development. The provincial head must then institute an investigation into the matter.

If a child dies in alternative care the management of the centre or the person with whom the child has been placed must report the death to the child's parent or guardian, a police officer, the provincial head of social development and the social worker dealing with the case. The police officer must initiate an investigation unless they are certain the child died of natural causes.

## **Chapter 12: Foster Care**

A child is in foster care if he or she has been placed with a foster parent (i.e. not the child's parent or guardian) through an order of court or an alternative care transfer order. Temporary safe care and placement in a child and youth care centre are not viewed as foster care placements.

A children's court may place a child into foster care with a family member, a person who is not a family member, or a registered cluster foster care scheme.

### *Section 181. Purposes of foster care*

Foster care is aimed at providing children with a safe, healthy, supportive environment. It promotes permanency planning goals, first towards family reunification, or if this is not possible, connects children to safe, nurturing and permanent family environments. It aims to respect the cultural, ethnic and community diversity of individuals and families.

### *Section 182. Prospective foster parents*

The steps needed to determine whether a child is in need of care and protection (chapter 9) must be followed before a child can be placed into foster care.

A prospective foster parent must:

- Be fit and proper to care for a child
- Willing and able to take responsibility of caring for the child
- Have the capacity to provide for the child's growth and development
- Be assessed by a designated social worker to ensure the above.

### *Section 183. Cluster foster care*

A cluster foster care scheme must be run by a non-profit organisation registered in terms of the Nonprofit Organisations Act, 71 of 1997. The organisation and the scheme it runs must comply with all prescribed legal requirements; the organisation must have permission from the provincial head of social development to operate a cluster foster care and the scheme must be registered. The provincial head of social development must monitor the scheme's management.

Cluster foster care is something new, and it reflects the effort to ensure that the Act is responsive to the increased number of orphans living in South Africa. Cluster foster care is a sort of professionalised form of care, in which children are placed with different foster carers or families, but those families are then linked to professional support and services. The models are still being developed on the ground.

### *Section 184. Determination of placement of child in foster care*

Before a child can be placed in foster care a designated social worker must submit a report to the children's court on the child's cultural,

linguistic and religious background, and the availability of prospective foster parents with a similar background.

A child may be placed with a person who has a different societal background to the child, but only if there is an existing bond between that person and the child; or if a person of a similar background cannot be found.

*Section 185. Number of children to be placed in foster care per household*

A foster care household may not accommodate more than 6 children, unless the children are blood relations or, the court believes it is in the best interests of all the children or the children are in a registered cluster foster care scheme.

*Section 186. Duration of foster care placement*

If a child has been in foster care for more than two years, a children's court can order, with a view to creating stability in the child's life that no further social work supervision and reports are required and that the placement can continue until the child is 18 years old.

It can also extend the foster care placement of a child with a family member beyond the 2 year limit for alternative care orders, if the child has been orphaned, abandoned by his or her parents or family reunification is impossible and it is in the child's best interests.

None of these orders however exclude the fact that a social service professional must visit the child at least once every two years to monitor the placement.

*Section 187. Reunification of child with biological*

*parents*

If it is possible and in a child's best interests, the court's foster care placement order must provide family reunification services with the child's biological parents, facilitated by a designated social worker. If family reunification is not achieved the designated social worker must submit a report to the children's court, explaining why it has not happened and suggesting ways to stabilise the child's life. The court can then order reunification services to continue or to stop them if reunification is not possible.

*Section 188. Responsibilities and rights of foster parents*

A foster parent's rights and responsibilities are subject to any order of the children's court, anything that might be in the regulations on rights and responsibilities; any other provisions of the Act or a foster care plan drawn up between a child's parent or guardian and their foster parent.

A foster parent cannot make major decisions regarding the child, without considering the child's views and the views of his or her parent or guardian. If a child has been abandoned, orphaned or family reunification has failed, a children's court can assign parental responsibilities and rights to a foster parent.

*Section 189. Termination of foster care*

Foster care can be terminated where to do so is in the best interests of the child concerned. When considering terminating a foster care placement the court must look at the relationship that exists between the child and his or her biological parent if the parents want the child back as well as relationship the child has with the foster parent

and foster family. It must also consider the prospects of achieving permanency in the child's life by returning the child to the biological parent, leaving the child with the foster parent, placing the child in other alternative care or adoption.

### Chapter 13: Child and Youth Care Centres

This chapter is divided into three parts. Part one concerns the establishment and registration of child and youth care centres. Part two governs their operation and management; while part three concerns miscellaneous matters.

Child and youth care centres must provide residential care to more than 6 children. The following are not child and youth care centres: partial care facilities; drop-in centres; boarding school or any other school affiliated residential programme; prison or any other education related facility.

Child and youth care centres must offer therapeutic programmes for the residential care of a child outside the family home, which may include programmes for

- the reception, care and development of children outside of their family environment,
- the reception, care and development of children on a shared basis, between the centre and a child's parent or other person with parental rights and responsibilities

- the reception and temporary care of a child awaiting placement
- early childhood development
- reception and temporary care of children to protect them from abuse or neglect
- reception and temporary safe care of trafficked, commercially sexually exploited and street children
- the reception and temporary safe care of children for the purposes of assessing and observing them, providing them with counselling and other treatment and assisting a child in family and community reintegration
- reception, development and secure care of children awaiting trial or sentencing or admitted under an order of court

• the reception, development and secure care for children with behavioural, psychological or emotional difficulties

In addition to residential care programmes a child and youth care centre can offer programmes like drug rehabilitation programmes and psychiatric treatment for children.

To offer these types of programmes a suitably qualified person must assess the programmes content, and the provincial head of social development must approve it.

“Child and youth care centre” is a new name, which includes within its ambit facilities such as “places of safety”, “children’s homes”, “secure care facilities” “schools of industry” and “reform schools”. Although these facilities do not all offer the same services, they will all be referred to as child and youth care centres. The services that they provide are captured in the “programmes” that they offer. It is common for newspaper reports to refer to “orphanages”. Actually, neither the past or present law describes any facility in this way. It is generally rather inaccurate, because few facilities house only children who are orphans. Many children in child and youth care centres have parents but for some reason their parents cannot care for them, or they are not permitted to do so due to previous acts of abuse or neglect.

*Section 192. Strategy to ensure sufficient provision of child and youth care centres*

The Minister must provide for an inclusive national strategy, consulting with other, relevant departments, to ensure an appropriate spread of child and youth care centres across the country particularly taking into account children with disabilities and chronic illness. Provincial MECs for social development must provide a provincial strategy and profile to ensure properly resourced, coordinated and managed child and youth care centres. The provincial head of social development must keep a record of all centres in the province and what types of programmes they offer.

#### *Section 193. Provision of child and youth care centres*

Child and youth care centres must be funded by the provincial MEC for social development from relevant government funds and must be managed in accordance with the Act and the national norms and standards. Any centre must also operate in accordance with the regulations required by the municipality it is situated in. No centre may be funded if it does not comply with national norms and standards.

#### *Section 194. National Norms and Standards for child and youth care centres*

National norms and standards must relate to:

- A residential care programme
- Therapeutic programmes
- Developmental programmes
- Permanency plans for children
- Individual development plans
- Temporary safe care
- Protection from abuse and neglect
- Children's assessment
- Family reunification and reintegration

- Aftercare
- Provision and access to health care
- Access to education and early childhood development
- Security measures for child and youth care centres
- Security measures and measures to separate children in secure care programmes from other children

#### *Part 1: Establishment of child and youth care centres*

##### *Section 195. Establishment of child and youth care centres by organ of state*

Social Development MECs for each province must provide child and youth care centres for that province.

##### *Section 196 Existing government children's home, place of safety, secure care facility, school of industry and reform school*

All the above establishments will be viewed as operating under the auspices of the Act as soon as the provisions become operational. Schools of industry and reform schools under the control of the Education Department will become the responsibility of the provincial department of social development within two years of this chapter's commencement. The Education Department must provide schooling at former government schools of industry and reform schools. All existing government homes, places of safety, secure care facilities, schools of industry and reform schools must register as a child and youth care centre within 2 years of the commencement of this section.

##### *Section 197. Establishment of child and youth*

*care centre*

National and provincial state departments, responsible for Social Development, a municipality or an accredited organisation may operate a child and youth care centre. They must register it; ensure it is managed in compliance with the Act and the national norms and standards and meets the legal requirements and regulations of the municipality in which it is located.

*Section 198. Existing registered children's homes and registered shelter.*

Existing privately operated children's homes registered under the Child Care Act are deemed as being registered under the new legislation for a full five years after the commencement of this section of the Act unless the registration is withdrawn. An existing registered shelter must register as a child and youth care centre within a five year period from the date this section becomes operational.

*Section 200. Consideration of application*

All applications for the registration of or renewal of registration of a child and youth care centre must be made to the provincial head of social development who must make a decision regarding the application within 6 months and issue a certificate of registration or renewal for successful applicants. The provincial head of social development must consider whether the centre complies with the norms and standards and municipal requirements, the applicant is a fit and proper person and that they have the necessary skills, funds and resources to run the centre. He or she must also consider that each person employed or assisting at the centre is

a fit and proper person and that they have the necessary skills to work there. A designated social worker must assess the centre and submit a report to the provincial head of social development for examination.

*Section 203. Cancellation of registration*

The state has the power to cancel or suspend the registration of a centre if it fails to comply with any of the requirements in section 200; conditions attached to the registration; registration holder or other person working at the centre becomes unfit to work at the centre or other requirements set out in the Act. However it can aid a registration holder to become compliant with the requirements, in order to have the registration reinstated.

The task of registering all the existing facilities, as well as any new applications that may be placed before the authorities, is going to be a huge one. On the one hand, it is clearly important for the state to register all such facilities, and for children only to be placed in registered centres. On the other hand, there are many service providers caring for children who have not previously had their facilities registered as there was no formal process required in the past.

*Part 2: Operation and management of child and youth care centre*

*Section 208. Management board*

Each child and youth care centre must have a management board of between six and nine members. The Act provides for how the appointments are done.

All relevant stakeholders, including members

of the community that the centre is located in, must have equal representation on the board. All board members must be suitable to work with children. A children's forum made up by children resident in the centre must form part of the board to ensure the children's participation.

*Section 209. Manager and staff of child and youth care centre*

A manager and sufficient number of staff must be appointed to operate the child and youth care centre. The person appointed to manage the centre must have the requisite skills and training and must be deemed fit and proper person for the role.

*Section 211. Quality assurance process:*

The provincial head of social development must see that a quality assurance process is in place to monitor the operation of a child and youth care centre. The process must follow the format below:

- A team connected to the centre must do an internal assessment of the centre
- An independent team must then conduct an external assessment of the centre
- Both teams must then decide upon an organisational development plan for the centre
- An external mentor must then be appointed by the independent team to see that the plan is put in place by the centre.

Once this process is complete, the board must submit a copy of the organisational development plan to the provincial MEC for social development.

Quality assurance did not appear in any statute prior to the Children's Act. However, this important way of checking on what is happening in such facilities has been in practice for a few years. It has also been recognised by the courts. Go to [www.childlawsa.com](http://www.childlawsa.com), and look for Centre for Child Law and others v the MEC for Education, Gauteng, and others. It tells the story of an application brought on behalf of boys in Luckhoff School of Industry who were being accommodated in Spartan conditions, without proper bedding in the middle of winter. Justice Murphy wrote a hard-hitting judgment, ordered a sleeping bag for each boy in the short term, and a developmental quality assurance process as a medium term measure.

## **Chapter 14: Drop-in-Centres**

*Section 213. Drop-in centres*

A drop-in centre is a place providing basic services to vulnerable children. A drop-in centre must provide basic services such as food provision, school attendance support, personal hygiene assistance or laundry services. It can also provide a range of programmes including:

- Guidance counselling and psychological support
- Social and life skills
- Educational programmes
- Recreation
- Community services
- School holiday programmes
- Primary health care services in association with local clinics
- Referral services to social workers or social service professionals
- Promote family preservation and reunification
- Computer literacy
- Outreach services; and
- Prevention and early intervention programmes

*Section 214. Strategy concerning drop-in centres*

The Minister must draw up a national strategy to provide for drop-in centres across the country

giving due consideration to children with chronic illness and disabilities.

The MEC for social development must ensure a similar provincial strategy exists and make a record of all drop-in centres that operate in the province. He or she must ensure that a provincial profile exists to help develop and review both national and provincial strategy.

#### *Section 215. Provision of drop-in centres*

The MEC for social development using relevant funds may provide and fund drop-in centres for his or her province.

Drop-in centres must be managed and maintained in accordance with the Act; comply with the required national norms and standards for drop-in centres and comply with municipal laws in the area where they are located in. Drop-in centres must comply with national norms and standards and other prescribed requirements to qualify for government funding. Funding must be prioritised for poor and disadvantaged communities and for making the centre accessible to children with disabilities.

#### *Section 216. National norms and standards for drop-in centres*

National norms and standards, determined by the Minister in regulations, must ensure the following:

- A safe environment for children
- Safe drinking water and a hygienic area for the preparation of food
- Hygienic toilet facilities and access to refuse removal services

Drop-in Centres have to be registered, and the processes regarding application are set out in full

in sections 217-222 of the Act.

#### *Section 224. Record and inspection of and provision for drop-in centres*

The provincial head of social development must keep a record of all drop-in centres in the province and regularly inspect these centres to ensure that the provisions of the Act are met.

The provincial strategy providing for drop-in centres must include measures to establish sufficient drop-in centres across the province, prioritise the types of centres most urgently needed, as well as seek out and provide suitable premises. Certain functions can be assigned to municipalities.

#### *Section 226. Serious injury, abuse or death of child in drop-in centre*

If a child is injured or abused while at a drop-in centre the provincial head of social development must be informed and he or she must then order an investigation into the matter.

If a child dies at a drop-in centre, the child's parent or guardian, a police official and the provincial head of social development must immediately be informed. The police officer must begin an investigation into the matter unless he or she is satisfied that the child died of natural causes.

### **Chapter 15: Adoption**

Children's courts govern all adoption procedures, including inter-country adoption. The Act creates a more inclusive notion of 'family', and as such it allows a range of people to jointly adopt a child,

rather than limiting joint adoption to a traditional husband and wife partnership. A same sex couple, in a stable life partnership can adopt a child. In fact any persons sharing a household and forming a family unit can adopt a child. Adoptions across racial, religious and cultural background are also permitted by the Act, should this be in a child's best interests. A children's court must however take the religious and cultural background of both the child and the prospective parents into consideration when deciding on an adoption placement. By broadening the scope of people who qualify to adopt, the Act increases the opportunities for children to be placed in stable, loving homes.

The development of the law relating to adoption by same sex adoption couples can be traced back to the Constitutional Court case of *Du Toit and Another v Minister of Welfare and Population Development and Others* 2003 (2) SA 198 (CC). In that case a same-sex couple wanted to adopt a child as a couple. The law allowed a single person to adopt, or a married (hetero-sexual couple). The Court found that this was discriminatory, and that it was not in the best interests of the child. The relevant section of the old Child Care Act was thus struck down. The Children's Act has underscored that development, and allows for recognition of different forms of family in which children may be placed for adoption.

#### *Section 230. Child who may be adopted*

Adoption may only take place if it is in the best interests of the child, the child is an orphan with no guardian or caregiver or the whereabouts of the child's guardian cannot be established. A child is also adoptable if he or she has been abandoned, abused or neglected or the child needs permanent alternative placement.

#### *Section 231. Persons who may adopt child*

Any adult who meets the requirement of the Act can adopt a child, including people in a permanent domestic life-partnership or any other

people forming a permanent family unit.

Prospective parents must be over 18 years; fit and proper people, willing and able to carry out parental rights and responsibilities in respect of the child, and must be assessed by an adoption social worker to check that they comply with the requirements. When conducting this assessment the social worker may take the cultural and community diversity of both the child and the prospective parents into account.

The Act explicitly states that a person's financial status is not an acceptable reason for disqualifying them from adopting a child. It carries this provision further by saying that anyone who adopts a child may apply for social assistance if needs be.

When a child becomes available for adoption, either a child's biological father or their foster parent may be considered as a prospective parent in the application.

#### *Section 232. Register on Adoptable Children and Prospective Adoptive Parents (RACAP)*

The RACAP must be created and maintained by the D-G and record the details of all children available for adoption. If prospective parents meet all the requirements qualifying them to adopt a child, and they are citizens or permanent residents in South African, they can be registered as prospective adoptive parents in the RACAP.

#### *Section 233. Consent to adoption*

Adoption can only take place if each parent and/ or guardians of the child has given written consent. A child's consent is required if the child is over ten, or younger, if they are deemed able

to understand the implications of their consent. Before consent is granted the child and his or her parent or guardian must undergo counselling by the adoption social worker managing the case. Should a parent want a particular person to adopt his or her child, they must declare their preference along with their consent. A person who has consented to a child's adoption has 60 days to withdraw that consent.

The Act does outline instances where consent to adoption is not required in section 236. For example if a parent is deemed incompetent due to mental illness, they have abused or neglected their child or have had their parental rights revoked by a court, their consent is not a prerequisite in adoption proceedings.

The rights of unmarried fathers to consent to the adoption of their children is now firmly reflected in the Children's Act. However, only a few years ago unmarried fathers had no such rights, the Child Care Act did not require an unmarried father to even be notified about the adoption of his or her child. Laurie Fraser challenged the law, and his lengthy legal battle through three tiers of the courts proved successful: the Constitutional Court ruled that the lacuna in the law was indeed unconstitutional, and directed that the law must change. However, by that time Fraser's son had been living with his adoptive parents for several years, and the Court ruled that it would not be in the child's best interests to have him returned to his biological father. So Fraser changed the law for all unmarried fathers, but did not succeed in getting his own son placed in his care.

#### *Section 234. Post adoption agreements*

Open adoptions are allowed for under the Act, and are governed by the conditions set out in a post adoption agreement. A post adoption agreement allows for and governs contact between a child and his or her former parents, guardian or family members. The agreement is drawn up between the child's former parent or guardian and the prospective adoptive parents.

An agreement can also be drawn up to allow for

the exchange of information between the parties, such as medical information regarding the child. A child's views must be considered when drawing up a post adoption agreement and it cannot be authorised without the consent of the child if the child has the capacity to consent.

Post adoption agreements are new in South African law. Adoption usually has the effect of cutting off all legal ties between the child and his or her biological parent. Post adoption agreements allow for a more "open adoption" approach in which the biological parent may retain contact or at least receive information. This will not perhaps be suitable in every case, but one can imagine that it would be very effective in cases where the parties know one another and are on good terms. This could occur in adoptions that occur within a family.

#### *Section 238. Notice of a proposed adoption*

When a child becomes available for adoption, a notice of proposed adoption must be given to anyone whose consent is required for the adoption to take place. If the person does not respond to the notice within 30 days, the court may view this as consenting to the adoption.

#### *Sections 242 and 243. Effect of and rescission of an adoption order*

Subject to the court order or a post adoption agreement an adoption order confers all parental rights and responsibilities onto the adoptive parent or parents and terminates any claim that the child's original parents or family members have on the child. An adoption order can however be rescinded by a High Court or a children's court on application by the child, the adoptive parent of the child or the child's previous parent or guardian. The application for a rescission order must come no later than two years after the

adoption. A rescission order may be granted if requirements for adoption had not been complied with and rescission must be in the best interest of the child.

#### *Section 248. Access to adoption register*

The Act provides for the creation of a national adoption register, that records the details of all adoptions that take place in the country, including any appeals of rescission orders granted regarding an adoption.

Information in the register may only be disclosed to an adopted child older than 18; adoptive parents of their 18 year old adopted child or the biological parents or previous adoptive parents of an adopted child, who is older than 18 with consent of the child and his adoptive parents. An adopted child or his adoptive parents can have access to medical information regarding an adopted child or the child's biological parents if the information relates directly to the health of the child.

#### *Section 249. No consideration in respect of adoption*

The payment of cash or the offer of gifts or favours, for the adoption of a child, is outlawed. Furthermore no one may induce a person, through money or gifts to put a child up for adoption.

To further strengthen this section, the Act also limits the type of person or organisation who may carry out adoptions. In terms of section 250 only adoption social workers or certain child protection organisations that have undergone prescribed accreditation may carry out adoptions. A Central Authority may provide inter country adoption

services. Advertising any details concerning a particular child's adoption is also prohibited under section 252.

### **Chapter 16: Inter-country Adoption**

South Africa is a party to the Hague Convention on Inter-country adoption. The convention aims to safeguard the rights and best interests of any child adopted across international borders. It establishes procedures that convention countries must follow to effect intercountry adoptions. Adherence to these procedures is intended to prevent the abduction, sale or trafficking of children under the auspices of adoption. The Act includes the text of the convention in schedule 1.

The Convention requires that for inter-country adoption proceedings to begin certain information must be established. These include whether or not a child is adoptable, whether all efforts to place them in their home country have been made and whether an inter-country adoption would be in the child's best interests.

The Convention also stipulates that the requirements for gaining consent in accordance with the laws of a specific country must be met before an inter-country adoption can take place. Where applicable this includes gaining the consent of the child. Furthermore, consent from the child, their parent or guardian or their family cannot be induced through the offer of payment or compensation in any form in terms of the Convention.

The Convention also provides for the establishment of Central Authorities in signatory states. These central authorities are designed to oversee inter-country adoptions and to ensure that all the regulations for inter-country adoptions

are adhered to.

The Act makes the Hague Convention part of South African law and regulates inter-country adoption in South Africa. This includes establishing who may carry out inter-country adoptions. Only child protection organisations accredited by the Central Authority, and under the conditions it deems necessary, may carry out adoption placements.

#### *Section 257. Central Authority*

The Director- General of Social Development functions as the Central Authority in South Africa. The DG however can delegate his or her powers to an official in the department. Certain tasks that the Central Authority needs to perform may be assigned to another organ of state or a child protection organisation accredited to carry out inter-country adoptions.

#### *Section 261. Adoption of a child from Republic by person in a convention country*

If a foreign couple or national wants to adopt a South African child they must apply to the Central Authority (CA) in their home state. The CA in that country must then establish whether the couple or individual is fit and proper to adopt the child.

The South African Central Authority (SACA) must determine whether the child is available for adoption. Once this is done and the respective CA's have exchanged the required information and documentation, they may then consent to the child's adoption. All documents and information regarding the case must then be referred to the relevant children's court, in the area where the child lives.

For the court to make an adoption order it must determine whether adoption is in the best interests of the child. It must also establish whether the prospective parents are fit and proper to adopt the child and ensure that the child is in SA and is allowed to leave the country. The court must ensure all processes under the Hague Convention have been adhered to. It must ensure that the child has been listed on the RACAP for at least 60 days with no suitable adoptive parents having been found in South African. If it is in a child's best interest, the SACA can withdraw its consent for an inter-country adoption within 140 days. If this occurs, the child must be returned to South Africa immediately.

Similar procedures apply in cases where a person from a non-convention country seeks to adopt a South African child. In these instances however, the person must contact the relevant adoption authority in their country. It in turns must deal with the South African Central Authority. Once both powers have consented to the adoption, the application must move to the children's court for ratification.

In 2007 the Constitutional Court handed down an important judgment regarding inter-country adoption. The case concerned "baby R" who had been found abandoned. An American couple wanted to adopt her, and were advised by their lawyer that the best way to go about it was to approach the High Court for an order of custody and guardianship, then remove the child from the country and adopt her in the US. The High Court ruled that the children's court was the correct forum. The Constitutional Court had ruled in 2000 that a law that prevented foreigners from adopting South African children was unconstitutional, and had ruled that inter-country adoptions would henceforth proceed through the children's court, in terms of the Children's Act and international law. In baby R's case the Constitutional Court also ruled that the matter should be heard by the children's court. The couple was finally able to adopt the baby, using the correct procedures. Go to [www.constitutionalcourt.org](http://www.constitutionalcourt.org) and find AD and another v DW and others, a 2007 judgment.

Section 273 prohibits anyone from processing or facilitating an inter-country adoption contrary to the terms outlined in this chapter. If they do they are guilty of an offence.

### **Chapter 17: Child Abduction**

This chapter makes the Hague Convention on the Civil Aspects of International Child Abduction part of South African law and gives effect to it.. The Convention is chiefly designed to protect against the parental child abduction across states. It aims to secure the return of any child removed to or detained in any convention state; and to ensure that the laws of child custody in one convention country are respected in other convention countries. <sup>38</sup>

#### *Section 276. Central Authority*

As in the case of inter-country adoptions, the establishment of a Central Authority in convention countries is required. In this case it is the Chief Family Advocate appointed in term of the Mediation in Certain Divorce Matters Act who is the CA in South Africa and he or she can delegate his or her powers to any family advocate.

#### *Section 278. Powers of court*

Matters of parental abduction are dealt with through the High Court. In instances of parental abduction the High Court may request that the Central Authority draw up a report on the child's circumstances prior to their abduction. It must however hear the views and the opinion of a child before it can rule on whether the child is to be returned home. The child must also be granted

legal representation in the matter.

### **Chapter 18: Trafficking in Children**

The UN Protocol to Prevent Trafficking in Persons aims to combat trafficking in people, particularly women and children. <sup>39</sup> South Africa is party to the Protocol, which requires its signatories to adopt or create legislation that criminalises human trafficking. The Children's Act makes the Protocol part of South African Law.

The Protocol defines trafficking and exploitation as:

'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of forces or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery of practices similar to slavery, servitude or the removal of organs' .<sup>40</sup>

The Protocol provides for the protection of victims of trafficking and its prevention. It also provides for co-operation measures, like training and information exchange, between states, aimed at deterring trafficking. <sup>41</sup>

39 Children's Act, No 38 2005, Schedule Three, Text of the UN Protocol to Prevent Trafficking in Persons, article 2

40 Children's Act, No 38 2005, Schedule Three, Text of the UN Protocol to Prevent Trafficking in Persons, article 3.

41 Children's Act, No 38 2005, Schedule Three, Text of the UN Protocol to Prevent Trafficking in Persons, article 2.

38 Children's Act, No 38 of 2005, Schedule 2, Text of the Hague Convention on the Civil Aspects of International Child Abduction, article 1.

#### *Section 284. Trafficking in children prohibited*

The Children's Act outlaws both trafficking and facilitating the trafficking of children. It extends this provision by stating that it is no defence in a matter to say that a child or the person controlling the child consented to the exploitation; or that the exploitation intended never actually occurred. If a court has reason to believe that that a child's parent or guardian is involved in trafficking that child, it may suspend their parental rights and responsibilities and place the child in temporary safe care.

Under the Act, an employer, whose representative or employee engages in child trafficking, can be held liable for contravening the law and have their operating licence revoked. Similarly in terms of section 291 a person or any legal entity based in South Africa involved in trafficking offences abroad is still liable to prosecution and conviction in South Africa.

#### *Section 285. Behaviour facilitating trafficking in children prohibited.*

The Act forbids any person or legal entity from knowingly letting property to someone harbouring trafficked children. It outlaws the advertising, publishing, printing or broadcasting of anything that alludes to trafficking. Internet service providers who come across any site on their server that refers to trafficking must report this to the police.

#### *Section 289. Child who is victim of trafficking found in Republic*

A child victim of trafficking must be referred to a designated social worker for investigation and

may be placed in temporary safe care until the investigation is complete.

Any foreign, undocumented child found to be a victim of trafficking in South Africa may be assisted in applying for asylum in terms of the Refugees Act, 130 of 1998. If they are found to be in need of care and protection by an order of court, the child may stay in South Africa for as long the order is valid.

#### *Section 290: Repatriation of child who is victim of trafficking*

A child cannot be repatriated to their home country unless adequate care arrangements in the country of origin are available, the child's safety is assured and there is no possibility that the child will be trafficked again; harmed or killed.

### **Chapter 19: Surrogate Motherhood**

Surrogate motherhood is regulated by the Act. A surrogate motherhood agreement is valid on condition such as that a written agreement, between the commissioning parents and the surrogate mother has been drawn up in South Africa and confirmed by the High Court. The Act protects the legal rights of both the surrogate mother, the commissioning parents, but above all it protects the status of a child conceived and born through a surrogate mother.

Surrogate motherhood is tightly controlled and a court can only confirm a surrogate motherhood agreement that has been drawn up in the prescribed format.

The court must be sure that the commissioning parents cannot have children naturally and that the reasons are medically sound and irreversible.

It must ensure that the commissioning parents are fit and proper people to raise the child, and that the agreement indicates the desirable, stable home environment the child will be brought up in.

The court must consider the surrogate mother fit to enter into the agreement and ensure that she understands all the legal consequences of the surrogacy agreement. She must have entered the agreement for altruistic reason and not as a source of income. The court also needs to ensure that she has documented history of healthy pregnancy and at least one living child of her own.

The surrogate mother may also terminate the pregnancy if she wants, on condition that she informs and consults the commissioning parents. She incurs no liability for terminating the pregnancy other than any medical expenses already paid for by the commissioning parents.

#### *Section 293. Consent of husband, wife or partner*

The consent of the spouses or permanent partners of the commissioning parent and the surrogate mother is needed before a surrogate motherhood agreement may be confirmed by a court.

#### *Section 297. Effect of surrogate motherhood agreement on status of child*

Once the agreement is confirmed it means that the child born of the surrogate mother belongs entirely to the commissioning parents. The surrogate mother must hand over the child. Neither she, her partner nor their families have any rights over the child.

If for any reason however, the surrogate

motherhood agreement does not comply with the Act, the child is deemed to belong to the woman who gave birth to the baby i.e. the surrogate mother.

#### *Section 298. Termination of surrogacy motherhood agreement*

A surrogate mother who is also a genetic parent to the child, through the use of her ovum for instance to achieve fertilisation may terminate the surrogacy agreement. She must do it within 60 days of the birth of the child, and by filing written notice to the court. The court on receiving notice must terminate the agreement making sure that the mother understands the effects of the termination and that she accepts parenthood of the child.

The commissioning father however still remains a parent of the child, if the surrogate mother has no partner or husband if she terminates the agreement after the child is born.

#### *Section 301. Payments in respect of surrogacy prohibited*

Giving or receiving payment, or promising payment in cash or kind, for a surrogate motherhood agreement is prohibited by the Act. Payment is only allowed to cover medical expenses for the artificial insemination of a surrogate mother, her pregnancy, the birth of the child and the legal costs of the surrogate agreement. The surrogate mother may also be compensated for her loss of earnings due to the pregnancy and be paid insurance cover against death or disability due to the pregnancy.

#### *Section 302. Identity of parties*

No one may publish or reveal the identities of people party to a surrogate agreement without written consent from those who are party to the agreement and no details of a child born of a surrogate motherhood agreement may be published at all.

## **Chapter 20: Enforcement of Act**

Officials representing the Director General, the provincial head of social development or a municipality are permitted to inspect any child and youth care centre, partial care facility, shelter or drop-in centre. An official may also inspect any place believed to be operating one of these facilities without registration.

In the course of an inspection they may observe or question management, staff, children, request and copy documentation, confiscate items and record proceedings in any way including taking pictures or videos. Any inspections carried out must be reported to the DG, provincial head of Social Development or municipality.

### *Section 305. Offences*

If a person is convicted of contravening the Act he or she is liable to a fine and or imprisonment of not more than 10 years. If a person is convicted of contravening the Act more than once he or she is liable to a fine and/ or imprisonment of up to 20 years.

Offences include

- subjecting children to any cultural or religious practises that may harm them
- obstructing a police officer, social worker or designated official in performing their duties in terms of the Act

- failing to comply with an order of court made in terms of the Act
- trafficking children or aiding in the trafficking of children
- managing, owning or leasing premises where the sexual exploitation of children is taking place

Finally, any person who is supposed to care for a child in any way but fails to, either by abuse or neglect is guilty of an offence.

## **Chapter 21: Administration of Act**

### *Section 306. Regulations*<sup>42</sup>

The Minister must make regulations governing a range of sections in the Act before it can take effect. These include regulating for the determination of child protection organisations and other organisations providing shelter, care and services to children.

Regulations must also be made establishing the national norms and standards for

- ECD programmes,
- child protection systems,
- child and youth care centre
- drop-in centres
- partial care centres

The Minister, Director General, a provincial MEC for social development and a provincial head of social development may delegate his or her powers and duties in the manner set out by the Act.

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<sup>42</sup> The Department of Social Development and the Department of Justice and Constitutional Development have published Draft Regulations for public comment. See Gazette No 31165 Notice No 780 of June 2008.

## Chapter 22: Miscellaneous Matters

### *Section 313. Amendment of Laws*

The following laws are repealed by the Children's Act:

*The whole of the Children's Act of 1960*

*Section 1 of the General further Law Amendment Act of 1962*

*The entire Child Care Act of 1983*

*The entire Age of Majority Act of 1972*

*The whole Children's Status Act of 1987*

*Section 4 of Prevention of Family Violence Act of 1993*

*The whole Guardianship Act of 1993*

*The entire Hague Convention on the Civil Aspects of International Child Abduction Act of 1996*

*The entire Natural Fathers of Children born out of Wedlock Act of 1997*

The code was updated in August 2007 to include a section on child pornography and the parameters under which it may be construed as acceptable to print such images. In section 1.7.3 the code states 'Child pornography may not be published unless, judged in context, it amounts to bona fide news, bona fide literature, a bona fide documentary, a bona fide scientific product or bona fide art.'<sup>43</sup>

Aside from this section however the press code does not directly deal with reporting on children. Rather it extends towards general principles around reporting.

Principles on reporting on children.

Given the challenges in reporting on children the MMP commits itself to reporting on children in an ethical manner, and specifically:

- To seek the truth and report it as fully as possible;
- To act independently, and;
- To minimise harm.

Further, the TITLE:

- Supports the constitutional protections of children;
- Believes that the community and the newspaper it represents should guard against any practice that may exploit or violate the rights of any child under the age of 18 ;
- Will encourage reporting on all matters involving children only if the matter is relevant;
- Will play a positive role in representing children and their rights, and therefore support better attitudes and opinions about children and their rights in our readers;
- Believes that respecting children's rights

## 7. Journalists and reporting on children

Journalists in South Africa have certain guidelines in place to govern how they go about covering stories in ways that balance their role as public watchdogs, as well as prevent them from doing unnecessary harm to innocent subjects or sources. The press code of South Africa requires that reporting of news is truthful, accurate and fair. The code guides how the press uses their platform to inform public debate, and guards against it becoming a tool to promote prejudice or discriminate against any person or group.

In instances when journalists do misrepresent something in a report, the code requires through section 1.6, that a newspaper make amends by printing a retraction, correction or an apology.

<sup>43</sup> South African Press Code, section 1.7

today will mean respect for all people's rights in the future.

In order to preserve the above principles, TITLE editorial staff hereby adopt the following editorial code in dealing with matters involving children:

1. The dignity and rights of every child are to be respected in every circumstance.
2. In interviewing and reporting on children, special attention is to be paid to each child's right to privacy and confidentiality, to have their opinions heard, to participate in decisions affecting them and to be protected from harm and retribution, including potential harm and retribution.
3. The best interests of each child are to be protected over any other consideration, including over advocacy for children's issues and the promotion of children's rights.
4. When trying to determine the best interest of a child, the child's right to have their views taken into account are to be given due weight in accordance with their age and maturity.
5. Those closest to the child's situation and best able to assess it are to be consulted about the diverse ramifications, including potential political, social and cultural ramifications of any reportage.
6. No stories or images will be published that might put the child, siblings or peers at risk even when identities are changed, obscured or not used. When it is editorially necessary to publish a picture of a child, which is potentially harmful to such child, the identity of the child shall be obscured in such a manner that the child cannot be recognised. In this regard, the face of the child shall be blurred or "pixelated" completely. Pixelating the face alone is not good enough, such pixelation should include anything in the photo which may identify the child, like a bracelet

or picture.

7. In all stories in which a child has been involved in a crime, either as a witness, victim or perpetrator, unless exceptional circumstances prevail and only if there is informed consent from the child involved and the child's caregiver, the child's identity will not be revealed either directly or indirectly.

8. Whenever the identity of a child is disclosed, whether pictorially or in print.

a. The statutory restrictions on the naming or identification of children shall be observed and adhered to. These include, but are not limited to, the General Laws Amendment Act dealing with the publication of matters around civil court proceedings and the Criminal Procedure Act;

b. The informed consent of the child and parent or guardian of any child shall be sought in all cases where the identity of the child is to be disclosed

c. Even if the parent or guardian consents to disclosure of the identity of a child, TITLE shall exercise a cautious discretion, if it may be harmful to the child to publish the identity of the child.

9. To prevent harm and possible stigmatisation, a child's HIV status will not be revealed, unless there are exceptional circumstances and informed consent from both the child and caregiver/parent has been attained. If in doubt, this information shall be left out.

10. Negative stereotypes about children based on race, gender, class, culture, and or sexual orientation are particularly harmful for children and will be challenged where possible.

11. Girl and boy children have equal rights and gender based stereotypes will not be perpetuated when reporting on children.

The broadcast media have far more stringent rules to abide by where children are concerned. This is because broadcasters supply and create content for children, and in providing this content they must be very aware of the specific needs and vulnerabilities of children.

Section 18 in the ICASA Code of Conduct for Broadcasters (CCB) is devoted to the kinds of content that should be avoided when creating children's programming. Gratuitous violence for example must not be included in programming that children be exposed to.<sup>44</sup> The code also forbids the broadcasting of unsuitable material at times of the day when children will be likely to see it. The code provides for the Watershed period, which forbids the broadcast of unsuitable material before a certain time in the evening.

Both the press code and the CCB are designed to guide the media in how to report on issues or create content and material for the entertainment of their audience or readership. The codes however are subject to the laws of South Africa, and should a journalist commit an act that grossly flouts the law and it is not done in the interests of informing the public or of exposing crime, corruption and injustice, the same laws of redress apply to journalists as any other citizen.

As with anyone who knowingly contravenes the Children's Act, a journalist who does not adhere to its provisions is guilty of an offence. Particularly, if a journalist reveals the proceedings of a children's court or the identities of the children concerned in a matter, that journalist can be charged with a criminal offence.

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44 ICASA Code of Conduct for Broadcasters, section 18

## 8. List of Resources

### *Legal Resources Centre*

<http://www.lrc.org.za>

National Office  
Braam Fischer House,  
25 Rissik Street,  
Johannesburg

**Tel:** 011 836 9831

**Fax:** 011 836 8680

### *Children's Institute, University of Cape Town*

<http://www.ci.org.za>

Children's Institute  
University of Cape Town  
46 Sawkins Road  
Rondebosch  
7700  
South Africa

**Tel:** +27 (21) 689 5404 / +27 (21) 689 8343

**Fax:** +27 (21) 689 8330

E-mail: [info@ci.org.za](mailto:info@ci.org.za)

### *Centre For Child Law*

<http://www.childlawsa.com>

Centre for Child Law  
Law Building (Room 4-31)  
University of Pretoria  
Pretoria  
0002

**Tel:** +27 12 420 4502

**Fax:** +27 12 420 4499

### *Alliance for Children's Entitlement to Social Security (Acess)*

<http://www.aces.org.za/>

PostNet suite # 78  
Private Bag X3

Plumstead  
7801  
South Africa

**Tel:** 021 761 0117

**Fax:** 021 761 4938

Email: [info@access.org.za](mailto:info@access.org.za)

*Department of Justice and Constitutional Development:*

<http://www.doj.gov.za>

Postal Address: Private Bag X81, PRETORIA, 0001

Street Address: Momentum Centre  
329 Pretorius Street (c/o Pretorius and Prinsloo Streets)  
Pretoria

**Tel:** 012 - 315 1111

**Fax:** 012 - 357 1112

*Department of Social Development*

<http://www.dsd.gov.za>

Postal address: Private Bag X901, PRETORIA, 0001

Street address: HSRC Building,  
North wing,  
134 Pretorius Street,  
Pretoria

**Tel:** (012) 312 7794

**Fax:** (012) 312 7943

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