



Protection of the Child: The Children's Court in South Africa

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FAMILY

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Introduction

- **South African children live in a country that has a Constitution with the highest regard for their rights and for the equality and dignity of everyone. Despite the best efforts of the South African Government and civil society to protect children from abuse, neglect and exploitation, it is a fact that they still remain vulnerable.**
- **A coordinated inter-disciplinary, multi-sectoral approach is required to address harmful practices, violence against and abuse of children in South Africa. The Government of the Republic of South Africa, regards the promotion and protection of children's rights and responsibilities, as of paramount importance.**
- **Since 1994, a specific Children's Framework has been put into place to protect and promote children's rights in our communities.**
- **In spite of this fact, children continue to be abused, neglected and exploited.**
- **Therefore, a more intensive effort is needed to fight this scourge.**

Children's Rights Framework

- (a) RSA is a signatory or has ratified the following key international instruments:**
 - (i) Universal Declaration of Human Rights;**
 - (ii) The United Nations Convention on the Rights of the Child;**
 - (iii) The Optional Protocol on the Sale of Children, Child Trafficking and Child Pornography;**
 - (iv) The Optional Protocol on the involvement of Children in Armed Conflict;**
 - (v) The Hague Convention on the Civil Aspects of International Child Abduction;**
 - (vi) The African Charter on the Rights and Welfare of the Child; and**
 - (vii) The Worst forms of Child Labour Convention.**

- (b) The Constitution of the RSA gives a baseline as follows:**
 - (a) Section 28.**
 - (b) Every child has the right**
 - (i) to a name and a nationality from birth;**
 - (ii) to family care or parental care, or to appropriate alternative care when removed from the family environment;**
 - (iii) to basic nutrition, shelter, basic health care services and social services;**
 - (iv) to be protected from maltreatment, neglect, abuse or degradation;**
 - (v) to be protected from exploitative labour practices;**

Children's Rights Framework

- The Constitution's baseline, continued:

Section 28 cont.:

(vi) not to be required or permitted to perform work or provide services that

1. are inappropriate for a person of that child's age; or
2. place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(vii) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be

1. kept separately from detained persons over the age of 18 years; and
2. treated in a manner, and kept in conditions, that take account of the child's age;

(vii) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(viii) not to be used directly in armed conflict, and to be protected in times of armed conflict.

Children's Rights Framework

- The Constitution's baseline, continued:

Section 28 cont..

(c) A child's best interests are of paramount importance in every matter concerning the child.

(d) In this section "child" means a person under the age of 18 years.

(e) Section 12:

(i) Everyone has the right to freedom and security of the person which includes *the rights to be free from all forms of violence from either public or private sources: and not to be treated or punished in a cruel, inhuman or degrading way.*

(ii) *Everyone has the right to bodily and psychological integrity,* which includes the rights to make decisions concerning reproduction and to security in and control over their body.

Children's Rights Framework

Section 30 further states the following:

“Everyone has the right to use the language and to participate in the cultural life of their choice. but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”

- Section 31 provides as follows:
- (1) “Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-
(a) to enjoy their culture, practice their religion and use their language: and
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with an provision of the Bill of Rights.”

Government has adapted our legislative frameworks accordingly as follows:

- (a) The Criminal Law Amendment (Sexual Offences and Related Matters) Act, 2007 (Act No 32 of 2007), implemented in phases as from December 2007;**
- (b) The Children's Act, 2005 (Act No 38 of 2005), implemented on 1st April 2010;**
- (c) The Child Justice Act, 2008 (Act No 75 of 2008), implemented on 1st April 2010;**
- (d) The Social Assistance Amendment Act (Act No. 5 of 2010) implemented in September 2010;**
- (e) The Domestic Violence Act, 1998 (Act No 116 of 1998);**
- (f) The Maintenance Act, 1998 (Act No 99 of 1998); and**
- (g) The Prevention and Combating of Trafficking in Persons Bill**

• **Governance and co-ordination structures:**

- (i) First National Plan of Action for Children developed and implemented since 1997, under lead of the erstwhile Office on the Rights of the Child, in the Presidency;**
- (ii) The updated National Plan of Action for Children, is being reconsidered at present by the Children’s Rights Advisory Committee, under Chair of the Department of Women, Children and People with Disabilities.**
- (iii) National Children’s Rights Advisory Council, under lead of the Department of Women, Children and People with Disabilities;**
- (iv) National Child Care and Protection Forum, under lead of the National Department of Social Development;**
- (v) Intersectoral Steering Committee on Child Justice, under lead of the Department of Justice and Constitutional Development;**
- (vi) National Intersectoral Steering Committee on Sexual Offences, under lead of DoJCD;**
- (vii) National Intersectoral Trafficking Steering Committee, under lead of DoJCD; and**
- (viii) National Anti-Rape Task Team, under lead of the National Prosecution Authority.**

Introduction: The Children's Act

- **The Children's Act, 38 of 2005, came into effect on the 1st of April 2010. The Department of Social Development (DSD) is the lead department for the Act. The DOJ&CD's main responsibility rests in the Children's Court operations vis a vis the Act.**
- **An integrated approach has been essential in the implementation of the Children's Act. Constant liaising between DOJ&CD and The Department of Social Development occurs on all levels**
- **Other important stakeholders:**
 - **SAPS**
 - **Legal aid**
 - **Family Advocates**

Introduction: The Children's Act

- The Children's Act, 2005 (Act No 38 of 2005), plays a large role in social crime prevention and enables a pro-active rather than re-active approach, to children at risk.
- Examples are:
 - The child protection register
 - Alternative care orders
 - Care orders for children who have been diverted from the criminal courts
 - Orders for early intervention and prevention
 - Removal orders into section 152 and 152 of the Act
- Abuse, as stipulated in section 28 of the Constitution is further defined in the Children's Act 38 of 2005 as any form of harm or ill-treatment deliberately inflicted on a child, and includes-
 - *assaulting a child or inflicting any other form of deliberate injury to a child;*
 - *sexually abusing a child or allowing a child to be sexually abused;*
 - bullying by another child;
 - a labour practice that exploits a child; or
 - *exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally;*

The Children's court

Which courts are children's courts?

Every magistrate's court children's courts as defined in the Magistrates' Courts Act is a children's court and has jurisdiction on any matter arising from the application of the Act for the area of its jurisdiction.

- (a) 385 Magistrates' Courts are deemed to be Children's Courts in terms of section 42 of the Children's Act.
- (b) 161 permanent children's court clerks appointed.

Who can be a Presiding Officer in a children's court?

Every magistrate is *ex officio* a presiding officer of a children's court and every additional magistrate is *ex officio* an assistant presiding officer of a children's court for the district of which he or she is magistrate, additional magistrate and assistant magistrate.

What are the duties of a presiding officer?

The presiding officer of the children's court must perform such functions as may be assigned to him or her under the Children's Act or any other law.

Who are officers of the children's court?

Presiding officer of the children's court

Clerks of the children's court are appointed in terms Children's Act

The Children's court cont.

Where should the court hearings be conducted?

Hearings should be held in a room which is furnished and designed in a manner aimed at putting children at ease. The room must be conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings without compromising the status of the court. This room must not ordinarily be used for the adjudication of criminal trials and must be accessible to disabled persons and persons with special needs.

Other Dedicated Services at Court Level -2010/2011:

- (i) 224 Child Witness Testifying Rooms;**
- (ii) 324 CCTV's- fitted courtrooms; and**
- (iii) 49 One-Way Mirror- fitted courtrooms.**

Is the children's court a court of record?

A children's court is a court of record and has similar status as a magistrate's court at district level

The Children's court cont.

Matters on which the children's court may adjudicate?

(Where it is not clear which court has jurisdiction in a particular matter, the children's court before which the child is brought has jurisdiction in that matter)

- The care of, or contact with, a child;
- The paternity of the child;
- Support of a child;
- The provision of early childhood development services;
- *The maltreatment, abuse, neglect, degradation or exploitation of a child, except criminal prosecutions in this regard;*
- *The temporary safe care of a child;*
- *The alternative care of a child;*
- The adoption of a child, including an inter-country adoption;
- A child and youth care centre, a partial care facility or a shelter or a drop-in centre, or any other facility purporting to be a care facility for children;
- Reviewing the outcome of a mediation
- Making a parental rights and responsibility agreement an order of court
- *Any other matter relating to the care, protection or well-being of a child provided for in the Act.*
- The conviction of a person for the non-compliance with an order of a children's court or contempt of such a court.

The Children's court cont.

- What orders may the Children's Court make?
- **An alternative care order**, which includes an order placing a child-
 - (i) in the care of a person designated by the court to be the foster parent of the child;
 - (ii) in the care of a child and youth care centre; or (iii) in temporary safe care;
- an order placing a child in a child-headed household in the care of the child heading the household under the supervision of an adult person designated by the court;
- an adoption order, which includes an inter-country adoption order;
- a partial care order instructing the parent or care-giver of the child to make arrangements with a partial care facility to take care of the child during specific hours of the day or night or for a specific period;
- a shared care order instructing different care-givers or child and youth care centres to take responsibility for the care of the child at different times or periods;
- **a supervision order, placing a child, or the parent or care-giver of a child, or both the child and the parent or care-giver, under the supervision of a social worker or other person designated by the court;**
- **an order subjecting a child, a parent or care-giver of a child, or any person to (i) early intervention services;(ii) a family preservation programme; or(iii) both early intervention services and a family preservation programme;**

The Children's court cont.

- a child protection order, which includes an order-
- (i) that a child remains in, be released from, or returned to the care of a person, subject to conditions imposed by the court; (ii) giving consent to medical treatment of, or to an operation to be performed on, a child; (iii) instructing a parent or care-giver of a child to undergo professional counselling, or to participate in mediation, a family group conference, or other appropriate problem-solving forum;
- instructing a child or other person involved in the matter concerning the child to participate in a professional assessment;
- instructing a hospital to retain a child who on reasonable grounds is suspected of having been subjected to abuse or deliberate neglect,
- instructing a person to undergo a specified skills development, training, treatment or rehabilitation programme where this is necessary for the protection or well-being of a child;
- instructing a person who has failed to fulfil a statutory duty towards a child to instruct an organ of state to assist a child in obtaining access to a public service to which the child is entitled, failing which, to appear through its representative before the court and to give reasons for the failure;
- limiting access of a person to a child or prohibiting a person from contacting a child; or allowing a person to contact a child on the conditions specified in the court order;
- child to appear before the court and to give reasons for the failure;

The Children's court cont.

- instructing that a person be removed from a child's home;
- a contribution order
- an order instructing a person to carry out an investigation
- any other order which a children's court may make in terms of any other
- provision of this Act.
- (2) A children's court may withdraw, suspend or amend an order made or replace such an order with a new order.

Over which matters does the High Courts have exclusive jurisdiction?

- The guardianship of a child;
- The assignment, exercise, extension, suspension or termination of guardianship in respect of a child;
- Artificial fertilisation;
- The departure, removal or abduction of a child from the Republic;
- Applications requiring the return of a child to the Republic from abroad;
- The age of majority or the contractual or legal capacity of a child;
- The safeguarding of a child's interest in property;
- Surrogate motherhood.
- There is nothing in the Children's Act preventing the High Court from limiting the inherent jurisdiction of the High Court as upper guardian of all children.

The Child in need of care and protection

What is a child in need of Care and Protection

S150(1) A child is in need of care and protection if, the child—

- (a) has been abandoned or orphaned and is without any visible means of support;**
 - (b) displays behaviour which cannot be controlled by the parent or care-giver;**
 - (c) lives or works on the streets or begs for a living;**
 - (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;**
 - (e) has been exploited or lives in circumstances that expose the child to exploitation;**
 - (f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;**
 - (g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;**
 - (h) is in a state of physical or mental neglect; or**
 - (i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.**
- (2) A child found in the following circumstances may be a child in need of care and protection and must be referred for investigation by a designated social worker:**
- (a) a child who is a victim of child labour; and**
 - (b) a child in a child-headed household.**

Orders a court can make upon the finding of “in need of care and protection”

- **Section 156 orders**
- **An order confirming that the child may remain under the control of a specific person.**
- **An order that the child be placed in a child and youth care centre.**
- **An order that the child be placed in a facility for children with disabilities or chronic illnesses.**
- **An order that the child receive appropriate medical, physiological or other treatment.**
- **An order that the child be placed in foster care.**
- **An order that the child be placed in foster care with a group of persons or an organisation operating as a cluster foster scheme.**
- **An order that the child be admitted as an in or out patient to an addiction treatment facility.**
- **An order that the child be placed in temporary safe care pending adoption.**
- **An order that a person be interdicted from maltreating, abusing, neglecting or degrading or from having contact with the child.**
- **An order that the child be placed in shared care.**
- **An order returning the child to the care of the person he/she was in, prior to their removal to temporary safe care.**
- **An order that the person caring for the child must, at their own expense, allow the child to be taken care of at a partial care facility.**

Example



Public Awareness and Communication

- (a) A Frequently Asked Questions booklet has been developed on the Children's Act 38 of 2005 and distributed nationwide. This booklet included information on the CPR.**

- (b) Braille booklets on information pertaining to the Children's Act 38 of 2005 has also been developed and will be launched during Child Protection Week 2012, which takes place from 28 May to 3 June 2012.**

- (c) Children's Act pamphlets have been developed in 7 official languages and are currently being distributed to courts.**

- (d) A dedicated email address (children@justice.gov.za) was created in 2011 and has received 165 E-mails from members of the public since its inception.**

- (e) A frequently asked questions webpage on the Children's Act 38 of 2005 was also launched in 2011, and has since received 14 359 visits**

Conclusion

The Children's Act, 2005 (Act No. 38 of 2005) provides for a coordinated and integrated approach for government departments and civil society organizations to provide an effective response system for child victims and those at risk of abuse, neglect & exploitation. The Children's Court is the Department of Justice and Constitutional Development primary mechanism to intervene in the protection of children

The Act is currently in the process of being amended, however, it has proved to play a very important role in the lives of the most vulnerable in society, our children.

Thank you

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