

# New children's law brings hope

South Africa's children are some of the most abused in the world. The new Children's Act acknowledges this.

**Jackie Loffell** outlines the most important contents of this Act and believes with vigilance it could mark a new and hopeful era for our children.

Everyone in South Africa knows that children are at risk. They are at risk from poverty, domestic and other abuse, HIV/AIDS and the loss of parents, sexual exploitation and substance abuse. To help address this, after 11 years of preparation, the Children's Act of 2005 and its 2007 amendments will soon come into force.

In the past, laws affecting South African children were fragmented and not all laws or courts followed the same principles. Children were pulled between them, or fell through the cracks. Also, the Children's Act had its origins in apartheid and failed to address the needs of the broad masses of children. Further, the new Act needed to include international agreements on children's rights.

The Children's Act covers much of the same ground as the Child Care Act of 1983 but in greater detail, as well as addressing new issues. But who is a child?

A controversial issue was whether the age of majority should be reduced. The Act now states that childhood ends at 18. This does not

mean that a child living at home after 18 can disobey household rules, neither does it relieve parents of obligations to support their child through tertiary training if they can.

Children in state care can continue to stay with their caregivers after 18 and still receive state aid while they complete their education. What it does mean, however, is that the problems of the old laws which prevented people aged between 18 and 21 acting on their own behalf in matters such as applying for jobs and signing legal documents, have come to an end.

## WHAT'S DIFFERENT?

There is a new emphasis on the rights of children, especially those with disabilities.

The Act requires that matters concerning children must protect, promote and fulfil the child. Children also have a right to participate according to age and level of maturity in decisions affecting them.

If children are disabled or have special needs this must be taken into account, and an enabling environment put in place. They

must get proper care and be able to take part in social, cultural and religious activities, and their caregivers must find necessary support services.

If a child's right is infringed, the child or any person or interest group can approach a court to deal with the matter.

The Act also gives children responsibilities to their families, community and the South African state according to their age.

## PROTECTING SOCIAL AND CULTURAL PRACTICES

The Bill of Rights states that decisions affecting children must be based on their best interest. The Children's Act lists which must be considered in reaching such decisions. These include protection from physical or psychological harm; the need for a stable family environment; continuity in the child's relationships; the effects of separation from an important person in the child's life; the age and developmental stage of the child; the need to retain links with family, extended family, culture and tradition; and any disability, chronic illness or special need that the child has.

The Act draws attention to harmful cultural, social and religious practices. It prohibits female genital mutilation and marriage of children below the minimum age. It restricts virginity testing of girls and cultural circumcision of boys to those over 16 years who have consented, after counselling, to these practices which must be carried out according to regulations.

A new approach to parent-child

relationships does away with terms such as 'custody' and 'access' in favour of 'parental responsibilities and rights'. These rights fall into categories of 'care', 'contact', 'guardianship' and contribution to the maintenance of the child. 'Care' responsibilities have to do with the daily tasks involved in raising a child. 'Contact' refers to the child's need for ongoing relationships with parents or other caregivers.

'Guardianship' comes into the picture when there is a need to make major decisions, such as consent for a child to be adopted, to marry, to get a passport or to leave the country. Consent to transactions over property belonging to the child is also the guardian's responsibility. The Act gives these rights to the biological mother of the child, and a father who is, or was married to the mother, at the time of the child's conception or birth or at any time in between.

The Act also gives rights to an unmarried father who was living in a permanent partnership with the mother when the child was born, or who has acknowledged that he is the father.

A legal parent and another person with an interest in the care of the child can draw up and register a 'parental responsibilities and rights agreement' to clarify how they will work together to ensure that the child is properly cared for. Such a plan may, for instance, be developed by a couple who are divorcing or separating, or an unmarried couple, or the parents and another person, perhaps a relative who is assisting in raising the child. To become legally binding, this agreement must be registered with the Family Advocate or a court. Caregivers can seek mediation if disputes erupt.

#### RIGHT TO HEALTH AND SERVICES

The Act extends health-care rights for children from the age of 12 (or younger if sufficiently mature) which take into account the younger age that children are becoming sexually active. In the old Act the age limit was 14. The law clarifies for health workers how to deal with approaches from such children. Children have the right to access health information about sexuality and reproduction, contraception and to consent to

HIV testing. This must take place with the necessary counselling.

Children can consent to non-surgical treatment but they can only consent to surgery with the help of a parent or guardian. They have the right to total confidentiality in dealings.

For the first time, the law obliges the government to plan for and provide services for children. The Act requires the Minister of Social Development, with other ministers, to plan for a "properly resourced, managed and coordinated" system with an "appropriate spread" of services nationally and provincially, including in their budgeting.

This applies to services protecting children against abuse and neglect, prevention and early intervention services, early childhood development and child and youth care centres. Government can fund day-care and drop-in centres, giving priority to very poor communities.

Here there is a crucial role for civil society which must monitor budgets to ensure that they are adequate for government, and NPO (non-profit organisations) services



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which are critical for government to deliver.

#### PREVENTION AND INTERVENTION

The Act prioritises prevention and early intervention through educational, developmental, supportive and therapeutic services to strengthen and service families that are vulnerable. Among the approaches is the promotion of parenting skills, including the use of positive, non-violent methods of disciplining children.

The law provides for a flexible protective system, with many options for assisting children and families.

If a child's well-being is threatened, the court can order the child and/or others in the family to go into a treatment or training programmes. It can place the child in a facility that provides special care related to a disability. A court can also divide the care of the child between the parents, other people or organisations through a 'shared care' order. Further, it can order the removal of an abuser from the child's home, who can then only have supervised contact with the child.

The Act places a stronger emphasis on the existing Child Protection Register by adding new occupational categories for people who are legally required to report cases of child abuse, in order to increase levels of reporting.

The register outlines Part A for children who need protection from abuse. Part B details people who the court finds "unsuitable to work with children" because they have abused a child. These people are barred from adopting, fostering, or providing services to children. This includes in schools, child welfare organisations, relevant government departments, clubs and societies.

The new law pays attention to

the registration, operation and monitoring of residential facilities for children, known as child and youth care centres. Centres must operate programmes to assist children who have experienced abuse and neglect, have been trafficked or exposed to commercial sex exploitation, are awaiting trial, or are under treatment for substance dependency.

There is a new approach to street children's shelters and drop-in centres. They are now on a par with other centres in the 'child and youth care centre' category. This means they can no longer operate an inferior service but must register and run programmes for the children they cater for.

The law recognises and provides for support for child-headed households where a child aged at least 16 has taken on the role of caring for children in the absence of an adult. The household must be supervised by a person designated by the children's court, an organ of state or an approved NGO. The household then qualifies for the same government grants and services as though it were headed by an adult.

Widespread poverty in South Africa means that community members may set up services that are unregistered and do not comply with standards. These include early childhood centres and children's homes. The Act takes a developmental approach to the registration and monitoring of children's facilities. The department can instruct people to stop operating, but there is an emphasis on enabling service providers to continue their work. It may give conditional registration to allow the service to continue while they put resources and good practices into place.

#### CHILD LABOUR, TRAFFICKING AND SEXPLOITATION

The Act introduces measures to deal with child labour, commercial sex exploitation and child trafficking. It is obligatory for a social service professional who is aware of these practices to report them to the police.

It is against the law to use child labour. This includes procuring or forcing a child into work for commercial sex, trafficking children into forced labour (this is new in the Act – see SALB 32.2 ), or for the purpose of committing a crime. A social worker has to investigate cases that come to light and find out if the child needs care and protection, and must arrange services that the child needs.

The new law has included The Hague Conventions on International Child Abduction and Intercountry Adoption. These conventions set out processes where a divorced parent leaves a country with a child who is legally in the care of the other parent and brings the child to South Africa, and provisions for a child to be placed in adoption in another country. There will be a Register on Adoptable Children and Prospective Adoptive Parents.

All these new approaches require learning and experience and will improve with practice. But the new Act has huge potential for improving the lives of children. The challenge as a nation is to ensure that there are enough resources for its implementation, and that we hold ourselves accountable for delivery. We must ensure that the new vision for children reflected in the Children's Act is translated into reality. LB

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