Centre for Child Law Submissions

for the

Complimentary Report to South Africa's State Report on the Implementation of the African Charter on the Rights and Welfare of the Child

CENTRE FOR
CHILD LAW

FACULTY OF LAW, UNIVERSITY OF PRETORIA

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1. BACKGROUND

The Centre for Child Law ("CCL") is a public interest litigation organisation registered with the Legal Practice Counsel as a Law Clinic and established in terms of the Legal Practice Act. CCL contributes towards the establishment and promotion of the best interests of children in South African law, policy and practice through litigation, advocacy, research and education.

The Centre for Child Law submits the following contributions through its affiliates, the South African National Child Rights Coalition, to the African Committee of Experts on the Rights and Welfare of the Child as per the African Charter on the Rights and Welfare of the Child.

The contributions that follow aim to supplement the Republic of South Africa's state party report in accordance with its reporting obligations as per the African Charter on the Rights and Welfare of the Child.

2. ARTICLE 2 ON THE DEFINITION OF CHILD

Age of criminal capacity

The Child Justice Amendment Act, 2019 (Act 28 of 2019) came into effect on 19 August 2022, on a proclamation by President Cyril Ramaphosa.

As a result, children below the age of 12 lack criminal capacity. Consequently, children below the age of 12 years may no longer be arrested, processed, charged, and prosecuted through the criminal justice system for the commission of a criminal offence. Such children, who may have committed crimes must be dealt with outside of the criminal justice system by social workers who may refer the child to a Children's Court for direction as to the measures that must be adopted to aid in the child's rehabilitation.

Children older than 12 years old, yet younger than 14 years old, are still presumed not to have criminal capacity. Therefore, the State must prove the child's criminal capacity beyond a reasonable doubt in a child justice court.

This means that children aged 12-14 may be processed through the criminal justice system if they commit a criminal offence. However, but the State must prove that they had the capacity to appreciate the difference between right and wrong and the capacity to act in accordance with this appreciation at the time of the commission of the offence.

Age of entering into civil, common law and customary marriages

Statutorily, in terms of the Marriage Act 25 of 1961 and the Recognition of Customary Marriage Act 120 of 1998, minors are still permitted to marry provided that they have the necessary parental consent in writing. The Civil Union Act 17 of 2006, makes no provision for persons below the age of 18 years old to marry.

The proposed Children's Amendment Bill has not increased the marriageable age to 18. The Draft Green Paper on Marriages was opened for public comment on 4 May 2021. No legislative, policy or other regulatory amendments have been undertaken to give effect to 18 as the common marriageable age across all marriage legislation.

Recommendations:

1. Align all marriage statutes with the ACRWC to ensure consistency with the AU agenda and end child marriage as a harmful practice.

3. ARTICLE 6 ON NAME AND NATIONALITY, STATELESSNESS AND BIRTH REGISTRATION

This area continues to present with major gaps, failures, and challenges to put in place adequate legislation, policy and practices. This is despite many previous recommendations from this Committee and the UN Committee on the Rights of the Child. The main barriers remain as follows:

Birth Registration

Children of single fathers

The Constitutional Court of South Africa handed down judgment in *Centre for Child Law v Director General: Department of Home Affairs and Others*[1] in 2021, in which it struck section 10 from the Births and Deaths Registration Act No 51 of 1992 (BDR Act). This section was deemed unconstitutional because it discriminates against the children of unmarried fathers. Such fathers were prevented (by section 10) from registering the birth of their children in the absence of the mother (who may have died, abandoned or be otherwise unable or unavailable).

This case was meant to clear the path for unmarried fathers to register their children, and by doing so, ensure the child's right to a name and a nationality form birth,[2] as well as their right not to be deprived of citizenship.[3] Unfortunately, no circular / directive has been sent to the local offices instructing them to, and how to register such births. As a result, such children are still left unregistered. We continue to receive many queries through law clinics for assistance on such cases. When the local offices are contacted, they advise that their instructions from head office is to obey DNA Circular 4 of 2014. In terms of this circular unmarried parents who give notice of their children's birth after 30 days, must have a DNA paternity test done, to prove their paternity before births will be registered. In terms of the circular, this applies when one of the two parents is a foreign national, but in practice it is also applied to unmarried fathers where the mother is South African but not available.

Children of parents with irregular immigration status

In the court a quo in the case above, an order was made regarding the regulations to the BDR Act. Orders regarding the constitutionality of regulations are not required t be confirmed by the Constitutional Court and was therefore not addressed in the final court. The order of the court a quo in relation to the regulations stand. The court a quo declared various parts of the BDR regulations to be unconstitutional and provided a reading in. The regulations as they were prevented children from birth registration where a parent could not provide a valid passport and a valid visa or permit. The court found this to be unconstitutional, as it violates the child's right to a name and a nationality from birth. It referred the matter back to parliament to be amended. In the meantime, such children would be able to legally register their births. However, the Department of Home Affairs has not attempted to alert its local offices of this development and such cases are still refused at the local offices. The law clinics receive a high number of queries of this kind. No attempt has yet been made to amend the regulations in line with the judgment or the Constitution.

[1] *Centre for Child Law v Director General: Department of Home Affairs and Others* [2021] ZACC 31.
[2] Section 28(1)(a) of the Constitution of South Africa.
[3] Section 20 of the Constitution of South Africa.

Orphaned and / or abandoned children / children in need of care and protection

Children who are orphaned or abandoned continue to face barriers to birth registration at the Department of Home Affairs. The BDR Act, read with its regulations, allow a social worker to register the birth of such a child. The details of the parents are only required to the extent that they are available, according to regulation 9. However, in practice the local offices require social workers to find parents and bring them to the office to participate in the registration process. This results in social workers approaching outlaw clinics to seek advice. This vulnerable group continues to suffer because of the lack of proper legal implementation in line with the law.

Children in need of care and protection are facing challenges to birth registration as the result of long waiting times at Home Affairs. All late registration of birth (LRB) applications face months long backlogs for any child, but children in the care of the state, who are already vulnerable, face longer waiting periods because their social workers are not given priority at the local offices. In a case brought by Lawyers for Human Rights in 2018, *ABBA and 33 children v the Minister of Home Affairs & others*, a social worker would wait for 2 years to register the children entrusted to her, because Home Affairs put them in the regular queue and would only register two children per month. This affected those children significantly in their chances of being adopted and developing strong bonds and emotional stability, the longer they stayed in the care system.

Access to citizenship and ID documentation

Despite court judgements ordering the Department of Home Affairs to make regulation to allow the implementation of sections 2(2) and s 4(3) of the South African Citizenship Act No 88 of 1995 (SAC Act), no such regulations have been published. Section 2(2) of the SAC Act allow stateless children born in the territory to acquire South African citizenship automatically at birth. Section 4(3) allows children who were born in South African, and live in the territory until they reach the age of 18 years, to apply for South African citizenship. The judgments in *DGLR & another v The Minister of Home Affairs & others*[4] regarding section 2(2) was handed down in 2014. The judgements in *Ali and others v The Minister of Home Affairs v Ali*[5] and *The Minister of Home Affairs & others v Jose & another*[6] regarding section 4(3) was handed down in 2018 and 2020 respectively. No regulations have been published and children still struggle to access these important recognition of citizenship and safeguards against statelessness and.

Two issues about issuance of identity documents (IDs) are relevant. First is the requirement that DHA places on 16-year-olds, in terms of which they must be accompanied by their parent to apply for their first ID. This is impossible for many children whose parents are deceased, in prison, or have abandoned them. These children are left without proof of identity and nationality. The Second is the well know ID blocking practice of Home Affairs. Where a parent's citizenship is being investigated, their ID is blocked on the electronic system along with their spouse and children. A child is then then prevented from accessing proof of their nationality, a passport, reissuance of birth certificates, social grants, among other services and rights.

Stateless children are still being largely ignored by the South African government. There is no legislation, nor policies or practices in place to identify and regularise stateless children (particularly those born outside South Africa. The law

[4] *DGLR and another v The Minister of Home Affairs and Others* (NGHC, 3 July 2014).
[5] Minister of Home Affairs v Ali (1289/17) [2018] ZASCA 169 (30 November 2018).
[6] *The Minister of Home Affairs and Others v Jose and Another* (169/2020) [2020] ZASCA 152 (25 November 2020).

remains without a solution. Where immigration permits are available, they cost R1450. One cannot even request a waiver of the cost without paying the fee.

Recommendations

1. DHA to accept other forms of proving paternity for the purposes of birth registration, including:
    a. Court orders recognising the paternity (section 21 and 26 of the Children's Court); and
    b. Customary practices, including lobola negotiated or paid regarding the parents of the child, damages paid with regards to a child born out of wedlock, or a couple being recognised by the tribal council or a community.
2. DHA to immediately send a directive / circular to all local offices cancelling DHA Circular 4 of 2004 and instructing local offices to register the births of children without the requirement of DNA paternity results.
3. DHA to put in place policies to allow social workers to be priorities at the local offices where they are acting on behalf of children in need of care and protection (in the care of the state), and to waive all fees connected to such cases.
4. DHA to instruct all local offices in writing to immediately stop requiring social workers to find and bring the parents of abandoned children to the registration process where children can be exposed to them, or never be registered because of their absence.
5. DHA to legislate to put in place legislation regarding the judgments in:
    a. *Centre for Child Law v DG Home Affairs* – amending the BDR Act and its regulations to allow children of parents with irregular immigration status to be registered and to allow the children of unmarried fathers to be registered;
    b. *DGLR v The Minister of Home Affairs; Ali v The Minister of Home Affairs; Jose v the Minister of Home Affairs* – publishing regulations on the application processes of section 2(2) and section 4(3) of the Citizenship Act.
6. DHA to issue ID documents to children at the age of 16 years as required by law without requiring them to bring their parents along to the application.
7. DHA to immediately stop blocking the IDs of children on the basis that they are being investigated or their parent is being investigated.
8. DHA to put legislation and policies in place to identify and regularise the stay of stateless children, including a referral system within DHA from all reception points.

4. ARTICLE 11 ON EDUCATION

School Infrastructure

In the *2013 Regulations Relating to the Minimum Uniform Norms and Standards for Public School Infrastructure* (hereafter 'Norms and Standards') were enacted into law, with specific timelines for full outcomes which were set out as follows:

- By 29 November 2016, all schools ought to have access to some water, electricity, acceptable toilets, and the replacement and repair of school infrastructure that is built using appropriate materials, thus eradicating schools built with mud or with asbestos, wood, and zinc.
- By 29 November 2023, schools should have functional libraries and laboratories.

- By 31 December 2020, all public schools must have assembly halls, sports fields, and other infrastructure set out in the Norms and Standards.

Despite the above undertakings, the Minister of Basic Education sought to extend the timelines. While it was reported that the Maths, Science & Technology Grant saw significant underspending across the provinces, resulting in 80% of schools not having access to laboratories.[7]

Pervasive underspending and lack of prioritization of school infrastructure leads us to our present situation where many schools are overcrowded. While children from poorer provinces migrate to the more affluent and resourced provinces and districts with hopes of securing access to an appropriate quality of education.

Children with Disabilities (handicapped children)

The South African Schools Act *2013 Regulations Relating to the Minimum Uniform Norms and Standards for Public School Infrastructur*e were signed into law in 2013. The Norms and Standards stipulate that all schools must adhere to the principles of 'Universal Design, which would render the Infrastructure inclusive meaning that those learners with mobility disabilities, who would be able to attend public schools in their immediate vicinity, would be able to easily do so.

However, there is still a systemic problem in terms of children who could otherwise be absorbed into the mainstream school system, are still excluded from school or subjected to unnecessary family separation to attend special schools, even where there is no significant need to.

Access to education for children with autism and severe to profound intellectual disabilities is still not a reality. Many children with autism or severe to profound intellectual disability stay out of school for far too long, because there are far too few public schools that serve these children, the result is that the child will remain out of school until they age out of the system and the correlating statutory provisions that require that such children be educated.

The Norms and Standards do not include requirements on the residential boarding for children with disabilities. There are no Norms that dictate how the boarding houses and lodging facilities must be run or specific provisions or standard operating procedures that will guide schools on how to maximally accommodate children with specific categories of disability.

Lastly, schools for children with disabilities tend to come with a lot of additional costs, including the cost of accommodation at a private or school-provisioned boarding house and food. As the schools will often be centrally located with children having to cross provision boundaries to attend school. The high costs associated with housing a child with a disability render schooling such children impractical or impossible, with due consideration to the socio-economic circumstances of the child.

White Paper 6: Special Needs Education, Building an Inclusive Education and Training System

White Paper 6 on Special Needs Education, Building an Inclusive Education and Training System has not attained the status of law, which would render it binding on the state. The White Paper is seen as a show of the government's policy

[7] Statement by Ms Sasha Peters, a Programme Manager: National Budget Analysis Unit, Financial and Fiscal Commission at the 2019/2020 DBE Audit Outcomes & Expenditure Patterns in respect of ASIDI, Conditional Grants & Equity in Education: FFC briefing.

position in respect of Inclusive Education. However, White Paper 6 is not binding and enforceable which renders it toothless in giving effect to the right to basic education for children with disabilities.

The 2014 *Screening, Identification, Assessment, and Support Policy* (hereafter 'SIAS Policy') was adopted in 2013. However, to date, there has not been much progression in the implementation of the SIAS Policy, especially with respect to referrals of children with learning disabilities to resourced schools and special schools that are better capacitated to provide for the child's needs.

The SIAS policy in itself is wide in its scope and intended application, it assigns responsibilities to and consequently requires coordination between the Department of Basic Education, the Department of Higher Education, the Department of Social Development, the Department of Health at district, provincial and national level, and Disabled Persons Organizations.

The Policy aims to address all micro, market and macro environmental factors. From identifying and referring a child with a disability to the building of school infrastructure and the training of teachers at higher education institutions to provide special needs and inclusive education.

It is recommended that similar to the development of ASIDI, clear policies and operating procedures be developed so that are clearly articulated and attached to reasonable and measurable outcomes to give effect to each individual objective set out in the SIAS policy and in turn the White Paper 6 on Special Needs Education, Building and Inclusive Education, and Training System.

Recommendations:

1. The promulgation into law of *White Paper 6 on Special Needs Education, Building an Inclusive Education and Training System* would ensure that the state has a statutory obligation in respect of children with disabilities as it would codify and streamline all measures undertaken by the state to provide basic education to all children, especially children with disabilities.
2. Adoption of clear policies and standard operating procedures to achieve the objectives set out in the SIAS policy.

5. ARTICLE 16 ON PROTECTION AGAINST TORTURE AND ABUSE

Policy on the Prevention and Management of Learner Pregnancy Policy in Schools

We recognize and welcome the Department of Basic Education's ('DBE') adoption of the DBE Policy on the Prevention and Management of Learner Pregnancy Policy in Schools along with its protective mechanisms which seek to identify and prosecute instances of statutory rape and sexual abuse.

Consequently, where the father is an employee of the school the *Protocol on the Management and Reporting of Sexual Abuse and Harassment in Schools* will be given effect to. Teachers will be reported and disciplined to the South African Council for Educators to be disciplined. While a concurrent criminal prosecution takes place parallel to this process where such a sexual act further constitutes a criminal act as per the Criminal Law Act (Sexual Offences and Related Matters Amendment).

Support for child victims and child witnesses to effectively and meaningfully participate in sexual violence matters

In the criminal justice system the South African Police Service's Family Violence, Child Protection and Sexual Offences Unit (FCS Unit) in each province aids children in rendering evidence in a meaningful and child-friendly manner, once a case has been successfully opened, investigated, and referred to the FCS Unit.

Although relatively substantial numbers of sexual abuse incidents are reported, very few of them are actually opened or investigated because child witnesses are not provided with the necessary support through intermediaries or other qualified professionals to give testimony. This serves as a systemic impediment to justice, taking account of the fact that in sexual abuse matters the only witness is often the victim, all the more reason that children must be given an opportunity to meaningfully render a statement and then to provide evidence to be used at the point of criminal prosecution.[8]

There is very little knowledge regarding the rights of learners and the services available to assist them in cases of sexual abuse and violence, whether in the home, community or in school. It is recommended that knowledge be disseminated at various levels regarding access to such support services to ensure that those child victims are able to open cases, provide evidence and receive therapeutic intervention for sexual violence that they have experienced.

It is recommended that Magistrates and prosecutors be trained to adjudicate in and protect the interests of of child victims in sexual offence matters.

6. ARTICLE 21 ON PROTECTION AGAINST HARMFUL SOCIAL AND CULTURAL PRACTICES

We note with concern the failure of the government of Limpopo to update its provincial legislation - Limpopo Initiation School Act (2016) so as to bring it in line with the Constitution as well as national legislation i.e. the Customary Initiation Act (2021)) and the Children's Act (2005).

Limpopo's provincial legislation which governs initiation, falls short of the best interests of the child, as a right, principle, and standard. The Children's Act and the Customary Initiation Act prohibit the admission of children younger than 16 years into initiation schools. Currently, the admission age in Limpopo's provincial legislation is shockingly lower than what is prescribed in the Children's Act and the Customary Initiation Act. In terms of the law provincial legislation is subservient to national legislation. Provinces are constitutionally mandated to ensure that children are offered more not less protection in terms of the law.

When news of the 6-year old boy's death broke, the MEC of the Limpopo Department of Cooperative Governance, Human Settlement and Traditional Affairs, argued that the initiation school contravened provisions of the Limpopo Initiation School Act. However, we would like to underscore the fact that Limpopo's provincial legislation still falls short of the required protective measures needed to ensure that unfortunate occurrences such as the 6-year-old's death do not occur in the future.

[8] Centre for Child Law 'Adjudicating Sexual Offence Matters Involving Children as Victims' 2022, available at https://centreforchildlaw.co.za/wordpress21/wp-content/uploads/2022/03/WEB-REPORT_CFCL_Sexual-Offence-matters-involving-Children-Report.pdf (accessed on 22 October 2022)

It is clear that the minimum age provided for in section 28(2)the of Customary Initiation Act, which is the authoritative law in this regard, is 16 years. Therefore, no child below the age of 16 years may be admitted into an initiation school for purposes of initiation. To the contrary, Limpopo's provincial legislation allows children younger than 16 years or older than 12 years to be admitted into an initiation school for initiation purposes.

The Children's Act draws a distinction between boy children under the age of 16 and those above 16 and it explicitly prohibits the circumcision of boy children under the age of 16 unless certain requirements are met.

The distinction in age for purposes of circumcision of male children is to address the issue of irreversible harm and deaths of children during the initiation process. Limpopo's provincial legislation has completely negated the fact that younger children, below the age of 16, ARE maybe more susceptible to potential harm which may result from the initiation. We are not opposed to cultural practices such as initiation. However, it urges that legislation regulating such practices must be informed by the Constitution, Children's Act and Customary Initiation Act. Currently, Limpopo's provincial legislation does not meet the protective standards set out in various pieces of law as mentioned above.

7. ARTICLE 28 ON DRUG ABUSE

On Protection from Substance Abuse

On 26 June 2022, 12 children, comprised of nine girls and twelve boys aged 13-17 died in the Enyobeni Tavern Disaster. Although the Liquor Act (Act 59 of 2003) expressly prohibits and criminally penalizes the sale or supply of liquor and methylated spirits to minors, it is well established that alcohol sales to minors are common in townships and villages.

Although the necessary laws and regulations are clear to liquor suppliers and police, no effect is given to these laws and regulations.

We recognize and appreciate the recent judgement *Centre for Child Law v Director for Public Prosecutions, Johannesburg and Others* [2022] ZACC 35, which recognized that children should not be criminalized and processed through the criminal justice system for possession and use of cannabis by a child, where an adult would not be arrested and subjected to the courts for the same offence. Furthermore, the Constitutional Court held that there are other means to give effect to the same rehabilitative purpose, that does not require imprisonment in a correctional facility for children who use or possess cannabis.

Recommendation:

1. Police and existing community-based policing structures must seriously enforce the Liquor Act to protect children.
2. There is a need to upscale services to children experimenting with substance such as cannabis to ensure that they receive adequate psychosocial and medical assistance to be rehabilitated.

8. CHILD PARTICIPATION/RESPECTING VIEWS OF THE CHILD

Participation rights are included in a number of laws pertaining to children and these provide mechanisms to promote children's involvement in decision-making. Although children are awarded the opportunity to participate in matters which affect them, barriers and challenges often prevent access to meaningful child participation. Furthermore, gaps remain between legal provisions and the implementation and exercise of these rights in practice. On 8 October 2015,[9] the Supreme Court of Appeal upheld an appeal by the Centre for Child Law and affirmed the protection of children participating in public interest litigation and the right to express their views. The judgment also had a wider impact in that it affected all vulnerable groups of people whose rights of privilege and confidentiality might need to be protected through public interest litigation.

The SCA also referred to section 28(2) of the Constitution, which provides that children's bests interests are of paramount importance in every matter concerning them. The Court proceeded to state that it was clear that the litigation at hand concerned the children and that whenever competing rights and interests must be weighed, considerable weight must be attached to the best interests of children. The Court concluded that the High Court did not attach sufficient weight to the rights of children. On a proper balancing of the competing rights and interests, the correct decision was in favour of protecting the children. The SCA overturned the decision of the High Court, allowing the Centre to keep the questionnaires confidential.

Recommendation:

1. That safeguards are put in place to protect children's identity and confidentiality in cases where they have been given the space to participate in a decision that impacts their life/rights.
2. That identified systemic issues in the criminal justice system concerning how child victims and witnesses should be accommodated and be allowed to participate in court proceedings regarding sexual offences should be addressed with expediency given how Covid-19 exposed the high levels of violence (including sexual violence) against children.

9. CHILD VICTIMS AND WITNESSES IN THE CRIMINAL JUSTICE SYSTEM

In 2009 the Constitutional Court handed down a very important decision concerning how child victims and witnesses should be accommodated and be allowed to participate in court proceedings regarding sexual offences.

In *Director of Public Prosecutions, Transvaal v the Minister of Justice and Constitutional Development,*[10] the Constitutional Court acknowledged that children are uniquely vulnerable and that they require specific attention when brought to testify in court. The court essentially required the state to ensure children's best interests remain intact when they appear in court whether as victims or witnesses.

After 5 years had elapsed since the Constitutional Court judgment in *Director of Public Prosecutions, Transvaal*. The Centre for Child Law embarked on a comprehensive survey to monitor the Department of Justice's compliance with the above-mentioned judgment of the Constitutional Court.

Research findings: The purpose of the report was to monitor and evaluate measures taken to ensure that child victims and witnesses are not exposed to secondary trauma due to a lack of child-friendly court services. The report sought to

[9] Centre for Child Law v Governing Body of Hoërskool Fochville. SCA Case no. 156/2015.
[10] 2009 (4) SA 222 (CC)

quantify compliance with the order by determining whether court services (intermediaries, CCTV systems, oneway mirrors, separate testifying rooms) have been improved on from 2009 to 2014. From a qualitative perspective,[11] we found a number of concerns regarding the uniform accommodation of children within the criminal justice process.

The report found that although court staff members and NGO workers who deal with child victims and witnesses all seem to be well aware of the needs of the children concerned and made clear efforts to meet those needs in resource-deficient court environments more needs to be done. A number of examples demonstrate this sense of responsibility towards the protection of child victims and witnesses. For instance the survey indicates that court staff allow child victims and witnesses to use staff toilets, and share their office space so that chid victims and witnesses remain apart from the general public and accused persons. Further examples include the early payment of witness fees and sponsored lunches and toys. Unfortunately, these inconsistent charitable efforts merely fill gaps and tend to blur the reality that there is a lack of uniformity in equipping the courts to make room for children who participate in criminal court procedures.

While the survey did not include every court in South Africa, a number of concerning reoccurring trends can be emphasised from the study emanating from those courts, which include:

- A lack of child friendly facilities such as child-appropriate separate waiting and testifying rooms;
- A lack of toys or alternative forms of entertainment;
- Children are not provided with refreshments or food; and
- At times witness fees are paid out early in day with the idea that this practice alleviates the obligation to provide refreshments and food, despite the fact that witness fees are not provided for purposes of securing refreshments while at court.

All these issues need to be addressed in order to ensure meaningful and safe participation of children in court processes.

9. PROHIBITION OF THE PRESS AND THE PUBLIC FROM THE TRIAL OF CHILDREN

On 4 December 2019 in the case of Centre for *Child Law and Others v Media 24 Limited and Others*[12], the Constitutional Court found that section 154(3) of the Criminal Procedure Act (CPA) is unconstitutional because it does not protect the identities of child victims of crime as well as witnesses and child offenders. It ruled that the Act should contain this much-needed protection for child victims, witnesses, and offenders. The Court also held that the protection does not automatically fall away when the children turn 18 years. The Court acknowledged the long-lasting impact that stories told the wrong way have on children's lived experiences. It held that section 154(3) of the Criminal Procedure Act is unconstitutional because it does not protect the identities of child victims of crime and ruled that the Act should contain this much-needed protection for child victims. Furthermore, that section 154(3) of the Criminal Procedure Act is invalid because it does not extend the protection of identities that children receive to after they turn 18 years. On the issue of ongoing protection, the Court made it clear that the default position of ongoing protection neither disregards the principle of open justice nor prevents the media from accurately reporting on a matter. Ongoing protection does not

[11] Making room: Facilitating the testimony of child witnesses and victims. *Centre for Child Law (2015).* *https://www.pulp.up.ac.za/component/edocman/making-room-facilitating-the-testimony-of-child-witnesses-and-victims*

[12] 2020 (4) SA 319 (CC)

weaken the public's right to be informed, nor does it reduce the media's right to report. The public will still be informed and in a position to evaluate whether justice is properly administered.

The Court gave Parliament 24 months to remedy the unconstitutionality and has in the meantime ordered an insertion of words into the section that provides the necessary protection. Firstly, the insertion makes it clear that the identities of victims under 18 years are protected. Secondly, the insertion ensures that the identities.

The amendments to the Criminal Procedure Act are underway and do, to a large extent, align with the findings of the Constitutional Court.[13]

Recommendation:

1. The Amendment Bill must be finalised and assented to without delay.

12. VIOLENCE AGAINST CHILDREN

In December 2021, the Centre for Child Law successfully completed a research report in which we critically analysed the ***National Strategic Plan on Gender Based Violence & Femicide*** **(2019**) (NSP from hereon) from a children's rights perspective. The purpose of the research is to highlight the manner in which VAC has been addressed in the policy framework while also identifying relevant gaps and practical concerns which impedes the protection of children against violence in South Africa.

There are current legal and policy developments in South African law as well as regional and international law which give impetus to the goal of ending violence against children. In terms of law and policy at domestic level, the government launched the NSP as its strategic response to the scourge of gender-based violence in the country. The NSP will be implemented over 10 years from 2020 to 2030. One of the major criticisms of the NSP from the children's rights sector is how the strategy doesn't have much detail on addressing violence against children in practical terms. In light of this, the Centre for Child Law conducted research on the NSP.

Some of the research findings

Some of the findings from our analysis of the NSP GBVF as well as information obtained from interviews conducted with representatives from both CSOs and government has identified the following concerns regarding the position of children within the NSP GBVF:

- ***There is no clear definition of Violence Against Children*** (VAC) as there are sometimes references to girl children and then only to children. International norms include boy children as falling within the parameters of GBV, but this is unclear in the NSP. This lack of a clear outline and discussion in the NSP as to what VAC includes and how it falls within the parameters of the NSP GBVF gives rise to confusion as to what role children play within this framework and what responses they are entitled to.
- ***Gaps relating to children:*** If VAC is included in GBV, and there is some international authority for this view, then there are numerous gaps within the NSP relating to children.

[13] See https://www.parliament.gov.za/storage/app/media/Bills/2021/B12_2021_Criminal_Procedure_Amendment_Bill/B12B_2021_Criminal_Procedure_Amendment_Bill.pdf

- ***There is no examination of the drivers of VAC*** and how these can be prevented;
- ***No acknowledgment of the importance of family and parent programmes*** or the protection of children online.

- ***Disagreement in the sector:*** There is still a great deal of disagreement amongst CSOs as to whether VAC should be included in the NSP GBVF or not, although all seem to be in agreement that children are not adequately represented. The great shortcoming in the NSP is that it does not address this issue directly, and this is crucial to determining whether children are adequately represented in terms of the mandate of the NSP. If VAC is to receive the same focus as GBV and the position of children strengthened within the NSP, then the NSP itself would have to clarify this expressly and explain how this will be accomplished.
- ***Lack of clarity***: There is no clarity in the NSP as to what a CSO is and what their exact role with respect to the NSP would be. CSOs have different structures, compositions and areas of focus and it is unclear whether they would have to fulfil certain requirements. In addition, they do not belong to any regulatory body and there is no standardised pathway for communication between CSOs.
- ***Funding***: Although certain CSOs would be able to implement programmes under the various pillars and would be able to perform oversight functions, they would require funding and resources to do this and would have to be capacitated to do so.

13. EDUCATION

Measures taken to encourage regular attendance and retention as schools and the reduction of drop out rates

Learner pregnancy

In September 2021, Cabinet approved a finalised policy titled 'Department of Basic Education Policy on the Prevention and Management of Learner Pregnancy in Schools'.[14] This policy introduces important changes, and aims to:

- Provide quality, age-appropriate comprehensive sexuality education
- Provide access to youth-friendly sexual and reproductive health services
- Ensure the return and retention of learners, after they have given birth, in an appropriate grade
- Facilitate pregnant learners' access to ante-natal care during pregnancy at school through collaboration with social sector partners and NGOs
- Provide a supportive, stigma-free, non-discriminatory environment for learners before and after birth, to ensure the continuation of learning and support their physical and psychological needs
- Provide for the effective development and training of educators
- Provide for the care, counselling and support of pregnant learners.

Importantly, the policy obliges schools to reasonably accommodate pregnant learners during their pregnancy, which may include making provision for short- to medium-term absences while pregnant, as well as allowing them to return to school after delivery and accommodating their learning, health and maternal needs.[15] In addition, the policy expressly provides that "no educator, school staff member or fellow learner may discriminate against, humiliate or abuse a learner physically, emotionally, or psychologically, based on their pregnancy or post-pregnancy status".[16]

[14] Available at https://www.gov.za/documents/national-policy-act-policy-prevention-and-management-learner-pregnancy-schools-3-dec-2021.
[15] K Ozah and D Petherbridge "Learner Pregnancy" p 208-225 in Basic Education Rights Hand Book (2022) Section 27 available at https://www.polity.org.za/article/section27s-basic-education-rights-handbook-2022-09-22-1
[16] Ibid.

However, the policy does contain some concerning provisions, including the following requirements:

- A pregnant learner is to remain in school during and after pregnancy. To facilitate the application of the relevant rights, learners who are over six months pregnant will be required to submit a medical certificate indicating the status of their pregnancy and estimated delivery date.
- In addition, the pregnant learner will be asked to provide medical reports to her appointed teacher or school principal certifying that it is safe for her to continue with her schooling if she wishes to stay in school beyond 30 weeks (8 months) of pregnancy.
- If the learner does not provide this information and fails to provide an explanation, she may be asked to take a leave of absence until medical proof is provided. Medical information provided by the learner to the principal shall be strictly confidential to protect the learner's right to privacy.

Even a cursory look at these provisions points to potential issues of contention, such as the insistence of the provision of a medical certificate, failing which a learner may not be allowed back to school. Such an approach does not take into account the socio-economic and social challenges learners may find themselves in, and may violate their right to privacy and dignity.[17]

In addition, the policy notes that a document titled 'Implementation Plan for the Policy on the Prevention and Management of Learner Pregnancy in Schools' will describe how the policy's goals will be achieved. This implementation plan is also intended to provide further detail on aspects such as learners' rights of access and associated referrals to appropriate counselling, care and support, as well as steps to be taken for establishing a Sub-Committee on the Prevention and Management of Learner Pregnancy.[18]

Unfortunately, this implementation plan does not accompany the policy. Despite these shortcomings, the policy does present an opportunity to set out the protective measures that must be followed by all schools in the country when assisting pregnant learners.

Recommendation:

1. The Department of Education must adopt the 'Implementation Plan for the Policy on the Prevention and Management of Learner Pregnancy in Schools' without delay;
2. The Department of Education must providing training to schools on the implementation of the Learner Pregnancy Policy so as to ensure that schools do not discriminate against pregnant learners as recent reports[19] indicate continued exclusion of these learners;
3. The Department of Education must monitor the overall implementation off the Learner Pregnancy Policy.

[17] Ibid

[18] Ibid.

[19] See https://www.timeslive.co.za/sunday-times/news/2022-10-23-im-only-five-months-pregnant-and-couldve-still-written-the-exams-matric-pupils-kickedout/#:~:text=According%20to%20the%20national%20policy,school%20during%20and%20after%20pregnancy%E2%80%9D.