

# Centre for Child Law

## Alternative Report to the UN Committee on the Rights of the Child

### To the Republic of South Africa's State Party Report

#### CONTRIBUTORS

Karabo Ozah – [karabo.ozah@up.ac.za](mailto:karabo.ozah@up.ac.za)

Moyahabo Thoka – [moyahabo.thoka@up.ac.za](mailto:moyahabo.thoka@up.ac.za)



CENTRE FOR  
**CHILD LAW**

FACULTY OF LAW, UNIVERSITY OF PRETORIA

11 August 2023



UNIVERSITEIT VAN PRETORIA  
UNIVERSITY OF PRETORIA  
YUNIBESITHI YA PRETORIA

Denkleiers • Leading Minds • Dikgopoto tša Dihlalefi

## **ABOUT THE CENTRE FOR CHILD LAW**

The Centre for Child Law (“Centre/CCL”) is a public interest litigation organization that is registered with the Legal Practice Council as a child law and child rights law clinic, established in terms of the Legal Practice Act. CCL is housed in the University of Pretoria’s Law Faculty and contributes to the establishment and protection of children’s rights through litigation, legislative and policy advocacy, research, as well as education.

CCL’s mission is to set legal precedents to improve and strengthen laws pertaining to children and to ensure that their constitutionally and statutorily codified rights are realized.

## **SUMMARY OF SUBMISSIONS**

Broadly, CCL tenders submissions in the present shadow report are based on some elements highlighted in the list of issues:

1. The minimum age for marriage and ongoing legal reforms towards outlawing child marriages;
2. Birth registration, statelessness and nationality;
3. Children’s rights and the business sector, specifically as it relates to the impact of climate change on the rights of the child and environmental health;
4. Measures adopted regarding cultural practices that negatively affect children, and the balancing of indigenous peoples’ rights alongside children’s rights;
5. The right to basic education for Children with Disabilities (CwDs) and challenges regarding access to real infrastructure and school admission;
6. Barriers to access to education for undocumented learners;
7. The challenges regarding children in street situations;
8. Challenges pertaining to the administration of child justice, with specific references children sentenced in Secure Care Centres;
9. Concerns regarding children as victims of sexual violence in schools and their right to give witness testimony in proceedings in civil disciplinary proceedings;
10. The right of a child witness to meaningfully participate in court during sexual violence proceedings.

## 1. ERADICATING CHILD MARRIAGES AND FORCED MARRIAGES

In 2022, the Minister of Justice, Mr Ronald Lamola reported that [287 girls](#) in South Africa were married before they turned 18 years old.<sup>1</sup>At present child marriages are legal under the Marriage Act 25 of 1961 and the Recognition of Customary Marriages Act 120 of 1998, until the Draft Mixed Marriages Bill is passed into law. The Marriage Act and Recognition of Customary Marriage Act permit girls aged 15 upwards and boys aged 18 upwards to marry. The Civil Union Act 7 of 2006 expressly precludes children from marrying.<sup>2</sup> Consensual *ukuthwala* in its true form is recognized as part of the process of concluding a customary marriage where willing lovers adopt *ukuthwala* as a collusive strategy to secure marriage negotiations, however, this practice has mutated. The widely publicized modern non-consensual form which is categorized by kidnapping, assault and rape and constitutes a forced marriage is illegal. Perpetrators are liable for imprisonment as seen in the *Jezile v S* case.<sup>3</sup>

The [Draft Mixed Marriages Bill](#) which intends to outlaw child marriages is currently open for public comments until 31 August 2023.<sup>4</sup>

The fact that many customary and religious unions are not registered with the Department of Home Affairs, to begin with, will be a serious hindrance to data collection and enforcement of the proposed Draft Mixed Marriages Bill. A look at South African jurisprudence over the past 20 years shows that the common issue stemming from customary unions, is the question of whether a customary marriage must be registered to be valid. The courts have, time and again, confirmed that failure to register the marriage does not affect its validity.<sup>5</sup>

---

<sup>1</sup> L Claasen, 'Officially, 287 girls in SA were married before turning 18. The 'real' number is way bigger, 12 April 2022, *News24*.

<sup>2</sup> Recognition of Customary Marriages Act, section 3(1)

<sup>3</sup> *Jezile v S* SA 62 (WCC).

<sup>4</sup> Government Gazette 48914.

<sup>5</sup> *Thembisile v Thembisile* 2002 2 SA 209 (T).

Other notable challenges in this premise are that:

- firstly, the Draft Mixed Marriage Bill does not guide community members, social workers or the police regarding the procedure to be followed when a child is found to be in a marriage.
- Secondly, it fails to address the process to be followed and assistance to be rendered for children who are presently in marriages.
- Thirdly, many communities in South Africa engage in initiation practices where the children are recognized as full men and women in their respective communities. Consequently, such children can marry without any societal impediment.
- Fourth, poor and orphaned children and children in rural areas are most vulnerable to child marriage, consequently, the necessary services must be made available to children by assessing whether child brides are children in need of care and protection. Trafficking of children from rural areas or neighbouring countries for sexual exploitation in the form of child marriage does occur and similar services must be made available to the children.

**We recommend the following:**

- National campaign informing communities in their respective indigenous languages that it is unlawful to marry a child or to consent to a child's marriage and the consequences thereof;
- Expressly include referrals of children found to be married for determination by a social worker as to whether such children are in need of care and in terms of section 150 of the Children's Act 38 of 2005, in the text of the Mixed Marriage Act;
- Expressly include referral to social workers for an assessment as to whether a child who is a victim of a child marriage is in need of care and protection in terms of section 150 of the Children's Act 38 of 2005;

**2. BIRTH REGISTRATION, STATELESSNESS AND NATIONALITY**

Our submissions on birth registration are made separately through our partnerships with other civil society organizations. We fully endorse the submissions made alongside our partner organizations.

### 3. HARMFUL CULTURAL PRACTICES AFFECTING CHILDREN AFFECTING CHILDREN

#### Ukuthwala

Consensual *ukuthwala* in its true form is recognized as part of the process of concluding a customary marriage where willing lovers adopt *ukuthwala* as a collusive strategy to secure marriage negotiations, however, this practice has mutated. The widely publicized modern non-consensual form which is categorized by kidnapping, assault and rape and constitutes a forced marriage is illegal. Perpetrators are liable for imprisonment as seen in the *Jezile v S* case.<sup>6</sup> Particularly, where a child under 18 years of age is subject to *ukuthwala* that would lead to child marriage, which now the Draft Mixed Marriage Bill will outlaw.

#### Customary initiation schools

Customary initiation school referred to as *DiKoma*, *Lebello*, *Ingoma* or *Uyaluko* is regulated by the Customary Initiation Act 2 of 2021, which was adopted to serve as the overarching national legislation intended to regulate customary initiation practices, the establishment of initiation schools and the process for their registration.

The Customary Initiation Act and section 12 of the Children's Act set out the mandatory age of admission into initiation schools as 16 years old. However, provincial legislation in the nine provinces has not yet been aligned with the National Initiation Schools Act. The untenable consequence legally is that those initiation schools that admit children below the age of 16 can effectively rely on the provincial legislation and regulations as a defence against charges brought in terms of the Customary Initiation Act, this is an ongoing practice.

Beyond the age requirement, there are various other requirements intended to protect children in the Customary Initiation Act, namely: the consent of the child, written consent from the child's parents to be admitted into an initiation school;<sup>7</sup> a clean bill of health from a professional nurse or medical practitioner; a certified medical practitioner or trained traditional surgeon to conduct the circumcision of boys to do away with male genital mutilation that results from untrained traditional surgeons.<sup>8</sup>

Provincial legislation has not been aligned with the National Customary Initiation Act and section

---

<sup>6</sup> *Jezile v S* SA 62 (WCC).

<sup>7</sup> Initiation Schools Act, section 28(1) (a).

<sup>8</sup> Male genital mutilation resulting from health complications, unsanitary conditions and untrained surgeons have been extensively recorded on [ulwaluko.co.za](http://ulwaluko.co.za).

12 of the Children's Act which both stipulate that children aged 16 and older may be admitted into customary initiation schools. In the Free State province,<sup>9</sup> in Phokwane Municipality in the Northern Cape province,<sup>10</sup> there is no age restriction regarding children eligible to be admitted into initiation schools provided that there is written consent from the child's parent or caregiver. In provincial statutes, the age tends to be lower than the 16-year-old threshold codified in the Customary Initiation Act.<sup>11</sup>

### Violent or harmful initiation rites

Violent or harmful initiation rites and practices have been outlawed through provisions of the Customary Initiation Act and the Children's Act, however, such practices still exist as members of the community and the initiates see the abuse as a necessary part of the transition into manhood or womanhood. Initiated family members are allowed to visit the initiates, however, there is a great stigma attached to initiates who are removed from the initiation school and unable to complete the course.

### **Recommendations:**

The state party must undertake concerted measures to:

- Align the provincial legislation and policy, as well as municipal regulations regarding customary initiation schools to bring them in conformity with section 12 of the Children's Act 38 of 2005 and Customary Initiation Act 2 of 2021;
- Ensure that provincial committees and Chieftaincies are properly equipped to give effect to the Customary Initiation Act;
- Ensure that perpetrators who abduct children into initiation schools, fail to verify the child's age or obtain parental consent and conduct illegal circumcisions are held criminally liable as set out in both section 305 of the Children's Act 38 of 2005 and section 33 of the Customary Initiation Act 2 of 2021;
- Provide information to communities so that they are aware of their right to report illegal activity in initiation schools.

---

<sup>9</sup> Free State Initiation School Health Act No 1 of 2014.

<sup>10</sup> Local government, Municipal Systems Act (32/2000): Phokwane Local Municipality, Promulgation of health by-laws for the operation and management of initiation schools. Provincial; Gazette 1850

<sup>11</sup> Free State Initiation School Health Act No 1 of 2014.

#### 4. CLIMATE CHANGE, ENVIRONMENTAL HEALTH AND THE BUSINESS SECTOR

South Africa is identified as one of Africa's highest contributors to air pollution from fossil fuel combustion and oxidation.<sup>12</sup> Numerous activities cause the country's GHG emissions.<sup>13</sup> Air quality in South Africa is compromised by both ambient and household air pollution.<sup>14</sup> In the case of the former, ambient air pollution is caused by electricity generation (burning fossil fuels or biomass), industrial processes (brick and cement manufacturing), mining, agricultural practices, poor waste management (open burning of garbage) and transportation. The mix of outdoor air pollution and incomplete burning of solid biomass fuels in indoor settings, cumulatively exposes vulnerable groups such as children to toxins of particulate matter, volatile organic compounds, and carbon monoxide, among others.

It is undeniable that children have little or no control over the environmental threats that they are exposed to, and that they lack the knowledge and ability to protect themselves. Consequently, children are more vulnerable and susceptible to various types of environmental harm.<sup>15</sup> Their exposure to these environmental threats causes unimaginable short- and long-term health impacts, compromising the rights of children to the highest standard of living, dignity, equality and to a clean, safe and healthy environment.<sup>16</sup> Some of the health implications for children include acute lower respiratory infections, nasal irritation, coughs, headaches, cardiovascular diseases, and lung and other forms of cancer.<sup>17</sup> Moreover, the exposure of children to pollution and other environmental harms may result in an increased likelihood of cognitive and developmental disabilities.<sup>18</sup> The World Health Organisation (WHO) has aptly underscored that 25% of the recorded deaths of children under the age of 5 years could have been prevented through the reduction of environmental risks.<sup>19</sup>

UNICEF's Climate Risk Index ranks South Africa as the 72<sup>nd</sup> country in the world in terms of its climate risk profile, with water scarcity, soil, and water pollution having a particular impact on

---

<sup>12</sup> Ibid.

<sup>13</sup> Fuggle and Rabie *Environmental management in South Africa* 624. These include for instance, energy (electricity) generation, the burning of solid biomass fuels, mainly wood and coal, and sometimes the use of paraffin and liquified petroleum gas (LPG) for cooking and heating

<sup>14</sup> Engelbrecht, and Kornelius, "Air quality management," in Du Plessis *Environmental law and local government in South Africa*, ed. (2020).

<sup>15</sup> Etzel "The special vulnerability of children" (2020) 1-9.

<sup>16</sup> Etzel, (ibid).

<sup>17</sup> UNICEF, *Clear the air for children: The impact of air pollution on children* (2016) 8.

<sup>18</sup> UNICEF, (ibid) 24.

<sup>19</sup> WHO "Don't pollute my future! The impact of the environment on children's health" (2017) 1.

children.<sup>20</sup> The Climate Risk Index builds a robust understanding of the risk profile and vulnerability of children in the context of the climate crisis. This observation is built upon earlier studies noting that more than 27% of South African children under five years of age are stunted due to climate-induced nutritional challenges,<sup>21</sup> with significant child hunger in various provinces such as the Eastern Cape province.<sup>22</sup>

To give effect to the 'polluter pays' principle, as expressed in the National Environmental Management Act (NEMA),<sup>23</sup> the Carbon Tax Act (CTA) was enacted in 2019. The purpose of the CTA is to provide for the imposition of a tax on the carbon dioxide equivalent of greenhouse gas emissions.<sup>24</sup> It should be noted that the energy sector contributes about 80% of South Africa's total greenhouse gas emissions (GHG).<sup>25</sup> According to the International Energy Authority,<sup>26</sup> the CTA would foster accountability for the negative effects of future energy production and consumption by private and public companies on one hand, while incentivising them to adopt cleaner technologies and practices, on the other.<sup>27</sup>

The CTA establishes a two-phase target-based implementation strategy. The first phase was from 1 June 2019 to 31 December 2022, and the second phase will take place from 2023 to 2030.<sup>28</sup> It, however, remains a concern that the CTA is currently the sole compliance mechanism<sup>29</sup> particularly given the impact that climate change and air pollution have on children. Although welcome, civil society organisations and activists have flagged the carbon tax as too inadequate to be effective and have, among several demands, called for a higher carbon tax.<sup>30</sup> It further appears that the South African government, in contrast to the positive progress with the promulgation of the CTA, is adamant on its reliance on coal-powered energy generation as an integral part of its energy mix.

---

<sup>20</sup> Ibid.

<sup>21</sup> UNICEF *Exploring the impact of climate change on children in South Africa* (2011) 44.

<sup>22</sup> Ibid, 47.

<sup>23</sup> National Environmental Management Act 107 of 1998.

<sup>24</sup> Carbon Tax Act preamble.

<sup>25</sup> South African Department of Mineral Resources and Energy, 2019 'Integrated Resource Plan 2019'.

<sup>26</sup> International Energy Agency, 2023. <https://www.iea.org/policies/3041-carbon-tax-act-act-no-152019> (Accessed on 5 August 2023).

<sup>27</sup> Ibid.

<sup>28</sup> Carbon Tax Act: sec 16.

<sup>29</sup> Centre for Environmental Rights, 2022 '*Life After Coal Comments on Proposed Amendments to the Carbon Tax Act, 2019*' para 12.

<sup>30</sup> Centre for Environmental Rights '*BUSA, BLSA "joint position" on delaying carbon tax compromise corporate SA's climate credibility*' 19 September 2022.



The Minister of Mineral Resources and Energy published the Integrated Recourse Plan 2019 (IRP) in terms of section 35(4) of the Electricity Regulation Act,<sup>31</sup> setting out the government's electricity plans for long-term energy diversification for the decade up to 2030.<sup>32</sup>

The IRP provides for fossil fuel electricity capacity in the form of 1500 MW of new coal-fired power capacity and 3000 MW of gas power.<sup>33</sup> This decision is viewed as regressive, rather than a progressive policy instrument that should supplement other government programmes and efforts towards a just transition towards a clean and sustainable future in the context of the growing threat of climate change.

Given these concerns, child and youth-led community-based civil society organisations collaborated and organised campaigns and responded against this decision through strategic litigation. In 2021 the *African Climate Alliance and Others v The Minister of Mineral Resources and Energy and Others*<sup>34</sup> the case was launched. The basis of the relief sought is that in the light of the climate crisis and the harms of coal-fired power, the decisions to obtain 1500 MW of new coal-fired power are an unjustifiable limitation of constitutional rights to life, dignity, equality, environmental rights, healthcare, food, water, and the best interest of the child principle. While this case is ongoing, its significance is worth noting, particularly given the fact that the applicants represent the interests of young people and children, who are affected by the decisions and actions of the State regarding climate change mitigation and adaptation.

To be further noted is the involvement of children and child-focused organisations in the advocacy campaigns linked to this case under the *#CancelCoal* tag. Strategic litigation remains a pivotal tool towards addressing and advocating for climate change-related policy and legislative reform and ensuring that the State complies with its international obligations, including as a member state of the UNCRC.

The South African government has, through strategic litigation, been directed to uphold its international and national obligations towards children's environmental rights. In the ongoing litigation where community-based and youth-led organisations challenged the government's obligations in respect of the constitutional right to a clean and healthy environment, in *Minister of Environmental Affairs v The Trustees for The Time Being of Groundwork Trust and Others*,<sup>35</sup>

---

<sup>31</sup> Electricity Regulation Act 4 of 2006.

<sup>32</sup> *Ibid* at 11.

<sup>33</sup> Integrated Resource Plan 2019 at 46.

<sup>34</sup> *African Climate Alliance and Others v The Minister of Mineral Resources and Energy and Others* (NGHC Case No. 56907/21).

<sup>35</sup> *The Minister of Environmental Affairs v The Trustees for the Time Being of Groundwork Trust and Others*

the court declared that the unsafe levels of ambient air pollution were in breach of sec 24 (a) of the Constitution.<sup>36</sup> This declaration confirms the State's obligations towards children, who are the most vulnerable group to environmental degradation, such as air pollution. The court further found that the Minister of Environmental Affairs should publish regulations in terms of the Air Quality Act.<sup>37</sup> While the government appealed the latter finding, in August 2022 the ministry published Draft Regulations,<sup>38</sup> and invited the public to submit comments on the draft in compliance with the court order. Although the draft regulations were published for comment, they lacked instructive elements to have the force and appeared to merely be published as an act to comply with the court order, which is, as discussed above being appealed. It appears further that the lack of enforcement of priority area plans undermines other legislative and policy efforts to protect children's rights to a clean and healthy environment, particularly those children who live in high-pollution areas.

In 2020 the President launched the Presidential Climate Commission (PCC) to oversee and facilitate a just transition to a low-emissions and climate-resilient economy.<sup>39</sup> Following multi-stakeholder engagements through consultations and research, in July 2022 the PCC published its first report, which set out a framework for just transition in South Africa.<sup>40</sup> According to the PCC, the framework takes into account existing just transition plans and work, including research, litigation and advocacy by other stakeholder groups that have been developed or are underway.<sup>41</sup> Although the report is a welcome development, it lacks specific strategies in responding to child-specific effects of climate change, including the rights of future generations

### **Recommendations:**

We recommend that the state government:

- Develop and adopt strategies intended to respond to the child-specific effects of climate change, including the rights of future generations;
- Undertake measures to ensure the enforcement of priority area plans in line with other

---

/ GDP Case No: 39724/19 – SCA Case Number: 549/2023.

<sup>36</sup> Constitution of the Republic of South Africa of 1996.

<sup>37</sup> National Environment Management: Air Quality Act 39 of 2004.

<sup>38</sup> Government Gazette No. 47199, 'Consultation of Proposed regulations for Implementing and Enforcing Priority Area Plans', 5 August 2022.

<sup>39</sup> Presidential Climate Change Commission, 2022 'A Presidential Climate Commission Report: A Framework for a Just Transition in South Africa' 05 July 2022. Accessed at <https://www.climatecommission.org.za/publications/design-addition-and-amendment-to-just-transition-framework-with-dedication-to-pcc-secretary> (Accessed on 5 August 2023).

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

legislative and policy efforts to protect children's rights to a clean and healthy environment, particularly those children who live in high-pollution areas;

- Hold businesses to the standards that have been set in statute, regulation and policy and impose the requisite penalties where violation occur.

## 5. CHILDREN IN STREET SITUATIONS

Children in street situations in South Africa represent a vulnerable group of children or those in the most difficult circumstances in need of care and protection. Once on the streets, these children become victims of abuse and violence due to the nature of their life on the streets. They are often deprived of a healthy childhood as being on the streets means that they spend most of their young lives trying to survive and take care of themselves, with little to no protection.

In South Africa, there are existing laws that protect and promote the rights of *all* children and outline the responsibilities of all the role players responsible for the well-being and development of children.<sup>42</sup> For children in street situations, the main role player is the State<sup>43</sup> to ensure that their rights when on the street are protected, promoted and fulfilled, as guided by both national and international law. The plight of children in street situations begs the question as to the extent of the State's obligation towards these children and whether existing legislation adequately protects their rights. The following measures taken by the State are consequently addressed:

- There is inadequate support and access to healthcare services, social services and psychological support and education for children in street situations. The Constitution of the Republic of South Africa, under section 28 provides an important benchmark in the protection of the rights of children. Particularly, section 28(1)(b) provides that every child has the right to family care, or appropriate alternative care when removed from the parental environment.<sup>44</sup>
- Sections 28(1)(c) goes further to provide that every child has the right to nutrition, shelter,

---

<sup>42</sup> Constitution of the Republic of South Africa, 1996; the Children's Act 38 of 2005; Child Protection Policy (2019); United Nations Convention on the Rights of the Child; African Charter on the Rights and Welfare of the Child, etc.

<sup>43</sup> *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) where the Court held that in the case of children with no parents, the State bears the primary duty to provide for the needs of children as per the Constitution specifically under section 28(1)(b) – (c).

<sup>44</sup> Section 28(1)(b) of the Constitution.

basic health care services, and social service. This provision extends to children in street situations. However, research<sup>45</sup> shows that children in street situations continue to be excluded and deprived of the enjoyment of these rights due to the lack of implementation of existing laws and policies that address these plights and mechanisms put in place to address them. The State also must ensure that every child has access to education as encapsulated further in section 29(1)(a) of the Constitution. This is read with section 5 of the School's Act that makes school attendance compulsory for all children between the ages of 7 till 15.<sup>46</sup> Unfortunately for children in a street situation, this is often not a reality as some, especially "children of the street"<sup>47</sup> who were born on the street and continue to live without parental supervision have never been or attended school before, and continue to be out of school. Not much has been done to ensure that children in street situations receive the necessary compulsory education.

- With respect to the reunification of children in street situations with their families, children in street situations are referred to as children in need of care and protection in terms of section 150(1)(c) of the Children's Act, because they live and work on the streets or beg for a living.<sup>48</sup> The Act provides that when a designated social worker comes into contact with children in a street situation, such must be reported to a social worker for investigation. The social worker will investigate whether the child is in need of care and protection. As a result, remove them from the street and place them in child and youth care centres. Accordingly, the removal of children in a street situation may take place in terms of sections 151 and 152 of the Act depending on the circumstances. Once the investigation and a report have been compiled by the social worker, it then when would be understood as to whether these are "children of the street" or "children on the street"<sup>49</sup>, so that proper measures are taken into consideration. The child children remain in the CYCC which must be in their best interests and not against their will.

---

<sup>45</sup> Pare, *Why have street children disappeared? – The role of international human rights law in protecting vulnerable groups* 4. See also Vandernbroeck *Autonomous Children, Privileging Negotiation, and New Limits to Freedom* 74; FS Mongwai (2022) "The protection and promotion of the rights of street children: A South Africa perspective available at <https://repository.nwu.ac.za/handle/10394/40102>.

<sup>46</sup> Section 5 of the South African School's Act 84 of 1996.

<sup>47</sup> Children of the streets refer to those children who live on the streets as "street living children"; See Mafokane 2014 *A conceptual analysis of the label "street children": Challenges for the helping professions*.

<sup>48</sup> Section 150(1)(c) of the Children's Act; see further Section 1 of the Children's Act which provides that a street child means a child who - (a) Because of abuse, neglect, poverty, community upheaval or any other reason has left his or her home, family or community and lives, begs or works on the streets; or (b) Because of inadequate care, begs or works on the streets but returns home at night.

<sup>49</sup> These are children who may have family members and are on the street during the day, then go back home at night after begging on the street.

The main purpose of the removal of the children on the street is to reunify them with their families. However, it becomes the responsibility of the designated social worker to ensure that in cases of children whose families are identified and located, an investigation is done to ensure that the home environment is ready to receive the child. This is important to ensure that the State provides the necessary support to the family to avoid the child being pushed back to the street again once reunified with the family. There are, however, instances where reunification fails due to a lack of proper investigation into understanding the push and pull factors that led to the child being on the street, to begin with. The reunification must be in the child's best interests and also consider their views. It will not be in the best interests of the child to be returned to the very situation that brought him or her to the street, which is why State intervention through family support is very important in cases of identifiable families.

- The violence and abuse experienced by children in street situations, on the street, is a consequence of the State's failure to remove these children from the street and protect them from further harm. When on the street these children become victims of brutal violence, sexual exploitation, torture, substance dependence, economic exploitation and even violence amongst themselves (where the older children are often the perpetrators).<sup>50</sup>
- There are times when children are victims of torture which is perpetrated by police officials, however, many of these cases go unreported as these children do not know of available mechanisms for them to report it. This is due to the force and violence when the children are removed from the street, which often might lead to further violations of human rights.<sup>51</sup> The State has the obligation in terms of national and international law to ensure that the children in street situations are protected from harm and torture. There is a lack of training on the part of police officials in terms of how they deal with children in street situations and thus leading to children being degraded and maltreated.

According to the Consortium for Street Children South Africa, there are estimated hundreds of thousands of children in street situations.<sup>52</sup> There are however, no clear statistics on these

---

<sup>50</sup> FS Mongwai (2022) "The protection and promotion of the rights of street children: A South Africa perspective available at <https://repository.nwu.ac.za/handle/10394/40102>.

<sup>51</sup> See for example the case of *Vilagran Morales and others v Guatemala, Merits*, IACHR Series C no 63 [1999] IACHR 17, IHRL 1444 (IACHR 1999).

<sup>52</sup> Consortium for Street Children available at <https://www.streetchildren.org/about-street-children/>.

numbers and it remains unclear, which further leads to a lack of implementation and proper measures put in place to ensure that the rights of these children are protected and promoted. There is no detailed data collection to be able to identify discrimination in the realisation of children's rights as recommended by the Committee on the Rights of the Child.<sup>53</sup>

### **Recommendations:**

It is therefore recommended that:

- There should be proper implementation of existing legislation and policies to ensure that the rights of children in street situations are protected and promoted;
- The Department of Education should collaborate with schools, communities, parents and NGOs to outline intervention mechanisms to address the plight of children in street situations;
- Advocacy on the plight of children in street situations that address early intervention and prevention strategies/programmes to avoid the pull and push factors in terms of the Children's Act;
- Training of those who come into contact with children in street situations to ensure that they are not subjected to further harm;
- Building more drop-in centres and child and youth care centres that accommodate children in street situations;
- Children in street situations should be provided the required services from social workers as they are in need care and protection, and be placed in Child and Youth Care Centres to ensure that they are in an environment that is conducive to their growth and development;
- To develop a centralised data collection system to know the numbers of children in street situations and the appropriate mechanism thereof in terms of family reunification where necessary.

## **6. ADMINISTRATION OF CHILD JUSTICE & CHILDREN IN CONFLICT WITH THE CRIMINAL JUSTICE SYSTEM**

The South African Constitution, 1996, is applauded as one of the best globally and this is

---

<sup>53</sup> See General Comment no 21: Children in street situation.

attributed, *inter alia*, to the Bill of Rights which is rich and deliberate in the context of fundamental human rights. In relation to children, section 28 of the Constitution is the pinnacle of children's rights. Section 35 of the Constitution enshrines the rights of accused, detained and arrested persons and children who are in conflict with the law are also entitled to those rights, including the right to be presumed innocent until proven guilty.

Section 28(1)(g) of the Constitution provides that "a child has a right 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". When so detained, the child must be kept separately from adults and the conditions of detained shall consider the age of the child.

Section 28(1)(g) is in harmony with Article 40(3) of the UNCRC which places a duty on South Africa as a state party to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

- (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
- (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

In South Africa, children in conflict with the law are dealt with under the Child Justice Act 75 of 2008 ('Child Justice Act') which, *inter alia*, establishes an age-appropriate mechanism and system to deal with children in conflict with the law. In its text, the Child Justice Act refers to the Children's Act 38 of 2005 ('Children's Act'), insofar as the facilities of detention for children in conflict with the law are concerned. Section 76(1) of the Child Justice Act provides that "a child justice court that convicts a child of an offence may sentence him or her to compulsory residence in a Child and Youth Care Centre providing a programme referred to in section 191(2)(j) of the Children's Act."

In light of the above, it is clear that South African laws applicable to children in conflict with the law contain an element of care for those children which further enhances the protection and promotion of the rights of those children. Nevertheless, there are some challenges in the

functioning of SCC. Some of the issues arise as a result of a lack of training of those that are entrusted with care and rehabilitation of children.<sup>54</sup>

#### Parole options for child offenders

The Child Justice Act makes no provision for parole, thus creating no incentive for good behaviour. Whereas adult offenders dealt with in terms of the Correctional Services Act 111 of 1998 may enjoy their right to liberty much earlier as of the Correctional Services Act make provision for parole. Section 73(4) of the Correctional Services Act 111 of 1998 makes provision for prisoners to be “placed under correctional supervision or on day parole or on parole before the expiration of his or her term of imprisonment.”

The behaviour of the offender, length of sentence, the seriousness of the offence, the existence of a support structure at home and whether the offender has been rehabilitated are among the various factors taken into consideration by the parole board. Although parole is a privilege and not a right,<sup>55</sup> it is our view that those privileges and incentives must be equally made available to child offenders to promote and incentivize good behaviour and to ensure that equal privileges for early release and community based sentencing are made available to child offenders. The enactment of parole into the Child Justice Act would necessitate the establishment of a body, with similar standing to a parole board to consider parole applications.

#### Sentencing in terms of 76(3) of the Child Justice Act

To illustrate, there is a lack of understanding of how to deal with orders granted in terms of section 76(3)(b) of the Child Justice Act. In terms of this provision, a Child Justice Court would order that a child be sentenced to compulsory residence in a SCC for a particular period, and an additional period of imprisonment in an adult correctional facility once the period of compulsory residence in a CYCC/SCC lapses.

---

<sup>54</sup> The Centre for Child Law, South African National Preventive Mechanism and South African Human Rights Commission report ,2022, ‘Reinforcing the rights of children deprived of liberty in Secure Care Centres in South Africa: A baseline study to inform a model for independent oversight’. And the ‘Model for independent oversight of Secure Care Centres in South Africa’ available at <file:///C:/Users/u15009603/Downloads/Secure%20Care%20Report.pdf> (accessed on 05 August 2023)

<sup>55</sup> *Motsemme v Minister of Correctional Services and others* (n 17) 285. In *Sebe v Minister of Correctional Services and others* 1999(1) SACR 244(Ck), where the applicant who was sentenced to 21 years’ imprisonment for, amongst other offences, malicious injury to property, argued that, in terms of the prison regulations, he had behaved well while serving his prison term and that, therefore, his sentence was supposed to be reduced by seven years. The Court held that “the remission of sentence was a privilege, and not a right purpose of which was to serve as an incentive to encourage good, disciplined behaviour and adherence to prison procedures”



At the lapse of a compulsory residential sentence, the head of the SCC has an obligation to provide a report and recommend whether imprisonment is still necessary after the child has completed their compulsory residential sentence, but the heads of SCC fails to write and submit reports and recommendations.<sup>56</sup> Which results in the further detention of the child in adult correctional facilities.<sup>57</sup>

The regulations to the Child Justice Act do not make provision for any of the following:

- (1) The period of time prior to the lapse of the child's compulsory residential sentence that the SCC Head must file a section 76(3) report with recommendations regarding further sentencing, release or conditions;
- (2) Once the SCC Head files such a report, the matter is not set down for hearing where the SCC Head's report is subjected to inquiry by the Child Justice Magistrate.
- (3) What is the role of the state prosecuting authority, are they permitted to tender submissions as the party bringing the matter to court?
- (4) To what extent is the child permitted to participate or to challenge the report?
- (5) To what extent is the magistrate empowered to engage the child or the child's legal representative?
- (6) Is the child permitted to have a representative in such matters?

Based on the above it is clear that the judiciary is also not clear as to how proceedings to consider the report and recommendations are constituted and whether the child is entitled to challenge the report, should the need arise. As a result, children find themselves remaining in detention even when their sentences to compulsory residence in SCC have lapsed.

#### Standard issue uniforms

Some CYCC/SCC do not provide children with standard-issue uniforms, thus pushing the children to wear their personal clothes. Some children do not have access to personal clothes while branded clothes and sneakers are seen to be status symbol, so those who have access

---

<sup>56</sup> Section 76(3)(b) of the Child Justice Act 75 of 2008.

<sup>57</sup> The Centre for Child Law, South African National Preventive Mechanism and South African Human Rights Commission report ,2022, 'Reinforcing the rights of children deprived of liberty in Secure Care Centres in South Africa: A baseline study to inform a model for independent oversight'. And the 'Model for independent oversight of Secure Care Centres in South Africa' available at <file:///C:/Users/u15009603/Downloads/Secure%20Care%20Report.pdf> (accessed on 05 August 2023)

to more clothes than others use the clothes to secure an undue privilege e.g. one child giving another child their share of lunch for a specified period in exchange for shoes, a shirt or jersey. While others will simply steal or victimize others to procure clothes and shoes. The failure to provide standard issue clothing exacerbates inequality amongst the children and leads to the victimization of others creating a division between the perceived 'haves' and 'have-nots'.

### Accreditation of programmes

There is also a mounting issue in relation to the accreditation of vocational programmes provided in SCC. Most of the vocational training programs (hospitality, computer, upholstery, brickwork and woodwork) are not accredited. The SCC is also required to provide educational services, many of those educational services provided are unaccredited and under resources such that the schools do not have adequate teaching and learning materials including textbooks. Therapeutic programmes in most SCC are not offered consistently and are often offered by unqualified persons. The issues as they stand illustrate South Africa's lack of compliance with article 40(4) of the UNCRC which requires, amongst other things, the provision of vocational programmes.<sup>58</sup>

This is a disservice to the children and counter-productive to rehabilitation. The lack of constant provision of the programmes (vocational, educational and therapeutic) leads to the children spending time locked up in their dormitories. There is also no clear and consistent incident reporting mechanism, as some centres have "suggestion boxes" other centres rely on a "word of mouth" reporting mechanisms.<sup>59</sup>

### **Recommendations:**

We recommend that the state, through its Department of Social Development and other relevant departments should:

- Ensure that all programmes are accredited and that therapeutic programmes are provided by trained personnel;
- Furthermore, heads and staff of SCC must be trained on the law applicable to children

---

<sup>58</sup> The Centre for Child Law, South African National Preventive Mechanism and South African Human Rights Commission report ,2022, 'Reinforcing the rights of children deprived of liberty in Secure Care Centres in South Africa: A baseline study to inform a model for independent oversight'. And the 'Model independent oversight of Secure Care Centres in South Africa' available at <file:///C:/Users/u15009603/Downloads/Secure%20Care%20Report.pdf> (accessed on 05 August 2023)

<sup>59</sup> Ibid.

in conflict with the law;

- We recommend that the children be provided with standard-issue uniforms to avoid victimization and theft in SCC and the creation of situational elitism among the children that differentiates between the 'haves' and 'have-nots';
- The Department must ensure that all children in the SCC are provided with adequate access to toiletries;
- SCCs must ensure that children do not spend the majority of their time locked up;
- SCCs must develop an incident reporting mechanism with clear periods for feedback and intervention to address issues of child-on-child victimization and staff-on-child victimization;
- The state should revisit the Regulations to the Child Justice Act on the procedure to be followed after the Head of a SCC files a report in terms of section 76(3) OF THE Child Justice Act, in terms of which:
  - The matter is to be set down and proceedings constituted;
  - Codify the right of the child to challenge the contents of the report personally or through legal representation;
  - Articulate the role of the state prosecutor in such proceedings;
  - Empower a magistrate to inquire further into the contents of the report to ensure well informed consideration of his decision to release the child indefinitely or with conditions or to transfer them to an adult correctional facility for further detention.
- The state should make provision for the early release of child offenders in a process similar to a parole hearing in terms of the Correctional Services Act, with due consideration to the relevant child rights principles;
- The state must ensure regular independent monitoring of SCCs through the National Preventive Mechanism with the help of child justice civil society organizations.

## **7. ACCESS TO BASIC EDUCATION FOR UNDOCUMENTED AND MIGRANT LEARNERS**

Undocumented children, who consist of South African nationals, migrant, asylum-seeking and refugee children, continue to face barriers to accessing basic education in South African schools. This includes children without birth certificates, passports or permits.

This fact is made evident by the previous Admission Policy for Ordinary Public Schools,<sup>60</sup> which prevented undocumented children from attending and accessing basic education unless they could produce proof of valid legal documentation. For South African nationals, a birth certificate was required, for non-nationals a study permit is required. As a result, any children without documentation in the form of birth certificates or study permits would be conditionally admitted into an ordinary public school for three months, if they failed to procure the required documents, they were excluded.

The exclusion is a violation of the right to basic education as codified in section 29(1) of the Constitution of the Republic of South Africa, which states that "everyone has the right to (a) *basic education*".<sup>61</sup> The Centre for Child Law and other civil society organisations undertook litigation to challenge the unfair and unjust discrimination that undocumented children faced and continue to face due to a lack of documentation.

Consequently, on 12 December 2019 the High Court in Grahamstown, Makhanda, delivered a judgement in the case of *Centre for Child Law & Others v Minister of Basic Education*<sup>62</sup> (*Phakamisa* judgement), declaring that children without birth certificates, passports or permits, have the right to basic education in terms of the Constitution and that the Department of Basic Education's ("DBE") Admission Policy of 2016 was unconstitutional to the extent that it informed the schools that DBE will not fund schools where children without identity numbers are admitted to those schools. This position deterred schools from admitting undocumented children as no resource allocation would be made to accommodate undocumented learners. The Court further found that the DBE acted unconstitutionally by refusing children the opportunity to receive an education based on a lack of documentation.

After the judgement, the DBE issued Circular 1 of 2020 in response to the judgement<sup>63</sup> Circular 1 of 2020 partially altered the Admission Policy as it relates to documentation directs public schools in South Africa to accept alternative forms of identification in the form of the child's clinic card, an affidavit by a parent or caregiver where a birth certificate, passport or permit is not

---

<sup>60</sup> National Education Policy Act 27 of 1996, Admission Policy for Ordinary Public Schools.

<sup>61</sup> Section 29(1) (a) of the Constitution of the Republic of South Africa, 1996.

<sup>62</sup> *Centre for Child Law & Others v Minister of Basic Education* 2020 (3) SA 141 (ECG) (12 December 2019) available at <http://www.saflii.org/za/cases/ZAECGHC/2019/126.html>.

<sup>63</sup> Circular No. 1: Admission of Learners to Public Schools available at <https://scalabrini.org.za/wp-content/uploads/2020/11/Department-of-education-circular-1-of-2020-undocumented-learners.pdf>.

available.

However, despite the *Phakamisa* judgement and Circular 1 of 2020, there are still concerning challenges as undocumented children are still denied access to basic education and schools are not receiving funding for admitted undocumented learners, with DBE citing that the details of undocumented learners cannot be captured on the South African Schools Administration Management System ('SA-SAMS') as the SA-SAMS system requires an identity number for each learner to be processed therein. However, an alternative mode of registering undocumented learners onto the SA-SAMS system is to provide their birth date in the sequence 080307, signalling that the child's date of birth is 07 March 2008.

CCL continues to monitor the implementation of this judgement. CCL continues to pursue individual cases referred to us by parents and/or caregivers, school principals and social workers. CCL takes on these individual cases to ensure that no child without documentation, is excluded and discriminated from access to basic education.

The data regarding the number of undocumented learners in the country and those admitted into schools is not made readily available non-existent and inaccurate. The only data predicting the number of undocumented learners in schools emanates from a National Assembly engagement. The Minister of Basic Education noted in his official response that there are approximately 11, 9 million (11, 905, 509) learners admitted in schools who are recorded on the Learner Unit Record Information and Tracking System ('LURITS'). Approximately 10, 87 million (10, 873,891) of those learners recorded on the LURITS system have South African birth certificates reflecting a South African ID number that is verified by the Department of Home Affairs. The remaining 465, 826 learners' documents do not have ID numbers.<sup>64</sup> This data is confusing because it is not disaggregated, it thus remains unclear whether these 465, 826 learners are those learners with other forms of documentation in the form of passports and study permits, or whether it includes children with ID numbers that have not been verified by the Department of Home Affairs. There is a need to engage in research to ensure a continuous data stream of information regarding the number of undocumented children in South African schools.

The collection of data would be a welcome and highly helpful tool to curb xenophobic sentiments

---

<sup>64</sup> Question NW2731 to the Minister of Basic Education, 21 December 2021, in response to Mr AC Roos's question, available at <<https://pmg.org.za/committee-question/17458/>> .

against undocumented children, the vast majority of whom are South African citizens to ensure that they are afforded the same rights as all children.

We recommend the following:

1. That the state party, particularly the DBE ensure implementation of the *Phakamisa* judgement and ensure that all schools in South Africa are made aware of this judgement and its subsequent Circular 1 of 2020 which prohibits exclusion of learners based on lack of documentation;
2. That the state party develop a proper mechanism to capture the details of undocumented children on the system, this could be the use of their birth dates, e.g. which are recorded as '080730' indicating a birth date of 30 July 2008;
3. That the state party ensure that schools are allocated adequate funding for undocumented learners as per the *Phakamisa* judgement;
4. That state party must engage in strategic collaboration with fellow departments and organisations on how to assist children who are undocumented in becoming documented, without violating the child's right to access basic education.

## **8. EDUCATION INFRASTRUCTURE**

The 2011 *Accelerated School Infrastructure Delivery Initiative* ('ASIDI') focused on ensuring appropriate water supply, sanitation, electricity and schools built from appropriate materials. The 2013 *Minimum Uniform Norms and Standards for Public School Infrastructure* currently sets out three, seven, and ten-year deadlines for the eradication of pit latrines and schools built from wholly inappropriate materials like mud, asbestos, metal and wood.

The 2018 *Sanitation Appropriate for Education* initiative ('SAFE') is intended to eradicate basic pit toilets, which are hazardous for children. Both ASIDI and SAFE are funded by the school infrastructure backlog grant.

The state has made significant progress reporting as follows:

1. Of the 332 schools in 2011 that were wholly built from inappropriate materials, 330 have been replaced with only 2 more to go, which are scheduled for competition in the 2023/2024 period;

2. Of the 1306 schools that had no water supply in 2011, 1292 projects have been completed with a projected 14 more scheduled for completion in the 2023/2024 period;
3. Of the 373 schools with no electricity supply in 2011, all 373 school projects have now been completed;
4. Of the 3395 schools with basic pit latrines in 2018, 2728 projects have been completed while 667 projects remain and are scheduled for completion in 2023/2024 period.

#### Access to information regarding school infrastructure

The Department of Basic Education (DBE) developed the *National Education Infrastructure Management System* ('NEIMS') in 2007, the NEIMS provided the public with information regarding the progress related to ASIDI and the *Minimum Uniform Norms and Standards* projects dealing with sanitation, electricity supply, appropriate materials for school buildings and water supply. The NEIMS system has been replaced by the *Education Facility Management System* ('EFMS'), this information was shared with the public on 30 May 2023.<sup>65</sup> Without an accessible system the general public and civil society organizations have no way to assess the progress of the state and are left to rely on media statements with no accurate and disaggregated data with which to compare the efficacy of the infrastructure projects and the monies spent by the state in that respect.

Both national and provincial DBE have repeatedly cited confidentiality regarding public procurement processes as the reason for refusing public access to the information. However, sections 195(1)(g) and 217(1) of the Constitution of the Republic of South Africa place an obligation on any of the spheres of government (national, provincial and local) to provide timely, accessible and accurate information regarding any contracts undertaken by the state to procure goods and services, that procurement process must be "fair, equitable, transparent, competitive and cost-effective".<sup>66</sup> Both provisions make reference to transparency and accountability as central tenets, which are wholly lost and disregarded by the refusal to make the EFMS system accessible to the public as required by the Constitution.

With respect to the concerns enumerated regarding confidential information, the state may retain those elements. Specifically, the information queried by the public and civil society

---

<sup>65</sup> Basic Education Parliamentary Committee, 'School Infrastructure (ASIDI +SAFE +Backlogs); BELA Bill: Provincial Public Hearings Report' available at <https://pmg.org.za/committee-meeting/30870/> (accessed on 07 August 2023).

<sup>66</sup> Section 217(1) Constitution of the Republic of South Africa, 1996.

organizations is with regards to:

1. The number of schools that continue to experience backlogs regarding school sanitation, water, electricity and building materials;
2. The stage in the procurement process.

In so doing, the public and civil society organizations will not have access to the names of bidders, the names of DBE procurement panel considering the bid or other sensitive information that can objectively and justifiably be excluded. The purpose of this information is to ensure that the public and schools know when they will reasonably receive the much needed infrastructure needed by the schools.

On the strength of the above Constitutional provisions, and the obligations of Provincial Education MECs as per sub-regulations 4(6) and 4(7) of the *Regulations Relating to Minimum Uniform Norms and Standards on Public School Infrastructure* we further request for Provincial Infrastructure Plan's and reports to be published annually and made publicly available by every provincial Education Member of Executive Council ('Education MEC').

Furthermore, the state must ensure that provincial plans and reports provide specific information and this information must be consistent across all provinces.

#### Poor performance of service providers

The poor performance of contracted service providers is noted as a major concern for the achievement of appropriate school infrastructure.<sup>67</sup> Budgetary deviations aimed at correcting infrastructure projects done incorrectly.<sup>68</sup> The state must undertake measures alongside the South African Police Service with the commercial crimes unit

#### **Recommendations:**

- The state party must make the *Education Facility Management System* ('EFMS') open to the public in conformity with the constitutional tenets of transparency and accountability;
- Provincial Education MEC's must develop and publish annual infrastructure plans and reports;
- The state party must ensure that all the remaining water and electricity supply, sanitation and

---

<sup>67</sup> Department of Basic Education, 30 May 2023, available on <https://pmg.org.za/committee-meeting/37096/> (accessed on 10 August 2023)

<sup>68</sup> *Ibid.*



infrastructure projects are completed by the end of the delineated 2023/2024 financial year.

## 9. ACCESS TO EDUCATION FOR CHILDREN WITH DISABILITIES

Despite the codification of every child's immediately realizable right to access basic education in the Constitution of the Republic of South Africa, 1996,<sup>69</sup> and as well as its equality clause which expressly prohibits unfair discrimination based on disability.<sup>70</sup>

### Infrastructure

*The Regulations Relating to the Minimum Uniform Norms and Standards for Public School Infrastructure* were signed into law in 2013. The *Regulations to 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 which, children with mobility impairments 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 do so.

The *Norms and Standards* do not include requirements on 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, 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 cafeteria for food. As the schools will often be centrally located with children having to cross provincial boundaries to attend school. The high costs associated with housing a child with a disability in private accommodation renders schooling such children impractical or impossible in mainstream boarding houses that do not have an accessible universal design.

---

<sup>69</sup> Constitution of the Republic of South Africa, 1996, section 29(1) (a).

<sup>70</sup> Constitution of the Republic of South Africa, 1996, section 9(3).

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 fall outside of the scope of protection of the correlating statutory provisions that require access to basic education for all children. Children stay on long waiting lists for years before they are able to attend school if at all, primarily because there are not enough schools for children with disabilities generally let alone those intended for children with autism or severe to profound intellectual disabilities. While full-service schools are wholly ineffective and resourced schools are few and far in-between and overcrowded.

*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 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. Consequently it is recommended that binding legislation be drafted and enacted in this respect, however, this will require the Basic Education Minister to determine ages of compulsory school attendance for learners with special education needs by publication in the Government Gazette, which the Minister has still failed to do in the prescribed form. CwDs rely on the *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa & Government of the Province of the Western Cape* judgement which expressly where the court found that the Western Cape provincial government and the national government violated the children's right to basic education, equality, human dignity and protection from neglect or degradation. The respondents were further directed to take measure to ensure equitable and affordable access to basic education; provide adequate infrastructure, human resourcing and transportation of children with severe to profound intellectual disabilities, the training of staff and accreditation of special care centres of the rights of children with severe top profound intellectual disabilities by failing to take reasonable measures to make access to basic education available to 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 written referrals for children with

disabilities to attend resourced schools, full-service schools or 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 state departments and consequently requires coordination between the state departments, namely: 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 SIAS 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, to training of teachers at higher education institutions to provide special needs and inclusive education and the provision of appropriate teacher and learner support materials, including assistive devices.

South Africa's Auditor General, in a presentation to Parliament's Basic Education Committee, highlighted that R818 million (\$962,937.60) was spent 'irregularly' or in a fraudulent manner by the Department of Basic Education in the 2019 financial year alone, that R818 million constituted more than double the amount from the previous year, 2018.<sup>71</sup>

The impact of this is that CwDs continue to be denied the right to enjoy basic education on equal footing with other children. Equally, many other children are taught in schools are not adequately resourced. This is more pronounced when taking cognisance of the fact that there are very few special schools and adequately resourced full-service schools in South Africa.

Nearly 121 500 children with disabilities are enrolled in ordinary schools; 119 500 are enrolled in special schools and an additional 11 500 have been placed on long waiting lists. The waiting lists are long and many children and parents have reported being on the waiting lists for years, some up until their child ages out of the basic education system and is removed from the waiting list, never having been able to enjoy the right to basic education.<sup>72</sup>

---

<sup>71</sup> Budgetary Review and Recommendations Report, by the Auditor General, Briefing to the Parliamentary Committee on Basic Education, available at <https://static.pmg.org.za/201103AGSA.pdf>, accessed on 05 December 2022.

<sup>72</sup> Human Rights Watch, 'South Africa: Children with Disabilities Shortchanged, Adopt free inclusive education for all, (accessed on 05 December 2022)

There is pervasive underspending, irregular and fruitless expenditure in the area of education, which disproportionately and systematically affects children with disabilities and children residing in rural areas.

On the issue of overcrowded schools, the Department of Basic Education announced a Special Intervention on Overcrowding in Schools, according to the DBE's director-general Mathanzima Mveli, following a meeting in August. Up to now, the government has tried to reduce school overcrowding mainly by providing mobile classrooms. As our research report on school overcrowding shows, school infrastructure is only one of many variables to consider in reducing overcrowding.<sup>73</sup> CCL does, however, recognize that the provision of hard infrastructure like classrooms is only effective in preventing overcrowding if a school has enough other related resources, such as teachers, non-teaching staff, and furniture and learning materials.

#### Learning materials for braille users

In 2022 the Constitutional Court declared some provisions of the Copyright Act unconstitutional in the *Blind SA v Minister of Trade, Industry and Competition and others CCT 320/21*. The result is that people with visual and print disabilities can now access published works in accessible formats like braille, audio and DAISY (Digital Accessible Information System).

#### Full-service schools

Full-Service Schools are intended to serve as examples of good practice and to “chart the way for all schools to ultimately become inclusive institutions”. The target set by White Paper 6 of establishing 500 Full-Service Schools (which represents the conversion of 3,6% of all ordinary public schools) was far too low to realize this aim.<sup>74</sup>

Despite reports of the government having exceeded this number, the effectiveness of these schools in achieving their intended outcomes has come into question.

In 2019, the Auditor-General of South Africa issued a damning report detailing the findings of an audit conducted at Full-Service Schools across the country. The audit looked at several indicators aligned with the *Full-Service Schools Guidelines* to assess their functioning and found

---

<sup>73</sup> Kialene Pillay, 'Overcrowded classrooms and lack of resources still plague Gauteng schools', 11 October 2022, (accessed on 03 December 2022)

<sup>74</sup> Guidelines for Full-Service/ Inclusive Schools 2010, Education White Paper 6, Special Needs Education, Building an Inclusive Education and Training System, see p 1.

that the majority of *Full-Service Schools* across all provinces were not functioning as they ought to be. As recently as 2022 Members of the Basic Parliamentary Committee reiterated this reclassification of schools as full-service schools while not providing adequate support as a major problem.<sup>75</sup>

The report stated that 77% of education districts were either, not sufficiently resourced, or that districts did not have plans in place to support Full-Service Schools. Consequently, 79 % of schools lacked adequate resourcing in terms of infrastructure, assistive equipment, and funding to constitute functioning Full-Service Schools.<sup>76</sup>

The Department of Basic Education would later issue a Moratorium announcing the Temporary Suspension of the Designation of Full-service Schools for three years to “ensure that those schools that have been designated as Full-service schools, were adequately capacitated to fulfil their function.”<sup>77</sup>

We note, regrettably, that the 20-year implementation plan including aspects of infrastructure development, envisaged in *White Paper 6* came to an end in 2021. Many of the targets remain unmet and will remain unmet if there is no overt initiative to include learners with disabilities in the planning, budget, implementation and evaluation efforts of the Department of Basic Education.

#### Disability-inclusive budgeting and reporting

Education receives the greatest share of government spending, constituting 5% of the overall GDP, yet, the struggle for access to safe, quality schools and education continues for many learners in South Africa. Particularly, those who are economically and socially disadvantaged-children from rural areas and children with disabilities.

In 2010, the President of the Republic and the Department of Basic Education were taken to court as a result of a failure to provide infrastructure and resources to ensure the enjoyment of

---

<sup>75</sup> Media Statement: Committee on Basic Education Concludes Oversight Visit to Northern Cape Schools, 4 February 2022.

<sup>76</sup> Parliamentary Monitoring Group (PMG), ‘Auditor-General’s briefing to the Portfolio Committee on Basic Education on the Budgetary Review and Recommendations Report: PFMA 2018–19’, available at [https://static.pmg.org.za/191008AGSA\\_Presentation.pdf](https://static.pmg.org.za/191008AGSA_Presentation.pdf).

<sup>77</sup> *Ibid.*

basic education for children with severe to profound intellectual disabilities, in the matter of *Western Cape Forum for Persons with Severe to Profound v Government of the Republic of South Africa*.<sup>78</sup>

There is pervasive underspending in the area of education for CWDs, this is exhibited through marked issues regarding Full-Service Schools and the lack of special schools for those children with disabilities who cannot be taught in a public ordinary school.

The Promotion of Equality and Prevention of Unfair Discrimination Act empowers the state to undertake special measures to promote equality with regard to race, gender and disability by enacting appropriate laws, developing progressive policies and initiating codes of practice to eliminate discrimination on the grounds of race, gender and disability.<sup>79</sup>

Additionally, South Africa is a State party to the UN Convention on the Rights of Persons with Disabilities, the African Charter on the Rights and Welfare of the Child, and the UN Convention on the Rights of Children, which require that access to education be made available to children with disabilities. These treaties require the state to make resources available for the education of children with disabilities. Furthermore, the Constitution of the Republic of South Africa, 1996, sets out the right to access basic education and further excludes disability as a ground for unfair discrimination.

### Data

One element of the SIAS policy is to identify any barriers to learning, including disability and referrals to the Department of Health or to private occupational therapists to diagnose and recommend the most appropriate learning environment for the child. There is no data regarding the number of children who are referred for further assessment using the SIAS policy. Furthermore there is no disaggregated data on the number of children with disabilities in South Africa generally. The state is only able to produce data on the basis of children who are in schools under DBE. Whereas, children in special care centers who are taught, stimulated and habilitated. Additionally there are parents who receive care dependency grants from the state as they care for their children with disabilities, this could be another form of information to be

---

<sup>78</sup> *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another* 2011 (a5) SA 87 (WCC).

<sup>79</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, section 28(3)(b).

used in collecting the data. There must be coordination between the DBE and the Department of Social Development to share information in this regard. Unfortunately, without proper data no adequate planning can be undertaken or implemented.

### **Recommendations:**

- The Minister of Basic Education must give effect to his powers in terms of section 3(2) of the South African Schools Act to determine a compulsory attendance regime for children with disabilities;
- The enactment of legislation by the state party, that is binding and establishes clear rights and duties, and makes provision for costing and budget allocation within the national DBE budget, the legislation must go through a public consultation process so that stakeholders, organizations representing persons with disabilities and experts to meaningfully contribute;
- The state must adopt standard operating procedures to achieve the objectives set out in the SIAS Policy and facilitate interdepartmental coordination in a manner that will be consistent nationally and delineate the roll of each state department at various levels;
- Develop clear actionable outcomes and timelines for the building of education infrastructure that is inclusive of Children with Disabilities;
- DBE & Department of Public Works and Infrastructure take account of the *National Strategic Framework on Universal Design and Access*, with respect to public school infrastructure, in line with the disability-inclusive approach codified in the *National Evaluation Policy Framework* to facilitate increased access;<sup>80</sup>
- When ordinary schools are reclassified, such reclassification should immediately be accompanied by the requisite support in the form of teachers, support materials among others, which must be available when the full-service school becomes operational;
- The state party must make a concerted effort to collect disaggregated data to identify and count all children with disabilities throughout the country, namely: in schools under DBE, in special care centres under Department of Social Development, those out of school and those on waiting lists. Furthermore the data must be disaggregated in accordance with the nature of the child's disability.

---

<sup>80</sup> National Evaluation Policy Framework, November 2019.

## 10. CHILD VICTIMS AND WITNESSES IN THE CRIMINAL JUSTICE SYSTEM

In 2009 the Constitutional Court handed down a crucial judgement concerning the manner in which 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*,<sup>81</sup> the Constitutional Court acknowledged that children are uniquely vulnerable and 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. Five years after this Constitutional Court decision, the [Centre for Child Law embarked on a comprehensive survey to monitor the Department of Justice's compliance](#) with the above-mentioned Constitutional Court judgement.

### **The Research findings indicated that:**

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 quantify compliance with the order by determining whether court services (intermediaries, CCTV systems, one way mirrors, and separate testifying rooms) have been improved on from 2009 to 2014. From a qualitative perspective,<sup>82</sup> 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 child 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

---

<sup>81</sup> 2009(4) SA 222 (CC)

<sup>82</sup> Making room: Facilitating the testimony of child witnesses and victims. Centre for Child Law (2015) available at <https://www.pulp.up.ac.za/component/edocman/making-room-facilitating-the-testimony-of-child-witnesses-and-victims> (accessed on 8 September 2022)



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.

The above issues need to be addressed to ensure meaningful and safe participation in court processes.

## **CONCLUSION**

The Centre for Child Law requests to be invited to make oral submissions before the UN CRC committee should this be necessary and is open to producing further written submissions, explanations or information that the Committee may require.

-End

---

### **Centre for Child Law**

University of Pretoria  
Law Building (4-31)  
Faculty of Law,  
Pretoria, 0002  
South Africa

Tel: +27 (0)12 420 4502  
Email: [centreforchildlaw@up.ac.za](mailto:centreforchildlaw@up.ac.za)  
Website: [www.centreforchildlaw.co.za](http://www.centreforchildlaw.co.za)