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## **INFORMATION FOR MEDICAL PRACTITIONERS ON THE CHILDRENS ACT NO 38 OF 2005**

### **INTERNATIONAL DIRECTIVES**

South Africa signed and ratified the United Nations Convention on the Rights of the Child (CRC) in 1995 and therefore had to make sure that all aspects of the CRC are incorporated into SA Law. The CRC :-

- brings together the children's human rights which are articulated in other international instruments
- articulates the rights more completely and provides a set of guiding principles that fundamentally shapes the way in which we view children
- is a universally agreed set of non-negotiable standards and obligations. These basic standards—also called human rights—set minimum entitlements and freedoms that should be respected by governments
- provisions are upheld by the UNICEF, the United Nations Children's Fund

The need to extend particular care to the child has been stated in other International Instruments such as the Geneva Declaration on the Rights of the Child, the United Nations Declaration on the Rights of the Child, the Convention on the Rights of the Child; the African Charter on the Rights and Welfare of the Child and recognised in the Universal Declaration of Human Rights. SA also signed and ratified the Hague Convention on Inter-country Adoption and the Hague Convention on International Child Abduction. Therefore the Act aims to give effect to these two Conventions as well.

The United Nations has in the Universal Declaration of Human Rights proclaimed that children are entitled to special care and assistance.

### **NATIONAL SAFEGUARDS FOR CHILDREN**

The SA Bill of Rights contains a number of provisions which protect the rights of children and which impose duties on the State to protect children. These include inter alia: The right to dignity, (Section 10); the right to freedom and security of person (Section 23); the right of children to be protected from maltreatment, neglect, abuse or degradation (Section 28(1)(d)); the right to basic education which includes the right to equal unimpeded access to education (Section 29).

The extent of the obligations imposed on the State by these rights is set out in Section 7(2) that requires the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights.' In *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at 82 C-E, the Constitutional Court interpreted these obligations in respect of Section 28 to mean:

*'In the first place, the State must provide the legal and administrative infrastructure necessary to ensure children are accorded the protection contemplated by Section 28. This obligation would normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse mentioned in section 28.'*

Section 28 of the Bill of Rights in our Constitution protects children (anyone under the age of 18) by giving them the right:

- to a name and a nationality from the day they are born
- to proper care by parents or a family member, or by someone else if the child has to be taken away from the family
- to enough food, shelter, basic health care and social services
- to be protected from being mistreated, neglected or abused
- not to be forced to work or given work which is not suitable for a child
- to have a lawyer paid for by the government, if the child has to appear in court
- not to be used in wars
- to be protected during times of war

Whenever a decision is made about a child, the most important thing that must be thought about is what would be in the best interests of the child.

**Section 29** of the Bill of Rights says everyone has the right to basic education. Everyone has the right to be taught at a government school in their own language but only if this is practical and if the government can afford it. The government must take steps, for example by passing laws that will help people who want further education.

The rights which a child has in terms of this Act supplement the rights which a child has in terms of the Bill of Rights -Section 8(1).

## **PARLIAMENTARY PROCESS**

### **The Children's Act**

The Children's Bill was first brought Parliament in 2003. It covers a range of different services some of which are controlled or provided by national government e.g. adoptions, and some of which are controlled or provided by provincial governments e.g. child and youth care centres. National Parliament in Cape Town can make decisions on its own about national issues, but it must work with the provinces when it is working on a Bill that affects them. In the same way that children have the right to participate in decisions that affect them, provinces have a right to participate in decisions that affect them.

Parliament decided to split the Bill into two parts and deal with them separately.

The first part of the Bill contains all the things that national government must deal with and Parliament worked on this part first. The MPs completed their work in December 2005, and the President signed it and its official name and number is the Children's Act No 38 of 2005. On the 29<sup>th</sup> June 2007, the President announced that certain sections of the Children's Act would come into force on 1 July 2007. The Sections which came into effect on 1 July 2007 are:

*sections 1 up to and including 11, 13 up to and including 21, 27, 30, 31, 35 up to and including 40, 130 up to and including 134, 305(l)(b), 305(l)(c), 305(3), 305(4), 305(5), 305(6), 305(7), 307 up to and including 311, 313, 314, 315 and the second, third, fifth, seventh and ninth items of Schedule 4 of the said Act come into operation.*

## **The Children's Amendment Bill**

The national Parliament started to work on the second half of the Children's Bill, called the Children's Amendment Bill [B19 of 2006] in August 2006. Because it is a Bill which affects the provinces, MPs from the provincial parliaments were asked to work on it first. From October 2006 to March 2007 provincial MPs met with people in their provinces to discuss the Bill and read the submissions that had been sent to them by the public. On the 29th May 2007 MPs from all the provinces met together in Cape Town and agreed to make many changes to the Bill in response to the public hearings and submissions. To show that this is a new version of the Bill they changed the name slightly. The Bill with the changes in it is called the Children's Amendment Bill [B19B of 2006].

The Children's Amendment Bill [B19B of 2006] has been given back to the National Assembly and was discussed by a group called the Portfolio Committee for Social Development.

On 29 June 2007, the President published a proclamation in the Government Gazette for the commencement of certain sections of the Children's Act on 1 July 2007.

The remaining provisions of the Children's Act came into effect on 1 April 2010.

## **The Children's Act**

The Children's Act aims, in short, to:

- Provide for partial care of children
- Provide for early childhood development
- Make further provision regarding the protection of children, such as child headed households and abolish corporal punishment
- Provide for prevention and early intervention services
- Provide for children in alternative care
- Provide for foster care
- Provide for child and youth care centres and drop-in centres
- Create certain new offences relating to children
- Facilitate consensus on who constitutes children in need of care
- Ensure access to child services for disabled children.

## **INTRODUCTION TO THE CHILDRENS ACT**

- To give effect to certain rights of children as contained in the Constitution;
- To set out principles relating to the care and protection of children;
- To define parental responsibilities and rights;
- To make further provision regarding children's courts;
- To provide for the issuing of contribution orders;
- To make new provision for the adoption of children;
- To provide for inter-country adoption;
- To give effect to the Hague Convention on Inter-country Adoption;
- To prohibit child abduction and to give effect to the Hague Convention on International Child Abduction;
- To provide for surrogate motherhood; to create certain new offences relating to children; and
- To provide for matters connected therewith

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#### **ANALYSIS OF RELEVANT CHAPTERS (HEALTH)**

<b>CHAPTER 1:</b>	<b>INTERPRETATION, OBJECTS, APPLICATION AND IMPLEMENTATION OF ACT</b>
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#### **Definitions**

Some of the following definitions are of interest:

"child" means a person under the age of 18 years;

"care-giver" means any person other than a parent or guardian, who factually cares for a child and includes, a foster parent, person caring for child with consent of parent or guardian, head of a shelter....

- (f) **a child and youth care worker** who cares for a child who is without appropriate family care in the community; and
- (g) **the child** at the head of a **child-headed household**;

"family member", in relation to a child, means -

- (a) a parent of the child;
- (b) any other person who has parental responsibilities and rights in respect of the child;
- (c) a grandparent, brother, sister, uncle, aunt or cousin of the child; or
- (d) **any other person** with whom the child has **developed a significant relationship**, based on psychological or emotional attachment, **which resembles a family relationship**;

"guardian" means a parent or other person who has guardianship of a child (regulated by section 18)

"parent", in relation to a child, includes the adoptive parent of a child, but **excludes-**

- (a) the **biological father** of a child **conceived through the rape of or incest** with the child's mother;
- (b) any person who is biologically related to a child by reason only of being a **gamete donor** for purposes of artificial fertilisation; and
- (c) a parent whose **parental responsibilities** and rights in respect of a child have been **terminated**;

"person unsuitable to work with children" means a person listed in Part B of the National Child Protection Register;

"RACAP" means the Register on Adoptable Children and Prospective Adoptive Parents contemplated in section 232;

"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;

### **Objects of the Act**

a) to promote the preservation and strengthening of families;

b) to give effect to the following constitutional rights of children, namely-

- i) family care or parental care or appropriate alternative care when removed from the family environment) social services;
- iii) protection from maltreatment, neglect, abuse or degradation; and

- iv) that the best interests of a child are of paramount importance in every matter concerning the child;
- c) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic;
- d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children;
- e) to strengthen and develop community structures which can assist in providing care and protection for children;
- f) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- g) to provide care and protection to children who are in need of care and protection;
- h) to recognise the special needs that children with disabilities may have; and
- i) generally, to promote the protection, development and well-being of children.

#### Best Interests of the Child

Section 2(b) to give effect to the following constitutional rights of children, namely-

- (iv) that the best interests of a child are of paramount importance in every matter concerning the child".

The factors to be taken into consideration when deciding on the "best interests of the child" is stated in Section 7.

Section 9 "Best interests of child paramount" states : In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.

This is nothing new, however, a new principle in the Act is Section 10 which states:

*"Child participation: Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."*

## **CHAPTER 2: GENERAL PRINCIPLES (starts at Section 6)**

### Right of a Child to participate

New principle of the child's right to participate is re-enforced in many Sections, for example, Section 6(5)

*A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision take in a matter concerning the child which significantly affects the child.*

New provisions: Section 11 “Children with disability or chronic illness”

- (1) In any matter concerning a child with a **disability** due consideration must be given to-
  - (a) providing the child with parental care, family care or **special care as and when appropriate**;
  - (b) making it possible for the child to participate in social, cultural, religious and educational activities, recognizing the special needs that the child may have;
  - (c) providing the child with conditions that ensure dignity, **promote self-reliance** and facilitate active participation in the community; and
  - (d) providing the child and the **child's care-giver** with the **necessary support services**.
  
- (2) In any matter concerning a child with **chronic illness** due consideration must be given to-
  - (a) providing the child with parental care, family care or **special care as and when appropriate**;
  - (b) providing the child with conditions that ensure dignity, promote **self-reliance** and facilitate active participation in the community; and
  - (c) providing the **child** with the **necessary support services**.
  
- (3) A child with a disability or chronic illness has the right not to be subjected to medical, social, cultural or religious practices that are detrimental to his or her health, well-being or dignity.

Section 12: “Social, cultural and religious practices”

- (1) *Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well- being.*
  
- (3) *Genital mutilation or the circumcision of female children is prohibited.*

*"circumcision", in relation to a female child, means the removal of the clitoris by any means*

*"genital mutilation", in relation to a female child, means the partial or complete removal of any part of the genitals, and includes circumcision of female children;*

Virginity Testing

- (4) *Virginity testing of children under the age of 16 is prohibited.*
  
- (5) *Virginity testing of children older than 16 may only be performed?*
  - (a) *if the child has given consent to the testing in the prescribed manner;*
  - (b) *after proper counselling of the child; and*
  - (c) *in the manner prescribed.*
  
- (6) *The results of a virginity test may not be disclosed without the consent of the child.*
  
- (7) *The body of a child who has undergone virginity testing may not be marked.*

Circumcision

- (8) *Circumcision of male children under the age of 16 is prohibited, except when-*

- (a) *circumcision is performed for religious purposes in accordance with the practices of the religion concerned and in the manner prescribed; or*
  - (b) *circumcision is performed for medical reasons on the recommendation of a medical practitioner.*
- (9) *Circumcision of male children older than 16 may only be performed-*
- (a) *if the child has given consent to the circumcision in the prescribed manner;*
  - (b) *after proper counselling of the child; and*
  - (c) *in the manner prescribed.*
- (10) *Taking into consideration the child's age, maturity and stage of development, every male child has the right to refuse circumcision.*

### Section 13: Access to health information and Confidentiality

Patient's have a right to have sufficient information about their health to enable them to make an informed decision about treatment or the refusal thereof.

#### 13. Information on health care

- (1) Every child has the right to-
- (a) have access to information on health promotion and the prevention and treatment of ill-health and disease, sexuality and reproduction;
  - (b) have access to information regarding his or her health status;
  - (c) have access to information regarding the causes and treatment of his or her health status; and
  - (d) confidentiality regarding his or her health status and the health status of a parent, care-giver or family member, except when maintaining such confidentiality is not in the best interests of the child
- (2) Information provided to children in terms of this subsection must be relevant and must be in a format accessible to children, giving due consideration to the needs of disabled children.

How does the above compare to the National Health Act?

#### User to have full knowledge

6. (1) Every health care provider must inform a user of—
- (a) the user's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user;
  - (b) the range of diagnostic procedures and treatment options generally available to the user;
  - (c) the benefits, risks, costs and consequences generally associated with each option; and
  - (d) the user's right to refuse health services and explain the implications, risks, obligations of such refusal.
- (2) The health care provider concerned must, where possible, inform the user as contemplated in subsection (1) in a language that the user understands and in a manner which takes into account the user's level of literacy.

#### Section 14:

Every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court.

#### 15. Enforcement of rights

- 1) Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.
- 2) The persons who may approach a court, are:
  - a) A child who is affected by or involved in the matter to be adjudicated;
  - b) anyone acting in the interest of the child or on behalf of another person who cannot act in their own name;
  - c) anyone acting as a member of, or in the interest of, a group or class of persons; and
  - d) anyone acting in the public interest.

#### Section 16 “Responsibilities of children”

Every child has responsibilities appropriate to the child's age and ability towards his or her family, community and the state.

#### Section 17 “Age of majority”

“A child, whether male or female, becomes a major upon reaching the age of 18 years”. The age of majority is the age at which you are considered responsible and liable for actions or inactions under the law.

### **CHAPTER 3: PARENTAL RESPONSIBILITIES AND RIGHTS**

Part 1: Acquisition and loss of parental responsibilities and rights

#### Section 18: Parental responsibilities and rights

A person may have full or specific parental responsibilities iro the child

A parent or guardian of a child must assist or represent the child in administrative, contractual and other legal matters; or

Whenever more than one person has guardianship of a child, each one of them is competent to exercise independently (except: Marriage, adoption, emigration, application for passport and immovable property) and without the consent of the other any right or responsibility arising from such guardianship

Application to health: Either parent may consent to health care of child.

The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights BUT if the biological mother is unmarried (minor), the guardian of the child's mother, is also the guardian of the child (Section 19). Previous Guardianship Act stated the maternal grandparent was the guardian of a child born to a minor mother. This does not apply to surrogate children.

Biological father: The biological father of a child has full parental responsibilities and rights in respect of the child if married to the mother or was married at conception, birth. If he has no responsibilities and rights, he can acquire full parental responsibilities and rights (lives with mother at time of the child's birth in a permanent life-partnership, legally declared to be the father, contributes in good faith to child's upbringing for a reasonable period, contributes towards expenses icw the maintenance of the child for a reasonable period – Dispute on these issues referred for mediation – Section 21.

A mother with parental responsibilities can also enter into a “parental responsibilities and rights agreement” as per Section 22. Care and Contact (Section 23) and Guardianship (Section 24) can be assigned to “any other person” on application to Court. Co-holders of parental rights and responsibilities can enter into a Parenting Plan (Part 3, Section 33).

What is the case in a divorce? It depends on the Decree of Divorce.

#### 19. Parental responsibilities and rights of mothers

- 1) The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child.
- 2) If-
  - a) the biological mother of a child is an unmarried child who does not have guardianship in respect of the child; and
  - b) the biological father of the child does not have guardianship in respect of the child, the guardian of the child's biological mother is also the guardian of the child.
- 3) This section does not apply in respect of a child who is the subject of a surrogacy agreement.

#### Part 2: CO-EXERCISE OF PARENTAL RESPONSIBILITIES AND RIGHTS

##### Section 31 (In effect on 1 July 07): Major decisions involving child

- 1(a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development,
- (b) A decision referred to in paragraph (a) is any decision-
  - (iv) which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.

## Section 32 – Care of child not holding parental responsibilities and rights

- (1) A person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, including a care-giver who otherwise has no parental responsibilities and rights in respect of a child, must, whilst the child is in that person's care-
  - (a) safeguard the child's health, well-being and development; and
  - (b) protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm or hazards.
- (2) Subject to section 129, a person referred to in subsection (1) may exercise any parental responsibilities and rights reasonably necessary to comply with subsection (1), including the right to consent to any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or guardian of the child.
- (4) A person referred to in subsection (1) may not-
  - (a) hold himself or herself out as the biological or adoptive parent of the child; or
  - (b) deceive the child or any other person into believing that that person is the biological or adoptive parent of the child.

## Part 4, Section 40: Rights of child conceived by artificial fertilisation

- (1) (a) Whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses as if the gamete or gametes of those spouses had been used for such artificial fertilisation.
  - (b) For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses have granted the relevant consent.
- (2) Subject to section 296, whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilization must for all purposes be regarded to be the child of that woman.
- (3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when-
  - (a) that person is the woman who gave birth to that child; or
  - (b) that person was the husband of such woman at the time of such artificial fertilisation.

## Section 41: Access to biographical and medical information concerning genetic parents –

A child born as a result of artificial fertilisation or surrogacy or the guardian of such child, is entitled to have access to any medical information concerning that child's genetic parents;

and any other information concerning that child's genetic parents but not before the child reaches the age of 18 years. Provided that the information does not reveal the identity of the person whose gametes were used of the surrogate mother.

#### **Chapter 4: CHILDREN'S COURTS**

Part 1: Establishment, status and jurisdiction

##### Section 46: Orders Children's Court may make

- (1) A children's court may make the following orders:
- (h) a child protection order, which includes an order- (ii) giving consent to medical treatment of, or to an operation to be performed on, a child; (v) instructing a hospital to retain a child who on reasonable grounds is suspected of having been subjected to abuse or deliberate neglect, pending further inquiry; (vii) instructing a person who has failed to fulfil a statutory duty towards a child to appear before the court and to give reasons for the failure;

Part 2: Court Proceedings

##### 53. Who may approach court

- (a) A child who is affected by or involved in the matter to be adjudicated;
- (b) anyone acting in the interest of the child;
- (c) anyone acting on behalf of a child who cannot act in his or her own name;
- (d) anyone acting as a member of, or in the interest of, a group or class of children; and
- (e) anyone acting in the public interest.

##### 55. Legal representation of children

If the child is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter to the Legal Aid Board.

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

- 1) If a child is seriously injured or abused while in partial care or following an occurrence at a partial care facility, the person operating the partial care facility or a person employed at the partial care facility must immediately report such injury or abuse to the provincial head of social development, who must cause an investigation to be conducted into the circumstances of the serious injury or abuse.
- 2) If a child dies while in partial care or following an occurrence at a partial care facility, the person operating the partial care facility or a person employed at the partial care facility must immediately after the child's death report such death to—
  - a) the parent, guardian or care-giver of the child;
  - b) a police official; and
  - c) the provincial head of social development.

- 3) The police official must cause an investigation into the circumstances surrounding the death of the child to be conducted by the South African Police Service, unless the police official is satisfied that the child died of natural causes.

**Chapter 7: PROTECTION OF CHILDREN**

Part 1: Child Protection System

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

- 1) Any correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.
- 2) Any person who on reasonable grounds believes that a child is in need of care and protection may report that belief to the provincial department of social development, a designated child protection organisation or a police official.
- 3) A person referred to in subsection (1) or (2)—
  - a) must substantiate that conclusion or belief to the provincial department of social development, a designated child protection organization or police official; and
  - b) who makes a report in good faith is not liable to civil action on the basis of the report.
- 4) A police official to whom a report has been made in terms of subsection (1) or (2) or who becomes aware of a child in need of care and protection must—
  - a) ensure the safety and well-being of the child concerned if the child's safety or well-being is at risk; and
  - b) within 24 hours notify the provincial department of social development or a designated child protection organisation of the report and any steps that have been taken with regard to the child.
- 5) The provincial department of social development or designated child protection organization to whom a report has been made in terms of subsection (1), (2) or (4), must—
  - a) ensure the safety and well-being of the child concerned, if the child's safety or well-being is at risk;

- b) make an initial assessment of the report;
  - c) unless the report is frivolous or obviously unfounded, investigate the truthfulness of the report or cause it to be investigated;
  - d) if the report is substantiated by such investigation, without delay initiate proceedings in terms of this Act for the protection of the child;
- and
- e) submit such particulars as may be prescribed to the Director-General for inclusion in Part A of the National Child Protection Register.
- 6) a) A designated child protection organisation to whom a report has been made in terms of subsection (1), (2) or (4) must report the matter to the relevant provincial department of social development.
- b) The provincial head of social development must monitor the progress of all matters reported to it in terms of paragraph (a).
- 7) The provincial department of social development or designated child protection organisation which has conducted an investigation as contemplated in subsection (5) may—
- a) take measures to assist the child, including counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation;
  - b) if he or she is satisfied that it is in the best interest of the child not to be removed from his or her home or place where he or she resides, but that the removal of the alleged offender from such home or place would secure the safety and well-being of the child, request a police official in the prescribed manner to take the steps referred to in section 153; or
  - c) deal with the child in the manner contemplated in sections 151, 152 or 155.
- 8) The provincial department of social development or designated child protection organisation which has conducted an investigation as contemplated in subsection (5) must report the possible commission of an offence to a police official

Part 2: National Child Protection Register

To be established by the Director-General, Confidentiality, Limited Access

Part A: to have a record (including circumstances) of abuse or deliberate neglect inflicted on specific children; use information to protect these children, monitor cases, determine trends, use for budgetary purposes.

Section 118 : Purpose of Part B of Register - The purpose of Part B of the Register is to have a record of persons who are unsuitable to work with children and to use the information in the Register in order to protect children in general against abuse from these persons.

Part 3: PROTECTIVE MEASURES RELATING TO HEALTH OF CHILDREN

**Section 129: Consent to medical treatment and surgical operation**

- (1) Subject to section 5(2) of the Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996), a child may be subjected to medical treatment or a surgical operation only if consent for such treatment or operation has been given in terms of either subsection (2), (3), (4), (5), (6) or (7).
- (2) A child may consent to his or her own medical treatment or to the medical treatment of his or her child if-
  - (a) the child is over the age of 12 years; and
  - (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment.
- (3) A child may consent to the performance of a surgical operation on him or her or his or her child if-
  - (a) the child is over the age of 12 years; and
  - (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation; and
  - (c) the child is duly assisted by his or her parent or guardian.
- (4) The parent, guardian or care-giver of a child may, subject to section 31, consent to the medical treatment of the child if the child is-
  - (a) under the age of 12 years; or
  - (b) over that age but is of insufficient maturity or is unable to understand the benefits, risks and social implications of the treatment.
- (5) The parent or guardian of a child may, subject to section 31, consent to a surgical operation on the child if the child is-
  - (a) under the age of 12 years; or
  - (b) over that age but is of insufficient maturity or is unable to understand the benefits, risks and social implications of the operation.
- (6) The superintendent of a hospital or the person in charge of the hospital in the absence of the superintendent may consent to the medical treatment of or a surgical operation on a child if-
  - (a) the treatment or operation is necessary to preserve the life of the child or to save the child from serious or lasting physical injury or disability; and
  - (b) the need for the treatment or operation is so urgent that it cannot be deferred for the purpose of obtaining consent that would otherwise have been required.
- (7) The Minister may consent to the medical treatment of or surgical operation on a child if the parent or guardian of the child-
  - (a) unreasonably refuses to give consent or to assist the child in giving consent;
  - (b) is incapable of giving consent or of assisting the child in giving consent;

- (c) cannot readily be traced; or
  - (d) is deceased.
- (8) The Minister may consent to the medical treatment of or surgical operation on a child if the child unreasonably refuses to give consent
- (9) A High Court or children's court may consent to the medical treatment of or a surgical operation on a child in all instances where another person that may give consent in terms of this section refuses or is unable to give such consent
- (10) No. parent, guardian or care-giver of a child may refuse to assist a child in terms of subsection (3) or withhold consent in terms of subsections (4) and (5) by reason only of religious or other beliefs, unless that parent or guardian can show that there is a medically accepted alternative choice to the medical treatment or surgical operation concerned.

**Section 130: HIV-testing**

- (1) Subject to section 132, no child may be tested for HIV except when-
- (a) it is in the best interests of the child and consent has been given in terms of subsection (2); or
  - (b) the test is necessary in order to establish whether-
    - (i) a health worker may have contracted HIV due to contact in the course of a medical procedure involving contact with any substance from the child's body that may transmit HIV; or
    - (ii) any other person may have contracted HIV due to contact with any substance from the child's body that may transmit HIV, provided the test has been authorised by a court.
- (2) Consent for a HIV-test on a child may be given by-
- (a) the child, if the child is-
    - (i) 12 years of age or older; or
    - (ii) under the age of 12 years and is of sufficient maturity to understand the benefits, risks and social implications of such a test;
  - (b) the parent or care-giver, if the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test;
  - (c) the provincial head of social development, if the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test;
  - (d) a designated child protection organisation arranging the placement of the child, if the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test;
  - (e) the superintendent or person in charge of a hospital, if-
    - (i) the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test; and
    - (ii) the child has no parent or care-giver and there is no designated child protection organisation arranging the placement of the child; or
  - (f) a children's court, if-
    - (i) consent in terms of paragraph (a), (b), (c) or (d) is unreasonably withheld; or
    - (ii) the child or the parent or care-giver of the child is incapable of giving consent.

### Section 132: Counselling before and after HIV-testing

- (1) A child may be tested for HIV only after proper counselling, by an appropriately trained person, of-
  - (a) the child, if the child is of sufficient maturity to understand the benefits, risks and social implications of such a test; and
  - (b) the child's parent or care-giver, if the parent or care-giver has knowledge of the test.
- (2) Post-test counselling must be provided by an appropriately trained person to -
  - (a) the child, if the child is of sufficient maturity to understand the implications of the result; and
  - (b) the child's parent or care-giver, if the parent or care-giver has knowledge of the test.

### Section 133: Confidentiality of information on HIV/AIDS status of children

- (1) No. person may disclose the fact that a child is HIV-positive without consent given in terms of subsection (2 ), except-
  - (a) within the scope of that person's powers and duties in terms of this Act or any other law;
  - (b) when necessary for the purpose of carrying out the provisions of this Act;
  - (c) for the purpose of legal proceedings; or
  - (d) in terms of an order of a court.
- (2) Consent to disclose the fact that a child is HIV-positive may be given by -
  - (a) the child, if the child is-
    - (i) 12 years of age or older; or
    - (ii) under the age of 12 years and is of sufficient maturity to understand the benefits, risks and social implications of such a disclosure;
  - (b) the parent or care-giver, if the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a disclosure;
  - (c) a designated child protection organisation arranging the placement of the child, if the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a disclosure;
  - (d) the superintendent or person in charge of a hospital, if-
    - (i) the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a disclosure; and
    - (ii) the child has no parent or care-giver and there is no designated child protection organisation arranging the placement of the child; or
  - (e) a children's court, if-
    - (i) consent in terms of paragraph (a), (b), (c) or (d) is unreasonably withheld and disclosure is in the best interests of the child; or
    - (ii) the child or the parent or care-giver of the child is incapable of giving consent.

### Section 134: Access to contraceptives

- (1) No. person may refuse-
  - (a) to sell condoms to a child over the age of 12 years; or
  - (b) to provide a child over the age of 12 years with condoms on request where such condoms are provided or distributed free of charge.

- (2) Contraceptives other than condoms may be provided to a child on request by the child and without the consent of the parent or care-giver of the child if-
  - (a) the child is at least 12 years of age;
  - (b) proper medical advice is given to the child; and
  - (c) a medical examination is carried out on the child to determine whether there are any medical reasons why a specific contraceptive should not be provided to the child.
- (3) A child who obtains condoms, contraceptives or contraceptive advice in terms of this Act is entitled to confidentiality in this respect, subject to section 105.

**Chapter 9: CHILD IN NEED OF CARE AND PROTECTION**

Part 1: Identification of child in need of care and protection

Part 2: Children's court processes

Chapter 10: CONTRIBUTION ORDER

**Chapter 11 : Alternative Care**

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

- 1) If a child in alternative care is seriously injured or abused, the management of the child and youth care centre, person or organisation in whose care or temporary safe care the child has been placed must immediately report the matter to the provincial head of social development, who must cause an investigation to be conducted into the circumstances of the serious injury or abuse.
- 2) If a child in alternative care dies, the management of the child and youth care centre or person in whose care or temporary safe care the child has been placed must immediately after the child's death report such death to—
  - a) the parent or guardian of the child, if he or she can be traced;
  - b) a police official;
  - c) the provincial head of social development; and
  - d) the social worker dealing with the matter.
- 3) The police official must cause an investigation into the circumstances surrounding the death of the child to be conducted by the South African Police Service, unless the police official is satisfied that the child died of natural causes.

## Chapter 14 : Drop-in centres

### 213. Drop-in centres

- 1) A drop-in centre is a facility providing basic services aimed at meeting the emotional, physical and social development needs of vulnerable children.
- 2) A drop-in centre must offer any of the following basic services:
  - a) Provision of food;
  - b) school attendance support;
  - c) assistance with personal hygiene; or
  - d) laundry services.
- 3) A drop-in centre may offer any of the following programmes appropriate to the developmental needs of the children attending that centre:
  - a) Guidance, counselling and psychosocial support;
  - b) social skills and life skills;
  - c) educational programmes;
  - d) recreation;
  - e) community services;
  - f) school holiday programmes;
  - g) primary health care in collaboration with the local health clinic;
  - h) reporting and referral of children to social workers or social service professionals;
  - i) promotion of family preservation and reunification;
  - j) computer literacy;
  - k) outreach services; and
  - l) prevention and early intervention.

**Chapter 15: ADOPTION**

**Chapter 16: INTER-COUNTRY ADOPTION**

**Chapter 17: CHILD ABDUCTION**

**Chapter 18: TRAFFICKING IN CHILDREN**

286. Assistance to child who is victim of trafficking

1) With due regard to the safety of a child and without delay-

a) the Director-General: Foreign Affairs must facilitate the return to the Republic of a child who is a citizen or permanent resident of the Republic and who is a victim of trafficking; and

b) the Director-General: Home Affairs must-

i) facilitate and accept the return of a child contemplated in paragraph (a);

ii) issue such travel documents or other authorisations as may be necessary to enable such a child to travel to and enter the Republic;

iii) at the request of another state that is a party to the UN Protocol to Prevent Trafficking in Persons or to an agreement relating to trafficking in children, verify that the child who is a victim of trafficking is a citizen or permanent resident of the Republic; and

iv) upon the child's entry into the Republic refer the child to a designated social worker for investigation in terms of section 155(2).

2)

a) If it is essential in the best interests of a child who has been trafficked, the Director-General must authorise an adult at state expense to escort the child from the place where the child was found to the place from which the child was trafficked.

b) The Director-General may not act in terms of paragraph (a) unless he or she is satisfied that the parent, guardian, care-giver or other person who has parental responsibilities and rights in respect of the child does not have the financial means to travel to the place where the child is in order to escort the child back.

## 288. Reporting of child who is victim of trafficking

An immigration official, police official, social worker, social service professional, medical practitioner or registered nurse who comes into contact with a child who is a victim of trafficking in the Republic must refer that child to a designated social worker for investigation in terms of section 289(1).

## Chapter 19: SURROGATE MOTHERHOOD

"surrogate mother" means an adult woman who enters into a surrogate motherhood agreement with the commissioning parent;

"surrogate motherhood agreement" means an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent;

### Main Principles

- Agreement (signed by all parties and entered into in SA) must be in writing and confirmed by the High Court
- At least one commissioning parent to be domiciled in SA
- Surrogate mother, husband / partner domiciled in SA (at time of contract) – Court may dispense with this requirement
- Consent to agreement and also sign
  - Husband, wife or partner (permanent relationship) of commissioning parent, and
  - Husband / partner of surrogate mother
- Genetic origin of child : Commissioning parent(s) not able to give birth to child
- Suitable to accept parenthood
- Surrogate mother is suitable and is not using surrogacy as a source of income (altruistic purposes)
- Surrogate mother to have a living child of her own
- Gametes of both commissioning parents to be used – or one if medical problem
- Artificial fertilisation of surrogate mother: Agreement first; Valid for 18 months only; cannot cancel contract after AI takes place
- Surrogate mother and relatives: Obligated to hand over child; no rights to parenthood or contact with child; no succession rights by child or maintenance rights
- If no agreement, the child is deemed to be child of the woman that gave birth
- Provision is made for termination and compensation

## 303. Prohibition of certain acts

- 1) No person may artificially fertilise a woman in the execution of a surrogate motherhood agreement or render assistance in such artificial fertilisation, unless that artificial fertilisation is authorised by a court in terms of the provisions of this Act.

- 2) No person may in any way for or with a view to compensation make known that any person is or might possibly be willing to enter into a surrogate motherhood agreement.

## **Chapter 22: MISCELLANEOUS MATTERS**

Section 305 (4) : Offences - A person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance.

### **Regulations**

#### **Chapter 6: Child Protection System (Section 104-110 and 142(a)-(f) of the Act)**

##### *General Regulations Regarding Children*

#### **37. Powers and responsibilities of persons suitable to investigate child abuse or neglect;-**

A person who is suitable in terms of regulation 36 to conduct investigations into cases of alleged child abuse or neglect, and who has received a report alleging the abuse or neglect of a child, must-

- a) investigate that report in accordance with regulation 35 within a reasonable time that may be required by the severity of the case;
- b) in cases of sexual abuse cases refer the child, within 72 hours, to a medical health professional for medical treatment;
- c) if necessary, accompany the child or cause the child to be accompanied to a police station for purposes of laying a complaint;
- d) if necessary, accompany the child or cause the child to be accompanied to a medical facility for purposes of medical treatment;
- e) facilitate counselling and support to reduce trauma to the child and his or her family members, and if necessary, refer the child to other relevant disciplines;
- f) co-ordinate the available and applicable child protection services to ensure the safety and well-being of the child;
- g) develop and implement a child protection plan in consultation with the child, his or her parents, guardian or care-giver and, if required, other relevant disciplines;

- h) review the child protection plan on a six-monthly basis or earlier, depending on the severity of the abuse or neglect;
- i) ensure that the prescribed particulars of the child are recorded in Part A of the National Child Protection Register; and
- j) take the protective measures contemplated in the Act prescribed in Section 151 and 152 of the Act.

### **38. Conditions for examination or assessment of abused or neglected children and consent of such children**

- 1) A child who is suspected of having been abused or neglected must, upon the examination or assessment of such child-
  - a) be addressed, in a language which he or she can understand;
  - b) be accompanied by a support person of the child's choice, unless he or she is of sufficient maturity and mental capacity to understand the reasons for the assessment or examination and expresses a wish not to be accompanied by such person;
  - c) be treated with empathy, care and understanding, with due regard to the child's right to privacy and confidentiality;
  - d) as far as possible be examined or assessed in a child-friendly environment;
  - e) not be subjected to the presence of any other person who is not required to be present at the examination or assessment; and
  - f) not be subjected to cruel or degrading language.
- 2) A child must, prior to his or her being examined or assessed for purposes of establishing whether such child has been abused or neglected, consent, either verbally or in writing, to the assessment or examination if such child is of sufficient maturity and has the mental capacity to understand the reasons for the examination or assessment:

Provided that an assessment or examination may proceed in the absence of a child's consent if it is deemed to be in the best interests of such child, in which case the reasons for proceeding with the assessment or examination must be noted in writing by the person doing the assessment or examination and explained to the child and to his or her parent, guardian or care-giver.

## **Chapter 8 : Protective Measures relating to Health Of Children (Section 129 of the Act)**

### **47. Consent by Minister to medical treatment of or surgical operation on child in certain circumstances**

An application to the Minister for the Minister to consent to the medical treatment of or surgical operation on a child in terms of section 129(7) and (8) of the Act must be made in writing in a form identical to Form 33.

### **48. Consent by child to performance of surgical operation**

- 1) Consent by a child to the performance of a surgical operation must be completed in writing by the person performing such operation or by a representative of the institution at which such operation is going to be performed, and signed by the child and must be furnished in a form identical to Form 34.
- 2) A parent or guardian who duly assists a child to consent to the performance of a surgical operation on such child must assent to this in writing on the same form contemplated in sub-regulation (1).

### **49. Consent to surgical operation of child where parent is a child below 18 years of age**

The parent or guardian of a child parent who duly assists such child parent to consent to the performance of a surgical operation on the child concerned, must assent to this in writing in a form identical to Form 35.

## **Chapter 12 : Alternative Care (Sections 167-179 of the Act)**

### **64. Serious injury, abuse or death of child in alternative care**

Serious injury, abuse or death of any child in alternative care must be reported in terms of section 178(1) or (2) of the Act in a form identical to Form 40.

## **Chapter 15 : Drop-In Centres (Sections 213-227 of the Act)**

### **95. Skills and training of persons employed at or engaged in drop-in centre**

- 1) Any person rendering services to children at a drop-in centre, excluding persons who do not work directly with such children, must possess the following skills:

- a) The ability to implement a development program in a drop-in centre;
  - b) report-writing skills;
  - c) skills or training on the identification of irregular and dysfunctional behavior in a child;
  - d) basic numeracy skills; and
  - e) skills or training on child development.
- 2) Any person employed at or engaged at a drop-in centre after registration of the centre in terms of these Regulations must provide his or her employer with-
- a) a certified copy of his or her identity document; and
  - b) proof of his or her skills or training.
- 3) Any person rendering services to children at a drop-in centre and who works directly with a child in such centre must be able to communicate with the child in a language, including sign language, which such child understands.
- 4) If a drop-in centre renders services to children with special developmental and behavioral needs, one or more persons with specialized skills in dealing with such children must be employed or available to provide such specialized services.

NOTE:

All sections contained in this document which is written in *bold and italic* reflects the relevant provisions of the Children's Act which came into effect on 1 April 2010.