



Reviewing the Children's Act

The Children's Amendment Act (Act 41 of 2007) was signed into law on 18 March this year. The Act, together with draft regulations recently published for public comment, represents the final step in the arduous, ten-year journey of reviewing the Child Care Act.

The new Act, when it becomes operational in 2009, will serve as a comprehensive one-stop shop to give effect to the constitutional rights of children. Importantly, the Act outlines the role of local government in providing this full basket of social services to children.

The new Act is not exclusively directed at children, however, but also has the broader intention of providing support to families in fulfilling their primary responsibilities to children. It also recognises and regulates the informal support networks found in communities. Importantly, it makes provision for the increasing prevalence of child-headed households as a consequence of HIV and Aids and the devastating impact that the epidemic has on family units and entire communities (see "Informal settlements and HIV and Aids", page 20). The Act

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puts strong emphasis on prioritising the needs of children suffering from chronic diseases and disabilities. It furthermore mandates that the funding of certain key programmes must be prioritised "in communities where families lack the means of providing proper shelter, food and other basic necessities of life to their children".

Local government has a direct role to play in identifying these vulnerable communities. In many instances, municipalities already perform a facilitative or enabling function for civil society and community-based organisations that undertake welfare activities. The Act, recognising the work already undertaken by municipalities, therefore confers both auxiliary and enabling roles on local government, as well as more direct and active roles for municipalities to play in implementing the Act.

Duties of local government

The Act creates three opportunities for local government to be directly involved in its implementation. The provincial head of social welfare, on his/her initiative, has the discretion to assign various functions – related to the registration of partial care facilities, early childhood development facilities and drop-in centres – to municipalities. All three types of facility provide temporary care for children and are situated in their immediate community.

‘Partial care’ refers to care given by any person (whether for reward or not) to more than six children. It excludes the care of children in schools, hostels or medical facilities and includes what are traditionally referred to as ‘after-care’ facilities provided to the children of working parents. ‘Early childhood development’, on the other hand, refers to the care of children up to schoolgoing age and includes programmes that stimulate the holistic development of young children and assist with school readiness. ‘Drop-in centres’, however, are a new concept that the Act introduces. These centres will provide basic services aimed at meeting the “emotional, physical and social development needs of vulnerable children” with services ranging from the provision of food to hygiene facilities, support for school attendance, counselling and after-school facilities.

To ensure that there is an appropriate spread of these facilities throughout a province, the MEC for social development is obliged to work with municipalities to identify proper sites for their placement. The MEC also has to ensure that a proper register of such facilities is maintained. In this regard, the Act provides that the provincial head of social development has the discretion to assign the functions related to the registration of these facilities to municipalities. This assignment takes the form of a written agreement between the provincial head of social welfare and the municipal manager, as the representative of the municipality.

The municipal manager will then be responsible for receiving and evaluating applications to register these facilities, a duty which extends to renewing the registration of organisations that are already registered. The municipal manager has the discretion to grant conditional registration to these facilities where national norms and standards are not complied with, or may even cancel the registration of a facility where necessary. Applicants who are dissatisfied with a decision taken by the municipal manager may appeal against the decision to the municipal council within 90 days.

The municipal manager also has the administrative duty of maintaining information on these facilities and making it

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available on request to the provincial head of social development.

While the municipal manager can delegate any or all of the assigned functions to a social service professional employed by the municipality, that does not divest him/her of all responsibility for the performance of the functions. However, the functions can only be assigned to the municipality once it is established that it has the necessary capacity to perform them.

Assigning original functions?

The duties contemplated in the Act, as described above, are exacting and require adequate budgeting and capacity building at municipal level. For this very reason it is important that the assignment framework prescribed in the Constitution and Municipal Systems Act is strictly adhered to. An evaluation of the assignment framework contemplated in the Act and draft regulations reveals, however, that this is not the case.

Firstly, on the face of it, the above duties seem to fall within the ambit of the municipal function of “child care facilities” listed in Schedule 4B of the Constitution. But if “child care facilities” are an original competence of local government, surely related functions should not then be assigned to local government? The Act fails, however, to define the ambit of “child care facilities” and simply assigns these functions to municipalities. If it is found that the above duties do indeed fall within the competence of “child care facilities”, it would mean that the Act contemplates the assignment to municipalities of original functions – that is, functions which already belong to municipalities. This is anomalous and therefore vulnerable to constitutional challenge.

Furthermore, section 126 of the Constitution outlines a specific framework for executive assignments:

A member of the Executive Council of a province may assign any power or function that is to be exercised or performed in terms of an Act of Parliament or a provincial Act, to a Municipal Council.

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The Act, however, extends the power of assignment to the provincial head of social development, not the MEC for social development. This does not comply with the Constitution, which requires the assignment to be done by the relevant MEC and published by the Premier. By vesting a provincial official with this authority, the Act creates the impression that changes to the constitutional division of powers are administrative matters.

Budgeting

The implementation of the amended Children's Act and the momentum in putting these mechanisms into place can only be sustained if there is a proper assignment of functions that not only includes adequate budgetary allocations, but also provides for human resources and capacity building to ensure that activities are sustainable.

While the draft regulations require the assignment agreement to be accompanied by an appropriate three-year budget, operational plan and service level agreements, they do not make consultation with the National Treasury, the Financial and Fiscal Commission and the Budget Forum compulsory.

Neither do they disclose the financial risks to and liabilities on municipalities after the three-year period or how any additional expenditure born by municipalities will be funded, as required by section 10 of the Municipal Systems Act.

Already there are indications that proper budgeting for implementation has not taken place. The Act, as stated above, will only be fully operational in 2009. Provincial legislatures therefore have to make budgetary allocations for the implementation of the Act in this financial year. An initial report by the Children's Institute on the 2008/09 budgetary allocations indicates that provincial governments collectively have not made adequate budgetary allocations for the first year of implementation of the Act.

Looking forward

Local government will be instrumental in the implementation of this Act. It continues to play a vital role in ensuring adequate service delivery and an enabling environment that facilitates the establishment of child care facilities in vulnerable communities. The absence of proper water and sanitation services, for example, should not stand in the way of the projects and initiatives contemplated in this Act, particularly in historically impoverished communities and informal settlements. As municipalities work in concert with provincial government, communities and civil society, they will undoubtedly be beneficiaries of the dividends that healthier families and, ultimately, healthier communities yield over the long term.

However, for these partnerships to be productive and sustainable, it is imperative that clear roles and responsibilities are defined. The assignment framework outlined in the Constitution and Municipal Systems Act carefully defines the relationship between the assigning organ of state and municipalities, thus creating legal certainty, which is vitally important when dealing with 283 municipalities spread across nine provinces. It furthermore acts as a safeguard to protect municipalities against unfunded mandates. Adhering to the assignment framework also serves to ensure that the proper systems are in place to equip any municipality to fulfil the assigned function.

Failure to adhere to this framework affects the operational and financial functioning of municipalities. Ultimately, it undermines the ability of municipalities to implement the provisions of the Act, and that not only has an impact on local government across the board, but, more importantly, disadvantages the children who live in the impoverished and vulnerable communities of South Africa.

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For the full submission on the draft regulations on the Children's Act, see the Local Government Project's submission at www.communitylawcentre.org.za