



**CALL FOR
GREATER PROTECTION
FOR CHILDREN**

**Submission from
National Children's
Rights Committee
(NCRC)
on the
Working Draft of the
New Constitution**

19 FEBRUARY 1996

MORE PROTECTION FOR CHILDREN IS STILL NEEDED IN THE WORKING DRAFT OF THE NEW CONSTITUTION

The NCRC is calling for greater protection for the rights of the child in the Working Draft of the New Constitution. While some changes have been made to improve protection for children's rights in the interim Constitution, major gaps still exist. For example, fundamental rights such as the right to automatic legal representation for children in all court proceedings are not provided for in the working draft.

South Africa cannot afford to accept a constitution which deprives children of their basic human rights as expressed in the Convention on the Rights of the Child. South Africa ratified the Convention on 16 June 1995, accepting the obligation to make sure that children's rights are protected in the highest law of the land, the constitution. In this submission, recommendations are made to fill the gaps in protection for children and to ensure that the final draft of the new constitution will be in line with the Convention on the Rights of the Child.

In recognition of the fact that every section of the Bill of Rights applies to children as well as to adults, the recommendations do not focus exclusively on section 27 alone referring to children.

RECOMMENDATIONS

EQUALITY: SECTION 7 RECOMMENDATION:

Add "economic status" to the list of prohibited grounds of discrimination

In our first submission to the Constitutional Assembly, the NCRC called for equal protection for children regardless of economic status. We requested that the language "economic status" be added so that all children would receive

equal protection before the law, regardless of the poverty into which they may have been born.

The Convention on the Rights of the Child as well as other widely recognized human rights treaties prohibit discrimination against a person on the basis of "property", meaning the financial status of the person.¹

Given the loaded connotation of property in this country, we propose that the term "economic status" is more appropriate to convey the principle that no person, and more especially no child, should go without his/her basic human rights because of how much or how little his/her family may earn. It is critical for the development of this country that all children have an equal chance to develop through equal access to health care, education, adequate nutrition and other fundamental rights. By placing a prohibition on discrimination on the basis of economic status, we will ensure that all children have the chance to survive and develop to their fullest potential.

FREEDOM AND SECURITY OF THE PERSON: SECTION 11

RECOMMENDATION: Add language specifically prohibiting corporal punishment

The NCRC supports the Convention on the Rights of the Child which condemns all forms of corporal punishment against children. We recommend that specific language be added to ensure that corporal punishment is considered as a violation of the bodily integrity and dignity of the child. This is necessary in light of the prevailing public opinion that corporal punishment against children is an acceptable form of "discipline".

Thus we would add to section 11(3)(b) the following: "No one may be treated or punished in a cruel, inhuman or degrading way, including corporal punishment."

¹ SEE Article 2(1) of the Convention on the Rights of the Child, Article 2 of the Universal Declaration of Human Rights, Article 2 of the International Covenant on Civil and Political Rights.

This language places the State in the position of taking the lead by ending the use of corporal punishment against children in public institutions. Such a leadership position would facilitate the promotion of more healthy forms of child rearing within the family and the community.

CHILDREN'S RIGHTS: SECTION 27

RECOMMENDATIONS: Highlighted below

27(1)(B): CHANGE LANGUAGE "when removed from a family environment" to "when lacking a family environment"

We advocate changing the above language so that the sub-section would read: Every child has the right to family care, or appropriate alternative care when lacking a family environment. Such language would indicate a pro-active duty on the part of the government to find alternative family care for all children in need, for example, children on the streets. The current language seems to be more re-active, and would cover only those children who are already removed from their families through State intervention.

The proposed language "when lacking a family environment" is more in line with the Convention on the Rights of the Child which places a pro-active duty of the State to provide special assistance and protection for any child without a family for whatever reason.²

27(1)(C): ADD LANGUAGE: "Every child has the right to safety, early learning opportunities, social security"

While we are pleased to see that the working draft has retained in this clause fundamental rights for children such as the right to basic nutrition, shelter, health care and social services, we would recommend adding language which would complete the package for children. Thus we like to see this sub-section rewritten as follows:

² SEE Article 20(1).

Every child has the right to basic nutrition, shelter, safety, early learning opportunities, basic health care services and social services and social security.

Safety is an important concept to be added as it would place the onus on the State and society to promote a safe environment for children, ie free from the effects of political violence and environmental hazards.

Early learning opportunities is an essential addition to this section as it covers the neglected field of child development from birth to six years which would fall outside the current language. Early learning opportunities encompass the child's right to education and play, together with basic nutrition, shelter, safety, health care and social services.³ The State has a duty to provide training, services and facilities for early childhood development. As stated by UNICEF in 1990: *"Good health, nutrition and creative stimulation during childhood are key determinants of school progress, social responsiveness and economic productivity"*. Research in South Africa and elsewhere has shown that children who have the benefit of early learning opportunities do better at school, are less likely candidates for delinquency, school drop out and teenage pregnancy. The costs benefit to the society should not be overlooked as investing in the early years is an investment in the future.⁴

Finally, the guarantee of social security for children, is particularly crucial to ensure their full survival and development. It is so important that it should be included in section 27, in addition to section 26. It should be noted that the concept of social services does not automatically include material or financial provision for destitute families.

³ There are 5,8 million South African children under the age of six years. 5,224,000 children in the age category 0-4 years, 956,000 5 year olds and 3,767,000 6-9 year olds. (Lategan, 1994). Children in the age group birth to six years have historically born the brunt of the past discriminatory system as evidenced by high infant mortality rates and the high school drop out by Standard 3.

⁴ SEE: Submission from the Early learning Resource Unit (ELRU), tel: 021-696-4804.

The Convention on the Rights of the Child is quite clear on this matter and expressly states in Article 18 *that although both parents have the common primary responsibility for the upbringing and development of the child and to secure within their abilities and financial capacities the conditions of living necessary for the child's development*, a child may need social security from the State when the parents of that child are unable to fulfil his/her basic needs.⁵

ADD TO 27(1): "Every child has the right to free and compulsory primary and secondary education"

Arguably the most important right that a State must guarantee for its citizens is the right to free and compulsory primary and secondary education. The Convention on the Rights of the Child regards this right to education as the pillar upon which the child's right to survival, participation, development and protection is based.

Because this right is of such an absolutely critical nature, we recommend that it be expressly stated in section 27 protecting children to read: "Every child has the right to free and compulsory primary and secondary education." Given the inequitable history of education in this country, it is essential to make such a guarantee clear and irreversible in the future.

ADD TO 27(1): "Every child has the right to special care if disabled, to maximize his or her full potential and reintegration into society"

The Convention on the Rights of the Child expressly provides for the rights of children with disabilities to *"enjoy a full and decent life in conditions which ensure dignity, promote self-reliance, and facilitate the child's active participation in the community."*⁶ As no other section of the working draft deal fully with protection for the rights of persons with disabilities, we feel it is important to protect the rights of children with disabilities by including this

⁵ SEE Articles 26 and 27.

⁶ SEE Article 23.

language.

ADD TO 27(1): "Every child has the right to be provided with automatic legal representation by the State in all civil and criminal matters affecting the child."

Children without legal representation are particularly vulnerable in the courts and judicial system. They are detained unnecessarily in prisons, police cells or secure care facilities as no one is defending their interests. They are more likely to be convicted, to serve longer prison sentences and to suffer from sexual exploitation and other damaging conditions while in detention.⁷

Children in civil proceedings are also in need of legal representation to protect their interests in issues of custody, guardianship and foster care.⁸

The interim Constitution makes reference to the right to legal representation at the expense of the State for detained and accused persons in cases where substantial injustice would otherwise occur.⁹ This conditional right, most likely drafted in fear of financial implications, should be set aside in favour of an automatic right to legal representation at the expense of the State in all cases involving children. The right of children to legal representation has been accepted worldwide.¹⁰

⁷ SEE The Legal Rights of Children in South Africa, Eds. Pollecutt, Motshekga, Gardner, National Institute for Public Interest Law and Research 1995.

⁸ SEE Re Children's Aid Society of Winnipeg and A.M. and L.C. 7 C.R.R. 246 (1983); (a Canadian appeals court holding that a 13-year-old child had a right to be present and to have an attorney in a wardship proceeding. The court reasoned that counsel was necessary because the child's liberty and security would be affected by a permanent custody order, and because the child's right to be heard would be ineffective without counsel.)

⁹ Section 25 (1) (c).

¹⁰ SEE The Beijing Rules, Article 7(1) and 15, the Convention on the Rights of the Child, Article 40 (2)(b); and See also In re Gault, (387 U.S. 1 (1967), (the United States Supreme Court holding that a child in a delinquency proceeding has a right to counsel and that, if unable to afford counsel, the child has a right to have counsel appointed and paid for by the State.) The right to appointed counsel also

ADD TO 27(1) "The child has the right to express his or her views in all matters affecting the child, with such views being given due weight in accordance with the age and maturity of the child."

The Convention on the Rights states that children must be given the right to participate in matters and decisions which affect the child. The Convention provides that the child's views be considered and be given due weight in accordance with the age and maturity of the child. The Convention on the Rights of the Child regards the child's right to participate as crucial.¹¹

While adults universally have been given a voice in the decisions that affect them, this right has not always been extended to children. Cautionary rules for child witnesses and the failure to provide a child friendly courtroom environment for all child victims testifying in court are just two examples of how the child does not have the full opportunity to be heard in South Africa.

Another example is the lack of opportunity to express preferences in cases of divorce and separation where custody is at issue, in accordance with the child's age and maturity. Often children are placed by courts with a parent or guardian without consultation, causing the children to be unhappy and harming their development.

Such disparate and unfair treatment must be rectified in a democratic South Africa and the child's right to be heard must be delineated in the final constitution.

extends to children in conflict with the law in Canada and Canadian courts have been vigilant in protecting a child's right to counsel in criminal proceedings. See ET. v. The Queen (19 C.R.R. (2d) 156 (1993)). See also Regina v. H. 19 C.R.R. 68 (1985); (holding that "[t]he right to counsel is not something that a minor is in position to waive.").

¹¹ SEE Article 12.

27(1)(F): ADD A NEW SECTION:

- (i) "Every child has the right when charged with a criminal offence to be dealt with by an appropriate judicial system which takes account of his or her age and which allows for diversion of the child away from judicial proceedings where there is desirable and appropriate."
- (ii) retain the present language of 27(f)

In keeping with the Convention on the Rights of the Child, the Beijing Rules (UN Standard Minimum Rules for the Administration of Juvenile Justice) and the UN Rules for the Protection of Juveniles Deprived of Their Liberty, we advocate that children in conflict with the law be diverted away from the formal criminal justice system whenever possible. This is recognized throughout the world as necessary to avoid the stigmatization of children and to promote accountability and rehabilitation for young persons in a more child friendly manner. Community/family conferences, community service and victim compensation programmes are just a few examples of how children can be held accountable for their actions while avoiding criminal proceedings and the harsh effect they have on the development of the child.

The proposed language above provides for more child friendly courts to handle cases of children and places the goal of reintegrating children in conflict with the law into society as the primary aim. These additions are necessary to ensure that the constitution is in line with the Convention.

27(3): DELETE THE LANGUAGE: "In this section,"

The words "*in this section*" are unnecessary because the definition of a child as a person under the age of 18 applies beyond the ambit of this section.

27(4): ADD A NEW SECTION: "No child may be discriminated against because of his or her nationality."

The Convention on the Rights of the Child requires States to provide for all children within their borders, regardless of nationality. Thus it is essential that the constitution recognizes this obligation so as to prevent situations where xenophobic reactions could cause children to be denied fundamental rights necessary for their development and survival.

In consideration, however, of the limited resources available in South Africa, it might not be appropriate to list national origin as a prohibited ground of discrimination in section 7 on equality. As a result, we have recommended that this clause apply specifically to children and should therefore be placed in section 27.

27(5) ADD A NEW SECTION: "Every child must be protected from the effects of armed conflict and no child may be used in armed conflict."

On the issue of children involved in the conduct of war, the Convention on the Rights of the Child only prohibits the use of children under the age of 15 in war. This is considered by most child rights advocates as a major flaw in the Convention.

To improve the status of children in South Africa, we recommend this extra protection in the constitution.

EDUCATION: SECTION 28

RECOMMENDATION: **CHANGE THE LANGUAGE OF SECTION 28(1)(a) to: "Everyone has the right to free and compulsory primary and secondary education in a state or state aided institution."/**

Arguably the most important right that a State must guarantee for its citizens is the right to free and compulsory primary and secondary education. The Convention on the Rights of the Child regards this right to education as the pillar upon which the child's right to survival, participation, development and protection is based.

Because this right is of such an absolutely critical nature, we recommend that it be more clearly expressed in section 28 to read: "Everyone has the right to free and compulsory primary and secondary education in a state or state-aided institution." Given the inequitable history of education in this country, it is essential to make such a guarantee clear and irreversible in the future.

RECOMMENDATION: **CHANGE THE LANGUAGE OF 28(2)(B): "to early childhood education, and to further education, which the state must take reasonable and progressive legislative and other measures to make generally available and accessible;"**

Vast numbers of children in South Africa have been historically been denied access to adequate care and education in the early years-birth to six years. It is at this critical developmental stage that minds and bodies are formed. The provision of early childhood education is an indication of society's commitment to the adequate growth and development of its most vulnerable citizens.

ACADEMIC FREEDOM: SECTION 29

RECOMMENDATION: Return this right to section 14, the second option.

Under the Convention on the Rights of the Child, all children have the right to access to appropriate information and freedom of expression. Thus the constitution should be clear that the right to academic freedom does not start in institutions of higher learning alone. In section 14, all persons, including children have the right to freedom of conscience, religion, thought, belief and opinion.

STATES OF EMERGENCY: SECTION 36

RECOMMENDATION: No part of section 27 may be suspended during states of emergency.

Because children are particularly vulnerable members of society, it is not acceptable to argue that any one of the rights specified in section 27 could be suspended during states of emergency. Children need to be educated, fed and given proper medical attention regardless at all times. Efforts must be made at all times to see that children are protected, to the best of the State's ability.

CONCLUSION

SUMMARY OF SECTION 27 AS PROPOSED BY THE NCRC

Please note that the underlined text represents our recommendations for addition. We advocate that the existing language should remain as is.

(1) Every child shall have the right-

- (a) to a name and nationality as from birth;
- (b) to family life, or appropriate alternative care when lacking a family environment;
- (c) to basic nutrition, shelter, safety, early learning opportunities, basic health services, and social services and social security;
- (d) to free and compulsory primary and secondary education;
- (e) to special care, if disabled, to maximize his or her full potential and reintegration into society;
- (f) to express his or her views in all matters affecting him or her, with such views being given due weight in accordance with the age and maturity of the child;
- (g) to be protected from all forms of neglect and abuse;
- (h) to be protected from exploitative labour practices, and not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age, or that place at risk the child's well-being, education, physical or mental health or spiritual, moral, or social development;
- (i) to be provided with automatic legal representation by the State in all civil and criminal matters affecting the child.
- (j) (i) when charged with a criminal offence to be dealt with by an appropriate judicial system which takes account of his or her age and which allows for diversion of the child away from judicial proceedings where this is desirable and appropriate;
 - (ii) not to be detained except as a measure of last resort, in which case, in addition to the rights the child enjoys under sections 11 and 34, the child may be detained only for the shortest possible period of time and has the right to be-
 - (a) kept separately from other detained persons over the age of 18 years; and
 - (b) treated in a manner, and kept in conditions, that take account of the child's age.

(2) The child's best interests are of paramount importance in every matter

concerning the child.

- (3) No child may be discriminated against because of his or her nationality.
- (4) Every child must be protected from the effects of armed conflict and no child may be used in armed conflict.
- (5) A child shall mean a person under the age of 18 years.



FOR FURTHER INFORMATION, PLEASE CONTACT:

Mr. Tseliso Thipanyane

Chairperson of the NCRC Legal Sub-Committee

Tel: 021-959-3286

Fax: 021-959-2411

E-mail: tseliso@law1.uwc.ac.za