

# Children's rights of access to health care services and to basic health care services: a critical analysis of case law, legislation and policy

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## OPSOMMING

### Kinders se reg op toegang tot gesondheidsdienste en basiese gesondheidsorgdienste: 'n kritiese analise van hofbeslissing, wetgewing en beleid

Die Grondwet waarborg kinders se reg op gesondheidsorg in artikel 27(1) en artikel 28(1)(c). Artikel 27(1) bepaal dat elkeen die reg op toegang tot gesondheidsorgdienste het, met inbegrip van reprodutiewe gesondheidsorg. Artikel 28 bepaal dat elke kind die reg op basiese gesondheidsorgdienste het. Die artikel ondersoek die betekenis en verband tussen die twee regte om sodoende te bepaal wat dit vir die staat beteken. Dit gee dan aanleiding tot 'n evaluering van wetgewende en ander maatreëls wat die regering aangeneem het om die twee regte te realiseer.

## 1 Introduction

In mid-2014, South Africa's total population was estimated at 53.7 million people, 18.5 million of who were children (under eighteen years).<sup>1</sup> Therefore, children constitute 34% of the total population. Such a large population of children presents an opportunity for government to hasten economic development and to minimise poverty. However, in 2014 63% of children still live in poverty.<sup>2</sup> The correlation between poverty and health is well known. Poor children face a host of health problems. They also do not have access to the most basic health care services.

South Africa showed commitment to protecting and promoting children's rights to health care when it ratified the United Nations Convention on the Rights of the Child, 1989 (hereafter the CRC) in 1995

1 Children Count 'Children in South Africa' available from [www.childrencount.org.za/indicator.php?id=1&indicator=1](http://www.childrencount.org.za/indicator.php?id=1&indicator=1) (assessed 2016-12-01).

2 Children Count 'Children who live in poverty' available from [www.childrencount.ci.org.za/indicator.php?id=2&indicator=14](http://www.childrencount.ci.org.za/indicator.php?id=2&indicator=14) (assessed 2016-12-01).

and subsequently adopted the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).<sup>3</sup> Children's right to health care is expressed in two sections of the Constitution. Section 27(1) accords the right to have access to health care services for all South Africans. Section 28(1)(c) entitles every child to the right to basic health care services.

Despite the obvious importance for children of the right to access to health care services and the significance the Constitution attaches to their right to basic health care services, the Constitutional Court has largely avoided basing their decisions on section 28(1)(c) of the Constitution.<sup>4</sup> There have also been a limited number of cases in which the right of access to health care services has been invoked.<sup>5</sup> As a result, there is a relative scarcity of judicial authority in South Africa on the interpretation of children's right to health care. However, in *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>6</sup> (hereafter *Grootboom*), the Constitutional Court dealt, for the first time, with the interpretation of the right of access to adequate housing as entrenched in section 26 of the Constitution. Although this case did not directly deal with the right of access to health care services and children's right to basic health care services, the judgment has certain clear implications for the rights of the latter. This was made explicit by the Constitutional Court in its subsequent decision of *Minister of Health and Others v Treatment Action Campaign and Others* (hereafter *TAC*) where much of its reasoning on housing rights was reiterated in respect of health care rights.<sup>7</sup>

The aim of this paper is to analyse the significance and the relationship between these two rights and to examine what this means for the state. This leads to an evaluation of the legislative and policy measures the South African government has put in place to realise these two rights.

3 S 24 of the Convention recognises the right of a child to the 'highest attainable standard of health'. It further obliges states parties to strive to ensure that no child is deprived of his or her right of access to health care services which is but a single strand of the broader health rights that are recognised.

4 The court focussed on the right to access health care services afforded to all in s 27; see also Buchner-Eveleigh & Nienaber 'Gesondheidsorg vir Kinders: Voldoen Suid-Afrikaanse wetgewing aan die land se verpligtinge ingevolge die Konvensie oor die Regte van die Kind en die Grondwet?' 2012 *PER* 123; Skelton 'Children' in Currie & De Waal (eds) *The Bill of Rights Handbook* (2013) 611.

5 *Soobramoney v Minister of Health, KwaZulu Natal* 1998 1 SA 765 (CC), *B v Minister of Correctional Services* 1997 (6) BCLR 789, *Treatment Action Campaign v Minister of Health* 2000 BCLR (4) 356 (T).

6 2001 (1) SA 46 (CC).

7 2002 (5) SA 721 (CC); Pillay 'Tracking South Africa's progress on health rights: Are we any closer to achieving the goal' 2003 *Law, Democracy and Development* 57.

## 2 The Right to Health Care Under the Constitution of the Republic of South Africa, 1996

Children's right to health care is expressed in two sections of the South African Constitution. Section 27(1) accords the right to have access to health care services, including reproductive health care services, for all South Africans. Section 27(2) obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of, amongst others, health care rights. Section 28(1)(c), which is that portion of the Bill of Rights dealing specifically with children's rights, states that children have the right to basic health care services.

It is also important to note that section 7(2) of the Constitution places an obligation on the state to respect, protect, promote and fulfil all the rights, including health care rights, in the Bill of Rights.

Questions of central concern are: What is the significance of children's right to basic health care services in section 28(1)(c), given that the Constitution already recognises the right of everyone to have access to health care services in section 27? What is the relationship between these two rights and what specific obligation does the state have in relation to children's rights to basic health care services?

### 2 1 Implications of the Words 'Right to Access' in Section 27(1)(c) in Comparison to the Words 'Right to' in Section 28(1)(c)

In *Grootboom*, the Constitutional Court suggested that to have access to housing under section 26 of the Constitution was different from the right to adequate housing under article 11(1) of the International Covenant on Economic, Social and Cultural Rights, 1966.<sup>8</sup> Similarly, it could therefore be argued that the right to basic health care services has different implications from those of the right to *access* to health care services because the former does not include the word 'access'.<sup>9</sup>

However as Chirwa notes, the manner in which the court defined the right of access to housing in that case did not clearly demonstrate that the right to housing and the right to access to housing meant different things.<sup>10</sup> In particular, the court emphasised in *Grootboom* that 'access

8 Chirwa 'Child poverty and children's rights of access to food and to basic nutrition in South Africa' 2009 *ESR Review: Economic and Social Rights in South Africa* 3.

9 *Idem* 4.

10 *Ibid.*

to' signified that it was not only the state that had the responsibility to provide housing but also private actors.<sup>11</sup> It also stressed the obligation of the state to facilitate the realisation of the right of access to housing (an element of the duty to fulfil).<sup>12</sup> According to Chirwa, the obligation of the state in terms of section 7(2) of the Constitution – to respect, protect, promote and fulfil the rights in the Bill of Rights – has rendered the words 'access to' in the socio-economic rights provision superfluous, as each of these rights, irrespective of whether they use 'access to', engenders these obligations, including the duty to facilitate the realisation of these rights (an element of the duty to fulfil).<sup>13</sup>

## 2 2 The Question of Child Prioritisation

It was initially thought that the inclusion of socio-economic rights for children in section 28(1)(c) – and because children's socio-economic rights in this section are not qualified by progressive realisation and available resources such as the socio-economic rights of everyone in sections 26 and 27 – children were entitled to priority over everyone else in the allocation of basic services and goods.<sup>14</sup> The Constitutional Court in *Grootboom* cited legitimate concerns against this kind of reasoning especially if it meant that children had an unqualified right to certain socio economic rights.

The Constitutional Court, rejecting the application of the right under section 28(1)(c) unqualifiedly, pointed out that such reasoning had absurd consequences in that it meant that parents with children were to be accommodated with their children, while those who did not have children, no matter how old, disabled or otherwise deserving they may be, would remain without any form of respite.<sup>15</sup> The court also warned about the danger of children being used as stepping stones to housing by their parents instead of being valued for who they are.<sup>16</sup>

The court was of the opinion that section 28 must be read in context and stated that 'the obligation created by section 28(1)(c) can properly be ascertained only in the context of the rights and, in particular, the

11 Par 35; see also Chirwa *ESR Review: Economic and Social Rights in South Africa* 4.

12 Parr 35 & 36.

13 Chirwa 2009 *ESR Review: Economic and Social Rights in South Africa* 4.

14 Proudlock 'Children's socio-economic rights: Do they have a right to special protection' 2002 *ESR Review: Economic and Social Rights in South Africa* 6; Proudlock 'Children's socio-economic rights' in Boezaart (ed) *Child law in South Africa* (2009) 292; see also *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C) para 290G-H & 291 B-D. See further Liebenberg 'The interpretation of socio-economic rights' in Woolman *et al* (eds) *Constitutional law of South Africa* (2006) 33-51; Stewart 'Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socio-economic rights of others' 2008 *SAJHR* 473; Pieterse 'Children's access to health care services within and outside of the parental-child relationship' 2010 *THRHR* 232.

15 Par 71.

16 *Ibid.*

obligations created by section 25(5), 26 and 27'.<sup>17</sup> This could imply that the basic socio-economic rights of children are subject to the internal limitations set out in section 27(2) that apply to everyone in cases where the rights of both the parents and their children are at stake.<sup>18</sup> It further implies that the rights can only be viewed in the light of the obligations placed on the state.

The court further held that section 28(1)(c) and section 28(1)(d) must be read together.<sup>19</sup> Essentially, section 28(1)(b) outlined who had the responsibility for the care of children while section 28(1)(c) outlined the essential elements of that care.<sup>20</sup> Thus if the child is in the care of the parents, then the parents have the primary duty to provide for the needs of the child. The state's duties are limited to creating a legal, administrative and infrastructural environment that would enable children to enforce their rights against their parents.<sup>21</sup> However, if the child, for example, is removed from their parents and is in state care, then the state bears the obligation under section 28(1)(c).<sup>22</sup>

The decision that the state is not primarily responsible for children under parental care can be interpreted to mean that children's socio-economic rights are subordinate to everyone's rights.<sup>23</sup>

In *TAC* an action was instituted as a result of the government's refusal to expand its pilot programme on the provision of Nevirapine, a drug administered to prevent the transmission of HIV from pregnant women to their unborn children. The Constitutional Court attempted to clarify its earlier decision in *Grootboom* by declaring that the state's duty to guarantee and provide children's socio-economic rights under section 28(1)(c) is triggered not only when children are physically separated from their parents, but also in situations where, although the children reside with their parents, the parents are indigent and unable to effectively provide for their children.<sup>24</sup> In other words, children whose parents lack the financial resources and who are dependent on the state for the

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17 Par 73.

18 See also Stewart 2008 *SAJHR* 476.

19 Par 76; s 28(1)(b) provides that every child has the right to family care or parental care or to alternative care when removed from the family environment. S 28(1)(c) provides that every child has the right to basic nutrition, shelter, basic health care and social services.

20 Par 76.

21 Parr 71 & 75-78. See also Pieterse 2010 *THRHR* 234.

22 Par 77. See Proudlock 2002 *ESR Review: Economic and Social Rights in South Africa* 7 where she criticises this interpretation as it provides limited protection to the majority of children whose parents can't afford to fulfil their needs.

23 Nicholson 'The right to health care, the best interests of the child, and AIDS in South Africa and Malawi' 2002 *CILSA* 365; Proudlock 2002 *ESR Review: Economic and Social Rights in South Africa* 7; Chirwa 2009 *ESR Review: Economic and Social Rights in South Africa* 5.

24 Par 79. See also Liebenberg 'Taking stock: The jurisprudence on children's socio-economic rights and its implications for government policy' 2004 *ESR Review: Economic and Social Rights in South Africa* 4.

provision of health care services have a claim against the state for the provisioning of health care services.<sup>25</sup>

Despite the above clarification, the court did not base its decision on section 28(1)(c) when it concluded that children are direct bearers of individual rights to health care services if they have indigent parents. Instead in this case, as well as the *Grootboom* case, the Constitutional Court declared that a violation of sections 27(1) and 27(2) of the Constitution had occurred in that the state did not adopt reasonable measures. Reasonableness requires the design, adoption and implementation of measures to realise socio-economic rights that are comprehensive, in the sense that they do not exclude a significant segment of the population, especially not those whose needs are the most urgent and whose ability to enjoy all rights is most in peril.<sup>26</sup> The court emphasises the need to pay attention to vulnerable and marginalised groups in general measures for implementing socio-economic rights in its definition of the test of reasonableness.<sup>27</sup> This part of the test provides space for children's rights to be invoked, as demonstrated in the *TAC* case, where the court found that the negative impact on children's rights to basic health care services of the state's limited programme, was a ground contributing to the unreasonableness of the policy.<sup>28</sup>

Two Transvaal High Court judgments have subsequently elaborated the entitlements implied by the state's responsibility for children who lack parental care. In *Centre for Child Law v Minister of Home Affairs*, the court indicated that it understood *Grootboom* to mean that 'the state is under a direct duty to ensure basic socio-economic provision for children who lack parental care'.<sup>29</sup> The court accordingly ordered that unaccompanied foreign children had to be removed from a repatriation camp, taken to a place of safety and be provided with the necessary legal assistance. In *Centre of Child Law v MEC for Education*, the same court emphasised the 'unqualified and immediate' nature of section 28(1)(c) rights and held that the state was duty-bound to fulfil them for children that are in the care of the state.<sup>30</sup> It ordered that children housed at a school of industry had to be immediately provided with sleeping bags, as well as with interim psychological and therapeutic support pending an investigation and recommendations pertaining to the implementation of permanent support structures at the school.<sup>31</sup>

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25 Par 79. See also Proudlock 'Children's socio-economic rights' in Boezaart (ed) (*supra* n 14) 300.

26 Currie & De Waal (eds) *The Bill of Rights Handbook* (2013) 576.

27 Par 68.

28 Skelton 'Children' in Currie & De Waal (eds) (*supra* n 4) 611; Proudlock 'Children's socio-economic rights' in Boezaart (ed) (*supra* n 14) 299. See further Friedman *et al* 'Children's rights' in Woolman *et al* (eds) *Constitutional law of South Africa* (2002) 47-13.

29 2005 (6) SA 50 (T).

30 2008 1 SA 223 (T) 227I-J & 228G.

31 230F-231F.

The current jurisprudence can be read to suggest that only children without parents and children living in extreme poverty may have a direct and immediate claim to socio-economic rights.<sup>32</sup> It is, however, doubtful whether the Court will in future interpret section 28(1)(c) as bestowing an unqualified, direct and immediate right on children where parental care is present. Liebenberg correctly states that 'current jurisprudence has not resolved whether children have direct entitlements to socio-economic services under section 28(1)(c)'.<sup>33</sup>

In those instances where parental care is present, or where the socio-economic rights of everyone is at stake, it appears as if Courts attempt to avoid interpreting section 28(1)(c). It is clear from the *Grootboom* and *TAC* judgments that courts prefer to adjudicate the matters where adults and children are concerned in term of everyone's socio-economic rights as provided for in sections 26 and 27. Recognising children's socio-economic rights in a separate section in the Constitution, if not intended to emphasise the priority of these children, at least underscores the need to pay particular attention to children in general measures, policies and programmes on social provisioning and the need for child-specific measures.<sup>34</sup>

A possible reason for the court's reluctance to interpret section 28(1)(c), is that the remedies to realise socio-economic rights require time and resources.<sup>35</sup> The difficulties inherent in the enforcement of section 28(1)(c), however, should not imply that children's socio-economic rights cannot be viewed as unqualified rights.

### 2 3 The Issue of Defining the Substantive Content of Health Care Service Rights

The Constitutional Court's treatment of the content of the right to health care in the *TAC* case is minimal.<sup>36</sup> Instead of giving content to the right, the court, just as in the *Grootboom* case, confined itself to assessing whether the state has taken reasonable legislative and other measures to implement the right. The reason for this is essentially a rejection of a minimum core content of health care services that fits all situations (and which would be applicable to children).<sup>37</sup> In its most recent judgment on the right of everyone to have access to sufficient water in *Mazibuko and Others v City of Johannesburg and Others*,<sup>38</sup> O'Reagon J also rejected the minimum core concept by stating:

32 See also Liebenberg 'The interpretation of socio-economic rights' in Woolman *et al* (eds) (*supra* n 14) 33-51; Stewart 2008 *SAJHR* 478.

33 Liebenberg 'The interpretation of socio-economic rights' in Woolman *et al* (eds) (*supra* n 14) 33-51.

34 Chirwa 2009 *ESR Review: Economic and Social Rights in South Africa* 5.

35 See also Stewart 2008 *SAJHR* 479.

36 Currie & De Waal (eds) 591.

37 See also Proudlock 'Children's socio-economic rights' in Boezaart (ed) (*supra* n 14) 303.

38 2010 4 SA 1 (CC).

Moreover, what the right requires will vary over time and context. Fixing a qualified content might, in a rigid and counter productive manner, prevent an analysis of context. The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable.<sup>39</sup>

O'Reagon J held further that:

... ordinarily it is institutionally inappropriate for the court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights.<sup>40</sup>

Liebenberg has criticised the court's reasoning by stating that:

A court cannot evaluate whether the state's conduct or omissions are reasonable in relation to the fulfilment of socio-economic rights unless it develops a prior understanding of the normative goal to be achieved.<sup>41</sup>

Stewart is also of the opinion that a major shortcoming in the Constitutional Court's adjudication of socio-economic rights is the reluctance of the Court to give substantive content to socio-economic rights.<sup>42</sup> He argues that section 28(1)(c) should be the minimum core content of everyone's entitlements and suggests that in determining the meaning or defining section 28(1)(c), the Court should be guided by the values and the transformative aims of the Constitution and by international law.<sup>43</sup> The International Covenant on Economic, Social and Cultural Rights (hereafter the ICESCR)<sup>44</sup> and the CRC are relevant for section 28(1)(c). The monitoring committee of the ICESCR was responsible for the idea of the recognition of the minimum core of rights and has produced extensive commentary on the content of health.<sup>45</sup> The supervising body of the CRC has also extensively commented on the

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39 Par 60.

40 Par 61. See Liebenberg 'Water rights reduced to a trickle' *Mail and Guardian Online* (2009-10-15) available from <http://mg.co.za/article/2009-10-21-water-rights-reduced-to-a-trickle> (accessed 2016-12-01) where she criticises the court's reasoning as follows: 'A court cannot evaluate whether the state's conduct or omission are reasonable in relation to the fulfilment of socio-economic rights unless it develops a prior understanding of the normative goal to be achieved'.

41 Liebenberg *Mail and Guardian Online* (2009-10-21) *supra* n 40; see also Proudlock 'Children's socio-economic rights' in Boezaart (ed) (*supra* n 14) 304.

42 2008 *SAJHR* 493.

43 Stewart 2008 *SAJHR* 482-485.

44 The ICESCR has been signed by South Africa but not ratified.

45 UN Committee on Economic, Social and Cultural Rights General Comment 3 'The nature of state parties obligations', General Comment 14 'The right to the highest attainable standard of health'.

health rights contained in the CRC.<sup>46</sup> None of these commentaries are strictly binding under international law, but since they aim to implement and advance human rights, they constitute valuable material that the court may use in defining the scope and content of children's basic socio-economic rights.<sup>47</sup>

What follows is an investigation into policy and legislative measures the South African government has put in place to realise children's right to health care.

### 3 Legislative Analysis

Currently there are three primary and many related pieces of legislation regulating children's health care rights.<sup>48</sup> The three main pieces are the National Health Act,<sup>49</sup> Mental Health Care Act<sup>50</sup> and Children's Act.<sup>51</sup> The Choice on Termination of Pregnancy Act<sup>52</sup> and the Sterilisation Act<sup>53</sup> provide for appropriate and accessible reproductive health care services. Reference will also be made to the Consumer Protection Act.<sup>54</sup>

#### 3 1 The National Health Act

The National Health Act came into operation in 2005 and provides a framework for the realisation of health care rights in South Africa.<sup>55</sup> This Act seeks to regulate national health and provide uniformity in respect of health services across the nation. It establishes a national health system made up of both the public and private health sector and highlights the rights and duties of health care providers and users.<sup>56</sup> It also strives to protect, respect, promote and fulfil the rights of people to progressive realisation of the constitutional right to access to health care services, children's right to basic health care services, and the rights of vulnerable groups such as women, children, elderly persons and persons with disabilities.<sup>57</sup>

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46 General Comment 3: HIV/AIDS and the rights of the child (2003), General Comment 4: Adolescent health and development in the context of the CRC (2003).

47 Rosa & Dutschke 'Child rights at the core: The use of International law in South African cases on children's socio-economic rights' 2006 *SAJKHR* 228, 229 & 249.

48 See Buchner-Eveleigh & Nienaber 2012 *PER* 113.

49 61 of 2003.

50 17 of 2002.

51 38 of 2005.

52 92 of 1996.

53 44 of 1998.

54 68 of 2008.

55 Preamble of the National Health Act.

56 S 2.

57 S 2(c).

The Act refers to the constitutional right to health care for children and recognises them as a vulnerable group.<sup>58</sup> The Act therefore recognises that children have specific health care needs. However, the Act does not define the concepts 'health care services' or 'basic health care services'.<sup>59</sup> As these terms are not generally used in international instruments or national constitutions, its content and definition is fairly unclear.<sup>60</sup> It is therefore difficult for health care providers to know what to do to ensure that children's constitutionally protected health care rights are fulfilled.

The Act does provide the categories of people eligible for free health services and gives legal force to the government policy on providing free health care services to children under the age of six.<sup>61</sup> Section 4(3)(a) indicates that the state and clinics and community health centres funded by the state must provide free health services to children below the age of six who are not members or beneficiaries of medical aid schemes. Health services are rather unhelpfully defined in the Act as follows:

health care services, including reproductive health care and emergency medical treatment as contemplated in section 27 of the Constitution, basic nutrition and basic health care services contemplated in section 28(1)(c) of the Constitution, medical treatment contemplated in section 35(2)(e) of the Constitution and municipal health services.<sup>62</sup>

Additionally, the state must provide 'free primary health care services' to all persons, except members of medical aid schemes and their dependents<sup>63</sup> and women, it seems regardless of membership to a medical scheme, with free termination of pregnancy services.<sup>64</sup> The reference to 'health services' in section 4(3)(c) rather than 'primary health care services', implies that all services, not just primary health care services,<sup>65</sup> must be provided free of charge to children under the

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58 S 2(c)(iii) & (v).

59 See also Buchner-Eveleigh & Nienaber 2012 *PER* 113.

60 Buchner-Eveleigh & Nienaber 2012 *PER* 113; Pillay 'The National Health Bill: A step in the right direction?' 2002 *ESR Review: Economic and Social Rights in South Africa* 11. However, the equivalent right to s 27 of the Constitution in the ICESCR (art 12, the right to the highest attainable standard of physical or mental health) has been the subject of a recent Comment (General Comment 14 'The right to the highest attainable standard of health') by the Committee on Economic, Social and Cultural Rights. The right which is not confined to 'health care', is of a wider scope than that in s 27 of the Constitution, but a good deal of the Comment can be of assistance in interpreting the South African right.

61 See par 41 *infra*.

62 S 1.

63 S 4(3)(b).

64 S 4(3)(c).

65 Primary health care services are the basic first level of entry into the health system. It generally includes maternal and child care, prevention and control of locally endemic diseases, immunisation against the main infectious diseases and appropriate treatment of common diseases and injuries.

age of six.<sup>66</sup>

However, the Act makes provision for free health care to children and other persons eligible for free health care dependant on the discretion of the Minister of Health. It states that the decision must be taken in consultation with the Minister of Finance and must take into account a number of factors, including the range of free health services currently available, the categories of persons already receiving free health services, the impact of any such conditions (in the case of a child) on access to health services, and the needs of vulnerable groups such as women, children, elderly persons and persons with disabilities.<sup>67</sup> It is arguable that the inclusion of this section about the Minister's discretion means that the right of children to free health care is not adequately safeguarded.<sup>68</sup>

Interestingly, the Act enables the Minister to determine the types of free health services that should be provided but this power has not yet been used.<sup>69</sup> Further, even though there are categories of people who are able to access free health services, the scope of these services are not evident. In other words, there is little to no detail on the actual tangible free health care services which the public, including children, may lawfully access.<sup>70</sup> Trying to determine what health care services children may be entitled to is a difficult exercise. There is no law on this issue and one must resort to policy documents, which mainly deal with primary health care.

As far as the rights of health care users are concerned, the Act does not contain a separate section dealing with the rights of children as health care users. However, the Act provides a link with the Child Care Act<sup>71</sup> in its definition of 'health care user'.<sup>72</sup> As the Child Care Act has been repealed by the Children's Act,<sup>73</sup> the relevant section is now in terms of

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66 Buchner-Eveleigh & Nienaber 2012 *PER* 115; Meerkotter, Gerntholtz & Govender 'Rights of vulnerable groups to health care' in Hassim, Heywood & Berger (eds) *Health and Democracy* (2007) 307.

67 S 4(2).

68 Meerkotter, Gerntholtz & Govender 'Rights of vulnerable groups to health care' in Hassim, Heywood & Berger (eds) (*supra* n 66) 307.

69 S 3 read with the definition of 'primary health services' and 'essential health services' in s 1.

70 Williams, Versfeld & Singh 'Public Health services: Pre- and post-NHI' 2013 *Healthcare Review* 32.

71 74 of 1983.

72 S 1. A health care user is defined as the 'person receiving treatment in a health establishment, including receiving blood or blood products, or using a health service; and if the person receiving treatment or using a health service is a) below the age contemplated in s 39(4) of the Child Care Act, 1983, user includes the person's parent or guardian or another authorised by law to act on the first mentioned person's behalf'.

73 35 of 2005.

the Interpretation Act<sup>74</sup> section 129 of the Children's Act.<sup>75</sup> Section 129 lowers the age at which a child may consent to medical treatment and operation independently to twelve years (from the previous ages of fourteen and eighteen respectively) and also takes into account the level of maturity of the child.<sup>76</sup>

A health care user has the right to consent to a health service provided that the user is twelve years of age, mature enough and capable of understanding the benefits, risks and other social implications.<sup>77</sup> The user has the right to participate in any decisions affecting his or her personal health and treatment.<sup>78</sup> If the consent is given by a person other than the user, such a person must, if possible, consult the user before giving the required consent.<sup>79</sup> The individual also has a right to appropriate, adequate and comprehensive information about the health services delivered,<sup>80</sup> as well as the right to emergency medical treatment.<sup>81</sup> Every user is also entitled to have full knowledge and receive information in connection with matters relating to his health.<sup>82</sup>

### 3 2 The Mental Health Care Act

The Mental Health Care Act provides a legal framework for mental health. This Act seeks to ensure that appropriate care, treatment and rehabilitation services are made available to people with mental health care problems.<sup>83</sup> It also seeks to regulate access to and provide mental health care, treatment and rehabilitation services to voluntary, assisted and involuntary mental health care users.<sup>84</sup> It highlights the rights and duties of mental health care users.<sup>85</sup>

The Act makes very little specific reference to the care, treatment and rehabilitation of children. It therefore does not give priority to their mental health care needs.<sup>86</sup>

The Act also does not provide the scope and detail of the mental health care, treatment or rehabilitation services to be provided.

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74 33 of 1957. S 12(1) provides that where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall be construed as references to the provision so re-enacted.

75 Buchner-Eveleigh & Nienaber 2012 *PER* 115.

76 See par 3 3 *infra*.

77 S 7, read with s 129 of the Children's Act 38 of 2005.

78 S 8.

79 S 8(2)(a).

80 S 12.

81 S 5.

82 S 6.

83 S 3(a).

84 S 3(b).

85 S 3(c).

86 See also Buchner-Eveleigh & Nienaber 2012 *PER* 117.

Although the Act does not deal with the rights of children in a separate section, it does refer to a child younger than eighteen years in its definition of 'mental health care user'.<sup>87</sup> The user has the right to consent to care, treatment and rehabilitation services or admission to health establishments, except in urgent cases or where a court or a review board has authorised it.<sup>88</sup> The Act distinguishes between different categories of persons who require mental health care on the basis of whether they submit themselves voluntarily or not to mental health care or admission. A person, including a child younger than eighteen years, who is capable of making an informed decision, can submit him or herself voluntarily to treatment and admission. The person is then entitled to appropriate care, treatment and rehabilitation services or to be referred to an appropriate health establishment.<sup>89</sup>

A person who is incapable of making an informed decision on the necessity of care, treatment or rehabilitation services due to his or her mental illness and who does not refuse the health intervention, may receive assisted care, treatment or rehabilitation services without his or her consent if the head of the health establishment has approved a written application.<sup>90</sup> The application for assisted care, treatment or rehabilitation of a child must be made by the parent or guardian of the user.<sup>91</sup> At the time of making the application, there must be a reasonable belief that the user is suffering from a mental illness or a severe or profound mental disability and that care, treatment and rehabilitation services are required for his or her health or safety, or for the health and safety of other people.<sup>92</sup>

A person who is incapable of making an informed decision on the necessity of care, treatment or rehabilitation services and who refuses the health intervention must be provided with care, treatment and rehabilitation services without his or her consent if the head of the establishment approved a written application by someone else.<sup>93</sup> An application for the involuntary care, treatment and rehabilitation of a child must be made by the child's parent or guardian.<sup>94</sup> At the time of making the application, there must be a reasonable belief that the user has a mental illness of such a nature that the user is likely to inflict serious

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87 S 1. A mental health care user is defined as a 'person receiving care, treatment and rehabilitation services or using a health service at a health establishment aimed at enhancing the mental health status of a user, State patient and mentally ill prisoner and where the person concerned is below the age of eighteen years or is incapable of taking decisions, and in certain circumstances may include i) prospective user; ii) the person's next of kin; iii) a person authorised by any law or court order to act on that persons behalf'.

88 S 9(1).

89 S 25.

90 S 26.

91 S 27(1)(a).

92 S 26(b)(i).

93 S 32.

94 S 33(1).

harm to him or herself or others or that care, treatment and rehabilitation is necessary for the protection of his or her financial interests or reputation.<sup>95</sup>

### 3.3 The Children's Act

The Children's Act was adopted in 2005 to give effect to children's rights already guaranteed in the Constitution, and sets out principles relating to their care.<sup>96</sup>

This Act provides that all actions or decisions pertaining to children must respect, protect and fulfil the children's rights set out in the Bill of Rights.<sup>97</sup> Section 4 provides further that all organs of government at the national, provincial and local levels must take reasonable measures to the maximum extent of available resources to achieve the realisation of its provision. Section 4 is in agreement with the decisions of the Constitutional Court in *Grootboom* and *TAC* in that children's section 28(1)(c) rights are not unqualified but subject to the availability of resources. In terms of section 4, a uniform approach aimed at co-ordinating and integrating the services delivered to children must be developed.<sup>98</sup>

The Act also provides that the best interests of the child are paramount and must always be considered when taking decisions pertaining to children.<sup>99</sup> In addition, the Act recognises the right of children to be involved in the decision-making process on issues related to them.<sup>100</sup>

The Act only gives children limited protection in respect of health care services. The main text of the Children's Act does not specifically refer to the child's right to basic health care services.<sup>101</sup> The Act also does not define the standard of health care of children or the concept 'basic health care services'.<sup>102</sup> However, the Act guarantees the right to information on health care and deals extensively with consent to medical treatment, surgery and HIV testing. These consent provisions empower children, who have reached a certain age and level of maturity, to access a particular health service independently. In terms of sections 129(2) and 129(3), a child may consent to his or her own medical treatment or operation if the child is over the age of twelve and of sufficient maturity

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95 S 32(b).

96 Further commitment to the protection of the rights of the child was added through the Children's Amendment Act; see also the preamble of the Children's Act.

97 S 6(2).

98 Ss 4(1), 4(2) & 5.

99 Ss 7 & 9. This is in line with provisions on the best interest of children already contained in the Constitution of the Republic of South Africa, 1996.

100 S 10.

101 The preamble of the Children's Act refers to s 28 of the Constitution, which includes basic health care services. See also Van der Westhuizen 'Critical care decisions on neonates and young children in England and Wales – Lessons for South Africa' 2013 *Obiter* 461.

102 Buchner-Eveleigh & Nienaber 2012 *PER* 120.

to understand the benefits and risks of the proposed treatment or operation. In the case of a medical operation, the child must also be duly assisted by his or her parent or guardian. Section 130 – which deals with HIV-testing – provides that no child shall be tested for HIV except when it is in the best interest of the child and consent has been given by the child if he or she is twelve years of age or older, or under the age of twelve years and is of sufficient maturity to understand the benefits, risks and social implications of such a test.

Section 134 deals with access to contraceptives. It provides that children twelve years or older may buy condoms and have access to free condoms.<sup>103</sup> Children of twelve years or older may access other forms of contraceptives without the permission of their parents or care-givers provided that they have received proper medical information and they have had a medical examination to ensure that there is no medical reason why the child should not receive a specific contraceptive.<sup>104</sup> This provision is inconsistent with the other provisions relating to the age of consent in the Act, because it does not require an assessment of the maturity of the child before the child receives contraception. The Act also protects the right of the child to confidentiality when getting access to contraceptives and advice to contraception.<sup>105</sup>

### 3 4 The Choice on Termination of Pregnancy Act

The Choice on Termination of Pregnancy Act promotes reproductive rights and extends freedom of choice by affording every woman (including adolescent girls) the right to choose whether to have an early, safe and legal termination of pregnancy. It sets out the circumstances under which a pregnancy may be terminated and the place where such termination may take place. It also addresses the issue of consent, counselling and information concerning the termination of pregnancy.

This Act provides that a girl of any age can consent to a termination of pregnancy.<sup>106</sup> She must be advised to seek parental assistance, but cannot be refused access to a termination if she does not wish to do so.<sup>107</sup> The High Court in *Christian Lawyers Association v Minister of Health* declared this provision of the Act to be in line with the Constitution.<sup>108</sup> The court found that the approach of the legislature to allow children access to abortion services without parental consent is constitutionally permissible because it is flexible to recognise and accommodate the individual position of the child based on her intellectual, psychological and emotional make up and actual maturity.<sup>109</sup>

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103 S 134(1).

104 S 134(2).

105 S 134(3).

106 See ss 5(2) & 1(xi).

107 S 5(3).

108 2005 (1) SA 509 (T).

109 Sloth-Nielsen 'Protection of children' in Davel & Skelton (eds) *Commentary on the Children's Act* (2007) 7-31.

### 3 5 The Sterilisation Act

The Sterilisation Act provides for the right to sterilisation and determines the circumstances under which it may be performed. This Act explicitly states that a person under eighteen years may only be sterilised if failure to perform the sterilisation would jeopardise his or her life or seriously impair his or her health.<sup>110</sup> In this case, permission is required from the person who is legally entitled to act on behalf of the child who is to be sterilised.<sup>111</sup> An independent medical practitioner must also certify, in writing, that the sterilisation is in the best interests of the particular child. Furthermore, the desirability of the sterilisation must be assessed by a panel.<sup>112</sup>

### 3 6 The Consumer Protection Act

In terms of the Consumer Protection Act (CPA), there is an obligation on a service provider – such as health-care professional – to provide quality and timely service.<sup>113</sup> Section 54 of the CPA should be read together with section 3, which sets out the purpose of the Act, namely to protect vulnerable groups.<sup>114</sup> These two sections refer to medical services available to children. The Act provides for the enforcement of consumers' rights by means of various remedies.<sup>115</sup>

## 4 Specific Health Care Policies and Programmes

### 4 1 Free Health Care to Pregnant Women and Children Under the Age of Six

One of the first interventions targeting child health was made in 1994, when President Mandela introduced a policy that provided free health care to pregnant women and children under the age of six.<sup>116</sup> This policy is an appropriate and important measure aimed at making health services increasingly accessible to a particularly vulnerable sector of health users.<sup>117</sup> This initiative was coupled with an extensive clinic-building programme to ensure greater physical availability of health care

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110 S 2(3)(a).

111 S 2(3)(c)(i) & (ii).

112 S 3(2) read together with s 2(3)(b).

113 S 54(1)(a) & (b) reads as follows: 'When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to (a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the service; (b) the performance of a service in a manner and quality that persons are generally entitled to expect'.

114 See Jacobs, Stroop & Van Niekerk 'Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview' 2010 *PER* 304.

115 *Idem* 307. It falls outside the scope of this article to discuss these remedies in detail.

116 GN 657 of 1994-07-01.

117 Pillay 2003 *Law, Democracy and Development* 73.

services to people in South Africa, especially for those who live in poverty.

Since 1994, the Government has developed a wide ranging set of policies and programmes that target children and address their specific health care needs.

## 4 2 The Primary Health Care Approach

Government has adopted the primary health care approach since 1994. Child health is a key component in the primary health care package of services. According to the Department of Health's Primary health care package for South Africa – norms and standards – primary health care clinics must provide promotive, preventative (monitoring and promoting growth, immunisations, home care counselling, de-worming and promoting breast feeding), curative (assessing, classifying and treating) and rehabilitative services in accordance with the integrated management of childhood illnesses protocols at all times that the clinic is open.<sup>118</sup> The integrated management of childhood illnesses strategy is a key national strategy for reducing morbidity and mortality from common childhood illnesses that affect children under the age of five years.<sup>119</sup> It provides detailed action-orientated guidance on assessing, classifying, treating and counselling children and their caregivers on common childhood illnesses.

Primary health care clinics must also provide immunisation services at all times that the clinic is open. The Expanded Programme of Immunisation aims to decrease childhood morbidity and mortality from vaccine-preventable diseases. Immunisation against these diseases remains the most cost effective health intervention presently known.

Although the package also deals with adolescent health, it is less comprehensive than the service offered to younger children.<sup>120</sup>

## 4 3 Adolescent and Youth Health Policy

In 2002 the Department of Health launched a policy on youth and adolescent health. The Department of Health reviewed and updated the policy.<sup>121</sup> This policy seeks to improve the health status of young people through the prevention of illness, the promotion of healthy lifestyles, and the improvement of health care delivery systems by focussing on the

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118 Department of Health *Primary health care package for South Africa – norms and standards* (2000) available from [www.hsph.harvard.edu/population/vaccination/southafrica2.doc](http://www.hsph.harvard.edu/population/vaccination/southafrica2.doc) (accessed 13-01-2017).

119 See also Meerkotter, Gerntholtz & Govender 'Rights of vulnerable groups to health care' in Hassim, Heywood & Berger (eds) (*supra* n 66) 313.

120 As defined by the World Health Organization, adolescents are aged between ten and nineteen years.

121 The adolescent and Youth Health Policy Draft 2012 is available from [http://www.youthmetro.org/uploads/4/7/6/5/47654969/adolescent\\_youth\\_health\\_policy\\_draft.pdf](http://www.youthmetro.org/uploads/4/7/6/5/47654969/adolescent_youth_health_policy_draft.pdf).

accessibility, efficiency, quality, and sustainability of youth and adolescent-friendly health services. The policy, amongst others, addresses sexual and reproductive health and rights, HIV and AIDS, tuberculosis, chronic disease, disability, drug and substance abuse, mental health, violence and unintentional injuries. A key strategy for addressing their health is to increase access to and quality of youth-friendly health services. The Youth-Friendly Health Services initiative aims to ensure that all health services are accessible to youth and adolescents by supporting a more relaxed atmosphere of delivering health care. The National Department of Health Strategic Plan 2010-2013 has set a target of 70% for primary health care facilities implementing youth friendly services by 2014/2015, to increase accessibility, availability and utilisation of health services by young people. However, studies have shown that the provision and impact of the youth friendly service initiative are limited and below the Departments target (that 70% of primary health care facilities should implement these services by 2014/2015).<sup>122</sup> The Department has called for the acceleration of the implementation of youth friendly health services in all primary health care facilities.

## 5 Conclusion

Although the Constitutional Court has held that the socio-economic rights of children who are under parental care do not create unqualified obligations on the state to provide certain socio-economic goods on demand, this does not mean that children's socio-economic rights have no meaningful implications for the state. At the very minimum, by recognising their right to basic health care services, the drafters of the Constitution intended to emphasise the need for child-specific measures on basic health services and the fact that general measures on the right to health care services should make adequate provision for children.<sup>123</sup>

The evaluation of legislation and policy shows that there is no single, comprehensive piece of legislation dealing with the child's right to health care.<sup>124</sup> There are three main and many related pieces of legislation dealing with children's right to health care. The National Health Act is the only Act that refers to the child's right to basic health care services. However, the Act does not define basic health care services. The concept

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122 See Geary, Gomez-Olivé, Kahn, Tollman & Norris 'Barriers to and facilitators of the provision of a youth-friendly health service programme in rural South Africa' available from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4067688/> (assessed 2016-12-01); Geary, Webb, Clarke & Norris 'Evaluating youth-friendly health services: young people's perspectives from a simulated client study in urban South Africa' available from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4306747/> (assessed 2016-12-01).

123 See also Chirwa 2009 *ESR Review: Economic and Social Rights in South Africa* 7.

124 See also Buchner-Eveleigh & Nienaber 2012 *PER* 136.

is also not defined in any government policy which has been developed to address children's specific health care needs.

The National Health Act recognises the overall vulnerability of children but then only makes provision for free health services to children under the age of six. In other words it provides free health services for only a particular category within the group of children.<sup>125</sup> As stated above, the reference to 'health services' rather than 'primary health care services' to which older children are entitled, implies that all services, not just primary health care services, must be provided free of charge to children under six.<sup>126</sup> As the National Health Act is silent on the actual tangible free health care services that must be provided to children, one must resort to policy documents which neither refers to the Act nor claim to determine the scope of primary health care services comprehensively.

As far as consent to health care services is concerned, it is clear that the National Health Act does refer to the Children's Act. The Children's Act deals with consent to medical treatment, operation and HIV testing. However the Children's Act does not refer to the National Health Act. Consent to termination of pregnancy is regulated by the Choice on Termination of Pregnancy Act. The Mental Health Care Act regulates consent to treatment by mentally ill children. The Mental Health Care Act provides that a person, including a child younger than eighteen years, who is capable of making an informed decision, can submit him or herself to voluntary treatment. There is no reference to the age threshold of twelve as is the case in the Children's Act. The Mental Health Act also does not refer to consent to an operation. It seems as if mentally ill children's consent to treatment is regulated by the Mental Health Care Act while their consent to an operation is regulated by the Children's Act.

It is clear that although a wealth of legislation and policies exist, none comprehensively provide for children's health care rights. The legislation that does exist contains obvious gaps. Most importantly, the concept 'basic health care services' has not been defined. A definition of basic health care services is important as it would firstly enable children and their caregivers to know what services they are entitled to under the Constitution. Second, it would provide service providers, managers and policy-makers with clear goals to work towards. Third, it would allow a more coherent development of laws, policies, programmes, services and budgets by aligning all of these to the defined requirements. Lastly, it will be possible to monitor progress made towards the implementation of children's right to health care through the development of appropriate indicators.

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125 See also Pillay 2003 *Law, Democracy & Development* 75.

126 See par 3 1 *supra*.