



Innocenti Case Studies

REFORMING CHILD LAW IN SOUTH AFRICA: BUDGETING AND IMPLEMENTATION PLANNING

UNICEF
Innocenti Research Centre

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The UNICEF Innocenti Research Centre

The UNICEF Innocenti Research Centre in Florence, Italy, was established in 1988 to strengthen the research capability of the United Nations Children's Fund (UNICEF) and to support its advocacy for children worldwide. The Centre (formally known as the International Child Development Centre) helps to identify and research current and future areas of UNICEF's work. Its prime objectives are to improve international understanding of issues relating to children's rights and to help facilitate the full implementation of the United Nations Convention on the Rights of the Child in both industrialized and developing countries.

The Centre's publications are contributions to a global debate on child rights issues and include a wide range of opinions. For that reason, the Centre may produce publications that do not necessarily reflect UNICEF policies or approaches on some topics. The views expressed are those of the authors and are published by the Centre in order to stimulate further dialogue on child rights.

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FOREWORD

More than 15 years of worldwide experience implementing the Convention on the Rights of the Child has led to a wealth of lessons learned. To encapsulate these lessons and make them widely available to entities working in the field of the rights of the child, the UNICEF Innocenti Research Centre has undertaken the *Study on the Impact of the Implementation of the Convention on the Rights of the Child*. The project aims to promote the universal realization of children's rights by documenting, analysing and reflecting on both positive experiences and challenges in implementing the Convention. One component of this work is case studies of actions taken at the national level.

This publication, *Reforming Child Law in South Africa: Budgeting and implementation planning*, is one such case study. It documents a rare attempt to assess all the steps involved in legal reform for realization of child rights and make a detailed estimate of the costs at each step. The case study addresses two costing projects in connection with these reforms:

one for development of a child justice system, another for a comprehensive children's act. Both of these were extensive pieces of legislation requiring substantial systemic adjustment.

Part 1 presents an overview of country experiences with law reform since the Convention on the Rights of the Child came into force. It summarizes how different countries have 'constitutionalized' children's rights. These chapters also cover the key roles of states parties, the legislature, the courts and non-governmental organizations in ensuring sufficient resources are devoted to fulfilling child rights. Part 2 details the process South Africa took in planning the costing and implementation of its Child Justice Bill and Children's Bill and summarizes the findings of the complete report.

Marta Santos Pais
Director, Innocenti Research Centre

PART 1

LEGAL REFORM AND BUDGETING FOR CHILD RIGHTS

Finalization of the Convention on the Rights of the Child (CRC) in 1989 was cause for celebration throughout the human rights community, but was only the first step in realizing child rights. In the almost two decades since, the real work of bringing the CRC to life has begun. Key to this is developing the legislative, administrative and other measures to ensure recognition of children's rights. Part 1 of *Reforming Child Law in South Africa: Budgeting and Implementation Planning* provides an overview of national legal reform measures to date.

States have approached legal reform in different ways. In some countries that developed or revised their constitutions after 1989, the constitution incorporates provisions of the CRC. A key aspect of 'constitutionalization' of children's rights is that it requires providing a way to enforce those rights and requires that they be 'justiciable', meaning they can be acted upon in a court of law.

Other countries have incorporated provisions of the CRC into domestic law. This approach calls for adopting comprehensive laws or at least embarking on a comprehensive review and reform of existing legislation. It must ensure that the general principles of the CRC are 'mainstreamed' through all national law. To date, reform has tended to be more extensive in areas with fewer budgetary implications. As a result, legal reform addressing civil rights has been more widespread than for socio-economic rights. Most challenging has been reform requiring systemic adjustment, such as child justice.

Article 4 of the CRC makes clear that states ratifying it are expected to allocate and expend resources to fulfil their pledges. While they are not required to deliver immediately on all child rights, they must demonstrate that they are giving them priority in allocating the country's resources. Thus budgets are increasingly being scrutinized, particularly by civil society groups, to determine the extent to which governments are fulfilling their promises.

1

THE CONVENTION AND LAW REFORM

The period following the finalization of the Convention on the Rights of the Child (CRC) in 1989 was characterized by great enthusiasm to implement it nationally and internationally. The Office of the United Nations High Commissioner for Human Rights reprioritized and placed children's rights on its agenda as a comprehensive item dealing with all aspects of children's rights. UNICEF began the process of reorienting its priorities and programming to reflect a rights-based approach. States parties and non-governmental organizations (NGOs) alike started to engage with the CRC.¹ A wave of law reform took place in numerous countries with ratification of the CRC, and there is much evidence of a fundamental transformation of laws governing children. As a result, children have become independent subjects entitled to rights, not just objects of parental rights and protection.²

Key to implementation of the CRC is article 4, which requires States parties to take all appropriate legislative, administrative and other measures to ensure realization of the rights of the child (*see box*). Legislative reform is a central element of the article 4 obligation to ensure that all domestic legislation is fully compatible with the CRC and that its principles

and provisions are effectively enforced. Although social programmes and institutions of implementation are also crucial, law reform is the first step towards effective and sustained implementation of children's rights.

Through the obligations created in articles 4, 42, 43 and 44, the CRC puts in place a framework for law reform. The CRC recognizes the same rights for all children, taking into account the different cultural, social, economic and political realities of individual countries. This is done specifically to enable each state to contextualize its own means of implementation in the framework of the legal obligations undertaken upon ratification of the CRC.

A UNICEF study on the implementation of the CRC states that, according to the General Measures of Implementation, law reform should "ensure compatibility of existing and new legislation and judicial practice with the CRC, in a number of ways, including: comprehensive reviews of legislation; the inclusion of children's rights in the constitution; the development of specific laws to reflect the CRC principles and provisions; by responding to "new" issues related

Box 1 **General Measures of Implementation**

"The general measures of implementation identified by the Committee and described in the present general comment are intended to promote the full enjoyment of all rights in the Convention by all children, through legislation, the establishment of coordinating and monitoring bodies – governmental and independent – comprehensive data collection, awareness-raising and training and the development and implementation of appropriate policies, services and programmes."

– UN Committee on the Rights of the Child, General Comment No. 5: *General Measures of Implementation for the Convention on the Rights of the Child*, CRC/C/GC/2003/5, para. 9.

to children's rights; and by considering effective remedies for children and their representatives if children's rights are breached."

The study further states, "the allocation of resources to children "to the maximum extent of their availability is key in States Parties' efforts to ensure the CRC implementation"³ Law reform and the subsequent implementation of legislation through programmes and institutions requires adequate and substantial allocation of funds from governments to ensure concrete implementation and to make children's rights a reality.

Constitutional Recognition of Child Rights

In some countries the CRC was automatically incorporated through existing constitutional provisions. In countries that have undergone a period of constitutional reform since 1989, the approach tends to be more comprehensive, aiming at specific recognition of children's rights. Countries that have not changed their constitutions since 1989 either make no mention of children's rights or make limited provision, and children tend to be envisaged through a protectionist or 'welfarist' approach. Although some countries have undergone a process of constitutional reform, in most cases the CRC has been incorporated into domestic law.⁴

Constitutionalization of children's rights is an effective measure to broaden and strengthen children's rights. However, unlike article 2(a) of the Convention on the Elimination of All Forms of Discrimination against Women, which specifically mentions constitutional incorporation, the CRC only broadly refers to the adoption of "legislative" measures. The CRC does require "appropriate measures" to recognize its provisions, which seems to indicate that if a State party has a constitution containing rights protections, constitutional incorporation would be the most appropriate measure to recognize children's rights.⁵ Constitutionalization has a specific budgetary advantage in that it provides the government with political justification for social programmes and resource allocation that prioritizes children's rights.

The inclusion of child rights provisions in constitutions is most pronounced in the Latin America and Caribbean and Central and Eastern European Regions. The constitutions of Poland, Romania, Slovenia and Ukraine include articles dedicated specifically to the rights of children. Only two countries in Western Europe (Belgium and Iceland) have amended their constitutions to add provisions on the rights of children.⁶

Yet it is important not to read too much into constitutionalization. Countries may choose to deal with children's rights in another context, which might prove more effective. A country that has entrenched children's rights in its constitution may not have done anything to implement those rights. However, the UN Committee on the Rights of the Child encourages countries to engage in constitutional review and reform in the light of changing conceptions of and standards for children's rights.⁷

Constitutions that have not been amended since 1989 tend to emphasize the protection of children. They are crafted in the context of parental duties and rights to protect children, failing to recognize the full range of rights set out in the CRC. Such constitutions should be reviewed and updated to reflect the State party's commitment to the CRC.

In some countries the constitution provides for the direct incorporation of human rights treaties into domestic law and gives them precedence over domestic law, in so far as it is inconsistent with such treaties. This mechanism applies to the CRC, and in countries with such provisions in their constitutions it is generally seen as unnecessary to incorporate the provisions of the CRC through additional constitutional reform.⁸

This approach may raise two main problems: First, law reform takes place mainly through judicial interpretation, which may be piecemeal and may have an undesirable outcome. For example, France's highest court, the Cour de cassation, held in a number of judgements that many CRC provisions are not directly applicable in French law. In 2005 the Cour de cassation and Conseil d'État agreed that the self-executing provisions of the CRC can be applied directly by the courts,⁹ but they still have an article-by-article approach according to which only certain articles are considered self-executing while others are not.¹⁰

Second, some governments are finding ways to limit the extent of the obligations imposed by the CRC through broad reservations or by declaring some articles not to be self-executing, meaning that courts may not apply them directly. Existing legislation is sometimes interpreted as not being in conflict with the CRC, suggesting that the convention therefore does not add anything necessitating law reform.¹¹

In a study by the UNICEF Innocenti Research Centre,¹² nearly a third of the countries analysed had constitutional provisions dedicated to the protection of children, ranging from detailed lists of rights (Brazil) to brief provisions (Thailand). It is clear from the terminology and provisions in the constitutions of all the countries studied that the CRC influenced the drafting procedure and terminology.

A particularly important aspect to constitutionalization of children's rights is that it requires providing a way to enforce those rights and requires the rights to be 'justiciable', meaning that if governments fail to ensure the safeguard of those rights, those deprived of their rights can approach the courts for relief. In Colombia, children's rights are entrenched in article 44 of the constitution, but those rights are not included in article 85 as rights that are applicable immediately. The constitutions of Albania, Ecuador, Ethiopia, Gambia, Ghana, Moldova, Namibia, Romania, Poland, Slovenia, South Africa, Uganda and Thailand provide mechanisms for enforcing children's rights, but only a few of these constitutions provide that these rights are immediately justiciable. In this respect South Africa's constitution, adopted in 1996, is particularly interesting and effective.

Section 28 of the constitution includes a specific section dedicated to the rights of children and the terminology used reflects the influence of the CRC. Section

28, sometimes referred to as the 'children's charter' or the 'mini bill of rights', lists the specific rights children have in addition to – not in place of – those in the country's Bill of Rights. Children are independent rights bearers, and South Africa's Constitutional Court has consistently interpreted the socio-economic rights of children to be immediately justiciable. Unlike other socio-economic rights, section 28 children's rights are not subject to internal limitation but are unqualified and immediately enforceable.¹³

For example, the right to housing requires the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of the right of every person to adequate housing. This means that the government has to progressively realize these rights, and thus as long as it has a reasonable plan to eventually provide adequate housing, the courts will not demand immediate enforcement of the right. On the other hand, children living separately from their parents (such as children living on the street) have a direct and immediate right to shelter. If challenged, the government cannot say it will realize this right at some time in the future; it must provide shelter immediately.

With regard to making rights easily enforceable for children, who may even be unaware of their rights, section 38 of South Africa's constitution allows any person or institution to act on behalf of persons who cannot act in their own name, on behalf of a class of persons or in the public interest.¹⁴ Children also have the institutional means to influence the decisions affecting their lives through section 28(1)(h), which provides that a child has the right to legal representation in all matters affecting the child.

Incorporating the CRC into National Law

Incorporating the General Principles¹⁵

The general principles of the CRC are:

- the best interests of the child (article 3)
- the right to protection from all forms of discrimination (article 2)
- the right to be heard and to have one's views taken into account (article 12)
- the right to survival and development (article 6, para. 2)

When incorporating the CRC into domestic law, the overall emphasis should be on adopting comprehensive laws or at least embarking on a comprehensive process to review and reform existing legislation. Law reform must not be limited to bringing parts of national law into conformity with the CRC, but must ensure the enactment of needed legislation and the mainstreaming of the general principles of the CRC through all national law.¹⁶

Some countries have incorporated the general principles of the CRC in a comprehensive law that includes a

list of fundamental children's rights. South Africa's approach was unusual in that the general principles were included in the country's interim constitution as early as 1993.¹⁷ These principles were expanded upon in the final constitution in 1996,¹⁸ but South Africa did not adopt a comprehensive law on children until 2006, with enactment of Children's Act 38 of 2005.

Other examples in sub-Saharan Africa are Botswana and Kenya, which have both adopted comprehensive laws incorporating the general principles and specific children's rights since 2000.¹⁹ Rwanda's Law No. 27 of 2001, though not a comprehensive law on children's rights, contains the general principles of the CRC as well as a list of fundamental children's rights.

The 2002 Act on the Social and Legal Protection of the Children in the Czech Republic (2002) and the 2004 Law on the Protection and Promotion of the Rights of the Child in Romania are particularly comprehensive pieces of legislation, rare examples of the incorporation of the best-interest principle in Central and Eastern Europe. Romania's law compels public and private authorities as well as individuals to "observe, promote and guarantee the rights of the child as stipulated by the constitution and the law, in accordance with the provisions of the UN Convention on the Rights of the Child."

In a similar vein, the preamble to the South African Children's Act 38 of 2005 recognizes that the need to extend particular care to the child (as stated in international instruments including the CRC and the African Charter on the Rights and Welfare of the Child) places certain obligations on the state. The enactment of the Children's Act is in part fulfilment of those obligations.

Many countries that have not adopted comprehensive laws have enacted measures to amend existing law to comply with the CRC, identified as gradual reform. The problem with this approach is that it is context bound and may only provide for specific circumstances. A common deficiency of pre-1989 legislation is its failure to recognize that children are entitled to civil rights and freedoms and to include provisions recognizing their socio-economic rights. Gradual law reform lacks a holistic approach and neglects to take into account the general principles of the CRC and many of the rights recognized in it during the law reform process.

Some countries choose to effect law reform only through regulations or decrees. This is insufficient, as the reforms will not have the legitimacy and public support of properly enacted laws, which are needed for the enforcement and justiciability of rights. Legislation, especially a comprehensive children's law or code, has a broader legal effect. The general principles and fundamental children's rights must be entrenched through legislation and should not be dependent on the government of the day or policy decisions that may change based on budgetary considerations.

Law reform must be extensive, promoting a wider sharing of responsibility to protect child rights in all branches of government. Such law reform endeavours are likely to attract attention and support from the national treasury, which is less likely where laws

are reformed through regulations or decrees. In some systems, regulations and decrees do not require parliamentary approval, meaning the measures would escape parliamentary oversight. This could have detrimental effects on budget allocations.

Incorporating Specific Rights

■ *Civil rights*

Generally speaking, civil rights law reform has fewer budgetary implications than reform directed at fulfilling socio-economic rights. Countries in Central and Eastern Europe have been active in reforming civil rights law, as evidenced by the previously mentioned law in Romania and the Law of the Republic of Belarus on Child Rights (1993). Both recognize a wide range of rights, including freedom of conscience, association, religion, privacy, and information and expression. Children are therefore recognized as independent bearers of all the civil rights in the bill of rights.²⁰ Georgia's Children's and Youth Associations (State Support) Act (1999) is a unique piece of legislation that broadens children's participation rights. This act allows children's organizations to submit reports to government on the status of children's rights and to submit suggestions to the legislature on formulating or amending legislation.

■ *Socio-economic rights*

Legislating for socio-economic rights in domestic law carries a significant cost implication. It is one thing to grant socio-economic rights in the constitution, which by its nature does not detail specific services; it is quite another to quantify in domestic legislation the level of services to be granted to children. Nevertheless, there has been significant law reform in the area of socio-economic rights, particularly in health care and education.

● *THE RIGHT TO HEALTH CARE*

Realization of the right to health care is usually regarded as dependent on available resources. Law reform in this respect is significant in that it indicates countries' commitment to providing free health care for children and mothers. New legislation or codes adopted in Latin America following the adoption of the CRC provided for children's right to health care as well as mothers' rights to prenatal care and maternity benefits.

Health care has been a key socio-economic consideration in law reform in the Central and Eastern European countries since the 1990s. Not only is the right to health care enshrined in various countries' constitutions,²¹ it has also influenced a variety of laws, covering areas from education to the environment. For example, the Georgia Education Act of 1997 gives students the right to certain health-care services at school. In the Russian Federation and Slovenia, children above the age of 15 may consult a doctor without parental consent.

Other countries also address children's right to health care. In France a law enacted in 1997 guarantees health care through a national health insurance system. Several Western European countries have adopted legislation either allowing immigrants and foreigners access to health care or prohibiting discrimination

against them. Sweden's Medical and Health Services Act was amended in 1997 to state that the provision of health care must be guided by the "equal value of all human beings and for the dignity of the individual."²² Legislation in various Western European countries requires mandatory health and sex education in secondary schools.

The justiciability of health care rights for children has been demonstrated in South Africa. The Constitutional Court has stated that, although parents bear the primary duty to care for children, the state must provide adequate care when the parents are unable to do so. In *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (2002),²³ the court was particularly concerned with the plight of children born to indigent mothers who did not have access to anti-retroviral medication. According to government policy, nevirapine (the drug taken by pregnant women to prevent transmission of HIV to the foetus) was only available at specific clinics and in city centres. The court found that where children are concerned, access to nevirapine was essential and urgent because access to the drug profoundly affected their ability to enjoy all the rights pledged in section 28 of the constitution. The government was therefore ordered to make it available at all state clinics and hospitals to ensure equal access.

● *THE RIGHT TO EDUCATION*

Most countries recognize the right to education in generous terms. Law reform has focused on raising the minimum school-leaving age, recognizing the right of minorities to be educated in their own language, prohibiting the use of physical punishment and ensuring free primary education. Sudan, for instance, has no minimum school-leaving age but requires children to attend school for eight years. Lebanon has adopted a law making school compulsory for all children up to the age of 12. South Africa's Schools Act 84 (1997) prohibits the use of corporal punishment, and the constitution entrenches the right to be educated in the language of the child's choice provided that it is reasonably practicable.

Most countries in Central and Eastern Europe have legislatively transformed their education systems to incorporate the values of the CRC. Legislation on education in the Russian Federation guarantees free secondary education, basic vocational training and nine years of free and compulsory basic general education. Furthermore the act requires that 10 per cent of the annual national income be used for education. Slovenia has adopted or amended three laws: The Guidance for Children with Special Educational Needs Act of 2000, which addresses children with special needs; the amendment in 2000 of the 1996 Vocational Education and Training Act to increase the number of children receiving secondary education; and the Music Schools Act (2000), providing for musically gifted children.

Law Reform Requiring Systemic Adjustment

Some areas of law reform require systemic changes that require increasing personnel and improving physical infrastructure. Changes to the way the criminal justice system treats children, both as offenders and as victims, generally requires this kind of adjustment.

Bringing domestic legislation on child justice into line with the CRC and other international child into justice instruments has been particularly challenging. Comprehensive legislation has been limited.²⁴ Many countries have enacted legislation to recognize children's right to legal representation, raise the minimum age of criminal responsibility, prohibit corporal punishment as a sentence and provide alternative sentencing options to imprisonment. However, there has not been widespread recognition of the principle that imprisonment should be a measure of last resort for children.²⁵

Child justice is regarded as particularly sensitive, and the slow progress in reforming it is attributed to the broad impact it will have on the law, criminal procedure, relevant authorities and institutions. Although child justice deals to a great extent with civil rights issues, the CRC and other international instruments require a thorough restructuring of child justice administration, taking into account children's special needs and rights. Full compliance therefore requires a long-term and substantial financial commitment from governments at all levels to develop a separate, specialized system, including alternative sentencing options and programmes for children.

Notes

- 1 Alston, P., and J. Tobin, *Laying the Foundations for Children's Rights: An independent study of some key legal aspects and institutional aspects of the impact of the Convention on the Rights of the Child*, UNICEF Innocenti Research Centre, Florence, 2005, p. 7.
- 2 Ibid. p. 8.
- 3 UNICEF Innocenti Research Centre, *Summary Report of the Study on the Impact of the Implementation of the Convention on the Rights of the Child*, UNICEF Innocenti Research Centre, Florence, 2004.
- 4 Alston, P., op. cit., p. 21.
- 5 Ibid. p. 10.
- 6 Belgium included article 22 in 2000 and Iceland included article 76 in 1995 as part of a new Bill of Rights. See also UNICEF, *General Measures of Implementation of the Convention on the Rights of the Child: Implementation in Western, Central and Eastern Europe*, UNICEF Innocenti Research Centre, Florence, p. 2; and UNICEF Innocenti Research Centre, *Summary Report*, op. cit., p. 3.
- 7 Alston, P., op. cit., p. 22.
- 8 Ibid. p. 11.
- 9 Self-executing means that once the treaty is approved, it is immediately enforceable and can be applied by the courts.
- 10 UNICEF Innocenti Research Centre, *General Measures of Implementation of the Convention on the Rights of the Child: The process in Europe and Central Asia*, UNICEF Innocenti Research Centre, Florence, 2005, p. 2.
- 11 Alston, P., op. cit. p. 21. Countries include Belgium, Chile, Italy, Japan, Netherlands, Portugal, the Russian Federation, Senegal, Syrian Republic and Tunisia.
- 12 UNICEF Innocenti Research Centre, *Summary Report*, op. cit. p. 1. In this report 50 countries were studied.
- 13 Government of South Africa, Constitution of South Africa, pp. 873-874. See also *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC); *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC).
- 14 Government of South Africa, Constitution of South Africa, section 38. See also *Centre for Child Law v. Minister of Home Affairs* 2005 (6) SA 50 (T); *Centre for Child Law v MEC for Education, Gauteng Provincial Government*, unreported judgement case no. 19559/06.
- 15 This section relies heavily on two UNICEF Innocenti Research Centre Reports: *Summary Report*, op. cit. and *Implementation of the CRC: Europe and Central Asia*, 2006.

Conclusions

The process of law reform in recent years has led to a fundamental change in the way children are viewed as rights bearers and as part of families and societies. Countries in which the CRC was incorporated through comprehensive or sectoral reform will have to continue with efforts to review legislation and amend or replace it to ensure it effectively protects the rights of children. They also face the difficulty of implementing each new law. Countries with constitutionally entrenched children's rights or comprehensive laws must commit to long-term financing and implementation of programmes.

As pointed out in the *Summary Report of the Study on the Impact of the Implementation of the Convention on the Rights of the Child*,²⁶ although extensive legislative reform may have taken place, this does not mean that children's rights have been realized at 'ground level'. Nor does it mean that children's lives have improved, or to what extent they have improved. Ultimately the realization of children's rights will depend on commitment by all branches of the state to prioritize the implementation of children's rights.

- 16 UNICEF Innocenti Research Centre, *Summary Report*, op. cit. p. 4.
- 17 Government of South Africa, Interim Constitution of South Africa, Act 200 of 1993.
- 18 S28(1)(h) provides that a child has a right to legal representation in civil matters if substantial injustice would otherwise result. The best interest principle in Section 28(2) is worded more strongly than in article 3 of the CRC. It provides that "the best interests of the child are of paramount importance in every matter concerning the child".
- 19 Botswana Law 8 of 2003 and Kenya's Children Act 8 of 2001. Section 3 of Kenya's Children Act, 'Realization of the rights of the child,' contains a limitation providing for progressive realization dependent on the availability of resources.
- 20 The Bill of Rights consists of the Universal Declaration of Human Rights; International Covenant on Economic, Social and Cultural Rights; and the International Covenant on Civil and Political Rights and its two optional protocols.
- 21 S33 of the Charter of Fundamental Rights and Freedoms of the Czech Republic; Art. 37(1) of the Constitution of Georgia; Art. 33 of the Constitution of Romania; Art. 68 of the Polish Constitution; Art. 41 of the Constitution of the Russian Federation; and Art. 49 of the Constitution of Ukraine.
- 22 UNICEF Innocenti Research Centre, *General Measures of Implementation of the Convention on the Rights of the Child: Implementation in Western, Central and Eastern Europe*, UNICEF Innocenti Research Centre, Florence, p. 6.
- 23 *Minister of Health and Others v. Treatment Action Campaign and Others* (No 2) 2002(5) SA 721 (CC) at para. 78-79 p749H-750B/C.
- 24 Morocco and Tunisia and some countries in Latin America and the Caribbean have comprehensive child justice laws.
- 25 South Africa adopted this principle in section 28(1)(g) of the Constitution but was criticized by the UN Committee on the Rights of the Child for non-compliance. The Correctional Services Act 111 of 1998 was amended accordingly and the principle has been confirmed as being part of the law by the Supreme Court of Appeal in *S v B* 2006 (1) SACR 311 (SCA) and *Director of Public Prosecutions Kwa-Zulu Natal v P* 2006 (1) SACR 243 (SCA).
- 26 UNICEF Innocenti Research Centre, *Summary Report*, op. cit., p. 19.

2

BUDGETING FOR CHILD RIGHTS – THE ROLE OF GOVERNMENT

A remarkable feature of the Convention on the Rights of the Child is the recognition of economic, social and cultural rights and the recognition that states ratifying the CRC are expected to match their words with action, even if this costs money. Article 4 proclaims:

“States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”

According to child rights expert Thomas Hammerberg, “the maximum extent of their available resources” does not imply that poorer countries can avoid their responsibilities.²⁷ It should instead be understood as a call for prioritization of children within the state budget so as to ensure appropriate levels of service delivery. Hammerberg, in comparing article 2(1) of the Convention on Economic, Social and Cultural Rights (CESCR) with article 4 of the CRC, says: “There is one clear difference between article 4 of the CRC and article 2 of the CESCR: The latter allows for a progressive realization of rights (with the exception of non-discrimination). This possibility of a gradual approach is not included in article 4, and, in fact, is limited in the CRC to a few specific articles.”

The reference in article 4 of the CRC to international cooperation indicates that, where necessary, other countries and bodies may need to assist in ensuring compliance with the CRC. Hammerberg points out that when the CRC was drafted, developing countries

were given the impression that their support for it would be rewarded in international relations. The ambition was to create constructive, developmental approaches, with the idea that the UN Committee on the Rights of the Child could use the reporting process as an opportunity to raise discussions about technical assistance from UNICEF, other international organizations and other competent bodies.

In 1990, shortly after the CRC came into force,²⁸ world leaders gathered in New York to promote the well-being of children at the World Summit for Children. They signed the World Declaration on the Survival, Protection and Development of Children and a Plan of Action, establishing a number of targets that were to be reached by 2000. One of the aims was to ensure ‘pro-child’ spending through specific actions for child survival, protection and development.

The UN General Assembly Special Session on Children in May 2002 issued a declaration calling upon all members of society to create a global movement to help build a world fit for children. “Put children first” was a decisive commitment. Another was “Eradicate poverty: Invest in children.”

Mobilization of resources was listed as a key objective in the declaration, the primary responsibility for which rests with each individual country. There was a clear recognition that new and additional resources, both national and international, would be required to ensure adequate allocation to the protection of children’s rights.

The UN Committee on the Rights of the Child has on occasion questioned States parties about their spending on children. In some cases, countries were questioned about the amount spent on defence in contrast to child-related social services.

The Role of the Executive

Economist Stefan De Vylder points out that macro-economic policies – which he defines as “embracing the choice of development strategy, fiscal policies, monetary policies, and trade and exchange rate policies” – are of paramount importance for the well-being of children.²⁹ He stresses that while there is a causal connection between economic growth and good outcomes for children, economic growth is not enough. He states “The pattern of growth is at least as important as the rate of growth.” If economic growth is to benefit children it needs to be inclusive, sustainable and equitable.³⁰

The role of government begins at the macro-economic level. Whatever the rhetoric, and however ‘pro-children’ the macro-economic policy looks, it is the state budget that gives a clear indication of a government’s real priorities. The budget reflects both taxation – where and how the revenue is to be sourced – and

what the money is going to be spent on. The government sets out its plans and indicates its policy priorities in annual estimates of expenditures.³¹ Most governments operate in a number of spheres, including national, provincial or regional, and local. Thus there may be a national budget as well as provincial and local budgets.

The state budget should also reveal specific programme expenditures for children. Typically budgets do not identify expenditures as being allocated specifically for children. Education is easily identifiable as being directed at children, but it might be difficult to identify social welfare or health spending as being specifically child-targeted. Other sectors, such as policing, justice and corrections, are even less likely to collect or present data disaggregated by age. It therefore requires monitoring and advocacy to ensure that the budget begins to show the programme expenditures aimed primarily at children.

Box 2 Evolution of Child Rights in South Africa

When the World Summit for Children took place in 1990, South Africa was not represented. It was not a Member State of the United Nations, and the struggle against apartheid was continuing. The democratically elected government that came to power in 1994 inherited a budgeting process in which children were virtually invisible, as was a large sector of the South African public, since the apartheid government had concentrated the majority of its expenditure on programmes on the minority white population.

Despite not having participated in the World Summit, the post-apartheid government accepted the ‘Put children first’ approach. In 2001, the government produced an End-Decade Report on Children, which documented progress towards the targets that had been set at the World Summit. One section of the report dealt with government efforts to address poverty and to ensure that children are given priority in economic and social development.ⁱ As its key response, in 1996 the government identified its broad macro-economic policy, ‘Growth, Employment and Redistribution’ (GEAR).

The End-Decade Report stated that a stable macro-economic foundation is essential for sustainable economic growth, “which in turn is good for children.” The government said the amount of money being spent on social services was high in comparison to other expenditures, as compared to similar middle-income countries. This was illustrated by the fact that over half the budget was allocated to education, health and welfare services.

Child rights researcher Judith Streak has analysed the South African government’s broad approach to realizing children’s rights between 1994 and 2003. GEAR had been preceded by the 1994 Reconstruction and Development Strategy (RDP). Streak compares the strategies thus:

“The RDP was very ambitious and optimistic about the potential for government to reduce poverty quickly through financing and implementing a broad range of programmes to deliver basic and social services to the poor...The GEAR strategy linked rapid poverty reduction (and by implication, the realization of social-economic rights) to conservative macro-economic policy, in the form of budget deficit reduction and restrictive monetary policy. It also stressed the need for institution-building at the level of state to enhance the efficiency of sending and delivery capacity.”ⁱⁱ

Streak concludes that despite the government’s emphasis on market mechanisms to reduce poverty and a conservative fiscal approach between 1996 and 2000, it initiated an extensive array of direct measures to realize children’s socio-economic rights. But she notes that there is still no systematic process for prioritizing child-specific rights in policy formulation, the budget allocation process or programme implementation. She recommends that the government establish a system linking its programming and budgeting to its constitutional and international obligations.

i The reports were prepared according to a template. Section C (j) of the document requested information about measures taken “to address poverty and debt; mobilize development finance; and halt the net transfer of resources from developing to developed countries; establish an equitable trading system; and ensure children are given priority in economic and social development.”

ii Streak, J., ‘Conclusion’ in E. Coetzee and J. Streak (eds), *Monitoring Child Socio-Economic Rights in South Africa: Achievements and challenges*, IDASA, Cape Town, 2004, p. 227

A children's budget or a pro-child budget is not a separate budget for children. Instead it is one that includes programmes aimed at realizing child rights within each departmental budget. Those working for pro-child budgets put their efforts first into ensuring the budget is reprioritized in ways that benefit children. This can be achieved through a combination of expenditure directed at children, such as education, and expenditure that indirectly affects children, such as strategies to reduce unemployment.

A government's responsibility to fulfil its commitments in terms of the CRC may be summarized as follows:³² governments are not required to deliver immediately on all child rights, but this does not mean they can avoid allocating any resources to children. A government must instead be able to show that it is giving priority to children's rights when it decides how to allocate the country's resources.

The obligation goes further: The government must be able to demonstrate that it will do as much as possible in as short a time as possible to protect children's rights, using the available resources effectively and efficiently. Governments should give priority to the rapid delivery of basic core services, improving them over time until all children's rights are fully realized. Thus, retrogressive steps of cutting back on spending for children are not acceptable. In states where even the core minimum rights are not resourced, the government should demonstrate that this is due to a genuine lack of resources, and it must have a plan to show how it will deliver on its obligations in the future.

The Role of Parliament

The International Parliamentary Union and UNICEF

For a number of years the International Parliamentary Union (IPU) and UNICEF have collaborated on children's rights. This collaboration included supporting the Parliamentary Forum, held in parallel to the UN General Assembly Special Session on Children in 2002. A document prepared for the forum by the IPU, 'The role of parliament in assessing the impact of legislation and budgetary decision-making on children', highlighted key issues, emphasizing the importance of allocating resources to implement the international commitments to children.

The debates at the forum and in follow-up discussions led the IPU and UNICEF to produce a handbook on child protection for parliamentarians.³³ The handbook states that "Parliaments and their members should be amongst the key champions of child protection. They have the capacity not only to influence the decisions and actions of government but also to connect with communities and constituencies to influence opinions and actions."³⁴

Functions of Parliamentarians

Although legislatures or parliaments may be structured in different ways, the handbook explains that in almost all countries they have three main functions:

- **Legislating:** Parliaments approve and can initiate laws that govern society in a structured manner;
- **Oversight of government activity:** Parliaments monitor the government's performance to ensure that it acts in a responsible and accountable manner for the overall good of society;
- **Resource allocation:** Parliaments are responsible for approving the national budget, thereby allocating resources to the government, and monitoring government spending.

■ *Legislative mandate*

Parliaments have several areas of responsibility relating to children's rights. First, parliamentarians should be familiar with international instruments and know which have been ratified or acceded to and which are awaiting ratification or accession. They can encourage ratification or accession, without reservations or declarations of understanding if at all possible, through activities such as asking parliamentary questions, calling for debates or mobilizing public opinion.

Second, parliamentarians have a role in incorporating children's rights into the constitution. This is a key legislative strategy because the constitution is the highest law, and in many systems laws must be developed in conformity with it. Entrenching children's rights in the constitution sets the standard against which the government's commitment and performance can be measured. Another advantage is that the constitution is difficult to amend and outlasts a particular political regime.

Third, parliamentarians have a role in passing national laws relating to children, including detailed statutes that protect children and promote their rights. This process often begins with a review of current laws and analysis of the gaps between the laws and their practical fulfilment. New laws should be drafted through an inclusive and interdisciplinary process, and if possible the process should be designed so that a change of government does not result in abandonment of the draft law.

Consideration of possible changes in government also has a bearing on whether to opt for a comprehensive piece of legislation that contains everything relevant to children or several pieces of legislation of more manageable size and complexity. In the Philippines, for example, a decision was made to keep the Juvenile Justice and Welfare Law (2006) relatively short, with a view to adding to its scope later through amendments or regulations. This strategy was chosen because of the country's short (three-year) election cycles.³⁵

South Africa's Child Justice Bill (described in chapter 4) faced similar challenges. After the election in April 2004 there was an inexplicable delay in moving the bill through parliament. The bill had been at an advanced stage of portfolio committee deliberations when national elections took place, but no further discussions have occurred in parliament since then. The ruling party retained power, but a cabinet reshuffle resulted in the appointment of a new Minister of Justice, and commitment to passing the bill appears to have slackened.

The IPU/UNICEF handbook is very important for the current study and provides the following advice:³⁶

“In order for legislation to be effective, the costs of implementation should be calculated and the appropriate legislative, executive and judicial authorities should make commitments to establish, strengthen or expand the coverage of the institutions and programmes necessary for implementation. Legislation that fully conforms to international standards, but is impossible to implement because the necessary infrastructure does not exist, does little and may even be counter-productive in some respects.”

Although the parliament usually receives draft bills from the executive, parliamentarians have the power to initiate legislation, either in committees or as individuals through private member’s bills. In July 2006, for example, a member of parliament (MP) from an opposition party in South Africa presented a private member’s bill aimed at defining basic education based on international best practice, in particular work done by the UN Committee on Economic, Cultural and Social Rights. The MP then called a media briefing at which he challenged the minister of education to “give her public backing to the bill, its intention, and the need to set definitive and measurable standards against which this government’s performance can be measured.”³⁷

■ *Oversight mandate*

Parliamentarians have the power and responsibility to examine and assess the activities of the executive. Information is needed to do this assessment, and parliamentary questions can result in revelation of important information. Parliamentarians are not limited to using this method of obtaining information, however. They can call for parliamentary briefings at which government officials are required to present information and answer questions.

The executive’s policy and programme approaches are also open to scrutiny by parliamentarians. Questions can and should be asked with regard to departments’ past performance and plans for the future. Parliamentarians can play a monitoring and evaluation role by requesting government departments to provide information when reporting to parliament. They can also monitor reporting responsibilities of government with regard to the CRC and other international instruments. When a country is late in reporting to the UN Committee on the Rights of the Child, for example, parliament can ask questions about this. When a country report has been presented and the concluding remarks received, these too can be presented to parliament, perhaps through a speech.

Parliamentarians can also maintain contact with NGOs to obtain information from them. Parliamentarians can benefit from information developed by NGOs and a different perspective on issues than that of the government.

■ *Resource allocation mandate*

In most countries parliament does not directly allocate resources, but it usually has a role in approving budgets put forward by the government. The budgets can

and should be investigated to make sure they include sufficient spending on children. Parliamentarians’ work relating to allocation of resources does not end there, however. The executive must also report on spending, and quite often the auditor general will also be required to report findings on each department’s spending. Parliament then provides a review and oversight function and holds the executive accountable.

The Role of the Courts

In many countries the judiciary is seen as the third arm of the State.³⁸ The courts also have an oversight role, because if the executive fails to deliver on legislative promises, an individual, including a child, may bring an action to court to challenge such failure.

Justiciability of Children’s Rights

As discussed in chapter 1, some legal systems may place limitations on the realization of children’s rights, making their progressive fulfilment subject to availability of resources. This section explores the justiciability of children’s rights arising from laws designed to safeguard them. South Africa provides a rich experience, based on entrenched constitutional rights for children, including children’s socio-economic rights.

Ratification of the CRC and subsequent domestication of its principles in the laws of a state create a network of justiciable children’s rights. The justiciability is founded in the nature of the responsibility the state has taken on with regard to children’s rights. This responsibility is strengthened in states that have included human rights (and in some cases, children’s rights) in their constitutions or human rights statutes.

In enforcing political and civil rights, the state is either required to refrain from certain actions – for example, the use of corporal punishment in schools – or to do something specific – for example, to provide children with appropriate alternative care if they are removed from the family environment.

A major debate in children’s socio-economic rights relates to their progressive realization. Article 4 of the CRC does not specifically include the idea of progressive realization, unlike the article dealing with education, which speaks of “achieving this right progressively.”

In South Africa a number of academics have argued that the reference to children’s socio-economic rights in section 28 of the constitution imposes a direct duty on the state to ensure that children who lack the basic necessities of life receive them without delay.³⁹ Some clarity on this issue was provided by the judge in the 2006 case of *Centre of Child Law and Another v. MEC for Education, Gauteng and Another*.⁴⁰

“What is notable about children’s rights in comparison to other socio-economic rights, is that section 28 [of the South African constitution] contains no internal limitation subjecting them to the availability of resources and legislative measures for their progressive realization. Like all rights, they remain subject to reasonable

and proportional limitation, but the absence of any internal limitation entrenches the rights as unqualified and immediate.”

Another debate concerns whether the parents or the state have the first responsibility with regard to children’s socio-economic rights. In South Africa, the *Grootboom* judgement held that where children are living in the care of their parents or families, the primary duty for their care falls on their families.⁴¹ The corollary of this, however, is that when children are not living with their parents they have a direct claim on the state for their socio-economic rights.⁴² South African courts have subsequently applied this rationale to children born in public hospitals and clinics to mothers who are indigent and dependent on the state. The court has found that the government has the responsibility to make health care services available to them⁴³ as well as to unaccompanied foreign children⁴⁴ and to children in a school of industries who are wards of the state.⁴⁵

Constitutional Litigation Risks

The costing of South Africa’s Children’s Bill (discussed in chapter 5) included an analysis of the constitutional litigation risks it posed. The purpose was to assess whether the bill was in line with the rights recognized by the constitution. The analysis considers a number of constitutional court judgements dealing with socio-economic rights that have shed light on what the government is constitutionally obliged to do to promote and protect socio-economic rights. The findings were that the constitutional court views all rights as justiciable, including socio-economic rights, and the court is prepared to examine the state’s role in respecting, protecting, promoting and fulfilling its obligations.

The courts will not go so far as to prescribe to the state what concrete policy choices it must make to achieve the rights, but it will intervene if the policy choices fail the constitutional standard of rationality and reasonableness. Therefore, as the Children’s Act is implemented, the courts may test the reasonableness of the act’s provisions as well as government’s efforts to put them into practice.

The analysis of litigation risks also looked in some detail at clause 4(2) of the Children’s Bill, which reads as follows:

“Recognising that competing social and economic needs exist, the state must, in the implementation of this Act, take reasonable measures within its available resources to achieve the progressive realization of the objects of this Act.”

The study pointed out that this wording introduces a resource qualification on implementation of the act. This part of the Children’s Bill has now become an act. The final wording is different from the bill that went to parliament. Section 4(2) of the Children’s Act reads as follows:

“Recognising that competing social and economic needs exist, organs of state in the national, provincial and, where applicable, local spheres of government must, in the implementation of this Act, take reasonable measures to the maximum extent of their available resources to achieve the realization of the objects of this Act.”

It is highly significant that the word “progressive” was omitted from the final version, and the words “to the maximum extent of their resources” were added. This is in keeping with article 4 of the CRC and with section 28 of the South African constitution.

Conclusions

The executive, the parliament and the courts all have important roles to play with regard to budgets. The executive usually sets the policy parameters and then drafts and presents bills to the cabinet for approval before introducing the bill to the parliament for its consideration. In the case of South Africa’s Child Justice Bill and Children’s Bill, the executive undertook the process of costing and budgeting. This is important because the finance department falls under the executive arm of government and must ultimately allocate funds to implement legislation. Where the executive has not costed a bill before sending it to parliament, it is incumbent on parliamentarians to ask questions of the executive about the budgetary implications of the proposed law. Once a bill has been passed into law, the parliament takes on an oversight role to ensure it is properly implemented.

The parliament’s role includes both oversight of government performance and the process of law making. The role of the courts concerns the justiciability of children’s rights. Courts must ensure that children’s rights are upheld, but they may be wary about the extent to which they will enter into the arena of budgets and spending choices. Courts in developing countries such as South Africa, India⁴⁶ and the Philippines⁴⁷ are providing some answers to the question of how far the courts are prepared to go in upholding the justiciability of children’s rights when they have budgetary implications.

Notes

- 27 Hammerberg, T., ‘Children’ in Eide, A., C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights*, Kluwer, The Hague, 2001, p. 366.
- 28 The Convention on the Rights of the Child entered into force on 2 September 1990, one month after the 20th ratification.
- 29 See de Vylder, S., *Macroeconomic Policies and Children’s Rights*, Save the Children, 2000.
- 30 *Ibid.*, p. 7.

- 31 Robinson, S, and L. Biersteker (eds.), *First Call: The South African Children’s Budget*, Institute for Democracy in South Africa, Cape Town, 1997, p. 20.
- 32 Adapted from Streak, J., *Monitoring Government Budgets to Advance Child Rights: A guide for NGOs*, Institute for Democracy in South Africa, Cape Town, 2003.
- 33 Inter-Parliamentary Union and UNICEF, *Child Protection: A handbook for parliamentarians*, Inter-Parliamentary Union, Geneva, 2004.

- 34 Ibid., p. 22.
- 35 Interview with Albert Muyot, UNICEF Philippines.
- 36 IPU and UNICEF, *Child Protection*, op. cit., pp. 26-27.
- 37 "DA seeks to define 'basic education' with private Bill", *Mail and Guardian* (online), 6 July 2006, available at <www.mg.co.za>.
- 38 This is a strong feature of common law systems, but in some civil law systems the judiciary is not seen as distinct from the executive.
- 39 Liebenberg, S., 'The Interpretation of Socio-Economic Rights' in Woolman, S. et al. (eds.), *Constitutional Law of South Africa*, Juta, 2005, pp. 38-40. De Vos, P., 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution', *South African Journal on Human Rights*, 1997: 67, p. 13; Sloth-Nielsen, J., 'The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*', *South African Journal on Human Rights*, 2001: 210, p. 17.
- 40 Transvaal Provincial Division, case no 19559/06. The judgement was handed down on 30 June 2006 and was not published at the time of writing.
- 41 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).
- 42 Sloth-Nielsen, J., 'The Child's Rights to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some conclusions in the aftermath of *Grootboom*', *South African Journal on Human Rights*, 2001; Creamer, K., 'The Impact of South Africa's Evolving Jurisprudence on Children's Socio-economic Rights on Budget Analysis', IDASA, Cape Town, 2002.
- 43 *Minister of Health and Others v. Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC).
- 44 *Centre for Child Law and Another v. Minister for Home Affairs and Others* 2005 (6) SA 50 (T).
- 45 *Centre for Child Law and Others v. MEC for Education, Gauteng and Another* (unreported case, Transvaal Provincial Division case no. 19559/06).
- 46 Supreme Court of India, *M.C. Metha v. State of Tamil Nadu and Others*, judgement dated 31/10/1990.
- 47 *Minors Oposa v. Secretary of Department of the Environment and Natural Resources*, reproduced in (1994) 83 *International Materials* 173, in which the court granted the petitioners the right to ecology for themselves and future generations.

3

BUDGET PROJECTS – A ROLE FOR NON-GOVERNMENTAL ORGANIZATIONS

Following the adoption of the CRC, projects sprang up in various parts of the world to examine and monitor the level at which States parties were “taking measures to the maximum extent of their available resources to ensure the realization of children’s rights.” Many of these projects were established by NGOs.

Child rights budget work is one of the ways to assess a government’s commitment to children’s rights. It has arisen from collaboration among children’s rights advocates, researchers, lawyers and economists. This work has required that they learn to speak each others’ language and understand the imperatives that drive each others’ work. A review of this work, commissioned by Save the Children Sweden (SCS), was published in 2005 under the title ‘First Introduction to Working for Child Rights from a Budget Perspective’.⁴⁸

The study points out that civil society organizations around the world are developing new avenues to engage with governments and hold them accountable. These projects bring together two areas of work – monitoring children’s rights and analysing government budgeting – in a new way.

The SCS study provides examples of various types of budget analysis undertaken in different parts of the world. The study sets out examples linked to specific rights to show the relationship between children’s rights recognized in the CRC and how budget projects can illuminate the extent to which these rights are being upheld or breached. A brief overview of projects drawn from the SCS study is set out below:

Children are entitled to equal rights: An example is a child rights budget study undertaken in Sweden in 2001⁴⁹ that tracked education spending. The study found that decentralization of schooling had led to

variations and inequity in the provision of education from one municipality to another.

Children are entitled to see all their rights realized: An example is a study undertaken by the Children’s Budget Unit of the Institute for Democracy in South Africa (IDASA) in 2004.⁵⁰ The study focused on four socio-economic rights (nutrition, health care, social security and education). It showed that the non-realization of one right often affected other rights; for example, an older child who gives up the right to education in order to work to support his or her younger siblings puts at risk the child’s own development and protection from abuse and exploitation.

Children’s best interests come first: An example is a study undertaken in the West Bank and Gaza in 2000 by the Secretariat of the National Plan of Action for Palestinian Children, supported by Save the Children Sweden.⁵¹ The study found that most ministries responsible for issues concerning children were generally under-funded and not considered priorities. The study concluded that the Palestinian Authority would have to set budget priorities in a new way to advance children’s best interests.

Children have the right to be heard: This relates to children’s participation in the budget process. Though many budget projects have now incorporated elements of children’s participation, a good example is a project run by the Centre for Defence of Children and Adolescents of Ceara (CEDECA) in Brazil, the results of which were published in 2004.⁵² The project encouraged adolescents in the city of Fortaleza to participate in analysing the municipal budget. After training in the budget system and process, the young people, aged 12 to 18, took part in the municipal government’s formal budget process, which resulted in increased spending on children and youth.

Governments are accountable to children: An example is a child rights budget study undertaken in Viet Nam in 2002⁵³ that assessed the government's obligation to children with disabilities. Having established how, when and who made decisions concerning education resource allocations, the study determined who was responsible for implementing the right to education for children with disabilities.

Situation Analysis

Many budget projects begin by studying the situation of children in the country, province, district or municipality. Such studies typically include demographic information about the child population, data on child poverty and vulnerability, and identification of the most important problems facing children. The legal framework for child rights must also be understood as a basis for any budget work and it is very important to consider what policies and programmes are in place that will affect children.

A relevant example is a study titled 'Zambia's Commitment to Children's Rights: The Budget Perspective',⁵⁴ The study provided an overview of the macro-economic situation and reviewed Zambia's national plan of action for children, listing targets to improve children's livelihoods. It then identified the specific programmes the government had put in place to

deliver health, education and welfare services to children and measured allocations and expenditures to implement them.

Input and Output Analysis

Budget input analysis deals with the funding being allocated to and spent on children. An example is a Peruvian child rights budget study in 2001⁵⁵ that provided a broad and detailed picture of public budgeting for children. Its aim was to reveal the extent to which the government regarded children as a priority.

The gaps between allocated and actual expenditures are another important area for analysis. One study that effectively analyses the gaps is 'Children and the Budget in Zambia'. The analysis showed that the amount spent on education, health and child welfare programmes was considerably lower than the amounts allocated, and that the gap had grown between 1991 and 2001.

Budget output analysis, on the other hand, looks at what is actually being delivered to children (*see box*). It is framed in terms of efficiency, asking, for example, how well the government is spending the money that has been allocated. It seeks to answer: What is the quality of the service being received by the children? Do children have equal access to services? Are the services being reached by more children?

Box 3

The South Africa Children's Budget Unit

One way for governments to ensure that adequate resources are dedicated to children is to establish an office with responsibility for analysing budgets from the perspective of their responsiveness to children's issues. South Africa did this by establishing the IDASA (Institute for Democracy in South Africa) Children's Budget Unit in 1995. Its aim is to conduct research and training and disseminate information to make government budgets more responsive to child rights.

The Unit's mandate is to report on child poverty and state obligations to realize child rights, focusing on budget obligations and socio-economic rights, identifying and analysing programmes and spending, and recommending strategies for improving programming and budgeting. The Children's Budget Unit process is participatory and includes children, particularly in its work on poverty.

- Since 1997, the unit has produced several substantial publications:ⁱ
- *First Call: The South African children's budget, 1997*
- *Where Poverty Hits Hardest – Children and the budget in South Africa, 1999*
- *Are Poor Children Being Put First? Child poverty and the budget, 2000*
- *Budgeting for Child Socio-Economic Rights: Government obligations and the child's right to social security and education, 2001*
- *Monitoring Child Socio-Economic Rights in South Africa: Achievements and challenges, 2004*

IDASA's Africa Budget Project works to build capacity in civil society and legislatures to participate effectively in budget processes in support of poverty reduction in Africa.

The Children's Budget Unit is part of the Southern African Child Rights Budget Advocacy Network, also known as Imali Ye Mwana, which means 'Money for Children'. The network advocates for effective and efficient allocation and use of resources in state budgets to advance child rights in countries of the Southern African Development Community through coalition building, capacity-building and research.

i South African Law Reform Commission, 'Juvenile Justice', Issue Paper No. 9, Project 106, SALRC, 1997.

Conclusions

The International Budget Project⁵⁶ has noted the renewed interest in budget work, particularly in the non-governmental sector. The importance of budgets in realizing child rights has been apparent for some time – so why are NGOs now gravitating towards this work? The answer appears to lie in the new international context. Many countries have shifted from being closed societies to being more transparent in their processes. This has created opportunities for NGOs, particularly in developing countries, to look into budgets and scrutinize whether or not they benefit their

targeted sector, and then to lobby for changes. Thus extensive budgetary activity is taking place in countries like South Africa that have undergone democratic transitions.

From the perspective of government, there is also growing understanding of the opportunity to address poverty through public-private partnerships. It is clear from the budget projects described in this chapter that constructive involvement of NGOs can improve the quality of debate about the budget, have a positive effect on the prioritization of spending and ultimately produce better outcomes for children.

Notes

- 48 Robinson, S., and E. Coetzee, *Working for Child Rights from a Budget Perspective: Studies and experiences from different countries*, Save the Children Sweden, Stockholm, 2005.
- 49 Näsman, E., J. Lindvall and J. Kjellberg, *The Art of Tracking Educational Resources: A Swedish child-focused budget study*, Save the Child Sweden, Stockholm, 2001.
- 50 Coetzee, E., and J. Streak (eds), *Monitoring Child Socio-Economic Rights in South Africa: Achievements and Challenges*, Institute for Democracy in South Africa, Cape Town, 2004.
- 51 Secretariat for the National Plan of Action for Palestinian Children, *Dollars and Sense for a Better Childhood: Palestinian child-focused budget study*, Save the Children Sweden, Stockholm, 2001.
- 52 Centro de Defesa de Criança e do Adolescente do Ceará (CEDECA), *Criança e Adolescente em Ação, Orçamento com participação (Children and Adolescents in Action, Participatory Budget)*, CEDECA, Fortaleza, Brazil, 2004.
- 53 Nguyen T., et al., *Assessing the Rights to Education of Children with Disabilities in Vietnam: A Vietnamese Child-Focused Budget Study*, Save the Children Sweden, Stockholm, 2002.
- 54 Mukuka-Luombe, A., A. Jayaraman, E. Simukoko, G. Sinyenga and R. Mpundu, *Zambia's Commitment to Children's Rights: The budget perspective*, IDASA and Save the Children Sweden, Stockholm, 2003.
- 55 Vasques, E., *¿Los Niños...Primero? El gasto público social focalizado en niños y niñas en el Perú (Public spending focused on children in Peru) 1990-2000*, Universidad del Pacífico and Save the Children Sweden, Stockholm, 2002.
- 56 The International Budget Project of the Centre on Budget and Policy Priorities was started in 1997 to assist in the growth of independent, applied budget work around the world. The website address is <www.internationalbudget.org>.

PART 2

CHILD LAW REFORM IN SOUTH AFRICA

The development of comprehensive statutes dealing with children in South Africa can be linked directly to ratification of the CRC in June 1995. The Government established a steering committee, with representatives of several departments, to develop a national plan of action for children in order to give life to the CRC.⁵⁷ The Justice representative identified drafting of child-related legislation as a priority. This led the Minister of Justice to request the South African Law Reform Commission (SALRC) to include two child-focused investigations in its urgent law reform programme: one on the establishment of a new system for juvenile justice and a second to review the Child Care Act. Previously there had been no separate law for child offenders, and the Child Care Act, which had been instituted during the apartheid government, had numerous inadequacies.

SALRC is a statutory body linked to the Department of Justice and Constitutional Development, yet it retains its independence. Its task is to produce research-based recommendations for law reform, including draft bills, for consideration by relevant cabinet ministers. It works through project committees

made up of experts from government and members of civil society, including academia and NGOs. Two committees were established to deal with the two thematic areas, and they included well-known children's rights advocates.

SALRC's law reform process is consultative. The project committee produces an 'issue paper' that outlines the problems and provides an overview of the general approach to be followed. This paper is circulated, written comments are received and consultative workshops are held. The responses guide the next phase, drafting of a 'discussion paper'. Based on rigorous research, the discussion paper provides a detailed indication of law reform proposals, including a draft bill. Written submissions are invited and workshops are held with stakeholders, including experts, practitioners and members of civil society. A 'final report' is then compiled, accompanied by a draft bill, and presented to the Minister of Justice and Constitutional Development and any other minister who may be affected. For example, the Minister of Social Development received the report on the review of the Child Care Act and the Children's Bill.

Note

57 The Steering Committee comprised representatives of the departments of Health, Welfare, Justice, Safety and Security (Police), Correctional Services, and Labour. The Steering Committee also allowed for participation by non-governmental organizations.

4

THE CHILD JUSTICE BILL

The project committee on juvenile justice was established in January 1997. During its three and a half years of operation, the committee produced an issue paper (May 1997),⁵⁸ a 450-page discussion paper comprising a draft bill (December 1998)⁵⁹ and a final report, the *Report on Juvenile Justice*, with a draft bill that was submitted to the minister in July 2000.⁶⁰ The consultative process was carried out with the financial and technical support of UNICEF and the Swedish International Development Cooperation Agency (SIDA). A video was produced for workshops with governmental and non-governmental practitioners and members of the public, which were held throughout the country.

The project committee also decided to consult with children. The children's participation project, run jointly with the National Institute for Crime Prevention and Reintegration of Offenders, involved children from a range of socio-economic backgrounds. All the participants had been accused of criminal activity, except for a control group of children who had never been in contact with the criminal justice system. The participants were asked to respond to a range of questions linked to the project committee's recommendations, summarized in a detailed report, *What the Children Said*.⁶¹

Commitment to CRC Obligations

The commitment of the SALRC juvenile justice project committee to the spirit of the CRC is evident from the opening paragraph of the *Report on Juvenile Justice*:

"By ratifying the Convention, South Africa is now obliged, in terms of article 40(3) thereof, to

establish laws, procedures, authorities and institutions which recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law, to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

It is quite clear, therefore, that the legal drafting flowed from South Africa's CRC obligations. The report clearly states that "(t)hose working for reform of juvenile justice in South Africa have always placed the issue firmly within the ambit of children's rights."⁶² The report also makes direct reference to the CRC, the UN Guidelines for the Prevention of Juvenile Delinquency, the UN Standard Minimum Rules for the Administration of Juvenile Justice and the UN Rules for the Protection of Juveniles Deprived of their Liberty. The African Charter on the Rights of the Child is also referred to in the report.

A key priority of the juvenile justice project committee was to create a child justice bill that would be 'implementable'. Previously laws had been passed in South Africa that were fine tributes to the CRC but that struggled⁶³ or even failed entirely⁶⁴ to get off the ground due to the practical difficulties of implementation and lack of resource allocation. The project committee was aware of the political dynamics linked to resource allocation and understood that the bill would face one of its most difficult challenges during the phase of parliamentary debate when financial arguments could be used to block fundamental change.

Cost-Effectiveness Analysis

Given South Africa's law on unfunded mandates (*see box*), the project committee decided early in its deliberations to commission a cost-effectiveness investigation of the proposed juvenile justice system and develop a strategy for implementation. It was the first time that a SALRC project committee had attempted any sort of cost analysis. Although some members of the SALRC were initially wary of getting involved in such a practical endeavour, they warmed to the idea later as the results of the work drew positive acclaim.

This work, performed by the Applied Fiscal Research Centre at the University of Cape Town during 1998 and 1999, involved collaboration between economists and lawyers. The lawyers had to learn economic jargon, basic budgeting and how to read spreadsheets, and the economists had to learn about the commitments the government had made to children by ratifying the CRC and drafting the constitution, as well as how a juvenile justice system operates 'on the ground'. This work was written up in a report.⁶⁵

Early on a flow chart was prepared showing the cost of taking a child through the criminal justice system. This required estimating what each of the five relevant government departments was currently spending annually on services for children. As some activities fell under the responsibility of provincial governments, this investigation had to factor in spending at both national and provincial levels.

Once the economists had completed this estimate, referred to as the baseline cost, they costed the annual expense of the proposed system and provided a breakdown of each department's expenditures. This involved developing such detailed estimates as the cost of transporting children to court, assessments by probation officers, diversion programmes, court time, time spent in correctional facilities and secure-care facilities, legal representation, training of personnel and monitoring of the system.

The cost-effectiveness analysis explored and compared the way children were then processed by the criminal justice system with the system described in

the Child Justice Bill. A spreadsheet model, referred to as the CJ model, was built to map the flow of children through the stages of the current and proposed systems. The model estimated costs associated with processing, transporting and detaining children arriving at each stage of the system during the course of a year, taking into consideration the different levels of criminal activity in metropolitan, urban and rural areas.

To compare the cost of the current child justice system with that proposed by the bill, three scenarios were generated and run in the CJ model.⁶⁶ The first, a baseline scenario, sought to replicate the flow of children going through the current criminal justice system. The second, called the full implementation scenario, was an ideal scenario, assuming appropriately trained officials efficiently operating a well-resourced system. The third, the roll-out scenario, sought to replicate how the new child justice system was likely to operate at approximately the halfway point in the implementation process, when the basic elements of the system were presumed to be in place but not being uniformly applied or used.

Running these three scenarios on the CJ model generated information on the expected process outputs of the existing and proposed child justice systems (for example, the number of children likely to be diverted or likely to be sentenced to imprisonment) as well as the likely expenditure at each stage for each scenario. Comparing this information across the scenarios enabled the budget analysts to evaluate likely savings or increased expenditures and their relative cost-effectiveness.

An important advantage of analysing cost-effectiveness during the bill's drafting was that it allowed for several comparable iterations of the bill. At one stage the bill was criticized because it called for magistrates presiding over preliminary inquiries to exempt themselves from subsequent trials if they had heard any prejudicial evidence during a preliminary inquiry.

The critics argued that this would prove too expensive, and this criticism was used by some members of the prosecuting authority to support an amendment that would preclude the magistrate from

Box 4 Unfunded mandates

In 1999 the South African Government passed a law called the Public Finance Management Act 1 of 1999. The Act is meant to enhance good management and calls for evaluating financial management performance using as its criteria effectiveness, efficiency, equity and economy. Section 35 of the Act requires the development of financial projections for certain types of legislation. Specifically it says:

"Draft national legislation that assigns an additional function or power to, or imposes any other obligation on, a provincial government, must, in a memorandum that must be introduced in Parliament with that legislation, give a projection of the financial implications of that function, power or obligation to the province."ⁱ

Any national legislation affecting powers of provincial government would therefore be considered an unfunded mandate if it was not accompanied by such a memorandum.

i Government of South Africa, Public Finance Management Act No. 1, 1999.

attending the preliminary inquiry. The economists examined this issue and determined the costs of stepping down after the preliminary inquiry would not be very significant, so the magistrate's attendance remained part of the bill.

The costing analysis also demonstrated the cost-effectiveness of clustering services. An enabling clause for the establishment of 'one stop' child justice centres was thus added to the draft. The scenario analysis also demonstrated a fact often advocated but rarely illustrated: if more is spent on prevention and early intervention services, the system will realize significant costs savings down the line.

These examples illustrate the importance of analysing the cost effectiveness of legislation during the drafting process rather than after a bill becomes law. It shows that inter-disciplinary analysis can influence the actual content of law.

Technical Assistance Project

When embarking on the law reform process, the South African government asked the United Nations for technical assistance in juvenile justice. A technical assistance project was established in October 1999 and situated in the department of Justice and Constitutional Development. It employed three South African staff and was overseen by a steering committee made up of representatives from the UN Development Programme, UN Office on Drugs and Crime, UNICEF and several government departments. One of its objectives was to plan for implementation of the Child Justice Bill, for which the project undertook important work in budgeting and implementation planning.

The first task was to update the scenario analysis, taking into account new developments and minor changes to the bill. The updated cost-effectiveness analysis confirmed the findings of the earlier analysis: the government was likely to realize significant overall savings from full implementation of the Child Justice Bill. The key to realizing savings is linked to how children would be processed in the new system. Some departments, such as Social Development, would need to spend more money in the proposed system than they were spending in the current system. But spending more in the early stages on assessment, preliminary inquiry and diversion would result in savings in connection with trial and detention.

However, the updated cost-effectiveness analysis failed to capture the attention of department officials. Numerous unsuccessful attempts to get them to respond to the analysis illuminated the reason for their lack of interest: it had been done for them, by outside economists. They therefore lacked a sense of ownership and participation. They did not really believe the information produced and did not feel compelled to act upon it.

It was therefore decided to approach the next step very differently. The bill was soon to go to parliament, and a budget and implementation plan was needed. Although the UN technical assistance project would oversee the process, this time the departments

themselves would be required to generate the numbers based on their own information and to develop their own budget allocations. This in turn would be linked to a real implementation plan, which the departments would then put into operation.

Budgeting and Implementation Planning

The earlier cost-benefit analysis had assessed a one-year period of the child justice system's operation. With the bill going to parliament, it was important that budgeting and implementation planning be performed according to the medium-term expenditure framework (MTEF) cycle, the government's three-year rolling budget system. Using the MTEF, each year the government presents a three-year spending plan that sets out allocations for the coming financial year and projections for the two following years.

The Inter-Sectoral Committee for Child Justice (ISCCJ), comprised of members from different government departments,⁶⁷ would steer the budgeting and implementation planning process, which was to result in a Budget and Implementation Plan. Realizing the importance of obtaining 'buy-in' at a high level of government, the ISCCJ called an initial meeting in October 2001 with the chief financial officers of the relevant departments to discuss the development of an integrated budget and implementation strategy for the Child Justice Bill. The meeting was chaired by the chief financial officer for Justice and Constitutional Development. Also attending this important initial meeting were representatives of the National Treasury, which was kept involved and informed throughout the process.

The UN technical assistance project, through the assistance of an economist, provided support to government in the following ways:

- Coordination of the process
- Expert advice and research
- Training and guidance
- Development of costing models
- Development of templates for information gathering
- Monitoring accuracy of outputs
- Guidance in developing norms and standards
- Support for departments in the process of developing budgets
- Consolidation of departmental budgets and implementation plans into one document

The economist prepared a template for each department to develop its budget. Relevant staff attended training sessions to learn how to budget according to the model. Regular meetings took place to discuss progress and solve problems, such as the absence or paucity of quality information in government data systems.

To establish the existing costs of processing children through the current criminal justice system and to determine any new costs that would result from the

new system, all departments had to agree on baseline data. For example, child arrest figures were a departure point for the budget and implementation planning process, because the number of children arrested each year is the basis for determining the total number of children entering the system. These numbers were supplied by the South African Police Service.

The other important piece of baseline information was the number of children (unsentenced and sentenced) in prison, available in reliable, verified statistics provided by the Department of Correctional Services. The current number of diversions could be estimated with reasonable accuracy from numbers provided by the National Prosecuting Authority, Probation Services and non-governmental service providers. The number of trials of persons under 18 years old was not known, but it was estimated through an assumption formula agreed on by departments and linked to verified information such as the number of arrests and of detentions.

The final Budget and Implementation Plan describes the costing model as follows:⁶⁸

“Spreadsheet models have been prepared that reflect the current budgetary allocations relating to children who are moving through the criminal justice process. The models are then used to analyse the new activities required by the Child Justice Bill and the budgets required for the first three-year cycle of the life of the new system. This allows for a phased and incremental approach to introducing the new requirements of the Child Justice Bill.”

The process revealed that in the current system budgets had not been compiled with the required accuracy. It therefore was necessary to develop norms and standards for certain sectors to quantify the requirements for a particular service or programme and to allow for accurate costing. This process was refined and utilized more fully in the Children’s Bill budgeting process (discussed in chapter 5). The Department of Social Development required more capacity development given the nature of the bidding process.

The inter-sectoral nature of the process was very important. The Department of Social Development, which had generally been under-funded in delivering social services, was required to put in a substantial bid to Treasury for the Child Justice Bill. This was made easier by the fact that the Budget and Implementation Plan demonstrated that although Social Development would require more funds, this could be offset by savings in other departments in the long run. Thus the ‘saving’ departments could support the ‘spending’ departments.

The Bill at Parliament

The Child Justice Bill was the first bill placed before the democratically elected parliament that provided detailed projections of expenditure. South Africa has a participatory style of law-making; every bill is deliberated on by portfolio committees made up of elected

representatives from various political parties. The government briefing and public hearings on the Child Justice Bill took place in February 2003.⁶⁹ Deliberations by the Portfolio Committee on Justice and Constitutional Development followed in March, August and September 2003.

Much of the debate at the Portfolio Committee centred around practical questions of government capacity to deliver services.⁷⁰ Thanks to the work of the project committee on child justice, the executive branch (through the ISCCJ) had taken up the challenge to ensure budget and implementation planning. The government officials representing the departments at parliament were thus able to present to the Portfolio Committee a comprehensive budget and implementation strategy to support the bill.⁷¹

The government’s preparatory work, supported by the United Nations technical assistance project, proved invaluable. The chairperson of the Portfolio Committee noted that, had the government been unable to demonstrate its readiness to implement the bill, it might not have been debated at all.⁷² The chairperson also mentioned the possibility of a phased approach to implementation, and it may be that the final version of the bill will indicate a staggered implementation date, allowing its provisions to be put into operation on different dates in different provinces according to their readiness.⁷³ These indications seem to bear out a prediction by child rights author Julia Sloth-Nielsen that the budget and implementation plan would “sway any doubting Thomas on the parliamentary benches who may be dubious as to the feasibility of implementing a separate child justice system in a developing country facing competing demands from many sectors.”⁷⁴

Conclusions

By the end of the process, the departments of Justice and Constitutional Development, Social Development, and Safety and Security all included allocations of funds required for the Child Justice Bill in their MTEFs for 2003 to 2005. However, although the bill was expected to pass during 2003, it did not. National elections were held in April 2004, a new minister of justice was appointed and parliament has not discussed the bill again.

The fact that the bill did not pass may raise questions about whether budgeting and implementation planning assists the process of law reform. Certainly, parliament is fully aware of the commitments it will make if it passes the Child Justice Bill, and this may have led to cautiousness by the minister. In the absence of any clear statement to this effect by the government, however, we can only speculate on the reasons for the failure of the bill.

Ironically, the Child Justice Bill made history for a second time by being the first bill in South Africa to have funds allocated by the national and provincial treasuries before its passage. These funds have been used instead to strengthen the existing child justice system, for example through the appointment of additional

probation officers in some provinces and building infrastructure such as secure-care facilities and a one-stop child justice centre. It is evident, therefore, that

preparation for implementation of the law is already well under way and children are already benefiting from the allocation of additional funds.

Notes

- 58 SALRC, 'Issue Paper on Juvenile Justice', Issue paper 9, Project 106, 1997.
- 59 SALRC, 'Discussion Paper on Juvenile Justice', Discussion paper 79, Project 106, 1998.
- 60 SALRC, 'Report on Juvenile Justice', Project 106, 2000. These documents are available at the following website: <www.doj.gov.za/salrc/index.htm>.
- 61 Community Law Centre, 'What the Children Said', Community Law Centre, Belville, 1999. For a more detailed report of children's participation in law making see L. Ehlers, 'Children's participation in law reform in Southern Africa – A critical analysis of Mozambique and South Africa's efforts to comply with their international obligations to give children a voice in the development of laws affecting their lives', M. Phil thesis, University of Cape Town, 2005.
- 62 SALRC, 'Report on Juvenile Justice', 2000, p. 4. See further J. Sloth-Nielsen, 'The Role of International Law in Juvenile Justice Reform in South Africa', LLD thesis, University of the Western Cape, 2001.
- 63 The Maintenance Act 99 of 1998 was not properly implemented until 2003 with the appointment of maintenance investigators required by the Act. An absence of implementation and budget planning when the legislation passed caused the delay. See C. Barberton and A. Grieve, 'Costing Certain Provisions of the Maintenance Act, 2002.
- 64 The right of children to legal representation in children's court matters provided for in section 8A, introduced by the Child Care Amendment Act 96 of 1996, has never been put into operation due to disagreements about which department should pay the cost. Therefore no funds have been allocated for this service.
- 65 Barberton, C. with J. Stuart, 'Costing the Implementation of the Child Justice Bill: A Scenario Analysis', *Research Monograph Series*, Applied Fiscal Research Centre, University of Cape Town, 1999.
- 66 Ibid.
- 67 Participating government departments and agencies were the Department of Justice and Constitutional Development (chair), National Prosecuting Authority, Departments of Social Development, Correctional Services and Education, South African Police Service, and Office on the Rights of the Child, in the Presidency.
- 68 Inter-sectoral Committee for Child Justice, 'Child Justice Bill Budget and Implementation Plan', Department of Justice and Constitutional Development, Pretoria, 2002. The document can be downloaded from <www.childjustice.gov.za>.
- 69 The government briefing is the opportunity for officials from the executive branch to present their aims, objectives and plans regarding the proposed legislation to the relevant portfolio committee. The public hearings provide an opportunity for individuals and civil society organizations to comment on a bill before the relevant portfolio committee and to recommend amendments.
- 70 The reasons for these concerns are highlighted by E. Van der Spuy, W. Scharf and J. Lever, 'The Politics of Youth Crime and Justice in South Africa' in C. Sumner (ed.), *The Blackwell Companion to Criminology*, Blackwell, Oxford, 2004, pp. 176-177: "The inevitable question is whether the already overburdened justice system will be able to cope with yet another major restructuring and the new infrastructure and staffing re-organization that will be necessary to make the system work." The Maintenance Act 99 of 1998 and the Domestic Violence of Act 116 of 1999 are examples of legislation that had laudable aims but have proved difficult to put into practice. The government has had to undertake costings and develop infrastructure after these acts came into force. See further L. Artz and D. Smythe, 'South African Legislation Supporting Victims' in L. Davis and R. Snyman (eds.) *Victimology in South Africa*, Van Schaick, Pretoria, 2005, pp. 138-140.
- 71 Inter-Sectoral Committee for Child Justice, 'Child Justice Bill Budget and Implementation Plan', Pretoria, 2002. In the foreword, Vusi Pikoli, Director-General of the Department of Justice and Constitutional Development, says "The process of planning for the implementation of the Child Justice Bill has been highly innovative and sets a good example for every piece of legislation that comes before Cabinet and Parliament. The planning and budgeting process started early in the process of law-making. Each decision made during the drafting and development phase was costed and weighed in terms of cost implication and cost benefit. The Bill was the first one ever to be costed whilst still in development at the South African Law Commission."
- 72 Minutes of the Parliamentary Monitoring Group, 28 February 2003. Available at <www.pmg.org.za>.
- 73 A. Skelton, 'The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice', LLD Thesis, University of Pretoria., 2005.
- 74 J. Sloth-Nielsen, 'The Business of Child Justice' in J. Burchell and A. Erasmus (eds.), *Criminal Justice in a New Society*, Juta, Lansdowne, 2002, p. 191.

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THE CHILDREN'S BILL

South Africa's Children's Act 38 of 2005 was passed in 2006. Its genesis was a request in 1998 by the Minister of Social Development⁷⁵ for the SALRC to a review the Child Care Act, which had been passed in 1983, under the apartheid regime. The Children's Bill was the most important piece of legislation pertaining to children ever taken up in South Africa and dealt primarily with care and protection issues.

As with the Child Justice Bill, the SALRC established a project committee to review the Child Care Act, early in 1998. The committee determined that the act was inadequate and that a far more comprehensive piece of legislation was required. Thus the committee undertook a major piece of research that examined provisions affecting children scattered across 26 pieces of legislation. The committee also considered the current priority concerns relating to children and those anticipated for the future.⁷⁶

The Children's Bill that eventually emerged from this process is an expansive piece of legislation incorporating provisions of the law of parent and child, child care and protection including prevention,⁷⁷ early intervention,⁷⁸ and measures for the protection of vulnerable children. The framework is based on children's rights, including socio-economic rights. The stated aims of the act include "provision for structures, services and means for promoting and monitoring the sound physical, intellectual, emotional and social development of children."

The budgeting and implementation planning for the bill did not begin early in the process of law reform. In fact, the Minister of Social Development had received the draft bill from the SALRC in December 2002 and, after numerous amendments were made, it was introduced into parliament in 2004. That is when the executive branch began the process of costing and budgeting.

Budgeting and Implementation Planning

The government initiated the budget and implementation planning process. Fully aware of the process that had led to the budget and implementation plan for the Child Justice Bill, the department of Social Development (the lead department for the Children's Bill) hired a consulting team to assist in costing the bill. The team, comprising economists, lawyers and a social work professional, made it clear from the outset that the process would be informed by the lessons learned during the costing of the Child Justice Bill.

The approach was based on the understanding that the consulting team would not prepare the costing or develop the MTEF budget and phased implementation plans. Instead, it would drive the process, provide training and advice, undertake critical research, develop costing models and monitor the quality and accuracy of the outputs received from the departments.

This meant that the departments that would be responsible for implementing the Children's Act would run their own process of costing, budgeting and implementation planning. They would have to gather information, cost the obligations using the models provided by the consulting team, develop the MTEF budgets and work out the phased implementation plans. This work was to be supported by capacity building for state employees. To this end, the consulting team would train groups of employees on costing, budgeting and implementation planning as well as give expert advice individually when required.

The process began with a number of supplementary studies to examine aspects of the bill that would have important cost implications. Three categories of

studies were prepared. The first was 'option studies', which considered different options with regard to specific parts of the bill, including which approach would be the most cost effective. For example, one option study looked at staff-to-child ratios in residential facilities caring for children, while another considered the timing of adoptions.

The second category was 'situational analyses', which gathered baseline information about the provision of services and infrastructure in the current system and considered the demand for services. A key situational analysis gathered baseline information on children in South Africa, while others dealt with more focused areas such as the functioning of the existing children's courts or the provision of foster care.

The third category was 'litigation risk studies', which examined the Children's Bill to assess the extent to which its provisions posed a future litigation risk to government departments and to make proposals for mitigating these risks. It also considered whether any aspects of the bill were more restrictive than existing legislation.

Developing the Costing

A 122-page report, *The Cost of the Children's Bill*, was completed in July 2006.⁷⁹ The remainder of this chapter summarizes key aspects of this report.

The consulting team worked closely with the departments during the costing project. The report records that:

- Officials from 48 national and provincial departments participated;
- Six training workshops were held, training 123 officials on the costing of legislation;
- Five workshops were held to set service delivery norms and standards, with the participation of 111 officials and representatives from NGOs;
- Ten workshops were held on the use of the different modules of Children's Bill Costing Model, training 231 officials.

In addition to all the meetings, training sessions and workshops, officials worked to calculate the costs of their department's responsibilities under the Children's Act. The consultants consolidated the input from the departments and analysed them for consistency. Where inconsistencies appeared, consultants worked one on one with department officials to improve the quality and accuracy of the work. The process therefore expanded the budgeting skills of numerous government officials throughout the country.

The consulting team also produced a set of full-cost scenarios (what the model would cost when fully implemented) and implementation plan scenarios (allowing for a phased implementation). The implementation plan scenarios were signed off by the heads of the departments that would have substantial responsibilities in terms of the Children's Act.

Activity-based Costing

Activity-based costing underpins the model used to cost the Children's Bill. It focuses on the cost of services

and requires answers to questions such as: How many adoptions are likely to take place annually? Who carries out which tasks, such as pre-screening parents and children, placing children and follow-up work? What is the value of that person's time? How long does each step take? What other costs are associated with this service? Which department is responsible for the service? Costs are then calculated using a formula that incorporates quantity of services, necessary inputs and price of inputs.

As an illustration, this formula can be applied to the cost of residential care in a child and youth care centre as follows: The **quantity** consists of how many children will require residential care and includes factors such as the maximum number of children per facility. The **input** consists of what is required to deliver the service – the number of different categories of staff, the physical needs of the children in terms of food, clothing, bedding etc. The **price** consists of the unit cost of each item, such as: How much are the different staff categories paid? How many shifts will be needed? How many hours per shift? How much does it cost to feed and clothe a child per day or per month?

It soon became evident that making these calculations would require calculating norms and standards. For instance, what is the standard or norm regarding the ratio of staff members to children in residential care? To simplify the costing, certain non-personnel inputs (such as office supplies) were added as a fixed ratio to personnel. In other words, it was assumed that every social worker would use part of the budget for office supplies, but this was linked to the social worker and not separately costed as part of the activity.

Development of Norms and Standards

During the workshops to develop norms and standards, which were attended by governmental and non-governmental service delivery staff, participants were asked to consider questions such as:

- What activities are necessary to deliver the service?
- How long will each activity take?
- How frequently will the activity have to be delivered?
- What level of worker will carry out activities?
- What qualifications must that person have?

For example, in adoption work one needs to identify activities such as identifying prospective parents, pre-screening, counselling, matching the child with the family, home visits, case conference, report writing, presentation of report at court, placement and follow-up visits. Some of these activities would have to be carried out by a qualified social worker, while others could probably be undertaken by an auxiliary social worker. In some cases more home visits would be needed, in some less, and the screening process could take longer in some cases than others. This is referred to as the 'service quantity norm'.

Assumptions used in the costing process are described as 'high', 'medium' and 'low' intensity of services to estimate how much of a particular activity would be required. The adoption of a child with

special needs, for example, would require a high-level intensity of services, and the service quantity norm would therefore be calculated at a higher rate. It would also be necessary to estimate how many of the children being adopted each year would likely be children with special needs, known as a 'demand variable'. It measures how many units of the different services would need to be supplied. As it is not possible to estimate with perfect accuracy how many children with special needs would require adoption services, one could estimate, for example, that 1 in 10 children to be adopted would have special needs. This is referred to as a 'process assumption'.

The norms and standards were developed based on current best practice, but they envisaged a future when there would be sufficient resources. For example, although the workshop participants knew there was a shortage of social workers, the norms and standards were worked out on the basis that there would be sufficient social workers.

This approach had to be reviewed during the costing project, when it became evident that the 'high' norms and standards were resulting in unachievable cost outcomes because they would require more than 100 per cent of South Africa's current social workers to run the activities.⁸⁰ It therefore became necessary to develop workable alternatives to these 'high' norms.

Implementation Plans

The project then adopted two costing assumptions on which four scenarios were based. The two assumptions are: (1) norms and standards, divided into 'high' and 'low'; and (2) demand for services, divided into 'implementation plans' and 'full-cost' options.

The implementation plans are based on the information provided by the government departments at all levels. The numbers produced by the different provinces vary significantly. The information was also based on current service delivery trends, which may account for some of the variations. In other words, some provinces were coping better with the demand for services than others, and some were better resourced than others.

The full-cost options are demand variables based on the consulting team's assumptions. These were developed by calculating the cost of different services based on demographic and poverty information for each province. The purpose of this was to estimate the actual demand for services. The full-cost scenario did not envisage a phased implementation approach, but rather assumed the system would be operating fully as from 2005/06.

The four scenarios were thus created through an intersection of the two sets of assumptions, as follows:⁸¹

	Low norms and standards	High norms and standards
Implementation plan	Implementation plan Low scenario	Implementation plan High scenario
Full cost	Full cost Low scenario	Full cost High scenario

The initial demand information (how many children would need the service) remained the same across the low and high scenario implementation plans, but there were different assumptions about the provision of services. Thus the demand variables differ. The high scenario assumed there might be more units of activity linked to a particular service or the activities might take longer, whereas the low scenario assumed less time would be spent on each activity or there would be fewer units of activity.

Existing and New Obligations

A very important consideration was the costing of existing and new obligations. Some of the services included in the Children's Bill were to replace existing services. The costs of delivering these services were, to some extent, already provided for in the budget and did not need to be costed afresh, unless the service was being changed or enhanced in some way. This is very important, because if existing services were included in the costing of the bill, it would appear prohibitively expensive to implement.

Another factor to consider was the possibility of under-funding in the current system. The costing exercise revealed serious levels of under-funding (more acute in certain provinces) of services for children. This funding gap was estimated by the difference between the costing outcomes in each scenario and the current MTEF budgets for social welfare services to children that are the same or similar to those envisaged by the Children's Bill. The calculation itself was simple; more challenging was developing an estimate of the current MTEF budgets for services to children.

The task of identifying current government expenditure was complicated by the fact that some of the departments did not distinguish between services for the general population and those for children.

For example, the department of Justice and Constitutional Development has a budget for lower courts. That portion of the budget includes the expenditure for children's courts, but it is not specifically indicated. To work out the funding gap the consulting team had to estimate this expenditure, based on the situation analysis of the functioning of the children's courts. This revealed that 5 per cent of available magistrates were working full-time on children's court cases, thus 5 per cent of the lower courts' budget was the amount spent on children. This amount was then measured against the current demand for children's court services, thus identifying the level of under-spending. This figure was then subtracted from the costing outcome scenarios, which revealed the funding gap.

Some officials saw costing and budgeting processes as an opportunity to load the bill's budget with demands for funding to meet existing obligations not currently in full compliance. Indeed, such backlogs must be met first in order to deal effectively with the new obligations. However, it was important to give a clear indication that these were not new obligations created by the bill.

Costing Outcomes

The costing was presented in four separate modules:

- National Department of Social Development
- National Department of Justice and Constitutional Development
- Provincial Departments of Social Development
- Provincial Departments of Education

Although each of the departmental budgets is set out separately, there is consistency across the different models. The budgets are interdependent, as demand variables for one department are based on the outputs of another. For example, the provincial departments used an assumption that 70 per cent of all care and protection cases reported to them would be resolved through intervention services and 30 per cent would be treated as care and protection cases requiring children's court inquiries. The number of children's court inquiries – a demand variable of the department of Justice and Constitutional Development – is thus the same as the total of the output figures generated by the provincial social development departments.

The costing model is set out over a five-year period, assuming inflation of 5 per cent per year. This is slightly higher than Treasury's inflation projections, a deliberate strategy to increase social worker salaries in real terms above inflation.

In addition to the four modules, the costing project provided information on the likely capital cost needs of residential facilities. These were the only capital costs considered in the project. The project also estimated the cost to prepare for implementation and train the officials who would implement the act.

Issues Raised by the Costing Exercise

■ *Priorities*

Many issues raised in the costing report may have a bearing on prioritization. For example, the budget for provincial social development departments includes substantial funds for intervention services. This is because many children will require such services. However, the report points out that properly implemented intervention services provided earlier in the system are significantly more cost-effective than drawing children deeper into the care and protection system.

A further prioritization question posed by the exercise concerns the increased workload of the department of Justice and Constitutional Development to deal with parenting agreements and custody and access issues. The question is whether these issues can be prioritized (given that they deal with children who are still living with their families) over children who are identified as being in need of care and protection or at risk of needing it.

■ *State and Private Partnerships*

The scope of the costing project was limited to state costs to meet the obligations arising from the Children's Bill. Currently private partners operate some services.⁸² However, the state is fully responsible for

services required by statute, and if such activities are carried out by private partners, the funding for such services remains the state's responsibility. In particular, the report stresses the government's responsibility to provide for wards of the state and reveals the lack of a coherent policy regarding this vulnerable group.

It is notable that these findings are consistent with the observations and recommendations of the UN Committee on the Rights of the Child arising from its day of general discussion at its 2002 session.⁸³ The theme was 'The private sector as service provider and its role in the monitoring of children's rights'.⁸⁴ The committee emphasized that State parties were primarily responsible for compliance with the CRC by all persons within their jurisdiction, and that the obligations arising from article 4 remain even when states rely on non-state service providers.⁸⁵

■ *Provincial Disparities*

The implementation plan scenarios are based on information provided by provincial government departments, and the costing project revealed something it did not set out to show: There are striking provincial disparities in current funding of services for children. If government opts to use the 'implementation plan' costing figures to formulate budgets, these inequalities are likely to persist. The 'full cost' scenarios, on the other hand, are based on population figures. Budgets based on these figures are more likely to gradually address the inequalities by pinpointing poorer provinces that have more children requiring services so they can receive increased budgets to ensure prioritized delivery.

■ *Human Resources Shortfall*

The proper implementation of the Children's Act will require a large number of social workers and auxiliary social workers. The costing indicates that the numbers required greatly exceed the numbers of such workers who are currently registered. The report says: "Even if the funding can be found, and implementation plans drawn up, there are simply not enough registered social workers to deliver the services envisaged by the Children's Bill. There are currently 11,372 registered social workers. According to the IP [Implementation Plan] Low scenario, 8,662 social workers are required to implement the Children's Bill in 2005/06. This increases to 16,504 in 2010/11. According to the FC [Full Cost] High scenario, 47,000 social workers are required in 2005/06 and 66,300 in 2010/11. In short the country is facing a critical shortage."⁸⁶

The report recommends that the government develop strategies to raise the status of the profession, address the poor working conditions of social workers and increase their numbers by actively recruiting students to study social work and providing them with generous bursaries linked with holiday and post-graduate work requirements.

■ *The Impact of HIV/AIDS*

No study on child-related legislation and service delivery in sub-Saharan Africa would be complete without an assessment of the impact of HIV/AIDS. The report indicates that the need to develop the low

norms and standards that emerged during the costing process can be attributed directly to the impact of HIV/AIDS on the demand for social welfare services. The high norms and standards are not impractical in themselves, but the number of children who will require the services is very high as a result of HIV/AIDS.

In the 'full high cost' scenario, the costing project included a feature that would test the impact of HIV/AIDS in a very direct way. The other three scenarios were based on the following assumptions about alternative care orders emanating from children's court inquiries: 80 per cent of children found to be in need of care and protection would be placed in kinship care, 10 per cent would be placed in foster care (with a non-relative), 5 per cent would be placed in children homes, 4 per cent would return to their families and 1 per cent would be placed in schools of industry.⁸⁷

In the 'full cost high' scenario the model purposely switched the foster care and children's home percentages to 5 per cent in foster care and 10 per cent in children's homes. This resulted in a dramatic increase in cost outcomes and an acute shortage of places in children's homes, requiring construction of new homes on an astonishing scale. The report thus highlights that South Africa cannot afford to fall back on children's homes and must ensure that kinship and foster care placements are effective. The country also must devise other innovative solutions.

Cost Comparisons

At first glance, the cost of the Children's Bill appears very high. The report put this neatly into perspective, however, by comparing it to the current budget for the

Department of Education and calculating it on a per-capita basis. This demonstrated that the per capita education expenditure is 14 times more than the per-capita expenditure for the 'implementation plan low' scenario and 1.8 times the expenditure for the 'full cost high' scenario. Another comparison was made to the 2005/6 consolidated budget for the country. This revealed that the costing outcome for the 'implementation plan low' scenario was 1.3 per cent of the total budget, while the 'full cost high' scenario was 8.4 per cent. This was again contrasted with the education budget, which amounted to 18 per cent of the consolidated government expenditure in 2005/6.

Conclusions

The costing project on the Children's Bill did not evaluate or cost the expected benefits of the proposed systems to children or to society. Such an endeavour is obviously difficult to undertake – it would indeed be very complex to measure the impact on society of children who are allowed to fall between the cracks of the protective systems meant to save them.

The costing project did establish what it would cost to implement the Children's Bill. This provides the government with a clear indication of the budgets that will need to be allocated. It also provides the basis of a detailed implementation plan. Through the presentation of scenarios, the costing project also made it possible to evaluate the cost-effectiveness of the proposed systems framed by the bill and to accurately plan its phased implementation over the MTEF rolling budget cycle.

Notes

- 75 The department was then called the Department of Welfare and Population Development. The name was changed to the Department of Social Development in July 2000.
- 76 SALRC, *Discussion Paper on the Review of the Child Care Act*, Discussion Paper 103, Project 110, 2001
- 77 In Chapter 8 of the report prevention is defined as "any strategies and programmes which strengthen and build the capacity and self-reliance of families, children, youth, women and older persons"
- 78 Early intervention services are defined as "services target children, youth, families, women, older persons and communities identified (through a developmental risk assessment) as being vulnerable or at risk."
- 79 Barberton, C., *The Cost of the Children's Bill – Estimates of the cost to Government of the services envisaged by the comprehensive Children's Bill for the period 2005-2010*, Report for the national Department of Social Development, July 2006. The report, together with detailed costing information and support documents, has been compiled as a CD and is available from Agnes.Muller@socdev.gov.za.
- 80 The costing exercise highlighted the urgent need to ensure retention of current social workers and hiring and training of additional social workers. In 2006 the Minister of Social Development announced that the department would introduce a package of salary increases and incentives to attract more people to enrol at university for social work. This was a direct result of the costing project.
- 81 Adapted from figure 2, Barberton, C., op. cit., p. 18.
- 82 Some of the service providers are non-profit organizations; for example, Child Welfare Societies undertakes the majority of the care and protection work on behalf of government. This work is contracted through service agreements and is subsidized. However, other services are provided by companies that tender for government contracts on a profit-making basis, for example, a company (Bosasa) runs a number of secure-care facilities for children awaiting trial.
- 83 The UN Committee on the Rights of the Child hosts a day of general discussion every year, usually in September or October, focusing on a particular article or theme in the Convention. This is done to enhance understanding of the contents and implications of the Convention.
- 84 See Odhiambo-Odongo, G., "The Private Sector as Service Provider and its Role in Implementing Children's Rights: The Views of the UN Committee on the Rights of the Child", vol. 4 *ESR Review*, 2003, available at <www.communitylawcentre.org.za>
- 85 The Committee recommended that States parties should therefore set standards and ensure compliance. The recommendations of the Committee are available at <www.unhcr.ch/html/menu2/6/crc/doc/days/service.pdf>. See also General Comment no. 5 paras 42-44, available at <www.unhcr.ch/tbs/doc.nsf>. South Africa's UN technical assistance project on Child Justice attempted to develop capacity in South Africa with regard to ensuring children's rights protection in state-private service-delivery partnerships. See report on a workshop held in May 2002, "Bringing Children's Rights and Protection the Centre of Service Level Agreements in the Child Justice System". Available at <www.childjustice.gov.za>.
- 86 Barberton, C., op. cit., p. 107.
- 87 Schools of Industry are institutions established under the Child Care Act 74 of 1983 and are schools maintained for the reception, care, education and training of children. Children who are found to be in need of care and protection in terms of section 14 of the Act are placed in such facilities. In terms of the new Children's Act 38 of 2005, which is still awaiting further amendments and promulgation, schools of industry will fall under the umbrella of child and youth care centres, which are residential care facilities not including, amongst others, boarding schools places of tuition or shelters.

6

CONCLUSIONS

Article 4 of the CRC has led to substantial gains for children in many parts of the world. States parties have responded to the call for legislative measures to implement it. But without budgets to implement laws, they will remain paper promises.

The calls made at the World Summit on Children to put children first, and at the Special Session on Children to invest in children, focused efforts by governments and non-governmental organizations on reprioritizing spending towards children. The UN Committee on the Rights of the Child has from time to time questioned States parties about their commitment to children through the examination of allocations in the national budget.

Article 4 calls for countries to take measures “to the maximum extent of their available resources.” With regard to socio-economic rights, there was a danger that some developing countries would interpret this wording as an escape clause, allowing them to avoid spending on children by pleading poverty. Experience has shown, however, that developing countries have been at the forefront of budget project work linked to children’s rights. Governments in countries that have undergone democratic transformation since 1989 have become more transparent and are providing information about budgets that they previously would not have made available. This has led to renewed interest in the significance of the budget as an area for lobbying, advocacy and monitoring.

While the influence of national legislatures on budget policy making has declined in most industrial countries,⁸⁷ legislatures in developing countries have proved to be very pro-active with regard to budgetary issues. The joint work of the IPU and UNICEF⁸⁸ has raised awareness among members of parliament regarding

reprioritization of budgets to realize children’s rights. Finally, courts in developing countries such as India, the Philippines and South Africa have shown a commitment to favourable interpretation of children’s rights issues, including socio-economic rights.

This study has focused on child law reform in South Africa. Its constitution was the first in the world to make an express commitment to children’s socio-economic rights. These rights were spelled out in a special section dedicated to children’s rights, and, as required by article 4 of the CRC, they were not subjected to an internal limitations clause.

Once the constitution was in place, IDASA’s Children’s Budget Unit led the way in budget work with its comprehensive and innovative projects. These have sought to investigate the meaning and scope of children’s socio-economic rights and have highlighted the importance of reaching a clearer understanding of children’s entitlements under the constitutional rights aimed only or primarily at children. The projects have identified key programmes that government has put in place and analysed both the input and output sides of the budget.

The central focus of this study was an examination of South Africa’s experience of costing child-related law reform. The cost-effectiveness analysis of the Child Justice Bill, which took place in the very early stages of law development, allowed budgetary considerations to be factored into the bill. This demonstrates that law reform need not be an ivory tower endeavour. Indeed, a legal drafting approach that incorporates pragmatic considerations improves the prospects for a law that is realistic and ‘implementable’.

The study also illustrates the importance of government buy-in. While consultant economists and non-governmental lawyers were important partners in

the costing process, the Child Justice Bill costing and budgeting process gained momentum once government departments took responsibility for generating the numbers for their budgets. The process also illustrates how UN technical assistance can effectively support a costing, budgeting and implementation project. Article 4 of the CRC makes reference to international cooperation, which includes UN technical assistance. It is an effective means of providing expertise and building government capacity to develop sound costing and budgeting methods.

The costing and budget development process for the Child Justice Bill was experimental, and the experience gained aided the substantially more comprehensive process of costing the Children's Bill. From the outset of the project, there was a firm understanding that the consulting team would not do the costing or develop the MTEF budget and phased implementation plans. Instead, the departments would take responsibility for these tasks, with the consulting team driving the process, providing training and advice, undertaking research, developing costing models and monitoring the quality and accuracy of the outputs received by the departments.

The setting of norms and standards, which had been used in the Child Justice Bill costing process, proved to be the foundation of the activity-based costing approach for the Children's Bill. This process revealed that government was underspending on services for children in the current system. It was also important to point out the funding gap in the current system. This was done by showing the gap between what the government was currently obliged to spend on children under existing laws and what was actually being spent. These expenses are prerequisites for the successful implementation of the new law, but they were not, strictly speaking, costs generated by the Children's Bill. The point was made that spending should be increased to ensure a functioning system, but this 'funding gap' should not be confused with funds needed for the new obligations arising from the Children's Bill.

The detailed results of costing the Children's Bill demonstrate that planning for the implementation of comprehensive legislation requires an approach that deals with competing priorities. If implementation must be phased in due to financial constraints, decisions must be made about which needs must be met as a priority. This exercise must be done considering the long term, however. Early intervention services are expensive because the number of children requiring them is large, but in the long run these services will prove cost-effective.

An examination of public-private partnerships for service delivery revealed that the state is fully responsible for services that are required by statute, and if such activities are carried out by private partners, the funding for such services remains the state's responsibility.

The Children's Bill costing project also revealed problems that many developing countries will face: provincial disparities in spending on children, a shortage of qualified workers in certain categories and the impact of HIV/AIDS. These problems are not insurmountable, but an implementation plan must include specific measures to meet such challenges.

The inter-sectoral nature of the costing projects proved to be an essential feature of the work. Government budgeting tends to take place through a 'silo' approach; each department generates its budget with little or no reference to other departments. The costing projects showed that in systems involving a number of departments, the output data of one department can become the input data of another. Thus, for a system to function properly, governments must use the same costing models, must base their budgets on the same or related data, and must have an integrated implementation strategy.

The phasing of implementation also needs to be planned concurrently, so that system prerequisites can be put in place before the addition of other features that may be dependent on those prerequisites. A new cost-effective system may reap cost savings for one department while requiring another department to allocate and spend additional funds. A consolidated, inter-sectoral approach to budgeting can help convince the treasury of the overall cost-effectiveness of the proposed system.

What happens if the costing and budgeting process result in outcomes that are unaffordable? Is there a danger that an accurate costing process could result in abandonment of an important bill because it is considered too expensive?

The experience thus far provides some tentative answers to these questions. First, when the outcomes based on numbers generated by the costing project on the Children's Bill emerged as being prohibitive, the costing project, in consultation with government and selected experts, adjusted the norms and standards. The scenarios then set out the contrasting costs and budgets based on different norms and standards.

Second, the proposed costs of the new system were favourably compared with the amount currently being spent on education, expressed as a percentage of the country's total budget. This proved an effective way of putting into perspective the amount of money required.

Finally, if legislative reform is to lead to quantifiable changes to children's lives, the budget needs to be provided. It is not advisable to avoid the costing process because of concerns that it might shed light on the cost of providing effective services for children. Doing so would effectively remove from legislative reform the purpose that was intended by article 4 of the CRC – namely, to effectively implement its provisions.

Notes

87 International Budget Project, 'Renewed Interest in Legislative Budgeting', available at <www.internationalbudget.org/themes/LEG/index.htm>.

88 IPU and UNICEF, *Child Protection: Handbook for Parliamentarians*, op. cit., 2004.

For every child
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