

## **Renewal and Reform: Special Issue on ‘Realising the Rights of Children to Quality Early Childhood Development in South Africa’**

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Access to holistic, quality early childhood development (ECD) services is needed to support the health, nutrition and early learning needs of young children.<sup>1</sup> While South Africa has made some advances in increasing access to ECD services for children in the democratic era,<sup>2</sup> significant gaps and challenges remain. Almost two-thirds of young children live below the poverty line,<sup>3</sup> a majority of the country’s poorest children do not meet learning and physical expectations for their age,<sup>4</sup> and the position of children with disabilities is even more dire.<sup>5</sup>

The devastating impact of the Covid-19 pandemic brought systemic failures in this sector into stark focus and has prompted developing research and jurisprudence on the right to ECD services.<sup>6</sup> At the same time, the regulation of this critical sector is in a state of flux. In 2019, President Cyril Ramaphosa announced that two years of compulsory pre-school would be introduced for children before Grade 1.<sup>7</sup> In a dramatic shift, the President also initiated a migration of key responsibilities relating to ECD from the Department of Social Development to the Department of Basic Education, which took effect in April 2022.<sup>8</sup> Legislative reform has also been proposed, with significant implications for the provisioning of ECD services.<sup>9</sup>

This special issue was initiated in recognition of, and as a response to, the need for in-depth, critical debates to explore opportunities and cautions around ECD sector renewal and reform, particularly from a human rights and legal perspective. A vibrant colloquium held in December 2021<sup>10</sup> brought together ECD practitioners, lawyers and researchers, from South Africa and abroad, to collectively engage on emerging themes in ECD from an interdisciplinary perspective.<sup>11</sup> The rich and wide-ranging contributions emerging from that colloquium, and included in this issue, reflect both the complexity and urgency of effectively realising the rights of children in early childhood.

The special issue coalesces around three main themes. The first is the rights-based framework within which the realisation of children’s rights in early childhood can be assessed. In their contribution, Sandra Fredman, Georgina Donati and Sara Naicker argue that the right to equality, as recognised in international law and the Constitution of South Africa, can be mobilised in response to pervasive disparities in access to and quality of early childhood care and education in South Africa.<sup>12</sup> Utilising a substantive equality framework, they conclude that direct and indirect discrimination based on poverty, race and gender are potential claims that can be established in the South African context. Significantly, they suggest that resource-based justifications in response to limitations of the right to equality are inadequate where budgets permit skewed resource distribution.

Focussing on children with disabilities, Mildred Bekink provides a comprehensive overview of international and regional instruments protecting the right to inclusive ECD services.<sup>13</sup> She evaluates the extent to which South Africa complies with its international law obligations in relation to children with disabilities and finds the country wanting in several respects. Her article makes concrete proposals for targeted reforms with a view to ensuring that ‘children

with disabilities enjoy the full benefit of their right to ECD for only then can we be regarded as society that values differences and respect the dignity and equality of our most vulnerable citizens'.<sup>14</sup>

Turning to the best interests of the child, Linda Biersteker, Lizette Berry and Malibongwe Gwele offer a grounded assessment of how South Africa's ECD regulatory framework aims to give effect to the constitutional requirement that the best interests of the child be given paramount importance.<sup>15</sup> Using a case study approach, the authors investigate how different stakeholders in a diverse, vulnerable community variously understand the best interests of the child requirement in relation to quality early education. The authors' study suggests that South Africa's current regulatory framework does not sufficiently address ECD programme quality, that contextual factors must be considered in the application of ECD regulations, and that 'it is essential to develop shared understandings between decision-makers and parents and community stakeholders'.<sup>16</sup>

Building on a rights-based framework, a second theme emerging from the special issue is a critical assessment of policy approaches aimed at realising universal access to ECD programmes. Laura Brooks, Janeli Kotzé, Colin Almeleh and Enganas Senona highlight disparities in access to ECD programmes in South Africa, particularly along lines of socio-economic status.<sup>17</sup> With the recent assumption of responsibility for ECD programmes by the Department of Basic Education, the authors evaluate the cost, capacity and policy implications of two options for expanding public provisioning of ECD programmes. The first is through a purpose-built centre approach, where the majority of ECD provisioning is in purpose-built centre-based programmes. The second is through a mixed-model approach, which includes provisioning from homes and community venues. Following a detailed comparison of the two models, the authors argue that a mixed-model approach offers a more cost-efficient option for enabling the realisation of universal access to ECD programmes in South Africa.

In their contribution, Megan Bryer and Yana van Leeve critically examine the tension between the twin objectives of expanding access to early childhood education and creating jobs for women in the context of neoliberal economic policies.<sup>18</sup> They are sceptical of the possibilities of a private sector market-led strategy meaningfully realising the rights of young children. Instead, they argue, such an approach will likely result in 'the continued exploitation, informality and invisibility of the women who provide early childhood education'.<sup>19</sup> Recognising challenges to public provisioning of ECD, they suggest that a public-private mixed model for provisioning is the most pragmatic approach to achieving universal access to quality ECD services. However, even with such an approach they caution that within a neoliberal economic framework 'there is no win-win for the women and the children, either or both will lose out'.<sup>20</sup>

A third theme is that of responsibility and accountability. In her contribution, Tess Peacock explores the obligations of local government in relation to child care facilities. Even though these facilities are allocated as a local government competency under the Constitution, the contours of local government's role and responsibilities in relation to ECD has been unclear. She argues that, in addition to ensuring the health and safety of child care facilities, municipalities may have a broader obligation to also build facilities to advance universal access to ECD programmes. She suggests proposals for law and budgeting reforms, and emphasises the need for a 'strong and coordinated ECD sector, advocating for these types of legal developments, will also be essential to bring this into fruition'.<sup>21</sup>

On the more focussed question of liability for injuries sustained by a child in a privately operated ECD centre, Leo Boonzaier critically analyses the recent Constitutional Court judgment of *BE obo JE v MEC for Social Development, Western Cape*.<sup>22</sup> He suggests that the Court's decision to not hold a public authority liable in delict for a negligent omission represents a surprising shift in its jurisprudence. While Boonzaier welcomes the Court's willingness to limit state liability, he argues that the policy implications and normative underpinnings in this area of the law remains unclear. He concludes by exploring avenues for future legal development.

Finally, the special issue concludes with an incisive review of *Ending Childhood Obesity: A Challenge at the Crossroads of International Economic and Human Rights Law*, where Salona Lutchman reflects on how childhood obesity creates a 'double malnutrition burden' in developing countries such as South Africa.<sup>23</sup> She provides an overview of the recently published edited collection and commends it for highlighting the importance of international co-operation in responding to a global food industry that is 'designed to maximise profits rather than provide healthy, nutritious food'.<sup>24</sup>

While the enormity of the challenges raised across this issue are unsettling, each author provokes and contributes to engagement on how these pressing issues can be effectively tackled. We thank our contributors for their in-depth research and insights, and are indebted to the *South African Journal on Human Rights* for facilitating this important and timely conversation.

### **Disclosure statement**

No potential conflict of interest was reported by the authors.

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### **Notes**

1 For an overview of relevant literature, see G Wills & J Kika-Mistry 'New foundations: Strengthening early childhood care and education provisioning in South Africa after Covid-19' in P Fourie & G Lamb (eds) *The South African Response to COVID-19: The Early Years* (2023) 205, 205.

2 Commendably, the South African government has demonstrated a commitment to prioritising ECD service provisioning in various legislative and policy instruments in the constitutional era (L Biersteker, L Berry & M Gwele 'In whose best interests? The ECD regulatory framework, understandings of the best interests of the young child and access to quality early education' (2022) 38 *South African Journal on Human Rights* 215). There has also been some improvement in material provisioning. For example, access to ECD programmes for four to six-year-olds has increased since 2002 (LE Brooks, J Kotzé, C Almeleh & E Senona 'Assessing the policy options for the public

provisioning of early childhood development programmes' (2022) 38 *South African Journal on Human Rights* 240).

3 Biersteker et al (note 2 above) X.

4 Brooks et al (note 2 above) X.

5 Tragically, only an estimated 5 per cent of South African children with disabilities attend ECD programmes (M Bekink 'The right of children with disabilities to early childhood development: Is South Africa complying with international law?' (2022) 38 *South African Journal on Human Rights* 192).

6 See, for example, Wills & Kika-Mistry (note 1 above) 205–231 and N Ally, R Parker & TN Peacock 'Litigation and social mobilisation for early childhood development during COVID-19 and beyond' (2022) 12 *South African Journal of Childhood Education* 1.

7 C Ramaphosa (President of the Republic of South Africa) *State of the nation address* (7 February 2019) <<https://www.gov.za/speeches/president-cyril-ramaphosa-2019-state-nation-address-7-feb-2019-0000>>.

8 Government of South Africa Proclamation Notice 21 in *Government Gazette* 44787 of 30 June 2021.

9 An initial round of proposed amendments to the Children's Act 38 of 2005 was ultimately rejected following concerns raised by civil society and sector stakeholders, see Ally et al (note 6 above) 9–10.

10 Thanks are due to the editors of the *South African Journal on Human Rights* (namely, Dr Sanele Sibanda, Professor Jeff Handmaker, Dr Muriel Mushariwa and Dr Joey Kok) for generously facilitating a pre-colloquium writer's workshop on 16 September 2021.

11 We are indebted to Dr Noam Peleg from the University of New South Wales, who delivered the opening address at the colloquium, and to Dr Alessandra Gotti from Instituto Articulo in Brazil, who delivered the closing address.

12 S Fredman, G Donati & S Naicker 'New beginnings: The right to equality and early childhood care and education' (2022) 38 *South African Journal on Human Rights* 167.

13 Bekink (note 5 above).

14 Ibid 214.

15 Biersteker et al (note 2 above).

16 Ibid 238.

17 Brooks et al (note 2 above).

18 MR Bryer & Y van Leeve 'Early childhood development and decent jobs: Planting two trees from one seed?' (2022) 38 *South African Journal on Human Rights* 261.

19 Ibid 264.

20 Ibid 284.

21 TN Peacock 'Advancing early childhood development: The role of local government' (2022) 38 *South African Journal on Human Rights* 285.

22 *BE obo JE v MEC for Social Development, Western Cape* 2022 (1) SA 1; L Boonzaier 'Delictual liability for injuries suffered at childcare centres' (2022) 38 *South African Journal on Human Rights* 309.

23 S Lutchman '*Ending Childhood Obesity: A Challenge at the Crossroads of International Economic and Human Rights Law*: by Amandine Garde, Joshua Curtis and Olivier De Schutter, Edward Elgar, Cheltenham, UK, 2020, 369 pp., ISBN: 9781788114011' (2022) 38 *South African Journal on Human Rights* 331.

24 *Ibid* 333.