

# A critical review of South Africa's



# CHILD

# PARTICIPATION

# FRAMEWORKS



By Lucy Jamieson and Hussienatou Manjang



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If children didn't have documented rights, then our needs and wants as children would not be made a priority. Children would be neglected; children would not be included in decision-making concerning children. Without us having our rights there would still be a lot of child labour, there would still be a lot of children who don't receive a basic education there would still be children who don't have an identity. Children's rights are very important and the only way to fully understand how important children's rights are is by imagining a society without children's rights.

*Hon. Mary-Ann Pretorius, Deputy President of the 2021/22 Children's Parliament*

## **Executive summary**

This report interrogates the normative framework governing child participation in South Africa. It provides an analysis of international human rights obligations under the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The report outlines domestic legislation and policy, national development frameworks, and case law about families, health, social services, education, justice, and legislative processes and provides several examples of child participation in practice. The analysis first assesses the normative framework against international obligations and then draws on the Lundy and Fokala's conceptual models to examine whether it truly supports the principles of meaningful child participation. While the law declares that children have a right to influence key decisions in their personal lives, the planning and implementation of services and the development of laws and policies do not provide adequate measures to support them in exercising that right. The report concludes that South African legislation and policy respects and protects children's right to participate but fails to adequately promote and fulfil children's rights; educate parents, caregivers and service providers on how to give effect to these rights; and provide resources necessary for meaningful participation.

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## Acronyms

<b>ACERWC</b>	African Committee of Experts on the Rights and Welfare of the Child
<b>ACRWC</b>	African Charter on the Rights and Welfare of the Child (or 'African Children's Charter')
<b>AU</b>	African Union
<b>CRC</b>	United Nations' Convention on the Rights of the Child
<b>MP</b>	Member of Parliament
<b>NDP</b>	National Development Plan
<b>NMCP</b>	Nelson Mandela Children's Parliament
<b>NPAC</b>	The National Plan of Action for Children 2019 – 2024
<b>NSP - GBVF</b>	The National Strategic Plan on Gender-Based Violence and Femicide
<b>OHCHR</b>	Office of the United Nations High Commissioner for Human Rights
<b>OPIC</b>	Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure
<b>RCL</b>	Representative Council of Learners
<b>SAHRC</b>	The South African Human Rights Commission
<b>SDGs</b>	United Nations' Sustainable Development Goals
<b>SGB</b>	School Governing Body
<b>SRH</b>	Sexual and reproductive health
<b>UN</b>	United Nations
<b>UNCRC</b>	United Nations Committee on the Rights of the Child



## Introduction

Child participation is understood as ‘ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are considered and shape the outcome of such processes’ (para 3).<sup>1</sup> The acknowledgement, respect, and meaningful involvement of children in decision-making processes in all matters affecting them, both in private and public, is essential to a child’s right to participate.<sup>2</sup> Child participation leads to children’s rights being respected, a greater understanding of legal responsibilities, and improved development. Children who meaningfully participate develop their skills, self-esteem, and confidence.<sup>3</sup> Participation also helps change entrenched attitudes towards children that lead to discrimination, social exclusion, and a lack of respect for their rights in general.<sup>4</sup>

South Africa has taken several steps to develop legislation and policy promoting children’s participation. First, it ratified international human rights frameworks like the UN Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC or ‘African Children’s Charter’), which stipulate the obligation of states to facilitate child participation. A series of regional and national development frameworks (see sections 2.2 and 2.4) also strengthen and encourage child participation, providing guidance on what constitutes meaningful participation. In line with these obligations, the Constitution of the Republic of South Africa (‘Constitution’)<sup>5</sup> enshrines an array children’s rights<sup>6</sup> and other legislation has been adopted to effect to these rights. This paper will focus on the laws and policies that enable children’s participation in a variety of public settings (education, health, social services, justice and law-making), including the Children’s Act, Choice on Termination

of Pregnancy Act, National Health Act, South African Schools Act, National Education Policy Act, National Youth Development Agency Act, Criminal Procedure Act and Child Justice Act. In addition, domestic jurisprudence has developed to realise the constitutional rights of children,<sup>7</sup> in particular, cases like *Christian Education South Africa v Minister of Education* and *S v M* (see section 3.1) established precedence on how to interpret the legal framework to give effect to children's participation rights. Hence, we also draw on case law.

The overall objective of this study was to review the normative framework of child participation in South Africa. The study also sought to identify and better understand the existing gaps in the effective implementation of child participation. In pursuit of these objectives, the study asked the following questions:

- i. What laws and policies advance children's right to participation?
- ii. What are the notable gaps in law and policy?
- iii. How do children and young people currently participate in law and policymaking?
- iv. What opportunities and conditions exist for greater youth participation in law and policy?

## **Scope of the study**

This research explored child participation frameworks in South Africa, with a focus on international human rights commitments, domestic legislation, policy and case law. Academic models of meaningful child participation informed the analysis of the legal framework and assessment of the sufficiency of the law to address what happens in real life situations. The analysis also highlights barriers to participation and provides recommendations on the way forward.

## **Methodology**

This study employed a doctrinal research method, a process of critically analysing authoritative sources, existing legislation, and related jurisprudence on a specific matter.<sup>8</sup> This method systematically scrutinised international and regional human rights law concerning child participation and South African legislation, policy, and case law regarding children's participation. The African Children's Charter, CRC, and the South African Constitution and legislation served as primary sources. Secondary sources for this method included books, journal articles, and grey literature that supported the analysis. The doctrinal approach guided 'interpretive qualitative analysis,'<sup>8</sup> and enabled the researchers to appropriately answer the research questions.

## Theoretical approach

To assess the normative child participation frameworks in South Africa, the study broadly relied on conceptual models of participation, specifically Roger Hart's 'Ladder of Participation',<sup>9</sup> Laura Lundy's 'Model of Participation in Action',<sup>10,11</sup> and Elvis Fokala's 'Balanced Model'.<sup>12</sup>

### *Hart's ladder of participation*

In 1992, Hart developed a ladder of child participation, this ladder was influenced by Arnstein's 1969 ladder on citizen participation,<sup>13</sup> with new additions. The ladder of child participation has eight levels: (1) manipulation; (2) decoration; (3) tokenism; (4) assigned, but informed; (5) consulted and informed; (6) adult-initiated, shared decisions with children; (7) child-initiated and directed; and (8) child-initiated, shared decisions with adults.<sup>9</sup> The first four levels are considered 'non-participation' and the second four, 'degrees of participation'. The concept of tokenism is noted as a form of participation that is not meaningful. It is described as occurrences wherein children appear to be given a voice but, have little to no space or control over the issue to meaningfully express their opinions.<sup>9</sup> For example, selecting children to participate on a conference panel without providing substantive information on the topic or facilitating consultation with the other children they are supposed to represent.<sup>9</sup>

Hart later wrote an article in 2007 addressing the misconceptions of the ladder of child participation that provides clarity on the scope of the ladder and limitations of the model.<sup>14</sup> Hart views the upper steps of the ladder as indications of different levels of child participation.<sup>14</sup> However, the ladder of participation primarily concentrates on the role adults play in the process and emphasises programmes over the everyday, informal participation of children in their communities.<sup>14</sup> An important critique flagged by Hart concerns the cultural limitations of the model, which relies on Western conceptions of child development that emphasise individual autonomy,<sup>14</sup> making it challenging to apply in a country like South Africa where child development is linked to community and collectivist culture.<sup>14</sup> He further argues that this is a challenge with the CRC itself to a certain extent, because it relies on Western psychologists.<sup>14</sup> Despite these limitations we will draw on the distinction between tokenism and meaningful participation.

### *Lundy's model of participation in action*

Lundy, writing in 2007, proposed that the implications of space, voice, audience, and influence must be considered for article 12 of the CRC to be successfully implemented.<sup>11</sup> The 'space' must be a safe and welcoming environment where children feel comfortable and confident



sharing their opinions without fear of reprisal or criticism.<sup>11</sup> In creating a safe space, children should be consulted on which issues they deem important, whether and how they want to participate in decision-making and the outcome.<sup>11</sup> Once a child or children have indicated they wish to participate, they must be listened to by an audience – the individuals involved in the decision-making process – and the influence of their participation must be reflected in the outcome.<sup>11</sup> It is important to explain to children how their opinions were taken into consideration and what actions were taken i.e. to give them feedback.<sup>11</sup> However, Lundy later suggests tokenistic participation can be a useful and sometimes necessary starting point on a journey to more respectful and meaningful engagement with children.<sup>15</sup> Lundy developed a checklist to assist with applying her model and implementing, which we used to frame our analysis.<sup>10</sup>

### *Fokala's balanced model*

Fokala proposes a balanced model that primarily draws inspiration from Lundy's model of participation, with a few additions and an African perspective.<sup>12</sup> The components of the balanced model include space, time involved, audience, and influence. According to Fokala, earlier models did not sufficiently stress the link between children, parents, the state, and a child's developing potential.<sup>12</sup> As a partner in the decision-making process, the state is responsible for intervening in the event a child's best interests are not protected.<sup>12</sup> Similarly, the primary responsibility of parents is to support children, not override their decisions.<sup>12</sup> Parents should set aside time to listen to their children and make their home a place where children feel comfortable voicing their ideas on issues that affect them. The balanced model proposes an environment that provides children assurance, security, and trust within a rural African context and regards children as active participants in all decision-making matters involving them if they wish to be.<sup>12</sup>

The three models discussed above build on each other; while Fokala's model is the most recent and specific to the African context, it primarily focuses on the home environment. This analysis of the normative framework in South Africa will therefore draw on both Lundy and Fokala since we see a partnership between children, parents, and the state as desirable and believe those elements should inform public decision-making or 'social dialogue'.<sup>16</sup> Both models recognise and draw on Hart's distinction between tokenism and meaningful participation.



## The right to participate under international and South African law

### International and regional human rights instruments

#### *UN Convention on the Rights of the Child (CRC)*

One of the CRC's<sup>17</sup> guiding principles asserts that all children have the right to be heard and to freely participate in matters affecting them (or not: children are not obligated to share their views and should not face any pressure to do so).<sup>1,18</sup> Article 12(1) affirms that 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'. A literal analysis of 12(1) and 12(2) is given in General Comment 12. The phrase 'shall assure' is a legal term that places a strict obligation on States to provide a range of 'appropriate measures to fully implement the right for all children' (para 19).<sup>1</sup> Article 12(1) also says states must examine a child's ability to develop an independent opinion to the maximum extent possible; it is not the responsibility of the child to establish their capacity (para 20).<sup>1</sup> The sub-article does not place an age restriction on a child's ability to express their own opinion and discourages states from doing so (para 21).<sup>1</sup> To formulate their views, children must be informed about the issues, potential decisions to be made, and the circumstances under which they can express their views (para 25).<sup>1</sup> Lastly, a child's evolving capacities must be considered, as children are not a homogenous group and their views may change with time (paras 29 & 30).<sup>1</sup> It is important to note that the right to participate applies to

groups of children, as well as individuals, requiring States to provide platforms that enable children to contribute their views and experiences to service planning and programming (para 104).<sup>1</sup>

There are five steps for states to consider to effectively implement children's right to be heard. The adult responsible for hearing the child must first inform them about their right to express their opinion in all matters affecting them and give them the necessary information to make an informed decision about whether to make themselves heard (para 41).<sup>1</sup> Second, the environment must be empowering and encouraging to ensure the child feels confident the adult will listen to them and consider what they communicate (para 42).<sup>1</sup> Third, each child's capability to form their views should be assessed on a case-by-case basis (para 44).<sup>1</sup> Fourth, the adult responsible for the hearing must inform the child how the process turned out and how their opinions were taken into account, which ensures the child's input was engaged with and valued, not merely heard as a tokenistic gesture (para 45).<sup>1</sup> Fifth, there should be legislation that provides children with an avenue to lodge complaints and legal recourse should their right to be heard be violated (para 46).<sup>1</sup>

The right to be heard (article 12) is linked to the CRC's three other guiding principles that concern non-discrimination (article 2), the best interests of the child (article 3), and the right to life, survival, and development (article 6). Every child has the right to exercise the rights stipulated in article 12 without discrimination (para 75).<sup>1</sup> Article 12 complements article 3 by offering a methodology to achieve the best interests of the child by providing a platform for children to express their views (para 74).<sup>1</sup> The UNCRC (the body responsible for monitoring and implementing the CRC) sees the right to be heard (article 12) as a tool to promote a child's full development (article 6), (para 79).<sup>1</sup> General Comment 12 spotlights the inextricable link between Articles 12 and 13 (freedom of expression) and 17 (right to information) fundamental prerequisites for appropriately exercising the right to be heard.<sup>1</sup>

The rights in the CRC are interdependent and indivisible, and thus, article 5 is also relevant to child participation, which places an obligation on a child's parents or guardians 'to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention'. Children should be equipped with the knowledge to understand and enjoy their right to participation to fully realise the rights outlined in article 12.

### *African Charter on the Rights and Welfare of the Child (ACRWC)*

Child participation is recognised by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) as both a basic principle of children’s rights and a right in and of itself. The ACERWC states children must be able to participate in decision-making processes on any matter involving them. This right to participate is found under articles 4(2) and 7 of the ACRWC. article 4(2) on the best interests of the child states that:

**In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.<sup>19</sup>**

Article 7 provides the right to freedom of expression: ‘[e]very child who is capable of communicating his or her views shall be assured the rights to express his [or her] opinions freely in all matters and to disseminate his [or her] opinions’. Other guiding principles of the African Children’s Charter include: prioritising the best interests of the child (article 4(1)), the principle of non-discrimination (article 3), and the right to life, survival, and development (article 5).

The African Children’s Charter introduces novel provisions reflecting African perspectives that relate to child participation. Article 31 introduces the responsibilities of the child, placing significance on children’s participation and contribution to their communities (para 11).<sup>20</sup> The ACERWC expounded on article 31, noting that the ACRWC guiding principles [namely the right to participate, as provided for under articles 4(2) and 7] must be applied whenever rights in the African Children’s Charter are interpreted.<sup>21</sup> Article 31 also stipulates that children have a responsibility to participate in all matters affecting them and in all spaces (para 11).<sup>20</sup> The General Comment explains that children must participate at all times and all levels, suggesting their involvement is crucial to advancing African unity and as such, they have a right to participate in all structures and platforms focused on fostering solidarity among African countries and peoples, in accordance with their age and capacity (para 87).<sup>20</sup>

After considering recent research from Africa that identified shortcomings in implementing child participation at the domestic level, the 34<sup>th</sup> Ordinary Session of the ACERWC<sup>a</sup> developed

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a The African Committee of Experts on the Rights and Welfare of the Child hold two ordinary sessions annually to facilitate dialogue on human rights issues and undertake its mandates. The Committee holds open and closes sessions. The open sessions are attended by various child’s rights stakeholders and the closed sessions are attended by the Secretariat of the Committee and Members of the Committee.



the Guidelines on Child Participation Guidelines.<sup>20</sup> The ACERWC notes that laws and policies concerning child participation should be gender-sensitive, inclusive of all children, and involve in-depth dialogue with children and other stakeholders at the family and community levels, in addition to the state obligations addressed in section 3 of the guidelines. The committee expressed that the meaningful involvement of marginalised and disadvantaged children should be prioritised (para 90),<sup>20</sup> and that child participation legislation and policy should be supported by all levels of government, connected to a national development plan, employ diverse methods of implementation, and consider the evolving capacities and vulnerability of children (para 91).<sup>20</sup>

The Guidelines stipulate it's the state's responsibility to give all children the information they need to meaningfully participate – information that is easily accessible through media like 'radio, television, libraries, books, press, internet, and helplines' and in child and disability-friendly formats that are suitable for all children, irrespective of age (para 93).<sup>20</sup> States are also responsible for providing adequate support and assistance to children in contact with the law throughout the judicial process (para 97).<sup>20</sup> The Guidelines stress the importance of capacity-building and developing community- and national-level strategies that utilise public campaigns and involve cultural and religious leaders to promote child participation and challenge traditional notions of child participation and adult authority, (para 101)<sup>20</sup> shifting sociocultural attitudes fundamental to fulfilling children's right to participate.

### *The right to appeal to an international treaty body when national mechanisms fail to effectively address violations of children's rights*

Both the CRC and the ACERWC feature communications procedures that offer greater accountability by equating children's rights with other human rights. The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC, also known as the Third Optional Protocol to the Convention on the Rights of the Child) is an international human rights treaty that allows the CRC committee to hear complaints from children that allege their rights have been violated. Children can only approach the United Nations if their national legal system is unable to remedy the violation. South African children do not have access to this mechanism since South Africa has yet to sign the OPIC.<sup>b</sup> There is a similar complaints mechanism built into the African Children's Charter (article 44),<sup>19</sup> which does not require separate ratification, allowing South African children or anyone acting on their behalf to approach the ACERWC.

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b <https://indicators.ohchr.org/> Accessed 10/02/2023.

## *African Youth Charter*

The African Youth Charter<sup>22</sup> is another regional tool ratified by South Africa<sup>c</sup> that includes a provision on the right of ‘every person between the ages of 15 and 35 years’ to participate. Article 11 provides an expansive provision on youth participation and deserves citing in its entirety:

1. Every young person shall have the right to participate in all spheres of society.
2. States Parties shall take the following measures to promote active youth participation in society. They shall:
  - a. Guarantee the participation of youth in parliament and other decision-making bodies in accordance with the prescribed laws;
  - b. Facilitate the creation or strengthening of platforms for youth participation in decision-making at local, national, regional, and continental levels of governance;
  - c. Ensure equal access to young men and young women to participate in decision-making and in fulfilling civic duties;
  - d. Provide access to information such that young people become aware of their rights and of opportunities to participate in decision-making and civic life;
  - e. Include youth representatives as part of delegations to ordinary sessions and other relevant meetings to broaden channels of communication and enhance the discussion of youth-related issues.<sup>22</sup>

The African Youth Charter calls on governments to establish conducive platforms to encourage youth participation in development and recognise the value of their contribution. Article 11 states that youth (including marginalised and vulnerable youth) should have the right to participate in developing their nations and sub-regions by being given equal access to information and engaging the legislature and other decision-making bodies.

## **International and regional development frameworks**

### *Transforming our World: The 2030 Agenda for Sustainable Development (Agenda 2030 or SDGs)*

The UN’s Agenda 2030<sup>23</sup> established 17 Sustainable Development Goals (SDGs) to be achieved by UN member states by 2030; these goals aim to promote prosperity while protecting the

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c A table of ratification of the African Youth Charter is available at <https://au.int/sites/default/files/treaties/7789-sl-AFRICAN%20YOUTH%20CHARTER.pdf> (accessed 10 October 2022).

planet. The agenda's call to 'leave no one behind' seeks to ensure that everyone, including children and young people, benefits from development. The SDGs don't specifically address child participation in the SDGs; however, the UN Human Rights Council recognises that adopting a child rights-based approach has the potential to accelerate the SDG's development gains for everyone and stop the intergenerational transmission of poverty. The Office of the United Nations High Commissioner for Human Rights (OHCHR) emphasised that rights holders should participate as partners in SDG implementation, expressly noting that children should be viewed as key actors with the capacity to actively engage in exercising their rights and driving solutions to shared problems.<sup>24,25</sup>

The SDGs also stress the importance of building democratic structures and processes to exercise participatory rights as a way to achieve substantive social and economic goals. Goal 16 is to: 'Promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable and inclusive institutions at all levels'. The associated targets reflect the transformation required to achieve Goal 16 and related goals. The OHCHR reiterates that 'inclusive participatory processes and institutions are critical for empowering groups at risk of being left behind'. Guidance on implementation directs that "States should adopt proactive measures, e.g., through providing safe spaces and mechanisms for children to participate and timely, 'child-friendly' information".<sup>25</sup> The Pathfinders on Justice Task Force compiled a comprehensive brief on the obstacles hindering the achievement of SDG16+; it gives utmost significance to ensuring the empowerment and active participation of children in all matters that impact their lives. It underscores that all forms of justice can be significantly improved by aligning with children's rights; justice becomes more effective when informed by children's perspectives and meaningful participation.<sup>26</sup> Finally, the OHCHR presents children's rights issues, including participation, at annual progress reviews on the implementation of the 2030 Agenda to the High-Level Political Forum, thus there is a modicum of accountability at the international level.<sup>27,28</sup>

### *Agenda 2063: The Africa We Want*

In 2015, the Assembly of the African Union (AU) adopted the Agenda 2063<sup>29</sup> framework to drive the African developmental agenda and hold individuals and governments accountable for pushing the agenda. Aspiration 6 specifically recognises the significance of child participation in advancing the development of Africa; for example, paragraph 47 specifically mentions children and refers to the involvement of all citizens in 'social, economic, political and environmental' development, irrespective of age.<sup>29</sup> The goal is that African children are empowered by 2063

as a result of the full implementation of the African Children’s Charter; similarly, the full implementation of the African Youth Charter is also to be achieved by that date.<sup>22</sup>

### *Africa’s Agenda for Children 2040: Fostering an Africa Fit for Children*

The AU also adopted the Agenda 2040<sup>30</sup> development framework in 2015, which outlines child participation as one of the aspirations the AU wants to achieve by 2040. Aspiration 10, entitled ‘African children’s views matter’, is based on the concept of ‘nothing about us, without us,’ emphasising the significance of including children in decision-making in accordance with Agenda 2063. The model stresses the need for child representatives who reflect a multitude of childhood experiences, consult with others, and communicate their findings – ultimately leading to some sort of responsibility.<sup>30</sup> One of the main objectives of Aspiration 10 is to encourage child participation at all levels, based on the concepts of representation, inclusion, and responsibility. In areas pertaining to their interests, children should be actively involved when laws and policies are adopted and their implementation monitored. One example of a mechanism to ensure children’s involvement would be a permanent and dedicated forum devoted to elevating children’s voices in these processes. At the school level, children should be involved in school management to foster student leadership and involvement.<sup>30</sup>

## **Domestic legislation**

### **Laws defining participation rights**

#### *Constitution of the Republic of South Africa*

Chapter two of the South African Constitution<sup>5</sup> (‘the Bill of Rights’) contains several provisions that speak to participation: freedom of expression (section 16), freedom of assembly (section 17), freedom of association (section 18), and right to information (section 32). Section 12(2) provides for psychological and bodily integrity, which includes sexual reproductive health rights and the right to consent to medical treatment. The only participatory right that explicitly excludes children is the right to vote and stand for elected office: section 19(3) provides that ‘every *adult citizen* has the right to vote in any elections for any legislative body established in terms of the Constitution’. However, the rights to form a party and freely participate in political campaigns (section 19(1)) and to fair and regular elections in all legislative bodies (section 19(2)) are unrestricted.

Section 28 is the only child-specific section of the Bill of Rights, stating that all children are entitled to a name and nationality (28(1)(a)); family, parental or alternative care (28(1)(b)); basic



nutrition, shelter, health care and social services (28(1)(c)); protection from maltreatment, exploitative labour practices, and detention (except as a measure of last resort) (28(1)(d)(e)(f)(g)); have a legal practitioner assigned by the state (28(1)(h)); and not be used in armed conflict (28(1)(j)). It also declares 'a child's best interests are of paramount importance in every matter concerning the child' (28(2)).<sup>5</sup>

Section 28 perceives children as vulnerable citizens and provides for their protective rights in general,<sup>6</sup> however, Kilkelly and Liefwaard contend it falls short of the recommendations made by the CRC Committee since it does not include children's participation rights.<sup>7</sup> However, the section ensures that 'every child has the right to have a legal practitioner assigned to the child by the state... in civil proceedings affecting the child, if substantial injustice would otherwise result' (section 28(1)(h)).<sup>5</sup> Although the right to legal representation is not automatic – the obligation only applies if there is a risk a child's rights will be violated if not represented – it is not limited in respect of age, maturity or capacity and hence is arguably broader than the international law.<sup>31,32</sup> The section stipulates that the state must assign legal representation for children in civil matters, which means a child's interests must be considered independently by others before the court and they can be independently assessed for legal aid.

The last provision (section 39(1)(b)) requires international law be considered when interpreting the Bill of Rights, as is the practice of the Constitutional Court;<sup>4</sup> implementation of section 28 can thus be strengthened by the CRC, African Children's Charter, and the other relevant regional frameworks discussed above. For example, the United Nations Committee on the Rights of the Child (UNCRC) says that the best interests of the child must be established in consultation with the child: 'there can be no correct application of article 3 [best interests] if the components of article 12 [the right to participate] are not respected'.<sup>1</sup>

### *Opportunities for young people to inform law and policy*

In addition to the Bill of Rights, the Constitution lays out the powers and functions of the executive, judiciary and legislative branches of government. Four sections in the Constitution

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d For example, the 2019 judgment in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* ruled corporal punishment of children in all settings unconstitutional. The judgment referred to international obligations under the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights to indicate the lack of recognition of the right to discipline. Further, it emphasised that the application's core concerns centre on what is in the best interests of the child. However, the judgment did not consider the views of the child at the centre of the case; rather, provided guidance based on what would be in the best interest of the child.

form an effective right to participate in legislative processes.<sup>e</sup> Sections 59, 72 and 118 place a duty on all legislatures and their committees to facilitate public involvement in law-making and oversight and ‘conduct its business in an open manner, and hold its sittings... in public’. Municipal councils are also obliged to publish all by-laws for public comment (section 160(4)).

Shier argues that meaningful participation only happens when organisations adopt specific policies that promote children’s participation.<sup>33</sup> The rules of Parliament reiterate the constitutional obligation to facilitate public involvement and outline instances when holding closed sessions is permissible but do not specifically mention children nor give any detail on how it should support public participation. Parliament did, however, develop guidelines for safeguarding children during virtual sessions as part of the COVID-19 pandemic response and *ad hoc* guidelines that supported children’s participation in the Children’s Amendment Bill hearings in 2021.

The Western Cape is the only province to have adopted a provincial constitution, which cannot limit established rights. In respect of public access, it reiterates the national constitution’s commitment in saying: ‘provincial Parliament must facilitate public participation in its activities and those of its committees’ (section 28(3)).<sup>34</sup> The Constitution of the Western Cape establishes the office of a provincial Commissioner for Children and provides that the Commissioner must assist the Western Cape Government in protecting the interests of children in the province. Part of that mandate involves engaging with children and supporting children’s participation in the governance of the province,<sup>34</sup> which the Commissioner has used to support children’s participation in law reform at both national and provincial levels and to make submissions to the UN and AU.<sup>35</sup>

The Constitutional Court has the power to interpret constitutional rights and obligations by looking at the context, the ordinary meaning of the words used, international law, and South African case law.<sup>36</sup> While the court hasn’t specifically examined children’s right to participate in legislative processes, there have been several cases looking at Parliament’s obligation to facilitate public participation.<sup>37-41</sup> By analysing these cases and applying the same interpretative methodology, Jamieson argues these rights extend to children and law-making bodies must put measures in place to promote their meaningful participation.<sup>42</sup>

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e The rights in the Constitution are based on international and regional law, the participation rights are found in article 25 of the ICCPR and article 13 of the ACHPR. General Comment 25 explains that “the conduct of public affairs”, is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive, and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional, and local levels’. The Constitution incorporates this right and applies to the different spheres of government.

### *The Children's Act*

The right to participate is found in sections 10 and 11 of the Children's Act<sup>43</sup> and forms part of its general principles. This is important as section 6 of the Children's Act specifies these principles should be applied when interpreting *all* legislation in matters relating to children. This section further states that 'a child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child'. Further, according to section 10 of the Children's Act:

**Every child that is of such an age, maturity, and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.**

Section 11 states:

- (1) In any matter concerning a child with a disability due consideration must be given to...:
  - (a) making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have;
  - (b) providing the child with conditions that ensure dignity, promote self-reliance, and facilitate active participation in the community;

Article 12 of the CRC and articles 4(2) and 7 of the African Children's Charter are fundamentally integrated into South Africa's legislative framework under sections 10 and 11 of the Children's Act.<sup>44</sup> The phrase 'age, maturity, and stage of development' in section 10 explicitly expresses the notion of a child's evolving capacities and recognises that children with appropriate capacity can make autonomous decisions. It's commendable that the Act doesn't specify an age at which competency can be predicted, recognising that children establish opinions very early in their development. The stipulation that a child should 'participate in an appropriate way' is not found in international or regional law and can be positively interpreted to imply decision-making forums are obliged to be child-friendly.<sup>31</sup>

Section 11 expands the concept of participation to specifically support the meaningful participation of South African children with disabilities and chronic illnesses, ensuring that measures are taken to support them in fully realising their right to participate, partially giving

effect to the AU’s demand for inclusivity. However, the notion of providing similar measures for foreign children was rejected during parliamentary deliberations.<sup>f</sup>

The Children’s Act also contains numerous provisions that establish children’s right to participate in specific decisions about care, health, adoption, children’s court proceedings, and the management of child and youth care centres, however, many of these clauses contain age thresholds and capacity requirements concerning decision-making (see Table 1).

**TABLE 1** Provisions supporting children’s right to participate in the Children’s Act

No restrictions	Age threshold	Age and/or capacity	Age/capacity and guidance
<p>Sec 13: <b>Information on health care</b></p> <p>(1) <i>Every child</i> has the right to – (a) have access to information on health promotion and the prevention and treatment of ill-health and disease, sexuality and reproduction... regarding his or her health status [and]... regarding the causes and treatment of his or her health status.</p> <p>Sec 14: <b>Access to court:</b></p> <p><i>Every child</i> has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court.</p>	<p>Sec 134: <b>Access to contraceptives</b></p> <p>(1) No person may refuse (a) to sell condoms to a child over the age of 12 years, or (b) to provide a child over the age of 12 years with condoms on request where such condoms are provided or distributed free of charge.</p> <p>(2) Contraceptives other than condoms may be provided to a child on request by the child and without the consent of the parent or caregiver of the child if – (a) the child is <i>at least 12 years of age</i>.</p> <p>Sec 137: <b>Child-headed households</b></p> <p>(1) A provincial head of social development may recognise a household as a child-headed household if... (c) <i>a child over the age of 16 years</i> has assumed the role of caregiver in respect of the other children in the household</p>	<p>Sec 31: <b>Major decisions involving child</b></p> <p>(1)(a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views or wishes expressed by the child, bearing in mind the <i>child’s age, maturity and stage of development</i>.</p> <p>Sec 61: <b>Participation of children in children’s court matters</b></p> <p>(1) The presiding officer in a matter before a children’s court must – (a) allow a child involved in the matter to express a view and preference in the matter if the court finds that the child, given the <i>child’s age, maturity and stage of development and any special needs the child may have</i>, can participate in the proceedings and the child chooses to do so...</p>	<p>Sec 12: <b>Social, cultural and religious practices</b></p> <p>(5) Virginity testing of children <i>older than 16</i> may only be performed – (a) if the child has given consent to the testing in the prescribed manner; and (b) after proper counselling of the child.</p> <p>(6) The results of a virginity test may not be disclosed without the consent of the child.</p> <p>(9) Circumcision of male children <i>older than 16</i> may only be performed- (a) if the child has given consent to the circumcision in the prescribed manner; and (b) after proper counselling of the child.</p>

<sup>f</sup> See <https://pmg.org.za/committee-meeting/10319/>; <https://pmg.org.za/committee-meeting/10318/>; <https://pmg.org.za/committee-meeting/5875/>



No restrictions	Age threshold	Age and/or capacity	Age/capacity and guidance
		<p>Sec 130: <b>HIV testing</b></p> <p>(2) Consent for a child to take an HIV test may be given by – (a) the child, if the child is – (i) 12 years of age or older; or (ii) under the age of 12 years and is of <i>sufficient maturity to understand</i> the benefits, risks and social implications of such a test.</p> <p>Sec 171: <b>Transfer of child in alternative care</b></p> <p>(4) Before the provincial head of social development issues an order in terms of subsection (1), a designated social worker must consult – (a) the child, taking into consideration the child's <b>age</b>, maturity and stage of development.</p> <p>Sec 233: <b>Consent to adoption</b></p> <p>(1) A child may be adopted only if consent for the adoption has been given by – (c) the child, if the child is – (i) 10 years of age or older; or (ii) under the age of 10 years, but is of <i>an age</i>, maturity and stage of development to understand the implications of such consent.</p> <p>Sec 234: <b>Post-adoption agreements</b></p> <p>(3) An agreement in subsection (1) may not be entered into without the consent of the child if the child is of an <i>age</i>, maturity and stage of development to understand the implications of such an agreement.</p>	<p>Sec 129: <b>Consent to medical treatment and surgical operation</b></p> <p>(2) A child may consent to his or her medical treatment... if (a) the child is over the age of 12 years; and (b) <i>the child is of sufficient maturity and has the mental capacity</i> to understand the benefits, risks, social and other implications of the treatment.</p> <p>(3) A child may consent to the performance of a surgical operation on him or her or his or her child if (a) the child is over the age of 12 years; (b) <i>the child is of sufficient maturity and has the mental capacity</i> to understand the benefits, risks, social and other implications of the surgical operation; and (c) the child is duly assisted by his or her parent or guardian.</p>

## Child participation in families

The definition of care set out in the Children's Act includes 'guiding, advising and assisting the child in decisions to be taken by the child', but the lack of any reference to child participation, including listening to the child's views is a serious omission, despite the provisions protecting the child's right to participate in major decisions. Section 18 provides for parental responsibilities and rights with regard to children. Sub-section (3) states the parents and/or guardians of a child 'must... (b) assist or represent the child in administrative, contractual and other legal matters'.<sup>43</sup> The purpose this assistance is to facilitate the child's meaningful participation and enable them to express their views (as opposed to the caregiver expressing theirs). This includes providing information in child-friendly formats appropriate to the child's maturity and development to help them express an opinion. Further, section 31 obliges individuals with parental responsibilities to 'give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development' in major decisions involving the child. However, section 32 outlines the responsibilities of caregivers who do not have formal parental responsibilities and rights without giving any reference to the child's right to participate; given that 20% of children do not live with either biological parent,<sup>45</sup> this is also an omission. The Children's Act recognises that parents make most decisions for their children but requires them to facilitate meaningful participation as part of their child's development. These provisions are contentious in socially conservative South Africa as they are seen to limit parental authority and give children undue influence.

## Health care services

### *The Children's Act*

In regards to health services, section 13 of the Children's Act<sup>43</sup> on information on health care provides that all children are entitled to:

- a) information on health promotion and the prevention and treatment of ill-health and disease, sexuality and reproduction;
- b) information regarding their health status;
- c) information regarding the causes and treatment of their health status;
- d) and confidentiality regarding their health status and the health status of a parent, caregiver or family member, except when maintaining such confidentiality is not in their best interests.

Again, such information must always be given according to a child's maturity and developmental capacity. Additional provisions in the Children's Act speak to children's involvement in specific health decisions, namely, consenting to medical treatment, surgical operations and HIV testing (sections 129 and 130). Section 129 mandates a child is eligible to consent to medical treatment if they are above the age of 12 and if they are of 'sufficient maturity and have the mental capacity to understand the benefits, risks, social and other implications of the treatment'. Section 130 allows children below the age of 12 to consent to HIV testing if they demonstrate the capacity to understand the implications involved; once they reach 12 years, they are granted the autonomous right to make that decision. Surgical operations are deemed riskier and the decision to consent therefore more complex; the Act requires that children be assisted by their parents when making decisions about surgical treatments. Section 134 states that no person may refuse to sell condoms to children over the age of 12 years or provide children over the age of 12 years with condoms on request, where such condoms are provided free of charge. These provisions are often criticised for being inconsistent as they indicate a specific age threshold, in contrast to other provisions of the Children's Act which consider the age, maturity and development of a child. Nevertheless, the provisions discussed in this paragraph respect the evolving capacities of children and give them support and autonomy to make decisions where they have capacity.

### *The National Health Act*

Section 8 of the National Health Act<sup>46</sup> on participation in health decisions says:

- (1) A user has the right to participate in any decision affecting his or her personal health and treatment.**
- (2)(b) A user who is capable of understanding must be informed as contemplated in section 6 even if he or she lacks the legal capacity to give the informed consent required by section 7.**

According to the definitions given in section 1, 'user' refers to the person receiving treatment in a health establishment or using a health service. If the person receiving treatment or using a health service is (a) below the age contemplated in section 39(4) of the Child Care Act, the "user' includes the person's parent or guardian or another person authorised by law to act on the first-mentioned person's behalf". It should be noted that the Child Care Act placed an age threshold of 14 years old to provide consent for any medical treatment, which the Children's Act of 2005 repealed. According to section 129(2) of the Children's Act, the implied age for

giving consent to medical treatment is 12 years and above, but the provision recognises the evolving capacities of the child and sub-section 2(b) notes that the child must possess sufficient maturity and have the mental capacity to understand the benefits, risks, social and other implications of the treatment. In the case of surgical operations children must be assisted by a parent or guardian when giving consent. Read with the Health Act, the Children's Act recognises the evolving capacities of children and ensures the ability to provide informed consent to medical treatment is not solely determined by age but also by a child's level of maturity and comprehension. The right to informed consent is thus closely linked to the right to participate, as information is imperative to understanding a situation and expressing one's views.<sup>47</sup> Section 6 of the Health Act provides that all South Africans, including children, be provided appropriate and relevant information (concerning benefits, risks, costs, etc.) to make informed decisions about medical treatment.

The UN has stated that the right to participate in the health sector goes beyond individual decision-making and requires states to 'introduce measures enabling children to contribute to the planning and programming of health services, including what services are needed, how and where they are best provided, discriminatory barriers to accessing services, quality and attitudes of health professionals' (para 104).<sup>1</sup> The National Health Act establishes a framework for health governance that includes national, provincial and district health councils, hospital boards, health centre and clinic committees – all of which are tasked with ensuring users' health care needs are met through consultation with 'key stakeholders', which are not defined.

### *The Choice on Termination of Pregnancy*

Section 5(3) of the Choice on Termination of Pregnancy Act<sup>48</sup> recognises pregnant minors' autonomy to make decisions:

**In the case of a pregnant minor, a medical practitioner or a registered midwife, as the case may be, shall advise such minor to consult with her parents, guardian, family member or friends before the pregnancy is terminated: provided that the termination of the pregnancy shall not be denied because such minor chooses not to consult them.**

In 2004, the Christian Lawyers Association questioned the constitutionality of this provision and the right of children to terminate a pregnancy without their parents' consent. However, the court upheld that a "cornerstone of the regulation of the termination of pregnancy of a girl and indeed of any woman under the Act is the requirement of her 'informed consent'".<sup>49</sup>

### *National Adolescent Sexual and Reproductive Health and Rights Framework Strategy*

Young people were among the stakeholders consulted during the development of the National Adolescent Sexual and Reproductive Health and Rights Framework Strategy,<sup>50</sup> which focuses on removing the barriers to sexual and reproductive health (SRH) service uptake and training health professionals to deliver 'friendly, non-judgemental and empathetic' services to adolescents irrespective of their age, disability, and sexual orientation. It also provides for adolescents to access information that is age-, language-, and content-appropriate and resources to equip them with a sense of 'inner-belief' 'self-respect' and build their capacity 'to be assertive and exercise self-agency and choice in order to negotiate [and] take informed decisions about their SRHR' (p33).<sup>50</sup> But while the Framework Strategy aims to improve adolescents' participation in SRH decision-making and recognises the need to create a responsive policy and planning environment, no provisions were made to ensure adolescent participation in governance structures.

### *National Adolescent & Youth Health Policy*

The National Adolescent & Youth Health Policy<sup>51</sup> promotes the health and well-being of children and young people aged 10 to 24 by aiming to make health services more accessible and responsive to their needs. The National Adolescent & Youth Health Policy commits to using technology and social media to deliver health information and expand access to health care. It provides for pre- and in-service training of health professionals and the introduction of a targeted package of programmes developed with young people. These tailored programmes include SRH, violence prevention, substance abuse, and nutritional services. Critically, it also commits to 'empower adolescents and youth to engage with policy and programming on youth health'<sup>51</sup> by:

- Including adolescents and youth on every clinic and hospital committee and every district AIDS council.
- Involving youth at a national level by establishing a National Adolescent and Youth Advisory Panel.
- Involving youth in developing training materials for service providers.
- Establishing youth-friendly spaces within health facilities that accommodate learner's schedules and introducing mobile-led systems that promote engagement, provide information, and allow youth to provide feedback on the care they receive.



## Social services and alternative care

### *The Children's Act*

The objectives of the Children's Act<sup>43</sup>, amongst others, are to give effect to children's rights to family care, parental care or alternative care, and social services. The Act provides for and regulates a continuum of services to support families, prevent violence, investigate abuse, assist with court inquiries, provide alternative care placements in child and youth care centres or foster care, and oversee adoptions.

In addition to the general principles, the Act explicitly states that children should participate in a range of decisions about their care and protection. Section 144 provides for prevention and early intervention programmes that 'must involve and promote the participation of families, parents, caregivers, and children in identifying and seeking solutions to their problems. In certain exceptional circumstances children are permitted to stay in households headed by a child of 16 or 17 years'.<sup>g</sup> These households must be supported by a supervising adult who according to section 137 may not take any decisions without consulting the child heading the house and the other children, subject to their age and maturity.

It's important to note that the Children's Act recognises it is often in the best interest of children to avoid court processes where possible, hence it allows for children's participation in formulating parenting plans, lay-forum hearings, and mediation processes (section 49). To give children an opportunity to influence major decisions about their care and protection, sections 53, 58 and 60 of the Act also allow children to open cases or approach the children's court, present evidence and even question witnesses where appropriate (see below section on judicial proceedings for more details).

The Act also provides measures to ensure children individually and collectively influence what happens to them within the care system. Children should participate in assessments, social workers and child and youth care workers must draft and regularly review care plans with the child, and decisions to change or terminate the child's placement also require their input.<sup>52</sup> Section 208 requires child and youth care centres to create children's forums to ensure children's views are heard and considered by management boards, taking into consideration their age and maturity. South Africa also has a National Preventive Mechanism whereby groups of experts conduct regular monitoring of secure care centres and child and youth care

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g In 2019 there were an estimated 26,000 children living in child-headed households, this is less than 0.1% of the child population. Three quarters of all children living in child-only households are aged 15 years and above and 41% are 17 years old [Hall, K (2022)].

centres, with or without prior notice. These visits aim to prevent torture and cruel or degrading treatment or punishment from taking place and to intervene if any abuse is identified. However, South Africa has yet to establish an independent complaints mechanism that would cover all facets of alternative care as required by international law.

### *The National Child Care and Protection Policy*

Child participation is a key objective of the National Child Care and Protection Policy,<sup>53</sup> which guides the implementation of the Children's Act. The policy states that every child who is of an age, maturity and stage of development has the right to participate appropriately in any matter that affects him or her (including decisions within the family, school, community and government), to express his or her views, and have those views duly considered. It also recognises that social attitudes often limit children's participatory rights including access to information. Throughout the policy, child protection and participation rights are twined, except crucially in the section that speaks to financing.

The National Child Care and Protection Policy reinforces the Children's Act's principles and clarifies that migrant children are entitled to social services and that their right to participate in decisions that affect them is protected by South African law. The specific inclusion of migrant children in the policy is imperative, considering the unique vulnerabilities and challenges they face, including lack of documentation and limited access to resources.

The National Child Care and Protection Forum is the body responsible for supporting the implementation, monitoring, and realisation of child protection laws, policies and programmes including the Children's Act and the National Plan of Action for Children<sup>54</sup>. The National Child Care and Protection Policy states that, together with its provincial and regional structures, one of the National Child Care and Protection Forum's mandates 'is to serve as a platform to coordinate child participation in the country' (section 6.2.4). It is intended to be an intersectoral committee that includes 'child representatives from the child participation subcommittee' (section 6.2.2), with additional child representatives serving as members of the provincial forums, to present the views of children (section 6.2.4). Despite being established in 2008, the National Child Care and Protection Forum has not convened a child participation subcommittee nor appointed any child representatives at the national or provincial level to date.

### *The National Strategic Plan on Gender-Based Violence and Femicide (NSP on GBVF)*

The NSP on GBVF<sup>55</sup> is a multi-sectoral strategic policy that ensures a coordinated response to the crisis of gender-based violence and femicide. It is constructed around six pillars that

aim to: strengthen existing architecture and promote accountability (Pillar 1); provide for prevention campaigns that address social norms and violent behaviour (Pillar 2); broaden access to justice (Pillar 3); deliver care and support services to GBV survivors (Pillar 4); create economic opportunities for women (Pillar 5); and provide research and information systems to track GBVF (Pillar 6). The principles of the NSP on GBVF include ‘active and meaningful participation’, ‘an intergenerational, youth-friendly approach’ and ‘mutual accountability’. The NSP claims to target both women and children, but a detailed analysis reveals that children are a subsidiary focus.<sup>56</sup>

The NSP set out roles and responsibilities for stakeholders to hasten the realisation of its outcomes. It gave the National Council on Gender-Based Violence and Femicide strategic oversight of the realisation of the national outcomes outlined in the plan, but once again, did not provide for or support the participation of children directly or through their representatives.

## Education and school governance

### *The South African Schools*

The School’s Act<sup>57</sup> was a landmark piece of legislation at the time of its enactment, providing for children’s participation within the education system.<sup>58</sup> The act ensures child participation in school governance and the development of codes of conduct by stipulating that high schools convene a Representative Council of Learners (RCLs)<sup>h</sup> and School Governing Body (SGB)<sup>i</sup> made up of students in grade eight and above. SGB guidance states that ‘learners with special educational needs [in] Grade 8 or higher can also be elected if this is reasonably practicable’;<sup>59</sup> since the obligation is on the state and organs of the state (such as schools) to provide an enabling environment, (para 11)<sup>1</sup> this limitation is discriminatory. Further, provincial governments have published regulations for RCLs but these tend to focus on procedures for selecting representatives, not powers and competencies.<sup>j</sup>

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h Sec 11 provides that a representative council of learners is established at every school and is inclusive of children in the eighth grade or higher and is recognised as the only ‘legitimate representative learner body at the school’.

i Sec 16(1) provides that the governing body is responsible for the governance of every public school. The composition of the governing body is outlined under Sec 23, and includes the principal, co-opted members, and elected members. Elected members comprise of parents, educators, members of staff that are not educators, and learners in the eighth grade or higher.

j Notice 110 of 2016 regulates the Establishment, Election and Functioning of Representative Council of Learners in public schools in the Northern Cape. <http://ncdoe.ncpg.gov.za/images/imgd/rcl/RCL%20Gazette%20NOTICE%20110%20OF%202016.pdf>

The Act also affords children the right to participate in disciplinary proceedings with the support of their parents or an intermediary<sup>k</sup> and gives learners facing suspension the right to present their views to their school governing body.

Under section 32, the powers given to minor members of public school governing bodies are restricted:

1. A member of a governing body who is a minor may not contract on behalf of a public school.
2. A member of a governing body who is a minor may not vote on resolutions of a governing body which impose liabilities on third parties or the school.
3. A member of a governing body who is a minor incurs no personal liability for any consequences of his or her membership of the governing body.

While it is essential to limit children's liability, and children's participation typically moves between different rungs of Hart's ladder. The restriction on voting rights has led to children being excluded from meetings,<sup>60</sup> resulting in tokenism and non-participation.<sup>9</sup>

### *The National Education Policy Act*

Two of the National Education Policy Act's guiding principles speak to child participation in:

**(b) enabling the education system to contribute to the full development of each student, and to the moral, social, cultural, political, and economic development of the nation at large, including the advancement of democracy, human rights and the peaceful resolution of disputes...**

**(m) [and] ensuring broad public participation in the development of education policy and the representation of stakeholders in the governance of all aspects of the education system, (section 4).<sup>61</sup>**

It can be argued that to fulfil sub-section (b), child participation should be instituted at all levels of education. According to General Comment 12 of the CRC, a child's ability to create opinions is influenced by a variety of factors, including knowledge, experience, environment, social and cultural expectations, and the extent of support received (para 29).<sup>1</sup> The UNCRC thus emphasises the significance of child participation in child development (para 59),<sup>1</sup> and stipulates that adults are responsible for creating an enabling environment for children to participate.

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k Section 8(6) provides that 'a learner must be accompanied by the parent or person delegated by the parent' whilst sec 8(7) allows for the appointment of an intermediary for any witness that may experience 'undue mental stress or suffering' by testifying.

This law provides that children from ‘organisations representing students that the [Education] Minister may recognise for this purpose’ (section 5(1(e)) should be consulted during the development of education policy – however, the UNCRC stipulates that this opportunity should be open to any child who wishes to participate (para 111).<sup>1</sup>

### *National Policy on HIV, STIs and TB for learners, educators, school support staff and officials in primary and secondary schools in South Africa*

The Department of Basic Education developed a policy to reduce the prevalence and impact of HIV, other STIs, and TB.<sup>62</sup> This policy aims to provide learners with the skills, knowledge, information, and access to supportive services they need to empower them to make informed life choices and protect themselves from and manage HIV, other STIs, TB and unintended pregnancy. It also provides for teacher training to combat negative attitudes and reduce stigma and discrimination. Youth groups are considered strategic partners in facilitating access to information and support peer education, but there is nothing to support the ongoing participation of children and young people in the planning and evaluation of health services.

## **Independent human rights institutions**

### *The South African Human Rights Commission (SAHRC)*

The SAHRC is established by section 184 of the constitution and the Human Rights Commission Act.<sup>63</sup> It has the power to investigate violations of human rights and handle complaints. Protecting children’s rights is one of seven focal areas identified to effectively fulfil the SAHRC’s mandate of promoting, protecting, and monitoring the realisation of the rights of children in South Africa. One of the full-time commissioners is responsible for children’s rights and is supported by a dedicated team in the national office, the Children’s Rights Unit. The SAHRC developed a child-friendly complaints procedure, *Children’s Complaint Box*, to handle complaints involving children ([www.sahrc.org.za](http://www.sahrc.org.za)). All nine provincial offices have specific rooms dedicated to providing children a safe space with which to lodge complaints.<sup>64</sup> The child-friendly procedure is guided by 15 principles that are aligned with theoretical notions of child participation, including age-appropriate communication, child-friendly spaces, consideration of evolving capacities, and the need for safe spaces.<sup>64</sup> At the time of writing, the current Commissioner (Angie Makwetla) and the Child Rights Unit were in the process of establishing an advisory group of children.



### *Western Cape Commissioner for Children Act*

The Western Cape promulgated legislation that establishes a Commissioner for Children who must protect and promote the rights, needs and interests of children in the province by working with the Departments of Education, Health, Social Development, Cultural Affairs and Sport.

The Commissioner's mandate is to 'monitor, investigate, research, educate, lobby, advise and report on, matters pertaining to children'. The office reports to the Provincial Parliament but arguably has enough independence to investigate complaints about government services and make recommendations. Section 14 speaks to child participation, stating that:

- (1) **The Commissioner must encourage the involvement of children in the work of the Commissioner.**
- (2) **The Commissioner must take reasonable steps to:**
  - (a) **ensure that children are made aware of the powers and duties of the Commissioner;**
  - (b) **ensure that children are informed of the ways in which they may communicate and obtain a response from the Commissioner; and**
  - (c) **consult children and organisations that work with children on the work to be undertaken by the Commissioner.**
- (3) **The Commissioner must develop and keep under review a strategy for involving children in the work of the Commissioner in accordance with this section.**

The Commissioner institutionalised her mandate by establishing a group of Child Government Monitors, an Advisory Council, and a dedicated complaints mechanism. Publications including the website and social media are all child-friendly. The office also conducts consultations with children across the province.<sup>65</sup> She has also supported children to lobby other institutions.

### **Judicial proceedings**

International law emphasises the right to participate in judicial proceedings, and South African law is well-developed in this area. The Constitution and the Children's Act guarantee access to the courts for children or persons representing the interests of children; the Child Justice Act creates special processes for dealing with child offenders, including specifying the age of criminal capacity and promoting diversion; and the Criminal Procedure Act protects the rights of children as victims and witnesses when testifying in court.

### *Access to courts*

Section 14 of the Children’s Act raises the question of whether children can institute proceedings in court. It states that ‘every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court’. The Constitution contains a general provision granting ‘everyone’ (thus including children) the right to access to courts (section 34). Furthermore, it adds in the children’s section 28(1)(h) the right to be assigned a legal practitioner in civil proceedings affecting the child.

The Children’s Act governs the participation of children in children’s court cases. Children’s courts deal with matters relating to parental responsibilities and rights, adoption, child protection and other matters relating to children’s well-being, like the unreasonable refusal of medical treatment (section 46). The Act contains several measures to support children’s participation in judicial proceedings. Section 61 obliges magistrates to ‘allow a child involved in the matter to express a view and preference in the matter if the court finds that the child, given the child’s age, maturity and stage of development and any special needs that the child may have, is able to participate in the proceedings and the child chooses to do so’. The Act also regulates space: ‘children’s court proceedings must be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to attaining the cooperation of everyone involved in the proceedings’ (section 60 (3)). Hearings can be held in closed offices rather than open courtrooms and magistrates can remove people from the courtroom when children are participating (section 60 (2)). Furthermore, the rules of the court must ensure appropriate questioning of children with special concern for children with disabilities, young children, and traumatised children and provide for suitably trained interpreters (section 52 (2)) and intermediaries to assist children in testifying.<sup>1</sup> As with criminal courts, children must be referred to the Legal Aid Board if they lack legal representation.

### *Dedicated criminal justice system for children*

The Child Justice Act<sup>66</sup> contains three guiding principles of participation under article 3 that must be taken into account:

**(c) Every child should, as far as possible, be given an opportunity to participate in any proceedings, particularly the informal and inquisitorial proceedings in terms of the Act, where decisions affecting him or her might be taken.**

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<sup>1</sup> Section 61 (2) obliges the children’s court to appoint an intermediary as per the Criminal Procedure Act, section 170A(1) if it is in the best interest of a child who is testifying before the court.

(d) Every child should be addressed in a manner appropriate to his or her age and intellectual development and should be spoken to and be allowed to speak in his or her language of choice, through an interpreter, if necessary.

(i) The rights and obligations of children contained in international and regional instruments, with particular reference to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

### *Treatment of child victims and witnesses during trial proceedings*

The Criminal Procedure Act<sup>67</sup> offers child victims and witnesses special protections to enable their full participation in court proceedings, including:

- holding proceedings *in camera* (section 153(3));<sup>m</sup>
- prohibiting the media from publishing the identity of children involved in court proceedings unless authorised by the judge (section 154(3));
- giving evidence through electronic media, such as close-circuit television (section 158(5));
- allowing children to give evidence without taking the oath or affirmation (section 164(1)); and
- appointing intermediaries to assist children to testify (sections 170A (1) and (7)).

## **Principles of participation in other pieces of legislation**

### *The National Youth Development Agency Act*

The Youth Development Agency Act<sup>68</sup> is aligned with the African Youth Charter in that it recognises youth as people between the ages of 14 and 35. It stipulates that one of the principles of youth development is their participation in '(i) democratic processes; (ii) community and civic decision-making; and (iii) development at all levels' (section 4).

## **National policy and development frameworks**

### *The National Child Participation Framework*

The National Child Participation Framework<sup>69</sup> offers a framework for all levels of government, civil society, and other sectors to follow to promote the meaningful participation of children. Its overarching goal is to guarantee that children participate more actively in all matters affecting them, in all settings.<sup>69, 70</sup> The framework outlines the international and regional

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m In camera means without public attendance.

obligations of South Africa concerning child participation and specifically references articles 5, 9, 12, 13, 15, 17 and 29 of the CRC and articles 4, 7 and 13 of the African Children's Charter. It also reiterates the importance of child participation in empowering children and fostering the full realisation of all rights, promoting active citizenship through public engagement, and promoting good governance. The framework recognises The Nelson Mandela Children's Parliament (NMCP) and provides children with opportunities to meaningfully participate and influence policy decisions.<sup>69</sup> The framework also provides normative domestic frameworks governing child participation and looks at legislation like the Children's Act, School's Act, National Education Policy, the Choice on Termination of Pregnancy Act and National Health Act, to name a few. The framework also serves as an educational tool to sensitize the public and advance child participation within South Africa by providing a comprehensive understanding of child participation, including the barriers and myths that exist.

### *The National Development Plan 2030: Our future – make it work (NDP)*

The NDP is the South African government's action plan outlining measures it will take to improve national development.<sup>71</sup> To provide young people with opportunities to participate in community development programs, the NDP 2030's overall goal is to enhance programmes and services for youth and implement new community-based initiatives – a clear indication that the government is willing to incorporate elements of participation into policy. Chapter eight ("Transforming human settlement and the national space economy") recognises the need to build capabilities and active citizenry and mentions plans to address issues facing youth and represent their voice. One of the sub-sections of chapter nine ("Improving education, training and innovation") focuses on basic education and proposes implementing inclusive education to help children with disabilities participate more meaningfully in society. A multitude of other human rights can be enjoyed with the knowledge and skills that education generates, including the right to participate in political and cultural life.

### *The National Child-Friendly Communities Framework*

The *Child-Friendly Communities Framework*<sup>72</sup> was established to give municipalities guidance on how to meet their constitutional commitments to uphold the rights of children and feature children's rights more prominently in their agendas.<sup>72</sup> According to the framework, children are regarded as central to realising the children's rights provided under the Constitution, domestic legislation and frameworks, CRC, African Children's Charter and other international human rights frameworks. It focuses on the unique needs and situations of children within a local municipality environment, using a child rights and well-being perspective, ensuring:

- a) Children are recognised as individuals and citizens in their own right within communities;
- b) Children's healthy development and active participation are promoted, which are crucial to the healthy future of communities and society at large;
- c) And opportunities are created for children to develop into independent citizens and they receive the support of adults in their communities.<sup>72</sup>

The framework's primary goal is to increase public awareness of children's rights and needs by collaborating with local government entities and other stakeholders. It's intended to help local government through a methodical process of incorporating children's rights into 'all of their policies, plans, strategies, and programs' (p8) and help them develop mechanisms to make it easier to measure and track the effects of their interventions on children's day-to-day lives. Without the right to vote, children have little influence over key choices that affect their lives and governance in the traditional political processes at the municipal, provincial, and national levels. The framework aims to safeguard children's rights by ensuring municipalities identify and strengthen current actions, improve service quality, reach more children, and ultimately have a greater impact on children.

### *The National Plan of Action for Children 2019 – 2024 (NPAC)*

The NPAC defines child participation as the 'active involvement of children in [the] legislation, policies, decisions, processes and programmes that affect their lives' (p. viii).<sup>54</sup> One of the NPAC themes concerns building a government that is competent in developing resources for the benefit of all citizens. The objectives outlined under this priority state that the influence of children's views should be reflected in government decisions, children should participate in government through forums like child parliaments and public debates, and children should be given the platform to hold government accountable. There are eight principles guiding the NPAC, one of them is that children should be allowed to participate in matters affecting them, including in the monitoring and evaluation of the plan. It also argues that child participation is critical to achieving social cohesion in South Africa.

The plan envisages the establishment of child rights focal points at national, provincial, and municipal levels. These Offices on the Rights of the Child are tasked with mainstreaming child rights and ensuring that child participation informs planning, programming, and implementation of service delivery, not only in government but also within civil society. Their responsibilities include popularising the *National Child Participation Framework*; providing child participation training; monitoring child participation; and reporting on child participation to Parliament, the AU and the UN and ensuring continuous improvement in child participation.





## Domestic jurisprudence on child participation

### Children's capacity and dignity

The case of *Christian Education South Africa v Minister of Education* addressed the issue of corporal punishment in schools, following its prohibition under section 10 of the South African Schools Act.<sup>73</sup> Christian Education of South Africa represented 196 Christian schools and argued that the prohibition of corporal punishment constituted a violation of several rights including the right to freedom of religion and the 'right to participate in the cultural life of their choice' (para 53). The Constitutional Court ruled in favour of the Minister of Education and rejected their claims. Although the case did not necessarily concern the children's participation, in the postscript to the case, Justice Sachs submitted that:

The children concerned were from a highly conscientized community and many would have been in their late teens and capable of articulate expression. Although both the state and the parents were able to speak on their behalf, neither was able to speak in their name. A curator could have made sensitive enquiries to enable their voice or voices to be heard. Their actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure (para 53).<sup>73</sup>

Justice Sachs recognised children as individuals with autonomy when he noted that though the state and parents can speak on behalf of children, neither should speak 'in their name'.

The judgment was passed in 2000, illustrating the Court's willingness to strengthen child participation in South Africa. The postscript also notes the value consulting with children would have brought to the issue of corporal punishment and religion.

In the case of *S v M*, Justice Sachs again emphasised the importance of child participation.<sup>74</sup> The brief facts of the case are that the applicant, M, a 35-year-old single mother of three sons was found guilty on several charges of credit card fraud and sentenced to four years imprisonment by the regional court. She successfully appealed the conviction on one count to the high court, which changed her sentence to one of incarceration with a possible eight-month release under supervision. She approached the Constitutional Court for leave to appeal after submitting an unsuccessful petition to the Supreme Court of Appeal for leave to appeal against the sentence of imprisonment. The Constitutional Court ruled that on sentencing a young child's primary carer, the best interests of the child should come first in all circumstances.<sup>75</sup> According to Justice Sachs, the interests of children must be given careful consideration during the sentencing process; he expressed the importance of the rights of children to express themselves and their autonomy as individuals:

**Individually and collectively, all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds, and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood (para 19).<sup>74</sup>**

## **Ensuring children are prosecuted as a matter of last resort**

The principal matter in *Le Roux and Others v Dey* surrounded the requirements of defamation and the amount of damages deemed appropriate in proceedings that involve the actions of children.<sup>76</sup> The amicus curie noted that the only legal remedy available to a person who has suffered defamation is to claim damages and that it would be in the best interests of children if the parties were required to engage each other before proceeding to court. The Constitutional Court concurred; drawing on the principles of restorative justice, it recognised that relationships can be restored through mediation before a matter is taken to court but fell short of making it a requirement. In a more recent matter, *ST v BN and Another*,<sup>77</sup> the Constitutional Court ruled that children of unmarried parents are entitled to enlist the services of a family advocate in matters affecting them without prior court intervention.

## Independent legal representation

According to section 28(1)(h) of the Constitution, every child has the right to have a legal representative assigned to him or her by the state in civil proceedings that affect the child when substantial injustice would occur if the child did not have a legal representative. In disputes between parents involving their children (e.g., maintenance, divorce, care and contact cases), the Legal Aid Board can appoint a lawyer to represent children separately from their parents.<sup>78</sup>

## Supporting child victims and witnesses during trial proceedings

*Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* the court ruled that in every case where a child is required to testify, a judicial officer must examine the individual needs, wishes and feelings of the child to determine whether it would be in their best interest to appoint an intermediary to assist him or her to testify.<sup>79</sup> The Constitutional Court ordered the Department of Justice to supplement the number of intermediaries and improve facilities at regional courts (e.g., with separate rooms, closed circuit television and one-way mirrors) to create a more sensitive courtroom environment and ensure that children are offered special protections.<sup>79</sup>

Children are involved in criminal cases as victims, witnesses, and offenders; to allow them to participate fully and effectively, the Constitutional Court ruled that their privacy must be respected so they can lead a 'normal life' despite being involved in a high-profile case. Further, in *Centre for Child Law and Others v Media 24 Limited and Others*, the court declared section 154(3) of the Criminal Procedure Act<sup>67</sup> constitutionally invalid to the extent that the protection it offered children did not extend beyond their reaching the age of 18 years.<sup>80, n</sup>

## Foreign children's access to court

The judgment in *Centre for Child Law and Another v Minister of Home*<sup>81</sup> confirms that unaccompanied foreign children are protected by the constitution and laws relating to children and cannot be deported without first being part of a children's court enquiry during which children have the right to be heard.

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n The Act was subsequently amended, it now offers full protection section 3A reads: An accused person, a witness or victim referred to in subsection 3 does not forfeit the protections afforded by that subsection upon reaching the age of eighteen years but may consent to the publication of their identity after reaching the age of eighteen years, or if consent is refused their identity may be published at the discretion of a competent court."

## **School disciplinary processes**

In the matter of *AB and Another v Pridwin Preparatory School and Others*,<sup>81</sup> the Constitutional Court held that a provision of the private school's contract with the parents was unconstitutional as it did not consider the principle of the children's best interest by giving the school power to terminate the contract between the parents of the students and the school.<sup>81</sup> <sup>82</sup> In this specific case, the contract was terminated due to the parents' behaviour, while the children were not consulted in the decision to expel them.<sup>81</sup> The Constitutional Court ruled that the children should have been permitted to speak with the school and the courts about the decision to expel them and the possible effects of the expulsion and that their opinions should have been considered in the matter.

Fawole discusses the merits of the fourth judgment's approach to interpreting the right to be heard and its relationship to the best interests of the child.<sup>83</sup> The judgment established the best interests of the child as a procedural right that that would be used as a benchmark to evaluate the behaviour of the independent school in this case.<sup>83</sup> According to the fourth ruling, the boys' input was crucial in evaluating their best interests and understanding how the school's decision affected them.<sup>83</sup> Further, Khampepe, author of the fourth judgment, notes that the Constitution, under section 39 supports the application of international law when interpreting the Bill of Rights and thus, the judgment relied on provisions of the ACRWC and CRC while supporting the concept of child participation.<sup>83</sup> Fawole contends that this judgment is especially significant considering the reluctance to recognise the opinions of younger children and how it firmly promotes the participation of younger children by applying the principle of the best interests of the child.<sup>83</sup>

## **Political participation**

Section 17 of the Constitution states that 'everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions'. The state must not unreasonably hinder people from protesting and rather put measures in place that enable individuals and groups to exercise their right to protest safely and peacefully. The state also must ensure protests do not infringe on the rights of others – for example, protesters who close schools violate the affected learners' right to basic education. Any protests near Parliament or the Union Buildings, or that involve more than 15 people are governed by the Regulation of Gatherings Act.<sup>84</sup> Permission to protest is not always required, however; organisers must notify local authorities to arrange road closures, safety officers and/or law enforcement to protect the public. Section 3(2) of the Act requires that organisers give notice of a gathering to the

relevant official seven days before the protest takes place. If notice is given less than 48 hours before the start of a protest, the state can prohibit the gathering; any gathering that happens without adequate notice being given is illegal. Section 12 (1)(a) of the Regulation of Gatherings Act made it a criminal offence to organise any kind of peaceful protest involving more than 15 people without first getting a permit from the local municipality. In *Mlungwana and Others v S and Another* the applicants argued that the law limited the right to peaceful assembly.<sup>85</sup> Interestingly, Equal Education joined the case as amicus curiae to draw attention to how the right to freedom of assembly has distinct importance for children. The Constitutional Court agreed that for children who cannot vote, ‘assembling, demonstrating, and picketing are integral to their involvement in the political process. By virtue of their unique station in life the importance of the section 17 right has special significance for children who have no other realistic means of expressing their frustrations’ (para 72).<sup>85</sup> The judges recognised that children have political rights and special consideration must be given to their needs when protecting these rights but that the law failed to distinguish between adult and minor conveners. ‘Children – who may not even know about or have the resources to adhere to the notice requirements in the Act – are indiscriminately held criminally liable if they fail to give notice before convening a gathering’ (para 89).<sup>85</sup>





## Children's participation in South African law and policymaking

Enshrining children's rights in laws and policies is only the first step in fulfilling them, rights only become a reality if these law and policies are implemented effectively. What has that participation looked like, so far? To what extent are children and young people participating in law and policymaking processes? There have been some positive developments in South Africa around children's participation; what follows is an assessment of examples from practice to test alignment with international human rights commitments and conceptual models of meaningful participation.

### *Engaging children in the development of the NDP*

While no measures were taken to include children in the development of the NDP, Commissioner Christina Nomdo (who went on to become the Commissioner for Children in the Western Cape) persuaded the (2015 - 2020) National Planning Commission to establish the Children's National Development Plan Initiative arguing that children are important stakeholders in the envisioning and implementation of the NDP. The group engaged marginalised and vulnerable children across South Africa who predominantly lived in rural or remote settings or were in prisons, in conflict with the law or state care, seeking insight amongst their experience with poverty.<sup>86</sup> To facilitate meaningful participation, workshops employed play-based learning activities like role-play, poster making, and group work to convey how government functions, planning challenges, and the complexity of children's rights.<sup>86</sup> The facilitators ensured that the environment was a safe space for children to express



their views and have their views respected.<sup>86</sup> The findings on care, health, violence, poverty, education and children's citizenship informed the NDP review.

The responses of the child participants to child participation in other forums are illuminating. They revealed that many children struggle to form and articulate their views confidently because they are often undermined by adult decision-makers at home and school. 'Children are told to be quiet and not to articulate their views, especially if those differ from the perspective of those in power', (p16)<sup>86</sup> leaving them with a low sense of dignity. Children want to play an active role in contributing to development initiatives but indicated feeling separated from decision-makers and doubt about whether their views would be taken seriously and have an impact.

When the COVID-19 pandemic hit, the Commission extended the initiative to include a project called 'Reaching out to children in lockdown'<sup>87</sup>. This project aimed to establish and highlight children's views regarding their experiences, feelings and activities living under COVID-19 restrictions and was again guided by Commissioner Nomdo. She invited the Children's NDP provincial representatives to act as co-researchers. The project was supported by the National Planning Commission Secretariat in partnership with child rights, data analysis and evaluation experts. Some of the interviews were conducted by child rights practitioners, but most were conducted by parents and caregivers using questions sent via WhatsApp. The children spoke in their home language and parents recorded the interview on their phones. About one hundred and sixty voice notes were sent through WhatsApp, and children also sent drawings and letters. The interviews were later transcribed and translated into English. These responses fed into a variety of negotiations with government ministers to ensure the voices of children were heard amid the national state of disaster. This practical example of including young children in policy development draws on Fokala's balanced model, in which parents and caregivers support children in sharing their views.

### *Creating a child-friendly version of the National Child Participation Framework*

The National Child Participation Framework guides how to meaningfully engage children to influence civil society, government, and other sectors.<sup>69</sup> The objective of the National Child Participation Framework is to promote child participation in all contexts so that their right to participate in decisions that affect them is realised. The framework gives a general overview of the national and domestic laws governing child participation in South Africa and outlines the guiding principles that should lead any process involving children in participation, as outlined in General Comment 12 of the CRC. A 'broad overarching checklist' is provided in the annexure,

aligned to the child participation standards provided under international and domestic law to guide stakeholders on ensuring the minimum standards are upheld in any participatory process involving children.

To ensure children were meaningfully involved in the process, a child-friendly version of the document was prepared with the participation of children.<sup>88</sup> The child-friendly document is presented as an activity book that enthusiastically engages children and enables them to learn about child participation, from as young as three years old.<sup>88</sup> All elements of the creation of the child-friendly document involved children, including content selection, editing, creating visual components through painting and drawing, and final approval.<sup>88</sup> From these exercises, children gained valuable information to strengthen their understanding of their rights and participation in general. The process facilitated meaningful participation wherein children were able to contribute based on the new information retained through the process.<sup>88</sup> The workshop revealed that children expressed being more informed about the importance of their participation in society and indicated it's possible to engage in meaningful participation with children. Providing children with a space to express their ideas and be respected encouraged meaningful dialogue. Finally, the facilitators ensured that information was disseminated in mediums accessible to all children, indicating that the audience had given due weight to the children's opinions.

### *Development of the National Adolescent and Youth Health Policy*

The Minister of Health appointed an Adolescent and Youth Advisory Panel to contribute to the development of the National Adolescent & Youth Health Policy<sup>51</sup>. As part of their research, members of adolescent advisory groups from three participatory research projects<sup>o</sup> systematically mapped the health challenges, needs and ambitions of their communities. They were invited to the National Adolescent & Youth Health Policy consultations alongside adolescents and youth health users, including those with communicable and non-communicable diseases, youth with disabilities, and youth at risk of HIV transmission. Researchers involved in these studies were included as authors on the policy, drew on the study data, and shared their expertise in participatory methodologies. Children and young people were involved in a range of processes and activities from focus groups to a Youth Health Parliament.<sup>89</sup> These consultations resulted in a commitment to 'empower adolescents and youth to engage with policy and programming on youth health'.<sup>51</sup> The foreword by the Minister acknowledges 'adolescents and youth as key experts in health policy

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<sup>o</sup> Young Carers, Mzantsi Wakho and Sinovuyo Teens

and programming’ and the Adolescent and Youth Advisory Panel continues to monitor the implementation of the policy.

### *Judicial proceedings*

The *Hoërskool Fochville* case is a recent example of how children can be involved in strategic impact litigation, the Department of Basic Education placed 37 English-speaking students at Hoërskool Fochville, an Afrikaans single-medium secondary school, due to a shortage of space in local English language schools.<sup>90</sup> Hoërskool Fochville filed a lawsuit objecting to the Department’s placement. To ensure the children’s best interests would be represented in court and their opinions heard, the Centre for Child Law and Legal Resources Centre intervened on their behalf.<sup>90</sup>

To facilitate meaningful engagement, the Centre for Child Law engaged with the 37 children, asking them to complete a questionnaire. The children were divided into groups of 6 to 8 learners and invited to complete the questionnaires anonymously or provide additional comments. The Centre for Child Law explained the aim of collecting information from the children was to ensure they were given a platform to express their views before the court.<sup>91</sup> This practice builds children’s capacity to voice their opinions and provides children with space, time, and an audience to listen to their views.

### *The Nelson Mandela Children’s Parliament (NMCP)*

Nelson Mandela Children’s Parliament (or the ‘Children’s Parliament’) functions on a principle of equity, rotating between each province to give all children the opportunity to participate. The program was incorporated into National Parliament’s annual agenda, but the seat of Parliament is in Cape Town and because the Children’s Parliament takes place in a different province attendance by MPs is poor. That said, the Children’s Parliament has improved young people’s interaction with national political and cultural leaders, increasing their visibility in society and enabling them to express their views on matters relevant and important to them.<sup>92</sup> Over the years, children have issued specific suggestions to decision-makers, policymakers, and legislators at various levels through the forum.<sup>92</sup> For example, the South African Police Force was requested by the Children’s Parliament in 2012 to reduce the 48-hour waiting period under the missing persons statute to 24 hours. Young people with disabilities were elected to significant parliamentary posts in 2014 after the Children’s Parliament urged for the rapid adoption of interventions for children with disabilities. During the fifth cycle of discussions in 2015, the Children’s Parliament made suggestions regarding government accountability, the

enforcement of several social policies, and establishing an ombudsman for children.<sup>92</sup> More recently, child parliamentarians were invited to dedicated public hearings on the Children's Amendment Bill (see below).

**As a child parliamentarian, I believe that children have the right to be taken seriously and share their views and ideas because as said that children are the leaders of tomorrow so I believe that children must share their views about what is affecting them and what are the solutions on that. To me, this right is important because it allows children to participate in and influence policies.**

*Hon. Given Matshika, Speaker of the 2021/22 Children's Parliament*

Since there aren't institutionalised linkages with legislative and executive bodies, it's rare for child parliamentarians to be directly involved in law or policymaking. Fayoyin thus concludes that 'although the initiative is perceived as a transformative instrument of social change, it is largely tokenistic, ceremonial and event-based' (p8).<sup>92</sup>

### **Engagement with the National Parliament**

Child participation in public hearings in the National Assembly and National Council of Provinces is extremely rare, even when committees are considering legislation where children are key stakeholders.<sup>42</sup> And in some instances, their participation has not been welcomed. Child Justice Alliance coordinators reported that during the Child Justice Bill hearings, young people were subject to hostile cross-examination and treated as 'delinquent'.<sup>93</sup>

The deliberations on the Children's Bill<sup>94,95</sup> and subsequent amendments are notable exceptions. The first hearings were held between 2004 and 2006. The child participants reportedly found the Members of Parliament (MPs) receptive to their inputs;<sup>96,97</sup> for example, issues raised by children, such as the ban on forced marriage resulted in legislative changes.<sup>97</sup> However, few measures were taken to accommodate children or safeguard their privacy.<sup>97</sup> Children and young people recently made submissions on the Children's Amendment Bill [B8 of 2020]; Parliament held two dedicated hearings for children that staff described as 'ground-breaking' in a public statement.<sup>98</sup> Both sessions were closed to the public; one was in Parliament, and the other was virtual. The process was triggered when the Western Cape Children's Commissioner and civil society organisations wrote to the Chair of the Parliamentary Portfolio Committee calling for a dedicated session for young people who made written submissions.<sup>99</sup> Parliament opened a dialogue with civil society organisations and children about how to make the space safe, and comfortable, without losing the sense

of occasion the young people wanted.<sup>100</sup> Parliament agreed to hold a private session and the record was not published in Hansard (the official record of debates in the South African parliament), to protect children's identities. Children were permitted to use poetry, rap, photovoice and other creative formats to make their submissions, with the understanding that each group conclude with short recommendations or instructions for the MPs.<sup>100</sup> The Public Education Office developed a set of guidelines to ensure meaningful, diverse and safe participation during the second virtual session.<sup>98</sup> Again, the adoption of recommendations made solely by children, like mandatory support programmes for children leaving alternative care,<sup>100</sup> provides evidence that children influenced the development of the law and that their participation was more than tokenistic. However, the issues raised were uncontroversial and did not challenge other stakeholders.

### *Presidential Summit on GBVF*

The NSP sets out the legislative and policy framework to respond to GBV in South Africa. As mentioned above, the NSP claims to target both women and children, but children are a subsidiary focus.<sup>56</sup> Representatives of civil society attribute this to the lack of consultation with children and the children's sector when the plan was drafted.<sup>56</sup> In 2022, representatives from the NMCP and child counsellors from local government attended the *Second Presidential Summit on Gender-Based Violence and Femicide*. To maximise their input, children attended a pre-summit where they learned about the NSP on GBVF and what would happen at the actual summit. Children identified priorities and resolutions that a smaller delegation advocated for at the main summit. The child representatives were given time to present to the plenary of 2000, to representatives from government and civil society at a caucus of children's sector representatives, and at a workshop to identify key priorities for action on children's issues. At the closing plenary children called for their needs to be given greater priority in the NSP, for their voices to be heard in coordinating structures, and put forward a resolution for a seventh pillar responding to children's needs to be added to the NSP. The resolution was recognised in the published report.<sup>101</sup> Incredibly, representatives of the Presidential Summit Planning Committee, including senior staff from the Presidency, met in private without the children and removed their resolution, claiming 'it dilutes women's issues' and 'infantilises women' to have children at the centre of the plan.<sup>p</sup> The child delegates were not made aware of the meeting nor given the opportunity to reply.<sup>q</sup> This shows how a participatory process can become

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p The first author attended the meeting.

q Personal communication with members of the Presidential Summit Planning Committee who organised the pre-summit.

tokenistic if children are not engaged throughout and how important feedback is to make participation truly meaningful.

In each of these examples we see a commitment to involving children in drafting laws and policies. In each process space was made available, and in the case of the Children's Amendment Bill the dialogue between children and parliament established ground rules that ensured that the process was meaningful for both the children and the adult decision-makers. Support for building children's capacity to exercise their voice is variable, in some cases it was embedded in the process in others civil society took on the responsibility of preparing children. Where children's participation is part of judicial proceedings or mainstream processes to develop laws and policies children have access to audience and have influenced the resultant frameworks, but this has only happened when they are the principal stakeholder. In contentious matters where other stakeholders have a vested interest traditional attitudes to children surface and children's views can be ignored.





## Assessment of legislative frameworks and participation in practice

Child participation, as both a principle and right under the CRC and ACRWC, is defined as a process that facilitates dialogue and information-sharing between children and adults, wherein children can express their views freely and influence outcomes (para 3).<sup>1</sup> The CRC and ACRWC provide supplementary explanations of the right to participate for children through general comments and substantive guidelines, which generally call for states to enact legislation and develop strategies at all levels of government, including national development plans that speak to child participation (GC12 para 48, AGC31 para 90)<sup>1,20</sup> and adopt a multi-faceted approach to child participation that promotes inclusivity. The conventions urge states to implement special measures that recognise the particular vulnerabilities of girls, foreign children, children with disabilities, children with chronic illness, and other children from disadvantaged backgrounds and ensure the right of all children to participate is fulfilled, irrespective of background (GC12 para 75, AGC31 para 91).<sup>1,20</sup> Children must always receive adequate support to facilitate their participation through processes that ensure opinions are freely expressed and given due consideration in accordance with the law (GC12 para 19, AGC31 para 94).<sup>1</sup> In all instances where a child decides to participate, their capacity must be assessed to understand how best to support their meaningful participation (GC12 para 10, AGC31 para 16).<sup>1,20</sup> Children are also entitled to access information in a format that is accessible to them, based on their maturity, development and any disability they may have. Such information should be available through a wide range of sources, including radio, television, libraries, books, the press, the internet, and helplines to enable children to freely formulate and communicate an opinion (GC12 para 25, AGC31 para 19).<sup>1,20</sup>

## Compliance with the UNCRC

South Africa has made considerable progress in adopting legislative measures that give effect to children's participation rights, in line with its international obligations under the CRC. The general principles found in the Children's Act (section 10) apply to all children in the implementation of all legislation, so there is a basic legal requirement in all settings to give children space to participate. Likewise, section 11 of the Children's Act compels all adults and organs of the state to make these spaces inclusive of children with disabilities and chronic illnesses.

### *Respecting the evolving capacities of the child*

The Children's Act and other laws include instances where children's participation is required and allow for autonomous decision-making. There is often debate about the 'lack of harmonisation' in South Africa, given the range of ages specified in the Children's Act for different decisions. The UNCRC has been clear that harmonisation is not required and that setting different age ranges for autonomous decision-making is in line with a child's evolving capacities.<sup>r</sup> However, that does not apply to the right to participate in, or influence, decisions taken by adults about children. The UNCRC suggests that age and maturity restrictions should only be considered when determining how much weight to give a child's opinion and that all opinions should be expressed and listened to (para 21).<sup>1</sup> Young children are often denied the legal power to make decisions but the principle of participation applies to all ages; even where children have no power to make decisions, they still have the right to be consulted.

The Children's Act respects children's evolving capacity for being involved in and taking decisions by introducing maturity and capacity requirements, neither of which are defined by the law and hence conditional on subjective interpretation. The different standards in the law are intended to give effect to children's rights and reflect South Africa's context. For example, children must be at least 12 years old to consent to medical treatment but can consent to an HIV test at any age so long as they have capacity. The two requirements differ as parliamentarians assumed most children have a high level of general knowledge about the virus i.e. they can make an informed choice, and civil society argued that adding a parental consent requirement would make it difficult for AIDS orphans to access HIV testing services. Similarly, since surgical operations typically carry a higher risk than other medical treatments and are considered more complex decisions they require a higher degree of support in the

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<sup>r</sup> Children's Amendment Bill: Legal Expert on Harmonisation of Age; Committee Report on Provincial Public Hearings | PMG." n.d. Pmg.org.za. Accessed July 11, 2023. <https://pmg.org.za/committee-meeting/34335/>

form of parental guidance – for both medical treatment and surgical operations, it is assumed the medical professional will assess the degree of complexity of the specific decision and the maturity and capacity of the individual child. The Act states these provisions must be guided by its general principles, so read together, all children have a right to age-appropriate information about their health, to participate in decisions about their health care with adult support, and make autonomous decisions if they have sufficient maturity. Thus, the act respects the evolving capacities of the child, their right to information and guidance, and their right to participate.

Overall, South Africa’s legislative framework appears to be comprehensive when comparing its provisions with the criteria set out in the UN’s guidance (see Appendix A). Nevertheless, the legislative and policy frameworks can be strengthened to further promote meaningful child participation. To assess the legislative framework’s strengths, weaknesses, and gaps we will apply a more critical framework based on models of meaningful participation namely Lundy’s model of participation as updated in 2015 and Fokala’s balanced model.<sup>10,12</sup>

## **Compliance with the theoretical models and the ACRWC**

The ACRWC is more specific to the African context in calling on states to consider the sociocultural influence within the country to understand how practices hamper child participation (para 68)<sup>20</sup> and shift attitudes through collaborating with all stakeholders in organising public campaigns and community dialogue (paras 102 and 107).<sup>20</sup> The ACERWC guidelines align closely with the Lundy model, emphasising the importance of space and time, voice, audience, and influence. If we use these as assessment criteria, a different picture emerges of the adequacy of South Africa’s legal framework in supporting children’s participation.

### *Families*

As section 10 of the Children’s Act applies to all individuals and not just the state, Moyo argues that South Africa’s domestic provisions go beyond the requirements of international law.<sup>31</sup> Since these sections were drafted by a liberal elite but must be enacted by a much more conservative public, it’s not enough to simply enshrine the right. The UNCRC recommends states promote parent education programmes that ‘build on existing positive behaviours and attitudes and disseminate information on the rights of children and parents’.<sup>1</sup> The ACERWC goes further and recognises there are cultural barriers to the implementation of these provisions that need to be supported by raising awareness and educating parents. The Children’s Act makes provision for parenting programmes to prevent abuse but there

are no supporting provisions that ensure that children and their caregivers have information about their right to participate. Therefore, Lundy's criteria of voice and audience are not met. The provisions in the Children's Act give children influence in theory by obliging people with parental rights to consider a child's views before making decisions but do not explicitly apply to caregivers and lack the obligation to give feedback to the child.

### *Education*

The law provides for children to be involved in creating codes of conduct and disciplinary hearings concerning their behaviour, but not in disciplinary hearings of educators who have been charged with violating their rights (para 110).<sup>1</sup> Secondary schools must provide spaces for child participation through RCLs and compulsory seats on SGBs, providing multiple spaces in which children should participate. However, there is no obligation to provide support to children to express themselves or produce information that is accessible. While the Schools Act obliges the Minister to consult with independent student organisations, there is nothing in the legal framework to promote the formation of these organisations or support them to 'assist children incompetently performing their participatory roles'(para 112).<sup>1</sup> RCLs have no power to influence decision-making other than by electing members to sit on the SGB. While SGBs give children a seat at the table, there is no obligation to ensure their meaningful participation due to children's limited voting rights and the lack of training for adult members. Learner representatives also have less opportunity to develop skills and experiences as they have shorter term limits compared to other actors (one year for learners versus three for other adult actors). Children and young people often complain that these spaces only allow for tokenistic participation since they do not influence decision-making.<sup>10</sup>

### *Health services*

Children 12 years and older are given decision-making powers in respect of their medical treatment and legislation specifies all children, regardless of age, have the right to be involved in decisions about their health. The Children's Act is the only law that specifically details the right to information and although the provision is limited to health care, it is expansive in covering information about a child's health status, prevention, and treatment. Further, it requires information be in a format accessible to all children, giving due consideration to the needs of children with disabilities and chronic illnesses. The lack of linkages to freedom of expression in the Children's Act has been perceived as a serious shortcoming as there is no express requirement to ensure participation is voluntary. Moyo suggests this could lead to children being overburdened with responsibility for decisions for which they feel they do not

want to take part in.<sup>31</sup> For example, the Choice on Termination of Pregnancy Act requires girls to give informed consent without any determination of competence or obligatory assistance for children who may lack competence.<sup>102</sup> However, the Children's Act adds specific criteria to determine understanding and capacity to make each decision. When it comes to having a voice in health care decision-making, the Children's Act provides support and guidance from parents (in the case of surgery) and counsellors (before HIV testing, virginity testing and circumcision). The requirement for health professionals to seek consent from older children requires them to listen and respect children's views but there is no legal mechanism that requires training in this area. The right to information on health care also protects children's rights to feedback on decisions not taken by them, making it the only service sector in which influence is fully respected.

The National Adolescent-Friendly Clinic Initiative is an accreditation programme designed to make health services more accessible and acceptable to adolescents by training healthcare workers to be non-judgemental and establishing national criteria for appealing, appropriately equipped and easily accessible health facilities throughout the country.<sup>103, 104</sup> However, it is not enshrined in law or policy and evaluative studies show it is under-resourced, and implementation varies greatly in different provinces.<sup>105</sup>

States are also required to provide platforms that enable groups of children to contribute their views and experiences to health service planning and programming (para 104).<sup>1</sup> The National Health Act does not provide for including children's views in policymaking or structures such as community health boards, nor does the legal framework provide any form of guaranteed participation in consultative forums within individual healthcare facilities. However, the Adolescent and Youth Health Policy promotes participation in some existing consultative forums and establishes a national Adolescent and Youth Advisory Panel. There are some exceptional examples of involving children in research<sup>106, 107</sup> and policy,<sup>89</sup> but despite their success, they have yet to become everyday practice.

### *Social services and alternative care*

The Children's Act and supporting regulations and policies create multiple spaces to enable children's participation in mediation between parents, investigations into abuse and neglect, and court proceedings regarding removal, placement, reunification, or permanent long-term placements including adoptions and foster care. For children in alternative care, the regulations detail that the right covers all significant decisions including the development and review of care plans and ongoing assessments. Children's court inquiries must take place

in child-friendly venues and presiding officers may exclude anyone from the proceedings to ensure that the environment is private and enabling. Child and youth care centres must have children's forums and either children or someone representing children's interest on the management board. Thus, the space component is fully met.

Although there is no explicit obligation to provide information, the Children's Act requires that social workers prepare children before going to court and provide intermediaries to ensure they can express themselves freely. Recognising that participation can have a potentially traumatic impact on the child, international guidelines recommend limiting the number of times a child is interviewed in social work or criminal investigations (para 24).<sup>1</sup> This is not stipulated in domestic law. In theory, this should be protected by provisions calling for intersectoral collaboration but in practice, children frequently experience re-traumatisation from being forced to retell their stories.<sup>108</sup> This detracts from the voice criteria as there are no legislative protections that ensure expression is voluntary. When dealing with children who have experienced trauma, professionals should have specialist training, yet again there is no legal requirement for child and youth care workers, social workers, clerks of the court or presiding officers be trained in this area of the law, child rights or child participation. This translates into a major weakness with respect to audience and influence when it comes to decisions affecting individual children.

The UN guidelines call for the inclusion of children in the development of prevention strategies (para 122)<sup>1</sup> and laws, policies, strategies and other measures to address all forms of violence (para 118).<sup>1</sup> Children were included in the development of the Children's Act and subsequent amendments. Indeed, during the review of the childcare legislation before the introduction of the draft bill, the South African Law Commission asked children and young people to identify which rights they should have in addition to constitutional rights. Most responses indicated 'The right to be consulted, listened to and respected by adults' (pp34-36).<sup>109</sup> This is in part why there are such strong participatory rights in the Children's Act. In stark contrast, the gender machinery has resisted allowing children's meaningful participation in forums for public participation in the development and implementation of the NSP on GBVF. This suggests that children's participation is still relegated to issues that only affect them and not other population groups, such as women.

### *Judicial proceedings*

Every child has the right to access the courts and participate in proceedings that affect them. The Children's Act, the Child Justice Act and the Criminal Procedure Act recognise that



many factors hinder children's genuine participation. The Children's Act creates child-friendly environments in children's courts and obliges magistrates to listen to children. They also require the state to remove language and cultural barriers and put a range of measures in place to create child-friendly spaces and ensure that children can express their views freely.<sup>31</sup> Court judgments have opined on the capacity of children and the value of their perspectives and statute provides for the assessment of their capacity as perpetrators, victims, witnesses, and affected parties. The laws also provide measures to safeguard children and assist them in participating in child-friendly ways (such as through intermediaries or CCTV and in using their preferred language) and legal assistance at state expense in certain circumstances. Case law creates additional obligations to guarantee representation, support victims and witnesses, and ensure inclusive access to the courts. The draft Children's Act required children's courts to have dedicated, specially trained clerks, however, Parliament removed this provision when the Department of Justice told MPs it was unaffordable.<sup>s</sup> On paper, the justice system creates space and time and gives voice to children; officers of the court are required to listen to children however, they are not required to be trained or provide feedback, so audience and influence is partial.

### *Legislative processes*

The Constitution, the rules of Parliament and the Local Government Act afford the 'public' the right to participate in legislative processes, budgeting, and oversight at national, provincial, and local levels. In theory, these provisions respect the right of children to access these spaces, and we have seen examples where the National Public Education Office has published information that is accessible and supported parliamentary committees to create dedicated and/or supportive spaces for children. But this is only when they decide that legislation is relevant to children. Children should have the same access to decision-makers and potential to influence the decisions as adults during these sessions<sup>t</sup> but since there is no training given to MPs or their staff, adult decision-makers' negative attitudes can have a deleterious effect on children's ability to express themselves freely and influence deliberations. Finally, even when children are able to express their views in the law-making process, there is no formal mechanism for feedback – although arguably, this is a limitation to everyone's rights, not just children's. The lack of any special measures in the rules of Parliament renders child participation discretionary rather than an enforceable right.

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s Deputy Minister of Justice, Adv Johannes de Lange, quoted in: Portfolio Committee on Social Development (2005) Transcript of meeting, 1 June 2005. [On file at the Children's Institute].

t There are specific examples of changes to the law that can be attributed to children forced marriage, support for child headed households [see Jamieson and Mukoma 2009], transitional support for care-leavers [Almeida et al 2023].

In its concluding observations, the UNCRC expressed concern about the lack of a systemically guaranteed avenue for children to participate in public decision-making (para 29).<sup>110</sup>

The UNCRC recommended the South African government ‘ensure children’s meaningful participation in public decision-making at all levels’ and ‘institutional[ise] the Children’s Parliament as a permanent forum’ (para 30).<sup>110</sup> The Children’s Parliament recently celebrated its 10<sup>th</sup> anniversary; by reaching this milestone one could argue it has become a permanent forum, however, it is run by the Nelson Mandela Children’s Fund, not the National Legislature, a separation which limits its scope of influence on public decision-making. The engagement over the Children’s Amendment Bill shows that meaningfully involving children in law-making is possible but must be institutionalised.

**TABLE 2** Assessment of South African legislation using Lundy and Fokala’s models of participation.

	Space and time	Voice	Audience	Influence
	Children’s capacity to participate is recognised, child-friendly safe and inclusive spaces are provided, and children are not rushed to participate	Appropriate information and support is given to children, to support them in freely formulating and communicating their opinions	Children’s views are communicated to a trained person with the responsibility to listen attentively and give an unbiased consideration	Children’s views are taken seriously and acted upon, where appropriate and feedback is provided to the child, including reasons for decisions taken
Family	✓	✗	✗	~
Education	✓	✗	✗	✗
Health	✓	✓	✓	✓
Social services	✓	~	~	✗
Justice	✓	✓	~	~
Legislative processes	✓	✗	✗	✗

Table 2 presents an assessment of South Africa’s legal and policy framework using the Lundy model. The laws are clustered into major areas of service provision affecting children’s health, social services, education, and justice, with the addition of legislative processes. Family is considered in the first row to reflect Fokala’s assertion this context is important in not only shaping participation at home but also within the other domains.

All the legislative and policy frameworks recognise the right to participate and create spaces and opportunities for children to be part of decision-making. Only health and justice laws require that children and young people are supplied with information in child-friendly formats and resources to support them in forming opinions. Laws regulating social services require these supports in some, but not all situations. When it comes to placing a duty on adult decision-makers to engage with children, South Africa's legal framework is very weak and there is even less provision for training to build the capacity of these adults. The same is true regarding the obligation to give weight to children's opinions and provide them with feedback about the outcome of their participation.

It is striking that health is the only set of laws and policies that fully gives effect to the right. Scholars of children's participation have argued that giving effect to the right has the potential to improve service delivery and effectiveness.<sup>111</sup> From a health systems perspective, there are gaps between policymakers' understandings of young people's needs and their lived realities; as a result, services rarely achieve their intended impact. The Department of Health may have learnt they need to engage with young people for instrumental reasons, which merits further investigation but is not within the scope of this paper.

## **Barriers to implementation**

It is evident that South Africa laws concerning child participation give effect to the basic right to participate, however, implementation has been challenging and can arguably be attributed to sociocultural attitudes and tokenistic approaches to child participation. The influence of African context, social hierarchies and culture on the practice of child participation has been recognised by several scholars.<sup>112</sup> A study conducted by the Centre for Human Rights in 2022 broadly explored barriers to meaningful participation in Africa. Their findings revealed that children across the continent believe their opinions do not hold weight merely because they are children and view culture as a barrier to their meaningful participation.<sup>112</sup> A more detailed study by Twum-Danso Imoh notes that children in Ghana who are expressive or assertive are perceived as disrespectful and often reprimanded for not 'respecting' cultural values like demonstrating obedience towards elders.<sup>113</sup> Moses discusses how South Africa's emphasis on child protection reflects cultural attitudes and a hierarchy of rights of children where the right to protection is deemed more important than the right to be heard;<sup>6</sup> it is thus important to explore the influence of sociocultural attitudes on the realisation of children's right to participate in decisions that affect them.<sup>114</sup>

*The influence of sociocultural attitudes*

Moyo observes that ‘Genuine participation takes place not in the Constitution or the relevant statutes, but in the families, communities, schools, hospitals, and courts in which children live, learn, seek treatment, and appear to give evidence. Many families and state agencies are manned by authoritarian adults bent on ensuring that young people’s views are shaped by adult preferences.’<sup>31</sup> The preservation and promotion of children’s participation rights in South Africa are impeded by cultural practices and views towards the role of children within the family,<sup>69</sup> thus, legislation that creates opportunities or spaces alone is not sufficient to foster child participation at all levels. In many instances where child participation was undertaken, the influence of children’s views has been minimal and not taken seriously by policy and decision-makers.<sup>69</sup> The lack of engagement with children at the local level can be attributed to the conventional attitudes and dismissal of children’s viewpoints in matters of local governance.<sup>69</sup>

*Tokenistic approaches to child participation*

The participation of young people in grade 8 or higher in school governance bodies became a legal requirement through the Schools Act.<sup>115</sup> However, conflicting provisions exist in the framework between protective and participatory rights. It is noted that young people can only hold a one-year term as a member of the SGB (through the RCL) yet the terms of office are comparatively longer<sup>u</sup> for the other adult actors.<sup>v</sup> It can be argued this constitutes a tokenistic approach to child participation; being given a one-year term in the SGB demonstrates learners are not treated as equal participants.<sup>115</sup> Further, the representative model replicates hierarchical relationships between different adult stakeholders and learner representatives; young people generally do not meaningfully participate or engage in these dynamics.<sup>116</sup>

For example, case studies from the Eastern Cape and Limpopo highlight children’s perceptions of SGBs. In the Eastern Cape, it was found that learner representatives did not always attend SGB meetings.<sup>116</sup> According to one participant, this was a result of parents and other adults thinking the SGB committee was just for adults. When their opinion and involvement are not required, sometimes learners are even asked not to attend meetings.<sup>116</sup> A study of four secondary schools in Limpopo yielded similar results;<sup>115</sup> youth who took part in SGB meetings reported they were excluded on many occasions when ‘teacher-related’ matters were discussed:<sup>115</sup>

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u Section 31(1) provides that ‘[t]he term of office of a member of a governing body other than a learner may not exceed three years’.

v Parents, non-teaching staff, and teachers.

When coming to issues of the teachers, maybe, say there's a teacher charged with misconduct and so on, they exclude you for five minutes or two minutes and you will come back and then they discuss, whereas the agenda is there. I mean, it is wrong that thing, you are part of the SGB, you see...

Similarly, during the NPAC consultations across the country, children declared that child representation on SGBs is 'just tokenism because children are not really listened to by adults' (p78).<sup>54</sup>



## Conclusion

South Africa is party to a number of international conventions and regional charters that outline its commitment to human rights. Both the UNCRC and the ACERWC elaborate extensively on states' obligations concerning child participation, including that information must be accessible to children (para 25),<sup>1</sup> the evolving capacities of a child must be considered, enforcing age thresholds should be discouraged (para 30),<sup>1</sup> and all stakeholders must be involved (paras 90 and 91).<sup>20</sup> Under the broader structure of the African Union, South Africa is also committed to ensuring that the goals and objectives of Agenda 2040 and Agenda 2063 are realised for a better future for children; both frameworks address strengthening efforts at promoting child participation. South Africa is also a party to the African Youth Charter which contains a lengthy article on the participation of youth in different facets of governance and society.

To honour these commitments, South Africa enacted legislation and developed policies to guide the realisation of children's rights to child participation. The Constitution articulates several provisions that address the participation of all citizens under the Bill of Rights, such as the right to information and freedom of expression, irrespective of age. Only the right to vote and stand for office is restricted to adult citizens. Other statutes outline the duties of the state and other actors to give effect to children's participation rights including, but not limited to, the Children's Act, Child Justice Act, Choice on Termination of Pregnancy Act, South African Schools Act, National Education Policy Act, National Health Act, and the National Youth Development Agency Act. In addition, national development frameworks like the National Development Plan 2030, National Child-Friendly Communities Framework, and National



Child Participation Framework, illustrate the South African Government's efforts to recognise children's participation rights on paper. However, many provisions exclude pre-teen children and few recognise that vulnerable groups such as children with disabilities or migrants require additional support. The courts have expanded the interpretation of the right of participation across a range of sectors, highlighting its intrinsic value and linking it to the best interests of the child; however, more than declaratory statements are needed for rights to become reality.

Article 4 of the CRC requires the state to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the convention (including strategic plans, policies, programmes, budgets, and services). Details of how to meet these obligations are typically found in policy but unless there is a statutory obligation and budget allocation, provision of the relevant service is unlikely to occur in practice. The legislative framework tends to be strong on negative duties, like 'respecting' and 'protecting' children's rights, but weak regarding positive duties of 'promoting' and 'fulfilling' children's right to participate as per section 7(2) of the Constitution.<sup>5</sup>

When the lens of meaningful participation is used to assess South Africa's legal framework, we find that while the law provides spaces for children to participate, there are limited measures to build children's capacity to express themselves or ensure children have an audience willing to engage them. Moreover, the laws set out specific decisions and processes that children should be part of, thus possibly limiting the extent of their influence to only those areas. Most importantly, the law fails to place a statutory obligation on the executive arm of government to provide services, programmes, human resources, and infrastructure necessary to give effect to the right in full. Put simply, when it comes to the allocation of state resources, participation is not a priority.

In conclusion, South Africa has domesticated its international obligations under the CRC and African Children's Charter to provide for child participation to a limited extent. These laws must be enacted in a socially conservative society in which adult attitudes act as a significant barrier to meaningful participation. International guidance on the implementation of the right to participate clarifies that States must remove all barriers to children's participation – not just legal but also political, economic, social, cultural, and attitudinal. 'It requires a preparedness to challenge assumptions about children's capacities and to encourage the development of environments in which children can build and demonstrate capacities. It also requires a commitment to resources and training' (para 135).<sup>1</sup> A major gap in South African law exists around the provisioning needed to raise awareness of children's rights; educate parents,

caregivers, and service providers on how to give effect to these rights; and support meaningful child participation. As with many states in the Global South where most children live in poverty and there are major concerns about their health and physical well-being, South Africa needs to make a concerted effort to highlight the social and economic benefits of participation before it will be prioritised.

# Appendix A: Assessing South African law against the commitments in the UNCRC

Requirement	Compliance
General principles	Full
National and subnational development frameworks	Full
Collaborate with stakeholders at national level, including, the child, parents, where necessary, traditional, community and religious leaders, NGOs and CSOs.	Partial
<b>Family</b>	
The law recognizes the rights and responsibilities of parents, or other legal guardians, to provide appropriate direction and guidance to their children in a manner consistent with the evolving capacities of the child.	Full
Acknowledge that a 'parent' is not limited to the child's biological parent. It includes legal guardians, extended relatives with child custody powers, children who are guardians and providers in child-headed homes and community leaders.	Partial
Encourage parents, guardians, and caregivers to listen to children and give due weight to their views in matters that concern them.	Full
Parents should be advised to support children in realising the right to express their views freely and to have children's views duly taken into account at all levels of society.	Partial
Promote parent education programmes, which disseminate information on the participation rights of children, reinforce gender equality, promote respect between parents and children, and ways of dealing with conflicting views within the family.	Partial
<b>Justice</b>	
All legislation on separation and divorce to include the right of the child to be heard by decision-makers and in mediation processes subject an individual assessment of the capacity of the child.	Full
Child offenders have a right to remain silent.	Full
The right to be heard applies to the police, the prosecutor, and the investigating judge. It also applies through all the stages of diversion and child justice process.	Full
In case of diversion, including mediation, a child must have the opportunity to give free and voluntary consent and must be allowed to obtain legal and other advice and assistance in determining the appropriateness and desirability of the diversion proposed.	Full
Every child must be informed promptly about the charges against her or him in a language she or he understands, and also about the juvenile justice process and possible measures taken by the court.	Full
The proceedings should be conducted in an atmosphere that enables the child to participate and to express her/himself freely.	Full

The proceedings should be conducted behind closed doors. Exceptions to this rule should be very limited, clearly outlined in national legislation and guided by the best interests of the child.	Partial
Child victims and witnesses should be informed about the availability of health, psychological and social services.	Full
Measures should be in place to reduce the number of times a child is interviewed.	Partial
Admit a child to be part of the judicial proceedings either directly or through an impartial legal representative.	Full
Child-friendly mechanisms for submitting a complaint and participating in investigations and court proceedings.	Partial
Child victims and witnesses should be consulted on the specific places and times of hearings, the availability of protective measures, the possibilities of receiving reparation, and the provisions for appeal.	Partial
<b>Social services and alternative care</b>	
Legislation, regulation and policy directives, to ensure that children participate in decisions to remove a child from her or his family because the child is a victim of abuse or neglect.	Full
Individual children in all forms of alternative care, including in child and youth care centres and foster care, can participate in decisions about the development of their care and/or treatment and their review and visits with parents and family.	Full
Establishment of representative councils of children in the residential care facilities, with the mandate to participate in the development and implementation of the policy and any rules of the institution.	Full
Establishment of a competent institution to monitor compliance with the rules and regulations governing the provision of care, protection or treatment of children.	Not compliant
Legislation, regulation and policy directives, to ensure that children are given information about the effects of adoption and ensure they participate in decisions about their adoption.	Full
Consult with children in the development and implementation of legislative, policy, educational and other measures to address all forms of violence.	Partial
Particular attention needs to be paid to ensuring that marginalized and disadvantaged children, such as exploited children, street children or refugee children, are not excluded from consultative processes designed to elicit views on relevant legislation and policy processes.	Not compliant
Provide the space for children to freely express their views and give these views due weight in all aspects of prevention, reporting and monitoring violence against them.	Partial
Provide child-friendly reporting mechanisms.	Not compliant
<b>HEALTH</b>	
Children, including young children, should be included in decision-making processes, in a manner consistent with their evolving capacities. They should be provided with information about proposed treatments and their effects and outcomes, including in formats appropriate and accessible to children with disabilities.	Full

Ensure that children of all ages have access to confidential medical counselling and advice without parental consent, irrespective of the child's age, where this is needed for the child's safety or well-being.	Partial
Legislation introduces a fixed age at which the right to consent transfers to the child without the requirement for any individual professional assessment of capacity. Where a younger child can demonstrate the capacity to express an informed view on her or his treatment, this view is given due weight.	Full
Provide clear and accessible information to children on their rights concerning their participation in paediatric research and clinical trials, so that their informed consent can be obtained in addition to other procedural safeguards.	Full
Introduce measures enabling children to contribute to the planning and programming of health services, including what services are needed, how and where they are best provided, discriminatory barriers to accessing services, quality and attitudes of health professionals, and how to promote children's capacities to take increasing levels of responsibility for their health and development.	Full
<b>Education</b>	
Creating environments that are conducive to the expression of children's views and removal of barriers to participation in schools, including educational programmes in the early years.	Partial
Involve children in the planning of curricula and school programmes.	Partial
Giving children's views weight is particularly important in the elimination of discrimination, prevention of bullying and disciplinary measures. Expand peer education and peer counselling programmes.	Full
Legislation establishing class councils, student councils and student representation on school boards and committees, where they can freely express their views on the development and implementation of school policies and codes of behaviour.	Full
Support the development of independent student organizations, which can assist children in competently performing their participatory roles in the education system.	?
Involve children in decisions about the transition to the next level of schools or choice of tracks or streams. Such decisions must be subject to administrative or judicial review.	Not compliant
In disciplinary matters in schools (e.g., suspensions and expulsions), refusals to grant school certificates. In the case of exclusion of a child from instruction or school, this decision must be subject to judicial review.	Full
<b>Legislation and policy</b>	
Children should be consulted in the formulation of legislation, policy and implementation plans related to violence prevention in schools, combating child exploitation through hazardous and extensive labour, providing health services and education to street children, and in the juvenile justice system.	Partial
Consult children at the local and national levels on all aspects of education policy, including, informal and non-formal facilities of learning, which give children a 'second chance', school curricula, teaching methods, school structures, standards, budgeting and child-protection systems.	Partial
Participation in the development of health policy and services.	Partial
Establish competent monitoring institutions, such as a children's ombudsperson, children's departments, units or desks, within NHRIs, commissioner or inspectorate.	Full

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