

A GUIDE FOR WORKING WITH VULNERABLE CHILDREN IN SOUTH AFRICA



WHO ARE VULNERABLE CHILDREN?

Vulnerable children include unaccompanied and separated children who may be any of the following

SOUTH AFRICAN CITIZENS
MIGRANTS
REFUGEES & ASYLUM SEEKERS
STATELESS PERSONS
CHILDREN OF UNKNOWN NATIONALITY

THE FOUR KEY PRINCIPLES OF CHILD RIGHTS IN INTERNATIONAL LAW (CRC) AND SOUTH AFRICAN LAW (WHICH SHOULD ALWAYS BE UPHELD BY GOVERNMENTS) ARE:

**NON
DISCRIMINATION &
EQUALITY**

**BEST
INTERESTS OF
THE CHILD**

**THE RIGHT TO
SURVIVAL
AND
DEVELOPMENT**

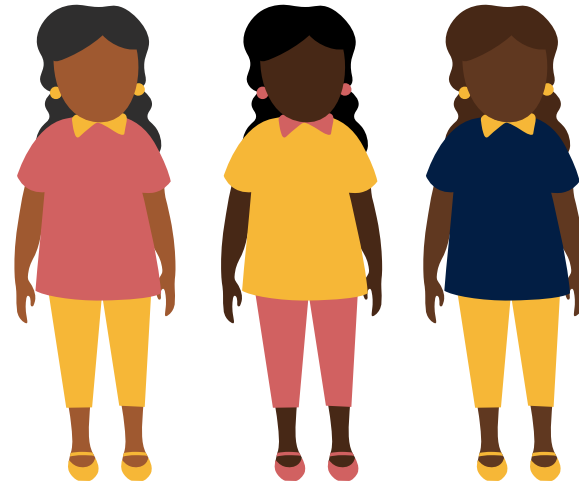
**CHILD
PARTICIPATION**



DID YOU KNOW?

“For the purposes of establishing the jurisdiction of the Children’s court, it is irrelevant whether the child is legally or illegally in the country.” - NS v The Presiding Officer Section 28, The Constitution of South Africa confirms: “The best interests of the child is of paramount importance in all matters concerning the child”.

SOME IMPORTANT DEFINITIONS:



WHO IS AN UNACCOMPANIED CHILD

General Comment 6 of the United Nations Convention on the Right of the Child "CRC" defines unaccompanied children as children who have been separated from both parents and other relatives and who are not being cared for by an adult who, by law or custom, is responsible for doing so.



WHO IS A SEPARATED CHILD

The General Comment 6 further defines separated children as children who have been separated from both parents or their previous legal or customary caregiver, but not necessarily from other relatives.



WHO IS A STATELESS CHILD?

The UN Convention Relating to the Status of Stateless Persons defines a stateless person (including children) as a person who is not considered a national (citizen) by any State under the operation of its laws. Stateless children may or may not have a birth certificate.



WHO IS AN UNDOCUMENTED CHILD?

An undocumented child is a child who does not have documentation in the form of a birth certificate and/or ID/passport/permit. An undocumented child is not stateless, unless they are also not recognised as a citizen by any country in the world.

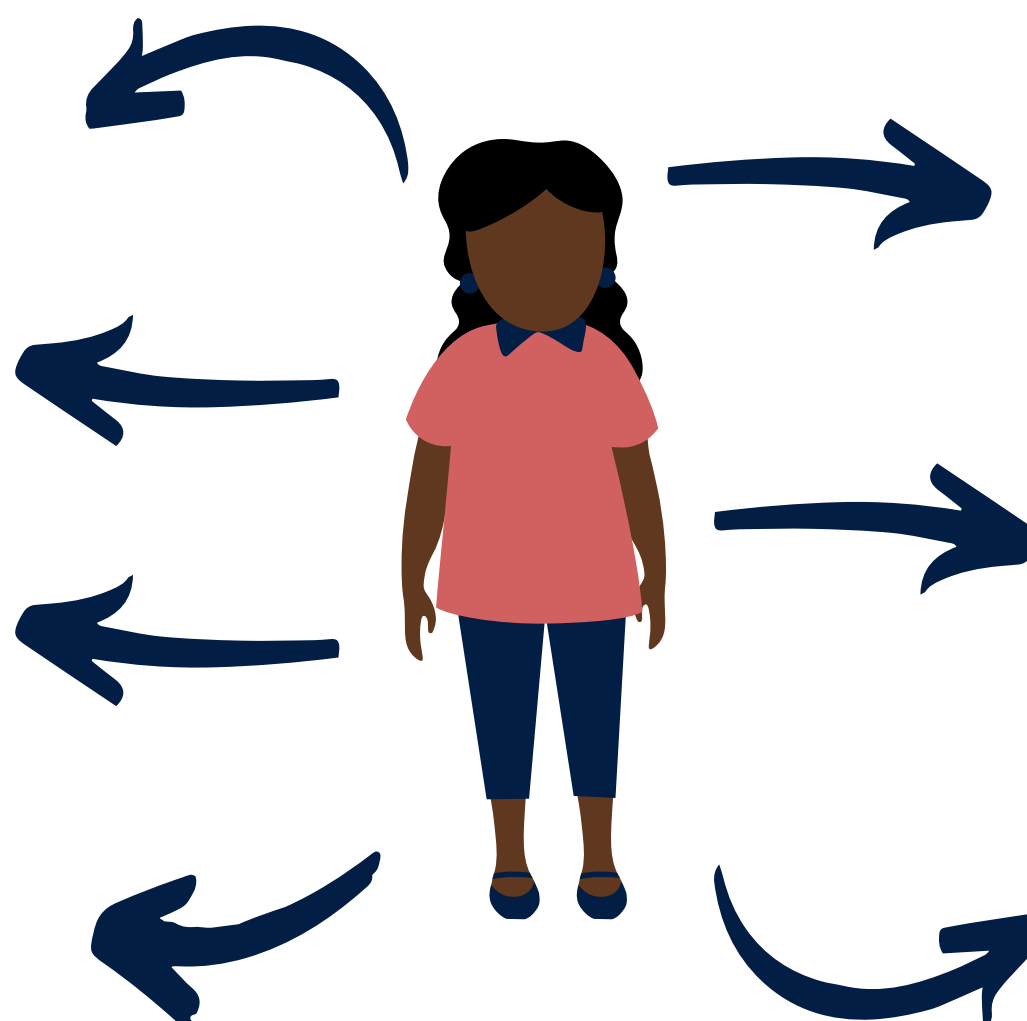
THE FOLLOWING FACTORS MAY ASSIST YOU TO IDENTIFY A VULNERABLE CHILD

THE CHILD IS NOT ATTENDING SCHOOL

THE CHILD HAS NO LEGAL DOCUMENTS

THERE IS A SUSPECTED SITUATION OF ABUSE / NEGLECT

THERE IS A SUSPICION THAT THE CHILD MIGHT HAVE BEEN TRAFFICKED OR INVOLVED IN CHILD LABOUR



IF THEY ARE FROM A DIFFERENT COUNTRY, THEY MIGHT SPEAK A DIFFERENT LANGUAGE

THERE IS NO ADULT LOOKING AFTER THE CHILD; .

OR THERE IS AN ADULT, BUT WITHOUT ANY DUTY TO LOOK AFTER THE CHILD FOR EXAMPLE, A FOREIGN CHILD IN THE CARE OF A GRANNY, AUNT, SIBLING, NEIGHBOR OR ANY UNRELATED PERSON

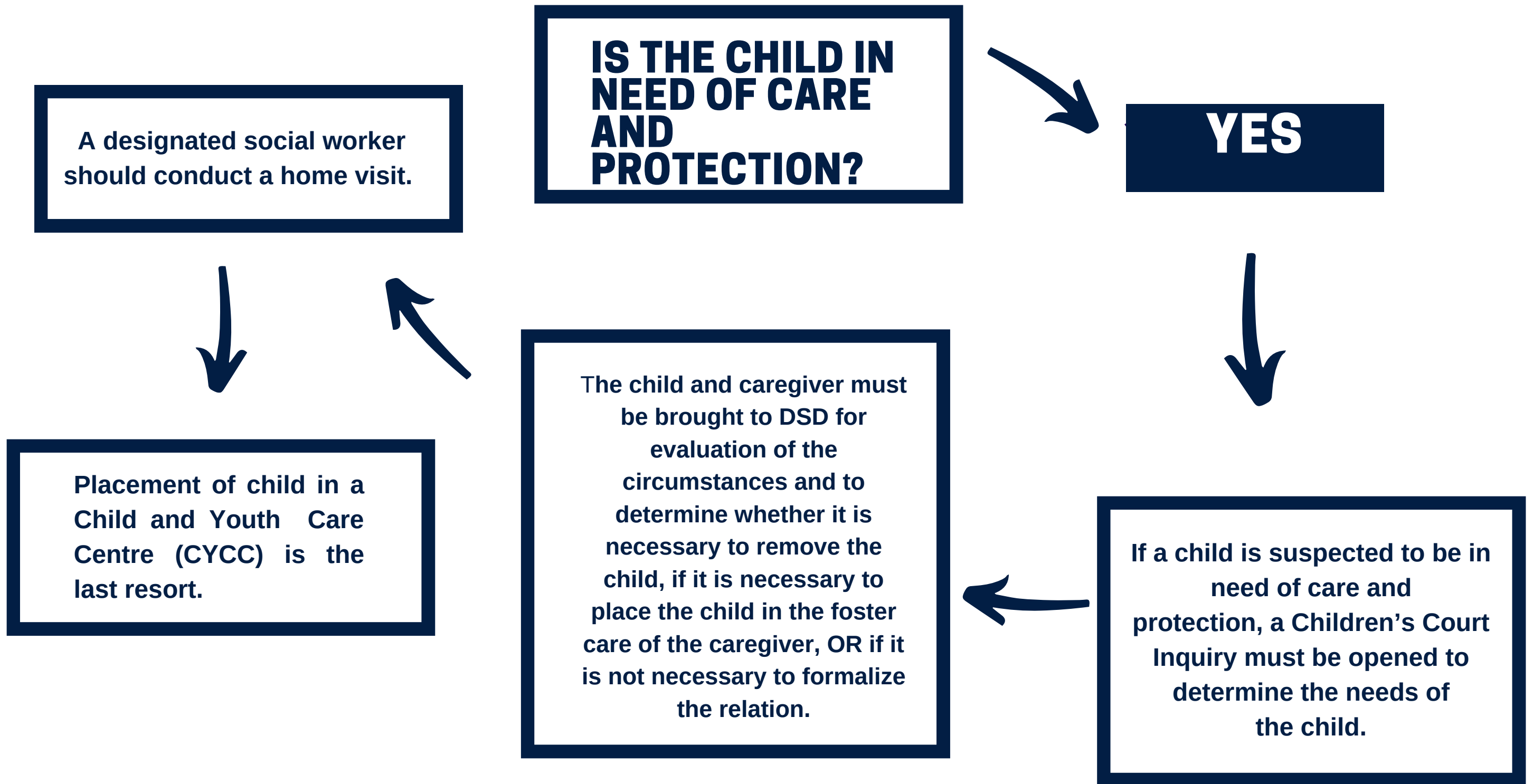
Source: World Health Organization



WHAT CAN I DO IF I ENCOUNTER A VULNERABLE CHILD?

The approach from a **PROTECTION** point of view should be the same as for any South African child.

The child may be identified by anyone – South African Police, Charity organisations, member of the public. The child should be brought to Department of Social Development (DSD) or directly to the Children’s Court by any of these persons.



Documentation is key to providing protection and access to services for vulnerable children in South Africa. There are various pathways to documentation depending on the child's circumstance. Here are some of the pathways to documentation which could guide a social worker or legal practitioner assisting a vulnerable child.



SAFEGUARDS IN LAW FOR VULNERABLE CHILDREN

SAFEGUARDS IN LAW FOR CHILDREN OF MIGRANTS BORN IN SOUTH AFRICA

Those who were born in South Africa could also apply for naturalisation in terms of section 4 (3) of the Citizenship Act: “A child born in the Republic of a) parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if- (b) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and (c) his or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act, 1992.

SAFEGUARDS IN LAW FOR STATELESS CHILDREN

A safeguard for stateless persons is in terms of section 2(2) of the citizenship Act which stipulates: Any person born in the Republic and who is not a South African citizen by virtue of the provisions of subsection (1) shall be a South African citizen by birth, if-

(a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and

(b) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act, 1992”

Stateless person can also apply for a section 31(2)(b) permanent residence application

SAFEGUARDS IN LAW FOR UNDOCUMENTED CHILDREN

Undocumented children can apply for permanent residence under section 31(2)(b) of the Immigration Act which provides: S31(2) Upon application, the Minister may under terms and conditions determined by him or her- (b) grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such decision. It is a ministerial exemption. The application is done through the Visa Facilitation Services (VFS). It costs R1 350.

MUBAKE V MINISTER OF HOME AFFAIRS CASE

The applicants in the case sought an order declaring that the children who had been separated from their parents, are dependents of their primary care-givers in terms of the definition of 'dependent' in section 1 of the Refugees Act 130 of 1998 and its accompanying regulations.

The applicants wanted that such children should automatically be recognized as dependents of existing asylum seekers or refugee adults who accompany them into South Africa. As a result the following order was made by the court: (1) declared that the separated children are dependents of their primary care-givers in terms of the definition of dependent in section 1 of the Refugees Act 130 of 1998 (2) First and second respondents were ordered to inform all Refugee Reception Offices by way of departmental directive to issue the relevant permits to separated children as dependents of their care givers.

AHMED AND OTHERS V MINISTER OF HOME AFFAIRS

In October 2018, the Constitutional Court held that, to the extent that a DHA Directive imposed a blanket ban on asylum seekers from applying for temporary residence visas without provision for an exemption application, was inconsistent with the Immigration Act and invalid. This case changed the space in that it makes allowance for asylum seekers to apply for permanent residence visas



ARGUMENTS THAT COULD SUPPORT A POSITIVE SECTION 31 (2)(b) APPLICATION

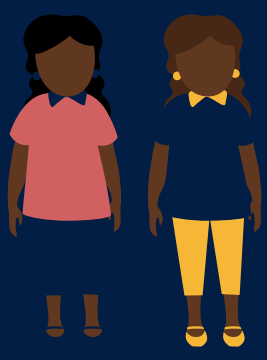
As seen above a Section 31(2)(b) application is a possible pathway to grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such decision. Below are some arguments that could support a positive 31(2)(b) application.

IT HAS BEEN ESTABLISHED THAT THE CHILD CANNOT BE REPATRIATED / IT IS NOT IN THEIR BEST INTERESTS TO BE REPATRIATED.

THE CHILD HAS A CHILDREN'S COURT ORDER STATING THAT IT IS IN THEIR BEST INTERESTS TO REMAIN IN SOUTH AFRICA

THE CHILD IS AT RISK OF OR IS STATELESS

THE CHILD IS INTEGRATED INTO SOUTH AFRICA: THEY SPEAK LOCAL LANGUAGES, THEY HAVE LOST THE CONNECTION TO THEIR COUNTRY OF ORIGIN, THEY HAVE FORMED IMPORTANT RELATIONSHIPS (THIS IS OBVIOUSLY VERY IMPORTANT FOR THEIR CONTINUED WELL-BEING, EVEN INTO ADULTHOOD), REINTEGRATION TO THEIR COUNTRY OF ORIGIN WILL NOT BE POSSIBLE OR IS NOT IN THEIR BEST INTERESTS



SOME ANSWERS TO QUESTIONS YOU MAY HAVE?



HOW DO I KNOW IF A CHILD IS A REFUGEE?



- There is no specific list of countries that produce refugees, but if a child is from a country affected by conflict, that child might be a refugee child
- Ask an expert to interview the child and do an assessment and opinion (LHR; UNHCR; Scalabrini Centre; Centre for Child Law)



HOW CAN AN UNDOCUMENTED CHILD BE PROTECTED?



If a child is undocumented, the Children's Court placement order acts as a means of protection and identity for the child until documentation options have been explored.



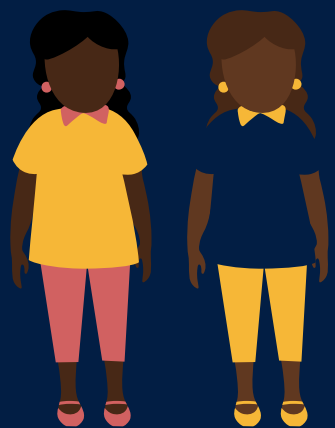
CAN CHILDREN APPLY FOR ASYLUM ON THEIR OWN?



In terms of the law and DHA practice, children cannot apply for asylum on their own. If it appears a child is a refugee, the Children's Court may appoint a person to assist the child to apply for asylum. It may order DHA to consider the asylum claim, but it cannot order DHA to grant asylum.

DID YOU KNOW?

- **FOREIGN CHILDREN WHO ARE UNDER 18 SHOULD NOT BE DETAINED AND DEPORTED.**
- **ONCE THE CHILD'S SAFETY IS ASSURED, ATTEMPTS TO TRACE THE FAMILY SHOULD BE STARTED.**
- **FOR SOME CHILDREN, RETURN TO THE COUNTRY OF ORIGIN MAY BE IN THEIR BEST INTEREST.**



WHAT RIGHTS DO VULNERABLE CHILDREN HAVE ?

Vulnerable children are entitled to all the rights that any other child in South Africa is entitled to including:

BIRTH REGISTRATION: A NAME AND NATIONALITY

The right to a name and nationality is an enabling right in ensuring that children are able to access the right to healthcare, education and social assistance. This right is clearly set out in article 7 (1) CRC, article 6(3) of the African Charter on the Rights and Welfare of the Child (ACRWC) article 24 of the International Covenant on Civil and Political Rights. This is further entrenched in our Constitution in section 28(1) (a) which states that everyone has a right to name and nationality from birth.

DOCUMENTATION: ASYLUM SEEKER AND REFUGEE PERMITS

Article 23 of the ACRWC binds South Africa towards its obligations to ensuring that asylum seekers and refugees in the country are documented. It states that state Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties. Section 22(1) of the Refugees Act makes provision for the applications and issue of an asylum permit

THE RIGHT TO HEALTHCARE

Article 24 (1) of the CRC provides states parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. This is further substantiated by article 14(1) of the ACRWC provides that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. Nationally, section 27 of the Constitution provides that everyone has right to health care and no person may be denied emergency medical care. The refugees Act is also clear in that it further grants refugees the right to health care in South Africa.

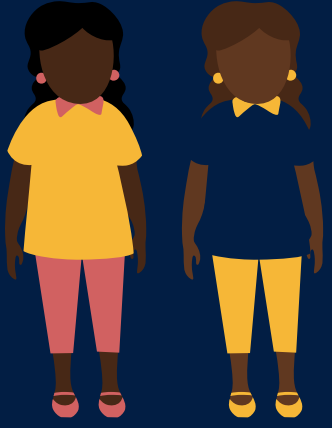
USMC are at risk of refusal to health care in instances where they are undocumented. A 2017 study on USMCs in the Western Cape revealed that children were only able to access emergency treatment and that it was when the treatment outside the emergency medical treatment where administrators usually seek documents. It is important to note that USMCS are entitled to healthcare and health providers to ensure that this category of children are assisted as with all children.

THE RIGHT TO EDUCATION

Section 29(1) of the Bill of Rights extends the right to basic education to “everyone”. This was further dealt with in *Phakamisa v Department of Education* where the court ruled that the Department of Basic Education (“DBE”) is responsible for funding migrant children regardless of their documentation status.

THE RIGHT TO SOCIAL GRANTS

Article 26 (1) of the ACRWC provides that states parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law. The above article is further entrenched in section 27(c) of the Constitution which provides that everyone has a right to social security including if they are unable to support themselves and their dependents, appropriate social assistance. The Department of Social Development is responsible for this function.



WHERE CAN VULNERABLE CHILDREN GET HELP?

IS IT AN EMERGENCY?



CHILDLINE: 0800 555 55



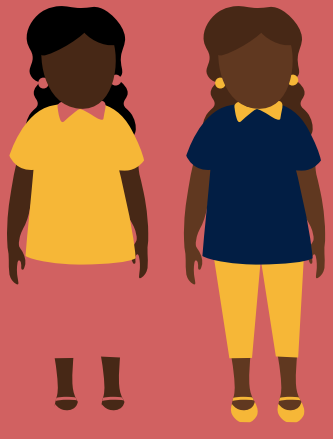
NATIONAL HUMAN TRAFFICKING HELPLINE: 0800 012 322



AIDS HELPLINE: 0800 012 322

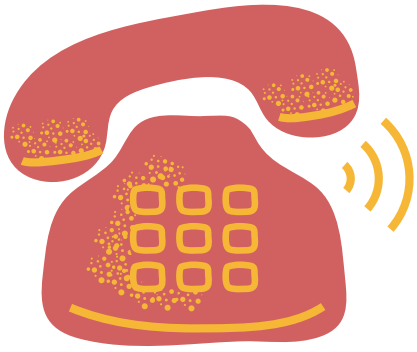


SOUTH AFRICAN DEPRESSION AND ANXIETY GROUP HELPLINE: 0800 456 789



DO YOU NEED LEGAL ADVICE OR ASSISTANCE?

There are some organisations who provide legal advice services on issues specifically related to vulnerable children. These include:



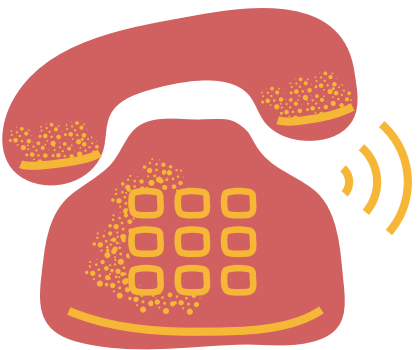
SCALABRINI CENTRE OF CAPE TOWN

Address: 47 Commercial Street, Cape Town

Tel: +27 21 465 6433

Email: info@scalabrini.org.za

Website: www.scalabrini.org.za



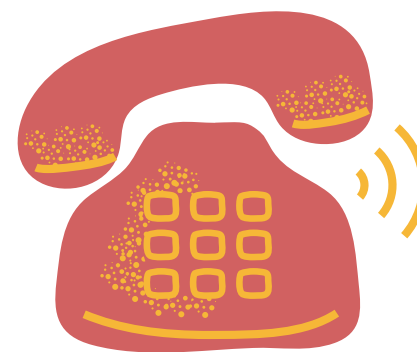
LAWYERS FOR HUMAN RIGHTS

Address: 4th Floor Southpoint Corner Building 87 De Korte Street Braamfontein

Tel: 011 339 1960

Email: liesl@lhr.org.za

Website: www.lhr.org.za



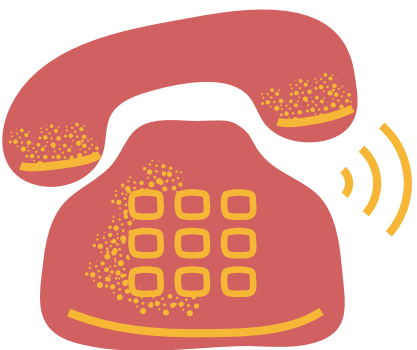
CENTRE FOR CHILD LAW

Address: Faculty of Law Law Building (Room 4-31) University of Pretoria ,Pretoria 0002

Tel: +27 12 420 4502

Email: centreforchildlaw@up.ac.za

Website: www.centreforchildlaw.co.za



PRO-BONO.ORG

Address: 1st Floor West Wing Women's Jail, Constitution Hill, 1 Kotze Street Braamfontein, Johannesburg

Tel: 011 339 6080

Email: info@probono.org.za

Website: www.probono.org.za



LEGAL RESOURCE CENTRE

Address: (National Office) 2nd Floor West Wing Women's Jail, Constitution Hill, 1 Kotze Street Braamfontein, Johannesburg

Tel: 11 038 9709

Email: sherylle@lrc.org.za

Website: www.lrc.org.za

This handbook was collectively compiled by Lawyers for Human Rights, Scalabrini Centre of Cape Town and The Consortium for Refugees and Migrants in South Africa.