For Better Implementation of Migrant Children’s Rights in South Africa

Written by Ingrid Palmary, PhD
Forced Migration Studies Programme
Discussion with selected UNICEF staff contributed to the finalisation of the report.
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List of acronyms

ACRC  African Convention on the Rights of the Child
AIDS  Acquired Immunodeficiency Syndrome
ART  Antiretroviral Therapy
AU  African Union
CCMA  Commission for Conciliation, Mediation and Arbitration
CRC  Convention on the Rights of the Child
DRC  Democratic Republic of Congo
DSD  Department of Social Development
DHA  Department of Home Affairs
DoH  Department of Health
FMSP  Forced Migration Studies Programme
HEAD  Health, Environment and Development Study
HIV  Human Immunodeficiency Virus
IOM  International Organisation for Migration
JMPD  Johannesburg Metropolitan Police Department
MRC  Medical Research Council
NGO  Non-Governmental Organisation
NSP  National Strategic Plan (for HIV/AIDS)
NACCA  National Action Committee for Children Affected by HIV/AIDS
OAU  Organisation of African Unity
OVC  Orphans and Vulnerable Children
POWA  People Opposing Women Abuse
RSA  Republic of South Africa
SADC  Southern African Development Community
SAPS  South African Police Service
UN  United Nations
UNICEF  United Nations Children’s Fund
UNHCR  United Nations High Commissioner for Refugees
Executive summary

This report outlines the situation facing children who migrate across international borders to South Africa. The report begins by outlining the policy framework that should guide migrant children’s access to rights in South Africa. This section points to a well-developed legal and policy framework for securing the rights of migrant children regardless of their documentation. The second section of the report reviews existing studies on child migration with a view to identifying children’s access to their rights as well as pointing to gaps in information. The research on child migrants indicates very poor implementation of the legal and policy framework and significant abuses of migrant children’s rights. In particular, children are often left behind when caregivers migrate and face a range of vulnerabilities associated with this. In addition, children are migrants in their own right and the existing research indicates that, where children migrate alone, they are particularly vulnerable to exploitative working conditions, violence and denial of basic rights. Migrant children’s access to basic health and education is extremely compromised and there is evidence of widespread violence and abuse against them – very often by the state authorities whose duty it is to protect them. Furthermore, there is an indication from the research that children who live outside of the major urban centres are particularly vulnerable.

There is a lack of capacity for intervention with child migrants in South Africa. Many of the migrant rights organisations that exist do not specifically address the rights of children and many children’s organisations lack the knowledge on migrant children’s rights to intervene effectively. Access to rights is almost entirely facilitated by NGOs in South Africa with migrant children having very limited direct access to government departments and services.

This report makes recommendations for intervention by the United Nations Children’s Fund (UNICEF) and other partners for strengthening migrant children’s access to basic rights in South Africa.
Recommendations

For improved information

Further research is needed into the following areas:

• Children living outside of urban centres and their access to basic rights;
• The situation of unaccompanied minors in border areas;
• The labour practices of migrant children;
• The experiences of children left behind when parents migrate, particularly their access to nutrition, education and health;
• Studies that focus on children’s rather than household experiences.

A central website collating information on children and migration should be maintained.

For advocacy

• Advocate for regional collaboration for ensuring the rights of children to access education and health. In particular regional coordination of responses to HIV are needed;
• Use regional structures such as the African Union (AU) and the Southern African Development Community (SADC) to highlight the barriers to South Africa’s implementation of child rights for migrants;
• Conduct national level advocacy for the rights of all children regardless of documentation;
• Advocate for labour courts to monitor exploitative labour conditions of children;
• Advocate for police to focus on eradicating smugglers on borders;
• Advocate for the Department of Social Development and the Department of Home Affairs to establish a working agreement on the procedures for dealing with child migrants;
• Advocate for the Department of Education to issue a memorandum clarifying that no child, regardless of documentation status, should be excluded from education;
• Advocate for the police and Department of Home Affairs to investigate the illegal deportation of children;
• Advocate for migrant children’s access to child support grants.

For policy development

• Advocate for the development of an action plan for unaccompanied minors;
• Clarify the rights of different categories of migrants in the national plan of action on OVCs and the national framework for orphans and other children made vulnerable by HIV and AIDS;
For organisational capacity building

- Support the development of in-house training for police and social workers on the rights of migrant children;
- Support for organisations outside of urban centres is needed where migrant children are likely to be most vulnerable, in particular the borders with Lesotho and Mozambique;
- Build local capacity for high level advocacy on child rights.

For migrant communities

- Support the structures that offer information on migrant rights and create new training and information services in under-serviced areas;
- Assist with the development of integration strategies in schools;
- Facilitate the development of community based care and support structures for unaccompanied minors.
Section 1: Introduction

This report gives an overview of the situation of children affected by migration into South Africa. It focuses on cross-border migrants who migrate alone, with adult caregivers or who remain behind when their caregivers migrate. The report is therefore not intended to document the experiences of children who migrate internally. The report covers the following main questions:

- What is the legal and policy framework governing the provision of rights to migrant children in South Africa?
- What is the profile of migrants and how has it changed over time?
- What are the reasons for children’s migration and what is the social cost of migration on families and children?
- What institutional capacity exists for responding to the needs of children who are affected by migration?
- What level of access to services do child migrants enjoy and what are the barriers to effective access?
- What are the main risks to the safety and protection of migrant children?
- What are the levels of integration of migrant children into South African society?
- What are the levels of knowledge among service providers and migrants themselves about their rights in South Africa?

Where answers to these questions were not available from existing data sources, gaps in information have been pointed out. This report begins with an overview of the legal and policy framework that should guide children’s access to rights. It also identifies where this framework is lacking and where there is failure in its implementation for migrants. The report then goes on to identify what is already known from research about the situation of children who are affected by migration. This section draws on existing research from studies by a range of different organisations. Gaps in information are identified, as is a research agenda that can support effective implementation of children’s rights. Finally, the fourth section of the report gives an overview of the organisations in South Africa that respond to the rights and needs of migrants. Gaps in service delivery are identified, as are the key challenges facing organisations responding to the needs of migrant children.
Section 2: Legal and policy framework

Conventions and declarations
Since democracy, South Africa has signed and ratified many United Nations (UN) conventions that create the framework for legislation and policy in keeping with human rights. This has been followed by a substantial process of law reform that is an important first step in securing a human rights approach to managing migration. This section reviews some of the key conventions, declarations, legislation and policy that guide South Africa’s response to migrant children. It is intended to provide a backdrop against which interventions for promoting the rights of migrant children can be read. Key founding conventions that have been signed by South Africa include the Convention on the Rights of the Child, the Convention on the Elimination of all forms of Discrimination Against Women, the optional protocols on the Convention on the Rights of the Child and the International Labour Organisation convention on the elimination of the worst forms of child labour. South Africa has also signed the UN declaration of commitment on HIV/AIDS and the SADC declaration on HIV/AIDS. For the most part, South African law reform has been in keeping with these instruments. However, given the particularly vulnerable position of migrant children in any society, the section below identifies some of the key instruments that can be used to secure the rights of migrant children in South Africa as well as the shortcomings in the legislation.

The Convention on the Rights of the Child states that all children are given equal status regardless of their nationality. It requires the state to:

- Take appropriate measures to promote the inherent right to life and ensure the child’s survival and development;
- Take appropriate measures to protect all children from any form of discrimination;
- Take appropriate measures to protect all children from all forms of maltreatment perpetrated by parents or others responsible for their care and undertake preventative and treatment programmes in this regard.

Of significance to migrant children are the provisions for refugee children which require the state to:

- Take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee, receives appropriate protection and humanitarian assistance;
- Assist such a child to trace parents and family and where possible arrange unification with the family; and
- In cases where no parents or other family members can be found, the child should be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason.
Drawing on the Convention on the Rights of the Child, the **African Convention on the Rights of the Child (ACRC)** specifies that every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the ACRC irrespective of the child’s or his/her parents or legal guardian’s “race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status”. This therefore provides a very important framework for securing the rights of migrant children. The ACRC states that every child has the right to a name and nationality and should be registered immediately after birth. States are required to recognise the principles according to which the child should acquire nationality if he/she is not granted nationality by the laws of any other state.

The ACRC states that all children have the right to free and compulsory primary education and calls on states to encourage secondary education. It makes special mention that states should promote the education of female children and allow girls who are pregnant to continue their studies on the basis of their individual ability. Furthermore it states that every child has the right to the best attainable state of health and to provide health care with emphasis on primary health care and the health of pregnant women. The ACRC states that every child should be protected from all forms of economic exploitation and from performing any work that is hazardous or interferes with their physical, mental, spiritual, moral and social development, earn minimum wages for admission to employment, and that the hours and conditions of employment should be regulated.

Furthermore, the ACRC states that children should be protected from torture, inhuman or degrading treatment and especially physical and mental injury or abuse, neglect and maltreatment including sexual abuse. This includes the responsibility of states to create monitoring units and the provision of support to the child. In a provision on the protection of the family, the ACRC states that every child separated from his/her family shall have the right to maintain relations and direct contact with them and, where the child is apprehended by the state, the parents or guardian shall be informed as soon as possible. The convention states that child marriage and betrothal of girls and boys should be prohibited and the minimum age of marriage should be set at 18 through national legislation.

As with the Convention on the Rights of the Child (CRC), there is a special provision for refugee children that requires states to take appropriate measures to ensure that a child who is seeking refugee status regardless of whether they are accompanied by caregivers or unaccompanied, receive appropriate protection and humanitarian assistance consistent with international human rights and humanitarian instruments. The state should cooperate with international organisations providing family tracing and reunification services and where no legal guardians or close relatives can be found, the child should be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason. This includes alternative foster or institutional care where they have no family environment, family tracing and reunification. Special mention is made that this applies to internally displaced children but there is no mention of other migrant children separated from parents. Nevertheless the ACRC does state that any child separated from his/her parents is entitled to special protection and assistance and this provision can be used to secure the rights of unaccompanied, undocumented minors. States are required to take all possible
precautions that this provision for family tracing does not result in the trafficking of children. It states that a child should be protected from sexual exploitation and abuse including coerced sex, prostitution and involvement in pornographic activities. The abduction, sale or trafficking of children should be prevented by all appropriate measures.

The UN Convention relating to the Status of Refugees takes, as one of its core principles, the unity of the family and recognises the family as the natural and fundamental group unit of society. In a unanimously adopted recommendation, it emphasises the family as a right, one which is threatened for refugees. Governments are required to take the necessary measures to protect the family with a view to:

- Maintaining the unit of the family where household heads fulfil the conditions for admission to the country;
- Protecting refugees who are minors, especially unaccompanied minors and girls with special reference to guardianship and adoption.

Article 3 states that the convention should be applied without discrimination and this would include discrimination on the basis of age. Similarly article 31 states that the country may not impose penalties because of illegal entry into the country nor can a refugee be expelled without due process of law. A person may not be returned to a place where their life is threatened due to race, religion, nationality or membership of a social group or political opinion. Beyond the abovementioned clauses on the family, there is little specific mention of the rights of children.

The Convention on the Elimination of Discrimination Against Women defines discrimination as “any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedoms in the political, economic, social, cultural, civil or other field”. States are required to ensure legal protection of the rights of women and prohibit discrimination against women. In terms of the convention, temporary measures to accelerate equality between men and women shall not be considered discrimination. The convention calls on states to modify cultural practices with a view to eliminating discrimination and to address discrimination in public and political life, education, labour rights, access to health facilities and access to financial and social services. It emphasises the particular problems faced by rural women and the need for equality of all women before the law.

International Labour Organisation Convention 182 on Child Labour recognises the need to remove children from worst forms of child labour and provide for their rehabilitation and integration. Furthermore, it recognises the interrelationship between child labour, poverty and the need for free basic education. It includes, as some of the worst forms of child labour: forms of slavery or similar practices including use of children in armed forces, debt bondage and compulsory labour, the use of children for prostitution or the production of pornography, the use of children in illicit activities and work that harms the health, safety or morals of children. It calls on governments to identify where such practices exist and implement laws to address them. It also calls on them to monitor such practices and implement programmes of action to eliminate these practices as a matter of priority. The convention emphasises the importance of education in eliminating
child labour and particularly for those children who are removed from such labour. It mentions the ‘special situation of girls’. Importantly it calls on states to assist one another in eliminating these practices which gives scope for addressing the situation of migrant children.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime defines trafficking in persons as the “recruitment, transportation, transfer, harbouring or receipt of persons using coercion or force, or the recruitment, transfer, harbouring or receipt of a child for exploitative labour including prostitution, forced labour, slavery or the removal of organs.” The Protocol calls on states to develop legislation to establish trafficking as a criminal offence, to provide victims with access to the legal process and provide for their physical, psychological and social recovery. The convention also provides for their deportation which should preferably be voluntary. The convention emphasises the need for states to develop programmes to prevent trafficking and to prevent re-victimisation of trafficking victims. The protocol states that law enforcement officials in different states should cooperate to identify trafficking at borders, to determine the methods used for trafficking and to ensure law enforcement officers and other relevant officials are trained to detect and prosecute traffickers. It also states that border controls should be strengthened to prevent trafficking.

The UN Declaration of Commitment on HIV/AIDS calls for leadership by governments in combating HIV/AIDS through the development of national strategies and financing plans for combating HIV/AIDS. It emphasises addressing the age and gender based dimensions of the epidemic. It encourages the development of regional and sub-regional approaches and plans to address HIV/AIDS. It includes two main components namely, prevention, and care and treatment. It emphasises the needs of the vulnerable including the youth, and the needs of orphans and vulnerable children for which national policies and strategies should be developed.

Legislation

The South African Constitution is central to promoting human rights in South Africa. Section 28 (3) of the Constitution gives protection to children’s rights whilst the Child Care Act along with the Children’s Act (described below) gives effect to these rights. According to the Constitution a child is any person under the age of 18 years. It makes no distinction between citizens and non-citizens and therefore can be taken to apply to all children in South Africa. It states that every child has the right to:

a. a name and a nationality, to family care or parental care, or to appropriate alternative care when removed from the family environment;

b. basic nutrition, shelter, basic health care services and social services;

c. be protected from maltreatment, neglect, abuse or degradation;

d. be protected from exploitative labour practices;

e. not be required or permitted to perform work or provide services that are inappropriate for a person of that child’s age, or place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;
Section 2: Legal and policy framework

f. not to be detained except as a measure of last resort, in which case, the child may be detained only for the shortest appropriate period of time, and has the right to be
   • kept separately from detained persons over the age of 18 years; and
   • treated in a manner, and kept in conditions, that take account of the child’s age;
g. to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
h. not to be used directly in armed conflict, and to be protected in times of armed conflict.

The Constitution also states that a child’s best interests are of paramount importance in every matter concerning the child.

The Children’s Act was written in 2005. On 1 July 2007, 43 sections of the Act were promulgated and are now in operation. The 2007 Act as well as the remaining sections of the 2005 Act are still not in operation. The Act aims to promote and preserve families and give effect to the constitutional rights of children. It sets the standard for the principle of “best interests of the child”. It sets out parental responsibilities and rights. Furthermore it mandates every Magistrate’s Court to become a Children’s Court and outlines their jurisdiction. The Act emphasises the rights of the child to participate in decisions affecting him/her. The Act requires that a register be kept of a) details of children who are abused or neglected and b) people deemed unfit to work with children. The Act goes on to define a “child in need of care” and this definition includes those who have been orphaned or abandoned. The Act makes special mention of child victims of trafficking and states that they may not be returned to their country of origin without consideration of the care arrangements in place for the child, the safety of the child and their risk of being trafficked again.

Most notable is that the references to migrant children, which were part of the draft bill, were removed from the final draft of the Children’s Act. Whilst the Department of Social Development argued that this was because it was not necessary to specifically identify migrant children, whether this limits or expands access to rights for migrant children remains to be seen. For example, in an address at the conference ‘Getting South Africa Ready to Implement the Children’s Act,’ Minister of Social Development, Zola Skweyiya, stated:

“Let me remind you all that Section 1 of the Children’s Act defines a child as a person under the age of 18 years. It does not add any additional requirements such as South African citizenship or that the child had to be born in South Africa. This means that foreign children are offered the same protective measures in terms of this legislation whilst they are in South Africa. Foreign children may be placed in temporary safe care and Children’s Court enquiries may be opened in order to determine whether the child is in need of care and protection. If the Court finds a foreign child to be in need of care and protection the Court will have the same options to order the future care situation of the child. This means that foreign children may be admitted to Child and Youth Care Centres or be placed in foster care in order to serve their best interests” (27 May 2008).
In spite of this, there is concern that, as has been the case with health care provision, the failure to specifically mention the rights of migrant children may mean there is confusion among service providers.

The Refugees Act states that refugees are entitled to the same health care and basic education as nationals. Most important is section 32 which states that any child who appears to qualify for refugee status and is in circumstances suggesting he or she qualifies as a child in need of care under the Child Care Act must be brought before the Children’s Court who may order them to be assisted in applying for asylum. Section 33 provides that a person who qualifies for asylum under the Refugees Act must assist any dependents to apply, or apply on their behalf. Significantly, the South African Refugees Act recognises the Organisation of African Unity (OAU) definition of a refugee which includes a person who has fled their country due to “events seriously disturbing the public order” and specifies that no person can be rejected at the frontier but must be allowed to proceed to a refugee reception office. Also significant is the emphasis on gender in the Act. Both gender and sexual orientation are specifically mentioned as grounds for applying for asylum and the proposed amendments to the Refugees Act further proposes adding gender as a social group. This makes it the most gender progressive Refugees Act in the world.

The Immigration Act states that a person may only enter the country with a valid passport and the appropriate temporary residence permit. For people identified as illegal foreigners, it outlines the procedures for arrest and deportation. One such form of temporary residence permit is if a citizen wishes their foreign immediate family member to join them. For children of working age, the corporate visa system is significant. It allows an employer to employ a group of foreigners under certain conditions. One such condition is that they are not employed for wages lower than a South African would be. It also allows for part of the foreigner’s salary to be remitted to their country of origin. A child of a citizen or permanent resident can be issued a permanent resident permit. People facing deportation must be given written notice of the intention to deport them and given 20 days to appeal the decision. The Director General then has 10 days to reject, modify or uphold the decision. The Act states that no person is allowed to employ an illegal foreigner.

The Citizenship Act states that a person can obtain citizenship by descent, birth or naturalisation. A child born in South Africa is only a citizen if born to South African parents. Importantly, a child is not eligible for such citizenship if the child’s parents entered the country illegally. A person born in South Africa is a South African citizen if they are adopted by South African citizens or has no other nationality or right to that nationality. A person is a citizen by descent if one of their parents is South African and they register the birth of the child in terms of the Act. The same applies for an adopted child. A child cannot be a citizen by naturalisation directly, but their parents can, after residing legally in the country for a period of five years. The child would then be awarded the same status as their parents. The spouse of a citizen by naturalisation is entitled to the same status. The Minister is entitled to issue, at his/her discretion, a certificate of citizenship if there is doubt as to the person’s citizenship.

The Births and Deaths Registration Act makes it compulsory to report births and deaths within the Republic. It is a criminal offence not to do so.
The Promotion of Administrative Justice Act requires that any action taken by a public official that negatively affects a person must be done in a transparent way and give the person an opportunity to make an input regarding the decision. Any final notice must give a clear statement of the decision, give full and written description of the evidence they used to make the decision and outline the rights that they have for appeal, to whom an appeal should be sent and the time allocated to appeal. This is important when assessing the treatment given to foreigners in terms of the laws outlined so far.

The Basic Conditions of Employment Act states that a child under the age of 15 may not be employed nor may anyone employ a child who is below the minimum school leaving age. Similarly, no one may employ a child in work inappropriate to their age or work that risks their education, physical and mental wellbeing, spiritual or moral or social development. The burden of proof lies with the employer if there is no evidence of the age of the child. The Act also prohibits all forms of forced labour. It creates for labour inspectors to monitor compliance with the Act. They can inspect places of employment and issue compliance orders. It also creates labour courts to hear cases connected to the Act. An important recent decision by the Commission for Conciliation, Mediation and Arbitration (CCMA) found that the conditions of work must still comply with this Act even if the employee was an undocumented migrant. On 7 April, 2008, the Johannesburg Labour Court ruled that undocumented foreign nationals have the same labour rights as South African employees. This is important, particularly for unaccompanied migrants who are likely to work and have no documents, as will be described below.

The South African Social Assistance Act specifies that social assistance is available to South African citizens. However, in October 2006, in response to a case brought by Lawyers for Human Rights in which refugees claimed the right to disability grants, the Department of Social Development filed a Social Assistance plan for refugees in which they committed to providing refugees access to disability grants by the middle of 2008. To date this has not been implemented. Furthermore, migrants who are not refugees do not have access to social assistance grants. In terms of the Act, grants are given for children under the age of 14 years to their primary caregivers, or to the adult upon whom the child is dependent, or to the foster parent of the child provided the child is a child in need of care. The Social Relief of Distress grant exists and there has been a significant lobby for this to be used to provide short term relief to migrants and asylum seekers. However, this has yet to happen.

The South African Schools Act requires the Minister to set in the Government Gazette the age for compulsory school attendance. It states that a public school must admit a child without unfairly discriminating in any way. This includes learners unable to pay fees. They may not require any admission test or require learners to subscribe to the mission statement of the school. The Act also prohibits corporal punishment. The Act allows for the creation of a school governing body made up of educators, learners, parents, experts and representatives of organisations for learners with special needs or disabilities.
Strategic plans and frameworks

The HIV & AIDS and STI Strategic Plan aims to reduce the rate of new infections by 50% by 2011. The key strategies for this include poverty reduction, empowerment, women’s rights and human rights, reducing gender based violence, creating an enabling environment for testing, education and increasing social cohesion. The policy puts a focus on young women, communication between parents and children and increased prevention programmes for higher risk populations. It also focuses on addressing the special needs of pregnant women and children.

The policy mentions migration as a risk factor for increased HIV prevalence. The emphasis is on migration as a risk factor for increasing the spread of HIV/AIDS and migrants are identified as a high risk group. However, there is a great deal of inconsistency about which migrant groups are considered to be at risk and why. For example, it refers at some points to labour migrants as a high risk group because they are likely to have more sexual partners. It later states that cross border migration increases the vulnerability of the migrant and those in their sending and receiving country. The plan then goes on to mention refugees as having higher risk due to the disruption of health care services, lack of knowledge about South African services, barriers such as language, and xenophobia. Nevertheless, in the section entitled “Increase roll out of prevention programmes for higher risk populations” migrants are no longer included in the list of vulnerable groups and the plan instead mentions men who have sex with men, lesbians, sex workers and their clients.

Importantly the plan mentions that children lack access to treatment and care as a priority for intervention, primarily because of the lack of youth friendly services. It identifies protecting and respecting children as a key principle underpinning the National Strategic Plan (for HIV/AIDS) (NSP). It also emphasises equality and non-discrimination against marginalised groups and specifically mentions “orphans, refugees, asylum seekers, foreign migrants...” (p.56). The section on prevention targets emphasises adolescents and the section on treatment, care and support emphasises orphans and vulnerable children and youth headed households. The plan also emphasises preventing school dropout with specific programmes for out of school youth, child headed households and youth friendly health care services. Monitoring of the national plan of action for Orphans and Vulnerable Children (OVCs) is included as is the need to track grants and social services to OVCs. Examples of suggested interventions that impact on children include exemption from school fees, exemption from health fees, child support grants and birth registration. The plan emphasises the need for OVCs to access documents and the implementation of local level services for OVCs and their access to a community caregiver. The NSP emphasises that Human Rights and access to justice are at the heart of the framework.

One of the main concerns with the plan is that the language used to refer to migrant groups is inconsistent, referring sometimes to internal migrants, sometimes to refugees, sometimes to refugees and asylum seekers and sometimes to all migrants. As will be discussed, this lack of clarity about which migrants have been entitled to which health services is an issue that has pervaded health care delivery to migrants.
National framework for orphans and other children made vulnerable by HIV and AIDS in South Africa is provided for by the HIV & AIDS and STI Strategic Plan. It identifies six key strategies for responding to the needs of such children namely:

- strengthening the capacity of families to care for children;
- strengthening community based responses for the care, support and protection of OVCs;
- Ensure legislation and policy is in place to protect OVCs;
- Ensure access to essential services;
- Raise awareness and advocate for a supportive environment for OVCs;
- Engage civil society and business to play an active role in the plight of OVCs.

The policy framework defines OVCs and creates for a coordinating structure to promote coordination among stakeholders, share information, promote collaboration among stakeholders and to mobilise resources for work with OVCs. The framework makes no specific mention of migrant children and can be taken to refer to all children living in South Africa.

The National Action Plan on OVCs identifies strategic priorities for addressing the needs of OVCs. They include:

- strengthening the capacity of families to protect and care for orphans and vulnerable children;
- mobilising community based responses;
- aligning policy and legislation and putting programmes in place;
- providing access to essential services;
- raising awareness to provide a supportive environment for OVCs; and
- engaging civil society and business to support OVCs.

There is an emphasis on the need for coordination among government departments and the plan proposes a National Action Committee for children affected by HIV/AIDS as well as provincial and district committees for children affected by HIV/AIDS. The action plan emphasises the need for resources to be made available for OVCs. Proposed activities are comprehensive and include programmes on food security, psycho-social needs, the specific needs of child headed households, establishing a database of OVCs emphasising early detection of at risk children, challenging stigma and providing legal protection. The emphasis for delivery is clearly placed with the Department of Social Development and the National Action Committee for Children Affected by HIV/AIDS (NACCA) but there is a strong emphasis on intergovernmental coordination particularly with the Department of Education and Department of Health and Department of Agriculture.

There are also two significant draft documents namely the draft Policy Framework and Strategic Plan on the Prevention and Management of Child Abuse, Neglect and Exploitation, each of which, if passed, can be used to secure the rights of children.
Reflections on the policy framework for securing the rights of children

Since 1994 South Africa has signed and ratified many significant conventions and has conducted a process of law reform in keeping with these commitments. From the perspective of migrant children’s and families’ rights there are two primary areas of concern.

Firstly, there are contradictory approaches to dealing with migrants in the law. The Refugees Act is an extremely progressive piece of legislation emphasising human rights. However, very few children and families who migrate to South Africa fall under this Act. To date there have only been approximately 150 000 asylum applications in South Africa of which approximately 30 000 have been granted asylum. There are a vast many more children who migrate under the Immigration Act which is a far more repressive piece of legislation focused on the restriction, detention and deportation of undocumented migrants. The focus on the control of migration has had an important impact on the rights of children as will be discussed later in the report.

Beyond this, there has been confusion among service providers about the different categories of migrants and their rights. For example, there is inconsistent practice among hospitals about providing treatment. Although it is clear from the Refugees Act that refugees are entitled to treatment, this represents a group of only 30 000 people. There is less clarity about the rights of asylum seekers, those on work permits and undocumented migrants. There has been equal confusion over whether children without documents should be able to receive education, with many schools turning them away.

Furthermore, even where there is clarity, there has often been a failure of implementation. For example, the Provincial Department of Health recently issued a memo clarifying that a person did not have to be in possession of any documentation in order to be given antiretroviral treatment. However, the practice in some clinics has still been to deny access to migrants without documents.
Section 3: The situation of migrant children in South Africa

Introduction

This section provides a description of what we know about the impact of migration on children and child rights based on previous research. The main databases used for analysis are listed in the table below:

<table>
<thead>
<tr>
<th>Database</th>
<th>Research conducted by</th>
<th>Nature of analysis</th>
<th>Geographical location of research</th>
<th>Year</th>
<th>Study sample</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Unaccompanied Minors' Study</td>
<td>Forced Migration Studies Programme, University of the Witwatersrand</td>
<td>Secondary analysis of data</td>
<td>Musina, Komatipoort and Johannesburg</td>
<td>2007</td>
<td>Unaccompanied minors. Migrants. N=200</td>
</tr>
<tr>
<td>Census South Africa</td>
<td>Statistics South Africa</td>
<td>Secondary analysis of data</td>
<td>Nationwide</td>
<td>2001</td>
<td>10% sample of all residents in country</td>
</tr>
</tbody>
</table>

It is important to note that none of these studies was designed to specifically address the question of migrant children’s access to rights. Similarly, they draw on diverse methodologies and different sample sizes making comparisons across the studies difficult. The findings do nevertheless allow tentative descriptions of the situation of child migrants to be drawn and gaps in research identified. That there
are so few sources of information about child migrants speaks to the need for both further research and centralising systems for storing and collating information about child migrants.

**Family structure and migration dynamics**

Most of the information on the structure of migrant families is available from sources that were not initially studies of migration but which, through random sampling, captured migrants. In each case that has been included in this report, the sample of migrants was sufficiently large to make useful conclusions.

Using Census and triangulating with others we can expect foreign born migrants to make up about 2% (approximately 900 000) of South Africa’s population (Crush and Williams, 2001). Of these, only about 150 000 are asylum seekers or refugees, making the progressive provisions of the Refugees Act open to only a small minority of migrants. What is clear from the census data is that migrants are concentrated in particular areas: cities, border areas and mining or agricultural areas. This is depicted in the map below:

**Figure 1: Percentage distribution of migrants in South Africa**

![Percentage distribution of migrants in South Africa](image)

This concentration of migrants is equally stark within cities as the following map of Gauteng indicates: