The Children's Amendment Bills [B13 -2015] and [B14-2015]
Briefing for civil society

30 May 2015

Background

In November 2014 the Department of Social Development (DSD) gazetted two draft Children's Amendment Bills for comment [GN 1106 and GN 1105]. The draft bills were then considered by Cabinet and some changes were made. The bills [B13-2015 and [B14-2015] have now been tabled in Parliament for debate and passage and Parliament will soon call for submissions.

This brief is aimed at informing civil society about the contents of the two bills and raising some questions and concerns for consideration prior to the writing of submissions.

Children's Amendment Bill [B13-2015]

This bill amends provisions that fall within the legislative responsibility of national government. It will follow the procedure prescribed in s75 of the Constitution which means the National Assembly has a greater role to play in the decision-making process.

Definitions

1. Amendment of **section 1:**
   The tabled bill proposes to insert two new definitions to explain the terms "sexual offences" and "Constitution".

National Child Protection Register (NCPR)

2. Amendment of **section 120**:

   Section 120 (4): The Children's Act currently states a person must be "found" unsuitable to work with children if convicted of certain offences. "Found" implies that the court must rule on the inclusion of a person's name (section 120(3) allows for evidence to be presented either during the course of proceedings or at the end).

   The memorandum at the end of the bill states that the "Department experiences challenges in populating the NCPR because some courts fail to make a finding of unsuitability to work with children after convicting an offender".

   The gazetted draft bill proposed to change section 120(4) so that anyone convicted of violence against children would be "deemed to be" unsuitable to work with children. This has now been simplified in the tabled bill to read "deemed" (this is technical change to improve drafting). The intention of the amendment is to ensure that everyone convicted of one of the listed offences is added to the register automatically. The only exception is if the offender was a child at the time of the offence.

Section 120(4)(a) of the Children's Act lists the offences that would trigger an entry on the NCPR these are currently limited to murder, attempted murder, rape, indecent assault or assault with intent to do grievous bodily harm with regard to a child. The gazetted draft bill expanded the list to cover all sexual offences. The tabled bill goes further and covers all sexual offences; all violent crimes against children; all attempts to commit violence against a child and possession of child pornography.

Section 120 (4A): New provisions inserted in the tabled bill: This amendment is aimed at allowing child offenders to make representations and gives discretion to the court to add a child offender's name to the register, where the decision is based on the child offender's best interests and the prosecution has shown that it is necessary to protect other children. This amendment is supposed to harmonise the Children's Act with Constitutional Court's judgment in the *J case* and amendments to the Sexual Offences Act Amendment Bill (SOAAB).

Civil society organisations have responded positively to similar amendments to the Sexual Offences Act, however, they also lobbied hard for certain amendments. The Portfolio Committee on Justice passed the SOAAB with amendments that put the onus on the prosecutor to ask the court to include a child offenders name on the register rather than relying on the Act. As the amendments to the Sexual Offences Act are still in progress, it's important that s120 (4A) is aligned with the final version of the SOAAB.

These sections mirror what was tabled in the draft.

Section 120 (5) is being reworded to ensure the automatic inclusion on the NCPR of anyone convicted of any of the offences listed in section 120(4)(a) in the five years prior to the commencement of the Children's Act. The Act commenced in 2010 so five years before that would include convictions dating back to 2005.

Possible problems with this amendment:
(a) There is no exception made for offenders who were children at the time of the offence.
(b)The SAPS criminal records do not list the age of the victim, therefore, it may not be possible to identify child offenders from electronic records. The cost of searching the records manually has been estimated and runs into billions (comment from DoJCS official at the Feb NCCPF).
(c) People convicted before the section commenced and added to the NCPR retrospectively will not have an opportunity to object to the inclusion of their name on the NCPR, as there is no obligation on the department to notify the offender. The Sexual Offences Act (SOA) states that where someone is added to the National Register of Sex Offenders (NRSO) they must be informed by the authority or person that is sending their name to the Registrar of the NSRO. The Children's Act should state something similar.

3. Amendment of **section 122 (1A):**
Insertion of a new provision to ensure that the National Police Commissioner sends names for inclusion in the NCPR. In the tabled bill this provision is included in section 122, instead of in 120(7) as proposed in the gazette draft bill. This is more logical as section 122 is entitled "Findings to be reported to the Director-General".

4. Amendment of **section 128(1):**
Insertion of a new provision that allows child offenders to apply to have their names removed from the NCPR.

Foster care

5. Amendment of section **150(1)(a):**

Change to the definition of child in need of care and protection in relation to abandoned and orphaned children.

The Children's Act states in s150(1)(a) that not all orphans are in need of state care and protection, only those "without visible means of support". The Act provides that a court can declare a child to be in need of care and protection if the child "*has been abandoned or orphaned* ***and is without visible means of support****".*

The words "visible means of support" were interpreted in two High Court judgments to essentially amount to a means test for the Foster Child Grant (FCG) to be applied by magistrates.

The draft gazette bill proposed to remove the words "is without visible means of support" and insert a new phrase using words taken from the High Court judgments:

> (a) *has been abandoned or orphaned and* ***does not have the ability to support himself or herself and such inability is readily evident, obvious or apparent;***

The tabled bill changes the wording to:

> (a) *has been abandoned or orphaned and* ***does not ostensibly have the ability to support himself or herself;***

The High Court's interpretation of s150(1)(a) was arguably necessary to protect the best interests of the three children before the court due to the alternative social grant, the Child Support Grant (CSG), being so low in value. However the interpretation is not systemically implementable. The number of orphans living in poverty with relatives and in need of a social grant far exceeds the capacity of the social workers and courts to process them through the foster care system. It has taken over 10 years to reach under 500 000 orphans and over the past two years the numbers reached have been decreasing, not increasing. There are a further 1 million orphans in need. Civil society has been calling for a kinship grant or "extended (larger) CSG" for relatives caring for orphans because it is clear that the foster care system will not reach the majority of orphans in need and all efforts to try and enable it to do so are diverting much needed resources away from abused and neglected children.

The department has drafted and passed a policy to amend the Social Assistance Act so as to create an Extended (higher value) CSG for relatives caring for orphans. The department also has a draft amendment to s150(1)(a) that would complement the new Extended CSG proposal. It is therefore surprising that the department proposes to amend s150(1)(a) in a way that is intended to entrench the use of the FCG as grant of choice for orphans in the care of relatives. This will make it difficult for the department to introduce its proposed Extended CSG which is aimed at addressing the challenges faced by orphans attempting to obtain the FCG.

A further concern is that the amendment is likely to confuse matters further as the wording is unclear and vague. And imposing a means test on the child as a test for entering foster care will

have the effect of excluding orphans who have a small inheritance/pension from being able to be placed in alternative care.

If a means test is to be imposed on the FCG it should be contained in the Social Assistance Act and its regulations and administered by SASSA according to prescribed formulae. Having a means test at the placement stage without specifying a formula will result in each magistrate creating their own means test which will result in inequities in access to the FCG across the country. Furthermore, having a means test at the placement stage confuses the need for "care" with the need for "financial support". A child with an inheritance may not need financial support, but they may very well still need an adult to "care" for them.

This amendment is very controversial. For a detailed breakdown of the crisis in the foster care system, see Civil Society Briefing on Foster Care May 2015.

Review of removal to temporary safe care

6. New provision **section 152A** – this new clause responds to the ConCourt judgment in the *C case* (brought by the Centre for Child Law, University of Pretoria). It allows the court to reviewing an emergency removal to make a variety of orders to ensure the best care and protection for the child. The tabled bill is similar to the gazetted bill except that, in cases where the child is returned to the care of the parents, the court has the discretion to order a designated social worker to investigate – in the gazetted draft bill there was no discretion and the court had to order an investigation.

7. Amendment to **section 155**: consequential amendment, same as gazetted draft bill.

Adoptions

8. Amendments to **section 159** – (gazetted in Children's Second Amendment Bill retagged).
    (a) Stops adoption orders lapsing after 2 years.
    (b) Technical amendment to improve legal drafting.

9. Amendments to **section 230** – new amendment inserted in the bill presented to Cabinet. Not gazetted but discussed during the consultations on the forthcoming third amendment bill. The amendment extends the definition of adoptable children to include stepchildren, and children whose parents consent to an adoption.

10. Amendments to **section 242** – new amendment inserted in the bill presented to Cabinet. Not gazetted but discussed in consultations on the third amendment bill. Allows the spouse or life partner of a biological parent to adopt their partner's children, without the biological parent losing his or her parental responsibilities and rights.

11. Consequential amendment to **table of contents.**

12. **Short title**.

The Children's Amendment Bill [B14 2015]

Definitions

1. Amendment of **section 1**: Definitions

"Adoption social worker" – the amendment will allow government social workers to provide adoption services.

There are minor changes to the definition from the gazette bill – the definition in the tabled bill now applies to social workers on a "part-time" or "contract" basis and not to social workers employed on a "casual" basis.

At the NCCPF in February 2015, government officials argued that this reform is necessary to expand the pool of professionals that can render adoption services and to increase demand by reducing costs. They argued that government services are provided for free, whereas private agencies charge fees (designated child protection organisations typically do not charge fees for adoptions). The first concern raised by civil society representatives present at the NCCPF was that the government should not be permitted to accredit and provide the service.

A further concern is that the standards appear to be less for government social workers and the definition would appear to allow any government social worker to provide adoption services. Before social workers in private practice can apply for accreditation to offer adoption services they must have registered this speciality with the SACSSP. As it stands there is no explicit requirement for government social workers to have the specialisation. The Social Service Professions Act recognises adoption as a social work speciality and, following widespread consultation on the Social Service Professions Policy, there are no proposals to change this. Therefore, the two laws seem to be contradictory.

This definition – if passed – could mean that children and parents, both biological and adoptive, served by government social workers will receive a less specialised and arguably less expert service. This is contrary to the equality principle enshrined in the Constitution and Children's Act.

Other new definitions ensure that young people in any form of education (school, FET, HE) are able to stay in alternative care, including foster care, until they turn 21. These definitions are the same as gazetted bill.

Automatic review of removals

Amendments follow from the *C case* brought to the ConCourt by the Centre for Child Law, University of Pretoria. Ensures that parents and children are heard by the court within a few days of the removal of a child to temporary safe care. This is an essential part of weighing up the best interests of the child and determining who should care for the child whilst a designated social worker investigates the children's circumstances.

2. Amendment of **section 151** – published for comment in the Children's Amendment Bill, retagged now in Children's Second Amendment Bill.

a. Amendment of **section 151(2)** – gives the court options including issuing an interim order i.e. a short-term order that stays in place until a full children's court inquiry can be conducted. following an investigation by the designated social worker. No change from gazetted bill.

b. Insertion of new **section 151(2A)** – reworded. The Act allows anyone to remove a child with a court order; this new version of the clause ensures that the court refers the case to a designated social worker who must then attend the review hearing. S151(2A)(b) still states that

the child should be present at the hearing and where reasonably possible the parents or care-giver.

3. Amendment of **section 152(2)** – *slightly amended from gazetted bill, minor changes to improve drafting not substantial.* Clarifies that the designated social worker must report the removal to the provincial Department of Social Development within 24 hours, and bring the child and parents to court if possible on the next court day.

4. Amendment of section 152(3)(b) – *new sub-section not in gazetted bill.* Clarifies the responsibilities of both the police and the designated social worker after a police officer has removed a child. The police officer must refer the case to a designated social worker before the end of the first court day following the removal. It is then the responsibility of the designated social worker to ensure the matter goes back to court for review, that the child and parents attend the review hearing, where possible, and starts an investigation.

Transfer of children in alternative care

These amendments clarify that the provincial Head of Social Development has the power to transfer children in alternative care, and protects the right of the child to have decisions reviewed by a court and allows for young people to stay in alternative care until 21.

5. Amendment of **section 171** – these sections are different to the gazetted bill. Most of the amendments are technical and simply clarify the Children's Act. The term "transfer in writing" has been used to ensure consistency.
   a. Amendment of **section 171(1):**
   The revised section is the same as the gazetted bill save for the fact that the term "transfer in writing" has been used to ensure consistency.
   b. Insertion of new subsection 171 (1A): this slight change in wording to ensure consistency.
   c. New amendment to **section 171(3)**:

   (a) Only courts can issue orders, the provincial HSD can issue notices the first change rectifies this error. The second change adds alternative carers to the list of people who should comply with the notice, recognizing that children may be transferred to another foster parent for example.

   (b) Compels the designated social worker to bring the case before the children's court where the person caring for the child does not comply with the notice issued by the HSD.

   Not in the gazetted bill.

   d. New amendment to **section 171(4)**:
   To ensure that the HSD reads the report by the designated social worker before transferring the child and to ensure that the designated social worker consult the list of persons before writing his or her report.

   Not in the gazetted bill.

   e. New amendment to **sections 171(4)(c) and (d)**:
   The insertion of alternative care into the placement options ensures that all possible parties in the transfer process are consulted.

Not in the gazetted bill.

f. Amendment to **section 171(5)**:
The addition of "or a person referred to in section 176(2)" allows the HSD to transfer young people over the age of 18 between different forms of alternative care.

This version of the bill replaces the term "secure care" with the term "more restrictive form of alternative care". This new term is more expansive and ensures that where old terminology of schools of industry etc. are still in use the same protective measures are in place during the transfer. New amendments clarify that the transfer must not be prejudicial to children in the new child and youth care centre or foster family or other form of alternative care.

g. New amendment to **section 171(6)**:
Change in the wording to ensure consistency.

Not in the gazetted bill.

h. New amendment to **section 171(6)**:
Addition of "foster care" to ensure clarity.

Not in the gazetted bill.

Application to stay in alternative care beyond 18 years

6. Amendment of **section 176 (2)** application
   a. New amendment to section 176(2) allows someone other than the child, e.g. the head of a child and youth care centre, to apply for permission for the child to stay in alternative care beyond 18 years, if the young person will remain in education. The new changes also allow for the child to stay in any alternative care not just the facility or family where they have been. Under the Children's Act officials do not have the power to transfer a young person in alternative care (including foster care) to another family or facility once they turned 18, even if they were completing their education and entitled to remain in care. *Not in gazetted bill.*
   b. Amendment to section 176(2)(b) clarifies that any education includes schooling, further education and higher education and training includes vocational training. *Minor change to the gazetted bill.*
   c. Insertion of new sub-section 176(3) that sets-out the procedure for making an application for a young person to remain in alternative care beyond 18 and allows for late application. *Not in gazetted bill.*

Foster care

7. Amendment of **section 186(1):** the amendments are not substantial – these were not included in the gazetted bill for comment. The changes have no impact. *Not in gazetted bill.*

The gazetted bill included an amendment to section 186(2); the first amendment was proposed in order to encourage magistrates to place children in foster care with relatives for longer periods.

8. Short title date changed.

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