

FOREIGN CHILDREN

Position Paper on the draft Children's Amendment Bill

Proposed amendments to s8(4) that will affect the rights of foreign children

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Endorsed by: Children's Institute UCT and Lawyers for Human Rights

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On 29 October, the Minister of Social Development published the draft Children's Amendment Bill for comment. Submissions are due by 29 November 2018. We are concerned that one of the draft amendments will negatively affect the rights of foreign children to be protected from abuse. This position paper explains our concerns. If you agree, please include these concerns in your own organisation's submission. The more submissions the Department receives, the more likely they may change the amendment.

Section 8: Application

The bill proposes to limit the applicability of the Children's Act, by inserting a new subsection (4) into section 8 of the Act:

'This Act applies to all children who are citizens of the Republic, and unaccompanied and separated migrant children'

This would limit the applicability of the Children's Act to certain types of children: citizen children as well as two groups of non-national children (separated migrant children and unaccompanied migrant children). Other children, such as accompanied refugee and asylum seeker children, children who are the holders of visas and permits (such as permanent residence permits or study permits) issued to them in terms of the Immigration Act 13 of 2002; and children who are here irregularly and are accompanied by an adult, are impliedly excluded from the protective ambit of the Children's Act. For the sake of convenience these children shall be referred to as the "excluded children" in this position paper.

1. The restriction of the Children's Act is **not** recommended.

2. It violates a number of the excluded children's constitutional rights. The restriction also fails to honour South Africa's international obligations under the UNCRC, the ACRWC and the 1951 Convention Relating to the Status of Refugees ("the UN Convention").
3. Children are entitled to the rights contained in the Constitution, with the exception of the right to vote and to stand for public office. The rights which children are entitled to include, amongst others, the rights to dignity, equality, life, freedom and security of the person, property, housing, health care services, education, sufficient food and water, social security, just administrative action, access to courts and the protections afforded to arrested, detained and accused persons. In addition to the rights listed above, in recognition of children's vulnerability, children are entitled to a range of rights that are contained in section 28 of the Constitution.
4. Limiting the application of the Children's Act in the manner suggested would have the effect of denying the excluded children many of the rights listed above. The suggested amendment is therefore unconstitutional and unlawful. Examples of how the restriction of the applicability of the Children's Act violates the excluded children's rights follow. The examples also demonstrate the impractical nature of the proposed amendment.

Example 1: child abuse

5. An undocumented Lesotho child, Mika (9 years old), is abused by her undocumented Lesotho parents. They regularly beat her with a metal pipe and sell her to men for sex. With the help of her school teacher, she approaches the children's court in the area in which she habitually resides. Based on her evidence, the presiding officer of the children's court orders a social worker to complete an investigation in terms of section 155(2) of the Children's Act. The social worker finds that Mika is in need of care and protection in terms of section 150 of the Children's Act. As a result of this finding, the presiding officer places her in foster care in terms of section 156(1)(e)(i) of the Children's Act.
6. If the applicability of the Children's Act were to be limited so as to exclude Mika in the above example, then various of her constitutional rights would be limited in the following way (the same holds true for all the other excluded children):

First, Mika's constitutional right to access a court would be limited, because the envisaged amendment would have the result that she would not be able to approach a children's court in terms of section 151(1) of the Children's Act to report the abuse.

Second, Mika's constitutional right to appropriate alternative care when removed from the family environment would be limited. This is because the envisaged amendment would mean that she (and the other excluded children) are shut out from the procedures in the Children's Act meant to assist children in need of care and protection.

Third, Mika's constitutional right to social services would be limited. This is because the proposed amendment would restrict the services that social workers offer to abused children in terms of, at the very least, section 155(2) of the Children's Act.

Fourth, the envisaged amendments would violate Mika's right to be protected from maltreatment, abuse and neglect. This is because the proposed amendment would restrict the services under the Children's Act which are designed to speedily assist abused children, and other children in need of care and protection. Without access to these services, there would be no mechanisms in place to ensure that Mika is immediately removed from her abusive parent's care, and placed into safe and appropriate alternative care. The physical and sexual abuse of Mika would therefore continue.

Lastly, all of the above would amount to a violation of her rights in terms of 28(2) of the Constitution.

Example 2: Parental rights and responsibilities

7. Esther (3 years old) and her parents are from Ghana. They live in South Africa as permanent residents. Her parents have never been married to each other. Esther was born in South Africa and was issued with an abridged birth certificate in terms of the Births and Deaths Registrations Act 51 of 1992. This means that only Esther's mother's name appears on the birth certificate. However, before Esther's parents could apply for an unabridged birth certificate, Esther's mother passed away. After her death, Esther's father tried to apply for the unabridged birth certificate himself, but was turned away, as the insertion of an unmarried father's details onto a birth certificate requires the mother's consent. The Department of Home Affairs advised Esther's father to obtain

confirmation of his parental rights and responsibilities from the children's court, after which they would issue Esther's unabridged birth certificate with his information on it.

8. If the applicability of the Children's Act were to be limited so as to exclude Esther in the above example, then various of her constitutional rights would be limited (and the same holds true for all the other excluded children):

First, the absence of confirmation of an unmarried father's parental rights and responsibilities can have knock-on effects for Esther. The CCL has assisted a number of unmarried fathers in their attempts to exercise parental care without confirmation of their parental rights and responsibilities. Their inability to do so without that confirmation is in reality seriously hampered. Unmarried fathers are frequently prevented from registering their children for school, from applying for grants for their children to the extent that their children qualify for one, and from applying for their children's birth certificates (or for amendments to their birth certificates). Should Esther's father face any of these difficulties, Esther's constitutional rights will be limited, including her right to a basic education, her right to social security and her right to a name and nationality at birth.

Second, Esther's constitutional right to parental care would be limited. This is because, as demonstrated above, her father would face practical barriers in effectively exercising parental care without an order from the children's court confirming that he is the holder of parental rights and responsibilities. In *S v M*¹ the Constitutional Court stated that "section 28 requires the law to make the best possible efforts to avoid, where possible, any breakdown of family life *or parental care that may place children at increased risk* (our emphasis)". In addition to ensuring that children are not placed at increased, the right to parental care encompasses that care of a certain quality be given to children. The proposed amendment will mean that Esther's father will not be able to give this to her.

Example 3: Adoption

9. Tarisai (4 years old) is a Zimbabwean national who resides in South Africa with her Zimbabwean mother. She and her mother hold asylum seeker permits. Tarisai's mother, to give Tarisai up for adoption to the family who she is employed by. Tarisai and her mother do not have any known family in Zimbabwe or elsewhere. The family approach a social worker

¹ 2008 (3) SA 232 CC.

who prepares all the necessary documentation. This includes the social worker's report required in terms of section 230(2) of the Children's Act, as well as the report from the Department of Social Development required in terms of section 239(1)(d) of the Children's Act. Both of the reports state that it is in Tarisai's best interests to be adopted by the potential adoptive parents. The matter is placed before a magistrate in the children's court and the adoption is granted.

10. If the applicability of the Children's Act were to be limited so as to exclude Tarisai in the above example, then her constitutional right to have her best interests considered of paramount importance would be limited. This is so, because despite it being in her best interests to be adopted, she would be barred from using the adoption procedures on account of her nationality.

Other submissions in relation to the proposed amendment

11. A blanket exclusion of the excluded children from the ambit of the Children's Act would not pass constitutional muster. That is so because a general prohibition such as the one envisaged by the amendment will inevitably include amongst those that it affects, children who require the services and regulation which the Children's Act has to offer, and which if they are unable to access, will constitute a material invasion of their constitutional rights. In this respect, the logic in *Teddy Bear Clinic*² carries over to the context of a statutory provision which affects foreign children: "the best-interests principle also applies in circumstances where a statutory provision is shown to be against the best interests of children in general, for whatever reason. As a matter of logic what is bad for all children will be bad for one child in a particular case". Accordingly, if there is evidence that excluding foreign children has a negative impact on them generally, then a court will be empowered to (and will likely not hesitate) to declare the statutory scheme unconstitutional ad contrary to the best interests of the child.³
12. Moreover, child law, which the Children's Act falls into or is part of, demands the individual consideration of a child's case. The Constitutional Court in *AD*⁴ stated that "[c]hild law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of

² 2014 (2) SA 168 (CC).

³ Ibid para 71.

⁴ *AD v DW* 2008(3) SA 183 (CC)

looking at and evaluating the specific circumstances of the case”. The Court went on to state that “[t]his means that each child must be looked at as an individual, not as an abstraction”. This is precisely what the blanket exclusion will prevent.

13. If the proposed amendment were to pass, it is invariable that the services which the Children’s Act offers, as well as the regulation it provides (such as governing the age of consent to medical procedures, governing access to contraceptives, and governing social, cultural and religious practices) would have to be replicated elsewhere, and largely under the same terms as those already provided for under the Children’s Act. This will require the use of scarce state resources where the justification for a replication is unclear.

14. In the end, for the amendment to ever be found to be constitutional, there must at least be:

14.1. a consideration of each of the services that the Children’s Act offers,

14.2. a purpose for seeking to limit the service to citizens, separated children and unaccompanied minors,

14.3. whether there are less restrictive means to achieve the purpose, and

14.4. whether it is in the best interests of the excluded children not to receive those services.

This exercise would have to be repeated for each service.

15. Further, consideration will also have to be given to what the Children’s Act regulates (for instance, as stated above, regulating the age of consent to medical procedures, regulating access to contraceptives, and regulating social, cultural and religious practices). For the proposed amendment to be found to be constitutional, justification for why the excluded children must go unregulated, or regulated under a different statute, would need to be presented.

16. There is no evidence that the exclusion services and regulation that the Children’s Act provides was considered in this manner,

We therefore intend to make a submission to the Department as follows:

Clause	Alternative proposal	Motivation
8(4)	'This Act applies to all children in South Africa, irrespective of nationality'	<p>In restricting the applicability of the Children's Act, the amendment excludes a number of foreign national children ("the excluded children"). The amendment thereby violates a number of the excluded children's constitutional rights. Such a restriction also fails to honour South Africa's international obligations under the UNCRC, the ACRWC and the 1951 Convention Relating to the Status of Refugees ("the UN Convention").</p> <p>A blanket exclusion of the excluded children from the ambit of the Children's Act would not pass constitutional muster. This is because a general prohibition such as the one envisaged by the amendment will inevitably include amongst those that it affects, children who require the services and regulation which the Children's Act has to offer, and which if they are unable to access, will constitute a material invasion of their constitutional rights (particularly where a purpose for the limitation, given its sweeping rather than specific nature, will not be capable of being established. So too will the extent of the limitation).</p> <p>Further, child law, which the Children's Act falls into or is part of, demands the individual consideration of a child's case. The Constitutional Court in <i>AD</i>⁵ stated that "[c]hild law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case". The Court went on to state that "[t]his means that each child must be looked at as an individual, not as an abstraction". This is precisely what the blanket exclusion will prevent.</p>

⁵ AD v DW 2008(3) SA 183 (CC)

		<p>If the proposed amendment were to pass, it is invariable that the services which the Children’s Act offers, as well as the regulation it provides (such as governing the age of consent to medical procedures, governing access to contraceptives, and governing social, cultural and religious practices) would have to be replicated elsewhere, and largely under the same terms as those already provided for under the Children’s Act. This will require the use of scarce state resources where the justification for limitation (and subsequent replication) is unclear.</p> <p>Very lastly, a restriction of the applicability of the Children’s Act would constitute a failure to meet our obligations under international law, including the UNCRC and the ACRWC, which does not differentiate between children in the manner suggested by the proposed amendment.</p> <p>Accordingly, the Children’s Act must remain applicable to all children, to ensure their protection and prevent the unnecessary duplication of legislation and resources in a segregated manner.</p>
6(2) (d)	Support	<p>We welcome an explicit reference to nationality in this clause so as to prevent discrimination against children based on their or their parent’s nationality.</p>

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