

ADOPTION

Position Paper on amendments in the draft Children's Amendment Bill related to

[s46(c) (A), 156(1)(e)(iii) & 239 (1) (d)]

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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. In this position paper we outline some concerns related to adoption. If you agree, please include these motivations in your own organisation's submission. The more submissions the Department receives, the more likely they may change the amendment.

Placement in temporary safe care with prospective adoptive parents pending adoption

During the 2011 consultations on the Children's Act there were numerous calls for a provision in section 46 that allows a children's court to place a child in temporary safe care with prospective adoptive parents pending adoption in cases where it would be appropriate, i.e.

- consent has already been given and 60 days have passed or
- the child is adoptable because the child is orphaned or abandoned.

This would complement section 156 that allows the placement of a child in temporary safe care pending adoption once the children's court enquiry concludes the child is adoptable.

A new section 46(cA) that permitted such an order was included in the July version of the Amendment Bill but removed from the Amendment Bill that has now been gazetted for comment. It is recommended that the section be included to read as follows:

(cA) an order, in the prescribed form, placing a child in temporary safe care pending an application for the adoption of such child, including with prospective adoptive parents, notwithstanding the provisions of section 167(2);

DSD raised objections to this clause on the basis that it will allow private social workers to place children without adequate safeguards. This objections is flawed as the placement must still first be approved by the children’s court. The children’s court must be satisfied that placement with prospective adoptive parents is appropriate. This will be in limited circumstances where it is easily verifiable that the child is adoptable, e.g. an abandoned child in respect of whom the investigation into the child’s circumstances has already been completed, or a child whose biological parents consented to the adoption and the 60 day period during which the parent may withdraw consent, has expired.

This prevents children from languishing in residential care in a CYCC instead of receiving parental care. This also prevents a situation where the child is placed in the care of the prospective adoptive parents by the CYCC on a leave of absence. This process is completely without court supervision or knowledge and the leave of absence has to be renewed every two weeks. There is no children’s court oversight that the child really is adoptable when CYCCs make use of the leave of absence procedure. It is preferable that an adoptable child is placed in the care of prospective adoptive parents under court supervision after the necessary investigation that the child is adoptable and the parents are suitable adoptive parents.

The new proposed section 46(cA) should be read with section 156(1)(e)(iii). Section 156(1)(e)(iii) relates to orders that the children’s court can make after it has found that a child is in need of care and protection. After such a finding, there are a range of options for alternative care of the child, one of which is adoption, in appropriate circumstances. Once a child has been found in need of care and protection and adoption is identified as a suitable alternative care placement, it is preferable that the child is placed in family care as soon as possible rather than languishing in a CYCC. We therefore recommend that section 156(1)(e)(iii) should be amended as follows:

- (e) if the child has no parent or care-giver or has a parent or care-giver but that person is unable or unsuitable to care for the child, that the child be placed in-
...
 - (iii) temporary safe care, pending an application for, and finalisation of, the adoption of the child, which placement may include placement with the prospective adoptive parents in appropriate circumstances;

Section 239 letter from HOD of DSD

Section 239(1)(d) of the Children's Act requires a letter of recommendation from the Head of Department of the provincial department of social development for the conclusion of an adoption. This requirement has caused long delays in adoptions due to DSD not producing the letter within a reasonable time period. To address this, the July version of the Children's Amendment Bill included a section that the letter may be waived if DSD doesn't answer within 30 days of a request for a letter.

The new section 239(1)(d) would read:

(d) be accompanied by a letter by the provincial head of social development **[recommending]** indicating compliance with the requirements in terms of this Act regarding the adoption of the child; Provided that such letter may be dispensed with if not furnished by such provincial head within 30 days of it being requested;

This amendment is in line with case law from the High Court stating that the requirement for a 239(1)(d) letter may be waived if there is an unreasonable delay.

The Amendment Bill that was gazetted for comment does not include this amendment, instead it allows DSD to file a report within 14 days from the date on which the letter was due indicating why the letter was not issued.

This does not resolve the delays experienced in getting these letters and the subsequent delay in concluding adoptions. In addition, there may be a further failure to deliver a reason for the late filing of the letter. Nor does the amendment comply with the current case law that the letter may be dispensed with due to unreasonable delay to deliver the letter.

The rationale for the s239 letter is sound and the purpose of allowing DSD to respond to a refusal to provide a letter is also justified. However, in order to avoid undue delay and harm to the child, there has to be a remedy in the event that the provincial head fails to provide the letter and fails to provide reasons, in order to prevent undue delay.

It is recommended that a combination of the two amendments be included:

239(1) (d) be accompanied by a letter by the provincial head of social development **[recommending]** indicating compliance with the requirements in terms of this Act regarding the adoption of the child;

(i) Provided that when the provincial head does not issue the letter within 30 days of it being requested, the provincial head must report the reason for such failure to the children's court within 14 days from the date on which the letter was due; and

(ii) If the provincial head fails to provide the report required in subsection (i), the letter may be dispensed with;