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CHILDREN'S BILL – WORKING GROUP
SUBMISSION TO THE DEPARTMENT OF SOCIAL DEVELOPMENT
PROTECTION OF FOREIGN CHILDREN

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This submission aims to discuss the need to protect foreign children found within South Africa in terms of South Africa's commitment to the United Nations Convention on the Rights of the Child and in terms of our commitment to protect all children in Section 28 of the South African Constitution. This submission identifies the various provisions within the Children's Bill that would have an impact on foreign children and comments on the gaps that have been created in terms of this bill.

Currently foreign children are given limited protection in a variety of forms and are often vulnerable to abuse and neglect. Although there is the Immigration Act, which outlines the rights of foreigners in South Africa, this legislation is silent on the treatment of children. One must then question whether the current Child Care Act should facilitate the care of these children based on the lack of directive from the Immigration Act. Should this be the case then it is very obvious from the implementation of the Child Care Act that there exist huge procedural gaps in the ability of organisations and government to ensure the protection and well-being of foreign children.

The Children's Bill is presenting South Africa with an opportunity to ensure the protection and well-being of these children through the creation of procedural mechanism and protections. For children found *in need of care* the government has an obligation to assist and monitor the children, keeping in mind the best interest of the child. Often for foreign children who are not refugees, this will be that they return to their country of origin. This Bill should incorporate the needs of returning these children in a humanitarian and child friendly system which will ensure the best interest of the child at all times.

The current draft of the Children's Bill only deals with refugees and undocumented migrants in two areas: foster care placements and trafficked children. In both cases the protection being suggested is haphazard and does not take into account the huge procedural gaps that challenge true access to protection for these children.

IDENTIFICATION

One of the largest challenges that social workers and immigration officers face today is identifying the various foreign children. Specifically, identifying children who would have a claim to refugee status thereby affording them the protection of the Refugees Act, is critical. There are often foreign children who have claims to refugee status but the social workers involved are not aware of the procedure and therefore treat the child as an illegal foreigner. Conversely there are situations where persons think that all foreign children are refugees and therefore assume the care of these children without consideration to the probability of returning the child to their families in their country of origin.

One of the permits available to persons wanting to enter the Republic is the Refugee permit. In terms of the Refugees Act, this permit is only to be given to persons who fulfil the requirements of acquiring refugee status. The Refugees Act defines a refugee as someone who is forced to flee his/her country as a result of a well founded fear of persecution or danger for reasons of race, religion, nationality, membership of a social group; or due to man-made disasters such as civil war, human rights violations on a massive scale and armed conflict.

Foreign children who do not fall under the criteria of refugees need to be dealt with in a comprehensive and planned manner, which includes liaising with their country of origin embassies and representatives. Although refugees cannot by virtue of their status appeal to their embassies for assistance, migrants who are in South Africa for reasons other than claiming refugee status have the luxury of appealing to their embassies. The Children's Bill should recognise the responsibilities that embassies have towards their nationals in this instance.

It is vital that the Children's Bill identifies the differences between these children and then directs persons to the Refugees Act with regard to the care and treatment of refugee children, and then foreign children to their relevant embassies or country of origin representatives.

Creation of a Central Authority

Currently there are few social workers that are able to identify these children and even fewer who know where to refer these children for assistance. There currently exists an office (International Social Services – ISS) within the Department of Social Development that is able, on a national policy level, to deal with these children. Unfortunately the office is made up of a small number of persons and has an extremely limited budget, which impedes their ability to intervene in these cases. A suggestion would be to create a statutory Central Authority within the Department of Social Development which would be equipped to deal with these children from identifying them to ensuring their passage through the Children's Courts, tracing their families and finally assisting in the return of the child should the need arise. This office would deal with all cases of foreign children, which would include inter-country adoptions, trafficking investigations, refugee children, tracing, and international abductions.

CHILDREN IN NEED OF CARE

There are many reported cases of foreign children found within South Africa who would fulfil the Child Care Act definition of a child in need of care. These children are, in terms of our Constitutional obligations, wards of the state and the imperative is on the government to ensure their protection and well-being.

Children's Court

Foreign children often struggle to be recognised as *children in need of care* due to obstacles which face them in accessing the Children's court. Their lack of documentation is a cause for concern for the procedural requirement of the court and often social workers and Children's Court officials are not certain of their jurisdiction with regards to the children. In the past this has resulted in the social workers leaving the children amongst adults with the Department of Home Affairs for deportation to their country of origin.

It is imperative that the circumstances of these children are investigated. Phenomena such as trafficking and *refoulement* are often overlooked when there is no investigation and the children can often be returned to dangerous and life threatening situations.

Protection

Refugee and asylum seekers children who are unaccompanied should be brought before the Children's Court magistrate in terms of the Refugees Act, which provides for provisions towards the formalisation of their status in respect of the asylum process and outlines the specific rights of refugees in South Africa. The children's court magistrate must facilitate the child's application to the Department of Home Affairs through the allocation of a formal guardian and ensure appropriate placement of the child.

TRACING

The Constitution states in Section 18 (1) (b) that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment. This right puts a responsibility on the government to find the parents of separated children and assess if it is in the best interest of the child to be returned to the parents. In the case of foreign children, this exercise of finding parents and family members is made so much more difficult by the need to cross international borders to trace the parents. The office of International Social Services is able to facilitate tracing through its international networks. There are also agencies such as the International Committee of the Red Cross and the UNHCR who are able to facilitate tracing.

BEST INTEREST OF THE CHILD

Status of children and their family

In the case of illegal foreign children, there remains the question of how to legalise the stay of the child in South Africa should the state believe that the necessary resources for the return of the child are not available? In terms of the Immigration Act, there is no provision for the legalisation of these children's stay in South Africa. To take this discrepancy further, one could argue that the duty of returning illegal foreigners, be they children or adults, to their country of origin falls under the jurisdiction of the Department of Home Affairs, thereby enabling the Department of Social Development to retract all responsibility of the child. This issue ignores the principle of the best interest of the child.

In cases where it is found not to be in the best interest of the child to return to their country of origin, there is again a vacuum in that there is no provision within the Immigration Act to provide these children with any type of status according to the criteria for temporary residence in South Africa, such as a *humanitarian visa* which countries such as Canada and England provide in these cases. A conflict of interest is then created with a Children's Court order coming into conflict with the Immigration Act.

In instances where children are found in need of care, but their parents are illegally in the country, by allowing the Department of Home Affairs to deport the parents and then

keeping the children in South Africa for reasons of their own protection and well-being also highlight a problem of giving a family member status in South Africa to remain and look after the children. This is a problem faced by persons who came to South Africa for economic reasons and are still unable to sustain their children in South Africa and would therefore have the children removed from their care.

Detention and deportation of children

Currently we have a situation of children being detained and deported with adults to their country of origin, a situation that is dangerous and not sustainable for the care of the child. On the basis of this argument we would like recommend the inclusion of established procedure for the return of children, which would in part be facilitated by the Department of Social Development to ensure the control of the procedure and the best interest of the child through a court order or directive.

By ensuring a formalised return, the court is able to make an informed decision on the reasons for the child's entry and status in the South Africa. The offices of International Social Services in the Department of Social Development are able to contact the country of origin and request assistance from the government social workers there, who in most cases would be able to arrange for care for the child in the country of origin. Currently children who are deported are merely left at the train station or border post and are soon looking for ways to return to South Africa.

FOSTER PLACEMENT

Currently in terms of the criteria of the Social Assistance Act, the foster care grant is the only grant available to non-citizens in South Africa. This limitation has proven problematic in that there are a fairly large percentage of the refugee community who are in need of assistance to care for their children. Where they are not able to access a Child Care Grant and are able to access a foster Care Grant, this calls into question the extent parents would go to ensure the care of their children. A current phenomenon is that refugee families are not able to look after their children in a material way and the children are therefore removed from the parents and put into a shelter or a foster family who are able to access grants to care for the children.

Determination of placement of children in foster care

In terms of Section 31(1) of the Constitution, every person belonging to a cultural, religious or linguistic community has the right to enjoy their culture, practise their religion and use their language. Children placed with foster parents with a different background from their own may be, albeit not intentionally, or directly, denied the right to enjoy their culture, or to practise their religion, or to use their language. This is specifically crucial when dealing with refugee children as in many cases they have been separated due to war and civil unrest and in principle would return to their country of origin when there is a stable environment for them to return to.

Problems arise especially with placing refugee children with refugee parents in that they do not fulfil the requirement for foster parents due to their financial situations. Most refugee informal foster parents depend on the income they receive from charity organisations. The general problems refugees face in South Africa with regards to social assistance, employment, documentation and xenophobia makes them a vulnerable and often indigent community.

While it is very obvious why welfare organisations maintain these standards for the selection of foster parents, this criteria is effectively excluding the poor and indigent parents. Refugee parents, although not financially secure, do provide refugee children with the crucial element of cultural and linguistic ties. It is never known when the parents may be found and the

children may return to their country of origin. Children who have been brought up in a South African community with no exposure to their culture will find it very difficult to adjust to their countries of origin and even to their parents if a long enough period of time has passed.

In most cases it has been argued that should the refugee parents be able to access the foster care grant they would then be able to fulfil the criteria as foster parents. This is a stance taken by some welfare organisations when dealing with indigent communities and child headed households in poor communities and has yet to be tested amongst the refugee communities. Foster Care Grants, as a means to an end, is a controversial issue amongst the Children's Courts, which prefer to view the grant as an assistance package to foster parents and not a basic requirement.

SPECIFIC PROVISIONS IN TERMS OF THE CHILDREN'S BILL

The following Section looks at the specific provisions within the Children's Bill, which will have an impact on the protection and care of foreign children. This section also analyses the various changes that the draft bill has undergone since the 19th June edition.

The final draft of the Children's Bill (4 August) has removed substantial sections included in the Children's Rights Chapter (3). With relevance to foreign children this includes the removal of

- Section 9 : Unfair discrimination
- Section 12 : Name, nationality and identity
- Section 13 : Family relationship
- Section 21 : Refugee and undocumented migrant children

The exclusion of these detailed sections dramatically waters down the rights and protection of foreign children and leaves them in the same category as that of the current Child Care Act, which is silent on these children. These will leave the protection of these children again to the South African Constitution which ensures these rights of unfair discrimination; name, nationality and identity; and family relationship.

The Bill does maintain the definition of an *undocumented migrant child* within the definition and this is because this category of children and refugee children are referred to in Section 184 – Determination of placement of children in foster care.

Refugee children are again referred to in Section 284 - Trafficked children found in Republic.

Beyond these two references there is a provision protecting children from removal from the Republic without the permission of the Children's Court or the parent/guardian of the child. This is an important protective step but is extremely broad.

Definitions

“undocumented migrant child” means a child who is unlawfully in the Republic after an illicit entry into the Republic by the child or the child's parents;

Comment:

This is seen as an unsuitable definition as it does not include children that are documented but in need of care, and excludes children who have arrived legally into the Republic but have overstayed their visas. This definition also excludes the idea of a child being brought illegally into a country by a 3rd party.

There is no reference to refugees or asylum seekers within the definitions. In order to ensure clarity around the

issue of refugees and asylum seekers it is suggested that the Children Bill include the definition of a refugee and an asylum seeker in terms of the South African Refugees Act and direct implementers to refer to these children in terms of the Refugees Act which contains provisions for the protection of refugee and asylum seeker children is found unaccompanied.

This submission recommends that to ensure the inclusive nature of this bill to the protection of all children that the definition of a child be extended to read “ a person under the age of 18 irrespective of nationality”.

CHAPTER 4: PARENTAL RESPONSIBILITIES AND RIGHTS

Certain applications regarded as inter-country adoptions

24. When application is made in terms of section **23** (1) by a non-South African citizen for the allocation of full parental responsibilities and rights in respect of a child or to act as guardian of a child, the application must be regarded to be an inter-country adoption for the purposes of the Hague Convention on Inter-country Adoption and Chapter **17** of this Act.

Comment:

Should a refugee decide to request guardianship over a refugee child in South Africa who would be the authority under which this process shall be taken forward? As refugees are not able to access the services of their country of origin by virtue of the nature of their asylum claim, it is unreasonable to expect the guardianship request to be handled in terms of an inter-country adoption, in which the country of origin would be involved in the process.

CHAPTER 10: CHILD IN NEED OF CARE AND PROTECTION

Part 1: Identification of child in need of care and protection

Definitional provision

150. A child is in need of care and protection if, at the time of referral in terms of section **47** or reporting in terms of section **105**, the child –

- (a) has been abandoned, orphaned or is without any visible means of support;
- (b) displays behaviour which cannot be controlled by the parent or care-giver;
- (c) lives or works on the streets or begs for a living;
- (d) is addicted to a dependence producing substance and is without any support to obtain treatment for such dependency;
- (e) has been exploited or lives in circumstances that expose the child to exploitation;
- (f) lives in or is exposed to circumstances which may seriously harm that child’s physical, mental or social well-being;
- (g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
- (h) is in a state of physical or mental neglect;
- (i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibility or a family member of the child, or by a person under whose control the child is; or
- (j) is subjected to exploitation

Comment:

This definition seems to exclude the previous Child Care Act criteria of children whose parents cannot be traced. By removing that as a criterion the Bill removes the onus on the social worker or relevant authority to trace the parents of the children.

There is a need for clarification with regards to the idea of “neglect” and “deliberate neglect” mentioned in Section 150 (I). The idea of “deliberate neglect is firstly not defined and secondly would translate to mean that the Bill is requiring the relevant authorities to prove “intent” in the process of neglect. Parents neglect

their children for reasons of poverty and due to circumstances beyond their control can not be seen as having the intention to neglect their children. On the basis of this argument the child who has been neglected due to poverty would not be considered a child in need of care, the Bill is excluding children who's needs are not being met due to poverty.

CHAPTER 8: PROTECTION OF CHILDREN

Part 4: Other protective measures

Unlawful removal or detention of children

- 137.** (1) No person may without lawful authority or reasonable grounds –
- (a) remove a child from the control of a person who has lawful control of the child; or
 - (b) detain a child with the result that the child is kept out of the control of a person entitled to lawful control of the child.
- (2) For the purposes of subsection (1) a person must be regarded as detaining a child if that person –
- (a) causes the child to be detained; or
 - (b) induces the child to remain with him or her or any other person.

Unlawful taking or sending of children out of Republic

- 138.** (1) No person may take or send a child out of the Republic –
- (a) in contravention of an order of a court prohibiting the removal of the child from the Republic; or
 - (b) without consent –
 - (i) obtained in terms of section 30 (5) from all persons holding parental responsibilities and rights in respect of that child; or
 - (ii) of a court.
- (2) For the purposes of subsection (1) a person must be regarded as –
- (a) taking a child out of the Republic if that person –
 - (i) causes the child to be taken, or in any way assists in taking the child, out of the Republic; or
 - (ii) causes or induces the child to accompany or to join him or her or any other person when departing from the Republic; or
 - (b) sending a child out of the Republic if that person causes the child to be sent, or in any way assists in sending the child, out of the Republic.

CHAPTER 12: CHILDREN IN ALTERNATIVE CARE

Definitional provision

- 167.** A child is in alternative care if the child has been placed –
- (a) in foster care;
 - (b) in court-ordered kinship care;
 - (c) in the care of a child and youth care centre following an order of a court in terms of this Act or the Criminal Procedure Act, 1977 (Act No. 51 of 1977); or
 - (d) in temporary safe care.

Children in alternative care prohibited from leaving the Republic

- 169.** (1) A child in alternative care may not leave the Republic without the prior written approval of the Director-General first being obtained.
- (2) In granting approval in terms on subsection (1), the Director-General may prescribe any terms and conditions to protect the best interest of the child in alternative care.

Comment:

The Children's Bill refers extensively to provisions protecting children from unauthorised departure, removal or abduction of a child from the republic. Section 138 refers to the need for a person to gain the consent of either the guardian or of the court for the purposes of taking a child out of the Republic. Section 138 (1)(a) refers to an order of court prohibiting the removal of the child from the Republic. Is one to assume that a Court will have to order that a child not be removed or that an order for a placement would be seen as not having the intention of removing the child? If this order is specifically for the child not to be removed from the Republic then when would this order be given and would this conflict with the Immigration Act, would the Immigration Courts be able to overrule this order?

Section 138 (2)(a) defines a person who takes a child out of the Republic. Would this definition include Immigration Officials or other government officials, who were removing the child for purposes of deportation in terms of the Immigration Act?

CHAPTER 13: FOSTER CARE AND CARE BY FAMILY MEMBERS

Determination of placement of children in foster care

184. (1) Before a children's court places a child in foster care by court order in terms of section 156, the court must consider a report by a designated social worker about –

- (a) the cultural, religious and linguistic background of the child; and
- (b) the availability of a suitable person with a similar background to that of the child who is willing and able to provide foster care or kinship care to the child.

(2) *A designated social worker must, in the case of a refugee or undocumented immigrant child, make inquiries with the United Nations High Commissioner for Refugees, a service agency working in a relevant refugee community or the relevant Government department to identify suitable persons who are willing and able to provide foster care or kinship care to the child.*

(3) A child may be placed in the foster care of a person from a different cultural, religious and linguistic background to that of the child, but only if –

- (a) there is an existing bond between that person and the child; or
- (b) a suitable and willing person with a similar background is not readily available to provide foster care or kinship care to the child.

Comment:

Section 184 (2) refers to refugees and undocumented migrants. By making it a requirement for social workers to make inquiries, will this in any way delay the investigations of the social worker should the identified agencies not be able to furnish or identify suitable persons for foster care. It should be noted that UNHCR does not in principle assist undocumented migrant children unless they have reason to believe that the children have a refugee claim. By making it a statutory obligation for UNHCR to assist is this not broadening their mandate without their consent? The provision should rather read that all foreign children should be reported to the relevant Government department namely ISS who would then be able to best identify the relevant agency to assist the children.

CHAPTER 19: TRAFFICKING OF CHILDREN

Purposes of this Chapter

280. The purposes of this Chapter are –

- (a) to give effect to the UN Protocol to Prevent Trafficking in Persons;
- (b) to give effect to certain bilateral or multilateral agreements relating to trafficking in children; and
- (c) generally to regulate trafficking in children

Trafficked children found in Republic

284. (1) Any trafficked child who appears to qualify for refugee status in terms of section 3 of the Refugees Act, 1998 (Act No. 130 of 1998) and who is found under circumstances which indicate

that he or she is a child in need of care and protection as contemplated in section 150 –

- (a) must immediately be brought before the Children’s Court for the district in which he or she was found in order to determine whether such child is a child in need of care and protection in accordance with the process set out in section 155; and
 - (b) may, pending such hearing, be placed in temporary safe care.
- (2) The Children’s Court may order that a child contemplated in subsection (1) be assisted in applying for asylum in terms of the Refugees Act, 1998 (Act No. 130 of 1998).

Comment:

By placing both trafficked children and refugees within the same category there is the threat of creating the perception that all refugees are trafficked children and/ or that trafficked children are all refugees. There are many cases of trafficked children not being refugees and thereby not being availed the protection of the Refugees Act, which leaves them open to abuse within the immigration system, which does not cater for children. This provision also excludes by definition all refugee children who are not trafficked from being referred to the Children’s Court in terms of the Refugees Act.

Recommended amendments to the Bill

The bill should include a separate section within the Children Rights Chapter which identifies foreign children. In this sub section of foreign children the bill needs to explicitly state that these children are protected in terms of this act. Further this section needs to distinguish between children who have refugee claims or status and those who do not.

Children with refugee claims and status should be referred directly to the Refugees Act for the allocation of a guardian and the facilitation of a asylum application with the Department of Home Affairs. The status and entitlement of certain rights is assured in terms of the Refugees Act, the UN Convention on the Status of Refugees and the OAU Convention on Specific Aspects of Refugee Problems in Africa.

Children who do not have refugee claims should in terms of the interpretation of the Convention of the Rights of the Child still be protected irrespective of their legal status. The Convention provisions are directed at the protection of **all children** with in a country’s jurisdiction, which translates into all children found within the country. The South African Constitution reiterates this non-discrimination of children in Section 28 where it also refers to **every child**.

Although the Constitution states that no one can be discriminated on the grounds of social and ethnic origin, the Bill should clarify this to include nationality, thereby elaborating and giving flesh to the concept of social and ethnic origin.

In terms of the rights of children, foreign children should be able to access birth certificates in South Africa as a means of documentation irrespective of where they were born, should they need the documentation. This is in terms of a child’s rights to a name and nationality.

Foreign children should be assured the rights of family reunification if it is the best interest of the child at the expense of the state. Return should be facilitated in a planned and monitored procedure which involves inter country communication between the relevant social welfare authorities. Investigations and tracing of the children’s circumstances must be prioritised by the relevant authorities in both countries.

The Bill should establish a Central Authority which would incorporate all aspects of foreign children including referrals, inter-country investigations and the maintenance of a database of all reported cases. This Central Authority is required in terms of the Hague Convention on International Child Abduction, Hague Convention on Inter-country Adoptions and the UN

Convention Against Transnational Organised Crime, which includes the relevant Protocol to Prevent Trafficking in Persons. This Central Authority will be based within Social Development but will work closely with the relevant Safety and Security structures.

Conclusion

It would bode well for the Children's Bill and the Department of Social Development through the Children's Bill to take into cognisance the practical realities and implications of migration and globalisation. Migration is a historical phenomenon in Southern Africa and globalisation will act as a catalyst to this trend. Foresight is needed on taking up the challenges of this phenomenon by catering to the needs of foreign children in the South Africa.

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