

Children's Bill Progress Update

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1 Latest developments

1.1) The first Children's Bill has been passed by Parliament

After the National Assembly (NA) passed the first Children's Bill in June 2005, it was sent to the second house of Parliament, the National Council of Provinces (NCOP), for debate.

Intense public and media debate over the NA's decision to ban the cultural practice of virginity testing put the NCOP process under the spotlight. The NCOP therefore decided to hold a second round of public hearings to give traditional leaders and

other interested stakeholders who had not yet been heard by Parliament, an opportunity to make submissions. After the hearings, the NCOP committee worked on the Bill for two months and proposed changes to a number of sections. These changes were then approved by the NCOP in plenary in early December.

However, because it is a “section 75 bill”, the NA retained the final decision as to whether or not to accept the amendments proposed by the NCOP. The NA Portfolio Committee on Social Development then considered the amendments proposed by the NCOP, and accepted the majority but rejected some. The NA plenary finally passed the Bill on 14 December 2005.

Parliament has now finished with the first Bill and it has been sent the President for signing. Once he signs it, the Bill will become an Act. But it will only come into force later when the President announces a commencement date in the Government Gazette. This will probably only happen in 2008 after the second Bill has also been passed.

For more detail on the amendments which were proposed by the NCOP and the final decisions taken by the NA, please read section 2 below. For more detail on the major law reform shifts which the first Bill brings about, please see the June 2005 Progress Update (<http://web.uct.ac.za/depts/ci/plr/cbill.htm#progress>) where we report on the amendments made by the NA in June 2005.

1.2) The Department of Social Development is busy re-drafting the second Bill (s76 Bill) to get it ready for tabling in Parliament

Parliament follows different processes for different types of bills. Bills that deal with matters that national government has authority over (e.g. the courts) is processed according to the procedure set out in section 75 of the Constitution and are known as “section 75” bills. Section 75 bills are dealt with only by the national Parliament in Cape Town and the NA has a veto power over any amendments proposed by the NCOP. The first Children’s Bill that has just been passed was a section 75 bill.

If a bill deals with a matter that national and provincial government both have authority over (e.g. delivery of social services by social workers) then besides the NA and NCOP debating the bill, the provincial parliaments must also be consulted as part of the law reform process. The procedure for these types of bills is set out in section 76 of the Constitution. This type of bill is called a “section 76” bill. For s76 bills, the NA does not have a veto power over amendments proposed by the NCOP and if the NA and NCOP cannot agree on an amendment, the matter will be sent for mediation. The second Children’s Bill that still has to be passed is a section 76 bill.

The Department of Social Development is now re-drafting the second Bill (s76 Bill) to get it ready for tabling in Parliament. Before the Bill can be tabled in Parliament, the costing has to be completed so that the provinces will have an indication as to how much the Bill will cost to implement. The costing is scheduled to be completed in April, therefore the earliest we can expect the second Bill to be tabled in Parliament is May 2006.

Once the second Bill (s76 Bill) has been passed, the two Bills will be merged into a single Children's Act. Then the whole Act will be published in the Government Gazette, and the President will announce when the Act will come into force. This last step will probably only happen in 2008.

2. Amendments proposed by the NCOP and accepted by the NA in December 2005

2.1 Summary

Cultural, social and religious practices

- A person who forces a child to marry under the legal age for marriage or above the legal age but without the child's consent, is now guilty of an offence which is punishable by up to 10 years in prison.
- A definition of Female Genital Mutilation (FGM) has been added to make it clear that circumcision of a female child (removal of the clitoris) is considered as FGM and prohibited.
- Circumcision of male children for cultural reasons is restricted to boys over the age of 16 years. For boys above 16 the Bill prescribes that circumcision may only occur with the boy's consent and after counselling.
- Virginity testing of children is restricted to children over the age of 16 years. For children above the age of 16 the Bill prescribes that the test may only be performed with the child's consent and after counselling. The Bill also prescribes that the results of the test may not be disclosed without the consent of the child and the child's body may not be marked in any way.

Parental responsibilities and rights

- Unmarried fathers who pay damages in terms of customary law and pay maintenance and contribute to the care of the child acquire parental responsibilities and rights.
- New offences have been introduced to prevent people holding parental responsibilities and rights from stopping the other parent from having contact with their children.

National Child Protection Register

- Government employees must now also be screened against the National Child Protection Register to assess whether they have been reported or convicted for harming a child.
- Offenders awaiting the outcome of an appeal process will remain on the National Child Protection Register until the appeal is finalised in their favour.

Children in need of care and protection

- Street children have been removed from section 150(2) as they are expressly covered under s150 (1).

- Foreign unaccompanied children and children who have been trafficked have also been removed from clause 150(2).
- The procedure for dealing with a category of child listed in s150(2) has been amended so that social workers, while obliged to carry out an investigation, are not obliged to report to the court or to refer all such children for a court inquiry.

Designated child protection organisations

- References to designated child protection organisations have been removed.

Kinship care givers

- All references to kinship caregivers have been removed.

2.2 More detail

2.2.1) Cultural, religious and social practices that have the potential to harm children have been prohibited or regulated

Forced marriages

The act of forcing a child into marriage or engagement without their consent or below the minimum age for marriage is now an offence and individuals can be sentenced for up to 10 years imprisonment for such actions. While the tabled Bill prohibited forced marriages it did not include a penalty clause which meant that the prohibition was unenforceable. Well-done to 15-year-old Belekhazi and Darkie Mpikwa from Girlsnet Alfred NZO Club in the Eastern Cape for their submission to the NCOP which proposed this amendment.

Female genital mutilation and female circumcision

Traditional leaders protested against the prohibition against female genital mutilation, but the NCOP upheld the prohibition. A definition of Female Genital Mutilation (FGM) has been added which makes it clear that FGM includes circumcision and that such practices are prohibited. A definition of circumcision of female children was inserted to clarify that circumcision means the removal of the clitoris.

Virginity Testing

The NA banned virginity testing. The NCOP re-opened the debate and heard a number of submissions on the topic. They proposed a compromise by introducing an age threshold. The practice is now prohibited if the girl is under the age of 16 years. For girls over 16 years, the testing can only be performed after counselling, in private, and with consent of the child. The results may not be publicly disclosed, and the child must not be marked. Regulations will prescribe the conditions under which the procedure can be carried out.

Male circumcision

The NCOP made an amendment to the effect that medical and religious circumcision can be allowed at any age but cultural circumcision is prohibited below the age of 16. Above the age of 16, it may only be performed after counselling and with the consent of the child.

2.2.2) Parental responsibilities and rights

Rights of unmarried fathers

The conditions under which an unmarried father can automatically acquire parental responsibilities and rights have been extended to include fathers who pay damages in terms of customary law. Such a father must also show that he has contributed to the upbringing of the child and that he has paid maintenance before he acquires rights and responsibilities.

Refusal of access to a child or refusal to allow a parent to exercise parental responsibilities and rights

If a parent, guardian or caregiver of a child prevents the other parent, guardian or caregiver from having contact with the child, or refuses to let them exercise their responsibilities and rights, they will be guilty of an offence.

2.2.3) National Child Protection Register

The NCOP introduced an amendment that anyone who commits more than one offence against a child will remain on the register in perpetuity, and the names of offenders who are awaiting the outcome of an appeal process will be held on the register until their appeal is successful. Government employees, including municipal workers, who work with or have access to children, must also be screened against the Register.

2.2.4) Children in need of care and protection

The NA inserted a new sub-clause (2) to section 150, the section which defines which categories of children are in need of care and protection. Section 150(2) listed five categories of children who *may* be in need of care and protection. The NCOP amended the sub-clause by removing three categories of children from the list.

Street children were removed from s150 (2) as they are expressly listed in s150 (1) as a child in need of care and protection. Unaccompanied foreign children and trafficked children were removed from s150 (2). The two categories which remain in s150 (2) are a child who is a victim of child labour and a child in a child-headed household.

In the Bill that was passed by the National Assembly in June [B70B of 2003] there was a cross-reference in s150 (2) to s155 (2) which could have been interpreted as meaning that all categories of children listed in s150 (2), had to be referred to the children's court. This has been removed.

A new sub clause has been added to s150.

“(3) If after investigation a social worker finds that a child referred to in subsection (2) is not a child in need of care and protection as contemplated in subsection (1), the social worker must where necessary take measures to assist the child, including counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation.”

Conversely if the social worker concludes that the child is in need of care and protection the child should be referred to the children's court.

2.2.5). Kinship care-givers

The concept of kinship care as a form of alternative care for children will only be debated when the second Bill (s76 Bill) is passed. Therefore, all references to kinship care-giver have been removed from the first Bill (s75 Bill).

2.2.6). Designated Child Protection organisations

The process for designating child protection organisations and the services they provide is contained in the second Bill (s76 Bill), therefore all references to 'designated child protection organisation' have been replaced with 'child protection organisation'.

3. Amendments proposed by the NCOP but rejected by the NA

3.1) Clerks of the Children's Court

The Department of Justice persuaded the NCOP to remove references to "clerks of the children's court" and replace them with references to "clerks of the court". This amendment could have had the effect of removing the provision for the specialisation of personnel working with vulnerable children. The NA rejected this proposed amendment and restored the reference to "clerks of the children's court".

3.2) Access to courts for children with disabilities and creation of child friendly environments in the court

The Department of Justice persuaded the NCOP to remove the clauses which provided for child friendly environments in the courts and for children's court hearings to be held in a room which is accessible to persons with disabilities. The NA rejected these proposed amendments and restored the clauses to ensure child friendly court environments and equal access for children with disabilities.

4. Areas still in need of attention in the first Bill (s75 Bill)

The first Bill (s75 Bill) has already been passed by Parliament. However, as the s76 bill is debated and decisions are made, technical amendments to the s75 bill may need to be made due to changes in numbering and definitions. This opens the door for amendments of substance to be introduced. We therefore discuss below three areas where problems still remain:

4.1) Assistance for unaccompanied foreign children

All references to unaccompanied foreign children have been removed from the Bill. The definition has been deleted and the category of unaccompanied foreign child has been deleted from clause 150(2). The Minister of Social Development stated that refugee children and asylum seekers are the responsibility of Home Affairs and should be dealt with in terms of the Refugees Act and not the Children's Bill. The Department was also of the view that it would be too costly for the state to bear the burden of having to trace the parents or guardians of such children and therefore a blanket clause that gave foreign children equal access to all the services provided by

the Bill would not be desirable as it would bind the state to provide costly services. The Department of Social Development therefore proposed the above two amendments to the NCOP and NA in December 2005 and both houses of Parliament approved the amendments.

These amendments are a blow for foreign children. The UN Convention on the Rights of the Child recognizes this group as being exceptionally vulnerable and therefore in need of affirmative action and therefore advises Governments to prioritise this category of vulnerable children and to ensure that they receive equal treatment and do not suffer any discrimination.

The Bill provided the perfect opportunity to clarify for all service providers that under international and constitutional law, foreign children may not be discriminated against and are entitled to equal protection from the state. The final Bill's silence on foreign children and their right of equal access to services under the Bill does nothing to minimise the existing problem of some service providers holding the opinion that foreign children are not entitled to equal protection and therefore denying them such protection.

4.2) Adoption

Section 233(1) (a) requires that a parent who is a minor (under 18) must be assisted by her guardian in giving consent for her baby to be adopted. Under the current law, any child who wants her child adopted can give consent on her own without her parent's knowledge. Requiring the young mother to tell her parents about her pregnancy may prevent many young mothers from considering adoption as an option. Working Group members brought this issue to the attention of the NCOP but the Department opposed any amendments to the clause, as they consider the need for the consent of the girl's parent as a necessary safeguard for the girl and the baby concerned.

4.3) Corporal punishment

While a range of cultural, social and religious practices were banned or regulated in order to protect children from harmful consequences, the practice of corporal punishment of children by their parents was not dealt with.

It appears as if this was not a deliberate decision by Parliament but more a consequence of the splitting of the Bill. The section on corporal punishment was put into the second Bill (s76 Bill) during the splitting and as a result it did not get included in Parliament's final decision making on the first Bill. However, if a prohibition is included in a bill it would need to follow a s75 procedure in Parliament.

The Department of Social Development has indicated that it is in favour of prohibiting corporal punishment in the home and intends to introduce an amendment to the first Bill (s75Bill) to this effect. Whether the amendment will remove the defence of reasonable chastisement or go further and impose an express ban on corporal punishment is yet to be seen. Either way, the end result of such an amendment would be that smacking of children in the home will not be allowed.

Due to the wide spread use of the practice in South Africa, an education campaign will need to be launched to provide the public with information and assistance as to alternative forms of discipline.

5. Special feature: Report back on the debate on age of consent for medical treatment, HIV testing, disclosure of HIV status, and access to contraceptives

During the NCOP deliberations, there was much media attention on the age of consent for medical treatment and access to contraception. This is the age at which a child can access medical treatment or contraception without their parents consent or knowledge. With sexually transmitted diseases and the HIV pandemic threatening the health and lives of children, it is important that all barriers preventing young people from seeking and accessing medical treatment, testing and contraceptives; are removed. One such barrier is the requirement that children need their parent's consent before they can access treatment, testing or contraceptives. While such a requirement is necessary to protect young children, it becomes less necessary as children get older and it can begin to pose a barrier for teenagers in need of treatment, testing or contraceptives.

Taking these considerations into account, the South African Law Reform Commission proposed that the current age threshold of 14 should be changed to age 12. Cabinet agreed with this proposed lowering of the age threshold and the bill tabled in the NA therefore set the age at 12 years. The NA agreed on 12 as the appropriate age at which a child could give consent without their parent's being involved in the decision.

The NCOP considered raising the age to 14 years following an amendment proposed by the National House of Traditional Leaders. The Department of Social Development stating that it would also agree with changing the age back to 14. Members of the Children's Bill Working Group and the HIV/AIDS sub-group lobbied hard to retain age 12 and in the end the NCOP decided to retain age 12.

6. What's in the second Bill (s76 Bill) ?

The second Bill, expected in Parliament from May 2006 onwards, contains chapters and sections on the following:

- Partial care (crèches) and early childhood development centres (*registration, norms and standards, funding and inspection*)
- Prevention and early intervention services to assist families to prevent abuse and neglect (*definition, provision and funding, and social worker reports*)
- Protection services for children who have been abused and neglected (*reporting of abuse and neglect, designated child protection organisations, and strategies concerning child protection*)
- Mentorship scheme for children living in child headed households
- Child safety at places of entertainment
- Prohibition of worst forms of child labour
- Corporal punishment

- Foster care and kinship care (*placement procedure, family re-unification services, and duration of court orders*)
- Child and youth care centres including children's homes, places of safety, secure care facilities, schools of industry and reform schools (*provisioning and funding, registration, norms and standards, management, and quality assurance*)
- Shelters for street children (*provision and funding, registration, norms and standards*)
- Drop in centres for vulnerable children.

The Department has not yet released an updated version of the second Bill (s76 Bill). However, the cabinet approved version (October 2003) is available on the Children's Institute website (<http://web.uct.ac.za/depts/ci>).

8. The way forward

The Children's Bill Working Group is meeting at the end of March to discuss the second Bill (s76 Bill). Draft submissions and discussion documents covering each area outlined above will then be written and circulated for comment and endorsements by mid April.

We are looking for additional organisations and individuals who would like to make submissions on the above areas. Our evaluation of the previous parliamentary hearings showed that the MPs responded well to a mix of submissions. They especially valued the submissions from service providers and children. We have enough "legal" submissions from organisations specialising in policy and law reform, but we are looking for submissions from service providers and children which provide case studies and evidence of the challenges faced in providing and implementing child protection services. Examples would include children's homes struggling to access funding, ECD centres having problems with registration, child protection organisations facing challenges in providing and funding primary prevention services and children's groups with experiences of the challenges in the system.

If you would like to make a submission or just want more information, please contact Lucy Jamieson on 021 – 689 8303 or lucy@rmh.uct.ac.za

For more information, please see the Children's Bill webpage on <http://web.uct.ac.za/depts/ci>