

NETWORK AGAINST CHILD LABOUR
REPRESENTATIONS ON THE
CHILDREN'S AMENDMENT BILL

**SUBMISSION TO THE CHILDREN'S AMENDMENT BILL PUBLIC
HEARINGS AT THE GAUTENG LEGISLATURE**

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The Network Against Child Labour welcomes and appreciates the efforts made by the Portfolio Committee in a very limited space of time to hold these hearings.

However, we believe that the removal of section 150 (2) from the Children's Bill, which deals with the rights of unaccompanied foreign children and those victims of trafficking, constitutes a serious human rights violation in terms of both international and domestic law.

1. Background of the project.

The NACL is an organisation not for profit. It was established in 1990. It consists of 70 members actively involved in the fight against child labour in South Africa. We believe in our mission that all children in South Africa must be free to learn, to play and to develop their full potential.

We therefore support the idea that any legislation, whether it is the Children's Act, Refugees Act or Immigration Act, should be implemented in a manner that complies with the spirit of the constitution and the Bill of Rights with the aim of eradicating child labour.

The NACL has the following objectives:

1. To bring together all organisations and individuals concerned with the elimination of child labour.
2. To educate organisations, the general public and communities against child labour
3. To provide information and policy guidelines on child labour and related issues.
4. To lobby for enforcement of legislation designed to bring about elimination of child labour.
5. To conduct action-oriented research and expose the problems related to child labour
6. To organise intervention where necessary.

2. Definition of unaccompanied children.

An unaccompanied minor is a child under the age of 18 years who is outside his or her country of origin, is separated from both parents, and is not in the care of an adult who, by law or customs, has responsibility to do so.¹

Unaccompanied minors may be classified in 5 categories namely:

1. Exiles
2. Emissaries
3. Exploited or trafficked
4. Runaway
5. Vagrants

Our focus will be on exiles (refugees and asylum seekers) and children victims of trafficking.

Definition of Refugee, Asylum Seekers and Trafficking in children.

A. Refugee

The United Nations defines a refugee as being a person who has fled his country of origin to seek asylum in another country based on a well founded fear of persecution for reasons related to race, tribe, nationality, religion and political opinion or membership of a particular group.

Whereas an asylum seeker is a person who is in another country applying for asylum and whose application is pending approval²

B. Trafficking in children

Trafficking in children involves the recruitment, transportation, harbouring or receipt of a child when this is done by means of sale, abduction, use of force, threats, deception or use of abuse, power or authority.³

3. Proposed Amendment.

Section 150 (2) of the Children's Bill (s75 Bill) listed 5 categories⁴ of children who *may* be in need of care and protection. But the NCOP amended the sub-clause by removing 3 categories, namely:

1. Street children
2. unaccompanied foreign children and
3. trafficked children

¹ UNHCR Refugee Children: Guidelines on protection and care, Geneva, 1994, p121

² Education Rights of Refugees, Asylum Seekers and Migrants, Wits Migrations Project, 2003

³ Trafficking of Children for Purpose of Sexual Exploitation, Report by Molo Songololo, 2000, p18

⁴ Child victim of child labour, child in a child-headed household, street children, unaccompanied foreign children and trafficked children.

Reason provided for the removal includes:

- That street children were expressly listed in s150 (1)
- For unaccompanied foreign children and trafficked children, the Minister of Social Development stated that they are the responsibility of Home Affairs and therefore should be dealt with in terms of the Refugee Act of 1998 and not the Children's Bill. And that it will be too costly for the state to bear the burden of having to trace the parents and guardians.

The removal of unaccompanied foreign children and trafficked children from the Children's Bill is not justifiable because it violates Section 22 of the International Convention on the Rights of the Child (ICRC) which expressly imposes special duties of care on the member states, including the duty of tracing the child's family with a view to family reunification. Secondly, it violates Section 27(b) of the refugees Act which includes the rights set out in Chapter 2 of the Constitution.

In order to be true to our national and international commitments to children rights we need to deal with unaccompanied children as "children" in the first place.

We recommend that the Commission re-inserts the categories of unaccompanied foreign children and trafficked children in s150 (2) as proposed in section 24, chapter 4 of the SALRC Draft Children's Bill. This section reads as follows:

Refugee and unaccompanied migrant children

- Every child who is a refugee or seeking refugee status in accordance with international or domestic law, and every undocumented migrant child, whether unaccompanied by a parent or other adult person has-
 - (a) the rights set out in this chapter, as may be appropriate in the circumstances⁵,
 - (b) the rights to be re-united with his or her family if the child was separated from his or her parents or family members; and
 - (c) the rights to receive humanitarian protection and assistance to realise the rights referred in paragraphs (a) and (b).

We further recommend that the Commission restricts the social worker's power in terms of S150 (3) due to the fact that currently only few social workers and Home Affairs Officials have sufficient knowledge of the correct procedures or policy with regard to unaccompanied foreign children. They have in the past admitted that they were not aware of such procedures⁶.

Fear by the state to incur excessive costs.

The NACL believes that the standard set by the rule of "the best interest of the child" which constitutes a cornerstone in our law will not be met if the state unfairly discriminates against children. The state may reduce the workload by seeking assistance from the United Nations High Commissioner for Refugees (UNHCR) or other NGOs such as Lawyers for Human Rights.

⁵ Unfortunately, not all the rights proposed by the SALRC were accepted.

⁶ Abeda, Bhamjee, Aiding the Least And Loneliest, 2004, p28.

Home Affairs as the Guardian.

Although the Department of Home Affairs is in charge to deal with refugees in terms of the Refugees Act, this does not exclude the Children Act from making addition provisions to strengthen and ensure a good implementation of refugee law.

It has been proved in practice that no standard procedures of referring unaccompanied foreign children to social services exist regarding detention or deportation.

Motivation

The NACL conducted a series of 17 workshops across the country into urgent matters affecting children in South Africa. Participants were also asked two of the following questions:

1. Whether the Children's Act should make provision for unaccompanied foreign children? 80% of participants from all the provinces agreed while 20% disagreed.
2. Whether foreign children should have access to government service such as health, education, welfare etc? 95% of participants from all the provinces agreed while only 15% disagreed.

In the light of this consultation, The NACL believes that unaccompanied foreign children and trafficked children should also enjoy the same basic rights as set out in Chapter 2 of the Constitution and Section 27(b) of the Refugee Act, as may be appropriate in the circumstances.

Other Recommendations.

The NACL welcomed the SALRC Draft Children's Bill in proposing the rights to education and the rights to social security. The Tabled Bill (B70) however failed to consider this.

1. The Rights to Education.

The NACL recommends that the final Bill expressly re-inserts the rights to education. The fact that the rights to education has already been expressly provided by other legislations⁷ does not exclude this Act from making further provisions. We believe that the Children's Act is the appropriate one to provide for all children's rights.

We therefore recommend that the Commission re-inserts, as proposed, section 21 of the SALRC Draft Children Bill which deals with the rights to education.

Should the rights to education be re-inserted, refugee children, asylum seekers and trafficked children must equally enjoy the same rights as provided in Section 29 of the Constitution, Section 27 of the Refugees Act of 1998 and Section 22 (1) of the ICRC, as may be appropriate in the circumstances.

⁷ The National Education policy Act 27 of 1996

2. The Rights to Social Security

The SALRC proposed a list of children's rights which included the "rights to social security". The final Bill however failed to consider this proposal. Section 23 of the SALRC Draft Children's Bill provided:

- that every child has the rights to:
 1. social security, including access to social assistance if the parent or care-giver cannot or does not provide for the basic needs of the child and;
 2. a child suffering from malnutrition or who is at risk of malnutrition has the rights to have access to sufficient and appropriate food including emergency measures by the state for a child whose survival is at stake.

As pointed out above, the Children's Act cannot avoid expressly mentioning the rights to social security simply because some other legislations have already done so. We believe that this Act is the appropriate one that could provide for the rights of children

We therefore recommend further that the Commission re-inserts Section 23 as proposed by the SALRC. When this right is re-inserted, refugees, asylum seekers and trafficked children should equally enjoy the same privilege as all other children in the country, as provided by the UN ICRC, Refugees Act and the constitution of South Africa, *as may appropriate in the circumstances*.

This will possibly assist many refugee children (orphans or child-headed household) whose parents have died as a result of HIV/AIDS or related diseases or are unable for provide for them, to benefit from social grants.

The NACL acknowledges efforts made by the Department of Social Welfare regarding refugees' access to health services (including access to ARV (Anti-Retroviral). We believe that much more can still be done in view of contributing also to the elimination of child labour. Researches have proved that most of the children used as workers, are often from poor families or refugees from neighbouring countries or the SADC.

Conclusion

The NACL makes these recommendations and hope:

1. that they are received in the spirit that they are given
2. that they are incorporated into our legislation as speedily as possible.