



SUBMISSION ON SECTION 76 OF THE CHILDREN'S BILL SEPTEMBER 2006

TO PROVINCIAL PARLIAMENT

INTRODUCTION

Child Welfare South Africa is the national coordinating body of 169 affiliate and branch members and 52 developing child welfare organisations working in urban, peri-urban and rural areas. Child Welfare member organisations render social services to thousands of children within the context of their families and communities, with the core purpose of protecting children against abuse, neglect and maltreatment. In doing this our members provide statutory interventions, alternative care that includes foster care, adoption, residential care, early childhood development, early intervention and prevention services as well as programmes for the care of children affected by HIV/AIDS. During 2004, members rendered services to 1 530 065 million people of which 1 154 323 were children and 63 273 children required statutory intervention in terms of the Child Care Act. These figures illustrate Child Welfare South Africa's strong position in rendering comments on the present Children's Bill.

COMMENTS, CONCERNS AND RECOMMENDATIONS OF SPECIFIC SECTIONS

CHAPTER 7: CHILD PROTECTION

Reporting of Child in Need of Care and Protection



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Discussion

Clause 105 (1)

Clause 105 of the Bill focuses on the reporting of suspected child abuse as well as procedures to be followed when reports are received. The section states only specific categories of people are mandated to report child abuse. Within the context of South Africa where incidents of child abuse are high it may be argued that the reporting of child abuse should be a community responsibility and not limited to specific categories of people. Mandatory reporting however is not a straightforward legal solution to child abuse and needs to be considered carefully. The issue of reporting protocols between civil society and significant role players, the response system to reports, the resources available to the system and the services presently available to children and families before and after reporting are equally as important. Further across the board mandatory reporting would divert scarce resources away from programmes delivering assistance to families and “at risk” children. In considering the present South African context CWSA supports mandatory reporting for specific categories of people only.

Clause 105 (1) of the Bill identifies these specific categories of people mandated to report child abuse. The section provides an extensive list of people most likely to come into regular contact with children and states:

Any teacher, medical practitioner, psychologist, dentist, registered nurse, physiotherapist, speech therapist, occupational therapist, traditional health practitioner, legal practitioner, social worker, social service professional, minister of religion, religious leader, member of staff at a partial care facility, shelter, drop-in centre or child and youth care centre, labour inspector or police official who on **personal observation concludes** that a child has been abused in a manner causing physical injury, sexual abused or deliberately neglected, must report that conclusion to the department of social development, a designated child protection organisation, police official or **clerk of the children’s court**.

Concerns arise regarding the term ‘**personal observation concludes**’. This term implies that before reporting child abuse the above category of people would have conducted their own investigation into a child’s situation and drawn a particular conclusion. The majority of the people identified in this clause does not have the necessary knowledge or experience to conduct such investigations, but should rather be encouraged to report suspected child abuse to those professionals working within this specialised field. It is therefore proposed that terms such as “reasonable grounds suspects” or “in good faith believes” be used.

Reporting of suspected child abuse to the **clerk of the children’s court** raises further concerns. In light of the fact that the training of clerks of the children’s court originally stated in Section 75 of the Bill has been removed skepticism remains as to whether or

not a clerk will have the necessary knowledge and experience to deal with reports of child abuse. Similar concerns would apply to police officers. It is therefore imperative that if we want to protect children effectively provision needs to be made within the Bill for all relevant personnel required to deal with reports of abuse to be appropriately trained.

Recommendation

The clause will therefore read:

Any teacher, who on **reasonable grounds suspects** that a child has been abused in a manner causing physical injury, sexual abused or deliberately neglected, must report that conclusion to the department of social development, a designated child protection organisation, **or appropriately trained** police official or clerk of the children's court.'

Discussion

Clause 105 (2)

This clause makes provision for the reporting of suspected child abuse by any member of society. This however does not imply mandatory reporting.

If we are to encourage the reporting of suspected child abuse and neglect we need to ensure that persons mandated to report (Section 105(1)) as well as the general public (Section 105(2)) are provided with protection from prosecution arising out of the reporting. The Bill needs to clarify that a person who makes a report does not breach professional ethics and does not become liable to civil or criminal processes if the report is made in good faith and on reasonable grounds. This matter was taken into consideration in our previous Child Care Act, and needs to be included in the Children's Bill.

Recommendation

The insertion of the following clause into the present clause 105:

No legal proceedings shall be instituted against persons reporting suspected child abuse as referred in Section 105(1) and (2) in respect of any notification given in good faith in accordance with this section.

Discussion

Clause 105 (4)

Concerning the reporting of sexual abuse by professionals conducting termination of pregnancy on a child poses further questions. This section states:

A medical practitioner or a registered midwife performing a termination of pregnancy on a child must, despite any provisions of the Choice on Termination of Pregnancy Act, 1996 requiring confidentiality, comply with subsection (1) if the pregnancy was due to sexual abuse of the child.

This clause raises a question regarding the reporting of statutory rape. Remaining in line with present law any child under the age of 16 years who undergoes a termination of pregnancy regardless of whether or not the pregnancy is a result of sexual abuse needs to be reported. Poverty and the effects of the HIV/AIDS pandemic have exposed children in South Africa to exploitation. Exploitation occurs not only in terms of survival sex (sex for money to buy basic necessities) by girl children but there is also an increased trend in the “sugar daddy” syndrome in many poor areas. This sees older men taking sexual advantage of young children in exchange for material goods. It is the responsibility of government and those involved in the child protection system to protect children against such violations. The need for reporting and investigating statutory rape is evident.

It should further be reported if a pregnancy is **suspected** to be the result of sexual abuse. All suspicions need to be reported for further investigation as often children who have been sexually abused are coerced by their abusers to deny abuse.

Recommendation

It is recommended that the clause read:

A medical practitioner or a registered midwife performing a termination of pregnancy on a child must, despite any provisions of the Choice on Termination of Pregnancy Act, 1996 requiring confidentiality, comply with subsection (1) if the pregnancy is suspected to be due to sexual abuse of the child or statutory rape.

In addition a definition of statutory rape needs to be included in the Bill. This definition would need to be in line with the Sexual Offences Bill.

Provision of Designated Child Protection Services

Introduction

In order to provide protection to the children of our country it is imperative that the child protection net be broadened especially within rural communities. At present the Department of Social Development in conjunction with NGOs such as Child Welfare are providing statutory (court) services aimed at the protection of children. The registration of additional child protection services is welcomed however cognizance needs to be taken regarding the standard of care provided by such services. We

would not like to see a repeat of the open legislation of the Non Profit Organisations Act, which has resulted in many organisations being registered who are unable to offer the necessary care and protection to our children due to lack of experience and knowledge within the field as well as many which have developed due to personal incentives contradictory to the best interest of children. This section of the Children's Bill needs to ensure that the principle of the best interest of children is upheld by all organisations seeking designation as a child protection service.

Discussion

Clause 106 (1)

This clause refers to the funding of designated child protection organisations and states:

Designated child protection services provided by an organ of state or a designated child protection organisation only qualify for funding from money appropriated by a provincial legislature if it complies with the national norms and standards mentioned in subsection (2).

It is agreed that in order to receive funding an organisation should be providing a service of a suitable standard. However it needs to be considered that in order to provide a high standard of service delivery adequate, effective and efficient financial and human resources are needed, hence the need for funding.

The Constitution of South Africa Section 28 (1) (b) obligates the state not only to preserve families but to provide alternate care for children who do not live in a family environment; while Section 28 (1) (d) emphasizes the state's obligation to protect children from maltreatment, neglect, abuse or degradation. It is therefore evident that the role of protecting children is a state responsibility. Within South Africa the NGO sector has played a pivotal role in providing child protection services and therefore should be subsidized at a 100% rate.

Recommendation

Discussion

Clause 106 (2)

This clause proposes the development of national norms and standards for designated child protection services and states:

The Minister must determine the national norms and standards after consultation with the MECs for Social Development, the Financial and Fiscal Commission and the Minister of Finance.

The clause highlights the need for the Minister to consult with sectors within the government yet makes no references to the involvement of civil society organisations. This is very disconcerting as the majority of child protection services are presently being offered by Non Profit Organisations. It is imperative to ensure that at all times consultation with civil society is emphasized and included.

Recommendation

It is recommended that the clause read:

The Minister must determine the national norms and standards after consultation with the MECs for Social Development, the Financial and Fiscal Commission, the Minister of Finance **and civil society organisations**.

Discussion

Clause 106 (4)

This clause highlights a variety of services provided by a designated child protection organisation. The list is extensive and makes provision for statutory services including reunification services, placements in foster care, adoption, investigations and assessments of children who may need protection, and the development of permanency plans. These services are the primary services provided by the child protection system. These services ensure the immediate safety of children and establish a caregiver environment for the child. Little cognizance is paid to the need to provide emotional and psychological services to children. Abuse causes emotional harm and has long-term effects and if not dealt with on a counseling level, a child could never recover.

Recommendation

It is therefore recommended that the following be added to the clause before 106 (4) (f):

The provision of counseling services to provide for the emotional well being of children.

Discussion

Clause 107 (1)

This section of the Bill is vague and does not provide adequate protection to children. The clause states:

The Director-General or provincial head of social development may designate **any appropriate organisation** that complies with the prescribed criteria as a child protection organisation to perform in the relevant province all or any specific designated child protection services.

Concerns arise regarding “the criteria” that would attribute a service as “**appropriate**”. Within this chapter no reference is made to the development of regulations that would determine which organisations are suitable and have the necessary skills, experience and capacity to provide a professional service to vulnerable and maltreated children. As previously mentioned one needs to be weary of designating organisations that do not have the necessary experience, knowledge or capacity to deal with child protection and statutory caseloads. Concerns would arise that children may experience situations of secondary abuse in a less than adequate system.

Recommendation

It is recommended that the clause read:

The Director-General or provincial head of social development may designate any appropriate organisation that complies with the prescribed criteria **as specified in regulations of this act**, as a child protection organisation to perform in the relevant province all or any specific designated child protection services.

Applications to Terminate or Suspend Parental Responsibilities and Rights

Introduction

The emotional and psychological well being of a child is rooted within a stable, safe and secure home environment. Key to any child protection legislation is establishing permanency for children. Clause 135 places this need ahead of parental rights and confirms the rights of the child as paramount.

Discussion

Child Welfare South Africa strongly supports Clauses 135 (1) (2) (3) and (4) as they seek to place children first, as guided by the principles of the best interest of the child.

Recommendation

Clause 135 (1) (2) (3) and (4) remain unaltered.

Child Headed Households

Introduction

Child headed households are not a new phenomenon in South Africa but reports of such households has escalated due to the HIV/AIDS pandemic. It is evident that not all children heading households should be dealt with through traditional child protection practices such as foster care and that each specific family needs to receive a more individualistic approach. This has led to **community based care options** in which community members or volunteers/employees of community-based organisations provide regular supervision and guidance to these households. This approach however is not without pitfalls. It can be argued that it is a grave injustice to burden a minor child with the responsibility of caring for siblings and is counter-productive to the aims of this Bill. With this stance it can be argued that we are compounding the abuse of children. By accepting the concept of “child headed households” we can be accused of giving up on children and not eliminating this phenomenon. Children and their needs are expected to adapt to the system and not visa versa. “The **“parentification process”** which refers to creating a parent out of a child to care for a parent or siblings, is associated with social isolation. Children assuming adult responsibility are deprived of nurturing, experience trauma, guilt and grief and terrible uncertainty about the future. They usually struggle without services and/or support systems in impoverished communities.

Discussion

Clause 136 (1) (c)

This clause seeks to define a household, which may be recognized as child headed and reads:

A child has assumed the role of caregiver in respect of a child in the household.

Considering the negative impact of the parentification process previously discussed it would be a great injustice to burden a minor child with this responsibility and counter-productive to the aims of this Bill. Concerns are present that with this stance we are compounding the abuse of children. As the clause presently stands a child of any age can assume the responsibility of overseeing other children within a household and the maturity of the child is not considered.

Recommendation

It is recommended that the clause read:

A child over the age of 15 years has assumed the role of caregiver in respect of a child in the household.

Discussion

Clause 136 (2)

Measures to protect children living within child headed households need to be put in place. This section of the Children's Bill sees an adult being designated to oversee child headed households, and reads:

A child headed household must function under the general supervision of an adult designated by –

- (a) a children's court; or
- (b) an organ of state or a non-government organisation determined by the provincial head of social development.

Although an adult may be assigned to oversee the household additional protection measures need to be put in place. We need to ensure that the adult who has assumed responsibility will take on the task in earnest and provide the best protection and care to the children assigned to them. This is important to prevent continued hardship of children in child headed households. It is also important for the designated adult to be held accountable for the children in their care.

Recommendation

It is recommended that a clause be inserted that reads:

The adult person referred to in subsection (2) is accountable to the child and family court; or the provincial department of social development; or to another organ of state or a non-government organization designated by the provincial head of social development; for the children designated to their care.

Child Safety at Places of Entertainment

Discussion

Clause 140 (4)

It is essential that children be protected at all times and the inclusion of this section in the Bill is a step closer to this goal. This clause states:

If a person providing the entertainment is not the owner of the premises or enclosure where entertainment is provided, the owner or the owner's agent must take all **reasonable steps** to ensure the subsections (2) and (3) are complied with.

The use of the word “reasonable” is of some concern as it denotes a lack of responsibility on the part of the owner or the owner’s agent. In situations where criminal proceedings need to occur the owner will fall back on the defense that reasonable steps were taken. This seems weak and directed more at protecting business than children. There should be no compromise when it comes to the protection of our children. One may ask why are we so “reasonable” with regard to adults when children can be harmed.

Recommendation

It is recommended that the clause read:

If a person providing the entertainment is not the owner of the premises or enclosure where entertainment is provided, the owner or the owner’s agent must take **full precaution and responsibility** to ensure the subsections (2) and (3) are complied with.

CHAPTER 8: PREVENTION AND EARLY INTERVENTION SERVICES

Purpose of prevention and early intervention services or programmes

Introduction

Early intervention and prevention services are central to providing for the protection of children. Section 28(2) of the South African Constitution highlights that a child’s best interests are of paramount importance in every matter concerning the child. To ensure that this obligation is met a comprehensive care package needs to be established in the Children’s Bill. This does not only refer to statutory interventions to protect children but programmes and services that can prevent children at risk from moving further into the child protection system.

Discussion

Clause 144 (1)

This clause identifies the services or programmes that prevention and early intervention services must focus on. A detailed and comprehensive list is provided. The list however does not take cognizance of the need for emotional and psychological care and counseling for children and families traumatized due to violence, abuse or loss. In order to aid children in developing into emotionally healthy adults, the trauma needs to be dealt with. The impact of trauma is evident in many ways during childhood and adult life. One possible result of trauma is post traumatic stress disorder. Other results may include depression, substance abuse, generalized anxiety and bipolar disorder.

Within the present South African context and the escalating impact of HIV/AIDS on children, early intervention and prevention services need to place specific focus on this vulnerable group of children. This would include children living with terminally ill parents, children who themselves are terminally ill, orphans and children living in child headed households. Children affected by HIV/AIDS are at increased risk of losing opportunities for school, health care, growth, development, nutrition, shelter. Services and programmes need to be prioritized for this vulnerable group.

Recommendation

It is recommended that the following clauses be inserted in 144(1)

(i) assistance and support for families and children who have experienced trauma due to violence, abuse or loss.

(j) assistance and support for families and children who have experienced bereavement, as well as children residing within child headed households.

(k) assistance and support for families and children living with chronic illnesses.

Discussion

Schools as protection systems

In ensuring that children are protected through the use of prevention and early intervention it is essential that children at risk be identified. The education system through schools provides the optimal opportunity to identify these children, as it is often the environment in which most time is spent. Furthermore, the education system has an obligation to report suspicions of abuse as emphasized in Chapter 8, Clause 105(1). The importance of this sector was highlighted in the SALRC draft of the Children's Bill and now needs to be included in Section 76.

Recommendation

The insertion of clause:

The principle of a public or private school must on a confidential basis –

(a) identify children who are frequently absent from school, where this may be due to their becoming involved in exploitative child labour or excessive household responsibilities, or to lack of appropriate family care;

(b) take all reasonable steps to assist them in returning to school or to discourage them from leaving school;

- (c) submit the names and addresses of those children to an appropriate prevention or early intervention programme or alternative support service, or to the nearest office of the Department of Social Development for assistance.

CHAPTER 10: FOSTER CARE

Introduction

CWSA statistical data reflects that the number of children committed for the first time to a foster home increased with 184% during 2003 and a further 30% during 2004. These figures are closely linked to children being placed in foster care due to orphanhood. A 67% increase in the number of orphaned children was recorded between 2003 and 2004.

The impact of the increased number of children in need of care on our statutory system is growing. Social worker caseloads are increasing rapidly as the foster care system becomes a means to find alternative care for orphaned children. Concerns however arise in that not all children orphaned can be said to be a child in need of care in terms of our Child Care Act. Social workers however are becoming hard pressed to aid these families by providing foster care as a means to provide financially for them. The difficulty arises in that our courts become blocked with such foster care cases reducing court and social worker time dedicated to children who may have experienced abuse, neglect or abandonment and are clearly children in need of care and protection as outlined in our law.

The social work profession is also facing a crisis, with high staff turnover resulting in organisations being crippled by vacancies along with the inability to attract social workers, the continued disparity between Government and NGO salaries and the differential provincial subsidies are causing havoc in service delivery.

Additional concerns remain in the ability of the South African economy to continue to support orphaned children through the foster care system. Will our country be able to continue to provide this level of financial support for the estimated orphans expected due to HIV/AIDS? In order to rebalance the system alternate means to aiding children who are orphaned yet still have family support need to be developed.

Discussion and Recommendations

Option 1

In light of our present social security system in which a child support grant is only available to children up to the age of 14 years it is necessary to ensure that orphaned

children receive financial assistance until the age of 18 years. This would require that orphaned children identified as in need of placement and who have family members available be placed in foster care, as is presently the practice. Changes however need to be made in the manner in which such placements are undertaken so to reduce the high workloads of social workers and open the courts to dealing with other matters such as child abuse. Two suggested solutions are apparent:

(a) Kinship foster care could be investigated, processed and taken through court by Social Auxiliary Workers. Social workers would be required to co-sign all reports but would not need to be present at the court. Social Auxiliary Workers would further assume the responsibility of monitoring and supervising all placements; alternatively

(b) Kinship foster care could be investigated and processed by Social Workers who complete the necessary report and submit it to court. No court hearing is held at which the Social Worker or family need to be present. The Commissioner of Child Welfare would review these reports and make the necessary orders. Any queries and concerns regarding a report can result in a court hearing being called.

These options would reduce blockages at court as well as social worker caseloads freeing the system to deal more effectively with children in deleterious situations. It would also continue to allow for children who have been orphaned to receive foster care grants.

Option 2

If it could be guaranteed that the child support grant would be extended to children up to the age of 18 alternate approaches to foster care then exist, as children orphaned would have continued access to financial assistance. It can be postulated that a reduction in the amount of children receiving foster care grants would increase the pool of funds available to our child support grants allowing for an increase in this grant. More South African children, be they orphaned or not could be reached through such a system.

As a means to aid orphaned children to receive the child support grant as well as to ensure that an adult is assigned custody (care and contact) of the child, orphaned children can be registered with the Children's Court. This would entail the caregiver of the child concerned to present before the Clerk of the Children's Court all relevant documentation proving that a child in their care has been orphaned. A custody order acknowledging the caregiver as the custodian of the child can then be made. When applying for child support grant such an order should suffice as proof of care.

The Department of Social Development would hold the responsibility of documenting such orders and would inform the family of their local government office, NGO, FBO or CBO that could provide additional support to the family through funded community

based care programmes. This would be essential so to ensure the continued protection of children in vulnerable situations.

Discussion

Clause 181

This clause focuses on the purpose of foster care. The purposes identified however are not specifically purposes of foster care. For example:

(c) support, encourage and facilitate relationships between children, their parents and other family members and to strengthen and preserve families and family relationships whenever it is in the best interest of the child;

(d) promote the goals of permanency planning, first towards family reunification, or by connecting children to other safe and nurturing family relationships intended to last a life time; and

The above outline the purpose of reunification services and not that of foster care.

Further, the fourth purpose of foster care stated in the Bill as

(e) respect the individual and family by demonstrating a respect for cultural, ethnic and community diversity.

The above is a principle of foster care practices and not a purpose.

Recommendation

It is recommended that the heading “Purpose of foster care” be removed, and that 181 becomes part of 180. It would then read:

180 (4) Foster care seeks to: (insert 181 (a) (b) (c) (d))

GENERAL COMMENTS

Active Participation of Civil Society

Introduction

The Democratic Government of South Africa through our Constitution has made strides to ensure that the rights of all are protected. Society today faces a complexity of challenges that call for multi-pronged solutions that must be underpinned by the involvement of civil society. To this end it must be ensured that in determining legislation that impacts on the most vulnerable in our society namely children, that

civil society has full and active participation. This rights of people need to be solidified in the Children's Bill. The development of norms and standards covering services to children need to include civil society partners who carry the majority of responsibility in implementing services.

Discussion

In the majority of chapters in Section 76 of the Children's Bill reference is made to the MECs consulting in the development of norms and standards. These include:

Partial Care 77(2)

Early Childhood Development 93 (2)

Child Protection System 106(2)

Prevention and Early Intervention Services 145 (2)

Child and Youth Care Centres 193 (2)

Shelters and Drop-in Centres 214 (2)

Where it is stated:

The Minister must determine the national norms and standards after consultation with the MECs for Social Development, the Financial and Fiscal Commission and the Minister of Finance.

It is strongly felt that civil society must be included in each clause and that the presumption that civil society would be involved in these processes not made.

Recommendation

It is recommended that the clause read:

The Minister must determine the national norms and standards after consultation with the MECs for Social Development, the Financial and Fiscal Commission, the Minister of Finance **and include the active participation of civil society organisations.**

