

Amendments to the Children's Act 38 of 2005 and the Children's Amendment Act 41 of 2007

Due July 15 2011

This document is a summary of proposed amendments to the Children's Act 38 of 2005 and the Children's Amendment Act 41 of 2007 to be submitted by 15 July 2011.

NAME OF ORGANISATION/DIRECTORATE/DEPARTMENT/PROVINCE: SCALABRINI CENTRE OF CAPE TOWN

DATE:

COMPILED BY: REBECCA CHENNELLS

CONTACT DETAILS:

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The following submissions focus on the Scalabrini Centre's concern that the absence of specific mention of foreign children in the current Act has the practical effect of allowing discrimination in the application of the Act by opening space for exclusionary interpretations of its provisions by overburdened and reluctant DSD staff. Foreign children are frequently denied the protection and services they are entitled to under the Constitution and in terms of International Law on the basis of their nationality or their lack of 'documentation'. The particular circumstances of different foreign children require definition and clear legislated delineation of the roles of the DSD and other State Departments and specification of particular procedures to be followed in particular circumstances.

Section number	Section title	Proposed amendment/addition	Reasons	Decision by DSD: Proposal accepted Y/N	Reasons
SECTION 1	DEFINITIONS:	'foreign child' – a child who is not a citizen of SA, orphaned and abandoned having corresponding meanings to definitions already provided...	'Foreign child' definition is necessary as an umbrella term under which more specific categories are grouped. These terms are required to be better defined as our further submissions relate to the insertion of provisions dealing with 'foreign children' and		

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			'sub-categories' of foreign children and the procedures required to be followed in each instance.		
Section 1 – section 289		'illegal foreign child' (referred to in section 289) / distinguished from an 'undocumented child'	It is not clear how a child can be 'illegal'. Or what this means in practice (ie: case law cannot deport children). We submit that to call a child "illegal" when ANY child is covered by the Act only exacerbates confusion over the application of the Act. Using the term UNDOCUMENTED would ensure a clear distinction from the treatment of undocumented adults who are 'illegally' in SA in terms of the Immigration Act. In addition, an undocumented child could have a legitimate claim to a status, such		

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			as citizenship through a parent, or refugee status on basis of a claim recognized in terms of S3 of the Refugee Act.		
Section 1 –		‘unaccompanied child’ – a foreign child in South Africa without any caregiver or relative.	There are many such children in SA.		
Section 1 –		‘separated child’ - a child separated from her/his parents but in the care of a relative or caregiver.	As above.		
Section 1 –		‘Asylum/refugee child’ – needs a definition referral to the Refugee Act	The Refugees Act provides for basic procedures in the handling of children who are unaccompanied or separated and requires that the DHA and DSD work together. Particular reference to the Refugee and Asylum Seeker child is necessary.		
Section 1 –		‘Stateless child’ – child whose			

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		nationality /citizenship to another country cannot be established or verified.			
SECTION 2	OBJECTS OF THE ACT:	(c) Should include specific mention of the States in respect of foreign children.	This is required to ensure that there is specific recognition of the imperative of ensuring rights are afforded to foreign children irrespective of sub-category and in accordance with our constitutional and International Legal obligations.		
SECTION 8	APPLICATION OF THE ACT:	Specific declaration of the application of the Act to foreign children whether born in/outside of SA. Referral to definitions included in S1 and noted above.	Necessary to confirm extent and nature of the application of the Act to foreign children in specific categories. This in line with our Constitutional and International law obligations.		
SECTION 150	CHILD IN NEED OF CARE AND PROTECTION:	Specific reference to investigation of foreign children who are found in SA without a parent / or in the care of another relative.	These cases need to be carefully considered because of the serious risk of trafficking and abuse by 'relatives' who		

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			<p>use children as free labour or otherwise are not acting in the child's best interests. Additionally, it is necessary to assess at earliest possible opportunity if the child can be returned to her/his own parents/home country. In our experience child relatives are often brought or arrive in SA (for a variety of reasons including refugee related reasons) and are then simply kept at home without access to schooling and basic needs being sufficiently addressed either out of neglect or dire economic circumstances.</p>		
<p>DEDICATED CHAPTER – suggested in addition to above changes that a comprehensive chapter be inserted to replace</p>	<p>FOREIGN CHILDREN:</p>	<p>General clause: international obligations and applicable principals.</p> <p>We propose that the particular</p>	<p>The Act already deals with categories of children and issues by chapter. It would be consistent, easier to</p>		

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the Trafficking chapter that is to be removed(?).		needs of foreign children may best be legislatively provided for by the creation/insertion of a chapter dedicated to guiding how particular categories of foreign children are to be dealt with.	reference and access and provide undisputable authority for field workers if their needs and the processes for addressing those were dealt with in a separate and comprehensive chapter. Foreign children present particular challenges as they have needs specific to their uncertain position in society: documentation, psychological needs, accessing resources, refugee claim processes, language barrier issues.		
		ASYLUM SEEKER/REFUGEE CHILDREN: the Act will need to speak to the changes in the Refugees Act which require social workers to play a role in the documentation of children who appear to have an asylum seeker claim.	Specific provisions are required for example to ensure that: <ul style="list-style-type: none"> 1. DHA officials particular responsibilities are legislated (Refugee Reception 		

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			<p>Officers and Immigration officials in certain key positions ie at the borders);</p> <p>2. provision of child appropriate structures and facilities;</p> <p>3. social workers tasked for specific processes (nb: which social workers will be responsible to handle referrals from Refugee Reception offices) or training of social workers generally;</p> <p>4. provision of obligations on social workers or caregivers to ensure the</p>		

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			processing of asylum claims and the extension of legal documents.		
		UNNACCOMPANIED / SEPERATED CHILDREN: the Act needs guidance on the procedures to be followed by social workers and others who are engaged in family tracing. Or in how to deal with the claims of relatives to be caregivers, and the particular complications regarding documentation of such children.	Currently the Act only envisages separation in case of trafficking. Does not deal with orphaned abandoned foreign children who can arrive as unaccompanied or separated or become so subsequent to arrival in SA. Such children have particular care needs and serious documentation issues which require legislative clarity in order for DSD and DHA to know their roles and responsibilities in respect of the children.		
		STATELESS CHILDREN: children where not possible to establish their nationality need to have procedures in place to ensure	Procedures and responsibilities of DSD and DHA in assisting and ensuring long		

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		that they are accommodated in terms of applicable international legal obligations.	term/durable solutions.		
		FOREIGN CHILD IN CARE OF THE SA STATE: procedures and practice regulating how they are accommodated and cared for. And addressing particular challenges faced by such children upon the attainment of majority.	Particular consideration to documentation and care at point of attaining majority (frequently foreign children complete matric late because of previous circumstances) and it is often the case that their legal status is uncertain due to death disappearance of parents/caregivers through whom they have previously acquired documentation legalizing their stay in SA. For example, a child who has refugee status through his parent and has never lived in her country of nationality. Need to refer to a naturalization process or engage DHA on this matter?		

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		<p>UNDOCUMENTED FOREIGN CHILDREN WHO HAVE BEEN PLACED IN STATE CARE: there is a need for a procedure to assist migrant children who have no documentation but are in State Care and in whose best interests it is to remain in SA permanently.</p>	<p>The issue is even more complex for children whose reasons for coming are either indeterminate or where the child is a migrant without a refugee claim.</p>		