

Parliament of the Republic of South Africa

PO Box 15

Cape Town

8000

14 August 2015

Attention: Ms Lindiwe Ntsabo

Email: Instabo@parliament.gov.za

RE: SUBMISSION AND REQUEST TO MAKE ORAL PRESENTATIONS ON THE CHILDREN'S AMENDMENT BILL [B13 – 2015] AND CHILDREN'S SECOND AMENDMENT BILL [B14 – 2015]

My name is Sipho Sibanda, I am a Social Work Lecturer (Practice) at the University of Pretoria and my field of specialisation is child protection and social security. I have seven years of social work experience in the field of child protection and have worked at Germiston Child Welfare and Jo'burg Child Welfare in the position of a social worker and subsequently social work supervisor. During my practice experience, I realized that since the introduction of the Children's Act 38 of 2005 and its subsequent effecting in April 2010, there has been instability in rendering child protection services. This state of affairs has been caused by some serious shortcomings in the new legislation. Despite all these challenges, not much research had been done to explore the nature of challenges that social workers working in child protection services are facing in implementing the said Act, in a bid to propose recommendations for its effective and efficient implementation. Therefore, I enrolled for a Master's Degree in Social Work (Social Development and Policy) at the University of Pretoria. In partial fulfilment of this degree programme, I conducted a study titled: Challenges faced by social workers working in child protection services in implementing the Children's Act 38 of 2005. Based on my experience in implementing the Children's Act and on the results of my research findings, I would like to make the following submissions regarding the Children's Amendment Bill [B13 – 2015] and Children's Second Amendment Bill [B14 – 2015].

Children's Amendment Bill [B13 – 2015]

Section 150 (1)(a)

Problems of immense proportions have resulted from the wording of section 150(1)(a). This section is one of the grounds for finding a child in need of care and protection. The current section 150(1)(a) of the Children's Act 38 of 2005 states that, ***“A child is in need of care and protection if, the child; has been abandoned or orphaned and is without any visible means of support.”*** From practice experience, this section has proved problematic when a social worker tries to open and finalise a children's court enquiry for a child in foster care whose order has lapsed. The same is true for an abandoned or orphaned child requiring foster care that has been staying with alternative parents on a private arrangement and now needs state assistance because of a small source of income which is only sufficient for themselves but not for an additional person (the child concerned). Such care givers are usually relatives receiving some form of state assistance (for example disability grant, older persons grant, and child support grant). A 2008 study conducted by the National Welfare, Social Service and Development Forum found that most children who require foster care reside with elderly relatives. Besides section 150(1)(a), there is usually no other ground for finding such children “in need of care and protection”. Unfortunately, most presiding officers reject the ground saying, “The child is not without ‘visible means of support’ as required by section 150(1)(a)” (Hall & Proudlock, 2011:2). Such children can only be eligible for a foster care grant if the children's court issues a court order placing them in foster care (be it with a relative or a non-relative). It is Noteworthy that there has been rejection of foster care applications on a “literal and strict” interpretation of “visible means of support” (SS v Presiding Officer of the Children's Court, Krugersdorp and others, 2011).

Most participants in my study (social workers) expressed serious concerns over this wording (a child is in need of care and protection if, the child; has been abandoned or orphaned and is without any visible means of support) and indicated that it should be changed. They said “what exactly does the phrase visible means of support mean”. They stated that it is a very subjective phrase and that lack of clarity on

section 150(1)(a) makes it inevitable for different stakeholders and office bearers to have different interpretations of the Act. The majority of the participants stated that most presiding officers do not have a standardised way of doing things. Therefore, having such an ambiguous phrase allows presiding officers to use subjective discretions in dealing with cases, especially foster care cases.

It was hoped that the Amendment Bill [B13-2015] would solve this challenge. Unfortunately, this Amendment Bill does not solve the issue, instead it makes matters even worse, for it reads ***“A child is in need of care and protection if, the child; has been abandoned or orphaned and does not ostensibly have the ability to support himself or herself.”*** This Amendment should be rejected and should not be supported. This is due to the following reasons:

Firstly, what does the word ostensibly mean? Is it not more ambiguous than “visible means of support” Ostensibly is a very subjective and relative word. It means something that is not certain, that has not been established. Its synonyms are: apparently; supposedly; seemingly; superficially and presumably. Do we really need such a controversial amendment? Will it not create worse problems than what we currently have? This tabled amendment definitely supports the use of idiosyncratic judgements by presiding officers, as we have seen in the “visible means” of support discourse. We should listen and consider what our social workers are telling us.

Secondly, the amendment implies that children have the duty to support themselves, is this realistic, and is it true, where and how on earth would children support themselves? Children do not have the ability to support themselves.

Thirdly, the amendment does not address the current foster care crisis in the country. The foster care system was designed for 200 000 children, currently it has 512 055 children on it (SASSA’s Socpen database, 2013). Moreover, it has taken the Department of Social Development more than 10 years to reach these 500 000 children (Proudlock, 2014). How long will it take them to reach 1.5 million children, another 10 years? 20 years? And what would be happening to these children in the meantime? Are we not infringing on their rights to social security. This is definitely unconstitutional. I want to reiterate that

“The foster care system has been overburdened and is being used for what it was not intended for, in other words, it is being "abused". Surely, it cannot

cope with 1.5 million children? If we attempt to force it to cope, it will be a disaster, more and more children will continue to fall through the cracks in the system. More and more children who are hungry and thirsty for social work services will continue being deprived of them as social workers will be busy conducting administration of foster care. Social workers under strain are forced into crisis intervention mode and end up running ambulance services instead of rendering proper developmental child protection and reunification services to children and their families.” (Sibanda, 2013)

Fourthly, the amendment implies an introduction of a means test, yet we want a system that that display principles of developmental social welfare services, and does not promote the principle of universal access. We do not want an introduction of a means test to determine eligibility for a foster care grant. The government of the Republic of South Africa has the constitutional obligation to provide such a grant. All foster children in the Republic of South Africa have the inherent constitutional right to access a foster care grant.

Equally significant, the amendment does not address the shortage of social workers, which is closely linked to the foster care crisis in the country. Although the Children’s Act now allows for children’s courts to make permanent foster care orders in specified circumstances (section 186). This reduces the costs and time of the two yearly reviews by social workers and the courts that were required by the Child Care Act 74 of 1983. Nevertheless, social workers and courts are still required for the first placement decision. The backlog in foster care placement is therefore set to continue. Proudlock and Jamieson (2008) write:

The result is that families caring for orphaned children will continue to wait for a long time before they receive the Foster Child Grant, while services for children who have been abused or exploited will also be delayed as social workers and the courts struggle under a heavy case load. The opportunity to promote the use of the administratively simple Child Support Grant for children placed with relatives and who are considered low-risk placements, has been lost. Besides reaching more orphaned children faster, and saving considerable costs for both the Departments of Justice and Social Development, it would also have freed up precious court and social worker time to deal with active cases of child abuse. The consequences of delays in dealing with child abuse cases are serious.

September and Dinbabo (2008:12) note that social workers are the ones to turn the Children’s Act into lived reality for children and their families. However, this is a huge challenge because social work is regarded as a scarce skill in South Africa (Earle,

2008:5-6). In addition to universities not delivering sufficient graduate numbers due to resource constraints, social workers, as a consequence of a high work load, low salaries and poor working conditions are leaving the profession or the country to work abroad (Earle, 2008:74). In his State of the Nation Address of 9 February 2007, the then President of the Republic of South Africa, Thabo Mbeki, highlighted the need to 'Accelerate the training of family social workers at professional and auxiliary levels to ensure that identified households are properly supported and monitored'. This statement represents the high-level public acknowledgment by government of the critical role played by social workers and their shortage in the country. According to the South African Institute of Race Relations (SAIRR) (2012:1), the total number of social workers registered with South African Council for Social Service Professions (SACSSP) in March 2012 was 16 740. This number includes social workers that work for the government; Non Profit Organisations, the private sector, as well as those that are no longer in practice but retain their registration status. Of these 16 740 registered social workers, "Only 6 655 (40%) are employed by government and 2 534 (16%) by NPOs" (SAIRR, 2012:1). This leaves 7 451 (45%) registered social workers that are either not practicing or are employed in the private sector. Clearly, the number of social workers is inadequate for a successful implementation of the Children's Act 38 of 2005. Proudlock and Budlender (2011) state that, "Between 16 000 and 66 000 social workers providing direct welfare services for the Children's Act alone are urgently needed in the country." SAIRR (2012:1) postulates that about 16 504 social workers are required to implement the Children's Act. This accounts for 99% of all registered social workers, illustrating the huge shortage of social workers in the country.

Fifthly, the amendment does not address the lapsing of foster care grants. It is impossible for social workers managing high caseloads to have all documents and attachments to reports for extending orders ready for courts on due dates. It is therefore inevitable for orders to lapse. According to Du Toit as cited in News24 (2011:1), an estimated 123 236 children's foster care orders had lapsed by the end of January 2011 without being extended and a large number of such orders were due to expire each month. Loffell, quoted in News24 (2011), attributed this to a contribution of backlogs at the various provincial departments, the children's courts and the child protection organisations. According to Skelton (2014) "In 2011 the

Department was taken to court by civil society because approximately 120 000 FCGs had stopped being paid to children. Social workers and courts had not kept up with extending the children's foster care court orders. The Department agreed in a court ordered settlement to re-instate the lapsed grants. The court order placed a temporary moratorium on any further lapsing of grants. The court ordered the Department to design a comprehensive legal solution by December 2014." We are now in 2015 and this comprehensive solution has not yet been designed.

More so, the amendment does not address the plight of children who are "in need of cash and not much in need of care." Most participants stated that their case loads are unnecessarily high due to the fact that they have cases for children who passed through the formal foster care system so as to access foster care grants. Realising the burden on the foster care system, the Portfolio Committee on Social Development in its report on the Amendment Bill has requested that the Department of Social Development conducts a comprehensive review of the social security policy for children and the foster-care system (Proudlock & Jamieson, 2008). However, we are now in 2015 and this review has not yet materialised. The value and contribution of social grants on the household income and well-being of families in South Africa is uncontested and indubitable.

So what should happen to section 150(1)(a)?

Since the case loads of social workers are unnecessarily high due to the fact that they have cases for children who passed through the formal foster care system so as to access foster care grants. Recommendations from participants are captured in the following quote:

- *I think it's actually prudent if we have a parallel system that can actually capture some of the children, especially the related placements, so that they don't go through the statutory processes that foster children go through, so that they can actually have their own sort of grant that is administered differently from the foster care grant, so that we reduce pressure on the conventional foster care system." (Sibanda, 2013)*

The regulations of the Social Assistance Act 13 of 2004 should be amended to allow for a kinship-care grant which would cater for orphans in the care of relatives. This will replace the use of the inaccessible foster care grant for this category of children. Therefore, ensure that the majority of orphans living in poverty with family members receive an adequate grant efficiently and timeously. By providing a kinship care grant that is accessed by direct application to SASSA and that is higher than the standard child support grant, the use of the foster care grant for orphans in the care of relatives will be reduced. This will also lighten social workers' case loads and therefore enable improved prevention; early intervention and protection services for abused and other vulnerable children. Loffel (2013) concurs;

There should be a re-examination of the system to allow for use of the limited number of social workers in the country in the most appropriate way. This could be achieved by providing financial support in the form of a Kinship Care Grant, which should be available to relatives who are providing stable, permanent care to orphaned children, and by linking them with appropriate community support services, while reserving the children's courts and child protection social work services for children who are experiencing or at risk of abuse, neglect and abandonment.

This view is reflected in the Draft Third Amendment Bill which was presented to Civil Society by the Drafter (University of Pretoria Centre for Child Law) in 2013. The Draft proposes that Section 150(1)(a) should be amended to remove the words "and is without any visible means of support" and replace them with the words "abandoned or orphaned and not in the care of a family member." The effect of this would be that children who are abandoned or orphaned but who are nevertheless living with a family member (who is not a biological parent) are not automatically in need of care and protection. However, the question is, what will then happen to children who are orphaned or abandoned but who are living with family members? Therefore, it is recommended that section 150(2) should be amended by the addition of a new paragraph (c) which adds the following to the category of children who may be in need of protection: "A child who has been abandoned or orphaned and is not living with his or her biological parent, but is in the care of a family member." This subsection requires that such children's cases should be "investigated". Furthermore, it is recommended that "investigated" be changed to "assessed". The rationale for this proposition is that an investigation is thorough and comprehensive whilst an assessment is general and simple. Moreover, an investigation can only be

done by a social worker, whilst an assessment can be done by any social service professional, including social auxiliary workers and the large growing army of child and youth care workers. The proposed amendment to Section 150 would create a system that allows for non-court ordered care by relatives, namely, kinship care grant as discussed above. This Draft Third Amendment Bill was welcomed, hailed and celebrated by the civil society as an answer to foster care crisis in the country and as a comprehensive social security strategy for orphans. It is however very unfortunate that it is now two years later and the Department of Social Development has not yet published the draft for comment in the Government Gazette or indicated when the Amendment Bill will come to Parliament. This Third Amendment Bill should be tabled before Parliament as soon as possible. Failure to release the Draft Third Amendment Bill has unimaginable consequences for children and their families.

Children's Second Amendment Bill [B14 – 2015]

Section 152

The tabled amendments to Section 152 are hereby supported. The immediate review will ensure that Children are not unlawfully removed as seen in the 2011 High Court case of Chirindza and others v Gauteng Department of Social Development and others. The purpose of such a review would be to determine whether the removal was in the child's best interests. It was because of the shortcoming of this section that the high court judge, Fabricious found and declared the Children's Act to be unconstitutional. The amendment will indeed give effect to the constitutional rights of children and families. However, it is of importance that guidelines on what social workers will need to prove at the reviews be provided. Moreover, factors to be considered by presiding officers at reviews should be indicated.

The other challenge regarding the amendment is that Section 152 (3)(b)(i) does not exactly give the social worker 24 hours to ensure that the matter is placed before the children's court after the placement of a child in temporary safe care. This time period

(24 hours seems or the next court day) seems to be running concurrently with the time frame given to the police officer in section 152(3)(b) (in the event that the removal would have been conducted by the police officer). So what this means is that if a police officer removes and places a child in interim temporary safe care placement, that police officer has 24 hours to report to the designated social worker, that very same social worker has exactly the same 24 hours (time running concurrently) to ensure that the matter is placed before the children's court for a review (note the words "placement of the child in temporary safe care" in Section 152 (3)(b)(i)). The question then is, what happens if the police officer notifies the social worker in the 23rd hour of the day following the removal, meaning the social worker is left with only one hour to present the case to the court. To avert massive problems resulting from this session, it is therefore suggested that the statement in section 152 (3)(b)(i) "Placement of the child in temporary safe care" be deleted and replaced by the statement "receiving such a referral". This will therefore mean that the police officer has 24 hours to refer the case to the designated social worker and then the designated social worker has 24 hours or "before the expiry of the next court day" to ensure that the matter is placed before the children's court for review.

Lastly, section 152 obligates the police officer to report the removal of the child both to the clerk of the children's court and to the designated social worker. What are the reasons for this double responsibility / double reporting? This has potential to cause confusion, it is therefore suggested that the police officer should only report the removal of the child to the designated social worker (only) then the social worker will take appropriate action as directed by the Children's Act.

Section 171

The amendments to section 171 regarding the transfer of children from one form of alternative care to another form of alternative care are hereby supported. The fact that children who are above the age of 18 but below the age of 21 who are still furthering their education, be it basic education, vocational or tertiary education can now be transferred from one alternative care giver to another alternative care giver will go a long way in ensuring the wellbeing of young persons who are still furthering

their education / studies. This was a huge shortcoming of the Children's Act. One participant in my research study stated:

“The child maybe in foster care, the foster parent passes on when the child is 18 years old, the child is discharged from foster care. Where to, that is a challenge, we have had a challenge to say okay he is an adult now, but do you kick somebody into the street just because he is an adult. What would therefore be the purpose of you investing money into raising a child into an adult, who you later leave on the streets?” (Sibanda, 2013)

It is indeed good news that such children that the participant was referring to can now be transferred from one placement to another placement. The age group of 18 to 59 is the forgotten age group when it comes to social security coverage in the country. Therefore, it is good that this tabled amendment zooms slightly into this marginalised group by catering for the 18 to 21 year olds, the youth who are often referred to as “the future of tomorrow”.

The removal of the word “ratification” from section 171 and its replacement with the word “approval” addresses problems that social workers on the ground had with the word “ratification”. However, the same can be said about the word “approval”, what does it mean?

The tabled amendment still promotes the issuing of transfer orders (for children moving deeper into the system) by the Department of Social Development, subject to approval by the presiding officer of a children's court. This sharing / division of responsibilities between these two departments will create administrative bottlenecks and cause ambiguity in the statutory status of children. Problems will arise when a child needs both an extension and transfer order. The current lack of capacity in the Department of Social Development is resulting in transfer orders being issued way after report due dates for the extension orders which mean social workers have to reinitiate children's court enquiries. The conflicting interests and actions of role players in the implementation of the Act is against the principles and ethos of the Children's Act as provided for in sections 4 and 5 of the Act, that advocates for inter-departmental collaboration in the implementation of the Act. It can therefore be stated that having the issuing of a transfer order based in one department

(Department of Social Development) and being overseen by another (Department of Justice and Constitutional Development) is a “complex and unwieldy arrangement”. Unfortunately, in this terrain marked by “institutional confusion”, social workers, children and families will end up being “caught in a vortex”. As stated above, it will become a huge challenge when a child needs both a transfer and an extension of placement order.

Therefore, this tabled amendment does not solve problems experienced regarding this section. Section 171(6) regarding the transfer of children deeper into the child and youth care system (e.g. from foster care into a children’s home) should be amended to make such transfer orders to be issued by the children’s court only. This will reduce the bottle necks associated with the issuing of transfer orders by the Department of Social Development and then being “approved” (same as ratified) by the children’s court. Placing the issuing of such orders in one department would avert institutional confusion. More so, the word “approval” should be included in the definition of terms and its meaning be elaborated. Why should the Department of Social Development issue an order and then the children court approve it? Why can it not be done by the same Department? Since the children’s court seem to be having the final say, why not take such transfer cases directly to court instead of first taking them to the Department of Social Development, then to the children’s court.

Section 176

The tabled amendments to section 176 are supported, the insertion of the words “Grade 12; higher education; further education and training or vocational training” is welcome as it would ensure that children above the age of 18 who are in tertiary education or vocational training receive a foster care grant. SASSA has been refusing to pay out grants for such children stating that they only pay grants for children who are in the basic education. This new section is now very clear and elaborate; it is a milestone in the protection of the rights of children and would obviate problems that social workers and families had with SASSA refusing to pay the grant. However, there is a need to amend SASSA regulations in order to allow for this new provision. Moreover, the words “grade 12” should be replaced with the

words basic education. This will cater for children who are already 18 but still doing grade 10 or any other grade that is not grade 12.

Unfortunately, the last part of the tabled Section 176 (3) which reads “---if such an application is submitted within three months after such date” is not supported. This part should be deleted due to the fact it is likely to lead to unintended consequences. There should be no cut-off date / time period within which section 176 applications can be made. It might happen that there is a genuine reason for a child that has turned 18 to submit the application after 3 months. Therefore, this section should accommodate such children by deleting the aforementioned statement from the tabled section 176 (3)

Thank you, I trust that the parliamentarians will take note of all the above mentioned suggestions.

This humble submission is made by Sipho Sibanda.

Mr Sipho Sibanda
Practice Lecturer
University of Pretoria
Dept. of Social Work and Criminology
HSB 13.6
Tel: +27(0) 12 420 4847
Fax: +27(0) 12 420 2093
E-mail: sipho.sibanda@up.ac.za



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

www.up.ac.za

REFERENCES

Centre for Child Law v Minister of Social Development and others (North Gauteng High Court) Case number 21726/11. Order of 10 May 2011a, unreported.

Children’s Act 38 of 2005 (Published in the *Government Gazette*, (28944) Pretoria: Government printer).

Chirindza and others v Gauteng Department of Health and Social Welfare and others (2011) JOL 27 290 (GNP).

Earle, N. 2008. *Social work as a scarce and critical profession*. Research consortium

Hall, K. & Proudlock, P. 2011. Orphaning and the foster child grant: a return to the 'care or cash' debate. *Children Count Brief*. Cape Town: Children's Institute, University of Cape Town.

National Association of Social Workers. 1983. *Standards for Social Service manpower*. New York: NASW, 1983, PP. 45

National Welfare, Social service and Development Forum. 2008. Use of the statutory foster care system to support long term kinship care: Impact on the social welfare system and the social work profession. Available www.forum.org.za. (Accessed: 14/02/2012).

News24 (10/05/2011). "Court order to end foster care crisis". Available: <http://www.news24.com/SouthAfrica/News/court-Order-to-end-foster-care-crisis>. (Accessed 2011/12/15).

News24. 17/08/2010. "Street kids' removal traumatic". Available: <http://www.news24.com/SouthAfrica/News/Street-Kids-removal-traumatic-20100816>. (Accessed:2010/12/30).

Proudlock, P. & Budlender, B. 2011. *Implementing the Children's Act: Analysis of human resource capacity and constraints*. Cape Town: Children's Institute, University of Cape Town.

Proudlock, P. & Jamieson, L. 2008. *The Children's Act: Providing a strong Legislative foundation for a developmental approach to child care and protection*. Cape Town: Children's Institute, University of Cape Town.

Republic of South Africa. 1996. *The Constitution of the Republic of South Africa. Act 108 of 1996*. Pretoria: Government Printers.

Republic of South Africa. 2004. Social Assistance Act 13 of 2004. *Government Gazette* No 26446, Government Printer.

September, R. & Dinbabo, M. 2008. Gearing up for implementation. A new Children's Act for South Africa, *Practice: Social Work in Action*, 20(2): 113-122.

Sibanda, S. 2013. *Challenges faced by social workers working in child protection services in implementing the Children's Act 38 of 2005*. Pretoria: University of Pretoria. (MSD Mini-Dissertation).

South African Institute of Race Relations. 2012. Social worker shortage undermines effectiveness of social welfare legislation. Available: www.sairr.org.za (Accessed: 2012/08/14).

South African Council for Social Services Professions. *February/March 2013 Newsletter*. Vol 2 Issue 2. Available: www.sacssp.co.za (Accessed: 2013/04/27).

SS v Presiding Officer of the Children's Court, Krugersdorp and others 9South Gauteng High Court) Case A3056/11, unreported.

Thabo Mbeki, President of South Africa. 2007. *State of the Nation Address of the President of South Africa, Thabo Mbeki: Joint Sitting of Parliament, 9 February 2007*. Available: <http://www.info.gov.za/speeches/2007/07020911001001.htm>. (Accessed 2012/10/02).