COMMENTS TO THE NATIONAL DEPARTMENT ON SOCIAL DEVELOPMENT ON REGULATIONS TO THE CHILDREN'S ACT (38 OF 2005) AND AMENDMENT ACT (41 0F 2007) AS PUBLISHED

SUBMITTED BY THE CHILDREN'S RIGHTS PROJECT AT THE COMMUNITY LAW CENTRE, UNIVERSITY OF THE WESTERN CAPE

11 August 2008

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1. Regulations on cultural male circumcision (regulations 8 and 9)

Section 12(9) of the Children's Act provides that a circumcision of male children over the age of 16 years may only be performed if the child has given consent, received proper counseling and the circumcision is performed in the manner prescribed. It is noted that regulation 9 has been drafted to refer to *religious* circumcisions for male children under the age of 16 years. However, there are no such regulations prescribing the manner in which (*cultural*) circumcisions for male children *over the age of 16* years should be performed as required by section 12(9) of the Act. It is submitted that a regulation be drafted to cover cultural or traditional circumcisions for male children over the age of 16 years. It is submitted that the regulations in this regard read as follows:

Cultural circumcision of male children over the age of 16 years

(1) Circumcision performed for cultural purposes on male children over the age of 16 years must be performed in accordance with the recognized practices of the culture concerned and must be performed by a person from that culture who has been properly trained to perform circumcisions.

(2) The person contemplated in sub-regulation (1) must ensure that –

(a) sterile surgical gloves are worn during the circumcision and that they are disposed of after each circumcision;

(b) any instrument used during a circumcision be disposed of after each circumcision unless sterilised in accordance with medical standards for the sterilisation of surgical instruments;

(d) there is no direct blood contact, contact with any body fluid or contact with any foreign substance between the child undergoing the circumcision and the person performing the circumcision; and

(e) the disposal of any instruments used for circumcision including any human tissue must be in compliance with any applicable legal provision and in accordance with medical standards for the disposal of surgical instruments and human tissue.

2. Regulation 18

It is noted that there is a comprehensive list of requirements for persons suitably qualified to mediate disputes relating to the acquisition of parental rights and responsibilities and parenting plans but that by using the word "or" in regulation 18(1)(d) each of these categories of persons suitably qualified stand alone and to the exclusion of each other. It is submitted that persons who possess a recognized qualification child development, child psychology or early childhood development referred to in regulation 18(1)(c) or admitted attorneys or advocates with five years experience in child and family law referred to in regulation 18(1)(d) should also have some appropriate training in mediation, as their respective qualifications and experience may not equip them with the appropriate skills to undertake mediation.

3. Regulation 40(4) (read with section 110 of the Amendment Act)

Regulation 40(4)(a), in line with section 110(5)(b), requires the provincial department of social development or a designated child protection organisation to whom a report has been made in terms of section 110(1), (2) or (4) to make an initial assessment of the indicators in regulations 40(2) and 40(3). However, no timeframe is indicated within which this assessment of the indicators must be undertaken. Nor is a time-frame attached to the assessment of the report received in terms of section 110(5)(b). It is submitted that because the report received concerns a child that is potentially being abused, that a time-frame within which the assessment should be conducted be specified in the regulations. It appears from discussions with social workers that in current practice, such an assessment is conducted within 48 hours of a social worker receiving the report. It is submitted that this be the time-frame within which the assessment contemplated in regulation 40(4)(a) be undertaken once a report is received in terms of section 110(1), (2) or (4).

Secondly, regulation 40(4)(b) contemplates an investigation to be conducted (if required) after an assessment of the indicators in terms of regulation 40(4)(a) is undertaken. However, it is not clear what this investigation is aimed at and it also does not appear to be an investigation in terms of section 155(2). It seems to be an investigation referred to in section 110(5)(c) which refers to an investigation regarding the truthfulness of the report received in terms of section 110(1), (2) and (4). If that is the case, then it is odd as the factors listed in regulation 40(4)(b) seem to go further than just an investigation into the truthfulness of the report.

It is our submission, that the assessment of the report in regulation 40(4)(a) according to the risk indicators set out in regulation 40(2) and (3) will in itself amount to an sufficient investigation into the matter which would necessarily also constitute an investigation of the truthfulness of the report and therefore no further investigation (as envisaged in regulation 40(4)(b) would be required. It is our submission, that the investigation in regulation 40(4)(b) amounts to a duplication of what the assessment should entail. Ultimately, we believe that the confusion has arisen as a result of incorrect wording in section 110 (7) where it refers to an “an investigation as contemplated in subsection (5)”. It is submitted that the wording should rather have read “an assessment as contemplated in subsection (5)” and that in subsection (5), subsection 5(b) should read “make an intial assessment of the report which shall include an investigation into the truthfulness of the report” thereby collapsing subsection (5)(b) and (c) together.

Our proposal therefore envisages the following scenario:

- A report is made in terms of section 110 of the Amendment Act.

- Accordingly in terms of section 110(5) an intial assessment of the report is conducted, which includes an investigation into the truthfulness of the report. This is done within 48 hours and the assessment is based on the risk indicators contained in regulation 40 (2) and (3).

- If the report of abuse is substantiated by the assessment in section 110(5) then the department must initiate proceedings in terms of the Act (in terms of section 110 (7)) which could include taking measures to assist the child (section 110 (7)(a)); or removing the offender (section 110(7)(b)); or deal with the child in terms of sections 151, 152 or 155 (section 110 (7)(c)).

So for example, if the last-mentioned option is the appropriate one for the matter namely, dealing with the matter in terms of section 110(7)(c), this will entail a full investigation and report in terms of section 155(2). This in itself seems to indicate the investigation envisaged by regulation 40(4)(b) is a duplication and unnecessary, given that the intial assessment is quite substantial and is followed by an in-depth investigation and report in terms of section 155(2).

We therefore submit that regulation 40(4)(b) be removed from the regulations, but that the factors listed in regulation 40(4)(b) (i) – (viii) be listed in regulation 40(4)(a) as factors to be taken into account during the assessment. In addition, when the department considers the technical amendments to the Act, they take our concerns regarding section 110(5) and (7) into account.

Therefore regulation 40(4) will read as follows:

(4) The provincial department of social development or a designated child protection organisation to whom a report has been made in terms of section 110(1), (2) or (4) of the Act must –

(a) make an assessment of the indicators referred to in subregulation (2) by taking the guidelines in subregulation (3) into account; and **which assessment should entail the following:**

(i) establish the facts surrounding the circumstances giving rise to the concern;

(ii) evaluate the child's parental circumstances, including parental characteristics, mental stability, maturity; physical or emotional impairment, substance abuse, capabilities, temperament, employment status, level of support given to the parent or care-giver by friends; the capacity and disposition of the parent or care-giver to give the child guidance and to give adequate and appropriate support to a child with

disabilities; emotional bonding between the parent or care-giver and the child; and a history of parental abuse or neglect of the child;

(iii) evaluate the child's family circumstances, including family violence; inappropriate discipline; dependency; marital stress; temporary or permanent unemployment; and family or parental composition;

(iv) evaluate the child's environmental circumstances, including poverty; overcrowding; homelessness; isolation; high mobility of the parents; the presence of social, environmental or financial stress; and the type of neighbourhood and community;

(v) identify sources who may verify the alleged abuse;

(vi) identify the level of risk that the child's safety or well-being is exposed to, including factors indicating that the child has suffered, or is likely in the near future to suffer, a non-accidental physical injury due to conditions which his or her parent or care-giver has failed to correct, or due to their having failed, to provide adequate protection; that the child is displaying symptoms of emotional damage and the unwillingness of the parent to address the problem or to seek assistance; that the child has been sexually abused by a member of the household; and that the child is in need of medical treatment, without which he or she will suffer severe ill-effects;

(ii) identify actual and potential protective and supportive factors in the home and broader environment to minimise risk to the child; and

(viii) decide on the appropriate protective measures or intervention as provided for in the Act.

4. Regulation 60(1)(b)

This regulation should read as follows by including reference to section 155(2):

"who is not in temporary safe care but is the subject of an investigation **in terms of section 155(2)** as to whether he or she is in need of care and protection."

5. Regulation 75(9)

Regulation 75(9) provides that a foster care plan, which has not been made an order of court, may be varied or amended on advice by a designated social worker or designated child protection organisation. However, there appears to be no form that has been designed for such variations or amendments and this appears to be a gap. It is submitted that in order for social workers and child protection organizations to be able to effect amendments and variations to foster care plans, that a form be devised for this purpose.

In addition, it is submitted that a regulation similar to regulation 75(7) be drafted to ensure that a copy of the amendments or variations to the original foster care plan be given to all the parties concerned.

6. Regulation 75(4)

It is submitted that the details listed in subsection 4(a) and (b) are particulars that must be contained in a foster care plan. Therefore, we propose that the word "**may**' in regulation 75(4) be changed to "**must**". It is submitted that the details listed are the basic minimum requirements for a foster care plan to achieve the purposes of foster care as set out in section 181 of the Amendment Act, therefore they should be mandatory.

7. Regulation 75(7)

It is unclear what is referred to by the term 'co-operation agreement' and we submit that if this is the foster care plan itself , then the wording of the regulation reflect this.

8. Annexure A – National Norms and Standards for Child Protection

8.1 k. Child-headed households (Minimum norms and standards)

Item (1) and (2) under the heading 'Monitoring and Supervision" incorrectly refers to section 136(3)(a) of the Act. The correction reference should read section 137(2).

These clauses also refer to a "mentor" that is appointed for the children while the Act in section 137 refers to an "adult" being appointed to supervise the child-headed household. The reference to "mentor" in these clauses should therefore be deleted and replaced with "adult" or "supervising adult" for the sake of consistency and to avoid any confusion.

9. Corporal punishment and other inhuman and degrading treatment or punishment of children in foster care, partial care, drop-in centres and child and youth care centres

It is noted that regulations to the Child Care Act (74 of 1983) contained express provisions relating to the discipline of children in foster care, places of care, children's homes, places of safety, schools of industries and shelters. These provisions, inter alia, expressly prohibited the use of certain behaviour management practices on children in

these facilities which *inter alia* included a prohibition on humiliation, ridicule and physical punishment of children. These facilities are now given new names under the Children's Act, namely Child and Youth Care Centres, Drop-In Centres and Partial Care facilities and it follows that children in these facilities must be given the same level of protection against physical and inhuman and degrading treatment and punishment as was previously granted.

However, it is submitted that the regulations and the minimum norms and standards in Annexure A referring to these facilities do not consistently provide this protection. In this regard the following is submitted:

9.1 Child and Youth Care Centres (regulations and minimum norms and standards)

The content of regulation 85 is supported as it comprehensively addresses and prohibits inappropriate behaviour management practices such as humiliation, ridicule, physical punishment, group punishment for individual behaviour and much more.

However, the norms and standards for Child and Youth Care Centres in Annexure A do not contain provisions on appropriate behaviour management practices. We submit that since minimum norms and standards form the minimum threshold relating to the functioning of these facilities below which they should not operate, we submit that provisions on behaviour management practices that are expressly prohibited, as set out in regulation 85(2), be included in the minimum norms and standards.

9.2 Drop In Centres (regulations and minimum norms and standards)

We support the content of regulation 104(4) – however they do not go far enough as they do not protect children from inhuman and degrading punishment. It is submitted that a provision be included that expressly prohibits inhuman and degrading treatment and punishment of children in drop-in centres.

In addition, similar provisions prohibiting inappropriate behaviour management practices should be included in the minimum norms and standards for Drop- In Centres in Annexure A.

9.3 Partial Care Facilities (regulations and minimum norms and standards)

We support the content of regulation 25(4) – however they do not go far enough as they do not protect children from inhuman and degrading punishment. It is submitted that a provision be included that expressly prohibits inhuman and degrading treatment and punishment of children in partial care facilities.

In addition, similar provisions prohibiting inappropriate behaviour management practices should be included in the minimum norms and standards for partial care facilities in Annexure A.

9.4 Foster parents (regulations)

While we support the content of regulation 70(1)(h), it is submitted that it be re-phrased to expressly prohibit corporal and other humiliating and degrading treatment and punishment of children. It is submitted that it should read as follows:

"guide the behaviour of such children in a humane manner and must not impose any form of physical violence or punishment, or humiliating or degrading forms of discipline."

10. Questions raised by social workers

The authors of this submission have recently been involved in training social workers in the Western Cape on the Children's Act and the draft regulations. The following are some questions raised by social workers during the training sessions which we thought necessary to bring to the Department's attention for consideration.

1. How does a supervising adult get designated as such for a child-headed household? Would potential people appear on a list and how would the court get access to such persons if the court is also allowed to designate a specific adult to supervise a child-headed household?
2. Should a form not be devised for the assessment conducted in terms of regulation 40(4)(a)?
3. Is a foster care plan necessary? Can this not be combined with a foster child's Individual Development Plan?