



TO: THE CHAIRPERSON, SOCIAL DEVELOPMENT PORTFOLIO
COMMITTEE

FROM: NCOP & LEGAL SERVICES UNIT

SUBJECT: CONSTITUTIONAL AND LEGAL IMPLICATIONS OF THE CHILDREN'S
AMENDMENT BILL B18B-2020

DATE: 04 OCTOBER 2022

I. INTRODUCTION

- [1] The Bill was introduced to the National Assembly in August 2020 in order to make certain amendments to the Children's Act 38 of 2005 (the "**Act**"). This opinion seeks to advise the Chairperson as well as Honourable Members on the Constitutional and Legislative implications of the Bill.
- [2] In terms of layout, this opinion is structured into five parts. Part I contains this introductory section, Part II sets out the background of the Bill and its constitutional and legislative framework in order to place it into context. Part III contains the clause-by-clause analysis. Comment is however provided on all those clauses which we are of the opinion warrant the attention of the Committee. Lastly, our conclusions and recommendations will be found in Part IV.

II. BACKGROUND AND PURPOSE

[3] According to its long title the Bill seeks:

- a) Contribute towards the comprehensive legal solution as ordered by the Gauteng Division of the High Court in Pretoria, in the matter of Centre for Child Law v Minister of Social Development (Case No: 72513/2017) to deal with challenges relating to the provision and administration of foster care.
- b) The High Court, on 28 November 2017, directed the Minister amongst others, to prepare and introduce before Parliament, the necessary amendments to the Children's Act 38 of 2005 ("the Children's Act") and the Social Assistance Act 13 of 2004 and to do so within a period of 15 months from the date of the Court Order to produce a comprehensive legal solution regarding the foster care system. The 15-month period referred to in the court order lapsed on the 28th of February 2019.
- c) Further the court ordered that any foster care order which, as at the date of the order, is in existence or has lapsed due to non-extension shall be deemed to be validly in place for 24 months from the date of the order or until the child subject to the order turns 18, whichever comes first. On 26 November 2019, the High Court extended the initial 2017 order for a period of 12 months and directed the Minister to request Parliament to expedite the process for the consideration and tabling of the amendments to the Children's Act, 2005.

III. CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

[4] South Africa's legislative framework is, in general, protective of children and their rights and there have been significant developments since South Africa ratified the African Charter on the Rights and Welfare of the Child (ACRWC) in 2000. The Constitution of South Africa (Section 28(1)) stipulates that, "every child has the right (b) to family care or parental care or to appropriate alternative care when removed from the family environment [and] (c) to basic nutrition, shelter, basic health care services and social services".

Furthermore, Chapter 12 of the Children's Act (No. 38 of 2005) states that foster care is a form of alternative placement that a children's court can order.

The Convention on the Rights of the Child (CRC) (1989):

Article 3(1) - states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 3(2) - states that States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 9 (1) - states that States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately, and a decision must be made as to the child's place of residence.

The African Charter on the Rights and Welfare of the Child (1989): Article XXV (25) (1) - states that any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled special protection and assistance.

IV. CLAUSE ANALYSIS

[5] **Clause 1** seeks to amend section 1 of the principal Act by substituting and inserting new definitions for abandoned child, cluster foster care scheme, social services practitioner and orphan .

- The definition of an orphan in the Principal Act is the normal definition where both parents are deceased. This amendment has taken into account households with single parents and where such single parents happen to pass away. The remaining children will still be regarded as orphans once this Bill becomes law.
- This will align the principal Act with current family and child law practice.

The Bill makes reference to separated and unaccompanied migrant children, care, temporary safe care, caregiver and regional court but no definitions are provided for the terms, propose that definitions for this terms be added ,

[6] **Clause 2** seeks to amend section 24 and extends the jurisdiction of the Children's court to hear guardianship matters.

- The increased jurisdiction of the children's court and the fact that the High Court no longer has exclusive jurisdiction in relation to guardianship matters of children is a positive step, as children's courts are more accessible and more well versed in family law and childcare matters , making guardianship applications accessible at the children's court will increase access to justice for a majority of people. Not only would reserving guardianship for the High Court exclusively only be in the interests of the more wealthy who have the necessary resources to use the High Court process, this amendment also serves to free up the already clogged roll of the High Court.
- According to section 42(1) of the Act, every magistrate's court, as defined in the Magistrates Court Act 32 of 1944 shall be a children's court and shall have jurisdiction on any matter arising from the application of the Act for the area of its jurisdiction, however regional courts are not able to act as children's courts. The Act has however been amended to include the "regional court" which sets out that this

means a court for any regional division as contemplated in the Magistrates' Courts Act.

- A number of the references to the Divorce Court, which is for all intents and purposes a High Court, have been replaced with a reference to the regional court. Regional courts are much cheaper and speedier to litigate in and so this inclusion of the regional court as the court that has jurisdiction to hear certain matters shows the emphasis the legislation is placing on ensuring that there is greater access to justice. This is further emphasized by the insertion of subsection 3A in section 45 of the Act, which provides that the High Court and children's court have concurrent jurisdiction over the guardianship of a child as contemplated in section 24 of the Act. In addition, subsection 3B was inserted which provides that the High Court, children's court and regional court have concurrent jurisdiction over the assignment, exercise, extension, restriction, suspension or termination of guardianship in respect of a child.

No proposed amendments for this clause .

[7] **Clause 3** seeks to amend section 45—

(a) by extending the jurisdiction of the children's court to include "guardianship of an orphaned or abandoned child".

(b) by excluding matters arising in a shelter from the jurisdiction of the children's court.

(c) by including unaccompanied or separated migrant child, or the child of an asylum seeker or refugee, as contemplated in the Refugees Act, 1998 (Act No. 130 of 1998) under the children's court jurisdiction.

(d) by adding to the powers of the children's court to refer any criminal matter arising from the non-compliance with an order of such court or a charge relating to any offence contemplated in section 305 to a criminal court having jurisdiction.

(e) by removing all references to the divorce courts and to clarify that the children's court and the High Court have jurisdiction over guardianship of a child. The High Court, children's court and regional court have jurisdiction over assignment, exercise, extension, restriction, suspension or termination of guardianship in respect of a child.

- The jurisdiction of the children's court has been widened in section 45 to include matters involving guardianship of an orphaned or abandoned child and matters involving an unaccompanied or separated migrant child or a child who is an asylum seeker or refugee as contemplated in the Refugees Act, 1998 (Act No. 130 of 1998). This increased jurisdiction of the children's court and regional court and the fact that the High Court no longer has exclusive jurisdiction in relation to guardianship matters of children is a positive step, as children's courts and regional courts are more accessible.

No proposed amendments for this clause.

[8] **Clause 4** seeks to amend section 105 by providing that the Department must ensure that a quality assurance process is conducted, in the manner and at the intervals as prescribed, in respect of all child protection services contemplated in this section.

- The establishment of these child protection units will strengthen the comprehensive social work assessments and the provision of responsive prevention and early intervention services, minimizing the need for children being placed in foster care.

No proposed amendments for this clause.

[9] **Clause 5** seeks to amend section 142 by empowering the Minister to make regulations prescribing the powers, duties and responsibilities of the Registrar

of the National Child Protection Register, and the establishment of well-resourced designated childcare and protection units with quality assurance units.

- Before this amendment, the Act did not provide an opportunity for a child to consent to an assessment and so this amendment effectively increases a child's participation in decisions involving the child.
- The Bill provides for the designation and functions for a Registrar of the National Child Protection Register. This may be a positive step as a registrar may be better equipped to handle certain functions that were previously assigned to the Director General, as the Bill sets out in the newly amended section 111(3) that the Director General must designate an official from the Department as the Registrar of the National Child Protection Register. However, the Bill does not set out the criteria one must meet to be designated as the registrar and this could pose a problem should an unqualified person be assigned this position.

Proposed that a criteria be added for person to be appointed as a registrar and instances where they can be removed from office.

[10] **Clause 6** seeks to amend section 150 to clarify that a child who is abandoned or orphaned and has no parent, guardian, family member or caregiver who is able and suitable to care for that child, is a child in need of care and protection. A child in need of care and protection will include “an unaccompanied migrant child from another country”; “a victim of trafficking”; or a child who “has been sold by a parent caregiver or guardian”.

- This clause complements the amendment of the Social Assistance Act and its Regulations, making provision for extended child support grant as part of the comprehensive legal solution (top-up).

Proposed amendment: the deletion of “such inability is readily apparent”

[11] **Clause 7** This clause will contribute to the decision-making process in relation to clause 5 as part of the comprehensive legal solution. Section 155 requires a

social worker to investigate whether a child is in need of care and protection and part of that investigation requires a comprehensive social work assessment. This can be read with regulation 55. This is usually the case when courts make a decision in terms of whether a child is in need of care and protection.

- *No proposed amendment for this clause.*

[12] **Clause 8** seeks to amend section 156 by adding that the child be placed in the care of a parent or family member, if the court finds that such person is a suitable person to provide for the safety and well-being of the child under a new subparagraph 1 (cA) .

- The enhancement of the foster care and adoption processes before the placement of a child will ensure that children are placed in an environment that is safe and secure, and also conducive for their development.

No proposed amendments for this clause.

[13] **Clause 9** seeks to amend section 157 by effecting minor consequential amendments. This amendment provides another provision to address the mechanisms required by caregivers to care for children that are orphaned or abandoned that may not necessarily require foster care placements.

- This promotes the one of the Children’s Act principles that seeks to promote and secure stability in a child’s life by considering adoption of children as the 1st option.

No proposed amendments for this clause .

[14] **Clause 10** seeks to amend section 159 by providing that a court may extend an alternative care order that has lapsed or make an interim order. Furthermore, it will be regulated to ensure the accountability of the respective officials regarding the lapsing of these orders. It further provides that notwithstanding the amendment to section 150(1)(a), an order placing an orphaned or abandoned child in foster care with a family member in terms of section 156 before or on the date of this Amendment Act, may be extended by the court in terms of section 159(2) or section 186(2).

- This amendment provides another provision to address the mechanisms required by caregivers to care for children that are orphaned or abandoned that may not necessarily require foster care placements.
- It promotes the one of the Children's Act principles that seeks to promote and secure stability in a child's life by considering adoption of children as the 1st option.
- Thus, it provides a legal mechanism contributing to the comprehensive legal solution for foster care by reducing the demand for unnecessary foster care placements and serving the child's best interests.
- Enabling the presiding officers to extend the alternative care (i.e., foster care) orders in this manner that is in line with section 48 of the principal Children's Act will contribute to the comprehensive legal solution by putting a mechanism that prevents these orders from lapsing.
- This amendment will enable social workers to ask magistrates to extend foster care court orders that have already expired which potentially removes the accountability that ensures children's alternative care placements are regularly reviewed by social workers and the courts.

[15] **Clause 11** seeks to amend section 160 by providing that the Minister may make regulations regarding the procedure, form and manner that a social service practitioner must follow when assessing, screening, investigating, referring to the relevant authority and placing a child who is in need of care and protection.

Proposed amendment : There is a need for an insertion which provides that a child's right to privacy and protection of personal information is subject to several Acts, including the Films and Publication Act, 1996 and the POPI Act, 2013. The POPI Act provide that the information of children must be handled with a certain amount of care and sets out how personal information of a child is to be processed and published, directly applicable to a child's right to privacy and protection of personal information, thereby offering the child more protection.

[16] **Clause 12** seeks to amend section 183 by providing that an organisation operating or managing the cluster foster care scheme must register as a designated child protection organisation within two years of this provision coming into operation and that the provincial department of social development or a designated child protection organisation must manage and operate a cluster foster care scheme in the prescribed manner.

- This may give an additional administrative burden on organisations, it suggested that some assistance be provided to organisations so ensure compliance.

[17] **Clause 13** seeks to amend section 185 by providing that not more than six children may be placed in foster care with a single person or two persons sharing a common household in terms of a registered cluster foster care scheme.

- The amendment is intended to ensure that children placed in cluster foster care are cared for appropriately and the caregiver is not overburdened.

No proposed amendment for this clause.

[18] **Clause 14** seeks to amend section 186 by providing that a children’s court may deem it necessary to order further supervision services and despite the provisions of section 159 (1) (a), regarding the duration of a court order, and after having considered the need for creating stability in the child’s life, the court may place a child in foster care with a family member and order that the foster care placement subsists until the child turns 18 years. It further provides for the effecting of minor consequential amendments to align the Bill with the current terminology and by providing that this section does not apply to a cluster foster care scheme.

- This promotes the one of the Children’s Act principles that seeks to promote and secure stability in a child’s life.

No proposed amendments for this clause.

[19] **Clause 15** seeks to amend section 312 by providing that the MEC for social development, subject to any provincial strategic plan, may enter into an agreement with a designated child protection organisation or a person on an agency basis in the relevant province.

No proposed amendment for this clause.

[20] **Clause 16** provides for the short title and commencement of the Act.

V. CONCLUSION AND RECOMMENDATIONS

[21] The Bill needs to create certainty on the categories of children protected by the Act, Section 28 of the Constitution provides that children's rights apply to all children in the Republic, as well as the Sexual Offences Act, which offers protection to all children in the Republic. The Bill needs provide for the rights of

unmarried fathers to acquire parental responsibilities thereby lessening the number of maternal orphans in need of alternative care . In conclusion, it is recommended that, the Committee consider the proposed amendments as well as the issues raised above pending public participation.