



# **Children's Bill Progress Update: Report on amendments made by the Portfolio Committee on Social Development**

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Lucy Jamieson and Paula Proudlock, Children's Institute,  
University of Cape Town

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## **1. Introduction**

The National Assembly passed the first part of the Children's Bill on 22 June. The Children's Bill Working Group, a national network of umbrella organisations working with children, is celebrating this moment as a major milestone for South Africa in the struggle to protect children from abuse and neglect. The new Bill introduces provisions and systems that will greatly advance our country's capacity to protect our children.

Many of our recommendations were heard, considered and incorporated by the Portfolio Committee on Social Development, the committee in Parliament that has been debating this Bill over the past 8 months. This Report provides you with a summary and detailed breakdown of the amendments made to the Bill by the Portfolio Committee. While the Bill is on the whole a great step forward, some problems remain. Details are provided below on the positive and negative aspects.

## **1. Overview of amendments made by the Portfolio Committee on Social Development**

### **The Bill is aimed at giving effect to constitutional rights to protection, social services and family care**

The objects clause of the Bill provides that the Bill is aimed at giving effect to the following three children's rights:

- a) The right to family care, parental care or appropriate alternative care
- b) The right to social services
- c) The right to protection from abuse, neglect, maltreatment and degradation

This is an important amendment made by the Portfolio Committee. It makes it clear that this is the law aimed at giving effect to these three rights.

The Bill also emphasizes the core international and constitutional principle that in every matter affecting a child, the child's best interests should be the primary consideration.

The chapters in the Bill are aimed at giving effect to these rights and the principle of best interests of the child. This is an important development because the Act that this Bill will eventually repeal, the 1983 Child Care Act, was not written from a child rights perspective. It was written in the 1980s by the Apartheid government when South Africa did not have a Bill of Rights or democracy. It therefore did not take into account key concepts such as equality for all children, equality for parents regardless of their gender, and the principle of the best interests of the child.

### **The Bill obliges all government departments to take reasonable measures to the maximum extent of their available resources to achieve the realization of the Act**

The inclusion of the words "maximum extent" before "available resources" is a major victory for children. This means that all departments need to prioritise children when they are making decisions about budgets and the allocation of resources. These words come from Article 4 of the UN Convention on the Rights of the Child and are aimed at ensuring that children's issues are prioritized in budget decisions.

### **The Bill obliges all departments to deliver services to children in an integrated, co-ordinated and uniform manner**

Protecting children from abuse and neglect is a task involving at least 7 different government departments at the national, provincial and local levels of government. A major problem affecting the system at the moment is the lack of co-ordination between all the different departments. Many children are not protected as a result and many children suffer terrible secondary traumatisation when they are in the system.

In recognition of this problem, the Bill has two clauses that strongly oblige all role-players to co-ordinate their services to ensure integrated service delivery to children and to co-operate with one another.

The actual mechanism to ensure co-ordination is not stipulated in the Bill; however, it could be set out in the regulations. We will be campaigning to ensure that a mechanism, such as an inter-sectoral committee, is established in the regulations.

### **The Bill has a special focus on children with disability and promotes equal opportunity and protection for children with disability**

Major advances have been made in recognising the rights of children with disabilities, and children with chronic illnesses, and guaranteeing they have access to all services provided by the Bill. The disability task team worked closely with the members of the committee and the drafters to make certain that the Bill creates an enabling environment and responds to the special needs of children with disabilities. The general principles section of the Bill recognises that to have equal access to those services, disabled children may require special support.

Throughout the Bill subsections have been added, but the biggest advance is the addition of a section dedicated to children with disability and chronic illness,

- 11.** (1) In any matter concerning a child with a disability due consideration must be given to—
- (a) providing the child with parental care, family care or special care as and when appropriate;
  - (b) making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have;
  - (c) providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community; and
  - (d) providing the child and the child's care-giver with the necessary support services.

### **Cultural, religious and social practices that have the potential to harm children have been prohibited or regulated.**

Female genital mutilation and virginity testing have been banned, and a male child now has the right to refuse to be circumcised. Anyone who violates these provisions or who fails to protect the child from such an abuse, is guilty of an offence.

### **Age for consent to medical treatment has been changed from 14 to 12**

Children under 12 need the consent of their parent or caregivers for medical treatment. Children over 12 can give consent to medical treatment for themselves. Children over 12 years can also consent to a surgical operation but must be assisted by their parent or guardian.

Care-givers (eg grannies) can now give consent for medical treatment for children under 12, however, consent for a surgical operation, in a non-emergency, may only be given by the Minister or the High Court, where no parent or guardian is available.

### **Important shift from concept of parental power to the new enlightened concept of parental responsibility is recognised**

The debate on replacing the terms 'access' and 'custody' with 'care' and 'contact', repeatedly dogged the committee. However they finally decided that it was important to shift from the concept of parental power to a new emphasis on parental responsibilities and rights and that the new terminology was essential for this shift to take place. They therefore decided to use the new terms of "care" and "contact".

The debate then focussed on whether the terms should be restricted to the Children's Bill or whether a sub-clause should be added to amend all legislation and common law where the terms access and custody were used. This would ensure that the jurisprudence behind the terms "access" and "custody" was retained for interpretation purposes while ensuring that the courts could shift to adopting the new terms of "care" and "contact" when interpreting other laws such as the Divorce Act.

The issue remained unresolved until the very last second. The committee voted to have the following subsection inserted into the interpretation section:

1.(2) In addition to the meaning assigned to the terms "custody" and "access" in any law, and the common law, the terms "custody" and "access" in any law must be construed to also mean "contact" and "care" as defined in this Act.

### **Guardianship applications to remain the exclusive jurisdiction of the High Court – thereby preventing caregivers in rural areas from being able to protect the property rights of orphans in their care**

Members of the committee were persuaded that the Children's Court should be empowered to hear guardianship applications in order to ensure that orphans property rights could be protected. However, the Deputy Minister of Justice argued against extending the jurisdiction of Children's Courts to include guardianship, as he was concerned about corruption, capacity and cost. He also wanted to remove the clauses aimed at ensuring that magistrates received appropriate training. After much deliberation and a last minute caucus by the ANC, the MPs decided to reject their amendment on guardianship and to abide by the Deputy Minister of Justice's instruction. Guardianship therefore remains the exclusive jurisdiction of the High Court. This is a major problem for the many caregivers who need to protect the property rights of the orphans in their care – especially those living in rural areas.

### **Legal Aid Board to decide whether child needs a lawyer in the Children's Court**

Magistrates must now consider whether or not a child needs a lawyer when a case appears in the Children's Court. If the Court is of the opinion that it would be in the best interests of the child to have a lawyer, then the Court must refer the matter to the Legal Aid Board. The Legal Aid Board must then make a decision as to whether to grant the child a lawyer at state expense. Regulations will guide the courts and the

Legal Aid Board, as to which situations would result in substantial injustice if the child does not have a lawyer.

### **National Child Protection Register incorporated into section 75 Bill**

Provision for the establishment of a National Child Protection Register has been reincorporated into the section 75 Bill. It was previously placed in the second Bill, the section 76 Bill.

The amended chapter includes changes to the data held on children, allowing for disaggregation on the basis of age, gender and disability, so that trends in abuse and neglect can be monitored and services adapted accordingly.

All welfare organisations working with children must check the names of all staff, and anyone who has access to children in their care. This includes current employees. Everyone who is placed on Part B of the Register (people unsuitable to work with children) will be notified and will be eligible for dismissal. Anyone who commits more than one offence against a child will remain on the register in perpetuity.

### **Children in Need of Care and Protection**

The categories of children identified as in need of care and protection has been redefined, now only orphans *without any visible means of support* are included, rather than all orphans. To determine whether they are in need of care and protection a social work investigation is compulsory for children who fall into one of the following categories: street children; a child who is a victim of child labour, a child who is a victim of trafficking; and a child in a child-headed household; and unaccompanied foreign child.

### **Adoption**

The bill creates a register of adoptable children and adoptive parents (RACAP).

The financial test that prevented many poor people from adopting children has now been removed.

A provision that allowed the adopting parents to pay the biological mother compensation for loss of earnings has been removed. This removes a possible form of unfair inducement to a mother to pressurize her to consent to the adoption of her child.

Psychologists and other professional persons such as lawyers have been added to the list of persons entitled to charge fees for adoption-related services. There has been controversy in this regard due to some lawyers profiteering from inter-country adoptions. However the drafters have made it clear that services performed by lawyers, unlike the social work component of the adoption process, will be optional, and lawyers will therefore not be in the position of being able to manage the adoption process for profit.

Section 233(1)(a) requires that a parent who is a minor (under 18) must be assisted by her guardian in giving consent for her child to be adopted. Under the current law, a sixteen year-old who wants her child adopted can give consent on her own without her parent's knowledge. Requiring the young mother to tell her parents about her pregnancy may prevent many young mothers from considering adoption as an option.

### **Inter-country adoption**

The Bill closes the loop-hole on back door inter-country adoptions. Any application for guardianship or rights to remove a child from the country will now be regarded as inter-country adoption and will have to go through a well regulated procedure.

Bi-lateral agreements can be made to regulate inter-country adoptions with countries that have not signed the Hague Convention. In terms of the Hague Convention, South Africa can only allow South African children to be adopted by foreigners from countries that have signed the Hague Convention on Inter-Country Adoptions. This provision excludes inter-country adoptions between many African countries. The ability to conclude bilateral agreements will therefore now and help to facilitate adoptions between African countries.

### **Trafficking**

The Bill makes trafficking of children an offence. Various people in the trafficking chain can now be arrested for trafficking; this includes those who are involved in advertising, harbouring or transportation activities. Syndicates can now also be prosecuted.

Assistance for victims of trafficking is stipulated:

- social workers must assess each child's case and provide an individualised plan for assisting the child
- children may apply for asylum if returning them to their country of origin would return them to an unsafe environment
- the state must pay for an adult to accompany a victim of child trafficking where necessary.

### **3. What lies ahead?**

The Section 75 Bill will now be referred to the National Council of Provinces (NCOP) and will probably be passed by the NCOP by the end of 2005. Once the s75 Bill has been passed by Parliament and signed by the President, and the costing process has been completed, the second bill (the s76 Bill) will be tabled in Parliament. This will probably happen in March 2006. The Section 76 Bill will probably take at least a year before it is passed. Once the second Bill has been passed, the two Bills will be merged into a single Children's Act.

#### *Next steps for the section 75 Bill*

The section 75 Bill will now be considered by the NCOP. The NCOP has three options: it can pass the Bill, it can amend the Bill or it can reject the Bill. If it passes

the Bill without amendments, the Bill will be submitted to the President for assent. If the NCOP amends or rejects the Bill, it will have to be reconsidered by the National Assembly.

The Minister for Social Development is very eager to have this Bill finalised as soon as possible, therefore the Select Committee will be under pressure to pass the Bill with no amendments. However, recently the NCOP has taken its legislative function more seriously and has put down its rubber stamp in favour of scrutinising the legislation. There are a number of controversial issues that the Select Committee may want to amend therefore, it is essential that we maintain the momentum of our advocacy strategy, starting with constituency visits to members of the Select Committee.

The Bill will not be implemented until both the section 75 and section 76 Bills are passed and the entire Act is published in the gazette.

*What's in the s76 bill?*

Partial care (crèches) and early childhood development centres

Foster care

Child and youth care centres (children's homes, places of safety, secure care facilities, schools of industry and reform schools)

Shelters for street children

Drop in centres for vulnerable children

Prevention and early intervention services (to assist families to prevent abuse and neglect)

Protection services for children who have been abused and neglected

#### **4. Detail on the amendments (clause by clause analysis)**

##### **Long Title**

The words "To give effect to certain rights of children as contained in the Constitution; to stipulate certain principles relating to the care and protection of children" have replaced the words "to define the rights and responsibilities of children".

##### **Preamble**

A rather unfocussed but well meaning preamble has been added to the Bill.

#### **Chapter 1 - INTERPRETATION, OBJECTS, APPLICATION AND IMPLEMENTATION OF THE ACT**

##### **1. Interpretation**

"abandoned" definition reinserted from s76 Bill

**“adoption service”** new definition added. This definition was inserted by the drafters and has not yet been approved by the committee.

**“care”** definition amended to include new sub-clause on special needs and new sub-clause to explain how the new concepts replace the old concepts of “custody” and “access”.

“care in relation to a child, includes, where appropriate—

- (i) accommodating any special needs that the child may have; and

In addition to the meaning assigned to the term “custody” and “access” in any law including the common law, the terms “custody” and “access” in any law must be construed to also mean “contact” and “care” as defined in this Act.”

**“caregiver”** definition amended by addition of categories of people to be considered caregivers

“care-giver means any person who factually cares for a child other than a parent or guardian, and includes—

- (c) a person who cares for a child with the implied or express consent of a parent or guardian of the child;
- (e) the person at the head of a child and youth care centre where a child has been placed;
- (f) the person at the head of a shelter;
- (h) a child and youth care worker who cares for a child without appropriate family care in the community; “

**“child labour”** definition inserted.

**“children’s court”** new definition added, to replace definition of **“court”**

**“contribution order”** definition reinserted from s76 Bill

**“exploitation”** definition amended, new categories added

“exploitation in relation to a child, includes—

- (a) all forms of slavery or practices similar to slavery, including debt bondage or forced marriage;
- (b) sexual exploitation; (commercial removed – has separate definition)”

**“guardianship”** now defined in the main body of the Bill section 18

**“National Child Protection Register”** definition reinserted from s76 Bill

**“orphan”** definition reinserted from s76 Bill

**“parental responsibilities and rights”** now defined in the main body of the Bill in section 18



**“parent substitute”** definition removed

**“partial care”** definition removed and placed in s76 Bill

**“partial care facility”** definition removed and placed in s76 Bill

**“person unsuitable to work with children”** definition reinserted from s76 Bill

**“primary care-giver”** definition removed. All references to primary care-giver have been removed from the Bill including the definition. Where appropriate care-giver has been used instead.

**“RACAP”** new definition added

**“respondent”** definition reinserted from s76 Bill

**“removal of body parts”** new definition added

**“school”** definition reinserted from s76 Bill

**“street child”** definition reinserted from s76 Bill

**“trafficking”** definition amended

**New subsection (2) added to extend the terms care and contact to cover all law.**

“(2) In addition to the meaning assigned to the terms “custody” and “access” in any law, and the common law, the terms “custody” and “access” in any law must be construed to also mean “contact” and “care” as defined in this Act. “

## **2. Objects of Act**

The objects have been tied to constitutional rights. These rights have been expressly incorporated into the objects clause and a new clause on disability has been added.

- “(a) to promote the preservation and strengthening of families;
  - (b) to give effect to the following constitutional rights of children:
    - (i) family care or parental care or appropriate alternative care when removed from the family environment;
    - (ii) social services;
    - (iii) protection from maltreatment, neglect, abuse or degradation;
    - (iv) that the best interests of a child are of paramount importance in every matter concerning the child;
  - (h) to recognise the special needs that children with disabilities may have;
- and”

## **4. Implementation of Act**

A much higher standard of implementation has been imposed upon the state in all spheres of government.

“4. (2) Recognising that competing social and economic needs exist, organs of state in the national, provincial and where applicable, local spheres of government must, in the implementation of this Act, take reasonable measures **to the maximum extent of their available resources** to achieve the realisation of the objects of this Act “

## **5. Intersectoral implementation of Act**

Section 5 has been added to ensure inter-sectoral implementation of Act.

“...all organs of state involved with the care, protection and well-being of children must co-operate in the development of a uniform approach aimed at co-ordinating and integrating the services delivered to children.”

## **Chapter 2 – GENERAL PRINCIPLES**

### **6. General principles**

New sections inserted which protect children from unfair discrimination on the grounds of disability; recognise a child’s need to play; and create an enabling environment to respond to the special needs that the child has.

“6. (2) All proceedings, actions or decisions in a matter concerning a child must—

(d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;

(e) recognise a child’s need for development and to engage in play, leisure and recreational activities appropriate to the child’s age; and

(f) recognise a child’s disability and create an enabling environment to respond to the special needs that the child has.”

### **7. Best interest of child standard**

New subsections added to recognise needs of children with disabilities and children with chronic illnesses.

“7. (1) Whenever a provision of this Act requires the best interest of the child standard to be applied, the following factors must be taken into consideration where relevant:

(i) any disability that a child may have;

(j) any chronic illness that a child may have;”

### **8. Application**

The word “chapter” has been changed to “Act”

### **Provisions of this Chapter take precedence over other law**

Section deleted.

## **10. Child participation**

The word meaningfully has been removed as this could be read to exclude children with mental disabilities.

## **11. Children with disability or chronic illness**

New section added

“11. (1) In any matter concerning a child with a disability due consideration must be given to—

(a) providing the child with parental care, family care or special care as and when appropriate;

(b) making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have;

(c) providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community; and

(d) providing the child and the child’s care-giver with the necessary support services.

(2) In any matter concerning a child with chronic illness due consideration must be given to—

(a) providing the child with parental care, family care or special care as and when appropriate;

(b) providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community; and

(c) providing the child with the necessary support services.

(3) A child with a disability or chronic illness has the right not to be subjected to medical, social, cultural or religious practices that are detrimental to his or her health, well-being or dignity.”

## **12. Social, cultural and religious practices**

‘Harmful’ has been removed from the heading, and the word “religious” included. Virginity testing has been banned outright.

“12.(1) Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to the well-being, health or dignity of the child.

(4) Virginity testing has been banned outright

(5) Every male child has the right to refuse circumcision.

(6) Any person who performs FMG, virginity testing, or circumcision where consent was refused, is guilty of an offence as is the person who is obliged to protect the child from abuse.”

## **13. Information on health care**

Now includes right to information on treatment of ill-health and disease and two new subclasses added:

(b) have access to information regarding his or her health status;

(c) have access to information regarding the causes of his or her health status; and

New subsection added

(2) Information provided to children in terms of this subsection must be relevant and must be in a format accessible to children, giving due consideration to the needs of disabled children.

### **15. Enforcement of rights**

Section amended

**15. (2)** The persons who may approach a court, are:

- (a) A child who is affected by or involved in the matter to be adjudicated;
  - (b) **anyone acting in the interest of the child or** (added) on behalf of another person who cannot act in their own name;
- Subsection (e) deleted

## **Chapter 3 – PARENTAL RESPONSIBILITIES AND RIGHTS**

### **18. Parental responsibilities and rights**

Definition is inserted into chapter.

### **19. Parental responsibilities and rights of mothers**

Reworded for clarity but no substantive changes

### **21. Parental responsibilities and rights of unmarried fathers**

Requirements for unmarried father to acquire parental responsibilities and rights automatically have changed. Previous requirements were to either live with the mother or care for the child for a total of 12 months. New requirements are:

- (a) if at the time of the child's birth he is living with the mother in a permanent life partnership; or
- (b) if he, regardless of whether he has lived or is living with the mother –
  - (i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father;
  - (ii) contributes or has attempted to contribute in good faith to the child's upbringing for a reasonable period; and
  - (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

Subsections (3) and (4) added introducing dispute resolution mechanisms if a dispute arises between the mother and father. This involves approaching the family advocate or a social worker for mediation as a first step and the court as a second step.

### **22. Parental responsibilities and rights agreements**

Section amended to allow mother to enter into agreement with any other person having an interest in the care, well-being and development of the child.

New subsections added

(5) Before registering a parental responsibilities and rights agreement or before making a parental responsibilities and rights agreement an order of court, the family advocate or the court concerned must be satisfied that the parental responsibilities and rights agreement is in the best interests of the child.

(6) (a) Family Advocate may amend or terminate agreements that registered with the Family Advocate (agreements made by the court may only be amended by the court).

### **23. Assignment of parental responsibilities and rights to interested person by order of court**

Restricted to care and contact. Guardianship can only be assigned by High Court.

### **27. Assignment of parental responsibilities and rights**

The word “parent-substitute” has been replaced with “guardian”

Parents may now transfer guardianship to a ‘fit and proper person’ in their will only and no longer by way of a separate agreement.

(1) (a) A parent who is the sole guardian of a child may appoint a fit and proper person as guardian of the child in the event of the death of the parent.

(b) A parent who has the sole care of a child may appoint a fit and proper person to be vested with care of the child in the event of the death of the parent.

(2) An appointment in terms of subsection (1) must be contained in a will made by the parent.

Subsections (5) to (7) deleted

### **28. Termination, extension, suspension or restriction of parental responsibilities and rights**

Section merged with section on ‘who may approach the court’

### **29. Court proceedings**

(2) application for “full parental responsibilities and rights” has been amended to “guardianship”

(5) “professional” has changed to “suitably qualified person”

### **30. Co-holders of parental responsibilities and rights**

(5) deleted as it’s a duplication of section 31

### **31. Major decisions involving child**

Section has been renumber and cross-references changed, no substantive changes

### **32. Care of child by person not holding parental responsibilities and rights**

“Emotional harm” has been added to the list of hazards that the care-giver must protect child from.

### **33. Contents of parenting plans**

New subsection added to allow for parenting plans to be drawn-up by parents who are not experiencing difficulties in exercising their parental responsibilities and rights.

“(1) The co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.”

### **34. Formalities**

Amended to distinguish between plans drafted to settle disputes and amicable agreements. The latter can be presented directly to the court, the former must be accompanied by a statement from the suitably qualified person who helped draft the agreement.

### **35. Amendment or termination of registered parenting plan**

New subsection added allowing family advocate to amend or terminate plans registered with them.

### **41. Access to biographical and medical information concerning genetic parents**

A guardian is entitled to the same information as the child.

## **Chapter 4 – CHILDREN’S COURTS**

### **42. Children's courts and presiding officers**

New subsection added:

“**42.** (3) For the purposes of this Act, the Minister for Justice and Constitutional Development may, after consultation with the head of an administrative region defined in section 1 of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944) appoint a magistrate or an additional magistrate as a dedicated presiding officer of the children’s court, within existing resources.”

New subsection added recognising needs of disabled.

“(8) The Children’s Courts hearings must, as far as is practicable, be held in a room which -  
(d) is accessible to disabled persons and persons with special needs.”

Minister of Social Development and Deputy Minister of Justice warned the committee not to insert these amends due to a lack of resources.

### **45. Matters children’s court may adjudicate**

Sub-section (1) has been amended to ensure that Divorce and Maintenance matters are not dealt with by the Children’s Court.

Matters which are the exclusive jurisdiction of the High Court:

- (3) (a) the guardianship of a child - retained
- (e) the appointment of a parent-substitutes - removed the term is redundant.
- (h) surrogate motherhood – added.

### **47. Referral of children by other courts for investigation**

(1) The child is to be referred to a designated social worker for investigation ito s155(2), rather than the Children's Court.

#### **49. Lay-forum hearings**

Persons who may sit on a lay-forum have changed from 'professionally qualified' to 'suitably qualified' person.

#### **50. Investigations**

New subsection added to give police power to remove anyone perceived as a threat to the child's safety.

“50 (4) the police official may-

(d) remove any person suspected of immediately causing harm or maltreatment of a child, from the child's home or place of normal residence in the manner contemplated in section 153 if the police official has a reasonable suspicion that the person-

(i) has caused the child harm; and

(ii) is likely to cause the child harm if the person is not so removed.”

#### **52. Rules and court proceedings**

(2) Rules made in terms of subsection (1) must be designed to avoid adversarial procedures and include rules concerning –

(b) the use of suitably qualified or trained interpreters.

The Portfolio Committee had added “and intermediaries” but this was lost following the intervention by the Deputy Minister of Justice.

#### **55. Legal representation of children**

Amended and new section written:

“(1) Where a child involved in a matter before the children's court is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter to the legal Aid Board referred to in section 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969).

(2) The Board must deal with a matter referred to in subsection (1) in accordance with section 3B of that Act, read with the changes required by the context.”

#### **61. Participation of children**

Has been amended to take into account any special needs the child may have.

#### **68. Referral of matters by clerk of children's court**

The clerk must refer the matter to a designated social worker for investigation, rather than the Children's Court.

### **Chapter 5 and 6 - PARTIAL CARE AND ECD**

Provisions removed and reinserted into section 76 Bill.

### **Chapter 7 – PROTECTION OF CHILDREN**

## **Part 2 - National Child Protection Register**

Provisions for the establishment of a National Child Protection Register have been reincorporated into the section 75 Bill. The amended chapter includes changes to the data held on children, allowing for disaggregation on the basis of age, gender and disability, and chronic illness

### **114. Contents of Part A of Register**

“114. (2) Part A of the National Child Protection Register must reflect—  
(a) In the case of reported incidents referred to in subsection (1)(a)—  
(ii) the age and gender of the child;  
(iii) whether the child has a disability and if so, the nature of the disability;  
(iv) whether the child has a chronic illness and if so, the nature of the chronic illness;”

The word ‘institution’ has been added to the list of locations where the incident occurred.

“(vii) the name and physical address of the institution, child and youth care centre, partial care centre or shelter or drop-in centre, if the incident occurred at such a place;”

### **119. Contents of Part B of Register**

Part B of the Register information on persons found to be unsuitable to work with children now contains the finger prints; a photograph, if available and, details of any offence they have committed against a child.

### **120. Finding persons unsuitable to work with children**

This section now applies to anyone:

who was by reason of mental illness or mental defect not criminally responsible for the act which constituted murder, attempted murder, rape, sexual abuse or assault with the intent to do grievous bodily harm with regard to a child.

This section now applies to anyone who was convicted of murder, attempted murder, rape, sexual abuse or assault with the intent to do grievous bodily harm with regard to a child during the five years preceding the commencement of this Chapter.

### **122. Findings to be reported to Director-General**

(2) Has been reworded so that it now confers an action on the Director General:

“122. (2) The Director-General must enter the name of a person found unsuitable to work with children as contemplated in section 120 in Part B of the Register—  
(a) as soon as the time for noting of an appeal or review has expired; or  
(b) if an appeal or review has been noted, as soon as the appeal or review proceedings have been concluded and the finding confirmed.”

Throughout the chapter where previously it said that the persons on Part B of the



register may not work with children, it now says work with “or have access to children”; and the list of institutions where such persons may not work has been expanded to include any institution providing welfare services to children.

#### **124. Disclosure of entry of name in Part B of Register**

Anyone currently employed in any of these institutions, who fails to disclose the fact that his or her name is entered in the Register is guilty of misconduct and his or her services may be terminated.

#### **125. Access to Part B of Register**

People who are allowed access to the Register now includes the manager or person in control of a designated child protection organisation dealing with foster care and adoption.

#### **126. Establishment of information in Part B of Register**

All agencies that are required to check new employees against the register must screen all existing staff within 12 months of the commencement of the chapter. The Director General must respond in writing to such inquiries within six months.

#### **127. Disclosure of names in Part B of Register prohibited**

A person must be informed when their name is entered on Part B of the Register.

#### **128. Removal of name from register**

A person convicted of an offence with regard to any child more than once, may not be removed from Part B of the Register.

**Part 3 - Protective measures relating to health of children** has been reincorporated into the section 75 Bill.

#### **129. Consent to medical treatment and surgical operations**

Where a child may consent to his or her own medical treatment or the performance of an operation, he or she may also give consent on behalf of his or her child.

A guardian has the same responsibilities and rights as a parent.

Care-giver has replaced primary care-giver.

The Minister for Social Development may give consent under the same terms as the High Court or the Children's Court.

#### **142. Regulations**

Regulations pertaining to the National Child Protection Register have been reincorporated in section 75 Bill

### **Chapter 9 - CHILD IN NEED OF CARE AND PROTECTION**

Sections 151 to 160 have been reincorporated into the section 75 Bill.

#### **150. Child in need of care and protection**

(1) (a) It has been recognised that many orphans have support and are not in need of care and protection therefore the word “or” was replaced with “and” before the words “without visible means of support”.

“150. (1) A child is in need of care and protection if, the child –  
(a) has been abandoned or orphaned *and* is without any visible means of support;”

The big change is that in all instances before the court considers whether a child is in need of care and protection, the matter must be referred to a designated social worker for investigation as contemplated in section 155(2). The social worker will make recommendations as to what interventions, if any, are necessary, including whether a court inquiry is necessary

Subsection (2) now makes a social work investigation compulsory for certain categories of vulnerable children.

“(2) A child found in the following circumstances may be a child in need of care and protection and must be referred for investigation by a designated social worker in terms of section 155(2):  
(a) a child who is a victim of child labour;  
(b) an unaccompanied foreign child;  
(c) a child who is a victim of trafficking;  
(e) a street child; and  
(f) a child in a child-headed household.”

#### **151. Removal of children to temporary safe care by court order**

Who must be informed of the removal has been change to include parent, guardian or care-giver; and the relevant provincial Department of Social Development. The time period for informing these people has been set at 24 hours.

#### **152. Removal of children to temporary safe care without court order**

Who must be informed of the removal has been change to include parent, guardian or care-giver; and the relevant provincial Department of Social Development. The time period for informing these people has been set at 24 hours. The matter must be reported to the relevant clerk of the Children's Court on the next court day.

New subsection added

“(7) Any person who removes a child must comply with the prescribed procedure.”

#### **154. Other children in need of care and protection**

Heading has been changed from ‘Siblings’ to ‘Other children’ in need of care and protection.

### ***Part 2 - Children’s court processes***

#### **155. Decision of question whether child is in need of care and protection**

Following subsections have been added to outline the social work investigation that must be carried out before a child is brought before the children's court.

**“155. (2)** Before the child is brought before the children's court, a designated social worker must investigate the matter and within 90 days compile a report on whether the child is in need of care and protection in such a format and containing such other information as may be prescribed.

(3) The designated social worker must report the matter to the relevant provincial department of Social Development.

(4) (a) If, after an investigation contemplated in subsection (2), the designated social worker finds that the child need not be referred to the children's court, he or she must indicate the reasons for the finding in the report, which must be submitted to the children's court for review.

(b) The designated social worker must indicate in the report the measures to be taken to assist the family if appropriate, including counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation.

(5) If, after an investigation contemplated in subsection (2), the designated social worker finds reasons for considering the child to be in need of care and protection, the child concerned must be brought before the court that has jurisdiction in the matter.”

#### **156. Orders when child is found to be in need of care and protection**

References to control of the child have been replaced with care of the child.

#### **Chapter 10 – CONTRIBUTION ORDERS**

Provisions have been reincorporated into the section 75 Bill; no changes to the content were made.

#### **Chapter 11 – CHILDREN IN ALTERNATIVE CARE**

Provisions removed and reinserted into section 76 Bill.

#### **Chapter 15 - ADOPTION**

##### **229. Purposes of adoption**

Respect for cultural, ethnic and community diversity has been removed as a *purpose* of adoption. This principle is incorporated into section 231 (3).

##### **231. Persons who may adopt child**

(7)(a): Unmarried biological father added to categories of those who can be considered to have declined to adopt if they fail to apply within 30 days of notification of application to adopt.

##### **232. Register on Adoptable Children and Prospective Adoptive Parents**

Very positive insertion.

##### **233. Consent to adoption**

(1)(a) Big problem – requires that a parent who is a minor must be assisted in giving consent (before his or her child can be adopted) by his or her adult guardian. Previous version could have been understood to have the same implication, but this was probably not the intention.

(1)(c) Need for child's consent to own adoption has been restored.

(5) Need for a parent to sign consent to adoption in front of the commissioner rather than the clerk has been restored.

(8) Provision is now made for child as well as parents to withdraw consent after 60 days.

#### **234. Post adoption agreements**

Explicit provision is made for post-adoption agreements re future contact/communication between child and parents or others, and re future exchange of info. Must be confirmed by the court in order to be binding.

#### **235. Freeing orders**

(4)(a). Technical improvement of provision for freeing orders. Order will not automatically lapse if a particular application does not go through.

#### **236. When consent not required**

(2). Provision for need for consent to be waived if child is an orphan and there is no caregiver/guardian willing or able to adopt.

(3)(c) Waiving of father's consent where pregnancy was allegedly due to rape. Children's court can now make a finding on balance of probabilities, which will not amount to a conviction for rape. (This is the present situation and was also recommended by the SALRC – the requirement of a criminal conviction in order to exclude the father was highly problematic.)

#### **237. Gathering of information for proposed adoptions**

(1) Provides that the efforts which have to be made to trace someone whose consent is required must be prescribed in regulations – this is helpful as it will do away with inconsistencies between courts e.g. in demands that agencies go hunting for unmarried fathers.

Subsection (a) also removes the requirement that the address of a person who does not have to be notified must be given to the court.

#### **239. Application for adoption order**

The necessary content of the social worker's report is spelled out and there is a requirement that the local DSD approve the placement. The latter requirement exists at present but was previously omitted from the Bill. Adds to work of the DSD and therefore to its costs.

#### **243. Rescission**

Right to apply for rescission applies to people who previously had guardianship, and not to those who had other forms or parental responsibility.

#### **248. Access to adoption register**

(3) & 4: Access is provided for both the child and the adoptive parents to medical information about the child or the biological parents which is pertinent to the health of the child. Where there is a post-adoption agreement, this may include access to other forms of information outside the usual limitations.

#### **249. No consideration in respect of adoption**

Provision for compensation of the biological mother for loss of earnings has been removed.

Psychologists and other professional persons such as lawyers have been added as being entitled to fees for adoption-related services. There has been controversy in this regard. The drafters have made it clear that such services, unlike the social work component, would be optional, and none of the professionals in question would be in the position of being able to manage the adoption process for profit.

It is stipulated that fees for counselling of the mother must be “reasonable”.

A designated child protection organization is included in the list of persons/ entities entitled to receive prescribed fees.

### **Chapter 16 - INTER-COUNTRY ADOPTIONS**

Throughout the Chapter ‘adoptable child’ has replaced the term suitable child.

#### **255. International co-operation**

New Clause inserted

Bi-lateral agreements can be made to regulate inter-country adoptions with countries that have not signed the Hague Convention (mainly applies to African countries - and facilitates 'African adoptions')

#### **258. Performance of functions**

Heading changed but content not amended.

#### **259. Accreditation of child protection organisations for inter-country adoption**

New subsection inserted

“(4) Subsection (1) does not prohibit the rendering of services in connection with the adoption of a child by a lawyer, psychologist or other professional person.”

#### **261. Adoption of children from Republic by persons in convention countries**

New subsections added ensuring that any adoption is in the best interest of the child, and allowing for consent to be withdrawn

“(5) The court may make an order for the adoption of the child if the requirements of section 232 regarding persons who may adopt children are complied with, the application has been considered in terms of section 239 and the court is satisfied that—

(a) the adoption is in the best interest of the child;

(f) the Central Authority of the Republic has agreed to the adoption of the child; and

(g) the name of the child has been in the RACAP for at least 60 days and no fit and proper adoptive parent for the child is available in the Republic.

(6) (a) The Central Authority of the Republic may withdraw its consent to the adoption of the child within a period of 140 days since the date on which it has consented to the adoption, provided that it is in the best interests of the child to do so.

(b) In the event of the Central Authority of the Republic withdrawing its consent as contemplated in paragraph (a), the child must be returned to the Republic forthwith in the prescribed manner.

(7) An order of court contemplated in subsection (5) takes effect only after the period referred to in subsection (6) has lapsed and the Central Authority has not withdrawn its consent within the stated period.

(9) The provisions of Chapter 15 apply to the adoption of a child referred to in subsection (8).”

## **262. Adoption of children from Republic by persons in non-convention countries**

New subsections added

“(5) The court may make an order for the adoption of the child if the requirements of section 232 regarding persons who may adopt children are complied with, the application has been considered in terms of section 239 and the court is satisfied that—

(a) the adoption is in the best interest of the child;

(g) the name of the child has been in the RACAP for at least 60 days and no fit and proper adoptive parent for the child is available in the Republic.

(6) (a) The Central Authority of the Republic may withdraw its consent to the adoption of the child within a period of 140 days since the date on which it has consented to the adoption, provided that it is in the best interests of the child to do so.

(b) In the event of the Central Authority of the Republic withdrawing its consent as contemplated in paragraph (a), the child must be returned to the Republic forthwith in the prescribed manner.

(7) An order of court contemplated in subsection (5) takes effect only after the period referred to in subsection (6) has lapsed and the Central Authority has not withdrawn its consent within the stated period.

(9) The provisions of Chapter 15 apply to the adoption of a child referred to in subsection (8).”

## **Chapter 17 - CHILD ABDUCTION**

## **Chapter 18 - TRAFFICKING IN CHILDREN**

### **283. International co-operation**

New section inserted giving the President the power to enter into bilateral agreements with Non-Convention countries.

### **284. Trafficking in children prohibited**

Prohibition has been extended

New subsections added to establish liability of employers and remove their licence or registration.

#### **284. Behaviour facilitating trafficking in children prohibited**

New section added banning the harbouring of child victims of trafficking, and advertising that promotes or constitutes trafficking.

#### **286. Assistance to children who are victims of trafficking**

New subsections added

“(1) (a) The Director-General of the Department of Foreign Affairs, without delay and with due regard to the safety of a South African child who has been trafficked to another country must, through its diplomatic channels, facilitate the return of the child to South Africa.

(b) (iv) must be a social work investigation under terms of section 155(2).

(2) State must pay for an adult to accompany the child home, if it is in the best interest of the child, and the parents, guardian, or care-giver cannot afford to.”

#### **288. Reporting of child victims of trafficking**

New section added:

“An immigration official, a police official, social worker, social service professional, medical practitioner or registered nurse who comes into contact with a child victim of trafficking in the Republic must refer that child to a designated social worker for an investigation as contemplated in section 288(1). “ [should be 289(1)]

#### **289. Child victims of trafficking found in Republic**

Section amended: child victims of trafficking to be referred to social worker for investigation before Children's Court inquiry.

Illegal foreign child victim of trafficking are entitled to remain in the Republic for the duration of any order made by the Children's Court.

#### **290. Repatriation of child victims of trafficking**

New section added :

State must pay for an adult to accompany the child home, if it is in the best interest of the child, and the parents, guardian, or care-giver cannot afford to.

#### **291. Extra-territorial jurisdiction**

New section added

Citizens and permanent residents can be prosecuted for offences committed overseas.

### **Chapter 19 - SURROGATE MOTHERHOOD**

#### **295. Confirmation by Court**

(d) “contact” replaces “custody”

#### **297. Effect of surrogate motherhood agreement on status of child**

Custody and access changed to care and contact.

#### **300. Termination of pregnancy**

The title has been changed and all references to abortion have been changed to termination of pregnancy.

### **301. Payments in respect of surrogacy prohibited**

Compensation in money changed to compensation in cash

## **Chapter 20 – ENFORCEMENT OF ACT**

### **304. Inspection of child and youth care centre, partial care facility, shelter and drop-in centre**

The other requirements that a centre, facility, shelter or place must comply with are now stipulated by law, not by the municipality.

### **305. Offences**

(1) (l)(i) and (ii) reinserted from section 76.

(1) (p) reinserted from section 76.

Subsections (r) and (s) added to make trafficking and facilitation an offence.

(3) De facto caregivers (eg relatives caring for orphans) added to those who are guilty of an offence if they abuse, deliberately neglect or abandon a child.

(4) medical aid has been changed to medical assistance

(5) A person who is the owner, lessor, manager, tenant or occupier of any premises on which the commercial sexual exploitation of a child has occurred is guilty of an offence if that person, on gaining information of that occurrence, fails to promptly take reasonable steps to report the occurrence to the South African Police Service.

New subsections added

(7) extends maximum sentence for repeat offenders to 20 years

(8) sets maximum sentence for trafficking at 20 years

## **Chapter 21 - ADMINISTRATION OF ACT**

### **306. Regulations**

(1) (a) cross –reference to 160 added.

(2) (a) (i) 'specified area' removed

(ii) 'specified' removed

### **308. Assignment of powers and duties by Minister**

grammatical changes

## **Chapter 22 Miscellaneous Matters**

### **312 - Agency agreements**

Title changed from outsourcing of services

Section amended so that now only the Minister may enter into agreements.

Previously the MEC had the same powers.