



17 July 2015

The Secretary to Parliament

P O Box 15
Cape Town
8000

PER EMAIL: emathonsi@parliament.gov.za

To Whom It May Concern,

RE: Comments on the Draft Refugees Amendment Bill

Please find attached hereto, Jo'burg Child Welfare's comments on the aforesaid document.

Yours Faithfully,

Margot Davids
Chief Executive Officer
Jo'burg Child Welfare

Caring for our children



COMMENTS: DRAFT REFUGEES AMENDMENT BILL

DETAILS OF INDIVIDUAL ORGANISATION MAKING THE SUBMISSION

Department/Organisation/Institution	Jo'burg Child Welfare
Name of Person Doing Submission	Nicole Breen
Designation/Position	Advocacy Manager
Email Address	advocacy@jhbchildwelfare.org.za
Cell Number/Landline	072 2577 938/011 298 8500

MANDATE OF ORGANISATION

1. Jo'burg Child Welfare ("JCW") is a non-profit organisation ("NPO") founded in 1909. It is a Designated Child Protection Organisation in terms of section 107 of the Children's Act 38 of 2005. It provides a range of direct services to abused, abandoned, neglected, orphaned and vulnerable children (including those who are infected or have been affected by HIV and AIDS) in the Greater Johannesburg area of South Africa.
2. The following will reflect the segments of the report on which JCW has elected to comment, in accordance with its mandate.

COMMENTS

3. JCW is cognisant of the need to share information with the public. It is also aware that the amendment, as it currently stands, contains inherent safeguards towards those whose asylum claims may be broadcast in the media. We assert, however, that the proposed amendment does not take into account the inherent vulnerability of children and the particular need to protect both their identity in proceedings before the Refugee Appeals Board, as well as their sense of dignity in the appeals process. These comments will therefore aim to highlight the need to view this matter from a child centred lens, and the need to tailor the amendment in such a way that it accommodates the rights of children. These comments will relate to any instance in which a child- either accompanied by his or her family or caregivers, or unaccompanied- is brought before the Refugee Appeals Board for a hearing in terms of section 26 of the Refugees Act 26 of 1998.
4. First and foremost, it is necessary to consider the provisions of section 28(2) of the Constitution, that is, that *"the best interests of the child are of paramount importance in every matter concerning the child."* Importantly, this entitlement extends to all children, regardless of their nationality. It is a principle iterated in various international instruments to which South Africa is a signatory, including the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The word "paramount" is emphatic, it creates an imperative that has to be borne in mind in all matters in which children are involved. By necessary implication, therefore, it is an aspect that has to

be taken into account in the adjudication of an appeal before the Refugee Appeal Board. This begs the question as to what the best interests of the child might be under the circumstance where their asylum claim is of interest to the public. The imperative created by section 28 exists because children are among the most vulnerable demographic of any given society. It essentially a mechanism through which their vulnerability is counterbalanced. Vulnerability is exacerbated in the case of children who have fled their country of origin and sought asylum. This is because of a number of factors including poverty, inequality, the effects of trauma and others. This vulnerability forms the backdrop of this submission. The following will examine the nature and effect of proceedings of this nature, the rights affected in such proceedings, how the courts protect these rights when children are called upon to give testimony before them, and the consequent recommendation as to how this Amendment Bill ought to address the rights of children.

5. Practically speaking, in the event that the Refugee Appeal Board is called upon to make a decision as to whether an individual is to be accorded refugee status, there is a process whereby the situation of the applicant is related to an appeal board member at a hearing. It is trite that those applying for refugee status may have undergone extreme trauma and may have been subject to extreme hardship. Recounting this state of affairs- while necessary- may in certain instances amount to secondary traumatisation. This may be exacerbated by the presence of additional people present at the hearing, and amplified by details of the account being publicised. Should a child be the subject of the asylum claim, and in the event that the media or other members of the public are present at the hearing, and in the event that details of the hearing are publicised, four main constitutional rights are affected, namely those contained in section 28(2) (as set out above), section 10 (the right to dignity), section 14 (the right to privacy) and section 28(1)(d) (the right of the child to be protected from maltreatment, neglect, abuse or degradation).
6. Given the aforesaid predisposition of such children to have suffered considerable trauma and hardship, their situation becomes comparable to children who have been victims and witnesses to a criminal act, as well as those alleged to have committed an offence. South African Law makes provision for the protection of children in these circumstances in the event that they are called upon to testify in court. Section 153(3) of the Criminal Procedure Act 51 of 1977, for instance provides that criminal proceedings may be held *in camera* where the child is the complainant in a sexual offence case upon the request of his or her parent of guardian. Section 153(5) of the same Act deals with child witnesses, and confers discretion upon the judicial officer to exclude the public from criminal proceedings. In the event that the case deals with a child offender (ie, where the child is at the centre of the proceedings), section 63(5) of the Child Justice Act 75 of 2008 precludes the presence of any person at the sitting of the child justice court unless the person's presence is necessary in connection with the case or the presiding officer has specifically granted permission for such a person to be present. As far as publication of the identity of a child is concerned, section 154(3) of the Criminal Procedure Act precludes the publication of the identity of either a child witness or accused. Section 170A of the Criminal Procedure Act also provides that a child may testify through an intermediary where it appears to the court that it would expose any child witness to undue mental stress or suffering if he or she testifies at such proceedings. Section

170A provides further that close circuit television may be used during these proceedings and that the witness can then give evidence from any place which sets the witness at ease and keeps him or her away from any person whose presence may upset him or her.

7. Although a hearing before the Refugee Appeals Board is neither as formal nor as adversarial as court proceedings, it is submitted that the challenges in terms of children having to give testimony are the same. It is therefore asserted that the same kind of protections should be accorded to children at hearings before the Refugee Appeals Board. Generally speaking, quasi-judicial forums, administrative tribunals or alternative dispute resolution mechanisms in South Africa do not offer any special protection to children. It is submitted that this should change to ensure that when a child is put before such a forum, that their rights are protected. It is therefore asserted that the proposed amendment should contain the following:
 - a. Emphatic provision that no media should be present at a Refugee Appeals Board Hearing at which an appellant is a child;
 - b. That the media should be precluded from publishing any information that could lead to the identification of a child appellant;
 - c. That provision should be made for proceedings concerning children to be held *in camera*;
 - d. That in the event that the presiding Appeal Board Member is of the view that a child's testimony before the Refugee Appeals Board would result in undue mental or emotional hardship that the child be entitled to testify through an intermediary;
 - e. That the appropriate resources should be made available to facilitate the provision of the above.

CONCLUSION

8. JCW welcomes the opportunity to comment on the Amendment Bill and it is our hope that it will assist in bringing the rights of children to the fore in this important process. This Amendment Bill represents a much-needed opportunity to clarify not only the parameters surrounding whether the media can be present and report on the proceedings before the Refugee Appeals Board, but also to ensure that their conduct and indeed the proceedings as a whole do not violate the rights of children. In order to ensure that a child is able to best represent their testimony, and thus increase their chance of successfully and rightfully being accorded refugee status in South Africa, there are certain prerequisites that have to be in place. An embargo on the presence of the media and on publication of their particulars is the first aspect; but rendering the environment to a child-friendly state is the overriding factor that must necessarily be considered.