18 August 2015

Ms Lindiwe Ntsabo

Portfolio Committee on Social Development

P O Box 15

Cape Town

8000

Per Email: lntsabo@parliament.gov.za

Dear Ms Ntsabo

RE: COMMENTS ON THE CHILDREN'S AMENDMENT BILL AND CHILDREN'S SECOND AMENDMENT BILL

The above matter has reference.

Please find attached comments on the aforesaid documents. The comments are divided into two sections, dealing with each of the Bills respectively.

Yours Sincerely,

Mrs Margot Davids

CEO: Jo'burg Child Welfare

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COMMENTS ON THE CHILDREN'S AMENDMENT BILL AND CHILDREN'S SECOND 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 ("The Children's Act"). 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.

OVERVIEW OF SUBMISSION

3. This submission will be divided into two parts- that is- aspects concerning the Children's Amendment Bill [B13-2-15] ("The Amendment Bill") and those concerning the Children's Second Amendment Bill [B13-2-15] ("The Second Amendment Bill"). Part 1 will examine and critically comment on the proposed amendments to section 120 and section 150. Part 2 will do the same in respect of the proposed amendments to section 1, section 151, section 152, section 176 and section 186.

PART 1: COMMENTS ON THE CHILDREN'S AMENDMENT BILL

4. The proposed amendments to section 120 of the Children's Act represent an important step forward in ensuring that children are protected from persons who have committed certain crimes as well as in ensuring that child offenders do not unjustifiably have their names entered onto part B of the National Child Protection Register ("NCPR"). This being said, it is our assertion that certain components of the proposed amendment should be reconsidered.

    a. The Amendment Bill proposes the substitution of section 120(4) with alternate text. One of the proposed changes it makes is to change *"a person must be found unsuitable to work with children-"* to *"a person must be deemed unsuitable to work with children-"*. This has been altered to obviate the need for courts to make a separate enquiry regarding whether a person's particulars ought to be entered into

part B of the Register. What is problematic, however, is that sections 120(1) and 120(2)- which the Amendment Bill does not address- refer specifically to a finding that has to be made. It is submitted that there is a stark difference between something that is "found" (ie: derived from a specific process) and something that is "deemed" (ie: an automatic consequence). Should the word "deemed" be included in subsection (4), it will render the subsection inconsistent with the other parts of the section. Conversely, there have been prolific difficulties with courts failing to make the findings of unsuitability, resulting in a failure to properly populate the register. As such, it is submitted that the wording in subsections (1) and (2) also be amended to reflect that a person is "deemed" unsuitable to work with children, rather than that a finding *per se* need be made.

b. A further component of this substitution is to alter the kinds of crimes which render a person eligible for entry of their particulars onto part B of the Register. It is submitted that in addition to the proposed stipulated offences should also be an offence in terms of the Prevention and Combatting of Trafficking in Person's Act 7 of 2013 as well as the common law offences of kidnapping and abduction. This is because both the seriousness and character of these offences could well render a person a risk to children.

c. It is proposed that a section 120(4A) be inserted after the aforesaid subsection 120(4). The first part of this insertion reads as follows *"before making an order contemplated in subsection (1)"*. The issue surrounding the question of a person being "deemed" or "found" unsuitable to work with children has been canvassed in paragraph 4a above. It is submitted that should this honourable forum elect to amend subsection (1) as suggested, that this wording will then be incorrect. This is because in the absence of having to make a finding, the court will no longer have to include the issue of unsuitability in the order. As such, it is asserted that the insertion should instead read *"before a person is deemed unsuitable to work with children"*.

d. Section 120(4A) sets out that in the event that a child is under the age of 18 years at the time the offence was committed, that the court has to,

    (a) Afford the child offender an opportunity to make representations as to why such an order should not be made;
    (b) Have the best interests of the child offender considered of paramount importance; and
    (c) On good cause shown, make an order that the particulars of the child offender should not be included in the Register

JCW regards this insertion as a positive change, but it notes with concern the possible disjuncture between this subsection, and the provisions of section 120(5). The proposed version of this subsection reads as follows:

Any person who has been convicted of an offence contemplated in subsection 4(a), whether committed in or outside the Republic during the five years preceding the commencement of this Chapter, is deemed unsuitable to work with children

The difficulty with these two subsections is that while subsection 4A sets out a process which seeks to ultimately prevent young people from having their particulars entered into the register, subsection 5 refers to any person. This could easily be interpreted to include child offenders. According to the Memorandum on the Objects of the Children's Amendment Bill, 2015- issued alongside the draft Amendment Bill- the purpose of inserting subsection 4A is, *inter alia, "to ensure the Act does not unjustly limit the rights of child offenders"*. It is submitted that if the Act makes room for inclusion of the names of child offenders in the Register on a retrospective basis, then this is precisely the effect it will have. It is therefore submitted that subsection 5 should exclude child offenders from its ambit.

5. The Amendment Bill proposes considerable change to section 150(1)(a) of the Children's Act. The first of these proposed changes comes in the form of the change of *"a child is in need of care and protection if the child..."* to *"a child is in need of care and protection if such a child..."* It is submitted that this alteration is problematic in the sense that it takes away a certain measure of specificity from the enquiry. The determination as to whether a child is in need of care and protection refers, most definitely, to the facts and circumstances of that particular child. The phrasing "such a child" implies more that a child in a generic type of circumstances will be a child in need of care and protection, rather than that specific child. It is thus difficult to see what value, if any, is added by the proposed change. It is therefore submitted that this change should not be made to the Children's Act and the wording should be left as it currently stands.

6. The Amendment Bill seeks to amend section 150(1)(a) by substituting *"(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"* with *"(1) a child is in need of care and protection if the child...(a) has been abandoned or orphaned and does not ostensibly have the ability to support himself or herself"*. It is submitted that this proposed amendment poses a problem for three main reasons:

    a. The word "ostensibly" is defined in the Oxford dictionary as *"As appears or is stated to be true, though not necessarily so; apparently"*. The use of this word renders the phrasing of the section vague and open to a myriad of interpretations on the part of presiding officers, which could well lead to inequitable results for children. It has been widely reported that the existing discretionary powers conferred upon magistrates regarding children's court processes lead to vast discrepancies in both court practice as well as in outcomes children receive. It is submitted that an ambiguity of this nature would only exacerbate this problem.

b. In addition, with regard to the use of the word "ostensibly", in order to make a finding that a child is in need of care and protection, section 155(2) of the Children's Act requires that a social worker first undertake an inductive and evidence-based investigation into the circumstances of the child and to produce a report in this regard. This report is intended to provide the court with the information it needs in order to take a decision with certainty about whether the child is indeed in need of care and protection and what steps should follow this determination. The question as to whether support is available for the child is thus something that is ascertainable and it is therefore incongruous that the standard by which the court would make a decision would be one that is ostensible in nature.

c. The wording *"have the ability to support himself or herself"* is problematic in that it almost appears to create the impression that there should exist an onus on the child to provide themselves with support. In South African law, the child care and protection framework exists to ensure that children themselves do not bear this kind of responsibility, except under very specific circumstances. There is a stark distinction between a child having the ability to support themselves, and whether it is in their best interests to do so. As such, it is submitted that this phrasing is inappropriate and ought not to be utilised.

d. In addition to the question as to whether the proposed amendment to section 150(1)(a) is appropriate, is the question as to whether it is necessary. According to the Memorandum on the Objects of the Children's Amendment Bill, 2015- issued alongside the draft Amendment Bill- *"the Children's Amendment Bill seeks to amend the Children's Act, 2005 (Act No. 38 of 2005)("the Act") so as to give effect to certain recent Court judgments and to insert definitions"*. The Memorandum further indicates that the purpose of the amendment to section 150(1)(a) is to *"give effect to the Nono Cynthia Manana and Others v The Presiding Officer of the Children's Court: District of Krugersdorp and Others (A3075/2011)[2013] ZA GPJHC 64."* In this case, the courts sought to interpret the meaning of the words *"visible means of support"* as they related to children for whom foster care had been recommended. The courts did not- in this case or in any other- make an order of constitutional invalidity, they simply proffered an interpretation as to the meaning of *"visible means of support"*. As such, there does not appear to be any patent reason to effect an amendment to the section. On this basis, and on the basis of the above, it is submitted that amending this section, at this juncture, is not necessary.

PART 2: COMMENTS ON THE CHILDREN'S SECOND AMENDMENT BILL

7. The current definition of an adoption social worker is

(a) A social worker in private practice-

(i) Who has a speciality in adoption services and is registered in terms of the Social Services Professions Act 1978 (Act 110 of 1978); and

(ii) Who is accredited in terms of section 251 to provide adoption services; or

(b) A social worker in the employ of a child protection organisation which is accredited in terms of section 251 to provide adoption services

The Second Amendment Bill seeks to alter several definitions in section 1 of the Children's Act. Among these is the aforesaid definition of "adoption social worker". The proposed change seeks to include,

(c) A social worker in the employ of the Department or a provincial department of social development, including a social worker employed as such on a part-time or contract basis

It is clear that this has been proposed with a view to increase the number of social workers who can work towards effecting adoptions. While this will make the process more accessible, JCW notes several difficulties with the proposed amendment.

a. From the current definition it is clear that two aspects are required- in respect of a social worker in private practice, specialisation, registration and accreditation and in respect of a social worker working at a child protection organisation, accreditation of the organisation. The proposed amendment, however, does not make the same criteria applicable to social workers in the employ of the state. Instead, this insertion makes it possible for "a social worker"-thus suggesting any social worker- in the employ of the Department or provincial department of social development to provide adoption services. It is submitted that this is problematic because adoption is a highly specialised field and should not be entrusted to persons without a measure of expertise, or within an institution or division of an institution without adequate expertise and supervision. In the Department of Social Development's "Accreditation Policy Framework for Service Providers Rendering Adoption Services in South Africa" it is noted that *"adoption services require special skills and therefore only certain persons are allowed to provide national and intercountry adoption services."* The document provides further that *"the purpose of accreditation of the adoption service providers is to ensure that adoption services are performed in accordance with South African children legislation and the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption of 23 May 1993 (hereinafter referred to as "The Hague Convention") and are based on the best interests of the child."* It is therefore submitted that at the very least, divisions of the Department or provincial department of social development should have to seek accreditation before they can render adoption services.

b. Should a division of the Department or provincial department of social development have to seek accreditation, it is submitted that it will be necessary to look further than the mere amendment of section 1 of the Children's Act. This is because accreditation is dealt with in terms of section 251 of the same Act, which states,

(1) The Director-General may in terms of a prescribed process accredit-

(a) A social worker in private practice as an adoption social worker to provide adoption services; and
(b) A child protection organisation to provide adoption services

(2) The Director-General must keep a register of all adoption social workers and child protection organisations accredited to perform adoption services

Should a division of the Department or provincial department of social development require such accreditation in order to perform adoption services, it is submitted that insertions into this section are also required. It is suggested that this take the following form:

(1) The Director-General may in terms of a prescribed process accredit-

(a) A social worker in private practice as an adoption social worker to provide adoption services;
(b) A child protection organisation to provide adoption services; and
(c) <u>A division of the Department or provincial department of social development with skills and experience in the field of adoption</u>

(2) The Director-General must keep a register of all adoption social workers, child protection organisations and Divisions of the National or provincial department of social development accredited to perform adoption services.

c. One possible issue with this accreditation process is that given that the Director-General is a part of the Department of Social Development, the accreditation process would not be impartial. This raises the concern that divisions of the Department working on adoptions would still not be subject to the same standards as others working in the field. As such, it is submitted that a third subsection should be inserted into section 251 that requires that in the event of accreditation of a division of the Department or provincial department of social development, such process should be overseen by an independent third party.

8. JCW acknowledges the need to give effect to the judgment in the case of *C and Others v Department of Health and Social Development, Gauteng and Others 2012 (2) SA 209 (CC)* ("the C Case"). This is important for the protection of children who have been removed on an emergency basis and ensures due process for children so-situated. Despite this, there are various aspects of the proposed amendments to sections 151 and 152 of the Children's Act which require discussion.

a. In the C case, the court proposes a reformulation of certain parts of sections 151 and 152. Section 152(3)(b) refers to instances in which the child concerned has been removed by a police officer. The court's proposed insertion seeks to set out what steps a police officer must take upon removing a child to temporary safe care and what a designated social worker must proceed to do. In this regard it proposed that such an officer must do as follows,

(b) refer the matter of the removal before the end of the first court day after the day of the removal to a designated social worker who must ensure that:

(i) the removal is placed before the Children's Court for review before the expiry of the next court day after the referral;

The proposed insertion into this section as it stands in the Bill, however, reads differently. It states,

(b) refer the matter of the removal before the end of the first court day after the day of the removal to a designated social worker who must ensure that:

(i) the removal is placed before the Children's Court for review before the expiry of the next court day after the placement of the child in temporary safe care;

b. The distinction between the two lies in the fact that in the court's suggested insertion, the social worker has from the time of referral until the end of the next court day, to ensure that the matter is placed before the children's court for review while in the amendment's proposed insertion, the social worker has from the time of the placement of the child in temporary safe care to make these arrangements. It is submitted that it is possible for it to take some time for the child to be placed in temporary safe care, meaning that the social worker could have a diminished period in which to ensure that the matter can be brought to court and that all of the relevant documents can be compiled in order for the matter to be heard. It is asserted that this places an unfair restriction on the social worker and could well lead to cases failing to reach court timeously.

c. With regard to the proposed amendments of both sections, it is necessary to examine practical challenges on the ground and how these should be addressed. In both emergency removals effected with a court order (section 151) as well as those effected in the absence of such an order (section 152), the social worker concerned is required to bring certain documents to court before the expiry of the next court day (either after the court makes an interim order, or after the child has been removed), One of these documents is known as a form 39. This is an acknowledgement of removal of the child and is issued by the Department of Social Development once they have been notified of removal of the child. A challenge social workers continuously face is that while presiding officers will not allow the matter to proceed in the absence of such a document, this form is often issued late, with the effect that the entire process is delayed. Given need to protect both children legitimately removed, as well as those removed erroneously, it is vital that this process occur within the prescribed timeframes. In addition to the Form 39, the designated social worker concerned must also produce a Form 2, a Form 7, a form 36 and a report detailing why it is averred that the child is in need of care and protection. Given the short time period, this is somewhat onerous- particularly if a

social worker has a high caseload and many cases running concurrently. If these documents are not provided, presiding officers will not allow the case to proceed. This cannot be said to be in the best interests of the child concerned. As such, it is submitted that on good cause shown, if these documents cannot be produced, that presiding officers should still hear the matter and, wherever possible, come to a decision about what is in the best interests of the child in the interim while these documents are being collated. It is submitted that this should be added as a subsection in both section 151 and 152.

9. JCW is largely in favour of the proposed amendments to section 176 of the Children's Act as these additions will facilitate ease of process for young people remaining in alternative care beyond the age of 18 years. It is our submission, however, that two aspects require discussion and consideration.

    a. The proposed substitution in section 176(2) reads as follows,

    "the continued stay is necessary to enable that person to complete his or her grade 12, higher education, further education and training or vocational training

    It is submitted that to have "grade 12" as the specific school year young people will be able to complete should they make such application could have inequitable results. This is because many children in alternative care have fallen behind at school and may well turn 18 years of age while they are in a lower grade at school. The provisions of the 2008 regulations to the Social Assistance Act 13 of 2004 ("The Social Assistance Act") made in terms of section 32 of this Act refer to instances in which a child in foster care can continue to receive the foster child grant beyond the age of 18 years. In this case, reference is made to "secondary school". It is submitted that this is a far more equitable reference as it does not exclude the aforesaid young people. It is therefore asserted that this should replace reference to "grade 12" in this section, and that a definition in this regard should be inserted into section 1, also replacing the proposed insertion of a definition for "grade 12" as it currently provided for.

    b. Section 32 of the Constitution of the Republic of South Africa ("The Constitution") states that,

    (1) Everyone has the right of access to-

    (a) Any information that is held by the state; and
    (b) Any information that is held by another person and that is required for the exercise or protection of any rights

    The outcome of an application of this nature has an impact on a number of rights of the individual concerned. It affects their right to housing; to food, water and social security as well as to basic education and further education (as the case may be). In light of this, it is submitted that every applicant has the right to have the outcome of their application communicated to them within three months of the office of the

provincial head of social development having received it. It is also important to note that a decision of this nature taken by the provincial head of social development constitutes "administrative action" as defined in section 1 of the Promotion of Just Administration Act 3 of 2000 ("the Promotion of Just Administrative Action Act"). The right to just administrative action is set out in section 33 of the Constitution. It states,

(1) Everyone has the right to just administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons

On this basis, in the event that an application of this nature is unsuccessful, it is submitted that the Act ought to also enjoin the provincial head of social development to provide an explanation as to why this is the case, within the same timeframes as set out above.

It is therefore submitted that the amendment should also contain the insertion of a further subsection giving effect to the above.

10. Section 186(1) of the Children's Act currently states that,

A children's court may, despite the provisions of section 159(1)(a) regarding the duration of a court order, after a child has been in foster care with a person other than a family member for more than two years and after having considered the need for creating stability in the child's life, order that-

(a) No further social work supervision is required for that placement;
(b) No further social work reports are required for that placement; and
(c) The foster care placement subsists until the child turns 18 years, unless otherwise directed.

The proposed amendment seeks to alter the above to read *"after a child has been in the care of a person other than a family member"*.

The Memorandum on the Objects of the Children's Second Amendment Bill, 2015 indicates that the intention surrounding the proposed amendment of this section of the Children's Act is, *"by removing the word "foster" to give courts discretion to grant an order for a period longer than two years where the child in need of care and protection has been living with the prospective foster parent for an extended period of time"*. It is submitted that this is incongruent with the effect of the amendment, and could stand to place children so-situated at considerable risk for several reasons. The explanation outlined above refers to children living with prospective foster parents, but the proposed text of section 186(1) does not do so; it simply refers to a child in the care of a person. This would mean that a child who has been in any kind of informal kind of care arrangement with a person not holding parental rights and responsibilities could have a foster care order granted in respect of this child

placing the child in their care, with no supervision, until they turn 18 years of age. It is submitted that this is problematic on various fronts.

a. As iterated, section 186(1) of the Children's Act as it currently stands requires that a child must be in foster care for two years before supervision by a social worker can be suspended and before the order can be extended until the child reaches adulthood. The rationale behind this section is that children placed in foster care require supervision to ensure that the placement is stable and that foster care remains suitable form of placement for the child. This two year period allows for the requisite supervision and submission of reports to court. If a child is not in any kind of formalised care setting, it is highly unlikely that the same degree of supervision and oversight would have been exercised. As such, it would be difficult to determine with certainty whether this kind of long term placement is indeed in the best interests of the child concerned.

b. In order for a children's court to make an order placing a child in foster care as contemplated in section 46(1)(a)(i) of the Children's Act, the child must first be identified as a child in need of care and protection as set forth in section 150 of the Children's Act. Should such a determination be made in respect of a child who has been in the informal care of a person for two years or more, there exists a good chance that the placement may not be stable. This is not necessarily due to the fault of the child's caregivers, but could be due to a myriad of factors as the grounds set out in section 150 are expansive. What this does amount to, however, is a very sound motivation for the courts to order that the placement continued to be monitored, that social workers continue to produce reports in respect of the matter and that the placement be reviewed after a stipulated period of time.

c. Two main practical considerations are also of relevance in this regard. First of all, anecdotal evidence shows that foster care placements with non-family members are more likely to break down than those in which the child is placed with a family member. In the event that the child is immediately placed in foster care with a person or family without supervision and this does occur, the child could be placed in a most perilous situation. Secondly, it is a reality that the children being cared for by people other than their families are prolifically vulnerable and have usually been orphaned, abandoned, abused or neglected. Such children often require the continuing intervention of a social worker in order to ameliorate the effects of such traumas and enable them to adequately adjust and integrate into their communities. Enabling courts to grant an order with the effect that these services are withheld- without the initial two years of supervision- could significantly compromise the well-being of such children.

CONCLUSION

JCW welcomes the opportunity to make comments on these pending amendments. It is our hope that our efforts will be of assistance in finalising the two Bills in question. While the proposed

amendments seek to effect positive change, it is respectfully submitted that considerable rethinking is required in order to ensure that they are practicable and respond to the needs of vulnerable children in South Africa.