

**SOUTH AFRICAN HUMAN RIGHTS COMMISSION**

**SUBMISSIONS ON THE CHILDREN’S AMENDMENT BILL [B13-2015]**

**AND**

**CHILDREN’S SECOND AMENDMENT BILL [B14-2015]**

*For presentation to the Portfolio Committee on Social Development*

*August 2015*

1. **Introduction**

The South African Human Rights Commission (SAHRC/Commission) welcomes the opportunity to engage with the Portfolio Committee on Social Development (Portfolio Committee) in relation to the Children’s Amendment Bill [B13-2015] (CAB) and the Children’s Second Amendment Bill [B14-2015] (CSAB).

The Commission has closely monitored the evolution and implementation of the Children’s Act 38 of 2005 (principal Act), and has presented before both houses of Parliament during the 2004 deliberations on draft versions as well as several incidental pieces of legislation which, over the years, amended provisions in the principal Act. The SAHRC notes that the principal Act contains competencies which fall within the ambit of both national and provincial departments and that it was enacted in two parts. The Commission further notes that Parliament shall be processing the current amendment Bills separately although they are inter-related. Therefore, for ease of reference, the SAHRC’s submission address both the CAB and CSAB seperately as Part 1 and Part 2 herein.

1. **The mandate of the South African Human Rights Commission**
	1. **Constitutional and Statutory Mandate**

The SAHRC is an independent state institution established by the Constitution of the Republic of South Africa (Constitution) and operating within the framework of the *Principles Relating to the Status of National Institution* (Paris Principles) adopted by the UN General Assembly Resolution 48/134 in 1993. According to section 184 of the Constitution:

184. (1) The South African Human Rights Commission must-

(a) promote, respect for human rights and a culture of human rights;

(b) promote the protection, development and attainment of human rights; and

(c) monitor and assess the observance of human rights in the Republic.

In September 2014, the South African Human Rights Commission Act 40 of 2013 came into effect, repealing its predecessor, the Human Rights Commission Act 54 of 1994. Accordingly, section 13(1)(a)(i) of the South African Human Rights Commission Act:

1. The Commission is competent and obliged to-
2. Make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of human rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of human rights.

In addition, section 13(1)(b)(v) of the South African Human Rights Commission Act empowers the Commission to review government policies relating to human rights and make appropriate recommendations.

**2.2 International Mandate**

As a national human rights institution (NHRI), the SAHRC is additionally guided by the Paris Principles in the execution of its constitutional and legislative mandate. These principles, among others, enunciate the responsibilities of NHRIs as follows:

3. A national institution shall, inter alia, have the following responsibilities:

(a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations,proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicise them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:

(i) Any legislative or administrative provisions, as well as provisions relating to judicial organisations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;

(b) To promote and ensure the harmonisation of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation.[[1]](#footnote-1)

It is within the aforementioned constitutional,, statutory and international mandate, that the SAHRC presents its comments on the amendment Bills to the Portfolio Committee on Social Development.

1. **The SAHRC’s Children’s Rights Portfolio**

The SAHRC has, in the 20 years since its inception, identified children’s rights as a critical focus area of its work. This focus has entailed monitoring the realisation of children’s rights, advocacy and research initiatives together with the investigation of alleged violations to the rights of children.

The SAHRC has, in addition,established an expert advisory committee on children under section 11 of the South African Human Rights Commission Act. The Section 11 Committee facilitates dialogue on key children’s rights issues with stakeholders from government, civil society and academia. In 2009, the SAHRC established a specific children’s rights and basic education portfolio, under the leadership of Commissioner Lindiwe Mokate.

The Commission has closely considered both the CAB and CSAB and welcomes the deference to judicial pronouncements evidenced in the drafts. In considering the reforms both the CAB and CSAB seek to entrench, the Commission has detailed its concerns around specific clauses which potentially impact on the best interests principle broadly in respect of alignment, pratical efficacy and unintended impact for the attention of the honourable Portfolio Committee.

The invitation to present the views of the Commission directly to the Portfolio Committee during its public hearings process is acknowledged, and the Commission will accordingly avail itself to assist the Portfolio Committee in matters pertaining to the current draft legislation, and more broadly, issues relating to children’s rights in South Africa.

**PART 1: Childrens Amendment Bill [B 13-2015]**

* 1. **Sexual offences**

*Definition*

Clause 1 of the CAB seeks to align the principal Act with the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007[[2]](#footnote-2) insofar as it incorporates the definition of a ‘sexual offence’. This amendment is welcomed as the legislation recognises the particular vulnerability of children and enacts comprehensive provisions relating to sexual offences in respect of sexual exploitation or grooming, exposure to or display of pornography and the creation of child pornography. The SAHRC however recommends the inclusion of sexual offences related to child pornography and the access of children to pornography as listed in the Film and Publications Act 65 of 1996. Furthermore, the SAHRC recommends the definition of a sexual offence also includes involvement in offences as set out in section 10 of the Prevention and Combatting of Trafficking in Persons Act 7 of 2013 (TiP Act).

*Persons unsuitable to work with children*

Clause 2 of the CAB seeks to strengthen child protection by simplifying the process of finding a person unsuitable to work with children. Sub-clause 2(a) specifically states that:

‘‘(4) … a person must be [found]deemed unsuitable to work with children—

on conviction of …any sexual offence contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007)...where a child is the victim of any such offence, or any attempt to commit any such offence, or possession of child pornography as contemplated in section 24B of the Film and Publications Act 1996 (Act No. 65 of 1996)…’’

In addition, Clause 2 of the CAB goes further and states that:

‘‘(5) Any person who has been convicted of an offence contemplated in subsection (4)*(a)*, whether committed in or outside the Republic… is deemed to be unsuitable to work with children.’’

The Commission views these amendments as a positive step as they provide further protection for children. However, the Commission notes with concern that Clause 2 does not designate persons who use children (or incites / coerces other persons) to commit any of the listed sexual offences, as unsuitable to work with children. In this regard, the Commission points to section 10 of the TiP Act which states:

“Involvement in offences

(1) Any person who—

(a) attempts to commit or performs any act aimed at participating in the commission of;

(b) incites, instigates, commands, directs, aids, promotes, advises, recruits, encourages or procures any other person to commit; or

(c) conspires with any other person to commit, an offence under this Chapter is guilty of an offence.

(2) A person who is found guilty of an offence referred to in subsection (1) is liable, on conviction, to the penalties for the offence in question, as provided for in section 13.”

In order to strengthen the protections afforded by virtue of clause 2, it is recommended that reference to section 10 of the TiP Act is included in the provision.

* 1. **Representation by child offenders**

The SAHRC notes that Clause 2 further amends the principal Act to give effect to the Constitutional Court judgement in *J v National Director of Public Prosecution and Another*[[3]](#footnote-3) insofar as affording children the opportunity to make representations before their names are included in the National Child Protection Register. In this case, the Constitutional Court held that the obligation imposed on courts to order that the particulars of an offender be placed on the National Child Protection Register does not allow courts to exercise any discretion in registering the particulars of the child offender nor for an individuated response of a particular child offender, taking into account the child’s representation and views.[[4]](#footnote-4) In giving effect to the judgement, Clause 2(b) of the CAB states that:

‘‘(4A) Before making an order contemplated in subsection (1), in respect of a child who was under the age of 18 years when he or she committed the offence, the court must—

*(a)* afford the child offender an opportunity to make representations as to why such an order should not be made;

*(b)* have the best interest of the child offender considered of paramount importance; and

*(c)* on good cause shown, make an order that the particulars of the child offender not be included in the Register.’’

The Commission welcomes the proposed amendment of the principal Act as it is in line with the *J* judgement and recognises the centrality of the best interest of the child. However, the Commission highlights the fact that many children may not fully be able to understand this clause or that they have to make representation as to why an order should *not* be made to include their name in the Register. This may therefore be prejudicial to the child. The SAHRC accordingly recommends that the onus is removed and that alternate means of presenting evidence as to whether a child’s name should be placed on the Register ought to be considered.

**1.3 Registers**

The Children’s Act makes provision for the establishment of a National Child Protection Register. The National Child Protection Register is divided into two parts. Part A of the Register’s purpose is to, *inter alia*, establish a ‘record of abuse or deliberate neglect inflicted on specific children’; to record ‘all convictions of all persons on charges involving the abuse or deliberate neglect of a child; and, all findings by a Children's Court that a child is in need of care and protection, because of abuse or deliberate neglect of the child.[[5]](#footnote-5) The purpose of Part B of the Register ‘is to have a record of persons who are unsuitable to work with children and to use the information in the Register in order to protect children in general against abuse from these persons.’[[6]](#footnote-6)

Clause 4 of the CAB, provides,

‘‘(1) A person whose name appears in Part B of the Register, or a person who was under the age of 18 years when he or she committed the offence in respect of which the finding was made, may in terms of subsection (2) apply for the removal of his or her name and any information relating to that person from the Register.’’

The SAHRC notes that this provision complements the *J* judgement wherein the court declared that being placed on the Register bears serious consequences for the offender. [[7]](#footnote-7) It also recognised the consequences of criminal conduct of a child extending into his / her adulthood as affecting the rights of the child.[[8]](#footnote-8) In order therefore to further strengthen child rights protection, the SAHRC recommends the provision is expanded to allow a representative or a person acting in the child’s best interest to bring forth an application on the child’s behalf.

*Alignment with Sexual Offences Act*

It should be noted that in June 2015, the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 5 of 2015 was enacted. The Act seeks to inter alia, align the legislation to the judgement in the *J* case as discussed herein. During the public engagement process on the draft legislation, the SAHRC provided both written and oral input to the Portfolio Committee on Justice and Correctional Services. The Commission therefore recommends that the CAB is considered in light of this development so as to ensure consistency between legislation particularly insofar as it relates to the issue of sexual offences and registers.

**1.4 Children in need of care and protection**

Clause 5 of the CAB relates to abandoned and orphaned children and subsequently changes the definition of a ‘child in need of care’. This is to give effect to the 2013 judgement in *Nono Cynthia Manana and Others v The Presiding Officer of the Children’s Court: District of Krugersdorp and Others.*[[9]](#footnote-9) Under section 150(1)(a) of the principal Act, a child in need of care and protection is currently identified as a child who “has been abandoned or orphaned and is without any visible means of support”. However, Clause 5 of the CAB seeks to redefine the latter and removes the qualifying phrase of ‘without any visible means of support’ to:

‘‘(1) A child is in need of care and protection if such a child—’’;

…has been abandoned or orphaned and *does not ostensibly have the ability to support himself or herself*’’*(emphasis added)*.

The SAHRC expresses its concern on two central issues in respect of Clause 5(1]). The first is that the provision creates two conditions for a determination regarding care and protection. In maintaining the conjunctive “and”, the CAB requires that abandoned or orphaned children do not qualify for support at this threshold level, but that they must in addition “not ostensibly have the ability to support himself or herself”. The additional condition on children who have been abandoned may not easily accord with paramountcy best interest principle. It is recommended therefore that the additional condition be reconsidered to expand protections as reform in the draft and through it, to the principal Act.

Secondly, the proposed amendment may, in effect, introduce a means test to determine whether children who fall under this section are indeed *‘in need of care and protection’* and subsequently places the onus on a child to prove that he/she falls within this category and qualifies for financial support. Furthermore, should it be the intention of the legislature to establish a means test, it is recommended that such determinations are made within the parameters of the Social Assistance Act 13 of 2004 to ensure that there is no disjuncture between different pieces of legislation. Additionally, the use of the term *‘ostensibly’* creates a purely subjective basis for assessment and may have the resultant effect of misinterpretation by magistrates, social workers and other implementers. The SAHRC therefore recommends that the practical implication of this amendment be closely considered and submits that the reading in Section 150(1)(a) of the principal Act is sufficient at this stage.

**1.5 Removal of a child without a court order**

By virtue of Clause 6, a new section (section 152A) is inserted into the principal Act which provides for the review of a decision for removal of a child to temporary safe care without a court order. This is in line with the judgement of *C and Others v Department of Health and Social Development*[[10]](#footnote-10) wherein the Constitutional Court recognised that the incorrect decision by a court for the removal of a child, without hearing the views of the child / parents / designated social worker or police official, should be subject to automatic review. Furthermore, that the principal Act failed to adequately provide for a review and has *‘the potential of being counterproductive because they fail to provide for a Children’s Court automatic review in the presence of the child and the parents…the laws are not in the best interests of children…’*[[11]](#footnote-11)

Significantly, the Constitutional Court directed that:

*The child has the right to challenge the appropriateness of his or her removal. Parents, in the exercise of their duty to care for the child, have a duty to challenge the correctness of the removal… It is in the interests of children for any law that effects the removal of children to provide, at the same time, for proceedings in which the correctness of the removal is tested by a Children’s Court in the presence of the child and parents.[[12]](#footnote-12)*

The SAHRC therefore welcomes the deference to the *C and Others* judgement reflected in the CAB as it will afford caregivers and the affected children, where possible, an opportunity to make meaningful representations before a court, to review a decision to remove a child from a particular environment. The SAHRC however recommends that there ought to be a stipulated time frame in both instances when a presiding officer makes an order in respect of, i) the return of a child to his / her parents or caregivers and ii) an investigation to determine if a child is in need of care and protection.

**PART 2: Children’s Second Amendment Bill [B14-2015]**

**2.1 Extension of the definition of adoption social worker**

Under the principal Act, an adoption social worker is defined as:

 (a) a social worker in private practice-

(i) who has a speciality in adoption services and is registered in terms of the Social Service Professions Act, 1978 (Act No. 110 of 1978); and

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

1. a social worker in the employ of a child protection organisation which is accredited in terms of section 251 to provide adoption services;

Clause 1 of the CSAB accordingly amends the definitions section of an ‘adoption social worker’, to further include:

1. 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.

The SAHRC expresses concern that the amendment does not establish the criterion that the government social worker ought to be accredited to provide adoption services or is registered under the Social Services Professions Act, as is currently the proviso for private practice social workers in the principal Act. In its current form, the amendment also creates a distinction between social workers in the private sector and those in the employ of government as there is no specific requirement for specialisation for those working in government. This may potentially lead to situations where the amendment, if passed, creates a disparity between the service offered between the public and private sector and may further have the unintended consequence of creating the impression that the sectors offer different levels of expertise as the standards for government social workers are less stringent.

**2.2 Review of interim orders for the temporary safe care of a child**

Clause 2 of the CSAB seeks to amend the principal Act empowering a presiding officer of the Children’s Court to issue an interim order for the temporary safe care of a child. In addition, the clause inserts a requirement that such interim order be placed before the Children’s Court for review (confirmation or setting aside), before the end of first court day, following the decision to issue an interim order. This amendment accords with the Constitutional Court judgement of *C and Others v Department of Health and Social Development,* that the removal of a child from a parent and subsequent placement in temporary safe care without recourse through automatic judicial review of such removal is unconstitutional. In its interpretation of the Children’s Act, the Court recognised the impact of separation on children, their parents, guardians or caregivers and provided a level of oversight to ensure that such conduct was made subject to judicial checks though a process of quick, automatic review. Clause 3 supports this approach by providing that a designated social worker ‘must ensure that the matter is placed before the children’s court for review before the expiry of the next court day after the placement of a child in temporary safe care’. Furthermore that such social worker must ensure that the child concerned and, where reasonably possible, the parent, guardian or caregiver, are present in the Children’s Court unless it is regarded as impractical.

Whilst acknowledging that the amendment seeks to ensure that children are heard by the court, the affected child, and where applicable the parents, might also be prejudiced by the short-time frames within which they must access a court. Ultimately the parties may potentially be unable to fully assist the court in arriving at a considered decision. It is therefore proposed that a proviso recognising the competency of a court to grant extensions for review in particular instances be included in the Bill.

**2.3 Children in alternative care**

The Commission welcomes the extensive amendments set out under clause 4 which seeks to address and streamline the process of transferring a child or person from one form of alternative care to another. The SAHRC is aware of the existing challenges with the current process under the principal Act and welcomes the Bill’s intention to empower the provincial head of social development to transfer a child or person from one form of alternative care to another.

In addition, the provincial head of social development is further vested, under Clause 5, to extend placement in alternative care in respect of persons who are still completing their secondary or tertiary education. Accordingly, it extends the period in which a child may be in alternative care up until the age of 21 to complete his or her education. The criterion in clause 5(b) specifically states that the basis for continued stay in alternative care is to:

‘‘(b) … enable that person to complete his or her grade 12, higher education, further education [or] and training or vocational training.’’

The SAHRC welcomes this amendment which recognises the critical importance of education. However it notes with concern that in instances where children / persons are within the alternative care system, (which includes foster care) they may be eligible to continue receiving the foster care up to the age of 21 years. The child support grant however is only available until the age of 18 years. The discrepancy in respect of financial support under the two systems is that children in foster care may continue receiving financial support whereas those receiving the child support grant, regardless of whether they are completing their secondary or tertiary education, are not eligible for a grant extension. The SAHRC therefore recommends that this amendment be reconsidered.

1. *Principles Relating to the Status of National Institutions*, available at http://www.jus.uio.no/smr/om/nasjonal-institusjon/docs/paris--principles.pdf [↑](#footnote-ref-1)
2. Hereinafter referred to as the Sexual Offences Amendment Act. [↑](#footnote-ref-2)
3. [2014] ZACC 13 (hereafter the *J* case). [↑](#footnote-ref-3)
4. *J* case,para42. [↑](#footnote-ref-4)
5. Section 114 of the Children’s Act 38 of 2005. [↑](#footnote-ref-5)
6. Section 118 of the Children’s Act 38 of 2005. [↑](#footnote-ref-6)
7. *J* judgement, para 43 [↑](#footnote-ref-7)
8. *Ibid*  [↑](#footnote-ref-8)
9. (A3075/2011) [2013] ZA GPJHC 64. [↑](#footnote-ref-9)
10. 2012 (2) SA 208 (CC) (hereafter the *C* judgement). [↑](#footnote-ref-10)
11. *C* judgement para 77. [↑](#footnote-ref-11)
12. *C* judgement para 79. [↑](#footnote-ref-12)