REPUBLIC OF SOUTH AFRICA

CHILDREN'S SECOND AMENDMENT BILL

(As amended by the Portfolio Committee on Social Development (National Assembly))
(The English text is the official text of the Bill)

(MINISTER OF SOCIAL DEVELOPMENT)

[B 14B—2015]

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GENERAL EXPLANATORY NOTE:

[ ]	Words in bold type in square brackets indicate omissions from existing enactments.
_____	Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Children's Act, 2005, so as to extend a definition; to insert new definitions; to provide that the removal of a child to temporary safe care without a court order be placed before the children's court for review before the expiry of the next court day; to provide for the review of a decision to remove a child without a court order; to provide for the provincial head of social development to transfer a child or a person from one form of alternative care to another form of alternative care; to provide that an application for a child to remain in alternative care beyond the age of 18 years, must be submitted before the end of the year in which the relevant child reaches the age of 18 years; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 38 of 2005, as amended by section 3 of Act 41 of 2007

1. Section 1 of the Children's Act, 2005 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the deletion in the definition of ''adoption social worker'' of the word ''or'' at the end of paragraph *(a)*, the insertion in that definition of the word ''or'' at the end of paragraph *(b)* and the addition of the following paragraph:

''*(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, has a specialty in adoption services and is registered in terms of the Social Services Professions Act, 1978 (Act No. 110 of 1978).'';

(b) by the insertion after the definition of ''commercial sexual exploitation'' of the following definition:

'' **'college'** means college as defined in the Continuing Education Act, 2006 (Act 16 of 2006);'';

(b) by the insertion after the definition of ''genital mutilation'' of the following definition:

'' **'grade 12'** means grade 12 as defined in section 1 of the Higher Education Act, 1997 (Act No. 101 of 1997);''; and

(c) by the insertion after the definition of ''High Court'' of the following definition:

'' **'higher education'** means higher education as defined in section 1 of the Higher Education Act, 1997 (Act No. 101 of 1997).''.

Amendment of section 151 of Act 38 of 2005

2. Section 151 of the principal Act is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

''(2) A presiding officer issuing an order in terms of subsection (1) may also issue an interim order **[that the child be placed in]** for the temporary safe care of the child if it appears that it is necessary for the safety and well-being of the child.''; and

(b) by the insertion after subsection (2) of the following subsection:

''(2A) The court ordering the removal of the child must simultaneously refer the matter to a designated social worker and direct that social worker to ensure that the—

(a) order in terms of subsection (2) is placed before the children's court, for review before the expiry of the next court day following the removal; and

(b) child concerned, and where reasonably possible the parent, guardian or care-giver, as the case may be, are present in the children's court for the purposes of assisting the court in making a decision which is in the best interest of the child.''.

Amendment of section 152 of Act 38 of 2005

3. Section 152 of the principal Act is hereby amended—

(a) by the substitution in subsection (2) for the words preceding paragraph *(a)* of the following words:

''(2) If a designated social worker has removed a child and placed the child in temporary safe care as contemplated in subsection (1), the designated social worker must—'';

(b) by the deletion in subsection (2) of the word ''and'' at the end of paragraph *(a)*;

(c) by the deletion in subsection (2) of the word ''and'' at the end of paragraph *(b)*;

(d) by the substitution for paragraph *(c)* of the following paragraph:

''*(c)* within 24 hours and without delay, report the matter to the relevant provincial department of social development of the removal of the child and of the place where the child has been placed**[.]**; and'';

(e) by the addition to subsection (2) of the following paragraph:

''*(d)* ensure that the—

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

(ii) child concerned, and where reasonably possible, the parent, guardian or care-giver, as the case may be, are present in the children's court.'';

(f) by the deletion in subsection (3) of the word ''and'' at the end of paragraph *(a)*; and

(g) by the substitution in subsection (3) for paragraph *(b)* of the following paragraph:

''*(b)* refer the matter before the end of the first court day after the day of removal of the child to a designated social worker, **[for investigation contemplated in section 155(2); and]** who must ensure that—

(i) the matter is placed before the children's court for review before the expiry of the next court day after the referral of the child;

(ii) the child concerned, and where reasonably possible, the parent, guardian or care-giver, as the case may be, are present in the children's court, unless this is impracticable; and

(iii) the investigation contemplated in section 155(2) is conducted;''.

Amendment of section 171 of Act 38 of 2005, as inserted by section 10 of Act 41 of 2007

4. Section 171 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

''(1) The provincial head of social development in the relevant province may, subject to subsection (5), **[by order]** transfer in writing **[transfer]** a child in alternative care **[from the child and youth care centre or person in whose care or temporary safe care that child has been placed to any other child and youth care centre or person]** from one form of alternative care to another.'';

(b) by the insertion after subsection (1) of the following subsection:

''(1A) The provincial head of social development in the relevant province may, subject to subsection (5), transfer in writing a person referred to in section 176(2) from one form of alternative care to another form of alternative care.'';

(c) by the substitution for subsection (3) of the following subsection:

''(3) *(a)* If the provincial head of social development transfers a child in terms of subsection (1) **[to the care of the child's parents, guardian or former care-giver]** under the supervision of a designated social worker, the **[order]** written notice of transfer must specify the requirements with which the child and that parent, guardian, **[or]** former care-giver or the current alternative care-giver must comply.

(b) If any requirement referred to in paragraph *(a)* is breached or not complied with, the designated social worker concerned **[may]** must bring the child before a children's court, which may, after an inquiry, vary the **[order]** written notice of transfer issued by the provincial head of social development or make a new order in terms of section 156.'';

(d) by the substitution in subsection (4) for the words preceding paragraph *(a)* of the following words:

''Before the provincial head of social development issues **[an order]** a written notice of transfer in terms of subsection (1), he or she must consider a report by a designated social worker, who must **[consult]** have consulted—'';

(e) by the substitution in subsection (4) for paragraphs *(c)* and *(d)* of the following paragraphs, respectively:

''*(c)* the child and youth care centre or person in whose care or temporary safe care or alternative care that child has been placed; and

(d) the child and youth care centre, alternative care or person to whom the child is to be transferred.'';

(f) by the substitution for subsection (5) of the following subsection:

''(5) If the provincial head of social development transfers a child or a person referred to in section 176(2) from a **[secure care child and youth care centre]** more restrictive form of alternative care to a less restrictive **[child and youth care centre or to the care of a person]** form of alternative care, the provincial head of social development must be satisfied that the transfer will not be prejudicial to other children in the less restrictive alternative care.'';

(g) by the substitution in subsection (6) for the words preceding paragraph *(a)* of the following words:

''**[No order in terms of]** A transfer contemplated in subsection (1) may not be **[carried out]** given effect to without **[ratification]** approval by a children's court if the child is transferred—''; and

(h) by the substitution in subsection (6) for paragraph *(a)* of the following paragraph:

''*(a)* from the care of a person, including foster care, to a child and youth care centre; or''.

Amendment of section 176 of Act 38 of 2005, as inserted by section 10 of Act 41 of 2007

5. Section 176 of the principal Act is hereby amended—

(a) by the substitution in subsection (2) for the words preceding paragraph *(a)* of the following words:

''A provincial head of social development may on application by a person placed in alternative care as a child, or by a person acting on his or her behalf, allow that person to remain in **[that]** alternative care until the end of the year in which that person reaches the age of 21 years if—'';

(b) by the substitution in subsection (2) for paragraph *(b)* of the following paragraph:

''*(b)* the continued stay in that care is necessary to enable that person to complete his or her grade 12, higher education, college education, internship or learnership.''; and

(c) by the addition of the following subsection:

''(3) An application contemplated in subsection (2) must be submitted before the end of the year in which the relevant child reaches the age of 18 years, but a late application may be condoned, upon good cause shown, if such application is submitted within three months after such date.''.

Amendment of section 186 of Act 38 of 2005, as inserted by section 10 of Act 41 of 2007

6. Section 186 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph *(a)* of the following words:

''(1) 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—''.

Short title and commencement

7. This Act is called the Children's Second Amendment Act, 2016, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE CHILDREN'S SECOND AMENDMENT BILL, 2015

1. BACKGROUND

1.1 In **C and Others v Department of Health and Social Development, Gauteng and others 2012 (2) SA 208 (CC)**, the Constitutional Court confirmed the order of the High Court declaring sections 151 and 152 of the Children's Act, 2005 (Act No. 38 of 2005) (''Children's Act''), unconstitutional, which provides for the removal of a child to a form of temporary safe care with or without a court order, to the extent that it provides for a child to be removed from family care by state officials and placed in temporary safe care, but does not provide for the child to be brought before the children's court for automatic review. The Court found that the Act lacked safety mechanisms to deal with a situation where a social worker or a police officer wrongly removed a child or where the children's court makes an order based on incorrect information. To give effect to the decision of the Constitutional Court, the Children's Second Amendment Bill (''Bill''), seeks to amend the Act to provide that the removal of a child to a temporary safe care without a court order be placed before the children's court for review before the expiry of the next court day and for an automatic review and that an interim order granted in respect of the removal of a child to temporary safe care be placed before the children's court before the expiry of the next court date and that the parent, guardian or care-giver be present in court.

1.2 The Bill also seeks to extend the definition of adoption social worker; to insert new definitions; to provide for the provincial head of social development to transfer a child or a person from one form of alternative care to another form of alternative care; and to provide that an application for a child to remain in alternative care beyond the age of 18 years, must be submitted before the end of the year in which the relevant child reaches the age of 18 years.

2. OBJECTS OF BILL

2.1 The purpose of the Bill is to give effect to children's rights as provided for in section 28 of the Constitution of the Republic of South Africa, 1996 (''Constitution''), to align the Act with other legislation and to give effect to the Constitutional Court decision in **C and Others v Department of Health and Social Development, Gauteng and Others 2012 (2) SA 208 (CC)**.

2.2 The Bill seeks to give additional functions to the provincial head of social development in respect of certain specified matters; and to extend the period in which a child may be placed in foster care. The reality is that some children in alternative care, due to unforeseen circumstances, fail to complete primary education before the date on which the child attains the age of majority. Secondly some children in alternative care require vocational training, higher education or further education and training. These circumstances require that the child be retained in alternative care until he or she completes his or her education or attains the age of 21 whichever occurs first. The Act does not empower the head of social development in provinces to transfer children or persons from one form of alternative care to another and this presents a challenge where a need arises for a child or person to be transferred. The Bill seeks to address these practical challenges which have been brought about through the implementation of the Act.

3. CLAUSE BY CLAUSE EXPLANATION

Ad Clause 1: Amendment of section 1

3.1 Clause 1 of the Bill seeks to extend the definition of adoption social worker and to insert the definitions of ''further education and training'', ''grade 12'', and ''higher education''.

Ad Clause 2: Amendment of section 151

3.2 Clause 2 seeks to amend the Act by providing for a presiding officer in the children's court to also issue an interim order for the temporary safe care of the child.

3.3 This clause also seeks to insert subsection (2A), which requires the presiding officer to also issue an order directing that the interim order be placed before the children's court before the expiry of the next court day following the interim order, for the confirmation or setting aside of such interim order and also to allow for the child concerned and the parent, guardian or care-giver to be present in court where possible. The amendment seeks to give effect to the judgment in **C and Others v Department of Health and Social Development, Gauteng and Others 2012 (2) SA 208 (CC)**, where the Constitutional Court held that removing a child from a parent and placing such a child in temporary safe care with or without a court order and without allowing for an automatic judicial review of such a removal, was unconstitutional.

Ad Clause 3: Amendment of section 152

3.4 Clause 3 seeks to amend section 152(2)*(a)* of the Act by inserting ''designated'' to change ''social worker'' to ''designated social worker''. This seeks to provide that the designated social worker must ensure that the matter is placed before the children's court for review before the expiry of the next court date, and ensure that the child concerned and, where reasonably possible, the parent, guardian or care-giver, as the case may be, are present in the children's court.

Ad Clause 4: Amendment of section 171

3.5 Clause 4 seeks to amend section 171 of the Act by empowering the provincial head of social development, by notice in writing, to transfer a child or a person from one form of alternative care to another. The Act as it stands prevents practical difficulties when there is a need to transfer a child or a person due to changed circumstances. The proposed amendment will empower the provincial head of social development to transfer a child or person from a restrictive form of alternative care to a less restrictive form of alternative care.

Ad Clause 5: Amendment of section 176

3.6 Clause 5 of the Bill seeks to amend section 176 of the Act by extending the provisions of section 176(2) to also allow a person, acting on behalf of a person placed in alternative care as a child, to make an application to allow that child to remain in alternative care until the end of the year in which the person in alternative care reached the age of 21 years.

3.7 Clause 5 also seeks to amend section 176 (2)*(b)* of the Act by replacing the words ''education and training'' with the words ''grade 12, higher education and further education and training'' so as to clarify the intention of the law and also in order to empower the provincial head of social development to extend an alternative care placement in respect of persons who are still doing their grade 12, higher education or further education and training.

Ad Clause 6: Amendment of section 186

3.8 Clause 6 seeks to amend section 186 by removing the word ''foster'' to give courts the 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.

4. PERSONS OR BODIES CONSULTED

The following is a list of bodies consulted:

LIST OF NON-GOVERNMENTAL ORGANISATIONS ("NGO"), NATIONAL AND PROVINCIAL DEPARTMENTS CONSULTED FOR THE REVIEW OF THE ACT

1. Working Group on Positive Discipline;
2. Wilna Malherbe Adoption;
3. Thakaneng Street Children;
4. SCALABRINI;
5. South African Montessori Association;
6. KwaZulu-Natal Adoption Coalition;
7. Operation Compassion South Africa;
8. National Council for Persons with Physical Disabilities;
9. Ikholwa Community Services, Rhema Hands of Compassion and Acres of Love;
10. Lawyers For Human Rights;
11. The Homestead Projects for Street Children;
12. Linda Biersteker on behalf of ACESS, National ECD Alliance, S.A. Congress for ECD; Western Cape ECD Association; Western Cape Resource and Training Organisation Forum; Early Learning Resource Unit; Foundation for Community Work; Katlehong Early Learning Resource Unit; Children's Institute; Northlink College, Siyabhaba Trust—Caritas South Africa.
13. Abraham Kriel Childcare;
14. Child Welfare SA eMalahleni;
15. Childline Gauteng;
16. Child Welfare South Africa through submissions made by Child Welfare member organisations, Mpumalanga, Eastern Cape and KZN;
17. Policy and Legislative Analysis sub-group of the Campaign on the Right to Education for Children with Disabilities;
18. Black Sash Trust;
19. ANEX;
20. South African Council for Social Service Professions—PBSW;
21. Resources Aimed At the Prevention Of Child Abuse And Neglect;
22. Ons Plek;
23. National Alliance for Street Children;
24. Jo'burg Child Welfare;
25. Ilifa Labantwana;
26. Family Life Centre, Parkwood, Johannesburg;
27. Cmr Uitenhage En Port Elizabeth;
28. ACVV National Council; and
29. National Adoption Coalition.

National Departments

1. Department of Justice and Constitutional Development;
2. Department of Women, Children and People with Disabilities;
3. Department of Home Affairs;
4. Department of Human Settlements;
5. Department of Traditional Affairs;
6. Department of Labour;
7. Department of Basic Education;
8. Department of Correctional Services;
9. Department of Health;
10. Department of Cooperative Governance;
11. Department of Transport;
12. Department of National Treasury;
13. Department of Public Service and Administration;
14. Department of Rural Development and Land Reform;
15. Department of Sport and Recreation; and
16. Department of Public Works.

Provincial Departments

The nine Provincial Departments of Social Development.

5. FINANCIAL IMPLICATIONS FOR THE STATE

Provinces will utilise existing budget allocations.

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department of Social Development are of the opinion that this Bill must be dealt with in accordance with the procedure prescribed by section 76 of the Constitution, since the contents of the Bill, in a substantial measure, deals with ''Welfare services'', which is a functional area of concurrent national and provincial legislative competence listed in Part A of Schedule 4 to the Constitution. According to section 76(3) of the Constitution a Bill must be dealt with in accordance with the procedure established by either section 76(1) or section 76(2) if it falls within a functional area listed under Schedule 4 to the Constitution.

6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)*(a)* of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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