

LRC

Legal Resources Centre



Scalabrini
Centre of Cape Town

+27 21 465 6433

**SUBMISSION TO THE NCOP SELECT COMMITTEE ON SOCIAL SERVICES ON THE REFUGEES
AMENDMENT BILL [B12B - 2016]**

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JOINT SUBMISSIONS PREPARED BY:

Ms M Mudarikwa – Legal Resources Centre – mandy@lrc.org.za

Ms Patricia Schnell – Legal resources Centre – patricia@lrc.org.za

Ms Marilize Ackermann – Scalabrini Centre – marilize@scalabrini.org.za

INTRODUCTION

1. The Legal Resources Centre (LRC) and Scalabrini Centre hereby submit representations focussed on the definition of 'dependent' as proposed by the Refugee Amendment Act. We welcome this opportunity to make representations.

BRIEF DESCRIPTION OF THE ORGANISATIONS

2. The **Legal Resources Centre (LRC)**, established in 1979, is a South-African based human rights organisation with regional offices in Johannesburg, Durban, Grahamstown and Cape Town. The organisation uses the law as an instrument of justice for the vulnerable and marginalised, including poor, homeless, and landless people and communities who suffer discrimination by reason of race, class, gender, and disability or by reason of social, economic, and historical circumstances. The strategies employed to secure the protection and promotion of human rights include impact litigation, law reform, participation in partnerships and development processes, education, and networking within South Africa, the African continent and at the international level. The LRC through its Refugee Project focuses on ensuring that the rights of asylum seekers and refugees are protected, fulfilled and promoted. This is done through providing: legal advice; legal representation; and by participating in advocacy and law reform.

Scalabrini Centre

3. The Scalabrini Centre of Cape Town (SCCT) is a registered not-for-profit organisation that perceives migration as an opportunity and is committed to alleviating poverty and promoting development in the Western Cape while fostering integration between migrants, refugees, and South Africans. The Scalabrini Fathers have been providing welfare services in Cape Town to displaced communities since 1994. In providing assistance, the SCCT advocates respect for human rights and utilises a holistic approach that considers all basic needs including advocacy, development, and welfare services.

Section 1 of the Draft Bill – Definitions

4. In this section we have focused on the proposed substitution of the definition of the word dependant. The current definition in the draft bill limits the ability to join children to only “unmarried minor dependent children”.

The need to define “dependent” broadly such that children are able to be joined to the files of their caretakers:

5. The current language of the Draft Bill renders it impossible for unaccompanied or separated children to be joined to the files of their kinship caretaker step-parents, grandparents, aunts, uncles, or siblings.
 - 5.1 In the refugee context, which necessarily implicates situations of violence and danger, it is very common for children to be orphaned or otherwise separated from their biological parents. In the absence of parental presence, extended family members often fulfil this role and serve as the caretaker for children within their family. The children are financially and emotionally dependent on these family members, without which they would often be totally without care.
 - 5.2 The Legal Resources Centre and Scalabrini Centre have worked with a number of individuals who have been unable to join the child/children that they provide sole care for onto their refugee files. This serves to greatly burden the children as they are denied an opportunity to legalise their presence in South Africa, and often are unable to obtain alternative documentation of any sort. This is problematic as it renders the children at risk of statelessness and often unable to access basic rights and services.
 - 5.3 The ability to gain legal status through joinder to an extended family member’s file allows children, who are orphaned or otherwise without parental care, continuous and effective care. Notably, this is important because it enables these children to remain in households that provide them with financial and emotional support, rather than being forced to become dependent on the state for care and protection and without documentation.
 - 5.4 Notably, the proposed definition also excludes children adopted by asylum seekers and refugees in South Africa. Given that adoption orders are granted by the Children’s Court and an adopted child is legally regarded as if they were the biological child of the adopting parent, it is irrational to exclude children adopted in South Africa from the definition of dependant once such an order is granted.
- 6 Thus the language of the Draft Bill should be expanded to include immediate and extended family members. Notably, this would mirror the UNHCR’s definition and understanding of dependency.
 - 6.1 The UNHCR’s operational definition of dependency incorporates a broader understanding that states: “dependent persons should be understood as persons who depend for their existence substantially and directly on any other person, in

particular because of economic reasons, but also taking emotional dependency into consideration”.¹

- 6.2 Moreover, “the principle of dependency requires that economic and emotional relationships between refugee family members be given equal weight and importance in the criteria for reunification as relationships based on blood lineage”, thus it should be understood to extend to grandparents, uncles, aunts, nieces and nephews, among others.²
- 6.3 This is because “a broad definition of a family unit—what may be termed an extended family—is necessary to accommodate the peculiarities in any given refugee situation, and helps minimize [*sic*] further disruption and potential separation of individual members”.
- 6.4 Additionally, the UNHCR Guidelines on Protection and Care, which deals specifically with how to best answer the needs of refugee children, highlights that the best way to approach child protection is to support the maintenance of the family unit and that “family unity must be a key factor in planning.”³
- 6.5 The Guidelines on Protection and Care also provides that “a child’s right to identity, including nationality, name and **family relations** should be preserved whenever possible” (emphasis added).⁴

Remove “minor” from the definition of dependent children

- 7 We further submit that the insertion of “minor” into the Draft Bill serves as an arbitrary cut off that does not correspond with the needs or reality of dependent individuals needing to be joined on to their family members’ refugee permits or applications.
 - 7.1 As discussed above, according to UNHCR, the correct measurement of dependence should look to financial and emotional dependence. Many children remain financially and emotionally dependent on their families beyond reaching the age of maturity, as evidenced by the fact that many individuals continue to reside with their family past this age.

¹ Resettlement Handbook, chapter 4.5.6. See also Chapter VI of the Handbook on Procedures and Criteria for Determining Refugee Status, UNHCR, Geneva, Switzerland, January 1992.

² Background Note for the Agenda Item Family Reunification in the Context of Resettlement and Integration, available at <http://www.unhcr.org/3b30baa04.pdf>.

³ Refugee Children: Guidelines on Protection and Care, UNHCR Geneva, available at <http://www.unhcr.org/protection/children/3b84c6c67/refugee-children-guidelines-protection-care.html>.

⁴ Ibid.

- 7.2 Moreover, this intrusion into when an individual can still be considered dependent does not correspond with actual experiences of families and serves to disrupt their private life.
- 7.3 As discussed above, the right to a family life is protected by the Constitution within the broader right to human dignity. In addition, the insertion of “minor” here likely intrudes upon the family’s, and the individuals that compose it, right to privacy which provides the guarantee that a person should be able to conduct his or her own personal affairs relatively free from unwanted intrusions.
- 7.4 Finally, the insertion of “minor” serves to create an upheaval at an otherwise unstable point of an individual’s life. The age of coming to maturity is usually marked by a transition into university or full time employment. It often corresponds with large changes in an individuals’ lifestyle, where they are forced to adjust from childhood to adulthood.
- 7.5 The loss of ability to gain legal status through legitimate relationship will further destabilise these individuals during a period of transition and sensitivity. This would serve as a great prejudice to these individuals and would place them at risk of losing all paths to legal status and, potentially becoming stateless.
- 7.6 Moreover, the inclusion of this age cut off likely violates the right to equality enshrined in section 9(4) of the Constitution which prohibits the state from unfairly discriminating on the basis of age, among other grounds.

Legal imperatives that must inform the Bill

- 8 Additionally, we would like to stress the importance of defining “dependent” broadly such that the constitutional tenants of the right to family and the principal of best interest of the child are respected.

Right of children to family or parental care

- 8.1 Section 28(1)(b) of the Constitution of the Republic of South African (“the Constitution”) guarantees each child the right to “family care or parental care, or to appropriate alternative care when removed from the family environment”. This wording prioritises the nurturing and development of children in families.
- 8.2 Moreover, the Constitution Court has noted that the right to family is also protected by Section 10 of the Constitution which guarantees “everyone has inherent dignity

and the right to have their dignity respected and protected”. The Court has noted that the right to dignity is a fundamental right that underscores and supports many of the other rights in the Constitution. According to the Court, decisions such as marriage and having a family:

[Are] a matter of defining significance for many people. To prohibit the establishment of such a relationship impair[s] the ability of the individual to achieve personal fulfilment in an aspect of life that was of central significance. Such legislation would clearly constitute an infringement of the right to dignity.⁵

- 8.3 The Court also notes that there is a constitutional obligation to “respect, promote, protect and fulfil the rights in the Bill of Rights” and that legislature must take care to limit the risk of an unconstitutional exercise of the discretionary powers it holds.⁶ Therefore the Draft Bill must contain a definition of dependent that preserves the right to family care.
- 8.4 Moreover, the right to family is respected by international and regional legal instruments that South Africa is a signatory to. The family is recognised as the natural and fundamental unit of society, and deserving of state protection, in a number of ratified instruments including:
- 8.4.1 Articles 12 & 16 of the 1948 Universal Declaration of Human Rights,;
 - 8.4.2 Preamble and Article 23 of the International Covenant on Civil and Political Rights;
 - 8.4.3 Articles 9, 10, 20, 21 and 22 of the Convention on the Rights of the Child (CRC);
 - 8.4.4 the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which emphasizes the right to family throughout the entire document,
 - 8.4.5 Article 18 of the African Charter on Human and Peoples’ Rights;
 - 8.4.6 Preamble of the African Charter on the Rights and Welfare of the Child (ACRWC) and
 - 8.4.7 Articles 1, 2 and 17 of the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children.
- 8.5 The CRC is the main international instrument addressing the right of children. As a signatory, South Africa has an obligation to promote and respect the rights contained therein.

⁵ *Dawood and Another v Department of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] (8) BCLR 837 (CC) at page 842.

⁶ *Ibid.*

8.5.1 In addition to recognising the family as the “fundamental group of society”, the CRC emphasises that the fulfilment of the rights and duties of family is fundamental to a child’s ability to access the rights granted to him/her in the CRC. This explicitly provides a link between the natural protection afforded by family care, and the rights guaranteed to children under international law. It also serves to underscore the importance of the family unit in fostering a nurturing and protective environment for the family.

9 Best interests of the child

9.1 The South African Constitution states that the child’s best interests are of paramount importance in every matter concerning the child.⁷ In addition, the Children’s Act provides for the child’s best interest to be applied as the standard in all matters concerning the care, protection and well-being of the child.⁸

9.1.1 These provisions have consistently been broadly interpreted and upheld in South African courts. The Constitutional Court has referred to the provisions as “an expansive guarantee that a child’s best interests will be paramount in every matter concerning that child.”⁹

9.1.2 Moreover, the Constitutional Court has stated “statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and courts must function in a manner which at all times shows due respect for children’s rights.”¹⁰ This has been interpreted as allowing the best interests of a child to supersede a conflicting law or administrative provision that is not in the child’s best interest.¹¹ Thus any language in the Draft Bill that is not in the best interest of refugee children must be struck.

9.2 Notably the best interest principal is also supported in the CRC where it, together with non-discrimination (Article 2) and child participation (Article 12), forms the triangle of rights that comprises the foundation of the CRC.

9.2.1 Article 3(1) of the CRC provides:

In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative

⁷Section 28 of the Constitution of the Republic of South Africa

⁸Section 9 of the Children’s Act No. 38 of 2005

⁹Sonderup v Tondelli [2000] ZACC 26; 2001 (1) SA 1171 (CC) at para 29F.

¹⁰S v M [2007] ZACC 18.

¹¹T v T and others [2015] 3 All SA 681 (GJ).

authorities, or legislative bodies, the best interests of the child shall be a primary consideration.

9.2.2 This has been interpreted to mean that all policy decisions concerning children must be made with the interests of children as a primary consideration.

9.3 Additionally, the best interest principle is also included in the ACRWC as not only a primary consideration, but the primary consideration, setting a higher standard than the CRC.

9.4 Moreover the UNHCR Guidelines on Determining the Best Interests of the Child provides that best interest determinations for refugee child should account for:

[E]xisting bond with the (extended) family, including parents, siblings and other persons important to the child's life is thus a key factor in determining the child's best interests ... emphasis should also always be placed on the continuity of the child's relationship with parents, siblings and other family members.¹²

9.5 Thus the Committee has a Constitutional, international, and regional duty to form policy in line with the principal of the best interest of the child. As is underscored by the UNHCR directive, the best interest of refugee children should be assumed to be continuation of familial relationships.

10 Should you have any queries or comments please do not hesitate to contact Ms. Mudarikwa at mandy@lrc.org.za and Ms. M Ackermann at marilize@scalabrini.org.za

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¹² UNHCR Guidelines on Determining the Best Interests of the Child, UNHCR May 2008, available at <http://www.unhcr.org/4566b16b2.pdf>.