Children's Amendment Bill, 2020

Centre for Child Law Oral Submissions

CENTRE FOR CHILD LAW
FACULTY OF LAW, UNIVERSITY OF PRETORIA

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12 May 2021

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Introduction & Overview of Centre for Child Law Submissions

- Ms. Isabel Magaya (**LLB**; **LLM**(Child Law): **LLD** Candidate)

Centre for Child Law (the Centre)

- is a public interest impact litigation organisation registered with the Legal Practice Counsel. The Centre contributes towards the establishment and promotion of the best interests of children in South African law, policy and practice through litigation, legislative & policy advocacy as well as research and education.
- **Overview of Submissions**
  - Corporal Punishment
  - Children's Privacy
  - Parental Responsibilities & Rights (Guardianship)
  - Foster Care (Comprehensive legal Solution)
  - Social work processes

Corporal Punishment in the Home

Definitions: New Proposal

- Currently the Bill has no provision on corporal punishment and the Centre for Child law proposes that a new definition be inserted.
- We propose the definition used by the UN CRC (Gen Comment Nr.8)
- It also reflects South Africa's National Child Care and Protection Policy (Oct 2019) as approved by Cabinet.

  "*Corporal punishment or physical punishment means any punishment in which force or action is used and intended to cause some degree of pain or harm. It involves, but is not limited to hitting children in any environment or context, including in a home setting, with the hand or instruments such as a whip, stick, belt, shoe or wooden spoon. It can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, caning, forcing children to stay in uncomfortable positions, burning, scalding, or forced ingestion.*"

- Inserting a new definition will also give effect to proposed changes in s12(11)
  - Section 12(11) "No child may be subject to corporal punishment or be punished in a cruel, inhuman and degrading manner."

Corporal punishment: Rationale for proposed changes

- South Africa's ***National Child Care and Protection Policy (Oct 2019)*** as approved by Cabinet provides:

  "The Children's Act will have to be revised to prohibit corporal punishment and any other form of cruel, inhuman or degrading treatment or punishment." Pg 122.

- We need the Bill to provide clarity with regards to what happens to parents in the event that physical punishment has been used:
  - Parents/caregivers should be referred to prevention and early intervention programmes so that they can get parenting support to develop non-violent discipline. These programmes are outlined in **s144 of the Children's Act.**

- DSD is responsible for protecting children from violence and assisting those children who have experienced violence.
- A prohibition of corporal punishment and other cruel, inhuman and degrading punishment in itself will not change behaviour. Therefore, it needs to be accompanied by adequate programmes to change behaviour.

Corporal punishment: Rationale for proposed changes

- **Criminalisation of parents for using corporal punishment should be considered a last resort**. There may however be instances in which it is necessary to prosecute parents/caregivers.
- Where corporal punishment ***constitutes physical abuse*** according to **s110(1) of the Children's Act,** social workers ***must follow the process outlined in section 110(8)*** of the Children's Act and must report the possible commission of an offence to the police**.**
- The intention of the proposed amendments to the Children's Act is to enable parents to be referred to parenting courses and other early intervention programmes.
- Imprisoning parents for hitting their child is – in most instances – not in the best interest of the child and will therefore not be the preferred option for dealing with parents who use corporal punishment. The Children's Act provides for different types of early intervention measures that can be used to assist parents to develop alternative forms of discipline.
- The Bill must:
  - Define what CP is &
  - Then cross reference to P&EI programmes

Privacy

6A Children's privacy and Clause 35 deleting section 74 [Not supported]

- We are extremely concerned to see that section 74 is deleted in its entirety and that the new clause in section 6A does not provide for the protection of privacy of children in children's court proceedings. We assume that this is simply an oversight. There are two routes to solving this problem, and DSD must take one of these, because to leave the Bill as it is will leave the identity of children in the children's court unprotected.

Our concerns:

- NB! The current Bill has removed the protection of privacy for children subject to children's court proceedings.
- The July 2018 version of the Bill also removed section 74, but section 6C in that Bill covered the protection of all children, appearing in all courts.
- This current version of the Bill does not do so, thus leaving children subject to children's courts unprotected.
- **The simplest way to solve this is to delete 6A <u>AND</u> Not delete s74**
- Alternatively, if DSD wants to try to protect the rights of all children appearing in all courts, then the wording of the July 2018 version of the Bill, clause 6C must be used.

Privacy: Proposed Changes

- The version that appeared in the July 2018 version of the Children's Amendment Bill (at clause 4, inserting a new section in its place), Reads as follows:

"(1) No person may, without the permission of a court, in any manner publish any information, including any image, or picture which reveals or may reveal the name or identity of a child who is or was a party or a witness in the proceedings of any court or who is or was subject to an order of any court: Provided that a person may waive, in writing, the protection of his or her privacy as contemplated in this section upon reaching the age of 18 years.

(2) Notwithstanding subsection (1) a designated social worker conducting an investigation for the purposes of finding that a child may be in need of care and protection or that such child may be made available for adoption publish information for identification of the child including images or pictures of the child in the prescribed manner, for the purpose of tracing the child's parent(s) or family."

PARENTAL RESPONSIBILITIES AND RIGHTS:

SECTIONS 24 & 25 OF THE CHILDREN'S ACT

- **Section 24(1).** The Centre for Child Law proposes that Children's Courts be given the power to deal with guardianship applications. Proposed amendments by the Centre:

  "Any person having an interest in the care, well-being and development of a child may apply to the High Court or the children's court for an order granting guardianship of the child to the applicant"

- ***Children's Courts are more accessible*** and well versed in family law and child care matters, and are experts on adoption which have wider implications than guardianship applications.
- Making guardianship applications accessible at the Children's Court ***will increase access to justice*** for the majority of people and enable caregivers to administer and protect the pensions inherited by the children in their care. Many of these pensions go unclaimed due to there being no-one representing the child's interest.
- Reserving guardianship for the High Court exclusively would only be in the interests of the more wealthy who have the necessary resources to use the High Court processes.

PARENTAL RESPONSIBILITIES AND RIGHTS:

SECTIONS 24 & 25 OF THE CHILDREN'S ACT

- **Section 25.** The Centre for Child Law makes the following proposed amendments in light of its proposals to section 24.

- Centre for Child Law proposal below (highlighted parts are our proposals in addition to DSD proposed amendments:

> "Subject to section 45(4), when an application is made in terms of section 24 by a non-South African citizen for guardianship of a child, the application [must be regarded as], <u>if heard in the High Court, must be referred to a children's court having jurisdiction to be dealt with as an application for</u> an inter-country adoption for the purposes of the Hague Convention on Inter-country Adoption and Chapter 16 of this Act<u>, unless such court, including the children's court if the application for guardianship had been lodged in such court, finds that exceptional circumstances warrant the application for guardianship to be granted.</u>
>
> <u>(2) The Central Authority of the Republic contemplated in section 257 (1)(a) must be cited as a respondent in the event of an application referred to in subsection (1).</u>"

SECTION 150 OF THE CHILDREN'S ACT

Litigation

- High strain on foster care system to due exponential increase in the number of children entering the foster care system. Children's courts load and social worker loads high and system not able to cope.
- CCL & DSD reached settlement agreement in 2011. Temporary solution prevented lapsing of grants. Comprehensive legal solution (clearing existing backlogs & allowing those that qualify for the CSG top-up to get it and remove them from the Foster Care System).
- Due to failure to develop comprehensive legal solution court order has been extended 3 times – 2014, 2017 & 2019. This was to prevent foster care orders from lapsing due to no permanent solution.

FOSTER CARE CRISIS

- 12 November 2020 – CCL & DSD entered into another agreement which was made an order of court. *This is almost 10 years into the ongoing litigation with no comprehensive legal solution.*
- The Minister was granted another reprieve within which to finalise and put in place the comprehensive legal solution by ***27 November 2022.***
- Minister granted a short reprieve within which to table before Parliament amending legislation to produce a comprehensive legal solution (November 2020).

Social Assistance Act, 2020

- First step in developing a comprehensive legal solution to the foster care crisis.
- The Minister of Social Development, with support of Minister of Finance, will be able to introduce a top-up to the CSG to ensure that relatives caring for orphans are diverted from foster care system to "child support grant with a top-up".

The Children's Amendment Bill, 2020

- ***Second step (and final) step to developing a comprehensive legal solution.***
- The aim of the proposed amendments should be to provide legal certainty on which children will be placed in the foster care system and provide guidance on which children will be referred to the CSG-top up. The proposed amendment to section 150(1)(a) by DSD:

  > "A child who has been abandoned or orphaned and has no parent, guardian, family member or care-giver who is able and suitable to care for that child"

- We support the intent of the amendment because it is aimed at making it clear that relatives caring for orphaned or abandoned children will no longer have to get a foster care court order before they can access an adequate social grant.
- However, we are concerned that the proposed amendment is too broad and will result in DSD and the children's court requiring social workers to find absent parents and or distant family and place children informally with that absent parent or distant family with no supervision or support. This is not in children's best interests as it does not take into account the importance of an existing 'attachment' for the child's psychological development.

FOSTER CARE CRISIS

- **Centre for Child Law's proposed amendments:**

  "A child who has been abandoned or orphaned and is not in the care of a family member as defined in section 1"

- This provides legal certainty that a child is considered to be in need of care and protection (and therefore may be placed in foster care) if they are abandoned or orphaned and not in the care of a family member.
- If the child is in the care of a family (and does not meet any of the other requirements to be found in need of care and protection as set out in the rest of section 150) then they will be referred to the CSG-top up.

DECISION OF QUESTION WHETHER CHILD IS IN NEED OF CARE AND PROTECTION

SECTION 155

The majority of the problems in respect of removed children should have been cured by the judgment in ***C and Others v MEC for Social Development, Gauteng and Others***. It is now clearly mandatory that there must be a hearing at the children's court on the next court day when a child is removed.

However, section 155(2) still states:

> "Before the child is brought before the children's court, a designated social worker must investigate the matter and within 90 days compile a report..."

This was not cured by the abovementioned judgment. There is therefore still confusion in respect of removed children. In respect of children not removed but the subject of investigation to determine whether they are in need of care and protection, there is no clear procedure to open a children's court file in the act or regulations.

This could be resolved through amendment to sections 155(1) and 155(2) to make it clear the court must open a file/enquiry.

- 155(1) – "**[A children's court must decide the question of whether]** Upon notification or referral to the children's court of a child who is the subject of proceedings in terms of section 47, 151, 152 or 154, a children's court must open a court file in the prescribed manner and must decide the question of whether is in need of care and protection."

- 155(2) – "**[Before the child is brought before the children's court,]** A designated social worker must investigate the matter and within 90 days from the date of referral compile a report in the prescribed manner on whether the child is in need of care and protection."

Thank You

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