Submission: Children’s Amendment Bill 18 of 2020

The Catholic Institute of Education welcomes the opportunity to make a submission as part of the public consultations phase. We welcome the progress being made and are sensitive to the political, economic and health paradigm shifts which have contributed to delays in enacting the changes. We also welcome the recent amendments to the Social Assistance Act which enable this bill especially with regards to the Child Social Grant top up.

We must however note with concern that at the point of signing the Act in the future, 10 years would have passed since the landmark court ordered settlement with regards to foster children, notwithstanding the extensions granted in 2014 and again in 2017, over 120 000 children have been directly affected by the failure for a legal solution to the foster care crisis. It is essential that citizens believe there is rule of law and court orders are adhered to by the state.

In this regard, Parliament must ensure effective oversight over the department as the consequence of this failure is an unfortunate public perception that all are not equal before the law as constitutionally required. To illustrate but not to stress the point, Irene Grootboom was not served with a home despite a constitutional court ruling, extensions are sought regularly for non-compliance by SASSA and this amendment comes 10 years after the fact, does negate in many ways the pro poor policies of government. Court orders for commercial and other civil laws are enabled with haste but social development has become seemingly complacent with enacting court orders, possibly due to lack of capacity which Parliament must ensure is funded appropriately but also because a progressively realisable constitution means that extensions are possible. We must guard against regression on realising rights and our submission highlights these points in particular.

Considering the long periods of campaigning required to bring about social assistance, the Child Support Grant took 8 years and the unemployment reliefs brought about temporarily due to the COVID19 pandemic, the slow pace of providing social protection which then are hampered by non-compliance is a disservice to the poor and extremely damaging to the soul of an already iniquitous country. Any failure in social development increases inequality. While it is not always useful to compare ourselves to Scandinavian countries, it is worth noting that before social protection and assistance, Norway’s market conditions provided the same levels of inequality as Argentina, but the government’s policy progressive taxation and the combination of Education, Health and Social Development interventions alleviated the market induced inequality to make Norway the most equitable country in the world. The fundamental failure and ongoing crisis in South Africa within Health, Education and importantly Social Development allows inequality to remain persistent and damaging to the people of the country.

While the amendment bill is welcome, the choice to bring in other issues such as ECD and rights of fathers complicated and delayed the processing of the bill. This further erodes the trust that the department was serious about resolving issues they were ordered by court to resolve. However, the recent work on this build is definitely a step in the right direction and an indication of rebuilding faith.

We welcome Parliaments role in requesting additional presentations and the work of the committee to bring about accountability is most welcome, especially the work done by many to process this extremely large 147 clauses bill.

In the history of our democratic dispensation no other court order has taken this long to resolve before the legislature and it must be a priority of future parliamentary committees and parliament itself to step in and ensure compliance before extensions are required and sought. The Department of Social Development should never be in need of an extension of a court order as the consequences of non-compliance affect those most protected by the constitution.

We provide the following clause by clause submission to assist Parliament to rapidly bring the bill into force.

The section numbers below refer to the numbering in the Bill and not the Sections of the Act.

**Section 1**

Section 1(a)(a)

We welcome the clarity provided in this clause though are not sure what the test of obviousness would be. As South African courts have a definition of reasonableness, it would be better to make the following insertion at the beginning of the clause “**a reasonable person would deem”** has obviously been deserted…

Section 1(j)

While ECD is in a transition to move from Social Development to then Department of Basic Education, it is essential that the clause is clear that we are dealing with existing centers registered or in the process of registering with the department of Social Development. As some schools include education for children pre Grade R, the broader definition may create an unintended consequence of transitioning registered Education providers into Social Development only to be transitioned back to Education.

We therefore recommend the insertion of the following after school going age “**and is registered or in the process of registration with the department of social development”.**

Section 1(m)

We welcome the definition though in current wording leaves open a two test approach, that it must be non-medical and have no health benefit. Either of these two should apply for the definition we therefore recommend the following clause instead **“genital mutilation means a procedure performed for non-medical and/or has no health benefit which intentionally”**

**Section 2,3,4,5,6,7,8,9,10,11**

We welcome these sections with no changes required

**Section 12**

We recommend that 12(d) around the termination of parental rights and responsibilities take into account the new section 2A as amended by clause 12(a) and recommend insertion after prescribed manner **“taking into account the views of the child where the child is of sufficient maturity and mental capacity”**

**Section 13(b)(b)**

It is unclear how suspension of legal matters is envisaged, due to the nature of court proceedings in matters of criminal law, suspension would not be possible and similarly if a civil case has been built for years, it would be unwise to suspend a pending matter or delay legal processes. The clause does not seem to present any benefit but creates legal process confusions which must be avoided. **We recommend the deletion of this clause** and leave matters such as these to the discretion of judges or magistrates on how best to handle multiple related legal processes.

**Section 14**

We recommend that this clause is tightened up. The loophole exists that one can apply to a lower court to avoid having The Hague convention apply. It is not clear why “**if heard in a High Court”,** the law should be simpler, that any court where the application is made, must (not may) refer the matter to a children’s court.

**Section 15,16,17,18,19**

We welcome these sections with no changes required

**Section 20(a)**

We recommend that an amount is stated for the fine to avoid arbitrary application. A minimum fine of x as prescribed by existing rules of court. The number should be somewhere between R10 000 and R30 000 for prescribed minimums.

**Section 21,22,23,24,25,25,27.28.29,30,31**

We welcome these sections with no changes required

**Section 32**

The deletion of section 74 of the principal act will infringe on the rights of children to privacy and increase the risks to children. There is no rationale provided for this deletion and therefore there is no point for debate as we cannot understand why the clause is being recommended for deletion.

We recommend the original clause 74 is not deleted and remains **“No person may, without the permission of a court, in any manner publish any information relating to the proceedings of a children’s court which reveals or may reveal the name or identity of a child who is a party or a witness in the proceedings”.**

**Section 33(c)**

We do not support this clause as it creates unrestricted powers, the defraying of costs can be interpreted in many ways. The clause should be clearer, **“responsibility for payment of costs…”**

**Section 34**

We believe an error has been made and it should state more than six rather than less than six under the envisaged new section 76(2). Otherwise it would read that partial care facilities must be registered when there are more or less than six children.

Furthermore the requirements may then force schools and ECD’s to register after care programmes as partial care facilities. The insertion of full-time causes this problem. It should be clearer in the Act, that the provisions of these clauses on partial care are required where no other registration exists or alternatively that it is the intention of parliament that only Social Development register these types of care. Effectively this will make school programmes, clubs and after care all fall within the ambit of partial care and cause an administrative burden and no doubt encourage litigation. To avoid the problem, the **full-time** should be deleted.

**Section 35(c)**

We oppose the change from must fund to may fund. In a resource constrained economic environment and considering that Act 38 of 2005 is progressively realisable, decisions were taken on which services must be funded and which may be funded. As the rights and policy have progressed in line with the constitution, we cannot then erode a progressively realised right by replacing must fund to may. This is very dangerous and must be rejected strongly to avoid any repetitions or the whole Act could be delayed due to constitutional litigation.

**Section 35(e)**

This clause is no doubt contentious and the same applies as above, if a right has been progressively realised, the state cannot enact legislation that regresses or revokes the rights achieved where these undermine rights achieved in the constitution. While there is space for improvement in infrastructure efficiency, we propose a rethink of this mechanism. While public funds cannot indefinitely be used to improve private property, as long as the organisation is a registered NPO and properties and the likes are transferred to the entity funding continues as is. The problem is how to help those in the process of becoming compliant when the risk is that they change their mind after public funds have been spent. We recommend deleting the proposed clause in its negative policy formulation and provide a clause that covers those in the process of registration where the conditions might not have been met to read

**“The MEC must reasonably facilitate access to finance for infrastructure development of candidate partial care facilities through government funded vehicles such as the Small Enterprises Finance Agency and Small Enterprises Development Agency, Public Investment Corporation and where possible through public private partnerships”**

**Section 36,37, 38,39, 40,**

We welcome these sections with no changes required

**Section 41**

The addition of routine inspections is unfortunate. The monitoring and support to partial care facilities and programmes is welcome but the terminology of inspection opens up the space for discomfort and abuse. We have a long history of inspections in the past and various government departments have set up monitoring and evaluation units that stay clear of using the ideology of inspectorates.

The clause achieves the same if you delete **“and conduct routine inspections”**, you avoid the problems and still improve the quality of partial care facilities without creating spaces for abuse and potentially corruption.

Furthermore, the language in other areas is for monitoring and evaluation and inspections seem to only appear to partial care and shelters which raises the question as to why these sectors are receiving further scrutiny compared to other programmes.

**Section 42,43**

We welcome these sections with no changes required

**Section 44(c)**

We recommend the deletion of **“inspection and”** for reasons cited above.

**Section 45,46,**

We welcome these sections with no changes required

**Section 47**

We recommend the same application for partial care to ECD conditional registration **“The MEC must reasonably facilitate access to finance for infrastructure development of candidate ECD facilities through government funded vehicles such as the Small Enterprises Finance Agency and Small Enterprises Development Agency, Public Investment Corporation and where possible through public private partnerships”**

**Section 48, 49, 50, 51, 52, 53, 54**

We welcome these sections with no changes required

**Section 55**

In the principal act these sections are about regulations the MEC may enact. It is incorrect to place legislative clauses in the section meant to list regulations and these clauses should be moved elsewhere. Furthermore, the practice from the regulations already in place has been to provide subsidies to registered centers. The use of the terminology funding, suggests something else when in reality small subsidies are paid to ECD in practice with these varying between provinces. ECD centers have to raise the bulk of their own funds either from fees or other fundraising activities and are therefore subsidized by the state and not funded by the state. In the case of private homes for example, the ECD owner has paid for or owns the property which did not come from public funds.

We recommend that a definition is provided for subsidy under section 1 and that the bill then replace all uses of the term funding and replace these with quality for a subsidy or subsidy to accurately reflect what is happening

We welcome the norms and standards for ECD

**Section 56,57, 58, 59, 60 , 61, 62, 63, 64, 65, 66, 67, 68, 69,70, 71, 72, 73**

We welcome these sections with no changes required

**Section 74**

We recommend a change from If necessary to **When necessary.** This is to highlight that medical testing and HIV testing in particular is not discretionary but sometimes necessary and when it becomes necessary must be paid for.

**Section 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85**

We welcome these sections with no changes required

**Section 86**

Under the current legislation, courts may provide an order for two years with a further extension of another two years and use their discretion for shorter periods. The six month envisaged in the bill is inconsistent with existing powers of courts and provided with no rationale. We recommend the period of **extension be no longer than two years** as per the existing practice.

It may be more sensible to delete this clause as it is then covered in section 87 without creating confusion.

**Section 87, 88, 89, 90, 91, 92, 93, 94, 95**

We welcome these sections with no changes required

**Section 96(j)**

The clause should not be deleted by amended to say “correctional facility” instead of prison

**Section 97(c)**

We recommend the following

“**The MEC must reasonably facilitate access to finance for infrastructure development of candidate Child and Youth Care facilities through government funded vehicles such as the Small Enterprises Finance Agency and Small Enterprises Development Agency, Public Investment Corporation and where possible through public private partnerships”**

**Section 98, 99,100,101,102,103, 104, 105**

We welcome these sections with no changes required

**Section 106**

The clause is not supported as again it revokes or regresses an established realized right. The team must and not may appoint a mentor

**Section 107,108, 109. 110, 111, 112**

We welcome these sections with no changes required

**Section 113**

We recommend deleting “and conduct regular inspections” for reasons cited above under section 41.

**Section 114, 115, 116, 117, 118, 119**

We welcome these sections with no changes required

**Section 120**

We are concerned that against international norms to have specialists social workers for adoption, the use of social worker responsible for adoption is too broad. We propose that it reads instead **“social worker specialised in adoption”**

**Section 121**

We welcome this section with no changes required

**Section 122**

The deletion of section 249 opens the way for unscrupulous adoptions and in particular concerns schools which may become shopping grounds for traffickers under the guise of adoption. The provision of these clauses specifically ensured that fees would not be charged and avoid trafficking in children with exceptions made for compensation to biological mothers for actual expenses and then payments for professional fees. The removal of these clauses are not in the best interests of children and allowing fees to be regulated outside the Act causes constitutional difficulties that must be avoided. The children’s Act like PAIA and PAJA is an enabling act of the constitution and must therefore enforce the supremacy of the constitution. The deletion of this clause would mean that regulation of fees would occur through subordinate policy and is not ideal.

We recommend that section 249 is **not deleted.**

1. **No consideration in respect of adoption**

**(1) No person may—**

**(a) give or receive, or agree to give or receive, any consideration, in cash or in kind, for the adoption of a child in terms of Chapter 15 or Chapter 16; or**

**(b) induce a person to give up a child for adoption in terms of Chapter 15 or Chapter 16.**

**(2) Subsection (1) does not apply to—**

**(a) the biological mother of a child receiving compensation for—**

**(i) reasonable medical expenses incurred in connection with her pregnancy, birth of the child and follow-up treatment;**

**(ii) reasonable expenses incurred for counselling; or**

**(iii) any other prescribed expenses;**

**(b) a lawyer, psychologist or other professional person receiving fees and expenses for services provided in connection with an adoption;**

**(c) the Central Authority of the Republic contemplated in section 257 receiving prescribed fees;**

**(d) a child protection organisation accredited in terms of section 251 to provide adoption services, receiving the prescribed fees;**

**(e) a child protection organisation accredited to provide inter-country adoption services receiving the prescribed fees;**

**(f) an organ of state; or**

**(g) any other prescribed persons.**

**Section 123**

We recommend the use of **“social worker specialised in adoption”**

**Section 124**

We welcome this section with no changes required

**Section 125**

We recommend the use of **“social worker specialised in adoption”**

**Section 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147 and 148**

We welcome these sections with no changes required

**Conclusion**

We thank you for the opportunity to make this submission, for any queries please contact. We make these submissions to both improve the existing social development provision but also to ensure that the transition of ECD into the Education sector is successful and in the best interests of children.

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