

CHILDREN'S AMENDMENT BILL – PUBLIC HEARINGS IN GAUTENG

BRAAMFONTEIN RECREATION CENTRE

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SUBMISSION BY LAWYERS FOR HUMAN RIGHTS

Lawyers for Human Rights (LHR) welcomes the opportunity to make further input into the Children's Bill process, especially given the prejudicial changes made to the s75 Bill in relation to foreign children, both accompanied and unaccompanied. The category of foreign children includes not only asylum seeker and refugee children, but also other categories of foreign children, in particular undocumented (or 'illegal') foreign children.

LHR notes with extreme concern the deletion of all references to unaccompanied foreign children from the first s75 Bill passed in December 2005 (Children's Act No. 38 of 2005). At present, the Bill only explicitly protects unaccompanied foreign children who might have been victims of trafficking. However, it is dead silent on the treatment and care that is to be accorded to asylum seeker, refugee and undocumented foreign children who are not victims of trafficking, despite obligations on the South African state to extend protections to these children arising from the 1989 United Nations Convention on the Rights of the Child (UNCRC), the 1990 African Charter on the Rights and Welfare of the Child (ACRWC), the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol, the 1969 Organisation of African Unity's Convention Regarding the Specific Aspects of Refugee Problems in Africa, the South African Refugees Act No 130 of 1998 and the Immigration Act of 2002 (as amended in 2004). The present Bill is also silent on services to be provided to 'accompanied' foreign children, regardless of status or nationality, who might be victims of abuse or neglect by their parents, caregivers or guardians, irrespective of being trafficked or not. In this regard, LHR would like to highlight three areas that require further amendment:

1. Inclusion of clause on non-discrimination relating to the applicability of the current legislation

As much as the current bill is based on the premise that a "child is a child" regardless of status or nationality, and an *implicit* regard for the principle of non-discrimination, this principle is not explicitly stated in the Bill. **The absence of an explicit clause that affirms the non-discriminatory application of the provisions in the Bill to all children leaves the door open for restrictive and exclusionary interpretations of such provisions, particularly in relation to foreign children, whether accompanied or unaccompanied.** In line with similar clauses contained in the UNCRC and the ACRWC, LHR hereby proposes that the Bill be revised to include a non-discrimination clause which states that:

Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Act irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, property, disability, birth or other status.

2. Inclusion of explicit mention of foreign children, whether accompanied or unaccompanied, under Section 150 (2)

In discussions held between LHR and representatives from the Department of Social Development, the Department noted that the removal of any explicit mention of foreign children from the Bill should be regarded as a positive development since it reaffirms the Department's commitment to be inclusive of all children irrespective of status, nationality, or whether they are accompanied or not, and to provide services to all children under 18 within the borders of the country.

However, as much as this inclusiveness might be espoused at the higher echelons of government, in practice, **failure to mention foreign children has, in recent years, not translated into inclusive state practices toward these children.** In particular, and as a result of the failure of the Child Care Act to make explicit mention of unaccompanied foreign children, these children were, year after year, effectively excluded from statutory children services provided by key departments such as Social Development, Home Affairs, and the South African Police Services. **It required costly and time consuming legal action by the Centre for Child Law and Lawyers for Human Rights (*Centre for Child Law vs. Minister of Home Affairs and Others 2005 (6) SA 50 (T)*) for the courts to explicitly affirm, once and for all, that unaccompanied foreign children should be dealt with under the provisions of the Child Care Act No.74 of 1983.** However, and despite this successful legal action, reliance on court orders and circulars (rather than explicit clauses in national legislation) in the face of staff turnover in key departments has meant that, to date, the procedures followed in relation to unaccompanied foreign children continue to vary from city to city.

Moreover, even though legal action was successfully undertaken to address the special needs of *unaccompanied* foreign children, **currently there are no explicit procedures to address systematically the needs of *accompanied* foreign children** (who have parents, guardians or caregivers) but **who are subject to abuse or neglect in their home environment.** The lack of any explicit mention of foreign children or an explicit recognition that they might be in need of care has often led to these children 'falling through the cracks' and continuing to live in abusive or neglectful contexts.

The South African government is bound not only by its accession to international conventions, but also by its own Constitution, to make necessary services available to foreign children, whether accompanied or unaccompanied. In terms of the latter, the South African government is obliged to provide, in conjunction with relevant international organisations, family tracing

services with a view to family reunification. This is particularly relevant at a time when South Africa, having become a member of the UN's Security Council, should lead by example by respecting its international obligations rather than being the subject of possible future litigation for refusing to uphold these obligations. It is therefore LHR's contention that **the Bill should make explicit mention of foreign children, whether accompanied or unaccompanied, to ensure that foreign children are expressly brought into the fold of the Children's Bill.**

3. Definition of different categories of foreign children

Besides making explicit mention of foreign children, it is LHR's view that **the Bill must be amended in order to: (1) explicitly define different categories of foreign children, particularly asylum seeker, refugee and undocumented foreign children and the procedures to be followed in respect of each category of children; and (2) in a separate section deal comprehensively with the trafficking of *any child* (whether asylum seeker, refugee or undocumented foreign child) and the procedures to be followed in instances of trafficking.**

While children should be regarded as children first, regardless of status or nationality, the lack of any substantive detail on the different categories of foreign children has led to confusion amongst service providers on how to deal with these children. In particular, when dealing with asylum seeker and refugee children, authorities must take into account special protections contained in the South African Refugees Act No 130 of 1998, as well as UN and OAU Conventions relating to refugees, which South Africa has ratified.

Moreover, as it presently stands, the Bill creates unnecessary confusion by only mentioning asylum seeker and refugee children in Section 289 which deals with trafficked children. **Being trafficked is not a status, but rather a form of coming, or being brought, into the country.** In other words, different children, whether they are asylum seekers, refugees, or undocumented ('illegal') foreign children, can be potentially trafficked. Unfortunately, however, Section 289 tends to associate only trafficked children with being potential asylum seekers or refugees. This is factually incorrect. Foreign children often have asylum claims without ever having been trafficked. In this sense, **the Chapter on Trafficking in the current Bill is deficient in that (1) it fails to recognise that any foreign child, whether an asylum seeker, refugee or undocumented foreign child, can be subject to trafficking; (2) fails to outline procedures to be followed in each of these instances of trafficking, and (3) fails to clarify which permits, under which Act, will be issued to trafficked children.**

RECENT CASE LAW REGARDING FOREIGN CHILDREN

1. In *Centre for Child Law v Minister of Home Affairs* the rights of unaccompanied foreign children who found themselves detained in South Africa, came under scrutiny. In this matter, which is arguably the most important judgement to date on the rights of foreign children in South Africa, the Court declared that:
 - All unaccompanied foreign children found in need of care should be dealt with in accordance with the provisions of the *Child Care Act*. This includes asylum seeker and refugee children and means that these children must be brought before a Children's Court for an inquiry into their circumstances to be conducted when they are found in need of care.
 - If it appears at a Children's Court inquiry that a child has a refugee claim, that child should be assisted to submit an asylum claim in terms of section 32 of the Refugees Act.
 - The government of South Africa is directly responsible to provide in the socio-economic and education needs of unaccompanied foreign children presently in South Africa. This includes the needs of asylum seeker and refugee children.
 - Unaccompanied foreign children may no longer be detained at the Lindela Repatriation Centre.
 - Unaccompanied foreign children must be provided with legal representation at State expense.
 - The way in which unaccompanied foreign children have been deported from Lindela in the past was unlawful.
 - There is a legal duty on the various Government departments to together formulate a detailed policy providing for the way in which unaccompanied foreign children should be dealt with in South Africa.

In response to the judgment, the South African Police Services issued policy directives to incorporate foreign unaccompanied minors.

2. *Bishogo v The Minister of Social Development* – This case dealt with the indirect bar on refugees accessing social services. In this matter, a Congolese refugee provided foster care to three young children, but was denied foster care grants because she was unable to provide a copy of a green South African identity document, when she applied for foster care grants. Shortly after the litigation commenced, the Minister of Social Development settled the matter on the basis that Ms. Bishogo would be paid social relief of distress grants for three months whilst the Department of Social Development re-programmed their computer infrastructure to allow the to accept refugee documentation as proof of identity.