

REPUBLIC OF SOUTH AFRICA

CHILDREN'S AMENDMENT BILL

*(As amended by the Portfolio Committee on Social Development
(National Assembly))*

[B 18B—2020]

ISBN 978-1-4850-0793-7

No. of copies printed 150

Professions Act, 1978 (Act No. 110 of 1978), to practise and render a service within the social service sector;”;

Amendment of section 24 of Act 38 of 2005

2. Section 24 of the principal Act is hereby amended by the following subsection: 5
 “(1) Any person having an interest in the care, well being and development of a child may apply to the High Court or children’s court for an order granting guardianship of the child”.

Amendment of section 45 of Act 38 of 2005

3. Section 45 of the principal Act is hereby amended—
- (a) by the insertion in subsection (1) after paragraph (b) of the following paragraph: 10
 “(bA) guardianship of a child as contemplated in section 24;”;
- (b) by the substitution in subsection (1) for paragraph (j) of the following paragraph:
 “(j) a child and youth care centre, a partial care facility or a [shelter or] 15
 drop-in centre, or any other facility purporting to be a care facility for children; [or]”;
- (c) by the insertion in subsection (1) after paragraph (j) of the following paragraph:
 “(jA) an unaccompanied or separated migrant child or a child who is an asylum seeker or refugee as contemplated in the Refugees Act, 1998 (Act No. 130 of 1998); or”;
- (d) by the substitution for subsection (2) of the following subsection:
 “(2) A children’s court must refer any criminal matter arising from the non-compliance with an order of such court or a charge relating to any offence contemplated in section 305 to a criminal court having jurisdiction.”;
- (e) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:
 “Pending the establishment of family courts by an Act of Parliament, 30
 the High Courts [**and Divorce Courts**] have exclusive jurisdiction over the following matters contemplated in this Act:”;
- (f) by the deletion in subsection (3) of paragraphs (a) and (b);
- (g) by the substitution in subsection (3) for paragraph (h) of the following paragraph: 35
 “(h) surrogate motherhood agreement; and
- (h) by the insertion after subsection (3) of the following subsections:
 “(3A) The High Court and children’s court have concurrent jurisdiction over the guardianship of a child as contemplated in section 24 of this Act. 40
 (3B) The High Court, children’s court and regional court have concurrent jurisdiction over the assignment, exercise, extension, restriction, suspension or termination of guardianship in respect of a child.”.

Amendment of section 105 of Act 38 of 2005, as inserted by section 5 of Act 41 of 2007 45

4. Section 105 of the principal Act is hereby amended by the insertion after subsection (5) of the following subsection:
 “(6) The Department must, as prescribed, develop and conduct a quality assurance process for the evaluation of—
 (a) child protection services; and 50
 (b) child protection organisations as contemplated in section 107.”.

Amendment of section 142 of Act 38 of 2005, as amended by section 6 of Act 41 of 2007

5. Section 142 of the principal Act is hereby amended—
- (a) by the substitution for paragraph (f) of the following paragraph: 5
 “(f) prescribing the conditions for the examination or assessment of children who have been abused, abandoned or neglected, including the consent of the child for any such examination or assessment given the age and maturity of the child;”; and
- (b) by the deletion of the word “and” at the end of paragraph (j) and the insertion after paragraph (j) of the following paragraphs: 10
 “(jA) prescribing the powers, duties and responsibilities of the Registrar of the National Child Protection Register;
 (jB) prescribing the criteria for the establishment and resourcing of designated child care and protection units; and”.”

Amendment of section 150 of Act 38 of 2005, as amended by section 5 of Act 17 of 2016 15

6. Section 150 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph: 20
 “(a) has been abandoned or orphaned and [**does not have the ability to support himself or herself and such inability is readily apparent**] has no family member who is able and suitable to care for that child;”;
- (b) by the deletion of the word “or” at the end of subsection (1)(h);
- (c) by the substitution in subsection (1) for paragraph (i) of the following paragraph: 25
 “(i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person [**under**] in whose [control] care the child is;”; and
- (d) by the insertion after paragraph (i) of the following paragraphs: 30
 “(j) is an unaccompanied migrant child from another country;
 (k) is a victim of trafficking; or
 (l) has been sold by a parent, care-giver or guardian.”.”

Amendment of section 155 of Act 38 of 2005, as amended by section 7 of Act 17 of 2016 35

7. Section 155 of the principal Act is hereby amended—
- (a) by the substitution for subsection (2) of the following subsection: 40
 “(2) [**Before the child is brought before the children’s court, a**] A designated social worker must investigate the matter and within 90 days compile a report in the prescribed manner on whether the child is in need of care and protection.”;
- (b) by the substitution for subsection (5) of the following subsection: 45
 “(5) If, after an investigation contemplated in subsection (2), the designated social worker finds the child to be in need of care and protection, that child must be brought before the children’s court for a hearing upon which such court must make a determination.”; and
- (d) by the substitution for subsection (6) of the following subsection: 50
 “(6) The children’s court hearing the matter may—
- (a) adjourn the matter for a period not exceeding [**14**] 30 days at a time; and
- (b) order that, pending decision of the matter, the child must— 55
 (i) remain in temporary safe care at the place where the child is kept;
 (ii) be transferred to another place in temporary safe care;
 (iii) remain with the person [**under**] in whose [control] care the child is;

- (iv) be **[put under]** placed in the **[control]** care of a family member or other relative of the child; or
- (v) be placed in temporary safe care.”; and
- (e) by the substitution in subsection (8) for paragraph (a) of the following paragraph:
 - “(a) must make an order that the child, if the child is in temporary safe care, be returned to the person in whose **[control]** care the child was before the child was **[put]** placed in temporary safe care;”.

Amendment of section 156 of Act 38 of 2005, as amended by section 9 of Act 41 of 2007

8. Section 156 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (b) of the following paragraph:
 - “(b) confirming that the person **[under]** in whose **[control]** care the child is, may retain **[control]** care of the child, if the court finds that that person is a suitable person to provide for the safety and well-being of the child;”;
 - (b) by the substitution in subsection (1) for paragraph (c) of the following paragraph:
 - “(c) that the child be returned to the person **[under]** in whose care the child was before the child was placed in temporary safe care, if the court finds that that person is a suitable person to provide for the safety and well-being of the child;”;
 - (c) by the insertion in subsection (1) after paragraph (c) of the following paragraph:
 - “(cA) that the child be placed in the care of a parent or family member, if the court finds that such person is a suitable person to provide for the safety and well-being of the child;”;
 - (d) by the substitution in subsection (1) for paragraph (d) of the following paragraph:
 - “(d) that the person **[under]** in whose care the child was must make arrangements for the child to be taken care of in a partial care facility at the expense of such person, if the court finds that the child became in need of care and protection because the person **[under]** in whose care the child was lacked the time to care for the child;”;
 - (e) by the substitution in subsection (1)(e) for subparagraph (ii) of the following subparagraph:
 - “(ii) foster care with **[a group of persons or an organisation operating] an identified foster parent who is part of** a cluster foster care scheme;”.

Amendment of section 157 of Act 38 of 2005

9. Section 157 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:
 - “Before a children’s court makes an order in terms of section 156 for the removal of the child from the care of the child’s parent, guardian or care-giver, the court must—”;
 - (b) by the substitution in subsection (1)(b) for subparagraph (i) of the following subparagraph:
 - “(i) leaving the child in the care of the parent, guardian or care-giver under the supervision of a designated social worker, provided that the child’s safety and well-being must receive first priority;”;
 - (c) by the substitution in subsection (1)(b) for subparagraph (ii) of the following subparagraph:
 - “(ii) placing the child in alternative care for a limited period to allow for the reunification of the child and the parent, guardian or care-giver with the assistance of a designated social worker;”;

- (d) by the substitution in subsection (1)(b) for subparagraph (iii) of the following subparagraph:
 “(iii) placing the child in alternative care with or without terminating parental responsibilities and rights of the parent, guardian or care-giver;”;
- (e) by the substitution for subsection (3) of the following subsection:
 “(3) A [**very young**] child who is three years of age or less who has been orphaned or abandoned [**by its parents**] must be made available for adoption in the prescribed manner and within the prescribed period except when this is not in the best interests of the child.”; and
- (f) by the substitution for subsection (4) of the following subsection:
 “(4) When issuing an order involving the removal of the child from the care of the child’s parent, guardian or care-giver, the court may include in the court order instructions as to the implementation of the permanency plan for the child.”.

Amendment of section 159 of Act 38 of 2005, as amended by section 8 of Act 17 of 2016

10. Section 159 of the principal Act is hereby amended by the insertion after subsection (2) of the following subsections:

- “**2A.** A court may extend an alternative care order that has lapsed or make an interim order for a period not exceeding six months on good cause shown.”.
- “**2B.** Notwithstanding the amendment to section 150(1)(a), an order placing an orphaned or abandoned child in foster care with a family member in terms of section 156 before or on the date of this Amendment Act, may be extended by the court in terms of section 159(2) or section 186(2).”.

Amendment of section 160 of Act 38 of 2005

11. Section 160 of the principal Act is hereby amended—

- “(cA) the procedure, form and manner that a social service practitioner must follow when assessing, screening, investigating, referring to the relevant authority and placing a child who is in need of care and protection.”.

Amendment of section 183 of Act 38 of 2005, as inserted by section 10 of Act 41 of 2007

12. Section 183 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:
 “(a) The organisation operating or managing the cluster foster care scheme must [**be a non-profit organisation registered in terms of the Non-profit Organisations Act, 1997 (Act 71 of 1997)**] register as a designated child protection organisation within two years of this provision coming into operation;”;
- (b) by the insertion in subsection (1) after paragraph (a) of the following paragraph:
 “(aA) the provincial department of social development or a designated child protection organisation must manage and operate a cluster foster care scheme in the prescribed manner;”.

Amendment of section 185 of Act 38 of 2005, as inserted by section 10 of Act 41 of 2007

13. Section 185 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

- “(2) [**More**] Not more than six children may be placed in foster care with a single person or two persons sharing a common household in terms of a registered cluster foster care scheme.”.

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

14. Section 186 of the principal Act is hereby amended—
- (a) by the insertion after subsection (1) of the following section: 5
 “(1A) Despite the provision of subsection (1) a children’s court may deem it necessary to order further supervision services as contemplated in section 65(2)(a)(ii).”;
- (b) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words: 10
 “A children’s court may, despite the provisions of section 159(1)(a) regarding the duration of a court order and after having considered the need for creating stability in the child’s life, place a child in foster care with a family member **[for more than two years, extend such an order for more than two years at a time or]** and order that the foster care placement subsists until the child turns 18 years, if—”; 15
- (c) by the substitution for subsection (3) of the following subsection: 20
 “(3) Despite the provisions of subsections (1) and (2), a social service **[professional]** practitioner must visit a child in foster care at least **[once every two years]** annually to monitor and evaluate the placement.”; and
- (d) by the insertion after subsection (3) of the following subsection: 20
 “(4) This section does not apply to a cluster foster care scheme contemplated in section 183.”.

Short title and commencement

15. This Act is called the Children’s Amendment Act, 2020, and comes into operation on a date determined by the President by proclamation in the *Gazette*. 25

MEMORANDUM ON THE OBJECTS OF THE CHILDREN'S AMENDMENT BILL, 2020

1. PURPOSE OF THE AMENDMENT BILL

The Children's Amendment Bill seeks to:

- (a) contribute towards the comprehensive legal solution as ordered by the Gauteng Division of the High Court in Pretoria, in the matter of *Centre for Child Law v Minister of Social Development* (Case No: 72513/2017) to deal with challenges relating to the provision and administration of foster care.
- (b) The High Court, on 28 November 2017, directed the Minister amongst others, to prepare and introduce before Parliament, the necessary amendments to the Children's Act 38 of 2005 ("the Children's Act") and the Social Assistance Act 13 of 2004 and to do so within a period of 15 months from the date of the Court Order in order to produce a comprehensive legal solution regarding the foster care system. The 15 month period referred to in the court order lapsed on the 28th of February 2019.
- (c) Further the court ordered that any foster care order which, as at the date of the order, is in existence or has lapsed due to non-extension shall be deemed to be validly in place for 24 months from the date of the order or until the child subject to the order turns 18, whichever comes first. On 26 November 2019, the High Court extended the initial 2017 order for a period of 12 months and directed the Minister to request Parliament to expedite the process for the consideration and tabling of the amendments to the Children's Act, 2005.

2. OBJECTS OF BILL

The Bill introduces the amendments as follows:

- 2.1 **Clause 1** seeks to amend section 1 of the principal Act by substituting and inserting new definitions. This will align the principal Act with current family and child law practice.
- 2.2 **Clause 2** seeks to amend section 24 and extends the jurisdiction of the Children's court to hear guardianship matters.
- 2.3 **Clause 3** seeks to amend section 45—
 - (a) by extending the jurisdiction of the children's court to include "guardianship of an orphaned or abandoned child";
 - (b) by excluding matters arising in a shelter from the jurisdiction of the children's court;
 - (c) by including unaccompanied or separated migrant child, or the child of an asylum seeker or refugee, as contemplated in the Refugees Act, 1998 (Act No. 130 of 1998) under the children's court jurisdiction;
 - (d) by adding to the powers of the children's court to refer any criminal matter arising from the non-compliance with an order of such court or a charge relating to any offence contemplated in section 305 to a criminal court having jurisdiction;
 - (e) by removing all references to the divorce courts and to clarify that the children's court and the High Court have jurisdiction over guardianship of a child. The High Court, children's court and regional court have jurisdiction over assignment, exercise, extension, restriction, suspension or termination of guardianship in respect of a child.
- 2.4 **Clause 4** seeks to amend section 105 by providing that the Department must ensure that a quality assurance process is conducted, in the manner and at the intervals as prescribed, in respect of all child protection services contemplated in this section.

- 2.5 **Clause 5** seeks to amend section 142 by empowering the Minister to make regulations prescribing the powers, duties and responsibilities of the Registrar of the National Child Protection Register; and the establishment of well-resourced designated child care and protection units with quality assurance units.
- 2.6 **Clause 6** seeks to amend section 150 to clarify that a child who is abandoned or orphaned and has no parent, guardian, family member or caregiver who is able and suitable to care for that child, is a child in need of care and protection. A child in need of care and protection will include “an unaccompanied migrant child from another country”; “a victim of trafficking ”; or a child who “has been sold by a parent caregiver or guardian”.
- 2.7 **Clause 7** seeks to amend section 155 by making minor consequential amendments.
- 2.8 **Clause 8** seeks to amend section 156 by adding that the child be placed in the care of a parent or family member, if the court finds that such person is a suitable person to provide for the safety and well-being of the child under a new subparagraph 1 (cA) and effecting minor consequential amendments.
- 2.9 **Clause 9** seeks to amend section 157 by effecting minor consequential amendments.
- 2.10 **Clause 10** seeks to amend section 159 by providing that a court may extend an alternative care order that has lapsed or make an interim order. Furthermore, it will be regulated to ensure the accountability of the respective officials regarding the lapsing of these orders. It further provides that notwithstanding the amendment to section 150(1)(a), an order placing an orphaned or abandoned child in foster care with a family member in terms of section 156 before or on the date of this Amendment Act, may be extended by the court in terms of section 159(2) or section 186(2).
- 2.11 **Clause 11** seeks to amend section 160 by providing that the Minister may make regulations regarding the procedure, form and manner that a social service practitioner must follow when assessing, screening, investigating, referring to the relevant authority and placing a child who is in need of care and protection.
- 2.12 **Clause 12** seeks to amend section 183 by providing that an organisation operating or managing the cluster foster care scheme must register as a designated child protection organisation within two years of this provision coming into operation and that the provincial department of social development or a designated child protection organisation must manage and operate a cluster foster care scheme in the prescribed manner.
- 2.13 **Clause 13** seeks to amend section 185 by providing that not more than six children may be placed in foster care with a single person or two persons sharing a common household in terms of a registered cluster foster care scheme. The amendment is intended to ensure that children placed in cluster foster care are cared for appropriately and the caregiver is not overburdened.
- 2.14 **Clause 14** seeks to amend section 186 by providing that a children’s court may deem it necessary to order further supervision services and despite the provisions of section 159 (1) (a), regarding the duration of a court order, and after having considered the need for creating stability in the child’s life, the court may place a child in foster care with a family member and order that the foster care placement subsists until the child turns 18 years. It further provides for the effecting of minor consequential amendments to align the Bill with the current terminology and by providing that this section does not apply to a cluster foster care scheme.

2.15 **Clause 15** provides for the short title and commencement of the Act.

3. PERSONS OR BODIES CONSULTED

- 3.1 The Bill was published for public comments from 29 October to 29 November 2018. The Bill was further consulted with provincial Heads of departments of social development and National Child Care and Protection Forum stakeholders which includes representatives from 26 National Departments, provincial departments of social development and Civil Society organisations.
- 3.2 The following stakeholders submitted written comments and a matrix report of the comments and the responses from the Department in respect of each comment is available.

National Departments

Department of Cooperative Governance and Traditional Affairs
 Department of Home Affairs
 Department of Justice and Constitutional Affairs

Civil Society organisations

National Adoption Coalition of South Africa
 Wandisa
 Cause for Justice
 Centre for Child Law
 Child Welfare South Africa
 CINDI
 Eastern Cape Adoption Coalition
 ENGO Free State province
 Language Environment and Educational Trust
 Equal Education Law Centre
 Family Literacy Project
 Freedom for Religion South Africa
 Global Initiative to end Corporal punishment
 National Association for Child and Youth Care Workers
 Ilifa la Bantwana
 Life Choices pregnancy crises centre
 Mamelani projects
 Nelson Mandela Children's Fund
 Refugee Legal and Advocacy Centre
 South African Council for Social Service Professions
 South African Catholics Bishops Conference
 South African Federation of Waldorf Schools
 The Peace Centre
 UNHCR

Individuals

561 submissions were received from individuals and church organisations.

Furthermore, four submissions were received from individuals in relation to adoption matters.

4. FINANCIAL IMPLICATIONS FOR THE STATE

- 4.1 Most of the amendments proposed by this Bill relate to normal operations related to specific matters regulated under the Act. For this reason, the financial implications thereof have already been taken into account when compiling the budget for these specific matters since the Act came into

operation. The Department of Social Development costed the Bill and its cost drivers and the results revealed that the overall cost of the Bill is expected to be R32 427 billion in 2020/21 increasing to R 58.353 billion in 2028/29. The amendments to provide for early childhood development centres will have a significant financial implication for the provinces.

5. PARLIAMENTARY PROCEDURE

- 5.1 The State Law Advisers and the Department of Social Development are of the opinion that the Bill should be dealt with in terms of the procedure prescribed by the provisions of section 76 of the Constitution.
- 5.2 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.
- 5.3 Further, the relevant Socio-economic Impact Assessment (SEIAS) has been approved.

Printed by Creda Communications

ISBN 978-1-4850-0793-7