

Update on the drafting of a policy on child care and protection

To support the Children's Act and Amendments

An initiative to draft a child care and protection policy to underpin the Children's Act and Amendments

- The DSD 'Children's Act' team has commissioned the policy
- The project is part of the Government Capacity Building Support (GCBS) which is funded by USAID and is a consortium between PACT SA and Mott Macdonald
- This project links to the 6th component of the GCBS program, namely 'Support and strengthen the child protection response framework'
- The purpose of the project is to provide technical support in developing a first draft of a child care and protection policy in collaboration with DSD and relevant stakeholders, which will inform amendments to the Children's Act

Background to the Children's Act

- The Children's Bill was drafted by a committee of the SA Law Reform Commission from the years 1997 to 2002.
- The committee was made up of DSD officials and members of civil society, and it was a research intensive process that considered the problems with Child Care Act, other comparative child laws from developed and developing countries
- At the time, the main 'new' (post 1994) policies that guided it were the Welfare White Paper (1997) and the Interim policy recommendations for the transformation of the child and youth care system

SALRC Discussion Paper, Report and Bill

- The SALRC put out a discussion paper making certain recommendations, and there was an opportunity for public comment
- There were workshops countrywide
- The feedback from this consultation process was incorporated, and a final report (3 'blue books') with explanations of why certain recommendations were accepted or rejected was produced
- Attached to the report was the Children's Bill
- That Bill went to cabinet, where certain changes were made.
- Split into 2 Bills and debated at Parliament, where further changes were made

Bills passed by Parliament

- The Children's Act passed in 2005 and aspects of it became operational on 1 July 2007
- The Children's Amendment Bill (the first amendment) was really just the 'other half' of the Children's Bill, and this was passed in late 2007
- The full Children's Act came into operation on 1 April 2010
- As with most new Acts, implementation 'teething problems' have occurred, some of which arise from drafting errors or weaknesses, some from more fundamental challenges and changes in priority that have occurred, and there have also been court challenges to some provisions.

But aren't there sufficient policies already?

- Law is the highest statement of policy so in a sense the Children's Act and its regulations themselves (to an extent) set out the policy
- But some of the policy is 'invisible', a set of assumptions that underpin the Act itself
- Some of these are captured in DSD policy documents, some not, and in some cases, there are even contradictions between policy and law
- There are numerous policies that add up to thousands of pages, and no-one is going to read all of this
- There is a need for an overarching policy that matches the law (and spells out the gaps)

Why the need for a policy now?

- DSD has introduced a 2nd Amendment Bill that contains a number of small policy changes – eg DSD social workers to do adoptions
- The 3rd Amendment Bill (which may still be further amendments) contains more substantial policy changes, and to get it through Cabinet and Parliament it will need a properly articulated policy to underpin it
- Therefore, to proceed further with the 3rd Amendment Bill, there is a need to draft a policy to underpin the Children's Act (with the proposed amendments)

What the policy drafting process aims to do

- Therefore in practical terms, this policy drafting process will
 - (i) Restate the policy that already exists within the Children's Act and its regulations, but articulate it as policy with the 'silent' policy assumptions expressly included
 - (ii) Incorporate clear policy positions that exist in an array of policy documents
 - (iii) Harmonise policy and law so that there are no contradictions
 - (iv) Include new policy positions in the 2nd and 3rd Amendment Bills
 - (v) Include new policy positions that are in development

The drafting process

- A technical assistance team was appointed:
- Ann Skelton, Karabo Ozah, Carina du Toit, Joan van Niekerk
- A working committee, Agnes Muller, Mathogonolo Sebopela, Sarah Mafetsa and Linda Naidoo and technical assistance team
- A broader project committee made up of other Departments has also been established and has met twice
- There has been a consultation process at which various policy positions were discussed, and the feedback is being considered for incorporation as the drafting continues

The drafting process time frames

15 December 2015: Policy positions submitted to DSD

27 and 28 Jan 2016: Presentation of policy submissions to broader inter-departmental committee, feedback received and incorporated

7,8 & 9 March 2016: Consultation on policy positions with Child Protection Forum and invited civil society organisations, with plenary overview and thematic workshops

Further consultations with Family Advocate, SALRC, DSD Adoptions

Draft policy to DSD by end June 2016

End July 2016: Conclusion of contract

DSD will then take the policy process forward

Key to the policy positions colour codes

- **Brown:** existing policy in policy
- **Black:** existing policy positions as in the Children's Act & Regs
- **Blue:** New policy ideas as they exist in the 2nd or 3rd Amendment Bills
- **Red:** Current policy not expressly stated in the Act
- **Violet:** New policy ideas in development
- **Green:** Explanatory notes

What will the policy look like

- There will be an overview chapter which considers the over-arching child protection policy approach eg – the importance of prevention, ECD etc.
- Then each chapter thereafter will more or less follow the chapters of the Children's Act, except where it is more logical to explain things in a different order. (eg chapters 4, 7 and 9) has some aspects that merge into one another.
- There will be a concluding chapter that considers the resources that are needed to make the system work – eg human resources, training, financial resources, partnerships etc.

Highlights of proposed inclusions, chapter 1

- Proposed inclusion: This Act applies to all children in the Republic, including children who are not citizens of the Republic
- No person may, without the permission of a court, publish any information that reveals or may reveal the identity of the child who is/was a party/witness in any court proceedings, or was subject to any court order.
- Two alternative proposals for a ban on corporal punishment in the home (one includes the possibility of prosecution in cases where referral to programmes have failed)

Chapter 3 Parental responsibilities and rights

- Existing policy but you have to read between the lines – will be spelt out **eg automatic acquisition of PRR, the fact that other family members besides parents can apply for PRR.**
- An application for prr, **including guardianship**, can be made to the high court or children's court.
- **The Family Advocate can provide an inexpensive and quick mechanism to issue written confirmation that a father has full PRR – and fathers will only have to show that they were living together (not in a permanent life partnership)**
- **Has the time come to give fathers full PRR based on biology?**
- **Co-holders of prr must decide where the child will reside or a court must designate the child's residence where the co-holders cannot agree – and shared care does not literally mean equal time**

Artificial fertilization

- Where a couple decides together to have a child through artificial fertilisation, through the use of donor gamete/s, that child is considered to be the child of the **birth mother and her partner**.
- **Male and female donor gametes may be used and the child does not have to be genetically related to the birth mother or her partner.** This is controversial as it is different from surrogacy – is that difference justifiable? – if so, should be explained in the policy.

Chapter 4 Children's Court

- Presiding officers in the children's court must as far as possible be specialised and preside in the children's court on a full time basis.
- The children's court has jurisdiction to amend a High Court order provided that there are very good reasons and a substantial change in circumstances since the High Court order was granted.
- Rules should be developed by the Rules Board that apply specifically in the children's court and is developed to assist the processes unique to the children's court.
- The rules should be designed to increase services for children with disabilities such as sign language interpreters.
- Make it clearer in policy that children have a right to have their own legal representative, not just when appointed by the children's court

Chapter 5 Partial Care

- General rule is that partial care is provided when a person takes care **six or more** children on behalf of their parents, **guardians** or care-givers(s 76(1))

A partial care facility managed by national/provincial/local government can register even if unable to meet requirement of taking care of six or more children(s 76(2))

A conditionally registered partial care facility qualifies for funding even if it only partially copies with national norms and standards (s 78(3A))

Conditional registration is made clearer – can apply for conditional registration which may be granted on conditions, specifying period within which must be complied with

Report supporting applications for registration can be done by social service practitioner

Better protection and clearer process for children where closure is ordered

NB Conditional registration etc also applies to CYCCs and Drop in Centres

Chapter 7: Child protection

- Department must ensure quality assurance process (as prescribed) in respect of child protection services.
- New national norms and standards to be prescribed for 'rehabilitation services for children with disabilities' and 'quality assurance'(s 106)
- The DG will designate CPOs that provide services on a national level, Provincial HOD will do so for services at provincial level (s 107)(the law amended to be clearer)
- New policy proposal: CPO can appeal the decision about withdrawal of designation within 90 days. Decisions by DG appealed to Minister, decisions by HOD to MEC of province. Decision must be made in 90 days

Child Protection

- Child Protection Register: DG must appoint a fit and proper person as Registrar of the National CP Register (S 111)
- ‘person means a person who is 18 years of older or was 18 or older when the offence was committed’
- NB: Recent discussions about this at Parliament in re 2nd Amendment Bill – also sexual offences brought in line with the Sexual Offences legislation
- Also a new time frame proposed: A person found unsuitable to work with children must be informed within 21 days of name being placed on Register
- In the light of recent events, should consider broadening the scope of this provision to prevent the ‘sale’ of children for other reasons, eg illegal adoption

Chapter 8: Child Care and Protection

- This chapter in the Children's Act is therefore underpinned by a number of policy documents that appear to adequately and appropriately elucidate the government position on prevention and early intervention.
- However these policy and strategic documents on P&EI need to be summarised and synthesised in the comprehensive Child Care and Protection Policy, clearly stating the intention that these programmes should be prioritised.