

POSITION PAPER RE: TABLED CHILDREN'S AMENDMENT BILL [B18 - 2020]

Adoptions: Submissions for comments on the Children's Amendment Bill are due by 27 November 2020. In this position paper we motivate for amendments in relation to adoptions that will affect the rights of children to permanent alternative care through adoptions. If you agree please include these motivations in your own submissions.

Submitted by:

National Adoption Coalition of SA ("**NACSA**")

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1. Context

Adoption is a key service to be considered for a child who does not have the prospects of permanent care by his or her biological parents. Adoptions is one of the designated child protection services as stipulated by the Children's Act (Act 38 of 2005). Adoption entails a legal process according to which the parental responsibilities and rights of biological parent/s or guardian/s in respect of a child are vested in the adoptive parent/s. In most instances the legal implication is a permanent termination of the responsibilities and rights of the biological parent/s or guardian/s. It therefore has permanent legal consequences as a child's legal identity is changed.

In South Africa, the Children's Act (38 of 2005) and the Adoption Policy Framework and Strategy (DSD, 2010a) prioritises adoptions as a preferred form of permanent alternative care for young adoptable children in line with The United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The purpose of adoptions is to protect children and to promote the goals of permanency by providing stable permanent alternative family care. The emphasis is on the fact that children have a right to grow up in permanent and stable families, and that adoption should be based on the child's best interest and rights. Adoptions is evidenced to be the best option for children who have been abandoned and who have no family or kin network or care. Although there is a lack of formal statistics on the number of child abandonments reported, service providers working in this area have reported a significant growth in numbers compared to 2019. The Gauteng Department of Health issued a report stating that 118 babies had been abandoned in Gauteng hospitals during lockdown. In cases where children have no family alternative to institutional care, adoption has robust developmental and emotional benefits over long term institutional care, in particular for younger children. The Children's Act is explicit about the importance of considering adoptions as a means to achieve permanence.

In cases of potential adoptable children where family could be traced the National DSD Adoption policy framework applies and the responsible service provider considers alternatives for permanent care or adoption within the child's extended family.

According to the Social Service Professions Act (110 of 1978) adoption is a specialised area in the field of childcare and protection. The Children's Act (38 of 2005), the Children's Second Amendment Act (18 of 2016) and the Social Service Professions Act prescribe who may legally provide adoption services. Adoption services may be provided by:

- Accredited adoption social workers in private practice who have a speciality in adoption services and are registered in terms of the Social

- Services Professions Act, 1978 (Act No.110 of 1978) to render adoption services.
- Designated and accredited Child Protection organisations.
- Social Workers in the employment of DSD who have a speciality in adoption services and are registered in terms of the Social Services Professions Act, 1978 (Act No.110 of 1978) to render adoption services.

The majority of social workers in the employ of the DSD were historically excluded from rendering adoption services. They therefore frequently do not meet the prescribed requirements to register a speciality. The SACSSP and the national DSD are currently discussing a possible resolution to provide interim measures for registration of DSD social workers as specialist in adoption to address the current impasse. This process has not been finalised, so no measures have been implemented yet.

Currently there are 59 adoption social workers in private practice and 93 designated and accredited child protection organizations (“**DCPO’s**”) mandated to render professional adoption services nationally. There are 10 accredited DCPO’s mandated to render intercountry adoptions within the framework of DSD approved working agreements. The bulk of adoption expertise lies within the accredited DCPO’s and adoption social workers.

Another important factor is that adoption numbers remain relatively low when compared to other forms of alternative care and sadly the numbers show a consistent decline. During the 2010/11 financial year there were 2436 adoptions registered in SA, compared to only 1186 registered during the 2017/18 financial year. These numbers are inclusive of the number of related or family adoptions.

The Table below provides statistics of children by care placement arrangement for 2017, 2018 and 2019. This information confirms the low number of adoptions compared to other forms of care.

Children according to childcare placement, 2012, 2017/18 & 2019

Number of children in foster care 2019	Estimated number of children in residential care facilities 2018	Number of adoptions registered in SA 2017/2018
386 019	21 000	1 186

Source: De Vries (2019); Flash report: Amendment Bill (2019) Draft White Paper for Social Development (2019).

There is also no additional financial support or adoption grant for adoptive parents, as is the case with foster care. Adoptive parents could potentially access the Child Support Grant, if they pass the means test due to having an income lower than R4500/month if single or R9000 if a couple.

The Children's Act (Act 38 of 2005) prescribes fees that may be charged by adoption accredited DCPO's for professional adoption services. Most accredited DCPO's charge a nominal adoption fee based on this provision. The income derived from these fees enables DCPO's to employ (and retain) experienced social workers, and to cover general operating costs, since not all DCPO's receive a subsidy for the rendering of child protection and adoption services. Although the State pays partial subsidies for the rendering of child protection services, not all accredited adoption service providers receive such financial support from the State.

Those that do receive subsidies often only receive partial and limited financial support which often **only covers** approximately **50 %** of the social work posts and programs. DCPO's do not make **ANY** profit through fees charged since these fees mostly just cover expenses incurred. It should also be mentioned that the salaries paid by DCPO's are significantly less when compared to salaries received by their counterparts employed by DSD.

Adoption costs include both expenses in relation to professional time of adoption service providers (salaries), secondly expenses relating to general operating costs (rent, transport, petrol, etc.) and lastly costs incurred for actual expenses for services in relation to children and legal finalisation of the adoption (medical, psychological, tracing & advertisements and sheriff). The majority of organizations also make use of an income based sliding scale and often render services free of charge when applicants cannot afford to pay a fee for professional services, ensuring that the service is accessible to all. Adoptions are strictly regulated and monitored, particularly with regard to finances. The tariff in Regulation 107 of the Children's Act No. 38 of 2005 limits the amount that may be charged in each category of adoption work. Before any adoption proceeds, a breakdown of all Regulation 107 costings must be provided to the court for inspection. Before any parent or caregiver signs consent to adoption, the presiding officer must ensure that there has been no enticement or duress, be it financial or otherwise, and attestation under oath is made by the signatory in this regard and countersigned by the presiding officer. Various Monitoring and Evaluation protocols are in place and in addition to complying with all requirements for not for profit entities, child protection organisations must submit audited financial statements.

2. Relevant Provisions:

2.1 Section 249: No consideration in respect of adoptions:

*The tabled Children's amendment bill dated 26 August 2020 introduced a significant change to proposed amendments in relation to consideration in adoptions. Sub section 2.1.1 of this paper will address the proposed amendment according to the **October 2018 draft Bill that was gazetted for comment**. Sub section 2.1.2 will address the amendment being proposed in the **tabled Bill of August 2020***

According to the Children's Act (38 of 2005) the following is stipulated in relation to consideration in respect of an 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 services receiving the prescribed fees;***
- (f) an organ of state; or*
- (g) any other prescribed persons.*

It is further regulated through Regulation 107 of the Act which sets fees for professional services rendered by DCPO's in an adoption. According to Section 249 and Regulation 107 a prohibition is placed on receiving consideration in respect of an adoption or inducing a person to give a child up for adoption. It does however allow for the mentioned categories of professionals to charge for expenses and services. This section is an important safeguard in ensuring that improper financial gain in relation to the adoption of a child is prevented.

2.1.1 The draft Children's Act Amendment Bill ("**CAB**") gazetted for comment on **29 October 2018** proposed to remove the provision that exempted those in categories (b) to (g) from this prohibition.

According to that proposal it would have, consequently, been illegal for **ANYONE** to receive fees for professional services rendered in respect of an adoption or to be reimbursed for any expenses incurred in connection with an adoption. Accredited Child Protection Organizations, accredited adoption social workers, lawyers, psychologist and all other professionals would no longer be able to charge for any expert or specialist service rendered to adoptable children and or adoptive families, not even for reimbursement of travelling expenses, medical testing etc.

The rationale provided by the Department for this proposed amendment was:

1. a Perception that the issues of fees created challenges where the best interest of children were compromised because not enough efforts are made to retain children within their families of origin.
2. to make adoptions more accessible.
3. To prevent commodification of children.
4. Adoptions should be the same as other forms of alternative care, and there are no differences justifying inclusion of professional fees in the Children's Act.
5. Not to prohibit charging of professional fees by social workers, lawyers, psychologist and other professionals in private practice. Rather it aimed to remove the regulating of fees by such professionals from the Children's Act, suggesting regulating of fees by respective professional councils. This point was perceived to be in contradiction with the proposed amendment, since the deletions resulted in s249 prohibiting the charging of fees by professionals.

The Bill was gazetted for comments at the end of 2018. NACSA did not support the proposed amendment which expressly prohibited anyone from charging for provision of adoption services. A submission was done proposing that professional fees charged by accredited adoption social workers and organisations should be allowed , supporting that it be regulated and prescribed as provided for by the Children's Act (38 of 2005).

2.1.2 The tabled Children's Amendment Bill dated 26 August 2020, now seeks to delete section 249 in its entirety. According to the Memorandum on the objects of the Children's Amendment Bill 2020, this amendment is intended to **delete reference to all fees that may be charged for adoptions.**

The deletion of section 249 addresses concerns about a prohibition on fees. During consultations with the Department the rationale for the proposed deletion of section 249 was discussed and it was confirmed that the Children's Act is not the appropriate vehicle for regulating fees for adoption services, and that it would be more appropriate for the respective councils that regulate professionals to do this regulation. The sector does not oppose the charging for professional services to be regulated elsewhere, but it has some concerns about the removal of the provisions in its entirety, since it could result in having unintended consequences which could have a negative effect on the system and allow for potential exploitation of mothers and children.

The problem with the proposal is that it could effectively open the door for unscrupulous individuals to profit off of adoption. The Act, at present, expressly provides that "**no person may ... give or receive, or agree to give or receive, any consideration, in cash or in kind, for the adoption of a child ...**" There is, accordingly, an absolute prohibition subject to the listed exceptions. If a person contravenes this section they may be

held criminally responsible and if convicted subject to a fine and/or imprisonment (section 305 of the Act). The provision, accordingly, and at its core dissuades people who do not fall within the exception from becoming involved and thereby limits the possibility of exploitation.

It should also be cautioned that should the tabled Bill repeal Section 249 it can take some years for a professional body to finalise a new code or regulation, which would in effect leave this space being unregulated for some time.

2.2 Definition of an adoption social worker

The definition of adoption social worker, in Section 1 of the Act “adoption social worker” means-

- a social worker in private practice- who has a speciality in adoption services and is registered in terms of the

Social Service Professions Act, 1978 (Act No. 110 of 1978); and who is accredited in terms of section 251 to provide adoption services; or

- a social worker in the employ of a child protection organisation which is accredited in terms of section 251 to provide adoption services;
- a social worker employed by the Department who has a speciality in adoption services and is registered in terms of the Social Service Professions Act, 1978 (Act No. 110 of 1978)

The following proposed amendments create confusion since they do not consistently refer to an adoption social worker:

2.2.1 Section 239

The tabled Children’s Amendment Bill propose that section 239 of the principal Act is amended as follows —

(a) by the substitution in subsection (1) for paragraph (b) of the following paragraph:

"(b) be accompanied by a report, in the prescribed format, by [an adoption social worker] *a social worker responsible for adoption*, containing-

The definition of adoption social worker in the Act is comprehensive and inclusive of social workers in private practise, DCPO’s and social workers in the employ of the Department, *this amendment proposes that adoption social worker as defined by the Act be substituted by a social worker responsible for adoption.*

This creates confusion on who may render adoption services as defined by the Act. The definition does not refer to a social worker rendering adoption services and the amendment should be aligned with the definition, therefore referring consistently to *an adoption social worker*.

2.2.2 Section 250

Only certain persons allowed to provide adoption services

Amendment of section 250 of Act 38 of 2005 proposes an insertion in subsection (1) after paragraph (d) of the following paragraph:

"(e) A social worker employed by the Department or a provincial Department of social development *who provides adoption services.*"

This amendment aims to include adoption social workers employed by DSD. The proposed amendment refers to a social worker rendering adoption services. In order to be consistent and to avoid confusion, it should refer to an **adoption social worker** employed by the Department as per the definition in the Act.

3. *Proposed Submission*

PROVISION	RATIONALE FOR PROPOSED AMENDMENT	ALTERNATIVE PROPOSAL	POTENTIAL IMPACT /MOTIVATION
<p>Section 249</p> <p>No consideration in respect of adoptions</p>	<p>1.To delete reference to all fees</p>	<p>1. Instead of deleting the section 249</p> <p>2. Amendment of subsection (2)(c), (d) and (e) by deleting the words:</p> <p style="text-align: center;"><i>“receiving the prescribed fees”.</i></p> <p>3. Amendment of subsection (d) by including:</p> <p style="text-align: center;"><i>“a child protection organization or an adoption social worker in <u>private practice accredited in terms of section 251 to provide adoption services</u>”</i></p>	<p>1. Removal of section 249 in its entirety will not be recommended since it could allow for criminal exploitation.</p> <p>2. By deletion of the words “receiving the prescribed fees” the objective aimed at removing the regulating professional fees for adoption services from the Children’s Act will be achieved, since it will not place a complete prohibition on the charging of fees.</p> <p>3. Professional fees charged will however still be regulated by the relevant respective professional bodies and councils.</p>

PROVISION	ALTERNATIVE PROPOSAL	POTENTIAL IMPACT/ MOTIVATION
<p>Section 239 (1)(d)</p>	<p>Section 239(1)(d) be accompanied by a letter by the provincial head of social development [recommending] <u>confirming compliance with the requirements in terms of this Act regarding the adoption of the child:</u></p> <p><u>(1) Provided that when the provincial head does not issue the letter within 30 days of it being requested, the provincial head must report the reason for such failure to the children's court within 14 days from the date on which the letter was due; and</u></p> <p><u>(2) if the provincial head fails to provide the report required in subsection (1), the letter may be dispensed with;</u></p>	<p>This will resolve the delays experienced in getting these letters and it will then comply with the current case law that the letter may be dispensed with due to unreasonable delay to deliver.</p>

