



TEL: +27 (0)74 355 0775

FAX: +27 (0)86 725 0837

EMAIL: INFO@CAUSEFORJUSTICE.ORG

POSTAL ADDRESS: P. O. BOX 12622, DIE BOORD, 7613, SOUTH AFRICA

WEBSITE: WWW.CAUSEFORJUSTICE.ORG

Our Reference: Children's Third Amendment Bill, 2018

Date: 13 September 2018

Department of Social Development
Chief Directorate: Children's Legislation, Monitoring and Reporting
134 Pretorius Street
PRETORIA

For Attention: Ms Sarah Mabasa

By Email: SarahMab@dsd.gov.za
MahlogonoloS@dsd.gov.za

Dear Ms Mabasa,

RE: SUBMISSIONS ON THE CHILDREN'S THIRD AMENDMENT BILL, 2018

1. We refer to the abovementioned matter, specifically the invitation by the Department of Social Development ("DSD") for comments on the Children's Third Amendment Draft Bill ("the Bill").
2. Cause for Justice ("CFJ") hereby thanks the Department for the opportunity to provide these written submissions and to participate in the law-making process.

BACKGROUND TO CAUSE FOR JUSTICE

3. CFJ is a non-profit human rights and public interest organisation founded in 2013 to advance constitutional justice in South Africa, primarily through participation in the legislative process and governmental decision-making structures, litigation and through creating public awareness on matters of public importance.
4. We focus our submissions on matters affecting rights, values and interests protected and/or promoted in the Bill of Rights and related matters affecting the best interest of children and the public interest.
5. All five of CFJ's core values give it a particular interest in the Bill, namely (1) the responsible exercise of freedom, (2) protection and promotion of human worth/value, (3) protection of the

MANAGEMENT COMMITTEE: RYAN SMIT, GENERAL MANAGER, +27 (0)83 235 1511 | WYNAND VILJOEN, CHAIRPERSON, +27 (0)82 891 7682 | CRAIG SNYDERS, EX-OFFICIO EXECUTIVE MEMBER | DIETER VON FINTEL, EX-OFFICIO EXECUTIVE MEMBER

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vulnerable in society (social justice), (4) ensuring accountable government action and (5) protecting the family against destructive outside (and inside) forces.

6. CFJ has over the past five years been involved in matters pertaining to the law (and law reform) on sexual exploitation, and the protection of children from exposure to potentially harmful and disturbing materials and premature exposure to adult experiences.
7. During the course of 2013, 2014 and up to March 2015, CFJ was one of three applicants in the “ICASA // StarSat (formerly TopTV)” judicial review case.¹ The matter was finally disposed of in CFJ and its co-applicants’ favour at ‘leave to appeal’-stage in the Supreme Court of Appeal in March 2015.
8. In addition, CFJ also made submissions to the Films and Publications Board later in 2015 as part of the public participation process on the Draft Online Content Regulation Policy and is a participant in the SALRC’s Project 107 - Sexual Offences: Pornography and Children (still on-going). CFJ also made submissions on the FPB’s Classification Guidelines review process during 2018.
9. Furthermore, CFJ has been a stakeholder and active participant in the Parliamentary process on the Films and Publications Amendment Bill, 2015 (“the FPAB”), which proposes (amongst other interventions) the legalising of online pornography in South Africa. The FPAB is now being considered by the National Council of Provinces (NCOP), where CFJ interacts with the NCOP Select Committee on Communications during its deliberations process.

STRUCTURE OF SUBMISSIONS

10. Our submissions are structured under the following four headings:

- | | | |
|----------|-------------------|--|
| A | Clause 4 | Insertion of section 6B in the Act
<i>‘children and the media’</i> |
| B | Clause 168 | Amendment of section 305 of the Act
<i>‘offences’</i> |
| C | Clause 162 | Amendment of section 294 of the Act
<i>‘genetic origin of child’</i> |

¹ Justice Alliance of South Africa v Mncube N.O and Others; In Re: Cause for Justice and Another v Independent Communications Authority of South Africa and Others; In Re: Doctors for Life International WC v Independent Communications Authority of South Africa and Others (18519/2013) [2014] ZAWCHC 162; [2015] 1 All SA 181 (WCC); 2015 (4) BCLR 402 (WCC) (3 November 2014).

- 15.2 Creators, producers, distributors and exhibitors of films, games and publications that are regulated by the FPA;⁴
- 15.3 Creators, producers, distributors and exhibitors of advertisements that fall under the jurisdiction of ASASA;⁵ and
- 15.4 Members of the Press Council of South Africa.⁶

(2) Other Accountable persons

Concern

- 16. Section 6B(2) requires the “media, parents, and caregivers or guardians” to protect children from exposure to potentially disturbing or harmful materials and from premature exposure to adult experiences. We submit that in this instance, the list is unnecessarily limited. Therefore, we suggest that the list be extended to place this duty to protect children on other persons or entities that work directly with, or in the furtherance of the best interests of, children.

Proposal # 2: Inclusion of other accountable persons

- 17. In this regard, we refer to section 110 of the Act, which requires certain persons to report child abuse and child neglect. We propose that the duty to protect children from exposure to potentially disturbing or harmful materials and from premature exposure to adult experiences be extended to the persons referred to in section 110 of the Act, which already recognises that these persons have a higher duty of care in relation to children than other members of the general public.

POTENTIALLY DISTURBING AND HARMFUL MATERIALS

Concern

- 18. Section 6B(2) refers to “potentially disturbing and harmful materials”. The phrase is too vague and so open for interpretation that it will not be implementable/enforceable in practice. The necessary clarification, which will cause the phrase to pass the threshold of law and pass constitutional muster, can be provided by linking the phrase to an objective description/measuring stick.

⁴ Films and Publications Act, 1996, as amended.

⁵ The Advertising Standards Authority of South Africa.

⁶ Including the Press Ombud and the Appeals Panel.

Proposal # 3: Clarifying the meaning of ‘potentially disturbing and harmful materials’

19. In this regard, since the phrase concerns “materials”, we suggest that the FPA classification scheme, as found in the FPA⁷ and the FPB Classification Guidelines (“the Guidelines”),⁸ provides an appropriate and suitable objective standard.
20. The Guidelines are subject to review every four years. The review process entails comprehensive public consultation in order to ensure that the norms, values and standards reflected in the Guidelines are consistent with those of the South African public and in line with constitutional norms and values. Its content accordingly is established by way of a democratic and participatory process. The Guidelines gives meaning to what “potentially disturbing and harmful materials” mean by indicating the suitability/appropriateness of varying media content for children of different ages. The Guidelines assigns age classifications to different materials based on a wide range of relevant factors to determine what kind of materials are potentially disturbing and harmful to children at which ages.
21. We accordingly propose that the subsection be amended to include referencing to the FPA classification scheme and Guidelines for purposes of determining the meaning of “potentially disturbing and harmful materials”.

PREMATURE EXPOSURE TO ADULT EXPERIENCES

Comment

22. Section 6B(2) refers to “adult experiences”. There are numerous experiences and actions that are legally reserved for adults – such as voting, consuming alcohol, having a driver’s licence etc. – that are not harmful to children to the extent that children observe adults partaking in such experiences or actions.
23. In our opinion, it is clear that the “adult experiences” contemplated are those experiences that are sexual in nature (including displays of non-sexual nudity) or relate to what is traditionally commonly referred to as “vices” (such as substance abuse).
24. Again, the context of the subsection in our opinion makes it clear that what is contemplated is not the premature exposure to real life adult experiences, but rather exposure to media content that contains (depictions of) adult experiences.

⁷ FPA, section 16 and 18.

⁸ <http://www.fpb.org.za/classification-guidelines/>

Proposal # 4: Clarifying the meaning of ‘premature exposure to adult experiences’

25. With regard to “premature exposure”, the FPA classification scheme and Guidelines are again of great assistance, since it provides a measuring stick for the suitability/appropriateness of varying media content for children of different ages. The Guidelines assigns age classifications to different materials based on a wide range of relevant factors to determine at what age exposure to what kind of content would be premature.
26. We accordingly propose that the subsection be amended to include referencing to the FPA classification scheme and Guidelines for purposes of determining the meaning of “premature exposure to adult experiences”.

“MUST PROTECT”

Concern

27. Subsection 6B(2) requires that the media, parents, caregivers and guardians “must protect” children from exposure to potentially disturbing or harmful materials and from premature exposure to adult experiences. The phrase “must protect” is vague because there is no indication or guidance as to the manner in which these persons “must protect” children – i.e. the standard of actions or measures to be taken to comply with this obligation is not specified. Without an objectively measurable or specified standard for compliance, also considering that in the present circumstances there is no sanction attached to non-compliance with the obligations created by the subsection, the subsection will have very little value as it will be up to each of the identified persons/groups to determine subjectively whether they are complying with the law. Such legislative text falls short of the requirements in order to constitute law.

Proposal # 5: Giving meaning to ‘must protect’ in order to enable compliance and enforceability

28. It is accordingly imperative that a subsection that provides a standard for compliance, should be added to subsection 6B(2). The purpose would not be to stipulate all possible actions and measures that each of the specified persons may conceivably take, but to set a standard or bar for compliance with the legislative obligation.
29. Without such addition/insertion, section 6B(2) will not be sufficiently practically implementable and enforceable to pass constitutional muster.
30. The additional subsection may require that -
 - 30.1 Each person or entity on which a duty to protect children as contemplated in section 6B rests, are obliged to take such steps and implement such measures as are reasonable in its particular

circumstances to fulfil its duty to protect children within the meaning of section 6B. The contemplated steps and measures will include, although it would not be limited to -

- 30.1.1 In respect of each of the abovementioned media regulatory authorities - they must, being guided by the classification scheme in the FPA and Guidelines, revise and include practical measures in their codes of conduct / good practice, to give effect to the obligation to protect children as contemplated in section 6B(2) read with the FPA classification scheme and Guidelines.
- 30.1.2 An express obligation should also be inserted that all persons who are required to protect children as contemplated in section 6B, must comply with all other applicable legal and ethical obligations and duties imposed on them with regards to the protection of children in terms of law and the rules governing relevant professions, practices, industries, services, products, goods, and media and other created or produced content.

B CLAUSE 168 – AMENDMENT OF SECTION 305 OF THE ACT – ‘OFFENCES’

Concern

31. The Bill proposes the insertion of the new section 6B into the Act. Section 6B imposes an obligation to protect children on the identified accountable persons. However, the Bill does not provide for the enforcement of this obligation. If the wording of the Bill is adopted as it currently reads, non-compliance with section 6B will not result in any consequences meted out by the Act, for the offending/contravening party.
32. Without consequences (including a sanction), the enforceability of the legislative obligation will be significantly reduced. There will effectively be no duty to comply, as there would be no incentive for the accountable person(s) to take the steps necessary to give effect to the obligation.
33. Express acknowledgment of non-compliance, coupled with a proportional sanction for non-compliance with statutory obligations, often serves as effective incentive to bring about compliance with the law.
34. Section 305 of the Act provides the mechanism whereby the obligations created by the Act are enforced. This section lists the sections of the Act that, if not complied with, constitute a contravention of the Act. The proposed amendment to section 305, as it currently reads, does not include section 6B.

Proposal # 6: Section 305 to be amended to include the contravention of section 6B as an offence

35. We propose that section 305 be amended to include non-compliance with section 6B as an offence. We specifically propose that section 6B is included in section 305(1)(c) of the Act.

C CLAUSE 162 – AMENDMENT OF SECTION 294 OF THE ACT – ‘GENETIC ORIGIN OF CHILD’

Comment

36. The Bill proposes to amend section 294 of the Act, by the insertion of subsection 294(2), in order to allow the High Court to, upon application and good cause shown, declare a surrogate motherhood agreement valid where the child whose conception is contemplated in the agreement, is not conceived by using the gametes of (any of) the commissioning parent(s).
37. We do not support the amendment and recommend that section 294 remains as it currently reads. In this regard, we refer to judgment of the Constitutional Court in ***AB v Minister of Social Development***.⁹ In that matter a woman, AB, who could not produce a gamete of her own, wanted to use the gametes of male and female person to conceive a child to be carried by another female person, the surrogate mother. She sought an order to have section 294 of the Act declared invalid. The majority of the Court held that section 294 of the Act is constitutionally valid and therefore declined to order that the section is unconstitutional.
38. The Court adopted a purposive approach to the interpretation of the section in order to determine whether it is constitutionally valid.¹⁰ The Court considered whether section 294 is irrational in terms of section 9(1) of the Constitution; whether AB’s rights to equality, dignity, bodily integrity (reproductive autonomy and reproductive health care), and privacy was limited by section 294; and whether such limitation was justifiable in terms of section 36(1) of the Constitution.

Rationality

39. The Court held that rationality is an incident of the rule of law.¹¹ When a law differentiates, the differentiation must be rational and not capricious or arbitrary. The differentiation must serve a legitimate government purpose.¹² The Court found that differentiation in section 294 does serve a legitimate and therefore rational purpose: the public good of creating a bond between the child and the commissioning parent(s).¹³ This bond is created for the purpose of serving the best interest of the child that will be born, by providing that child with a genetic link to his/her parent(s).¹⁴

⁹ [AB and Another v Minister of Social Development 2017 \(3\) SA 570 \(CC\)](#)

¹⁰ Ibid at [273].

¹¹ Ibid at [283].

¹² Ibid at [285].

¹³ Ibid at [287].

¹⁴ Ibid.

Limitation of rights

Right to equality

40. In order to determine whether section 294 infringes the right to equality, a two-stage enquiry is required. Firstly, it has to be determined whether the section discriminates against a specific class of persons.¹⁵ Secondly, it has to be determined whether the discrimination is unfair on the basis that it occurs on one of the listed grounds.¹⁶ The Court found that the section does not discriminate against a specific class of persons (persons who are infertile), in fact it affords infertile persons with an opportunity, which they otherwise would not have had, to make use of surrogacy under certain conditions.¹⁷

Right to reproductive autonomy and right to reproductive health care

41. The Court found that the right to dignity¹⁸ and reproductive autonomy as guaranteed in section 12(2)(a) of the Constitution is not limited by section 294 of the Act. The Court held that the right to freedom and security of the person is a negative protection in the sense that it pertains to what may not be done to a person's body and not what may be done to a person's body.¹⁹
42. The Court found that section 294 does not limit the right to reproductive health care in terms of section 27(1)(a) of the Constitution, either. This section does not give rise to a self-standing and independent positive right. It must be read together with section 27(2) of the Constitution from which it is clear this section imposes an obligation on the state to progressively realise rights in accordance with the availability of resources.²⁰

Right to privacy

43. The Court found that section 294 of the Act does not limit the right to privacy,²¹ as the right to privacy does not include an independent right to autonomy.²²

¹⁵ Section 9(2) of the Constitution of the Republic of South Africa, 1996.

¹⁶ Section 9(3) of the Constitution, 1996.

¹⁷ [AB and Another v Minister of Social Development 2017 \(3\) SA 570 \(CC\)](#) at [301] to [302] and [304].

¹⁸ Section 10 of the Constitution, 1996.

¹⁹ [AB and Another v Minister of Social Development 2017 \(3\) SA 570 \(CC\)](#) at [306] to [308].

²⁰ *Ibid* at [320] to [321].

²¹ Section 14 of the Constitution, 1996.

²² *Ibid* at [323].

Limitations analysis

44. Since the Court found that section 294 does not limit any constitutional rights, a determination as to the limitation of rights was unnecessary.²³

Proposal # 7: Section 294 to remain unchanged as it is in line with the Constitution

45. In light of the above, it is clear that section 294 of the Act as it currently reads is in line with the Constitution, as confirmed by the Constitutional Court. There are no constitutionally justifiable grounds for the proposed amendment of section 294. Parents who are unable to use surrogacy to have children, have the option of adopting a child. We accordingly propose that section 294 of the Act not be amended, but remains as it currently reads.
46. In South Africa, a country with a large orphan population, there is a particularly big need for adoptive parents. The requirement of a genetic link between the child to be born and at least one commissioning parent (for legal surrogacy) accordingly has the incidental/concomitant effect of prioritising the lives of existing children in need of parental care and family life over people's personal desires for a child of their own making, but who is equally unrelated to themselves as any adopted child would be. In essence, a "commissioned" child with no genetic link to the commissioning parent(s) is also an adopted child, but by disallowing the creation of such children, the law ends up valuing the lives of existing vulnerable children in need of care over the personal desires of would-be-parents to create unrelated new/other children from scratch.

D CLAUSE 8 – INSERTION OF SECTION 12A IN THE ACT – 'POSITIVE DISCIPLINE OF CHILDREN'

47. We agree with, confirm and support the submissions and proposals made by *Freedom of Religion SA* in respect of clause 8 of the Bill.

CONCLUSION

48. In summary:
- 48.1 We support the insertion of section 6B, subject to the clarification of certain terms contained in the section and the elaboration of the section as set out above;
- 48.2 We propose that section 305 be amended to include non-compliance with section 6B as an offence;

²³ Ibid at [324].

- 48.3 We do not support the proposed amendment of section 294; and
- 48.4 We support the retention of the common law defence of reasonable chastisement.
49. We trust that the above submissions are of assistance to the Department and look forward to your response thereto (if any) in due course.
50. We request an opportunity to make oral submissions in this regard during any future consultations that may be held in relation to the Bill.
51. CFJ remains at the Department's disposal to assist in the further development and/or amendment of the Bill to effectively achieve its intended purposes: the promotion and protection of the best interest of children in South Africa.

Yours faithfully,

Liesl Stander (Preparer)

and

Ryan Smit (Reviewer)

Legal Advisor: Law and Policy

Director: Law and Policy