



Civil Societies Children’s Bill Taskforce

**POSITION PAPER BY CIVIL SOCIETY ORGANISATIONS ON**

# **THE BILL TO ENACT THE LAW OF THE CHILD ACT (2009)**

**TO BE PRESENTED TO THE PARLIAMENTARY STANDING COMMITTEE  
(COMMUNITY DEVELOPMENT)**

**On 7<sup>th</sup> and 8<sup>th</sup> October 2009.**

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## SECTION I: GENERAL REMARKS

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### 1.1 Introduction

On 31<sup>st</sup> July 2009 the Government introduced in Parliament a Bill to enact the Law of the Child (2009).<sup>1</sup> According to its objects and reasons, the Bill ‘contains provisions which provide for the improvement of the means under which children’s rights are given, custody and protection of children’s rights with a view of harmonizing various laws, International conventions and agreements on the Rights of the Child, the National Policy on children for purpose of having a comprehensive law which protect children from any kind of discrimination or humiliation.’

This position paper is prepared by a number of Tanzanian civil society organisations (CSOs) working with and for children in the country. This position was thus prepared by CSOs under the auspices of the Civil Societies Children’s Bill Taskforce, upon consultation with a wide spectrum of CSOs working for and with children in the country. Therefore, the position paper represents Tanzanian CSO’s opinion on the Bill.

### 1.2 The Basis for and Need to Enact the Law of the Child (2009)

The need to have a comprehensive children’s law was voiced even before the adoption of the *United Nations Convention on the Rights of the Child* (CRC) in 1989<sup>2</sup> and the *African Charter on the Rights and Welfare of the Child* (ACRWC) in 1990.<sup>3</sup> In 1986 the Law Reform Commission of Tanzania (LRCT)<sup>4</sup> informed the Minister responsible for justice that it had established a working group to examine

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<sup>1</sup> Bill Supplement No 13, published in the *Gazette of the United Republic of Tanzania*, No. 28 Vol. 90 dated 10<sup>th</sup> July 2009; printed by the Government Printer, Dar es Salaam, by Order of Government.

<sup>2</sup> United Nations General Assembly Resolution 44/25 of 20<sup>th</sup> November, 1989.

<sup>3</sup> Whereas the CRC was ratified by Parliament in 1991, the ACRWC was ratified in 2003 by Parliament.

<sup>4</sup> The LRCT was established under the *Law Reform Commission of Tanzania Act*, Cap. 171 R.E. 2002. According to section 4(1) of the Act, the LRCT mandate is ‘to take and keep under review all the laws of the United Republic with a view to its systematic development and reform.’

existing laws affecting children in Tanzania and provide recommendations for legislative revisions.<sup>5</sup>

In its final report on the review, which took four years to be completed, the LRCT acknowledged that ‘there were already general indications and fears that the present law and practice relating to children’s problems in various socio-economic circumstances had been over-taken by the ever-changing circumstances.’<sup>6</sup>

The LRCT did a very comprehensive review, having visited and surveyed at least 12 regions in the country. It also sent out questionnaires to courts, local authorities, ministries and key state institutions responsible for children’s welfare. The team further visited Kenya and Zambia ‘to study legislation in those countries, and reviewed the laws of the United Kingdom and New Zealand.’ Released at the time around which the CRC and the ACRWC were being adopted and implemented locally in various countries, the review report recommended, *inter alia*, for total repeal and replacement of the laws affecting children’s rights in Tanzania.

The UN Committee on the Rights of the Child (the CRC Committee), which has, on regular occasions, been emphasizing that it is an essential aspect of States Parties thereto, while implementing the CRC, to ensure that all domestic legislation is “fully compatible” with the provisions and principles of the CRC. The CRC Committee, in its Concluding Observations in respect of the country’s initial report (1998) and the second periodic report (1998-2003), was concerned “at the lack of a clear time frame (for Tanzania) to finalize the consultative process and enact ‘The Children’s Act.’”<sup>7</sup>

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<sup>5</sup> TUMBO-MASABO, Z. and V. Leach, “What Happened to the Children’s Statute?” in MAMDANI, M. et al (eds.), *Influencing Policy for Children in Tanzania: Lessons from Education, Legislation and Social Protection*, Dar es Salaam: Research on Poverty Alleviation, 2009, pp. 12-18, at p. 12.

<sup>6</sup> LAW REFORM COMMISSION OF TANZANIA, “Report of the Commission on the Law Relating to Children in Tanzania,” submitted to the Minister for Justice and Constitutional Affairs, Dar es Salaam, April 1994, p. 4. Available at [http://www.commlil.org/tz/TZLRC/report/R\\$4.pdf](http://www.commlil.org/tz/TZLRC/report/R$4.pdf) (accessed 28 September 2009). This report is sometime called, “the Tenga Report” because the LRCT Working Group which produced the report was chaired by Dr. Ringo W. Tenga an experienced advocate and law lecturer at the University of Dar es Salaam.

<sup>7</sup> See UN CRC COMMITTEE, “Consideration of Reports Submitted by States Parties under Article 40 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania,” CRC/C/TZA/CO/2, dated 2<sup>nd</sup> June, 2006, para 9.

It should be noted that, in its second periodic report to the CRC Committee (1998-2003), Tanzania reported that it was undertaking legislative review and collecting views of stakeholders, including children, through the national ‘White Paper.’ It was reported that the National White Paper would engender ‘The Children’s Act.’<sup>8</sup>

However, it was not until July 2009 when the Government introduced the Bill to enact the *Law of the Child Act (2009)*.

### **1.3 Objective of the Position Paper**

This position aims at providing a collective position of members of CSOs in the country with a view to providing more information, inputs and materials to the process of enacting the *Law of the Child Act (2009)* in the context of the contemporary Parliamentary Rules and practice allowing members of the public to participate in the lawmaking processes. The position paper is premised in the practical experience drawn from various members of the CSOs working with and for children in the country.

### **1.4 Methodology of Opinion Gathering**

Since the LRCT report was released in 1994 the Government of Tanzania (GoT) expressed its intention to amend laws related to children. In 2000 the Ministry of Constitutional Affairs and Justice adopted the LRCT’s recommendations. However, since then government efforts to enact a single child law has been slow and sometimes with no specific focus. As such, in 2002/2003 the National Network of Organizations Working with Children in Tanzania (NNOC), supported by Save the Children, widely discussed and collected opinions and proposals from all stakeholders including children and came out with a proposed child

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<sup>8</sup> See UNITED REPUBLIC OF TANZANIA, “The Country Second Periodic Report on the Implementation of the Convention on the Rights of the Child (CRC): 1998-2003,” Ministry of Community Development, Gender and Children; August, 2004. See also UNITED REPUBLIC OF TANZANIA, “Consideration of the Second CRC Periodic Report: 1998-2003 – Answers to Questions Raised for Additional and Updated Information to be Considered in Connection to Second CRC Report during the UN CRC Committee Session on 15<sup>th</sup>-19<sup>th</sup> May, 2006, in Geneva, Switzerland,” Ministry of Community Development, Gender and Children; April 2006.

statute,<sup>9</sup> which was presented to the government as well.<sup>10</sup> Supporting the recommendations of the LRCT, NNOC proposed for a comprehensive children law.

Therefore, in the preparation of this position paper the CSO Alternative Child Bill was used as a basis for the review of the current Bill to enact the Law of the Child Act. In complementing the CSO Alternative Child Bill, members of CSOs used the relevant international instruments on the rights of the child to which Tanzania is a State Party. The Concluding Observations and the General Comments Issued by the United Nations Committee on the Rights of the Child (which monitors the implementation of the CRC) were also used to provide further practical inputs to this paper.

The framework materials forming the basis of this position paper were discussed at a Stakeholders’ Consultative Workshop that was held at Kunduchi Beach Hotel, Dar es Salaam, on 24<sup>th</sup> and 25<sup>th</sup> September 2009. The workshop was held under the auspices of the Taskforce and financially supported by UNICEF. At this workshop, a small working group comprising of six children’s rights experts<sup>11</sup> was appointed to consolidate and refine the stakeholders’ inputs, leading to this paper.

In sum, the stakeholders involved in the process of preparing this position paper are contained in the annexed list of participants.

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<sup>9</sup> The position paper and CSOs’ alternative statute was prepared by two legal experts namely Magnus Andersson and Clement Mashamba. Apart from being submitted to the Chief Parliamentary Draftsman (CPD) in May 2003, the CSO Alternative Statute was presented to the Parliamentary Standing Committee (Community Development) in April and July 2009 by the National Organisation for legal Assistance (nola) on behalf of NNOC.

<sup>10</sup> See ANDERSSON, M. and MASHAMBA, C.J., “Basic Elements and Principles to be Incorporated in a New Children Statute in Tanzania: A Requirements Paper to be Presented by NNOC to the Government Draftsman,” Dar es Salaam: National Network of Organisations Working with Children in Tanzania, May 2003. See also See MASHAMBA, C.J., “Basic Principles to be Incorporated in the New Children Statute in Tanzania,” in MASHAMBA, C.J. (ed.), *Using the Law to Protect Children’s Rights in Tanzania: An Unfinished Business*, Dar es Salaam: National Organization for Legal Assistance, 2004.

<sup>11</sup> John Seka (Tanganyika Law Society); Eric Guga (Coordinator of the Taskforce); Kaleb L. Gamaya (National Organization for Legal Assistance, nola); Edna Kamaleki (Save the Children, Dar es Salaam); Abdallah Ibrahim (Child Rights Expert); and Clement Mashamba (nola).

## **SECTION II: PROGRESSIVE ELEMENTS OF THE BILL TO ENACT THE LAW OF THE CHILD ACT (2009)**

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Revolving around children’s rights principles and standards as contained in the CRC, the ACRWC and the *National Children Policy* (2008), the Bill to enact the *Law of the Child Act* (2009) contains several progressive elements, including:

- a) Consolidation of the “ALL” Laws affecting children;
- b) Recognition and guarantee of both the rights and welfare of the child;
- c) Emphasis on the general duty of the child;
- d) Care and protection of a child;
- e) Foster care and adoption;
- f) Protection of the child’s right to work;
- g) Duty on local government to support the child;
- h) Juvenile Justice;
- i) Establishment of Approved schools;
- j) Institutionalized care; and
- k) Repeal or amendments of various draconian laws, including *Affiliation Act*, *Adoption Act*, *Day Care Centre Act*, and *Children and Young Persons Act*.

## SECTION III: CRITICAL ISSUES OMITTED FROM THE BILL

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### 3.1 Introduction

From the thorough reading of the *Bill to Enact the Law of the Child Act (2009)*, members of CSOs have discerned that there are a number of critical issues that have been left out by the Bill. These issues are, however, very imperative in the realisation of children’s rights in the country. Therefore, it is the CSOs’ plea that the Committee urges the Government to entrench them in the Act when it comes to fruition. The key issues are enumerated herein below.

### 3.2 Guiding and Fundamental Principles

CSOs acknowledge the fact that the Bill contains provisions that make reference to the basic principles and standards set out in the CRC and ACRWC. However, the said principles are set out in the marginal notes and are scattered throughout the Bill. In order to provide emphasis on the substance of these standards and/or principles, CSOs propose that the Act should contain, ***at the very beginning***, an exhaustive enumeration of the guiding and fundamental principles that will guide the implementation and enforcement of the Act in a similar manner as the *Land Act (1999)* and the *Employment and Labour Relations Act (2004)*. Such principles are also entrenched in modern children’s statutes in Uganda and South Africa.<sup>12</sup>

These principles should *guide* all citizens, Parliament, the President (the Executive), the Judiciary, the Cabinet, political parties and other bodies and persons (private or corporate) *in applying or interpreting this Act or any other law* and in taking and implementing any policy decisions, for the establishment of a just and free society responsible for children’s rights and welfare.

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<sup>12</sup> Ugandan Children Statute (1996) and South African Child Act (2005)

The list of the guiding and fundamental principles proposed by CSOs should include, but not limited to, the following:

“1. (1) These guiding and fundamental principles set out in this section guide—

(a) the implementation of all legislation applicable to children, including this Act; and

(b) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.

(2) All proceedings, actions or decisions in a matter concerning a child must—

(a) respect, protect, promote and fulfil the child’s rights set out in the Bill of Rights, the best interests of the child standard set out in this Act and the rights and principles set out in this Act, subject to any lawful limitation

(b) respect the child’s inherent dignity;

(c) treat the child fairly and equitably;

(d) protect the child from unfair discrimination on any ground set out in section 5 of the Act, including on the grounds of gender, race, age, religion, disability, status of family, custom, ethnic origin, rural or urban background, birth, socio-economic status, being a refugee or other status, the health status or disability of the child or a family member of the child;

(e) recognise a child’s need for development and to engage in play and other recreational activities appropriate to the child’s age; and

(f) recognise a child’s disability and create an enabling environment to respond to the special needs that the child has.

(3) If it is in the best interests of the child, the child’s family must be given the opportunity to express their views in any matter concerning the child.

(4) In any matter concerning a child—

(a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and

(b) a delay in any action or decision to be taken must be avoided as far as possible.

(5) A child, having regard to his age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.”

### 3.3 Checklist of the Best Interests of the Child Standard

CSOs acknowledge that in section 4(2) of the Bill, there is specific mention to the need to have consideration for the best interests of the child ‘in all actions concerning a child whether undertaken by public or private social welfare institutions, courts or administrative bodies.’ There is also general reference to the best of interests of the child principle in several other sections of the Bill.

However, CSOs are of the opinion that there is no exhaustive enumeration of the dimensions and scope of application of the principle of the best interests of the child as envisaged in Article 3 of the CRC and Article 4 of the ACRWC. CSOs are of the view that, as consistently emphasized by the UN Committee on the Rights of the Child, the best interests of the child principle,

“... together with other identified general principles in the Convention, should be reflected in legislation and integrated into all relevant decision-making.”

This is reflected in General Comment No. 5 on “General Measures of Implementation for the Convention on the Rights of the Child (Articles 4, 42 and 44, paragraph 6).”<sup>13</sup> The Committee specifically states that the best interests’ principle

“... requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principles by systematically considering how children’s rights and interests are or will be affected by their decisions and actions – by, for example, a proposed or existing law or policy or administrative action not directly concerned with children, but indirectly affect children.”<sup>14</sup>

In the context of the above explanation, CSOs recommend that the Bill should contain, in the preliminary part, a checklist of the standards of the best interests of the child in the following regards:

### **Best Interests of Child Standards**

**1** (1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely—

(a) the nature of the personal relationship between—

(i) the child and the parents, or any specific parent; and

(ii) the child and any other care-giver or person relevant in those circumstances;

(b) the attitude of the parents, or any specific parent, towards—

(i) the child; and

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<sup>13</sup> CRC/GC/2003/5.

<sup>14</sup> Ibid, para. 12.

(ii) the exercise of parental responsibilities and rights in respect of the child;

(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;

(d) the likely effect on the child of any change in the child’s circumstances, including the likely effect on the child of any separation from—

(i) both or either of the parents; or

(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis

(f) the need for the child—

(i) to remain in the care of his or her parent, family and extended family; and

(ii) to maintain a connection with his or her family, extended family, culture or tradition;

(g) the child’s

(i) age, maturity and stage of development;

(ii) gender;

(iii) background; and

(iv) any other relevant characteristics of the child

(h) the child’s physical and emotional security and his or her intellectual, emotional, social and cultural development

(j) any disability that a child may have;

(j) any chronic illness from which a child may suffer;

(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

(l) the need to protect the child from any physical or psychological harm that may be caused by—

(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or

(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;

(m) any family violence involving the child or a family member of the child; and

(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

(2) In this section “parent” includes any person who has parental responsibilities and rights in respect of a child.”

### 3.4 Provisions Relating to Duties, Roles and Responsibilities

The spirit of the CRC and the ACRWC is embedded in the setting out of specific duties, roles and responsibilities amongst various beneficiaries and benefactors of children’s rights. These include parents (or specific parents, etc), children themselves and the state or community. While the CRC provides for the roles, obligations and responsibilities of parents in both general and specific terms, the ACRWC does the same but goes as far as to enlist responsibilities of the child, which list is reiterated in section 15 of the Bill.

Although the Bill has a best interests section (s. 4(2)), it lacks provisions regarding the government acting to realise the rights of the child. There is no exhaustive list setting out which are the responsibilities and duties of the state, community, parents or the child. Therefore, CSOs recommend for clear set up of these responsibilities in separate sections, as follows:

### 3.4.1 Parental Responsibility

CSOs propose that the Bill should contain parental responsibilities as follows:

#### **“Definition of Parental Responsibility**

(1) In this Act, "parental responsibility" means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.

(2) The duties referred to in subsection (1) include in particular—

(a) the duty to maintain the child and in particular to provide him / her with—

(i) adequate diet;

(ii) shelter;

(iii) clothing;

(iv) medical care including immunization; and

(v) education and guidance;

(b) the duty to protect the child from neglect, discrimination and abuse;

(c) the duty to raise their children in such a manner as to prepare them to become responsible adults or citizens taking into consideration their positive religious, traditional, or cultural background.

(3) The fact that a person has or does not have parental responsibility shall not affect—

(a) any obligation which such person may have in relation to the child (such as a statutory duty to maintain the child); or

(b) any rights which in the event of the child's death, such person (or any other person) may have in relation to the child's property.

(4) A person who does not have parental responsibility for a particular child, but has care and control of the child shall, subject to the provisions of this Act, do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare.”

### 3.4.2 Community Responsibility

CSOs acknowledge the fact that the Bill contains provisions, in Part VIII (sections 94-96), relating to the role and responsibility of local government authorities in providing support services to children. However, CSOs are of the view that there is a need to also have provisions setting out the role and responsibilities of the community towards the realisation of children’s rights.

Therefore, CSOs recommend that there should be added some provisions providing to the effect that:

- “ (i) All individuals and authorities in the community should have the duty to protect the rights and well being of every child in accordance with the law. Clan/kinship members shall have the foremost duty to provide care to children belonging to their clans before the community resumes the responsibility.
- (ii) A child in the care of an institution shall have the right to be cared for as his/her parents would care for him.
- (iii) It should be the duty of parents and authorities to make sure that every child that is born is registered within a period not

exceeding two months after birth and given a name. The names of *both* parents should also be registered.”

### 3.5 State Responsibilities

CSOs acknowledge the progressive elements of the Bill with regard to the role and responsibilities of the state towards the realisation of children’s rights in view of Article 1(1) of the ACRWC, which requires that:

#### “Article 1: Obligations of State Parties

1. The member states of the Organisation of African Unity [now the African Union] Parties to the present Charter shall recognise the rights, freedoms and duties enshrined in this Charter and shall undertake to take the necessary steps, in accordance with their constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.”

CSOs recommend that the Bill should contain the following as State Responsibilities:

“(a) The State has a duty to recognise, promote and protect **all** children’s rights, freedoms, principles and duties enshrined in the CRC and ACRWC through the National Children Policy (2008), this Act and any other existing policies and laws, or those to be subsequently promulgated or enacted. For the purpose of this Act, the following shall be overriding principles guiding the State in the discharge of this duty:

- (i) The Best Interests of the Child,
- (ii) Survival and Development,
- (iii) Non-discrimination,
- (iv) Participation,

- (v) Provision, of basic services and entitlements and
- (vi) Protection.

(b) The State has a duty to put in place functioning programmes, frameworks, mechanisms and infrastructures and minimum standards for the smooth and effective implementation and enforcement of the Act, including, but not only limited to: -

(i) the duty to construct, maintain and supervise the approved schools, juvenile court buildings, school or vocational training and health centres facilities, recreation facilities and any other facilities or infrastructures, necessary for the wellbeing of the child, either directly or through local government authorities;

(ii) the duty to establish institutions to enable children’s participation as active citizens from the grassroots to national levels;

(iii) the duty to establish institutions and mechanisms to oversee smooth and effective enforcement of the Act; and

(iv) the duty to put in place programmes, frameworks and mechanisms to enable monitoring and evaluation of the implementation of the Act.

(v) the duty to ensure the training and deployment of sufficient human capacity to uphold the provisions of this Act.

(c) the State has a duty to make sure the provisions of this Act and the National Children Policy (2008), together with the CRC and ACRWC, are made known to the members of the general public, particularly children, in a language familiar to children and the majority of the members of the general public.”

Institutional frameworks:

The Bill relies heavily on Government Social Workers to respond to violations of children’s rights and to enforce the Act. This is highly impractical given the financial, capacity and personnel constraints in the Department of Social Welfare. Children’s Rights is an inter-sectoral issue and this Act provides an opportunity to create the equivalent of Kenya’s National Council for Children’s Services, which would have responsibility for supervising and enforcing child rights, advising the Government and establishing and enforcing minimum standards for professional practice with children.

### **3.6 Provisions Relating to Diversion Measures**

CSOs acknowledges the availability of several diversion measures in the Bill such as the establishment and operationalisation of the juvenile court in sections 97-100; availability of bail in section 101; separation of children from adults while in remand and post-disposition stages; and recognition of several alternatives for dealing with offending children.

However, CSOs observe that the Bill does not contain specific provisions prominently providing for diversion measures to be sections 6(2) opted for when an offending child is in contact with the penal law.

Therefore, CSOs proposes for the law to contain clear provisions emphasizing the use of diversion from formal hearings to appropriate community programmes where the consent of the juvenile is encouraged for the best interest of the juvenile.

### **3.8 Form of the Bill**

CSOs have noted some problems relating to the form of the Bill. For example, there are provisions put together in a particular part although they do not belong to the same subject matter for which that part is enacted.

In this regard, sections 6(2), containing provisions for the right to name and nationality, makes reference to the provisions of Part IX, which essentially contains provisions relating to juvenile justice.

In section 9 in Part II contains provisions relating to parentage in subsections (3) and (4), matters which fall under follow under Part V of the Bill (“Parentage, Custody, Access and Maintenance”).

In the same section, subsections (1) and (2) contain duties and responsibilities of the State to protect certain child rights like the right to life, although the marginal notes indicate that the section contains parental duty and responsibility.

In Part IV, there is section 33 containing provisions prohibiting publication of any information or photograph that may lead to the identification of a child in any matter before the court except with the permission of the court. In fact, these provisions ought to be under Part IX dealing with children in conflict with the law.

In section 56, Part VI there is a repetition of the provisions of 56(1) in paragraphs (c) and (d).

In Part XII, there is section 154, providing for seeking for a permit to operate a day-care centre from the Commissioner. This section would otherwise be under Part XI, immediately after section 151, which relates to the inspection of day-care centres and crèches by the Commissioner.

Section 155, under Part XII, containing provisions relating to offences for operating approved residential homes without licence, is similar to after the provisions of section 146 (2) under Part XI. Therefore, section 155 should be deleted.

In addition, there is reference to non-existing provisions in section 130(3) in Part X makes reference to the provisions of section 28(7), while in fact section 28 has three subsections only.

Generally, the flow and arrangement of parts in the Bill are not well structured in a logical or conventional way. For instance,

- (i) Part VII (now Part VIII) is supposed to have the following aspects:  
support services for a child by a local government authority.
- (ii) Part VIII is required to have institutionalized care (now Part XI).
- (iii) Part IX would contain matters relating to employment of a child (now Part VII).
- (iv) Part X (now Part IX) would contain provisions relating to the rights of the child in conflict with the law.
- (v) Part XI (now Part X) would contain provisions for approved schools.

The rest of the Parts should remain as they are.

## SECTION IV: SPECIFIC REMARKS AND RECOMMENDATIONS

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Upon having thoroughly and critically gone through the Bill, CSOs have the following specific observations, remarks and recommendations on a section-per-section basis.

### PART I: PRELIMINARY PROVISIONS

**“Foster-care”** is defined as a ‘voluntary’ relationship. This definition proscribes the option in the future of a fostercare system that includes the financial reimbursement of carers and the phrasing may need to be reconsidered to keep options open.

The penalty for contravening provisions of Part I of the Bill is 6 months imprisonment and/or a fine of approximately \$380 (s. 14); under the Kenyan Children’s Act, the penalty is 12 months imprisonment and/or a fine of approximately \$660 (s. 20). There may be a need to reconsider if the penalty under the Tanzanian Bill is sufficient.

**Section 15** lacks the proviso that due regard be had to the age and ability of the child.

This Bill lacks the provision regarding the enforcement of children’s rights, and that if a person believes there to be a contravention, s/he can apply to the High Court for redress on the part of the child. This needs to be included.

### PART II: RIGHTS AND WELFARE OF THE CHILD

Under this part, CSOs have the following observations and recommendations:

**Section 4** should have a new subsection, providing that:

“(3) For the purposes of this Act, the term “welfare of the child” shall include the best interest of the child.”

**In section 5(2)**, there should be added a new ground for discrimination, i.e.

“Status of the parents, or guardians or relatives, or pregnancy status of a child.”

**Section 5(2)**: Discrimination should not be on the grounds of sex not gender as gender is a social construct not a biological disposition.

**In section 6(2)** there is reference to the provisions of **Part IX** of the Bill in respect of the right to name and nationality. However, **Part IX** contains provisions relating to children in conflict with the law.

**CSOs recommend** that the error should be rectified to avoid confusion during the application of the Act when it comes into force.

The right to automatic nationality for any child born in Tanzania must be included, and in the case of dual citizenship the provision made that the child shall have the choice of renouncing one nationality upon reaching the age of 18.

**Section 7** should be more elaborative and provide the different family arrangements a child may find themselves in i.e. with biological parents; adopted parents; legal guardians etc

**Section 7(3)** should also include that financial constraints should not deny a child medical care.

**In section 8(1)(e)** the following words should be inserted immediately before the word “education”

“access to information,”

**Section 9** fails to specify who has parental responsibility for a child, other than to mention in vague terms: parents, guardians and relatives. More detail would be preferable, specifically who has parental responsibility and the rights that accompany such duty. Likewise, who and how a person may be appointed guardianship of a child.

**In Sections 8 & 9** It is the duty of the parent to ensure a child’s right to education, leisure, liberty and healthcare – there is not mention of the government’s duty to uphold these rights.

**In Section 9** while the Bill does mentions a child’s right to life, again the government takes no responsibility to uphold this right.

**In Section 9** with regards to education, there is no mention of a child’s right to free basic education in accordance with Article 28 of the UNCRC.

**In Section 9(3)(a)**, it simply says that parents have the duty to protect children from abuse but does not provide children an entitlement to protection from abuse, and entitlement to rehabilitative treatment for victims of abuse. This needs to be changed and the institutional framework for such treatment detailed.

An additional section should be included that protects children from being involved in armed conflicts

The Bill lacks provisions regarding the right to religious education.

**In section 11**, there shall be added a new subsection (2) containing the following words:

“(2) The right to opinion shall include the child’s right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.

Provided that such information shall not be morally or religiously injurious to the child; or shall not be injurious to the rights or reputation of others; or shall not compromise national security or public order.”

**Section 13(1)** states that children are not to be subject to any cultural practices that dehumanise or cause physical/mental injuries, but should also specify that no person shall subject a child to female circumcision or early marriage.

**Section 13(2)** should specify that corporal punishment is an ‘unreasonable’ punishment.

### **PART III: CARE AND PROTECTION OF A CHILD**

Under this part, CSOs have the following observations and recommendations:

**In section 16**, there should be added a new subsection (1) to provide as follows:

“(1) A child shall be entitled to care and protection from the parents, guardians, relatives, community, local government or the state, or any other institution or organ capable of discharging care or protection.”

**Subsection (1) of section 16** shall be subsection (2) and shall contain the following words after the words “need of”:

“special”

**Section 17** states that no person shall sell drugs to a child, but this falls short of the child’s right to protection from the use of drugs and from being involved in their production, trafficking or distribution.

**Subsection (1) of section 17** should be rephrased to read as follows

“(1) Any person who allows a child to enter and stay in a discotheque, bar, or night club, for the purposes of getting services therein commits an offence and shall have his premises closed.”

**Section 17(2)** should also include the prohibition of sale of solvents to children.

There shall be **inserted a new subsection (3)** in section 17, reading as follows:

“(2) It shall be the duty of a local government authority or council to allocate areas for recreation and leisure of children in its jurisdiction.”

The current **subsection (3)** shall be **subsection (4)**.

**In section 18 (1)** the following words shall be inserted immediately after the words “on application by a social welfare officer”;

“or any other interested person or institution working with children.”

**In section 19 (1)** the following words shall be inserted immediately after the words “on application by a social welfare officer”;

“or any other interested person or institution working with children.”

**Section 19(7)** should be moved to Section 18

**Section 20:** is an illustration of the institutional weakness in the Bill. To whom does the Social Worker report and to whom is s/he accountable in ensuring the protection of the child. If the child continues to be abused whilst under a supervision order what are the consequences for the Social Worker?

**Section 21** should be rephrased to read as:

“21. A social welfare officer shall, if he has reason to believe that any child’s right is being or is about to be infringed, visit any home, an approved residential home or institution, as the case may, for the purpose of finding out if there is any child abuse.”

**Section 22(1):** fails to take into account if a child is running away from abuse.

**Section 26(1c):** include the word ‘or safety’ at the end of the sentence.

The Bill lacks provision regarding the right to privacy and this needs to be included.

#### **PART IV: FOSTER CARE PLACEMENT**

Under this part, CSOs have the following observations and recommendations:

**In subsection (3) of section 32** the following words shall be inserted immediately before the word “upon”:

“immediately”

**In Section 4:** please ensure that ‘patron’ is defined

**In subsection (4) of section 32** the following words shall be inserted immediately after the word “applicant” in last line;

“for the time specified in the permit.”

**Section 31(3)** should include visits and interviews with the child’s teachers and Ward Executive Officer.

**Section 33** should be put immediately after **section 100 in Part IX**.

## **PART V: PARENTAGE, CUSTODY, ACCESS AND MAINTENANCE**

Under this part, CSOs have the following observations and recommendations:

**Section 40:** is a duplication with section 30

**In section 41**, there should be inserted a new subsection (2) containing the following words:

“In determining the extent of contribution stated in subsection (1) of this section, the court shall take into account the cost of living, the income and responsibilities of the parent at the time being.”

Therefore, the provisions of section 41 as it is should be subsection (1) thereof.

**In section 42** there should be added a new **paragraph (f)** immediately after the paragraph (e), containing the following words:

“(f) Any other interested person, institution, organisation, or a local government authority.”

**In section 42** there should be added a new subsection (3) to the effect that:

“(3) Any other interested person, institution, organisation, or a local government authority who is capable of maintaining a child may apply to the court for a maintenance order.”

**Section 43** should be rephrased to reflect gender parity in the order for maintenance. Therefore, reference to the word “mother” or “father” should be substituted by the word “legal parent.”

## PART VI: FOSTERAGE AND ADOPTION

Under this part, CSOs have the following observations and recommendations:

From the reading of the provisions of **section 32 and 53**, the two sections have provisions providing to the same effect.

We **recommend** that:

1. Sections 52 and 53 be deleted for being repetitive of section 32; and
2. The title of Part VI be re-casted to remain with the word “**ADOPTION**” only.

**In subsection (1) of section 54**, the jurisdiction of courts to determine adoption proceedings and issue adoption orders should be pegged from the level of a court presided over by a Resident Magistrate. Therefore, the subsection should be re-casted and rephrased as follows:

“54. (1) Subject to the provisions of this Act, an application for an adoption order shall be made to:

(a) the High Court in respect of inter-country adoption, where a citizen from a foreign jurisdiction applies for an adoption order in respect of a Tanzanian child; and

(b) to the Court presided over by a Resident

Magistrate where a Tanzanian citizen applies for an adoption order in respect of a Tanzanian child.”

**In subsection (1) of section 59**, a **new paragraph (e)** should be inserted immediately after paragraph (d), providing that:

“(e) the applicant has undergone the fosterage process as provided for under section 32 of this Act.”

## PART VII: EMPLOYMENT OF A CHILD

Under this part, CSOs have the following observations and recommendations:

**In section 78(3)** an additional bullet should be included that labour be considered exploitative if the child is not attending primary school because of the need to work.

**In sections 80 and 82**, there should be added subsections creating criminal sanctions (sentence), by either fine or imprisonment.

**Section 82(4)** allows children to be trained on hazardous work sites. This creates a considerable loophole for employers that needs to be closed.

#### **PART VIII: SUPPORT SERVICES FOR A CHILD BY LOCAL GOVERNMENT AUTHORITIES**

Under this part, CSOs have the following observations and recommendations:

The provisions of this part are, to a large extent, similar to the provisions of section 11 of the CSO Alternative Child Act.

**Section 94(4)** does not place any obligation on Local Government Authorities to financially assist children. The phrase ‘whenever possible’ should be removed.

**Section 94(5)** requires that the LGA place the child in accommodation. This should be expanded to explain what type of accommodation and the procedures for doing so.

**Section 95(1)** needs to specify which officer of the LGA receives the report from the Social Worker.

#### **PART IX: A CHILD IN CONFLICT WITH THE LAW**

Under this part, CSOs have the following observations and recommendations:

**In section 98(1)**, the word “application” should be replaced by the word:

“‘matters.’”

It should be expanded to mean more than what is provided in Civil Procedure Code.

**In section 99(1)(e and f)** should be expanded to expressly entitle children to the presence and assistance of another interested adult (e.g., a neighbor, teacher, volunteer, law student, non-admitted lawyer). There should also be an express provision requiring notification of arrest and proceedings to parents, guardians, relatives or, at a child’s request, another adult.

There shall be added the following words immediately after the words “with rules made by the Chief Justice”:

“in consultation with the Ministers responsible for social welfare and children.”

There should be added **a new subsection (3) in section 99** containing the following words:

“(3) The Chief Justice shall issue rules of procedure for Juvenile Court within six months of the coming into operation of this Act.”

**In section 100**, subsection (3) should be reworded in the following respect:

“(3) Adults who commit offences in contravention of this Act shall be criminally charged in the Juvenile Court.”

**Because** the Juvenile Court is a specialised court for all matters concerning children. Our recommendation is based on the fact that it negates the whole purpose of the juvenile court.

**In Section 101-103** as currently written, the police can arrest and take a child into custody without presentment to the court until the investigation is complete and then the proceeding is to be short. As a practical matter, cases often are brought to court earlier and many times the investigations, and the proceedings, are protracted. As a precaution, there might be time limits to prevent children from being remanded for extended periods without court review and to further limit the overall period of detention before final adjudication.

**Section 101(b)** still gives legal scope for the round-up of street children. This needs to be limited in its scope so that mass arrests of children is prohibited.

**In section 102**, the words “so far as practicable” should be deleted as the same creates room for abuse of the best interest of the child principle in the Act.

**In section 103(1)** we recommend that the section be re-casted to reflect the fact that the police should, as far as its practicable, amicably resolve the case before coming to the court.

A new subsection (2) should be added, containing the following words:

“(2) Where a child is brought before the police, the police officer shall have the duty to inform the child if he is or not going to be taken to court or other measures are going to be employed.”

In section 105, the following words should be added immediately after the words “the particulars of the alleged offence”:

“and the consequences of the offence.”

**In Section 106** if the court asks the child to make a statement, the court also should advise the child of a right to remain silent.

**Section 108(2)** should be expanded to expressly entitle children to the presence and assistance of another interested adult (e.g., a neighbor, teacher, volunteer, law student, non-admitted lawyer). Para 108(2) also might expressly refer to the statement of defense.

**In section 108(3)** the words “with prior consent of the court” should be deleted as we see no reason for the court to give consent prior to hearing. We ask will the consent be freely given. At what time should it be given and with what procedure?

**In section 109** we suggest expansion of this provision by adding the following words after the word “the Juvenile Court”:

“the accused or his parent, guardian, relatives or legal representative.”

**In section 111(1)** provides the court must be “satisfied” the offense is proved. This might expressly incorporate the “beyond reasonable doubt” standard.

**In section 111** a new subsection (3) should be added, containing the following words

“(3) For the purposes of this section the court shall seek information from the Social Welfare Officer, the Police or any other person vested with such special information regarding the accused child.”

**In section 112** We are recommending deletion of the words “in its discretion require the attendance of his parent, guardian, relative or social welfare officer”: because the intended words defeat the spirit of provision of section 99 of the Act.

**In section 113(2)**, we are recommending the insertion of a list of documentary evidence as to proof of age in similar terms with **section 35 of the Act**.

**Subsection (4)** of the Act should be deleted because the true determination of the age of the person accused should not be limited to avoid being prejudicial especially when the judgment is not in favour of the child.

We are concerned with the issue of confidentiality of the medical records in **subsection 113(5)**. We are further recommending that if the child is of sufficient age to understand the procedure then it is only him who is needed. If the child is not capable of comprehending the test we recommend that his chosen representative should be present, instead of a social welfare officer or a community development officer.

The **entire section 115** treating child as a witness does not provide safeguards to protect the child from the rigorous legal regime. It is essentially the same procedures as provided for in the **Evidence Act**. We recommend that victim and psycho-social support services should be at hand to the child witness.

We recommend the adoption of wording as provided for under section 127(2) of the **Evidence Act**, which reads:

“... to justify the reception of his evidence...”

**In section 116(1)** we are recommending addition of the following words immediately after the word behavior to make it more specific:

“during the court procedures.”

**In section 116(2)** we are recommending that the following words should be added after the word “order” at the end of the subsection:

“or prescribed in the rules to be made by the Chief Justice.”

We are overwhelmingly concerned with the provisions of subsection (3) of section 118 relating to recovery of fine or compensation from a parents guardians or relatives by distress or imprisonment. This is supposed to be a child friendly law and must certainly serve to make parents conform to the laws without punishment for actions of their children.

**Subsection (2)(b) of section 119** is absurd for being violative of the freedom of movement as guaranteed under the Constitution of Tanzania (1977). It should be deleted in its entirety.

**A new subsection (3)** should be added to **section 119** to read as follows:

“The Chief Justice may from time to time consult with relevant stakeholders as to the nature of sentences and may make rules to that effect.”

## **PART X: APPROVED SCHOOLS**

Under this part, CSOs have the following observations and recommendations:

**A new subsection (3)** should be added to **section 121**, which shall read as follows:

“(3) It shall be the duty of the Ministry responsible for Social welfare to ensure that sufficient number of approved schools are available at all times and catering for both girls and boys.”

**In section 122 (1)** the following members to the Board of Visitors should be added:

“(h) Member of the Commission for Human Rights and Good Governance; and

(j) a representative of the Civil Society dealing with children rights in the region.”

A **new subsection (3)** should be added to **section 123**, which shall read as follows:

“The Minister shall comply with the recommendations of the Board and where it is proposed that non compliance will not be possible reasons for such non compliance shall be communicated to the Board in writing.”

We are concerned as to what happens after the sentence is commuted. Are there any mechanisms to involve the social welfare department?

If our concern is taken into consideration we propose that there should be added a new subsection (2) to 128 to read:

“(2) Where the inmate sentence is commuted the court may make further orders as to what will happen to the inmate with a view to rehabilitate the child.”

In section 130 there is reference to subsection (7) of section 28, which does not exist in the Bill. This reference should be rectified.

**Section 130(1)**, requires appeals to be entered within seven days. This should be at least 30 days, if not longer.

## PART XI: INSTITUTIONALISED CARE

**Section 140:** Additional grounds that should be included include, the absence of a child protection policy and procedures, children failing to be enrolled or attend school, and an absence of ongoing professional development training for staff.

**Section 147(1)** There is a discrepancy between the requirement for fees for day care centres and none for residential centres. Is this an oversight or deliberate?

**Section 147(3)b:** Again needs the inclusion of a child protection policy and procedures for registration.

**Section 147(4):** Need to include the requirement that the premises are safe and that staff have been screened for criminal or pedophile backgrounds. This needs to be included for both residential and day care centres.

**Section 147(6):** There is an omission in ensuring that residential centres also receive a registration certificate.

**Section 148(1&2):** Needs to also apply to residential centres

## PART XII: MISCELLANEOUS PROVISIONS

Under this part, CSOs have the following observations and recommendations:

**Section 155 in Part XII** should be put immediately after section 133, as it creates an offence for violating the provisions of section 133.

**In Part XII** there should be added **a new section 159** immediately after section 158, providing to the effect that:

“159. On and after the commencement of this Act, notwithstanding any other written law to the contrary, this Act shall apply to all matters relating to children’s rights in Mainland Tanzania and any provisions of any other written law applicable to all matters relating to children’s rights which conflict or are

inconsistent with any of the provisions of this Act shall to the extent of that conflict or that inconsistency cease to be applicable to all matters relating to children’s rights or any matter connected with all matters relating to children’s rights in Mainland Tanzania.”

**In Part XII** there should also be added **a new section 160** immediately after the new section 159, providing to the effect that:

“160. The Minister shall, within twenty-four months after the commencement of this Act, cause this Act to be translated into Kiswahili and that translation shall be published in the *Gazette* and in any other manner and form as will enable the citizens of Tanzania to gain access to that translation.”

### **PART XIII: CONSEQUENTIAL AMENDMENTS**

Noting the propositions to add two **new sections 159 and 160** proposed above, **section 159 of Part XIII** shall be referred to as **section 161**.

Section 4(1) of the Bill states that persons below the age of 18 are to be known as children. But in Part XIII Consequential Amendments, (c) Sub-Part III, which pertains to the Employment and Labour Relations Act, there is no mention of section 4 of the ELRA being amended. (Section 4 ELRA: a child is a person under the age of 14, except that in hazardous employment, a child is a person under 18.)

Sub Part 1 regarding the Marriage Act fails to repeal or amend the Marriage Act’s ss. 13 & 17 that make lawful girls marrying under the age of 18 and under the age of 15 with parental consent. This needs to be amended to avoid discrimination between the sexes.

**This Bill also needs to repeal:**

- 1. The Township (Removal of Undesirable Persons Act), 1944, which allows for the detention of unaccompanied children.**

2. **The Destitute Persons Act (CAP: 389 R.E. 2002]**
3. THE Criminal Procedure Act [CAP 20 R.E. 2002],
4. THE Penal Code [CAP. 16 R.E. 2002],

All four laws<sup>15</sup> are contrary to Article 15 of the Constitution, in that they permit children to be arrested, detained or otherwise deprived of their liberty, and that this serves no legitimate purpose. Further, this is disproportionate, unreasonable, arbitrary and/or with insufficient procedural safeguards. Both the Townships (Removal of Undesirable Persons) Ordinance and the Destitute Persons Act are contrary to Article 17 of the Constitution, in that they infringe the right of all citizens of Tanzania to move freely in the United Republic and to live in any part of the United Republic. This infringement serves no legitimate aim, is disproportionate, unreasonable, arbitrary and has insufficient procedural safeguards. All four laws<sup>16</sup> are contrary to Articles 12 and 13 of the Constitution, in that they fail to treat children differently to adults. This is unlawful discrimination and contrary to the principle of equality. It serves no legitimate purpose, is disproportionate, unreasonable, arbitrary and/or has insufficient procedural safeguards.

**Under this part, CSOs have the following observations and recommendations:**

## **SECTION V: CONCLUSION**

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<sup>15</sup> All of the Townships (Removal of Undesirable Persons) Ordinance and the Destitute Persons Act; sections 14(h) and 28(b) of the Criminal Procedure Act; and section 177(3) and (4) of the Penal Code.

<sup>16</sup> All of the Townships (Removal of Undesirable Persons) Ordinance and the Destitute Persons Act; sections 14(h) and 28(b) of the Criminal Procedure Act; and sections 176(2) and 177(1),(2), (3) and (4) of the Penal Code.