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To: Department of the Premier, Western Cape Government
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Re: Comments on the Draft Western Cape Commissioner for Children Bill, 2017

From: Advocate N L Badenhorst
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Per e-mail: legal@forsa.org.za

Date: 31 October 2017

Summary of submissions:

1. As an organisation working to protect and preserve religious freedom in South Africa, *Freedom of Religion South Africa (FOR SA)* commends the intent of the draft Western Cape Commissioner for Children Bill (“the Bill”), but is concerned that the Bill does not adequately cater for the strengthening of the family unit¹ and the rights and authority of parents² as required of the (Provincial Government) by international covenant.
2. FOR SA recommends that the presumably unintended, but nonetheless unconstitutional, consequences of the current (wide) scope of the Bill, be avoided or eliminated by inserting in the Bill special provisions relating to the State’s obligations to protect the family unit and the rights of parents as the ones having primary responsibility with regard to their children’s upbringing.

¹ Article 18 of the African Charter on the Rights and Welfare of the Child, 1990 provides for the Protection of the Family and explicitly states that “*The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development.*” [Own emphasis added]

² Article 20 of the African Charter on the Rights and Welfare of the Child, 1990 provides for Parental Responsibilities, stating that “*Parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development the child.*” [Own emphasis added]

3. *FOR SA* would appreciate the opportunity to make verbal submissions with regard to the Bill, if and when such opportunity presents itself.

About FOR SA:

4. *Freedom of Religion SA NPC (2014/099286/08) (FOR SA)* is a non-profit, non-denominational Christian organisation, that serves to protect and preserve religious freedom in South Africa.
5. *FOR SA* represents the views of religious leaders representing over 5 million people from a cross-spectrum of churches, denominations and faith groupings who have authorised *FOR SA* to speak on their behalf (to government and Parliament) to address issues relevant to them.
6. As such, *FOR SA* is a voice for the religious community in South Africa on issues affecting our freedom of religion, freedom of religious expression, freedom of association and the rights of religious communities in South Africa. All of these are fundamental rights entrenched in our Constitution. As such, the State as well as the citizens of South Africa, have an obligation to respect, protect and promote these rights.

FOR SA's interest in the current matter:

7. As already explained, *FOR SA* concerns itself with matters (incl. draft policy and legislation) that may impact upon South Africans' freedom of religion and related rights.
8. We commend the intent of the Bill and support the legislative efforts to give effect to the provisions in the Western Cape's Constitution³ for the appointment of a Commissioner for Children ("the Commissioner"), to assist the Provincial Government with protecting and promoting the interests of children in the Western Cape.
9. It seems that wide powers, similar to that of the Chapter Nine Institutions, are granted to the Commissioner. This is clearly a *bona fide* attempt to safeguard the rights of children under the South African Constitution.⁴
10. We are however concerned that in its endeavour to protect children and to provide for a Commissioner that monitors, investigates, undertakes research and educates the public, the Bill may override the rights and responsibilities of parents to bring their children up in conformity with

³ s78(2) of the Constitution of the Western Cape.

⁴ s28 of the Constitution of the Republic of South Africa.

their religious, moral or philosophical convictions and beliefs, and take away from the authority of the family as the cornerstone of society.⁵

Sections in the Bill relating to the Commissioner's Function and Duties:

11. In this regard firstly, and as a matter of principle, we submit that it is necessary and appropriate to link, and expressly incorporate, the Commissioner's (monitoring and investigative) powers provided for in the Bill, to s 78 of the Constitution of the Western Cape which establishes the Commissioner in the first place: In terms of this section, the Commissioner's mandate is to:

"... assist the Western Cape government in protecting and promoting the interests of children in the Western Cape, in particular as regard –

(a) health services;

(b) education;

(c) welfare services;

(d) recreation and amenities; and

(e) sport."

12. While, in terms of the above provision, the Commissioner's powers are clearly not limited to the above areas of interest, it does make it clear that the intention of the Western Cape Constitution is that the Commissioner should, first and foremost, be concerned with the interest areas specifically mentioned by s 78. In the circumstances also, we submit that the Bill should be careful not to give sweeping powers to the Commissioner that may well venture far outside what was intended by the Western Cape Constitution.

13. In this regard, we mention that in relation to a previous policy proposed by the Western Cape Department of Education (namely the WCED Policy on the Registration of a Learner for Education at Home (2014/02/11)), there was a huge outcry by the public against the broad (monitoring and investigative) powers given to the assessors provided for in that Policy, and which posed a major threat to parental authority and the inner sanctum of the home. As a result, the Policy was withdrawn.

14. We turn now to the sections in the Bill that relate to firstly, the Commissioner's powers to monitor and investigate and secondly, to the applications (by third parties) for matters to be monitored

⁵ Article 9 of the African Charter on the Rights and Welfare of the Child, 1990 provides for the right of children to Freedom of Thought, Conscience and Religion and explicitly mandates that "**State Parties shall respect the duty of parents and where applicable, legal guardians, to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies.**"

and investigated by the Commissioner. These sections are concerning, especially to religious parents, due to *inter alia* the spate of international removals of children from parents for being “*too Christian*” in various countries including for e.g. Norway and Germany.⁶

15. Monitoring:⁷

- a. The section pertaining to the Commissioner’s function and duty to monitor, amongst other things, the interests of children, only provides for the Commissioner to liaise closely and build relationship with various other commissioners, provincial and national departments and private organisations.
- b. The Commissioner’s monitoring powers are therefore not explicitly defined, nor their impact explained.
- c. Notably, there is no specific provision excluding the monitoring the private homes of children, or confining it to instances where there is a reasonable suspicion that the child is exposed to the risk of physical harm (as would justify such monitoring).

16. Investigation:⁸

- a. This section is similarly broadly drafted and its (undefined) implications potentially very wide.
- b. The nature, scope and process of investigations as well as the Commissioner’s powers in performing such investigations, need to be fully canvassed in order to protect both the family unit and parents as the primary people responsible for raising their children and parental rights to raise their children in line with their beliefs and culture.

17. Applications for matters to be monitored, investigated or researched:⁹

- a. This section is similarly broadly drafted and potentially harmful.
- b. No provision is made for defining the scope of the matters a Commissioner may investigate, but leaves this decision, with such wide-reaching consequences which could potentially disrupt family units, solely at the discretion of the Commissioner.¹⁰
- c. The consequences of a Commissioner’s decision are not stipulated beyond that the Commissioner may apply to Court for the appointment of a curator.¹¹ Provision for due

⁶ <https://www.lifesitenews.com/news/family-whose-five-kids-were-seized-in-norway-could-get-their-case-heard-by> and <https://www.thelocal.de/20170406/german-parents-go-to-eu-court-after-police-seized-kids-in-homeschool-raid>

⁷ S8 of the Bill.

⁸ S9 of the Bill.

⁹ S14 of the Bill.

¹⁰ S14(7) of the Bill.

¹¹ S14(8).

process as well as an appeal (outside of the expensive court system) needs to be catered for.

18. Access to information and institutions:¹²

- a. The Bill provides simply that all institutions, irrespective of being private or public, are required to provide the Commissioner, upon request, with information pertaining to any matter falling within the scope of the Commissioner's functions.
- b. As per paragraph 14(b) above, the scope of matters is not properly defined.
- c. Neither is any provision included to protect either the child's,¹³ or the parents', right to privacy.

19. Finally, we are concerned that there may be an overlap, and therefore duplication, in the functions and powers of the Commissioner for Children on the one hand, and the Western Cape office of the South African Human Rights Commission (SAHRC) on the other. The SAHRC's constitutional mandate includes the protection and promotion of the rights of children in terms of s 28 of the Constitution. Similar to the Commissioner, the SAHRC's powers and functions (in terms of s 184 of the Constitution and the SAHRC Act, 2013) include investigation, monitoring, research, education, co-operation with other state institutions and agencies on national and provincial level, etc.

¹² S19 of the Bill.

¹³ Article 10 of the African Charter on the Rights and Welfare of the Child, 1990 provides for the Protection of Privacy of children and states that "*No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence..*"

Recommendations:

20. *FOR SA* proposes that the Bill's scope be more defined and therefore its reach limited to avoid the abovementioned unintended consequences in the following respects:

- a. The Preamble to the Bill should make mention of s 78 of the Western Cape Constitution and explicitly incorporate the areas of interest specifically mentioned in s 78. This should be repeated when the Bill addresses what the Commissioner's functions and duties in terms of the Bill would be.
- b. Matters falling within the scope of the Commissioner's powers and duty to monitor and investigate should be explicitly defined and limited to, for example, abuse, physical harm and neglect.
- c. Section 8 which deals the Commissioner's function and duty to Monitor should:
 - i. Explicitly define the Commissioner's monitoring powers, and explicitly explain the process to be followed and the expected consequences that could follow as a result of such monitoring;
 - ii. Also include a specific reference to the Department of Social Development (DSD);
 - iii. In section 8(3) thereof, include a reference to non-profit organisations;
 - iv. A specific provision stating that the term "monitoring" is intended to only refer to that monitoring which is necessary specifically to prevent children from physical harm in home. Monitoring should therefore be explicitly confined to instances of genuine / real risk.
- d. Section 9 which deals with the Commissioner's function and duty to Investigate should be narrowly drafted and explicitly state the nature and scope of the Commissioner's investigatory powers, process, consequences and appeal procedures against such investigations.
- e. Section 14 which deals with applications for matters to be monitored, investigated or researched by the Commissioner should:
 - i. Be narrowly drafted, including an explicit defining of the scope of the matters a Commissioner may investigate.
 - ii. Specific protection against the disruption of family units during an investigation by the Commissioner is to be included, for example, no removal of children except by an order of Court.

- iii. The ambit, and potential consequences of, decisions by the Commissioner are to be explicitly explained, i.e. the legal and practical effects of such a decision.
 - iv. Provision for due process as well as appeal (outside of the expensive court system) needs to be catered for.
- f. Section 16 should be amended to indicate which office specifically in the Provincial Parliament, the Commissioner must report to.
- g. Section 19(1) which deals with the access to information and institutions by the Commissioner should:
- i. Define the matters (i.e. the situations) in which a Commissioner may ask institutions for information.
 - ii. Provision protecting both the child's, and/or the parents', right to privacy.
- h. Specific provision is required to be made in terms of the international covenants signed, that the Commissioner is to protect and strengthen the family unit and the rights of parents as the ones with the primary responsibility to raise their children and their right to do so in line with their religious beliefs. To this effect, section 7 of the Bill (including its subparagraphs) should be amended to include reference to parental / family rights, responsibilities and interests.

THE END.