



THINK PIECE:

Room for Regulation: Law of the Child Act 2009

By Claire Mason, in collaboration with Mkombozi

1. Introduction

The adoption of the Law of the Child Act 2009 is a key step in Tanzania's efforts to strengthen the legal protection of children's rights and establish an effective child care and protection framework that complies with international standards. While the law is a welcome development for Tanzanian children, there is widespread uncertainty about how the Act will work in practice. For civil society organisations (CSOs) like Mkombozi, which champion children's rights and provide child protection services, it is unclear what role they will play in the new regime and how key child protection interventions, such as fostering, will be implemented. This is in part due to the fact that the Act is not clearly drafted but largely because its key provisions are yet to be operationalised by regulations.

Work has begun on drafting the regulations and it is expected they will be finalised sometime in the near future, although exact timeframes are unknown. It will be important that Mkombozi and other like-minded organisations engage in the regulation-making process to influence how our role in the sector and the parameters in which we will operate are defined. It will also be important for us to share our knowledge of what is happening on the ground and what is working well with the children we work with. It will be difficult to effect any changes once the regulations have been promulgated as it is unlikely amendments to the Act will be supported any time in the near future.

2. Purpose

This paper is focussed on the provisions of the Act that impact the most on Mkombozi's service delivery work - in particular, those relating to fostering, approved residential homes and street-involved children. In relation to fostering, this paper attempts to provide some insight into how Tanzania's new fostering process, as it is described in the Act, is likely to operate and what Mkombozi's role is most likely to be. By and large though, this paper signals areas where the Act lacks clarity both on matters of process and the role of organisations working in the area of fostering. It, in turn, poses issues for further discussion and possible refinement through regulation. As an organisation committed to improving the lives of street-involved children in Moshi and Arusha, we also have significant interest in how the Act and regulations will provide for their rights, care and protection. As an approved residential home with distinct views on how best to provide alternative care to children, we also have a strong interest in clarifying our powers and responsibilities under the Act.



We also have a strong interest in how a child's right to participate will be provided for in the forthcoming regulations. To this end, we have produced a standalone think piece on child participation, which we refer readers to for our position in this regard.

While beyond the scope of this paper, we note that our close analysis of the Act has identified a number of other areas that require further clarification through regulation. Areas of particular concern include those parts of the Act relating to the court-ordered removal of children from parental care, adoption, employment of children and juvenile justice. These parts either lack specificity in definition or process leaving how they should be implemented open to wide interpretation. We call on CSOs who work in these areas to undertake the same exercise we have in this paper and identify where the Act lacks clarity on both purpose and practice. As a collective we can then advocate for great certainty through the regulations and in turn improve how we will operate under the Act, facilitate its successful implementation and, ultimately, foster the better protection of children in Tanzania.

3. Fostering

3.1 Key provisions on fostering

A child's right to live with his or her parents, guardian or family is affirmed in section 7 of the Act. When an issue of care and protection arises, a child is only to be separated from his family if he or she is suffering or is likely to suffer significant harm, or their current living environment is not in their best interests; otherwise, every effort must be made to reunify the child with his or her family. Where this is not possible, the child must be provided with the best substitute care available (section 7(3)). Under the Act, substitute care includes temporary care in a daycare or creche, an approved residential home or institution, with foster parents or, more permanently, adoption. In relation to fostering, the Act contains two main provisions, which provide some insight into how the formal fostering process will work in Tanzania.

Section 53 specifies the circumstances under which a child can be fostered:

- when he or she has been placed in the care of an approved residential home or institution either by way of court order **1**, at the recommendation of a social welfare officer or by any other person.

Section 32 then outlines the fostering approval process:

- a social welfare officer, in conjunction with the manager of an approved residential home or institution, makes a recommendation to the Commissioner of Social Welfare to place the child with a willing foster parent;
- a willing foster parent also makes an application to the Commissioner; and
- where the Commissioner is satisfied that the willing foster parent will take care and maintain the child, he or she shall grant permission for the child to be placed in their care. **2**

3.2 Lack of procedural detail

Other than the above provisions there is little guidance in the Act as to how the fostering process will work in practice or how it will be supported. By empowering the Minister of Social Welfare to make rules on foster care placement, the Act has instead left this level of much needed detail to regulation. **3** This is a less than ideal situation as a formal fostering regime, like the one contemplated by the Act, requires a comprehensive set of procedures and systems to make it operational and sustainable. In the absence of this framework being provided in primary legislation, the development of comprehensive regulations will be critical. At a minimum, the regulations will need to provide a high level of procedural detail on all aspects of the fostering cycle, including but not limited to:

- how Tanzania's fostering sector will be structured and governed (including clear definition of the roles and responsibilities of its primary players);
- how Tanzania's fostering system will work: comprehensive procedures for every aspect of the foster care cycle will be necessary so that foster care policy and procedures are consistently understood, interpreted and applied across the region contributing to common standards of quality care for children in foster care placement;
- process for recruiting, assessing, approving, licensing, monitoring and training foster carers;
- process and guidelines for making applications for court orders;
- process for making recommendations to the Commissioner (including form, mode of transmission, decision-making criteria and timeframes, provision for delays); and
- process for monitoring the efficiency and effectiveness of services.

3.3 Foster care sector

It is clear from sections 32 and 53 that social welfare officers and approved residential homes will play a key role in the fostering process and undoubtedly need to co-ordinate their efforts and collaborate frequently. Currently, however, the sector is fragmented, and fostering is undertaken according to different imperatives and with little oversight. The Department of Social Welfare implements a formal foster care programme to a limited extent but as a step on the path to adoption rather than as an alternative child care mechanism in itself. Where it is in operation, there are gaps in process, particularly in the recruitment, screening, training and support of foster carers, and inadequate monitoring and follow up due to lack of funding. **4** Within this vacuum, child protection organisations involved in fostering have been left to develop their own systems of monitoring and recruitment. Mkombozi, for example, has piloted its own fostering programme and developed comprehensive guidelines and procedures to support, regulate and sustain its practice.

First and foremost then, the Government will need to clearly define how the foster care sector will work in Tanzania and introduce measures to standardise the delivery of foster care services. For reasons of effectiveness and efficiency, it is more than likely that Tanzania will need to formalise a system of shared service delivery, where local authorities and independent organisations work together. If a joint approach is envisaged under the Act, it will be crucial to define from the outset how this arrangement will work and develop robust procedures to provide certainty to everyone involved. Ideally, there will be an opportunity for government and organisations involved in fostering to meet and take stock of what is working across the sector. Time should also be taken to review best practice models from other jurisdictions. Taking a collaborative approach from this early stage will undoubtedly contribute to the long-term success of Tanzania's fostering system.

It would also be worthwhile to take some time to consider whether a delegated model of service delivery is preferable over the collaborative approach contemplated by the Act. It is common practice in other jurisdictions for government to delegate the delivery of fostering services to NGOs and other independent agencies otherwise known as foster care providers or partner agencies. In the United Kingdom for example, foster care is delivered by a range of foster care providers and their practice is regulated by the Fostering Services Regulations 2011. These regulations specify how foster service providers will undertake foster care placement and the screening, training and monitoring of foster care parents. Further thought will need to be given however to whether a delegation of powers is possible under the regulations as the Act does not specifically provide for this.

3.4 General technical issues

On a general note, as the flow and arrangement of parts in the Act are not well structured in a logical or conventional way **5**, it is consistently unclear what the key elements are of any given step or process.

In respect to fostering, a number of process issues are ambiguous. For example:

- Section 24(1) seems to suggest that a certain period of time must pass where a parent shows no interest in a child before it can be fostered. This requirement appears under the part of the Act concerning care and supervision orders so it may well only apply when the court has adjudicated the case at issue. As this distinction is not made in the Act it is unclear whether it is a key element of the fostering process or not.

- Similarly, it is also unclear whether fostering can only take place when a child has been placed in an approved residential home or institution by way of a care or supervision order. Section 32(1) reads as if a social welfare officer and an approved organisation can only make a fostering recommendation to the Commissioner where a care or supervision order has been made whereas section 53(1) provides that the Commissioner can place the child with a foster parent in a number of situations with or without a court order.

- To add to the confusion, the Act also provides that notwithstanding any other provisions in the Act, the Commissioner can place a child directly into foster care by deed without particularising in what situations he or she may exercise this power.

As noted above, this lack of clarity on procedural detail can be found throughout the Act and is not simply isolated to provisions relating to fostering. Again, it is critical that the regulations synthesize disparate parts of the Act and fill any procedural gaps in order to provide a clear description of how fostering and other key processes will take place in Tanzania.

4. Street-involved children

While street-involved children are not specifically referred to in the Act, they qualify as children in need of care and protection by virtue of their age and circumstances. Street-involved children are also afforded particular protection under section 94 of the Act, which imposes a specific duty on local government authorities to identify the most vulnerable children in their areas, provide them with assistance and housing if need be and reunite them with their families if possible. **6**

In a practical sense, when a child protection matter arises in a local authority area it becomes the responsibility of the social welfare officer to investigate and determine a course of action. In the case of a street-involved child it is most likely a social welfare officer will provide the child with assistance and accommodation or attempt to reunify him or her with family, as provided in section 94. In the absence of local authority accommodation services for street-involved children however it is likely social welfare officers will seek to place a street-involved child in an approved residential home pending either a court determination, family reunification or fostering recommendation. **7**

As an organisation which is both an approved residential home and provider of services to street-involved children (including family reunification and fostering), we are very interested to see how these provisions will work in practice and interact with the reality on the ground.

We currently work directly with street-involved children on the streets of Moshi and Arusha, who come into our services as a result of this interaction rather than at the referral of the Department of Social Welfare. We then determine an appropriate care plan for the child, provide them with temporary accommodation and then, depending on their circumstances, pursue one of a number of options including family reunification. We hope that we can continue to work in this way as the interventions we make have a real impact on the children we work with. Alternatively, if local authorities take their obligations under section 94 seriously, we look forward to working with them to identify street-involved children in need of assistance and working with the Department of Social Welfare on how best to address their needs and manage their cases collaboratively.

As in the case with fostering, the Act specifies a number of tasks that approved residential homes and social welfare officers will need to execute together while a child is in alternative care and if he or she returns to his or her family. **8** There appears to be a high level of co-ordination expected amongst social welfare officers and approved residential homes. We have a positive relationship with the Department of Social Welfare in Kilimanjaro and imagine we will continue to operate together effectively under the Act. Regardless, it will be important proper procedures are put in place outlining how we will interact and work together to support street children, particularly if we have differing professional opinions on how to deal with a certain situation.

We are also concerned that the Act lacks certainty around when a child can be admitted to the care of an approved residential home. Section 137(1) appears to be the authority on this point and states that a child can be admitted to an approved residential home pending the determination by the court for care and protection or at the recommendation of a social welfare officer. Section 53(1)(c) however suggests that a child can be placed in an approved residential home by any person. As an approved residential home, we have a keen interest in the regulations providing clarity around when we can take children into our care. We note however that we have strong views about being able to continue to work as we have been – directly with street-involved children in Moshi and Arusha – and be able to take them into our services without recourse to the court or on the approval of the Department of Social Welfare. Our current approach works well and delivers real change for children.

In relation to street-involved children that come to us via court order, we note a number of specific concerns. Firstly, it is most likely we will receive street-involved children by way of care order **9**, which the court can put in place for a period of up to three years. As an organisation who is moving towards providing the temporary and transitional rather than long-term care of street-involved children we have serious issue with the possibility that we will be referred cases for this length of time.

We also note that cases where street-involved children cannot be fostered or where family reunification is not an option, the Act provides that they are to “be encouraged and assisted by the patron, manager and social welfare officer to become independent and self-reliant.” While the Act’s emphasis on assisting a child to become independent and self-reliant is welcome, the Act also provides that until independence and self-reliance is obtained a child shall not be required to leave an approved residential home or institution if under 18. **10**

By creating this right to long-term care and a corresponding duty on approved residential homes to provide it, the Act runs counter to current best practice thinking and Mkombozi's key strategic objective to provide transitional rather than residential care to street-involved children. We seek clarity then around how these provisions will apply to organisations no longer in the business of long-term residential care.

As an organisation, we also watch with interest how the Government will give effect to the rights of street-involved children. As noted by the Committee on the Rights of the Child, governments are required to actively identify if special measures are required to realise the rights of certain groups of children within their jurisdictions.¹¹ Street-involved children fall squarely within this category and the Tanzanian Government will need to implement targeted mechanisms to assist them to realise their rights. For example, the Government will need to consider what special measures need to be taken to ensure the views of street-involved children are taken into account in policy and decision-making processes and how certain rights of particular significance to them, such as the right to work, can be recognised and supported.

We are also concerned about how street-involved children in conflict with the law will be protected under the Act. We are still to undertake an in-depth review of the Act's provisions relating to juvenile justice from the perspective of street-involved children but note from the outset that they are at particular risk when they come into contact with the criminal justice system. It is imperative that the regulations relating to juvenile justice emphasise the need to treat all children equally and, if possible, clearly list street-involved children as a group of children whose rights are to be respected. This emphasis must follow through into the training of law enforcement officers to truly bring about changes in the treatment of street children with the criminal justice system. Additionally, considering the particular circumstances of street-involved children, special provision also needs to be made for their legal aid and support in court.

5. Next steps

As emphasised throughout this paper, it will be important for Mkombozi and other CSOs to engage early in the regulation-making process to influence how key areas of interest such as fostering, child participation and juvenile justice will work in Tanzania and call for what works best for children to be the priority. It is unclear, however, where the regulation drafting process is at or when CSOs can input into the process. Seeking confirmation of key timeframes is therefore a matter of priority as is scheduling time for stakeholder engagement.

It will be equally important for like-minded organisations to begin sharing their views on the Act and forming a collective position on what requires further clarification under regulations before engaging with government. As a first step then, contact should be made with the Ministry of Health and Social Welfare to confirm the status of regulation drafting and when there will be an opportunity for CSOs to be consulted. At the same time, Mkombozi should initiate contact with other like-minded CSOs to determine their willingness to mobilise. A work programme for identifying areas of concern and possible solutions, and producing a collective position paper to submit to government at the appropriate time should then be devised.

EndNOTES:

1. While section 53(1)(a) suggests that fostering can only occur when a child has been committed to an approved residential home or institution under a supervision order, section 32(1) also provides for those situations where committal has been by way of care order.
2. The Act also provides that the Commissioner may, by deed, place a child in foster care but it is unclear under what circumstances he or she may exercise this power.
3. See subsections 32(6), 53(6) and 157(b). We note subsection 32(6) empowers the Minister of Children's Affairs to make foster care regulations in consultation with the Minister of Social Welfare whereas the Minister of Social Welfare is empowered to make foster care regulations in consultation with the Minister of Children's Affairs in subsections 53(6) and 157(b).
4. Enabling child rights to family: Mkombozi's position on foster care, p4, <http://www.mkombozi.org/publications>
5. Position Paper by Civil Society Organisations on the Bill to Enact the Law of the Child Act, p 29.
6. Section 94(4) to (6).
7. Section 137.
8. See subsections 137(3), 137(4) and 137(5).
9. As it appears from our reading of the Act that supervision orders will be sought when children can remain under their parents' care albeit under the supervision of a social welfare officer.
10. Subsections 137(5) and 137(6).
11. Committee on the Rights of the Child. (2003). General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child. CRC/GC/2003/5, 27 November 2003 at para 12.