

PEAR Statement on Families for Orphans Act

PEAR is not opposed to intercountry adoption. We support ethical adoption practices and policies that include intercountry adoption as an option for children *when that option is within the best interests of the individual child*. We believe that the US government should assist the orphans and vulnerable children of the world with compassion and without preconditions. We do not believe that offering financial incentives, including debt forgiveness and humanitarian aid, for participation in intercountry adoption is ethical.

Furthermore, severe mismanagement and corruptive practices have led to the closure of several countries to intercountry adoption. We would like to underscore that this legislation doesn't replace the need for due diligence and country-specific mechanisms to be in place prior to the consideration of re-opening these countries to intercountry adoption.

Please use your voice to let Congress know your opinion on the Families for Orphans Act:
http://www.washingtonwatch.com/bills/show/111_SN_1458.html

In July 2009, PEAR announced its opposition to HR 3070/S. 1458, the Families for Orphans Act, also known as FOA and FFOA. We outlined our concerns with the Act's expansive definition of an orphan, its restrictive definition of permanent parental care, its ambiguous "concern" with cultural norms, and the Act's underlying conflicts.

PEAR intends to engage in dialogue with all legislation writers. We postponed our expanded comments pending a meeting with the Families for Orphans Coalition. Due to both scheduling conflicts and the Coalition's continued efforts to promote and lobby for this legislation, we are now releasing our complete comments.

PEAR's Objections to the Families for Orphans Act:

- 1. The Act as written will result in the unnecessary separation and dissolution of families due to the Act's definitions of orphan, institution, and permanent parental care.***
- 2. The Act as written appears to violate US Law, International Law and treaties such as UNCRC by not considering the rights, needs and best interests of each individual child.***
- 3. The Act places an unnecessary and unethical pressure on countries by tying aid and the release of debt to the acceptance of international adoption and the incorporation of US first world standards and concepts concerning the care of children.***
- 4. The primary beneficiary of this legislation will be the NGOs that rely on international adoption for their existence.***

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Misuse of the “Orphan” Statistic

PEAR's position: We believe it is inappropriate to use a statistic intended to garner support for programs assisting orphans and vulnerable children dealing with the effects of an AIDS epidemic to bolster support for legislation dealing with broader family issues. This legislation places restrictions on aid to foreign communities based upon their willingness to participate in international adoption. Without a solid understanding of the effects of loss of one parent or both parents within specific communities and cultures, including a lack of information on the numbers of children residing outside the care of a family, use of these statistics to encourage outside intervention requiring the removal of children from their families and communities is inappropriate.

Explanation: The act's problematic definition of an orphans starts with the misuse of the UNICEF orphan statistic found in section 2, paragraph 7 of the Act. This section requires Congress to make a finding that there are 132,000,000 orphans in the world, and to use this finding as a basis for this particular piece of legislation. This number comes from reports issued by UNAIDS, UNICEF and USAID entitled: “*Children on the Brink, a joint report on orphan estimates and program strategies.*” These reports have been published periodically since 2000 and were written with the intention of raising global awareness on the effects of HIV/AIDS and encouraging financial support for increasing resources to areas most impacted by AIDS, the effected children, their families, and communities. The intent was not to support the need for international adoption or permanent parental care of 132,000,000 orphans (or the more recent estimate of 143,000,000).

The UNICEF statistic that Congress is being asked to accept comes from the 2000 report and includes the definition of an orphan as a child under age 15 who has lost one or both parents. The latest report, published in 2004, defines orphans to include anyone under the age of 18 who has lost one or both parents. The reports contain a breakdown of maternal orphans (loss of mother), paternal orphans (loss of father), and double orphans (loss of both parents). It is also apparent in reading these reports that not all of these children are without the care of an adult. Many are residing with extended family or other families within their communities. There is no breakdown on the number of children residing within institutions or on their own. In further analyzing the report from 2004, it should be noted that the estimate of double orphans (those who have lost both parents) is 16.2 million, or approximately 11%.

Resource: An excellent discussion on the misuse of the UNICEF statistics:

Red Thread or Slender Reed: Deconstructing Prof. Bartholet's Mythology of International Adoption, Johanna Oreskovic and Trish Maskew. Buffalo Human Rights Law Review, Vol. 147, pp. 71-128, 2008 Buffalo Legal Studies Research Paper No. 2009-08, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1346026 and at Ethica: <http://www.ethicanet.org/orphanstat>

The Act's Definition of Orphan Is in Conflict with Current Federal, State and International Laws

PEAR's position: A law requiring countries to allow for child welfare interventions and international adoption of its orphans ought to, at a minimum, be consistent with its own country's definition of an orphan, an adoptable child, and a child in general. This is especially true when the Act will apply not only to international policy but also to domestic policy on orphans and children at risk. We also believe that the Act's unintended consequences are extremely severe and warrant a redraft or exclusion of the provisions defining institutions.

Explanation: The act defines an orphan as: “(7) ORPHAN.—The term “orphan” means any child—
(A) who lacks permanent parental care because of the death, the disappearance of, or the legal, permanent relinquishment of such child by both biological parents;
(B) who is living in the care and custody of an institution;
(C) whose biological parents' rights have been legally terminated; or
(D) whose country of origin has determined lacks permanent parental care.”

There is no definition of a “child” contained within the Act, however an “institutionalized child” is defined as being under the age of 21, and a “child” without permanent parental care is defined as a person under the age of 21. PEAR therefore assumes that the Act intends to consider persons under the age of 21 as children to whom the Act applies. This expansion in the age of children is an increase from most US domestic and international legislation dealing with children, adoption, and child welfare issues.

In the US, legal majority (adulthood) is usually attained at age 18. According to West's Encyclopedia of Law, the age of majority is as follows:

“[t]he age at which a person, formerly a minor or an infant, is recognized by law to be an adult, capable of managing his or her own affairs and responsible for any legal obligations created by his or her actions.

A person who has reached the age of majority is bound by any contracts, deeds, or legal relationships, such as marriage, which he or she undertakes. In most states the age of majority is eighteen, but it may vary depending upon the nature of the activity in which the person is engaged.” “Age of Majority.”

West's Encyclopedia of American Law. The Gale Group, Inc. 2005. Encyclopedia.com. 10 Oct. 2009 <http://www.encyclopedia.com>.

In addition, according to the Child Welfare Gateway, “[c]hildren can enter foster care at any age, from infancy up to age 18 years, and most exit by the time they are 18 years old. In some States, youth can remain in care past age 18 under special circumstances (for example, if they are in an educational program). In some States, youth who exit care at age 18 can sign themselves back into care to receive certain benefits, such as college tuition assistance available through Federal or State programs.” *Foster Care Statistics*, Child Welfare Information Gateway, Updated October 9, 2009. <http://www.childwelfare.gov/pubs/factsheets/foster.cfm#6>

It should also be noted that The United Nations Convention on the Rights of the Child defines a child as “every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.” PEAR notes the UNCRC definition even though the US has not ratified the UNCRC, because every country from which US citizens may adopt, with the exception of Somalia, has ratified the UNCRC. Thus, this Act will conflict with current International Law on the issue of majority and the definition of a child.

The Act also further expands the definition of orphan from our current definitions contained in the IAA Section 302 (a) and Immigration Laws (Section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. 1101(b)(1))). The Act conflicts with our current laws both by raising the age of children from 16 (18 in the case of biological siblings adopted by the same family) to 21 and by changing the circumstances under which a child may be considered an orphan. Currently, an orphan is defined as:

“(G) a child, under the age of sixteen at the time a petition is filed on the child’s behalf to accord a classification as an immediate relative under section 201(b), who has been adopted in a foreign state that is a party to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption done at The Hague on May 29, 1993, or who is emigrating from such a foreign state to be adopted in the United States, by a United States citizen and spouse jointly, or by an unmarried United States citizen at least 25 years of age— “(i) if— “(I) the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States; “(II) the child’s natural parents (or parent, in the case of a child who has one sole or surviving parent because of the death or disappearance of, abandonment or desertion by, the other parent), or other persons or institutions that retain legal custody of the child, have freely given their written irrevocable consent to the termination of their legal relationship with the child, and to the child’s emigration and adoption; “(III) in the case of a child having two living natural parents, the natural parents are incapable of providing proper care for the child;

(Section 101(b)(1) of the Immigration and Nationality Act)

Equally troubling is the inclusion of all children residing in institutions in the term orphan. According to the Act an institution is defined as:

- (A) an orphanage;*
- (B) a children’s home;*
- (C) a boarding school for orphans;*
- (D) a shelter;*
- (E) a residential facility;*
- (F) a hospital;*
- (G) a dormitory;*
- (H) long-term foster care; and*
- (I) any other setting in which permanent parental care is not being provided to the child.*

Under this definition, all children in US foster care would be considered orphans (paragraphs H and I), as would children of families residing in shelters (paragraph D), young adults 18-21 residing in shelters (paragraph D), students under 21 living in college and university dormitories (paragraph G), children and young adults under age 21 residing in mental health residential treatment centers (paragraph E), children and young adults residing in correctional facilities (paragraph E), students residing in boarding school dormitories (paragraph G), and young adults under 21 serving in the armed forces and living in barracks (paragraph G and I). We sincerely hope that this section and its possible applications were unintended consequences due to drafting oversights.

Overly Strict Definition and Requirements for “Permanent Parental Care”

The Act’s definition of Permanent Parental care states:

- (8) *PERMANENT PARENTAL CARE.*—*The term “permanent parental care” —*
- (A) *means a legally recognized relationship between a(sic) adult and a child who is younger than 21 years of age, which is life-long and provides a caring, safe, stable physical environment;*
- (B) *includes—*
- (i) *domestic and international adoption;*
- (ii) *legal guardianship; and*
- (iii) *legal kinship care; and*
- (C) *does not include temporary or long-term foster care, institutionalization, or mentoring.*

The definition of permanent parental care as worded in the Act can lead to the unnecessary and cruel act of removing children from caring homes and communities. Furthermore, a child found to be without permanent parental care can then be offered for domestic or international adoption.

PEAR has three major concerns with this definition:

- burden of identifying and codifying legally recognized relationships,
- possible manipulation of “caring, safe, stable physical environment” terminology
- failure to recognize alternate care situations that may be in the best interest of an individual child.

The Burden of “Legally Recognized Relationships” and Incorporation of First World, Western Legal Concepts

PEAR’s position: PEAR does not believe that the Act provides the level of study, understanding, expertise or value to structures present in the societies, cultures and legal systems of the nations with the greatest need for assistance in child welfare. This Act appears to be more about conforming laws and policies to the US western definition of family, children and proper care than about assisting countries in developing child welfare practices and policies that adequately address the needs, values, faiths and structures of the communities intended to be served.

Explanation: Many of the countries experiencing “orphan crises” are countries which also have legal systems that vary greatly from ours and do not consistently or reliably provide access to its most vulnerable citizens. In fact, many organizations provide programs specifically addressing this problem in the same geographic areas in which US citizens and Western Europeans adopt the most children via intercountry adoption.

According to the American Bar Association’s Rule of Law Initiative “The absence of effective bar associations, along with the lack of financial support and political will on the part of governments, contributes to an environment in which significant portions of the general public cannot obtain legal advice or equal access to the legal system.” ABA Rule of Law Initiative “Access to Justice and Human Rights Programs” <http://www.abanet.org/rol/programs/humanrights.html>. The ABA has been providing this assistance since 1990 (almost 20 years) and has served in over 130 countries, yet access to basic legal services in many of these countries remains limited and difficult.

It seems impossible that a country’s legal system and child welfare system could be retooled to match the paradigms of the Act the short periods provided under the Act (one to two years) without significant negative impact on its culture and upon its most vulnerable members. Without access to legal systems and legal advice, families and communities that rely on informal adoption, communal care and kinship care will be unable to comply with the Act and governments may be forced to remove children from their homes and communities in favor of international adoption in order to comply with the minimum requirements of the Act. This result, an initial increase in numbers of children available for international adoption, may indeed be a primary motivator in the formation of this Act.

A compounding factor in this analysis is the cursory nod to cultural sensitivity and cultural norms. While the Act provides a gratuitous mention of “cultural sensitivity” in developing policy under the Act, it only requires that cultural norms be taken into consideration to the extent that these norms conform with the Act. Hence, the Act gives only a cursory nod to cultural norms without making any real requirement for honoring cultural norms that differ from our own.

The World Bank’s Justice for Poor initiative attempts to provide “justice and governance reform, which values the perspectives of the users, particularly the poor and marginalized such as women, youth and ethnic minorities.” According to the World Bank, its initiative “recognizes that a large percentage of the community live under non-state or customary justice systems that are complex, numerous, and idiosyncratic. Such rules systems are deeply constituent elements of cultural norms and social structures, and, being unwritten, are extremely difficult for outsiders (national or international) to fully comprehend. Concepts of justice are closely intertwined with, and are embedded in, the social, economic, and political structures of a given society. Any attempt at pro-poor justice reform, therefore, needs to commence with a detailed understanding of these structures and processes (both formal and informal) whereby the poor achieve or are denied justice.

“About Us” Justice for the Poor, Last updated: 2009-03-13

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTJUSFORPOOR/0,contentMDK:21172652~menuPK:3282951~pagePK:210058~piPK:210062~theSitePK:3282787,00.html>

Possible Manipulation of “Caring, Safe, Stable Physical Environment” terminology

PEAR’s position: PEAR believes every child should have a caring, safe and stable physical environment. PEAR strongly feels that this portion of the definition of “permanent parental care” could be manipulated and abused to remove children from impoverished communities and/or cultures that differ with respect to Western concepts of care, safety and stability.

In addition, we also do not agree that the Act’s provision concerning cultural norms is strong enough to prevent the removal of children from care. If an NGO or service program trained under a western NGO should conclude that a particular norm falls outside of the purpose of the Act children could be removed and placed for adoption and the caregiver would have little to no recourse.

Failure to Consider Care Options that Lie Outside of “Permanent Parental Care”

PEAR’s position: PEAR believes that warehousing of children in large institutions that do not provide adequate affection, attention, education and care is harmful to children and not in their best interests. PEAR also acknowledges that some children can thrive in small group homes, foster families, and other community based care options that provide children with the opportunity to remain within their community and among the people they care for. Examples of successful models include some SOS Children’s Villages, Kitezh in Russia, Christ’s Home for Children in the US, and Shishur Sevey in West Bengal India. Instead of barring any type of alternative community care, the Act should contain provisions to explore innovative options that meet the varied needs of children and serve their best interests.

Explanation: The Act provides that: “The right of a child to grow up in a safe, loving and permanent loving relationship with a responsible adult is a basic human right.” That provision coupled with the definition and requirements of permanent parental care for children fails to take into consideration the individual needs of children and alternative care options that do not require removal of children from their communities, extended families and peer relationships.

The Act’s failure to allow for alternative care options such as long-term foster care, mentoring and institutionalization may deprive older children of viable options, may separate sibling groups, or may result in the disruption of treatment services, educational opportunities or life goals of the children involved. This especially true for older children and for those children with trauma histories, behavioral issues, and/or cognitive or psychological disorders that are being successfully treated within their community, yet outside of permanent parental care as defined by the Act.

2. The Act as written appears to violate US Law, International Law and treaties such as UNCRC by not considering the rights, needs and best interests of each individual child

PEAR's position: The rights, needs and best interests of children must be put first in deciding on adequate care when parents are unable to care for their children. The rights and desires of ASPs, foreign governments, and PAPs should never come first nor be the motivator for determining whether a child can be best served within his/her community or abroad. The Act appears to assume that permanent parental care is always in the best interest of *all* children. There may indeed be instances where providing permanent parental care, as defined by this Act, may not be in the best interests of the individual child. By eliminating opportunities for communities to provide long term care for children some children may needlessly suffer interruption of education, mental health services, medical services or extended familial relationships that are within their best interests to maintain. Making this type of sweeping assumption that does not take into consideration the individual child's best interest is unconscionable.

Explanation: Current International Law, found in the UNCRC states as follows:

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

and

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration

(again, although the US has not ratified the UNCRC, every country, with exception of Somalia, from which US citizens adopt has ratified it and is subject to it)

Current US law, in all 50 States, requires the consideration of the best interests of the individual child in determining custody and placement of children. Javad Namazie, Family Law Chapter: Child Custody and Visitation, 7 GEO. J GENDER & L. 1017, 1018-19 (2006). This concept is reiterated in the National Association of Social Workers Standards for Social Work Practice in Child Welfare.

<http://www.socialworkers.org/practice/standards/NASWChildWelfareStandards0905.pdf>

The Act provides for a principle of subsidiary, ie the order in which placement options can be made. The Act's subsidiary requirements are found in section 101(c)(3)(D):

PRINCIPLE OF SUBSIDIARITY.—In developing policies and programs under this Act, the Coordinator should—

- (i) attempt to reunify children with their family before pursuing adoption, legal kinship or legal guardianship and domestic adoption; and*
- (ii) ensure that reasonable efforts have been made to provide permanent parental care domestically before international. This rule of subsidiary echos that found in the UNCRC but does not provide for as wide a range of alternative local care options nor does it mention any consideration of determining what is in the child's best interests.*

However, the principle of subsidiary in the Act contains no mention of consideration for the individual child's best interests.

Although the Act contains requirements for the provision of permanent parental care and requirements for subsidiarity in determining placement options, nowhere is there a provision for determining placement options within the child's best interest. In fact, there is no mention in any part of the Act of consideration of what is in the individual child's best interests. Best interests are not even mentioned once in the Act. The only right of children acknowledged in the Act is a play on the UNCRC right of a child to grow up in his/her family by creating a human right for all children to grow up in *a* family.

3. The Act places an unnecessary and unethical pressure on countries by tying aid and the release of debt to the acceptance of international adoption as well the incorporation of US first world standards and definitions of proper care and "family".

PEAR's position: PEAR has deep concerns about the ethical consequences of linking aid and debt forgiveness to the willingness of developing countries to place their children for intercountry adoption. The Act clearly creates financial incentives for developing countries to participate in intercountry adoption. To qualify for assistance of any type, the country must substantially meet or be working to meet 18 individual minimum standards including that the country must allow for international adoption.

Explanation: The Families for Orphans Coalition attempts to downplay this requirement by stating "The minimum standard for IA is that the country must allow IA – it does not state that the country must conduct IA". However, reading the requirements and the Act in its entirety clearly shows that countries must participate in intercountry adoption if the child cannot be placed in permanent parental care within the country. Our question to the Coalition and drafters of this Act is why include the requirement that a country *must* allow for intercountry adoption if intercountry adoption does not have to be conducted to fulfill the Act's requirements?

In addition, linking aid and debt forgiveness to the acceptance of US standards of child welfare and especially the Act's concept of legally recognizable, permanent parental care when the underlying cultural, legal and/or social service foundations do not exist in these countries to adequately support these standards is extremely concerning. Without these foundations, the Act will fail to protect vulnerable families and children from unnecessary separation and governmental interference. Governments unable to meet the standards of the act due to the lack of these foundations may be willing to "sacrifice" children to intercountry adoption in an effort to conform with the Act and continue to qualify for aid.

4. The primary beneficiary of this legislation will be the NGOs that rely on international adoption for their existence

PEAR's position: After continued analysis and discussion of the components of the Act, PEAR concludes that this piece of legislation is not aimed at assisting the world's orphans, but rather as an economic stimulus package for adoption service providers and organizations whose financial health relies on the continuation of a brisk and uninterrupted business in international adoption. In the past few years international adoptions have decreased overall. The result to adoptions agencies and supporting organizations has been a decrease in revenue. Some agencies have been forced to close. This brings about questions on the motivation behind this legislation as well as the ultimate goals achieved when these policies are subsequently enforced.

Explanation: Of the \$16 M appropriated for this Act's implementation:

~\$3M will be appropriated to creating the new office in the DOS; most of the positions and delegated responsibilities will fall to current organizations involved in intercountry adoption and their individual members. The Act specifically allows the Coordinator (who must have experience in permanency related policies and systems) to delegate many of his/her duties to NGOs with experience in intercountry adoption;

~ \$5 M will go to foreign governments for social services in support of the Act, however, these governments must agree to allow for IA and must agree to accept the Act's definitions of family and proper care of children;

~ \$5 M in grants will go to current US organizations (e.g. ASPs and the Act's biggest supporters: NGOs like JCICS, Kidsave, NCFCA, and the World Wide Orphan Foundation) to assist foreign governments in creating programs in conformity with the Act;

~ \$3 M will go to current NGOs involved in IA and child welfare, including the Act's biggest supporters, to study and establish "global best practices."

As can be clearly seen, *over two thirds of the \$16M budgeted could go directly to NGOs* and their individual members who rely on intercountry adoption for their financial success. In addition, the Act ensures the continuation of intercountry adoption and adoption service provider friendly policies and procedures by placing someone from the industry in a position of policy making authority within the DOS.