Children's Amendment Bill [B18-2020]

Submission from the Children's Institute, UCT

To the Portfolio Committee on Social Development

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Overview of the CI's written submission

- Orphaned & abandoned children in the care of family members
- Children's court jurisdiction to hear guardianship matters
- Parental responsibilities and rights of unmarried fathers
- Positive parenting
- Temporary safe care
- Children's right to privacy in children's court
- Partial care and early childhood development

Full written submission is available here

Focus of oral submission

- Orphaned & abandoned children in the care of family members

  Sections 150(1) (a) & s159

- Parental responsibilities and rights of unmarried fathers

  Sections 21 & 21A

- Positive parenting

  Sections 1; 12, 18, 110(2); 114 (1) (a); 144

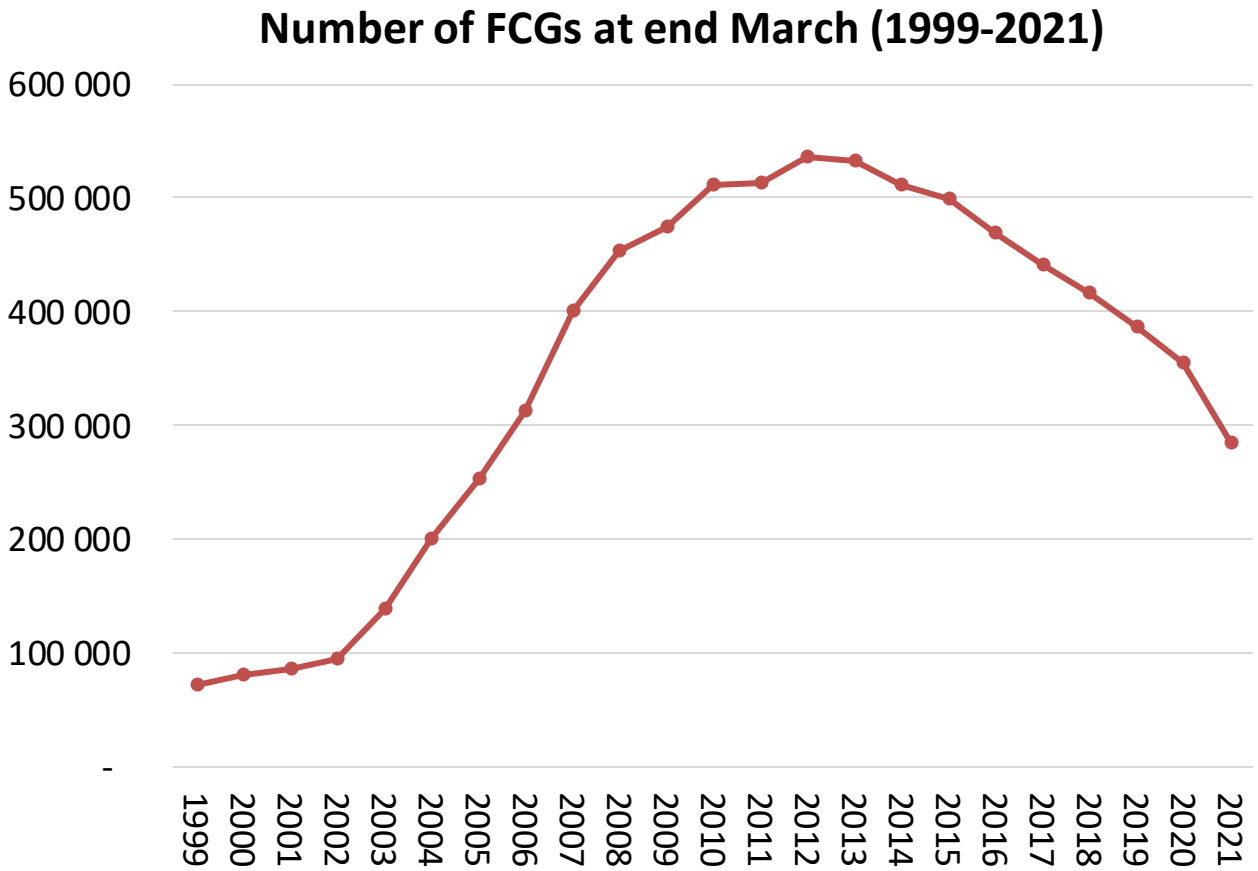
The foster care crisis

- Early 2000's: relatives caring for orphaned children were **encouraged to apply for foster care**.
- Foster care system is a **labour-intensive system** with lots of checks and balances because foster care is **alternative care**.
- The **system could not cope** with the number of cases.
- In 2011 over 120 000 children lost their FCGs and a further 300 000 were at imminent risk. The High Court ordered DSD to design and implement a **comprehensive legal solution** by 2014.

A decade of chasing the backlog

- At first DSD **delayed on the required law reform** and instead focused on trying to fix the problem 'administratively'.
- A decade of DSD using the scarce resources of the child protection system to '**chase the backlog**' of expired foster care orders.
- This **impacted negatively on social worker and court time** needed to provide protection services to abused and neglected children.
- It has also resulted in a steady **decline in foster care numbers** due to fewer new foster care placements being made.

Rapid decline in foster child grants



- FCGs grew rapidly during 2000s, then stalled.
- Numbers declined steadily since 2013.

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Rapid decline in foster child grants

Year	FCGs in payment	Diff from previous year	% change year-on-year
2013	532 159	-4 588	-1%
2014	512 055	-20 104	-4%
2015	499 774	-12 281	-2%
2016	470 015	-29 759	-6%
2017	440 288	-29 727	-6%
2018	416 016	-24 272	-6%
2019	386 019	-29 997	-7%
2020	355 610	-30 409	-8%
2021	**?**		

- The table compares FCG numbers as at end March.

Prioritise the Comprehensive Legal Solution

Part 1:

✓ CSG Top-Up legislated!

✗ But not budgeted for…

Part 2:

➔ Clarify in s150(1)(a) of the Children's Act when orphaned and abandoned children are:

a) in need of **care & protection** services

= FCG

b) in need of **cash** & **prevention** services

= CSG Top-Up

S150(1) (a) DSD's proposed wording

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150(1) A child is in need of care and protection if, the child -

(a) has been abandoned or orphaned and **[does not have the ability to support himself or herself and such inability is readily apparent]**; has no parent, guardian, family member or care-giver who is able and suitable to care for that child;

We support the intention, BUT

- It must be combined with an adequate replacement grant (CSG top-up)
- It requires revision to the wording…

Concerns with s150(1) (a)

Exclusion is too broad

- Danger that children found abandoned or orphaned will be placed informally by social workers with distant relatives with whom there is no bond, without traceable system for follow up support or supervision.

- We recommend that s150(1)(a) be worded slightly differently to focus on the question of whether or not the child is already in the care of a family member (rather than whether they 'have' such a family member somewhere or whether the caregiver they are living with is a 'suitable' person):

S150(1) (a): CI's proposed wording

150(1) A child is in need of care and protection if, the child -

(a) has been abandoned or orphaned and is not in the care of a family member as defined in section 1;

Duration of alternative care orders - s159

- S159 of the Act provides that alternative care orders can be made for a max of 2 years and that the court can extend them for a further 2 years at a time
- Due to the high number of children in the foster care system - this legal requirement cannot be met. This has necessitated the five High Court orders since 2011 aimed at preventing FCGs from lapsing.
- The Bill proposes an amendment to s159 (new 2A) to allow for alternative care court orders that have expired to be brought to the children's court for extension after they have expired.
- We oppose this amendment
  - it is simply delaying the backlog to another day
  - does not ensure that the child's FCG remains in payment during the period of expiry of their court order.
  - it will disadvantage the 23 000 children in CYCCs who need regular review of their placements

Prevent regressive action

- Most of the 300 000 children in the foster care system are orphaned children living with relatives. Once the bill becomes an Act, they will be at risk of losing their foster care orders and consequently their FCGs.
- When their case comes back to the court for review in terms of s159, the children's court will review their case against the new criteria in the amended s150(1)(a). Magistrates may interpret this to mean that existing foster care placements of orphans with family members must be terminated.
- This needs to be **explicitly prevented** as would constitute **regressive action** for the children and families already in receipt of the FCG.
- A **transitional clause** can prevent this happening

Proposed transitional clause - s159 (2B)

(2B) Notwithstanding the amendment to section 150(1)(a), an order placing an orphaned or abandoned child in foster care with a family member in terms of section 156 before or on the date of commencement of this Amendment Act, may be extended by the court in terms of section 159(2) or section 186(2).

PRRs of unmarried fathers -s21

- Section 21 sets out the circumstances when an unmarried father is considered by the law to have automatically acquired PRRs.
- For example if he lived with the mother at the time of the child's birth, or he has paid damages or consented to be identified as the child's father on the birth certificate.
- It also provides for a mediation process if there is a dispute, and court review of the mediation.

Challenges with s21 and support for new s21(1A)

- A challenge with s 21(1) is that the father has no document which he can present in the event that he must show he holds PRRs to a third party such as a medical aid, life insurance company or a government department.
- This a particularly a challenge when the mother has died or abandoned the children with the unmarried father and is compounded by the fact that over 65% of children born to unmarried fathers do not have their father's details on their birth certificate
- The proposed amendment to 21 (1A) is aimed at addressing these challenges by enabling a family advocate to issue a **certificate confirming that an unmarried father has automatically acquired full PRRs in terms of s21(1).**
- We support this amendment: It is a positive development that could reduce the number of instances where unmarried fathers have to approach courts for an official document to confirm his PRRs.

Proposal to strengthen s21 certificate process

To strengthen this amendment we make two proposals:

1. Enable Children's Court's to also provide s21 certificates

- Family advocate's office does not have a presence in all areas, especially rural towns. But almost every rural town does have a Children's Court.
- Capacity constraints often hamper the Family Advocate office from meeting the demand and there are long waiting lists.

2. Ensure children whose mother has died or abandoned them can also benefit from the advantages of the s21 certificate process

- The proposed certificate process currently does not cater for a situation where the mother has died or has abandoned the child with the unmarried father. The section should be amended to include these circumstances.

Proposed additions to s21(1A) underlined

s21(1A) A family advocate or a children's court may, in the prescribed manner, issue a certificate confirming that the biological father has automatically acquired full parental responsibilities and rights in terms of subsection (1)(a) or (1)(b) on application from—

(a) the mother and biological father jointly;

(b) the biological father, after reaching an agreement during the mediation process referred to in subsection (3); or

(c) the biological father, if—

(i) in terms of subsection (3), he referred the matter for mediation and the mother, after receiving such notice of mediation, unreasonably refused to attend the mediation, or

(ii) the mother's whereabouts are not known or she is deceased; and

(iii) the biological father has shown to the satisfaction of the family advocate or the children's court that he has automatically acquired full parental responsibilities and rights in terms of subsection (1)(a) or (1)(b).

Corporal Punishment

- The CI provided expert evidence to both the High Court and ConCourt showing that corporal punishment is violence and it can have serious and long-lasting effects including driving an intergenerational cycle of violence.
- The ConCourt declared that the defence of reasonable chastisement is a violation of children's rights and that any form of corporal punishment, no matter how light, is assault
- Therefore this bill should include:
  - **A clear prohibition** of the use of corporal punishment
  - A specific **obligation on the state to provide parenting programmes** to support behaviour change e.g. learning positive discipline techniques
  - **A clear referral mechanism for corporal punishment cases from the justice system to the welfare system-** child protection services are better placed to investigate reports and assess the needs of children
  - **A mechanism for referring parents to prevention and early intervention programmes**–criminal prosecution should be a measure of last resort, reserved for serious cases and repeat offenders