Children's Institute's submission on the Children's Amendment Bill 18 of 2020

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1. Introduction

The Children's Institute (CI) is a multi-disciplinary unit in the Health Sciences Faculty of UCT. We envision a society in which children are valued, nurtured and protected; their rights are realised and where they are able to participate, develop and reach their full potential. We aim to contribute to the development of laws and services that promote equality and realise the rights of all children in South Africa. This is achieved through developing an evidence base; using this to advocate for policy, law and service reform that is in children's best interests; and educating service providers for effective implementation. Set against a human rights framework, we focus attention on key challenges facing children in South Africa - poverty, inequality, violence and trauma.

Since its establishment in 2001, the CI has earned a reputation as a leader in child policy and law reform, and our work is widely recognized and relied upon by government, civil society and donors. Over the past decade the CI has contributed significantly to a number of policy, legislative and budget reforms, in the areas of social assistance, child protection services, and early childhood development. These contributions have resulted in improved access to grants, welfare services and early childhood development for millions of children. The CI has led a number of alliances and is well-known for promoting rights-based, participatory, and evidence-based approaches to debate and decision making.

The Children's Institute has been participating in the making of the Children's Act since 2001 when it was first conceptualised. It is complex law in many respects - we are constantly humbled and educated by the experiences of children, their parents and caregivers, and the many practitioners who grapple with this complexity on a daily basis. Our written submission is aimed at strengthening and improving the law in the best interests of all the children dependent on it for development, care and protection.

2. Orphaned and abandoned children in the care of family members

2.1 Introduction

In this part of our submission, we comment on amendments that affect orphaned and abandoned children in the care of relatives.

- s1 – defines when a child is considered abandoned or orphaned and who is considered a family member
- s24 (1), 45(1) & 45(3) – determine which courts can help a family member obtain legal guardianship for the children in their care
- s150(1) (a) - defines when an orphaned or abandoned child will be considered by social workers and the court to be in need of state care and protection and therefore able to be placed in foster care, and benefit from supervision services and a foster care grant
- s156(1) - outlines the orders that a children's court can make if it finds a child to be in need of state care and protection
- s159 - sets the duration of alternative care orders at 2 years and requires 2 yearly review and extension of orders
- s186 (2) &(3) - provides an exception to the rule in s159 by allowing the children's court to place children in foster care with relatives for longer than 2 years and until the child reaches the age of 18 years

2.2 Context

In South Africa, approximately 3.9 million children live with and are cared for by family members such as grandparents, aunts, uncles or siblings, without their biological parents being present in the household.[1] Older children are more likely than younger children to be living with relatives. Care of children by relatives, and frequent movement of children between households, has been a feature of childhood in South Africa for many years. This is due to a range of factors including customary practice, population control under Apartheid, labour migration, poverty, housing, schooling, low and continually declining marriage rates, and death of parents.

[1] Hall K (2019). *Demography of South Africa's children.* In Shung-King M et al (Eds) South African Child Gauge 2019. Children's Institute, University of Cape Town. Pg 217

In 2018, approximately 600 000 of the children living with relatives had been orphaned by the death of both parents, or one parent had died and the other had abandoned the child (absent and providing no care or support).[2] About 50% of them were already in foster care and receiving a Foster Child Grant (FCG) of R1000/month, while the other half were living informally with a family member with 30% receiving a Child Support Grant (CSG) of R430/month and 20% receiving neither of these grant. The reason why only 50% were receiving the FCG is because the foster care system was not designed to support such large numbers of children and has therefore been unable for the past 10 years to reach all eligible orphans. This is despite significant increases in the numbers of social workers over this period of time. The foster care system was designed for children who need state supervision and care because they have been abused, neglected, or do not have anyone to care for them. It is a highly regulated system with many checks and balances aimed at ensuring the child is protected from further harm, work is done to possibly re-unify them with their family of origin, and their care plan is reviewed and updated every 2 years. It was not designed to be a mechanism for providing income support for large numbers of children who are predominantly already in the care of family members.

In 2011 when the foster care system was straining under a case load of over 500 000 children, 120 000 lost their FCGs due to their court orders not being reviewed and extended every 2 years as is required by s159 of the Act. Another 300 000 were at imminent risk of losing their FCGs and a further 700 000 orphans were eligible but not able to access the system. As a result of this crisis, the High Court ordered the Minister and Department of Social Development to design and implement a comprehensive legal solution.[3] This solution would need to ensure sustainable support to the majority of family members caring for orphaned and abandoned children, and reduce the foster care caseload carried by social workers and courts.

In October 2020, Parliament passed the Social Assistance Amendment Bill as the first part of the comprehensive legal solution.[4] This Bill empowers the Minister of Social Development to pay a higher Child Support Grant (CSG) to relatives caring for orphaned and abandoned children living with relatives. When implemented (hopefully April 2021), this 'CSG Top-Up' will replace the use of the FCG for <u>new</u> applications by family

[2] Hall K (2020). Analysis of the 2018 October GHS and NIDS 2018 data. Note that this includes all double orphans but not all single orphans. The majority of single paternal orphans (children whose fathers' are deceased) are in the care of their mothers and those that are not, tend to still have contact with their mothers and are therefore not abandoned.

[3] Centre for Child Law v Minister of Social Development and Others (North Gauteng High Court) Case number 21726/11. Order of 10 May 2011a. Reported in: Government Gazette No. 34303. Notice 441. 20 May 2011

[4] B8B of 2018

members caring for orphaned or abandoned children, while orphaned and abandoned children in the care of family members who are already on the FCG will remain in the system until they age out at 18 years (or 21 if they are still in education). Over the next 5 to 10 years, the FCG will revert to being used for 'classic' foster care cases.

The second part of the solution requires amendments to the Children's Act. These are needed to clarify which orphaned and abandoned children should go into the child care and protection system and therefore into foster care, versus those who simply need the CSG Top-Up and support services. To do this, s150(1) (a) of the Act needs to be amended. Other sections also need amendments to make it easier for family members to formalise their parental responsibilities and rights, to deal with the backlog of extensions over the next few years until it is reduced by the majority of children aging out of the system, and to prevent existing FCG beneficiaries from losing their grants. Below we comment on the proposed amendments to these sections.

The majority of family members caring for orphaned or abandoned children require support from the state, but not supervision or statutory services.[5] The support these children and families need includes:

(a) an adequate social grant if they do not have enough money to provide for the child's basic needs;
(b) access to a range of 'promotive' and 'prevention' services – including ECD, child and family counselling, support groups, parenting programmes, safe parks;
(c) access to a range of options to formalise parental rights and responsibilities if needed, including guardianship; and
(d) like all other children in South Africa, orphaned and abandoned children also need to be able to access responsive child protection services if they are experiencing abuse, neglect or exploitation.

[5] Department of Social Development (2019) National Child Care and Protection Policy. Pg 48 - 49

2.3 The amendment bill and our submissions on how the bill needs to change

Children in need of care and protection [s150(1)(a)]

s150(1) (a) defines when an orphaned or abandoned child will be considered by social workers and the court to be "in need of care and protection" and therefore able to be placed in foster care, receive supervision and a foster care grant. For this reason it is considered the 'gateway' clause for foster care.

Section 150(1) (a) currently reads as follows:

> 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;

This wording means that all orphaned and abandoned children in the care of relatives should be considered in need of care and protection because no child is able to support him or herself. The proviso in s150(1) (a) therefore does not help to clarify which orphaned or abandoned children need care and protection. It has been agreed by civil society and the department of social development that orphaned or abandoned children who are in the care of family members, should not automatically be considered to be children in need of statutory care and protection.

The Amendment Bill therefore proposes to change s150(1) (a) as follows:

> 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]**; <u>has no parent, guardian, family member or care-giver who is able and suitable to care for that child</u>;

This wording makes it clear that abandoned or orphaned children who are in the care of the other parent, a legal guardian, family member or caregiver are not in need of care and protection, unless that current caregiver is not able or suitable.

✓ We support the intention behind this amendment. We believe that this amendment, combined with an adequate replacement grant in the form of the CSG Top-Up, will reduce the number of children referred to the foster care system. This will reduce the high foster caseload being borne by social workers and courts and free them up to provide better quality protection and care services to children who have been abused, neglected or exploited (orphans and non-orphans).

However, we have two concerns. Firstly, we are concerned that the amendment goes too far because it implies that even babies abandoned on the side of the road may be excluded from the protection of s150(1) (a). We recommend that only children who are already in the care of a family member should be excluded, and not children who may have a suitable and able caregiver that is yet to be located and approached. With the wide ambit of the proposed wording, there is a danger that children found abandoned or orphaned will be placed in temporary safe care for long periods of time while a family member is being located and persuaded to take the child. Or they could be placed informally by social workers with a distant relative that they do not know and there will be no trace of the child in the system or follow up support or supervision.

There is a substantial difference from a child rights perspective between an existing caregiver that the child knows and is attached to and has already bonded with, versus a new caregiver that the child has no bond with. Therefore if a previously uninvolved and relatively unknown distant relative is found in another province and they indicate they are able to care for a child that has been recently orphaned, that placement should be a foster care placement to enable the state to supervise and monitor the placement for the first two years. If the child and relative are both happy with the arrangement, it could be converted to guardianship after the first two years.

✎ We therefore 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 and not whether they 'have' such a family member:

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;

Note that section 1 defines a family member as:

(a) a parent of the child;
(b) any other person who has parental responsibilities and rights in respect of the child; *[eg a guardian]*

(c) a grandparent, brother, sister, uncle, aunt or cousin of the child; or

(d) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship; *[eg a neighbour the child has lived with for the past 5 years]*

- Secondly, we recommend that the words 'suitable and able' be removed because they are unnecessary. The Act already covers situations where a child's caregiver is not suitable or able to care for the child in the other sub-sections in s150(1). For example, if a child is found by a social worker to be in the care of a relative and the social worker finds that the relative is not suitable or able to care for the child because the relative is addicted to drugs, the social worker would need to open a child protection inquiry based on one of the other grounds listed in s150(1) eg. '(f)the child lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;' or '(h) the child is in a state of physical or mental neglect; '

Definition of abandoned child [s1]

The definition of an abandoned child needs to be read together with s150(1) (a) as it is in this context that it is most used.

The proposed amendment reads as follows:

> **abandoned <u>child</u>' [, in relation to a child,]** means a child who—
>
> *(a)* has **[obviously]** been deserted by **[the]** a parent, guardian or care-giver; **[or]**
> *(b)* **[has,]** for no apparent reason, had no contact with the parent, guardian or care-giver for a period of at least three months; or
> *(c)* <u>has no knowledge as to the whereabouts of the parent, guardian or care-giver and such information cannot be ascertained by the relevant authorities</u>;

The rationale for including sub-section (c) in the definition is not provided in the memorandum to the bill. It is therefore not clear what challenge it is aimed at addressing or how it will further improve care and protection for children. We recommend that Parliament ask DSD to clarify its

intent behind this amendment and also to elaborate on who the 'relevant authorities ' are and how they will be resourced and capacitated to investigate and find missing parents. The current practice is for social workers to publish an advert in the local newspaper with a photo of the child and a request for anyone who knows the child to come forward. However, these adverts are costly (especially for NPOs who are not subsidised to cover the cost) and ineffective in tracing parents, especially parents who do not want to be found. Furthermore, finding parents who have abandoned their children, will not render the children no longer abandoned, especially if the parent is not willing to be a parent.

Definition of an orphan [s1]

The definition of orphan needs to be read together with s150(1) (a) as it is in this context that it is most used. Some social workers and magistrates have interpreted the current definition narrowly/incorrectly to exclude many maternal orphans who are living with relatives and their father's whereabouts are unknown.

The proposed amendment reads as follows:

> **'orphan'** means a child **[who has no surviving parent caring for him or her]** <u>whose parent or both parents are deceased;</u>

✓ We support the proposed amendment as it makes it clear that children who have lost one parent are also orphans.

Guardianship applications by family members [s24, 45(1) & 45(3)]

Guardianship is important because there are certain things that guardians (rather than caregivers) must decide on or agree to on behalf of a child. Mothers of children are guardians, married fathers are guardians, and some unmarried fathers are guardians. In South Africa we have many children living with family members by family arrangement or due to being placed in foster care – but their caregivers or foster parents are not guardians.

Under the Children's Act, family members would have to bring an application to the High Court, which costs money because they will need to travel far and have an attorney or advocate who can appear in the High Court. It would be much closer and less costly if they could go to the children's court, which is in the local magistrates' court.

Access to guardianship applications at children's court level will therefore improve access to court for family members looking after orphaned and abandoned children, and for this reason the children's rights movement has for a number of years been advocating for the children's courts to be able to hear applications for guardianship. The Children's Court routinely deals with adoption applications which have more far reaching implications than guardianship. There is therefore no reason why they cannot adjudicate over guardianship matters. We are therefore pleased to see that the tabled Amendment Bill [B18 of 2020], proposes amendments to enable the children's court to hear guardianship applications in these instances.

The problem is that the Amendment Bill creates uncertainty about whether all cases of guardianship can be brought to the children's court or only those relating to orphaned or abandoned children.

The Children's Act currently only allows the High Court to hear applications concerning guardianship of children. This restriction on the Children's Act's jurisdiction appears in section 24(1); 45 (1) & 45(3). All 3 of these sections therefore need to be amended if Parliament's intention is to enable the children's court to also hear guardianship matters. While the amendments proposed to s45(3) are clear, the amendment proposed to s45(1) restricts the children's court to cases of orphaned or abandoned children, and there is no amendment proposed to s24(1). This creates uncertainty.

We therefore propose amendments to s24 and 45(1) (c) to make it clear that the children's court can hear all guardianship matters and not just cases involving abandoned and orphaned children.

Assignment of guardianship by order of court

24 (1) Any person having an interest in the care, well-being and development of a child may apply to the High Court or the children's court for an order granting guardianship of the child.

Matters childrens court may adjudicate

45 (1) Subject to subsection 1(4), a children's court may adjudicate any matter, involving -

'(bA) guardianship of a child as contemplated in section 24'

Orders the court can make after finding a child in need of care and protection [s156(1)]

Section 156(1) provides a range of orders that the children's court can make after it has found a child to be in need of care and protection. Sub-section (4) provides that if a court finds that a child is not in need of care and protection, it may also issue an order referred to in subsection (1), except for a 'placement' order.

The bill proposes the following insertion to subsection (1),

(cA) that the child be placed in the care of a parent or family member, if the court finds that such person is a suitable person to provide for the safety and well-being of the child;

Because this is a 'placement' order, this option will only be available to the court if the court has found the child to be in need of care and protection. The inclusion of this option is supported as it will formalise the practice of informally placing children with other family members after their parent or caregiver has been found to have abused, neglected or exploited them. Formalising the practice ensures that the case is logged on the system and the child and family receives re-unification services and supervision. Informal placements with family members in cases where a biological parent has abused or neglected child, can put child at risk as there is nothing stopping the child from returning to the abusive parent or the abusive parent from removing the child from the family member's care.

It must however be noted that if the child has been orphaned or abandoned and is already in the de-facto care of a family member, the court will not be able to 'place' the child in that caregiver's care using s156(1) (cA) because in these cases the court will not be able to find the child to be in need of care and protection [due to the amendment to s150(1) (a) proposed by the Department].

- If the intention behind the insertion of sub-section (cA) was to cater for the need to formalise the care arrangements of orphaned or abandoned children living with family members, it would be better to make an amendment to s46 (1), which deals with all the orders a children's court may make, not just the protection orders, and phrase it as follows:

46. (1) A children's court may make the following orders:

(aA) an order confirming or granting parental responsibilities and rights in terms of s23 and s24 to a family member caring for a child

Duration of alternative care orders [s159]

The Act currently provides in s159(1) & (2) that alternative care orders can be made for a maximum period of 2 years and that the court can extend them for a further 2 years at a time after a social work report and review hearing by the court. Because there are a high number of children in the foster care system compared to the low number of social workers - the legal requirement of two yearly social worker reports and court reviews of all children in foster care cannot be implemented. This is why DSD has been chasing a backlog for ten years. This in essence is the foster care crisis. This has necessitated the five High Court orders (2011, 2014, 2017, 2019, 2020) aimed at preventing these children's grants from lapsing. There are three options to solve the crisis':

(1) reduce the number of children in the foster care system by designing an alternative system of providing social grants to the children who do not need social workers or courts to intervene in their care arrangement;
(2) double the number of social workers; or
(3) change the foster care system from a system for children in need of alternative care, to a system for children in extended family care.

Option 1 is being given effect to by the combination of the CSG Top-Up and the amendment to s150(1) (a) above.

Option 2 has been pursued by DSD for the past ten years but is not economically feasible nor the best use of social workers' time.

Option 3 is being partially put into effect via the amendments to s159(2A) and s186(3).

In practice the first part of the amendment to s159(2A) would mean that alternative care court orders that have expired can be brought to the court for extension after they have expired. This will affect the 23 000 children in child and youth care centres, an unknown number of children in temporary safe care and 350 000 children in foster care.

The problem with option 3 is that it does not take into account that there are approximately 60 000 children in the foster care system and 23 000 children in child and youth care centres who need the two-yearly period court review required by section 159(1) & (2) to ensure the social workers and courts are working on family re-unification or permanency care plans. This is because they have been removed from their parents due to abuse, neglect or exploitation, or have been abandoned or orphaned and have no family member to care for them. Regular periodic review is an international requirement for children in alternative care. This is because alternative care should be a temporary placement pending family re-unification, and the review process is aimed at holding social workers accountable for doing family re-unification work. If the law allows orders to lapse with no consequences for those responsible for reviewing and extending them, there is a substantial risk this will become standard practice which means the majority of alternative care orders could run over 2 years. As there is no time limit imposed by the amendment, an order could be many years overdue for extension before it receives attention. Behind a these alternative care orders are approximately 83 000 very vulnerable a children who need a social worker to work their case and ensure they can either be re-unified with their family of origin, put up for adoption or their care planned otherwise adapted to ensure permanency and stability.

However, periodic review is not necessary if the children are already in family care and there is no prospect of them being re-unified with their biological parents due to them being deceased or having disappeared. This is the case for approximately 300 000 of the orphaned and abandoned children currently in foster care with extended family, and the other 300 000 not yet in the system.

- We therefore recommend that the amendments proposed to s159 (2A) should be clearly marked as transitional, timebound provisions that are restricted to cases of orphaned or abandoned children in foster care with family members. This relaxation to the s159 process should not be allowed if the case involves an abused or neglected child who has been removed from their parents and placed with a foster parent (whether or not related) or in a child and youth care centre.

  (2A) For three years from the date of commencement of this Act, in relation to orphaned or abandoned children in foster care with family members, a court may extend an order that has lapsed or make an interim extension of an order for a period not exceeding six months, on good cause shown and if such an extension will be in the best interests of the child.

Note also that this provision will not prevent SASSA from stopping payment of the FCG on the day the foster care order expires. A valid court order is a requirement set in the Social Assistance Act for continued payment of the FCG. The proposed s2A amendment will only ensure that

the FCG will later be re-instated and back payed when the extension order is finally submitted to SASSA. FCGs will therefore still lapse for a period of time if this provision is used. A substantial number of grants will lapse if this becomes standard practice. This provision is therefore not aimed at ensuring the child continues to receive the FCG uninterrupted and therefore is not a comprehensive solution to the foster care crisis.

Protecting children already in foster care from losing their FCGs [proposal for a new clause s159(2B)]

Once this bill becomes an Act, approximately 300 000 orphaned or abandoned children who are already in foster care with family members are at risk of losing their foster care orders and consequently their FCGs. This is because when their case comes back to the court for review in terms of s159, the children's court will review their case against the criteria specified in s150(1) (a). Because s150 (1) (a) is being amended to exclude new applications for foster care by family members caring for orphaned or abandoned children, it could be interpreted by magistrates to mean that existing foster care placements of orphans with family members must be terminated. This needs to be explicitly prevented as it will constitute regressive action for the children and families already in receipt of the FCG.

✎ We therefore recommend the following transitional clause.

> (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 this Amendment Act, may be extended by the court in terms of section 159(2) or section 186(2).

Long term foster care placements with relatives [s186(2)& (3)]

The bill proposes amendments to s186(2) and (3) which are aimed at encouraging social workers and courts to make long term foster care placements or extensions for children in the care of family members, especially in the case of orphaned or abandoned children. This is aimed at reducing the need for review of these placements. If effective, these amendments may be helpful in reducing the backlog during the transition period of the first three years. However there is no guarantee that these small changes will persuade social workers or courts to move away

from two yearly reviews as each social worker and court is entitled to exercise their discretion and the default and common practice is two year placements and two yearly reviews ito s159(1) & (2).

Once there are no more orphaned or abandoned children in the care of family members in the foster care system, the rationale for these clauses may become redundant.

Summary table:

Section	Concerns	Our proposal
Def of orphan s1	*Support* A child whose mother has died and whose father's identity or whereabouts is not known, is in the same situation as a child whose father has died.	
Abandoned child s1	*Not enough information provided* The rationale for including sub-section (c) in the definition is not provided in the memorandum to the bill. It is not clear what challenge it is aimed at addressing or how it will further improved care and protection for children. We recommend that Parliament ask DSD to clarify its intent behind this amendment and also to elaborate on who the 'relevant authorities ' are and how they will be resourced and capacitated to investigate and find missing parents. The current practice is for social workers to publish an advert in the local newspaper with a photo of the child and a request for anyone who knows the child to come forward. However, these adverts are costly and ineffective in tracing parents, especially parents who do not want to be found. Furthermore,	

	finding parents who have abandoned their children will not render the children no longer abandoned, especially if the parent is not willing to be a parent.	
Guardianship s24 & s45 (1) (c) & S45(3)	We support the amendments to s45(3) as these will ensure that family members caring for orphaned and abandoned children, and unmarried fathers will be able to apply for guardianship at the children's court. The children's court is more accessible on a physical and economic level to the majority of people. We propose amendments to s24 and 45(1) (c) to make it clear that the children's court can hear all guardianship matters and not just cases involving abandoned and orphaned children.	**Assignment of guardianship by order of court** 24 (1) Any person having an interest in the care, well-being and development of a child may apply to the High Court <u>or the children's court</u> for an order granting guardianship of the child. **Matters children court may adjudicate** 45 (1) <u>(bA) guardianship of a child as contemplated in section 24'</u>
Definition of a child in need of care and protection S150(1)(a)	We support the intent of this amendment because it is aimed at making it clear that relatives caring for orphaned or abandoned children will no longer have to get a foster care court order before they can access an adequate social grant. This is necessary because it has been proven that the foster care system is not effective in reaching the majority of orphans in need, and the attempts at doing so have consumed social worker time, reducing their time to respond to cases of serious abuse. However, we are concerned that DSD's proposal is too broad and will result in DSD and the children's court requiring social workers to find absent parents and or distant family and place children informally with that absent parent or distant family with no supervision or support. This is not in children's best interests as it does not take into account the importance of an existing 'attachment' for the child's psychological development. If a new caregiver is	A child who has been abandoned or orphaned and <u>is not in the care of a family member as defined in section 1</u>

	found that the child has no existing bond with, then its important that the child is placed into the child care and protection system for at least 2 years so that their placement is supervised and supported. We also recommend that the words 'suitable and able' be removed because they are unnecessary. The Act already covers situations where a child's caregiver is not suitable or able to care for the child in the other sub-sections in s150(1).	
Orders when child is found to be in need of care and protection s156(1) (cA)	*Support and recommend additional amendment* This new sub-section will provide the option to the court to place the child in the care of a family member only if the court has found a child to be in need of care and protection. This is important to formalise the practice of placing abused or neglected children in the care of family members, while the social services practitioners are attempting to provide services to the 'reform' the biological parent. Note however that if the child has for example been orphaned or abandoned and is in the care of a family member, the child will not be found to be in need of care and protection by the court, and a s156(1) (cA) 'placement' order cannot be made. [See s156(4)]. We therefore recommend an amendment to s46 to make it clear that the court can confirm or grant parental responsibilities and rights to family members.	46. (1) A children's court may make the following orders: (aA) an order confirming or granting parental responsibilities and rights in terms of s23 and 24 to a family member caring for a child
Duration and extension of alternative care orders	*More information in needed from DSD as to why this amendment is needed and how it will further children's best interests*	(2A) For three years from the date of commencement of this Act, in relation to orphaned or abandoned children in foster care with family members, a court may extend an order

s159 (2A)	In practice the first part of this proposed insertion would mean that alternative care court orders that have expired can be brought to the court for extension after they have expired. This will affect the 23 000 children in child and youth care centres, an unknown number of children in temporary safe care and 350 000 children in foster care. This amendment can only be necessary if social workers are unable to prepare the extension in time. Which indicates the law is being 'stretched' to compensate for a lack of implementation capacity and/or lack of a comprehensive legal solution aimed at reducing the foster care case load. Will this amendment be necessary if the comprehensive legal solution is in place and there is less demand for foster care? If foster care case loads are reduced, there should be no reason for delays in reviewing and extending alternative care orders and therefore no need for this new s159(2A). Note also that this provision will not prevent SASSA from stopping payment of the FCG on the day the foster care order expires. It only ensures that the FCG will later be re-instated and back payed when the extension order is finally submitted to SASSA. FCGs will therefore still lapse for a period of time. This provision is therefore not aimed at ensuring the child continues to receive the FCG uninterrupted. We therefore propose that this clause be restricted to cases of orphaned and abandoned children in the care of family members and that it be structured as a time bound transitional clause to be used only in exceptional cases due to the current high backlog.	that has lapsed or make an interim <u>extension of an</u> order for a period not exceeding six months, on good cause shown.

Preventing orphans already in foster care from losing their FCGs S159(2B)	Once this bill becomes an Act, approximately 300 000 orphaned or abandoned children who are already in foster care with family members are at risk of losing their foster care orders and consequently their foster care grants. This is because when their case comes back to the court for review in terms of s159, the children's court will review their case against the criteria specified in s150(1) (a). Because s150 (1) (a) is being amended to exclude new applications for foster care by family members caring for orphaned or abandoned children, it could be interpreted by magistrates to mean that existing foster care placements of orphans with family members must be terminated. This needs to be explicitly prevented as it will constitute regressive action for the families already in receipt of the foster care grant.	(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 this Amendment Act, may be extended by the court in terms of section 159(2) or section 186(2).
Duration of foster care placements s186 (2) & (3)	*Not convinced these amendments will achieve their objective* These small amendments are aimed at encouraging social workers and courts to make long term foster care placements or extensions for children in the care of family members, especially in the case of orphaned or abandoned children. This is aimed at reducing the need for review of these placements. If effective, these amendments may be helpful in reducing the backlog during the transition period of the next five years. However there is no guarantee that these small changes will persuade social workers or courts to move away from two yearly reviews as each social worker and courts are entitled to exercise their discretion and the default and common practice is two year placements and two yearly reviews ito s159(1) & (2). Once there are no more orphaned or abandoned children in the care of family members in the foster care system, the rationale for these clauses may become redundant.	

3. Children's court jurisdiction to hear guardianship matters

3.1 Challenges with the Children's Act

The Children's Act currently allows only the High Court to hear matters concerning guardianship of children. The children's court can decide over the other aspects of parental responsibility and rights (care and contact) but is not allowed to hear guardianship matters.

This does not make sense because the children's court is well versed in family law and childcare matters and is an expert on adoption – which has more wide-ranging implications than guardianship applications. There is therefore no reason why the children's court should not have jurisdiction to hear all guardianship matters. Making guardianship applications accessible at the children's court will increase access to justice for the majority and enable caregivers to administer and protect the pensions and policies inherited by the children in their care. Many of these pensions and policies go unclaimed due to there being no-one able to legally represent the child's interests. Reserving guardianship for the High Court exclusively would only be in the interests of the more wealthy who have the necessary income to use High Court processes.

Granting jurisdiction to the children's court to hear guardianship matters will not remove the High Court's jurisdiction as the upper guardian of all children because the rulings of the Children's Court can be appealed to the High Court if necessary to protect the child's best interests.

Guardianship is important because there are certain things that guardians (rather than caregivers) must decide on or agree to on behalf of a child. Mothers of children are guardians, married fathers are guardians, and some unmarried fathers are guardians. In South Africa we have many children living with family members by family arrangement or due to being placed in foster care – but their caregivers or foster parents are not guardians.

> Example: *Lerato lives in a house that she owns with her two children Neo and Palesa. Lerato dies in a motor vehicle accident, and Lerato's mother, Maria, then takes care of the children. The father of the children lives in another province and is not involved in the children's lives. Lerato worked for the government and had a pension and a life insurance policy, and the Road Accident Fund (RAF) will possibly issue a payment in respect of the motor vehicle accident. In order to deal with the children's inheritance of the house and money that will*

be made available by the RAF, Maria will need to be appointed as guardian of her grandchildren. Under the Children's Act, she would have to bring an application to the High Court, which costs money because she would need to travel far and have an attorney or advocate who can appear in the High Court.

3.2 How to address the challenge

It would be less costly and physically closer if family members like Lerato above could go to the children's court, which is in the local magistrates' court, to obtain guardianship orders.

Allowing the children's court to hear guardianship matters will also improve access to court for unmarried fathers and promote their increased involvement in their children's care.

This restriction on the children's court jurisdiction appears in sections 24(1); 45 (1) & 45(3). All three of these sections would therefore need to be amended.

3.3 The amendment bill and our submissions on how the bill needs to change

We are very pleased to see that the Bill proposes amendments to s45(3) to enable the children's court to hear guardianship applications.

However, the Bill creates uncertainty about whether all cases of guardianship can be brought to the children's court or only those relating to orphaned or abandoned children. This is because while s45(3A) and (3B) are clear that it will be all cases; s45(1) (bA) and s24 create the impression it will be only for cases involving orphaned and abandoned children. We recommend that s24 and s45(1) (bA) be amended to be in line with s45(3A) and (3B).

Assignment of guardianship by order of court [s24]

There is currently no amendment proposed, which leaves this section restricting guardianship to the High Court, whereas the section preceding it on 'care and contact', clearly enable both the High Court and the children's court to hear 'care and contact' applications, which are the other two aspects of parental responsibilities and rights. We propose an amendment to make it clear that guardianship can be heard at the level of the Children's Court:

> s24(1) Any person having an interest in the care, well-being and development of a child may apply to the High Court or the children's court for an order granting guardianship of the child.

Matters children's court may adjudicate [s45(1) (bA)]

The bill proposes to insert a new subsection (bA) into s45(1). This new subsection provides that a children's court may adjudicate 'guardianship of an orphaned or abandoned child as contemplated in section 24'.

Imagine Lerato, the mother in our example above, was not killed in the accident but suffered a brain injury. In order to deal with the financial issues and to make other decisions for the children (eg if one of the children has to have surgery), then their granny, Maria, still needs guardianship. Under our proposed wording she would be able to approach the children's court, whereas under the amendment bill's provisions, she would not - she would have to apply to the High Court, because the children are not orphaned or abandoned.

The restriction to orphaned or abandoned children would also exclude unmarried fathers from approaching the children's court to resolve guardianship matters. It does not seem fair that relatives will be able to apply to the children's court whereas biological parents such as unmarried fathers will have to go to the High Court. This will also adversely affect the ability of unmarried fathers to be involved in their children's lives and to protect their children's rights.

To ensure conformity with s45(3) and to remove any restrictions, we propose section 45(1) (bA) is amended to read:

> "(bA) guardianship **[of an orphaned or abandoned child]** as contemplated in section 24

Matters children's court may adjudicate [Section 45 (3A) & (3B)]

The bill proposes to insert the following subsections into the Act:

> (3A) The High Court and children's court have concurrent jurisdiction over the guardianship of a child as contemplated in section 24 of this Act.
>
> (3B) The High Court, children's court and regional court have concurrent jurisdiction over the assignment, exercise, extension, restriction, suspension or termination of guardianship in respect of the child.

This amendment is supported as it means that guardianship orders in relation to all children can be granted by either the High Court or the children's court. It also means that if a change has to be made, the parties can go back to either court to change it or end it.

However, ss(3A) refers back to 24 of the Act, which is not being amended to include the children's court (see above) and this may cause confusion. Section 24 therefore needs to be amended accordingly.

Summary table:

Section	**Concerns**	**Proposal**
45 (3A) & (3B)	Supported This amendment is supported as it means that guardianship orders can be granted by either the High Court or the children's court. It also means that if a change has to be made, you can go back to either court to change it or end it. However, the problem is that it refers back to 24(1) of the Act, which is not being amended (see above) and this may cause confusion.	Amend s24 to match s45 (3A) (see below)

24	Parental responsibilities and rights is made up of 3 aspects: care, contact and guardianship. s23 precedes s24 in the Act and makes it clear that applications for 'care and contact' can be heard by a range of courts, including the children's court. However, s24 restricts jurisdiction over guardianship to the High Court. This needs to be amended if the intention is to extend jurisdiction to the children's court.	'(1) Any person having an interest in the care, well-being and development of a child may apply to the High Court or the children's court for an order granting guardianship of the child to the applicant.'
45(1)(bA)	The restriction to cases of orphaned or abandoned children would exclude unmarried fathers, and family members caring for children who are not abandoned or orphaned. There is no rationale for making this restriction and it also does not match the amendments to s45(3A) & (3B) which do not contain a restriction.	Delete subsection (bA) and replace with "(*bA*) guardianship"

4. Parental responsibilities and rights of unmarried fathers

4.1 Introduction

The Children's Act provides that there are four aspects included in parental rights and responsibilities and that a person can either have full or partial PRRs[6]. The four aspects are:

(1) to care for the child;
(2) to maintain contact with the child;
(3) to act as a guardian of the child; and
(4) to contribute to the maintenance of the child.

The Act draws a clear distinction between married and unmarried fathers in respect of the acquisition of full parental responsibilities and rights (PRR). Married fathers automatically acquire full PRRs while unmarried fathers automatically acquire full PRRs only if they meet the requirements set out in s21. Alternatively, they may acquire full or partial PRRs through a court order using s23, s24 and/or s45(1) or (3).

Automatic acquisition of parental responsibilities and rights [s21]

In terms of s21(1) (a): an unmarried father acquires full PRRs in respect of his child if he lives with the child's mother in a permanent life-partnership when the child is born.

> Example 1: *Nosipho and Thando live together as life-partners but are not married. If their baby is born while they are still living together – then Thando, the father of the baby, automatically acquires full PRRs in respect of the baby.*

[6] s18

In terms of s21 (1) (b): an unmarried father also acquires full PRRs, regardless of whether he has ever lived with the child's mother, if he –

(i) consents to be identified as the child's father (this can be achieved through successfully applying to Home Affairs to have his name added to the child's birth register or to the Court to be identified as the child's father in terms of section 26 of the Children's Act, or through paying damages in terms of customary law);

(ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period;[7] and

(iii) contributes or has attempted in good faith towards expenses in connection with the maintenance of the child for a reasonable period[8].

Example 2: *In the case of GM v KI[9], the court had to assess whether the unmarried father of a child met the requirements of s21(1)(b). The mother (GM) and father (KI) of the child had never married and they did not live together at any time. After birth, the child's birth was registered at Home Affairs with the father's surname, with his consent. Based on this consent, the court found that the father had acquired full PRRs in terms of section 21(1)(b)(i) of the Act.*

Example 3: *Vuyo and Lalitha met at a party and had a one-night stand which resulted in baby Sipho being born 9 months later. They are not a couple and do not live together but agree that they will both be Sipho's parents. Vuyo's family paid damages in terms of customary law to Lalitha's family. Vuyo and his wife, Nobuntu, care for Sipho on the weekends, and he pays Sipho's school fees and buys his clothes. Vuyo meets all the requirements of the Act and therefore automatically acquires full PRRs s with regards to Sipho.*

[7] This sub-section is about whether he has contact with the child and is involved in caring for the child, eg by caring for the child over weekends, taking the child to soccer practice on the weekend, phoning the child regularly if he lives far away.

[8] This sub-section is about whether he makes or tries to make financial contributions for example by paying maintenance, putting the child on his medical aid, paying school fees.

[9] GM v KI (2015) 3 SA 62 (GJ)

Section 21(1) was designed to provide automatic acquisition of PRRs for unmarried fathers where there is no dispute between him and the child's mother about whether he complies with all the requirements in the section. This works very well for unmarried couples who are living together, or between unmarried parents who live apart and between whom there are no disputes.

Mediation for disputes [s21(3)]

If the mother (or maternal family) disputes whether the biological father has fulfilled the requirements as set out in section 21(1)(a) or (b), the dispute 'must' be referred for mediation[10]. The use of the word 'must' implies that the parties have to try mediation before the court can be approached. It is in children's best interests for family disputes to be settled by mediation rather than court processes as they are less adversarial and formal than court proceedings and more conducive to child participation. The mediation can be done by a family advocate, social worker, social service professional or other suitably qualified person. S21(3) read with s45(4) allows them to approach the court for review of the mediation outcome if they are not satisfied.

Acquisition of parental responsibilities and rights through a court order [s23 & 24]

A father who does not automatically qualify in terms of section 21(1) and who wishes to acquire PRRs, may approach a court seeking an order for care and contact (s23), and guardianship (s24). He may select whether he wishes to approach the children's court or a High Court if he just wants care and contact. If he also wants guardianship, his only option is to approach the High Court.

4. 2 Challenges with the Children's Act

Automatic acquisition of parental responsibilities [s21]

[10] s21(3) (a)

A drawback of s21 (1) is that the father has no document which he can present in the event that he must show he holds full PRRs to a third party such as a life insurance policy company, or a government department like Home Affairs. This is particularly a problem for unmarried fathers when the mother dies or she leaves the family and her whereabouts are unknown. In 2018, there were approximately 136 000 children living with their fathers after their mother had died.[11]

If the child has a birth certificate with the father's name on it, then the father will not have any challenges. If the child has a birth certificate but the father's name does not appear on it, which is the case for 65% of fathers,[12] then he will have to apply for an amendment to the birth certificate. If the child does not have a birth certificate, then the father faces many challenges to prove he has PRRs ito s21.

> Example 4: *Mr Feni has been caring for his three children since their births. They are now aged 6, 8 and 10. Four years ago, the children's mother abandoned the family and they have not been able to find her. The children were not registered at birth and the school principal has requested Mr Feni to submit their birth certificates to the school. Mr Feni approaches Home Affairs to register his 3 children's births. He has a letter from the local chief confirming that he is the children's father, that they were born in the area and that the mother has left the family. He also has a letter from the school principal for the two older children. Home Affairs tells him that unmarried fathers cannot register the birth of their children and that he must first get an order from the Children's Court in terms of s156 finding the children to be abandoned and placed in his care.*

Mr Feni's children are clearly not abandoned or orphaned and Mr Feni has s21 PRRs in respect of his children, therefore Home Affair's request for a s156 child protection order is not the right approach. The law is currently not clear on how children like Mr Feni's can get a birth certificate.

Another drawback is that the section does not work 'automatically' in reality if a mother or the maternal family dispute that a father has satisfied the s21 requirements. Disputes often arise as to whether damages have been paid and whether the father has contributed enough maintenance

[11] Hall K (2019) Single orphans living with remaining parent http://childrencount.uct.ac.za/indicator.php?domain=1&indicator=3

[12] Statistics South Africa (2017) Recorded Live Births

to the maternal family and/or the mother. Breakdown in relationships between the mother and father or maternal and paternal families can also lead to disputes.

Therefore while the law may consider the father to have automatically acquired the rights, if the mother or a maternal family are caring for the child and they dispute the father's rights, then he has to take the issue to mediation and if it is not resolved satisfactorily via this route, he has to proceed to court for an order confirming his s21 rights. Similarly, if an unmarried father of a child is caring for the child and a mother or maternal family dispute that he has PRRs ito s21, they will need to take the matter to mediation and then court for a determination.

Mediation and court for disputes [s21(3)]

Whether mediation is accessible to parents is dependent on the availability of mediators, how much the mediator costs and the financial situation of the parents.[13] For example, many small towns do not have family advocates and public sector social workers across the country are generally not available for family disputes due to high caseloads of foster care, ECD compliance monitoring and child abuse.

When mediation fails or is not accessible, parents (and relatives) approach the courts to resolve disputes. The courts have attempted to interpret s21, however several courts have come to different assessments.[14] Some courts required all 3 requirements in s21(1) (b) to be met, while others only required one or two to be met. The question of whether the requirements in (i)–(iii) are cumulative, or distinct and independent, has not yet been settled.

- In *RRS v DAL*[15], it was held by the High Court that all three of the requirements must be satisfied.
- However, in *I v C & another*, a concern was raised about an interpretation that renders the three requirements cumulative, because it excludes 'the penniless unmarried father who nevertheless cares for his child's upbringing and contributes or makes good faith attempts

[13] Adams, DL (2016) "The challenges that unmarried fathers face in respect of the right to contact and care of their children: can amendments to the current law make enforcement of these rights more practical? PHD Thesis (11 March 2016) University of the Western Cape. At pg 58

[14] Adam at pg 2.

[15] *RRS v DAL* (22994/2010) [2010] ZAWCHC 618 (10 December 2010)

to contribute to the child's upbringing'.[16] The High Court in this case did not find it necessary to decide the issue of the correct interpretation of the word 'and' in section 21(1)(b).

- In *KLVC v SDI & another,*[17] the unsuccessful appeal against the decision of the High Court in *I v C & another*, the Supreme Court of Appeal (SCA) agreed with the reasoning of the High Court, which had found that the father had met all three requirements.[18] The SCA therefore found it unnecessary to decide the issue of whether all 3 requirements had to be met but indicated that in making a decision on section 21(1)(b) requirements a court should 'consider the facts, exercise a value judgment and come to a conclusion'.

Section 28(1)(b) requirements are intended to automatically confer full PRRs, without the involvement of the court, so the vagueness of the wording and the value judgments it requires, can make it difficult to work with. Making it clearer in the law would hopefully reduce the need for approaching the court for an interpretation.

Acquisition of parental responsibilities and rights through a court order [s23 & 24]

If an unmarried father wishes to acquire guardianship he would need to apply to the High Court (s24).

Applications to the High Court are expensive and the majority of unmarried fathers cannot afford it. If a family member such as a granny or the child's mother wants to contest the application, they would also need to find resources for a lawyer and transport costs to attend the court far away.

Some unmarried fathers and family members approach Legal Aid for assistance in making or opposing a High Court application, however, due to capacity constraints at Legal Aid offices, in practice there are long delays and often justice is delayed or denied.

> Example 4: *When baby Emily was born, her mother did not inform Nathan, her biological father of Emily's birth. When Emily's mother died in a car crash, the maternal family told Nathan that he was the father and that they needed him to care for Emily as they were*

[16] I v C & another (KZD) 4 April 2014 (case 11137/2013) para 30.
[17] [2015] 1 All SA 532 (SCA),
[18] KLVC v SDI paras [14], [16], [28], [34].

too elderly. Nathan wanted to be acquire PRRs so that he could care for Emily. He applied to the children's court for care and contact in terms of s23 and was granted these two aspects of PRRs. Later it emerged that Emily's mother had taken out a retirement annuity and that Emily was entitled to a death benefit from this annuity. However, the insurance company refused to recognise that Nathan was Emily's legal guardian because his name was not on her birth certificate, there was no marriage certificate and he only had care and contact rights in terms of s23 and no guardianship rights. Nathan was advised by the insurance company that he should apply to the High Court in terms of s24 to obtain legal guardianship. It took Nathan several years to save enough money to make an application to the High Court. During that time, Nathan and Emily did not have access to Emily's inheritance which they needed for Emily's basic needs such as food, clothing, and transport to school.

4.3 Which children's rights are affected by these challenges?

Children's rights to a name and nationality[19]

Children's legal identity is important, as many rights flow from it. Although our law does not distinguish between children of married or unmarried parents, some children's rights are affected depending on the recognition of their biological link with their fathers.

A key identity right is nationality: For example, if a child's mother is Zimbabwean and the child's father is South African, the child will have a right to be recognised as a South African citizen. If the parents are married there will be no difficulty in establishing this as our law assumes that a child born within a marriage is the child of the married father. If the parents are unmarried, s21(1) applies, and this theoretically should assist with establishing the child's right to citizenship. However, Home Affairs requires proof of the relationship between the unmarried father and

[19] s28(1) (a) of the Constitution of the Republic of South Africa

the child and therefore insists on a paternity test.[20] The paternity test costs approximately R2500 and must be paid for by the father. This proves to be an economic barrier to many indigent fathers and as a result many children's right to citizenship is not realised.

Another key identity right is birth registration: If a child's mother dies and the child is not yet registered with Home Affairs, the unmarried father needs to register the child's birth to ensure the child's right to identity is realised. If the parents are married the father would have no difficulty in registering the child's birth. If the parents are not married, s21(1) applies, and this theoretically should assist with establishing that the father is the child's parent. However, Home Affairs currently requires proof of the relationship between the unmarried father and the child and therefore insists on a court order or a paternity test. Many father's are unable to obtain a court order and/or afford a paternity test, which leaves the child unregistered and at risk of being excluded from social assistance, education and health care.

Children's rights to family or parental care [21]

Children's rights to family or parental care is generally understood to include the child having an unimpeded relationship with both parents. Section 21(1) assists to some extent by making it clear that the law recognises that unmarried fathers automatically acquire full PRRs if certain conditions are present. While the law recognises this acquisition, an unmarried father can be prevented from exercising his responsibilities and rights if the mother of the child refuses to allow him contact or involvement. Is such a case, the child's rights to have a relationship with his or her father are also being impeded.

The mother may have a reason for the refusal, but this reason will only stand up in court if the refusal is based on the best interests of the child. For example, the father may have assaulted the mother and threatened to assault the child and the mother is protecting the child. However, if the mother's reason is that she no longer loves the father and wants to start a life with a new man, that will not necessarily stand up in court as a reason that is in the child's best interests.

[20] Department of Home Affairs (2014). Circular 5 of 2014. Requirements relating to paternity tests in respect of registration of births and referral to National Health Laboratory Services.
[21] s28(1) (b) of the Constitution of the Republic of South Africa

4.4 The amendment bill and our submissions on how the bill needs to change

Changes to the requirements that an unmarried father must meet [s21(1) (a) & (b)]

Co-habiting unmarried fathers – s21(1) (a)

The Bill proposes to expand the scope of section 21(1)(a), which currently is restricted to the time of birth, to include the time of conception. An unmarried father will soon be able to automatically acquire PRRs if he lives with the mother at the time of the child's conception or any time between the child's conception and birth.

> Example 5: *Nosipho and Thando were a couple and lived together at the time their baby was conceived, but they separated just before the baby was born. Under the current s21, Thando would not acquire PRRs. If the proposed amendment is adopted by Parliament, then Thando will be entitled to automatically acquire full PRRs*.

☑ We support this amendment.

No-cohabiting unmarried fathers – s21(1)(b)

The Bill deletes the phrases "in good faith" and "for a reasonable period" from paragraphs (ii) and (iii) of section 21(1)(b). Thus, an unmarried father will no longer have to prove that he contributes or has attempted 'in good faith' to contribute to the child's upbringing and expenses in connection with the child's maintenance for 'a reasonable period'. He will have to prove only that he contributes or has attempted to contribute to the child's upbringing and expenses in connection with the child's maintenance. The intent behind his contribution or the length of time her contributed will no longer be relevant factors.

☑ We support this amendment as it reduces subjective value judgments and makes it easier to determine if the conditions have been met.

Changes to the mediation process [s21(3)]

The Bill removes the reference to "social worker" and "social service professional " and replaces both with the term "social service practitioner". This means a child and youth care worker and auxiliary social worker can also provide mediation services. The objective of these amendments is to ensure consistent use of the term "social service practitioner" in the Act and broaden the number of practitioners available to assist families with mediation on s21 disputes.

☑ We support this amendment with the proviso that social service practitioners receive training on how to do mediation and how to interpret and apply s21.

The Bill seeks to delete subsection (3)(b) from section 21. This subsection states that any party to the mediation referred to in section 21(3) may have the outcome of the mediation reviewed by a court. The memorandum to the bill does not explain why this sub-section is being deleted. We therefore need to speculate. It could be because its unnecessary to state that mediation can be reviewed by a court because this is obvious or already covered by s45 (1) (c) or 45 (4). Or is the intention of the deletion to prevent court review of the mediation?

> Comment from an organisation assisting fathers in Makhanda*: "This is an important question. In principle, the mediation process should be reviewable. While it is not an arbitration process where the arbitrator makes a binding decision, the mediators can sometimes be biased or the views of one of the parties can be ignored. We often see a clear bias against the fathers, with social workers and practitioners preferring mothers and female family members over the biological fathers of the children."*

☒ We oppose this amendment because the mediation process should be allowed to be reviewed by the children's court and then the High Court. The mediators other than the family advocates have no legal training and they could make mistakes or biased findings. We recommend Parliament ask for further clarity on the reason for this deletion.

New provision for obtaining a 'certificate' from the family advocate [s21(1A)]

The Bill inserts subsection (1A) into s21 to enable a family advocate to issue a certificate confirming that an unmarried father has automatically acquired full PRRs in terms of subsections (1)(a) or (1)(b). This addition is a positive development as it could reduce the number of instances in which unmarried fathers have to approach the court for an official document to confirm his PRRs. The family advocate's certificate will now provide the requisite documentation without the need to incur expenses and time related to obtaining a court order.

However, the effectiveness of this option will be dependent on the capacity of the office of the family advocate to meet the demand.

> Comment from an organisation assisting fathers in Makhanda: *"This is dependent on how the office of the family advocate will be capacitated. For example, in Makhanda in the Eastern Cape there is no family advocate, so the only option fathers have is to approach the children's court. The closest offices of the family advocate are in Port Elizabeth and East-London that are both further than 120km from Makhanda. This is true for many smaller towns that are far from offices of the family advocate. A concern about this amendment is that children's court may take the position that it is now the job of the family advocate to recognise s21 rights and that these matters will only be dealt with by the children's court in exceptional circumstances. While the proposed amendment does use the word "may" it can easily be construed to mean "must" and could result in placing the burden on the family advocates alone. This would leave many fathers unable to access the office of the family advocate. Even if they were to have access to that office, the family advocates are often underfunded and overworked and will struggle to have the capacity to deal timeously with these applications. "*

Based on these capacity concerns and the fact that magistrate's courts are more accessible then the family advocates' office, especially in rural areas and small towns, it would be important to make it clear that a father also has the option approach the children's court for a s21(1A) certificate.

A further challenge with this amendment is that the proposed certificate process does not cater for the situation where the mother has abandoned the family or she has died. Expanding the certificate process to cover these circumstances would enable an unmarried father to apply for a certificate from the family advocate to recognise his s21 rights as a father.

☑ We support this amendment with the following additions and provisos:

Proviso: A 21(1A) certificate should not be made a legal requirement with respect to birth registration by an unmarried father. It should only be required in cases where there this a dispute between the mother and father as to whether or not to include the father on the birth certificate. If the mother is deceased or her whereabouts are unknown, a s21(1A) certificate should not be required by Home Affairs prior to accepting a birth registration application from an unmarried father.

✎ Addition: Insert the underlined words

'(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)*.

Making guardianship applications more accessible for unmarried fathers [s45 & s24]

☑ We support the proposed amendments to s45(3A)&(3B) which would expand the jurisdiction of the children's court to include applications for guardianship, including by unmarried biological fathers. The consequence will be that unmarried fathers, who do not have the financial means to approach the High Court for assistance, will be able to go to the children's court instead.

✎ We propose that s24(1) also be amended to provide this clarity and that the proposed amendment to s45(1)(cA) be changed to remove the restriction to cases of abandonment or orphaning as this restriction excludes unmarried fathers:

> 24(1) Any person having an interest in the care, well-being and development of a child may apply to the High Court <u>or the children's court</u> for an order granting guardianship of the child to the applicant.
>
> 45(1) Subject to section 1(4), a children's court may adjudicate any matter, involving-
>
> (a) the protection and well-being of a child;
>
> (b) the care of, or contact with, a child;
>
> <u>*(b*A*)* guardianship of **[an orphaned or abandoned]** a child as contemplated in section 24;</u>
>
> (c) paternity of a child;

✎ We propose that the requirement in s24(3) that an unmarried father must prove why the mother (or another guardian) of the child is not suitable to be the child's guardian should be removed. The Act already envisages that guardianship can be held by more than one person and is typically held by both parents.

24(3) In the event of a person applying for guardianship of a child that already has a guardian, the applicant must indicate whether he or she is applying for co-guardianship with the existing guardian or submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child.

Summary table:

Section	Comments and concerns	Proposal
21(1) (a)	Support	
21 (1) (b)	Support Removing adjectives which require value judgments will make the section more accessible to parents and more consistent interpretation by the courts.	
21 (1A)	Support with additional insertions Unmarried fahers often need a legal document to prove that they have full PRRs ito s21. This amendment would enable an unmarried father to apply for a certificate from the family advocate to recognise his s21 rights as a father. The Act needs to cater for the situation where the mother has abandoned the family or she has died. The Act should also allow the children's court to provide this certificate because the children's court is more accessible than the family advocate in rural areas and small towns.	Insert the underlined words: ''(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)*.'';'
21(3)(a)	Support This amendment will make mediation more accessible. Proviso: Social service practitioners need to receive training on mediation and the interpretation and application of s21	
21 (3)(b)	Oppose the deletion of this sub-section The motivation behind deleting this sub- section is not explained in the memorandum. Is the intention to not allow parents to take the mediation on review to a court? Or is the amendment merely technical as it is being assumed this sub-section is not necessary because s45 covers the question as to whether a mediation can be reviewed by a court. It is not clear from s45 that a children's court can review the outcome of a s21 mediation.	Retain this section and amend s45(1) as follows: **Matters a children's court may adjudicate** 45(1) (cA) confirmation of an unmarried father's rights in terms of s21(3)(a), or review of mediation in terms of s21(3)(b).
24(1)	This section needs to be amended The Act should be clear that the children's court also has jurisdiction to hear guardianship applications. The children's court will be more accessible than the High Court for unmarried fathers and also more practised in ensuring child participation in the decision making process.	Insert underlined words: '(1) Any person having an interest in the care, well-being and development of a child may apply to the High Court or the children's court for an order granting guardianship of the child to the applicant.'
24(3)	This section needs to be amended In terms of s30(1) the Act clearly envisages that more than one person can hold PRRs with respect to one child. This is naturally the case for all	Insert underlined words: ''(3) In the event of a person applying for guardianship of a child that already has a guardian, the applicant must indicate whether he or

	married couples and for all unmarried couple where there is no dispute. There is therefore no reason to require a person applying for guardianship to have to prove the existing guardian is not suitable, unless they are applying for sole guardianship.	she is applying for co-guardianship with the existing guardian or submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child."
45 (1) (bA)	Support if restriction to abandoned or orphaned children is removed This will ensure parents, including unmarried fathers, can also approach the children's court to resolve guardianship matters.	"bA guardianship" or "(*bA*) guardianship where the application is brought by the child's unmarried father or other family member of the child"
S45(1) (cA)	We propose a new amendment to make it clear that the children's court can also issue an order confirming s21 rights and review mediation with regards to s21 rights.	**Matters a children's court may adjudicate** (cA) confirmation of an unmarried father's rights in terms of s21(3)(a), or review of mediation in terms of s21(3)(b).
45(3A) & (3B)	Support This amendment is strongly supported as it means that guardianship orders can be granted by either the High Court or the children's court. It also means that if a change has to be made, you can go back to either court to change it or end it. However, the problem is that it refers back to 24(1) of the Act, which is not being amended (see above) and this may cause confusion. This can be solved if s24 is amended as suggested above.	

5. Positive Parenting

5.1 Introduction

The Constitutional Court has declared corporal punishment unconstitutional

On 18 September 2019, Chief Justice Mogoeng announced the Constitutional Court's decision on corporal punishment in the home. Based on evidence submitted by the Children's Institute and others the court concluded that corporal punishment is a violation of the best interest principle and children's rights to dignity, equality and freedom from violence; and because parents can use positive parenting practices to guide children's behaviour that it is not justifiable to hit children.[22] In a unanimous judgment the court declared the common law defence of "reasonable and moderate chastisement" invalid and unconstitutional. This means that the law no longer protects parents who use corporal punishment, even a light smack, or the threat of force to discipline a child. Parents are now treated like everyone else who hits a child and can be charged with assault.

The Court called on Parliament to create a regulatory framework for reports

Recognising that it is not in the best interest of children for parents to be criminalised for something that has been common practice, the Court called on Parliament to consult with parents, children and other interested parties on a regulatory framework that would outline how the state and child protection agencies should deal with reports. According to the legal principle *de minimis non curat lex*, the law does not concern itself with excusable and/or trivial conduct, hence, prosecutors already have discretion whether or not to prosecute cases of assault. But there needs to be a clear set of principles based on restorative justice that determines how cases should be handled including the option to refer to parents to community-based parenting programmes.

Additionally, the law should place a clear obligation on the State to promote behaviour change. The use of corporal punishment is still widespread and will require significant investment to shift attitudes and change behaviours of parents, professionals, community leaders and children. The

[22] Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others [2019] ZACC 34 at para 74.

Children's Amendment Bill submitted to Parliament presents an opportunity to create the required regulatory framework for reports, awareness, and to develop programme**s** to support parents to learn positive discipline so that we end the use of corporal punishment.

Why did the court ban corporal punishment?

Below is a summary of the research that the Children's Institute presented to the Constitutional Court in our expert affidavit:

Corporal punishment increases the risk for more severe forms of child abuse

Proponents of corporal punishment argue that corporal punishment is different from physical child abuse. However, the divide between corporal punishment and physical abuse is blurry. Studies show that most physical child abuse takes place in the context of discipline: 75% of physical abuse of children occurs during episodes of discipline using corporal punishment, and children who are spanked by their parents are seven times more likely to also be severely assaulted by their parents.[23] The link between corporal punishment and more severe forms of physical child abuse has also been confirmed in a meta-analysis reviewing 88 studies that were conducted over 62 years.[24]

Corporal punishment has negative effects for children's health and development

Because of the overlap of corporal punishment and physical abuse, prohibiting corporal punishment is critical to prevent more severe forms of child abuse. In addition to an increased risk of severe child abuse, corporal punishment should be prohibited because it increases the risk of children developing aggressive, delinquent and antisocial behaviours. Corporal punishment also undermines the parent-child relationship and can lead to negative mental health impacts (e.g. anxiety; depression). Research in several countries suggests that even 'mild' forms of physical punishment such as spanking and slapping are associated with a number of unwanted outcomes (see Figure 1).

[23] Durrant J & Ensom R (2012) Physical punishment of children: lessons from 20 years of research. *Canadian Medical Association Journal*, 184(12): 1373–1377.
[24] Gershoff ET (2002) Corporal punishment by parents and associated child behaviours and experiences: A meta-analytic and theoretical review. *Psychological Bulletin*, 128(4): 539-579.

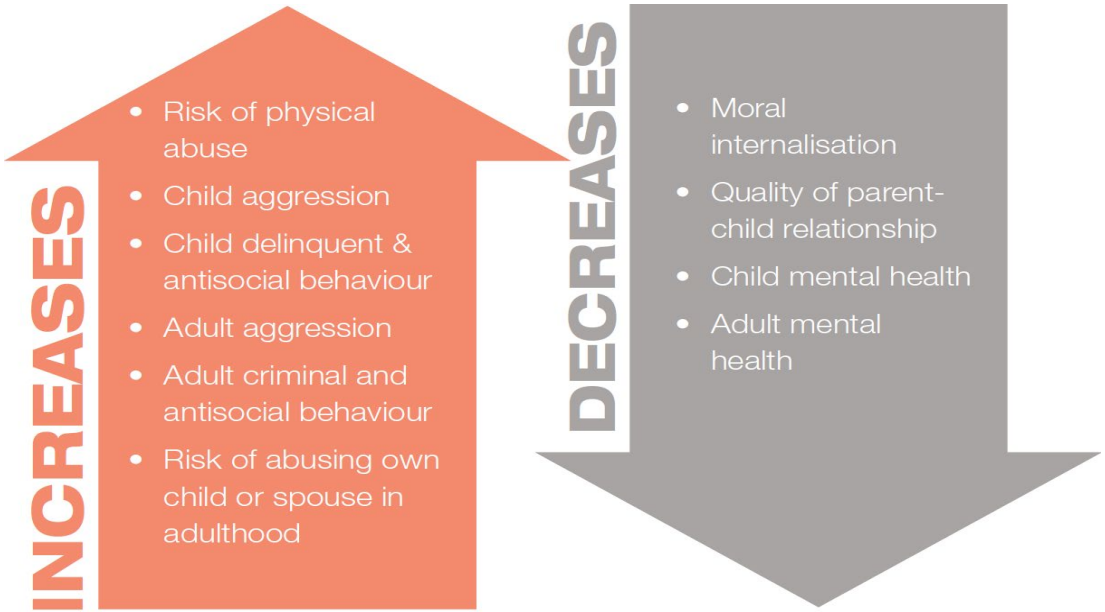

Figure 1: Associations between corporal punishment and negative outcomes.

Figure based on Gershoff ET (2002) Corporal punishment by parents and associated child behaviours and experiences: A meta-analytic and theoretical review. *Psychological Bulletin,* 128(4): 539-579.

Not all children will experience negative effects such as increased child aggression or anxiety. Whether or not the child will suffer from negative effects depends on a number of mediating factors (e.g., frequency and severity of corporal punishment; age of child; sensory arousal of child; child's and parent's characteristics; etc.).

Corporal punishment feeds into the intergenerational cycle of violence

Corporal punishment should be prohibited because it feeds the cycle of violence. In many families, corporal punishment co-occurs with domestic violence; it also shares some of the same risk factors as domestic violence.[25] Research shows that male children who experience physical punishment or witness intimate partner violence against their mother are more likely to perpetrate violence against their intimate partner and children later in life (i.e. as adults).[26] Female children who experienced maltreatment are at an increased risk of becoming victims of intimate partner violence in adulthood.[27] The experience of corporal punishment (and other forms of violence) during childhood is thus linked to the perpetration and experience of violence in adulthood. To stop the intergenerational cycle of violence we need to stop hitting children.

Corporal punishment is not effective in changing children's behaviour

Parents who use corporal punishment mostly have two goals: (1) immediate compliance, in other words, parents want to stop a certain undesirable behaviour of their child; and (2) long-term compliance, in other words parents want the child to not repeat this behaviour in future. Research shows that corporal punishment is effective in stopping a child's behaviour. But other forms of discipline, for instance time-out, are just as effective. In terms of long-term compliance, research shows that corporal punishment does not change children's behaviour for the better. In fact, more spanking is associated with **less** long-term compliance and evidence of 'conscience'.[28] In other words, corporal punishment does not teach children better behaviour.

[25] Fulu E, Miedema S, Roselli T, McCook S, Chan KL, Haardörfer R & Jewkes R (2017) Pathways between childhood trauma, intimate partner violence, and harsh parenting: Findings from the UN Multi-country Study on Men and Violence in Asia and the Pacific. *Lancet Global Health,* 5:e512-522.
[26] Fulu (above).
[27] Fulu (above).
[28] Gershoff, E. T. 2013. Spanking and Child Development: We Know Enough Now to Stop Hitting Our Children *Child Development Perspective* 7(3):133-137.

5.2 Our proposals for the Children's Amendment Bill

What is corporal punishment? [s1]

In order to heed the Constitutional Court's call for a regulatory framework for reports of corporal punishment, the bill will need to define corporal punishment.

The National Child Care and Protection Policy[29], hereinafter the Policy, approved by Cabinet in October 2019 following the judgment, gives a definition of corporal punishment based on the guidance from the UNCRoC:[30]

> ***'corporal punishment'*** *or 'physical punishment' means any punishment in which physical force or action is used and intended to cause some degree of pain or harm. It involves, but is not limited to, hitting ('smacking', 'slapping', 'spanking') children in any environment or context, including the home setting, with the hand or instruments such as a whip, stick, belt, shoe or wooden spoon. It can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, caning, forcing children to stay in uncomfortable positions, burning, scalding, or forced ingestion. [31]*

The Policy further clarifies that '*Violence has no minimum, moderate or maximum… it is clear that protection must be from "all forms of violence" and therefore anything that resembles violence is unacceptable.'*[32]

Similarly, the Constitutional Court judgment makes it clear that corporal punishment by parents is assault, where existing definitions of assault are clear that the slightest touch or even the threat of the use of force are included:

[29] National Department of Social Development (2019). National Child Care and Protection Policy: Working together to advance the right of all children to care and protection. Pretoria: National Department of Social Development.
[30] UN Committee on the Rights of the Child (CRC), General comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia), 2 March 2007, CRC/C/GC/8
[31] Department of Social Development (2019) National Child Care and Protection Policy, p7.
[32] National Department of Social Development (2019). National Child Care and Protection Policy: Working together to advance the right of all children to care and protection. Pretoria: National Department of Social Development, p72.

'Violence is not so much about the manner and extent of the application of the force as it is about the mere exertion of some force or the threat thereof.' [33]

✎ We recommend that the definition used in the Cabinet approved Policy is inserted into the Act. This is necessary to increase awareness and to give effect to the proposed amendments to section 12 (prohibition), and 18 (parental rights and responsibilities).

Repeating the prohibition in the Children's Act [s12]

The Policy states "*The Children's Act will have to be revised to prohibit corporal punishment and any other form of cruel, inhuman or degrading treatment or punishment.*" [34]

The Constitutional Court judgment makes it clear that any form of corporal punishment no matter how light or even the threat of force is against the law. So, adding an express prohibition will not change the law it will simply reinforce it. However, the public may not recognise the various actions that are covered e.g. kicking, shaking scratching etc. therefore inserting an explicit ban and a definition has the potential to increase awareness of the ban and what it covers.

In several countries court judgments were in fact followed by law reform, i.e. prohibitions of corporal punishment in various settings was confirmed in legislation. These countries include Costa Rica, Nepal, Israel, Namibia, Zambia and South Africa[35]. In South Africa, the Abolition of Corporal Punishment Act was adopted in 1997 following the Constitutional Court judgement in 1995 in the *State v Williams et al, case no. CCT/20/94* which ended juvenile whipping as it was cruel, inhuman and degrading.

[33] Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others [2019] ZACC 34 at para 38.
[34] National Department of Social Development (2019). National Child Care and Protection Policy: Working together to advance the right of all children to care and protection. Pretoria: National Department of Social Development., p72.
[35] See https://endcorporalpunishment.org/human-rights-law/national-high-level-court-judgments/

✎ We recommend the addition of a new subsection into section 12, based on the principles of the National Child Care and Protection Policy:

Social, cultural and religious practices

12. (11) No child may be subject to corporal punishment or be punished in a cruel, inhuman or degrading way. Hitting a child is assault.

Clarifying that parental responsibilities and rights includes positive parenting [s1 & s18]

Some parents and caregivers believe that the ban on corporal punishment has removed their right/responsibility to discipline their children. The Children's Act should clarify that parents have the responsibility to care for children and guide their behaviour without resorting to violence.

We therefore recommend that the definition of care should be amended to correspond to the definition used the Policy and section 18 of the Act which details parental responsibilities and rights should be amended to include specific reference to the responsibility to discipline children without resorting to violence.

The definition of "care" [s1]

Changing the definition in the Act would reinforce the message that parents have a responsibility to guide their children's behaviour but that they must do so without resorting to violence.

✎ We recommend that the Act is aligned with the definition in the policy:

care, in relation to a child, includes, where appropriate –
(*g*) guiding the behaviour of the child in a humane manner using positive parenting and non-violent disciplinary methods;

Parental responsibilities and rights [s18]

✎ We recommend the addition of a new subsection:

Parental responsibilities and rights

'**(2A)** A person who has parental responsibilities and rights in respect of a child, and any other person who has care of a child, must not subject the child to corporal punishment or treat or punish the child in a cruel, inhuman or degrading way, to ensure the child's right to physical and psychological integrity as conferred by section 12(1)(c), (d), (e) of the Constitution.'

Promoting positive parenting [s144]

The Act already places an obligation on the State to fund and provide prevention and early intervention programmes including programmes that focus on 'developing appropriate parenting skills and the capacity of parents and care-givers to safeguard the well-being and best interests of their children, including the promotion of positive, non-violent forms of discipline' (section 144 (1)(b)). However, ending the use of corporal punishment requires large attitudinal and behavioural change. It is therefore not sufficient to provide programmes; the state needs to raise-awareness. An important first step is to have a clear provision on **'Promoting positive parenting'** in chapter 8 on prevention and early intervention programmes.

✎ We recommend the addition of a new subsection:

Purposes of prevention and early intervention programmes—

144. (4) The Department in partnership with relevant stakeholders, must take all reasonable steps to ensure that -

(a) education and awareness-raising programmes concerning positive parenting are implemented across the Republic; and
(b) programmes promoting positive discipline at home and in alternative care are available across the Republic.

Referral of parents to prevention and early intervention services [s110]

The National Child Care and Protection Policy states:

> *Criminal prosecution of parents and caregivers for the use of corporal punishment should be a measure of last resort. Those who use inappropriate punishment (including corporal punishment) should be referred to prevention and early intervention services.*[36]

Does the current legal framework enable this?

Criminal prosecution as a last resort

Assault is a criminal offence. Therefore, if a child is assaulted, the child or anyone acting in the best interests of the child may open a case with the police. If a child reports the case to the police, the police will be obliged to open a docket. However, prosecutors continue to have discretion whether or not to prosecute a case of assault. According to the legal principle *de minimis non curat lex*, the law does not concern itself with excusable and/or trivial conduct. It is therefore very unlikely that the prohibition of corporal punishment will lead to a surge in the prosecution of parents. Indeed, there is no observable increase in cases since the judgment – however, this is difficult to determine as lockdown reduced the number of reports of violence overall.

Referral of parents to prevention and early intervention services

The Children's Act allows for cases to be reported to social services and provides for referral mechanisms between police and social services. Key professionals working with children are obligated to report physical abuse causing injury and deliberate neglect and may opt to report to social services or the police (section 110(1)).

Additionally, section 110(2) states “Any person who on reasonable grounds believes that a child is in need of care and protection may report that belief to the provincial department of social development, a designated child protection organisation or a police official.”

[36] National Department of Social Development (2019). National Child Care and Protection Policy: Working together to advance the right of all children to care and protection. Pretoria: National Department of Social Development, p73.

Section 150(1)(i) states that a child is in need of care and protection if the child is being **maltreated**, **abused**, deliberately neglected or **degraded** by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.

Corporal punishment is covered under the definition of abuse:

> ***"abuse",*** *in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes—*
>
> *(a)* ***assaulting a child*** *or inflicting any other form of deliberate injury to a child;*
>
> *…*
>
> *(e)* ***exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally****;*

Section 110(8) stipulates that the social worker must report the possible commission of an offence to a police official. Given that corporal punishment constitutes an assault, social workers would therefore be required to report cases of corporal punishment to the police. In theory, these provisions should cover the reporting of the use of corporal punishment, however, there are concerns that this is not explicit.

One way to deal with this is to amend section 110(2) "Any person who on reasonable grounds believes that a child <u>has been abused or neglected or</u> is in need of care and protection may report that belief to the provincial department of social development, a designated child protection organisation or a police official." This would encompass corporal punishment as the current definition of abuse covers assault, see above.

Police officers receiving a report in terms of section 110 (1) or (2) of the Children's Act are required in terms of section 110(4) to ensure the safety of the child and within 24 hours notify social services of the report and any steps that have been taken with regard to the child.

Section 110(5) of the Children's Act requires the social worker to make an assessment and allows him/her to take measures to assist the child. The Children's Act provides for different types of early intervention measures that can be used to assist parents to develop alternative forms of discipline. In other words, the social worker could refer the family for another intervention even where previous interventions have failed.

This allows for a social work assessment and investigation into severe cases whilst also triggering a criminal justice response. This approach does not create new processes for dealing with corporal punishment. There are concerns that using section 110 would require such reports to be recorded on the National Child Protection Register. To ensure that only substantiated reports following a full social work investigation and a finding that the child is in need of protection are include in the Register, we recommend the following amendment:

Contents of Part A of Register.—

114(1) Part A of the Register must be a record of—

(a) all substantiated reports of abuse or deliberate neglect of a child made to the Director-General in terms of this Act;

Summary table:

Section	Proposal	Motivation
1	Amend the definition of 'care': (*g*) guiding the behaviour of the child in a humane manner using positive parenting and non-violent disciplinary methods;	This amendment clarifies that the duty of care includes guiding behaviour whilst highlighting that must be done without resorting to violence of any form.
	Add a definition: **'corporal punishment'** or 'physical punishment' means any punishment in which physical force or action is used and intended to cause some degree of pain or harm. It involves, but is not limited to, hitting ('smacking', 'slapping', 'spanking') children in any environment or context, including the home setting, with the hand or instruments such as a whip, stick, belt, shoe or wooden spoon. It can also involve, for example, kicking, shaking or throwing children, scratching,	A definition is required to give effect to the changes proposed to section 12(11) and 18. The proposed definition is based on the definition used in South Africa's Child Care And Protection Policy October 2019, as approved by Cabinet. It also reflects General Comment No. 8 by the United Nations Convention on the Rights of the Child. The Constitutional Court ruled that even 'moderate' corporal punishment violates children's rights and evidence shows that it increases children's risk to experience more severe forms of physical abuse.

	pinching, biting, pulling hair or boxing ears, caning, forcing children to stay in uncomfortable positions, burning, scalding, or forced ingestion.	This definition clarifies that all forms of violence no matter how light or the threat of force are a violation of child rights.
12	Add the following sub-clause: 12. (11) No child may be subject to corporal punishment or be punished in a cruel, inhuman or degrading way. Hitting a child is assault.	This mirrors the principles in the National Policy. It is necessary to increase public awareness, and correct implementation of the Children's Act
18	Add the following sub-clause: S 18(2A) A person who has parental responsibilities and rights in respect of a child, including any other person who has the care of a child, must not subject the child to corporal punishment or treat or punish the child in a cruel, inhuman or degrading way, to ensure the child's right to physical and psychological integrity as conferred by section 12(1)(c), (d), (e) of the Constitution.	It is important to have explicit reference to corporal punishment – the most common form of cruel punishment – to make it absolutely clear that corporal punishment by parents/caregivers is prohibited
110	Amend section 110(2) by inserting the underlined words: (2) Any person who on reasonable grounds believes that a child has been abused or neglected or is in need of care and protection may report that belief to the provincial department of social development, a designated child protection organisation or a police official.	In general, criminalisation of parents for using corporal punishment should be considered a last resort. The addition of a non-mandatory reporting clause will allow social workers to assess the situation and refer parents to a suitable prevention and early intervention programme such as positive parenting or anger management

114	Amend section 110(2) by inserting the underlined word: **Contents of Part A of Register** 114. (1) (a) all substantiated reports of abuse or deliberate neglect of a child made to the Director-General in terms of this Act;	This ensures that reports of corporal punishment will not be added to the child protection register unless a social worker has investigated and considers the child to be in need of protection.
144	Add the following sub-clause: (4) The Department in partnership with relevant stakeholders, must take all reasonable steps, to ensure that - (a) education and awareness-raising programmes concerning positive parenting are implemented across the Republic; and (b) programmes promoting positive discipline at home and in alternative care are available across the Republic.	DSD is responsible for protecting children from violence and assisting those children who have experienced violence. A prohibition of corporal punishment and other cruel, inhuman and degrading punishment in itself will not change behaviour. Therefore, it needs to be accompanied by adequate programmes to change behaviour. The proposed subsection 144(4)(a) will ensure that DSD budgets for and undertakes education and awareness-raising programmes. These should not only focus on the prohibition of corporal punishment, but also include information on positive discipline to inform caregivers about non-violent discipline. The proposed subsection 144(4)(b) emphasises that all role-players need to understand what their role is in ensuring positive discipline. The Department therefore needs to equip all relevant government and civil society role-players in promoting positive discipline in the home and alternative care. Given the widespread acceptance of corporal punishment in society, role-players need to understand the rationale behind the prohibition and their role in promoting the prohibition.

6. Removal and temporary safe care of children in need of care and protection

6.1 Introduction

Section 28(1)(b) of the Constitution states that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment.

The Act provides for and regulates the removal of children from their families and their placement in alternative care. The Act recognises three forms of alternative care: temporary safe; foster care and care in child and youth care centres.[37]

Section 1 of the Act defines temporary safe care, in relation to a child, to mean:

> care of a child in an approved child and youth care centre, shelter or private home or any other place, where the child can safely be accommodated pending a decision or court order concerning the placement of the child, but excludes care of a child in a prison or police cell.

A temporary safe care placement is therefore a short-term protective measure pending a longer-term decision on the child's future care.

There are number of reasons why a child may need to be placed in temporary safe care. These include if they have been abandoned or are being abused or neglected by their family, or their caregiver has a problem with alcohol or drug addiction, or there is domestic violence within the family and the child is at risk of harm. It is the role of a designated social worker[38], a police officer or a person authorised by the court to remove

[37] s167(1)(a) – (c).

[38] A designated social worker is a social worker in the employ of the Department of Social Development or a Designated Child Protection Organisation (DCPO). A DCPO is a child protection organisation that has been designated by the Department of Social Development to provide 'statutory' child protection services on the state's behalf, for example Child Welfare.

such children from their caregivers and place them in temporary safe care pending an investigation into whether the child is in need of care and protection and a determination by the children's court.

6.2 Removal of a child in order to place them in temporary safe care [s151 &152]

Because removing a child from their family and home is a drastic measure, it can only be done in cases where the child is at risk of harm if not removed, and it will be in the child's best interests to be removed. Furthermore, the social worker or police officer doing the removal should first consider whether it is possible and, in the child's best interests to rather remove the alleged offender from the child's home using s153.

The Children's Act and its regulations therefore set strict rules that social workers, police and magistrates must follow when removing a child and placing the child in a temporary safe care. A child may be removed with a court order in terms of s 151 or without a court order in terms of s152 of the Act. Amendments were made to these sections by the Children's Amendment Bill of 2018. These were aimed at ensuring that all temporary removals required a court order, before the removal is implemented (ito s151) or the next court day after the removal is implemented (ito s152).

Removal of child to temporary safe care <u>by court order</u> [s151]

The children's court may issue an interim order placing a child in temporary safe care if it is necessary for the safety and wellbeing of the child.[39] When making the interim order, the court will order a designated social worker to bring the case back to the court for review the next court day after the removal has happened. Therefore, if the removal happens on a Saturday, then the children's court must review the removal order on the Monday. The social worker must also ensure that the child and their parent or caregiver are present in court when the interim order is reviewed by the court. The social worker or police officer who has removed a child using a court order must, without delay but within 24 hours,

[39] s151(2)

inform the parent, guardian or caregiver of the child if such person can be traced;[40] refer the matter within 24 hours to a designated social worker for investigation;[41] and report the matter to the relevant provincial Department of Social Development.[42]

Removal of child to temporary safe care <u>without a court order</u> [s152]

Where there is a reasonable belief that a child is in need of care and protection[43] and is in need of immediate urgent protection[44] a child may be removed without a court order if obtaining a court order may cause delay that may compromise the safety and wellbeing of the child.[45]

Where a child is removed without a court order and placed in temporary safe care, the social worker or police official must inform the parent, guardian or the caregiver about the removal without delay but within 24 hours.[46] They are also expected to: (a) inform the clerk of the children's court about the removal not later the next court day; (b) bring the case to the Children's Court for review before the expiry of the first court day after the placement in temporary safe care and (c) ensure the child and parent or caregiver attends the review.[47] Furthermore, the removal of the child must be reported to the Department of Social Development.[48]

If a police official[49] is the one removing the child without a court order, he or she must also refer the matter to a social worker for investigation.[50]

The children's court will then review the temporary removal and either confirm or reverse the removal.

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[40] s151(7)(a).
[41] s151(7)(b)
[42] s151(7)(c)
[43] s152(1)(a)(i)
[44] s152(1)(a(ii)
[45] s152 (1)(b)
[46] s152(1); 152(2)(a); 152(3)(a)
[47] s152(2)(b) (d) & (e)
[48] s152(2)(c)
[49] s152(3)(a)
[50] s152(3)(b)

Placing a child in temporary safe care [s167(1) (c), (2) & (3)]

Before a child can be placed in temporary safe care, the place of care or person providing the care must be approved by the provincial head of Social Development[51] and must comply with criteria that are prescribed in the Regulations.[52]

The Amendment Bill proposes to amend s167(3) to provide that a person who has been approved to provide temporary safe care will remain approved for a 2-year period, while a CYCC will remain approved for a 5-year period.

✓ We support this amendment

Section 167(2) of the Act says that a child cannot be kept in a temporary safe care for a period of more than six months without a court order placing the child in alternative care. This section could be interpreted in a number of different ways, one of which is that temporary safe care can be used for 6 months before a court order needs to be obtained. If this interpretation is followed then s167(2) would be contradicting the amendments that were made to s151 & 152 by the Children's Amendment Bill of 2018 which require all temporary care placements to have a court order.

The Amendment Bill proposes to amend section 167(2) of the Act to bring it in line with the 2018 amendments to s151 & 152 so as to make it clear that all temporary safe care placements need to be formalised by a court order within 72 hours.

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[51] s167(3)(a).

[52] s167 (3)(b). According to Reg 57 (2) Approval to provide temporary safe care to a child may not be granted to a person, facility, place or premises unless the relevant provincial head of social development or the person authorised to grant approval is satisfied that-
(a) the child will be cared for in a healthy, hygienic and safe environment in line with the reasonable standards of the community where the temporary safe care is to be provided;
(b) the child will be provided with adequate nutrition and sleeping facilities;
(c) the person responsible for providing the child with temporary safe care has not been found to be unsuitable to work with children in terms of section 120 of the Act and is willing to provide such care;
(d) the area in which the child is to be placed in temporary safe care will not be severely disruptive to the child's daily routine; and
(e) care will be provided in accordance with the definition of 'care' in section 1 of the Act.

✓ We support this amendment

The Bill also seeks to provide that a child may not be in foster care or a registered child and youth care centre without a court order placing the child in such care [s167 (2)(c)].

✓ We support this amendment with the proviso that shelters providing services to street children are provided with the option not to follow this route because formalising a street child's care arrangements too early can result in the child refusing support.

The Amendment Bill also proposes an amendment to make it clear that a court may not place a child in temporary safe care for a period longer than 6 months at time. [s167 (2)(b)]

✓ We support this amendment to prevent temporary safe care from being used as a permanent care arrangement for an indefinite period of time.

Summary table:

Section	Comments	Proposal
167(2)(b)	Support	
167 (2) (c)	Support With the proviso that shelters providing services to street children are provided with the option not to follow this route because formalising a street child's care arrangements too early can result in the child refusing support.	
167 (3)	Support	

7. Children's right to privacy in children's court proceedings

7.1 Challenges with the Children's Act

The Children's Act provides for the protection of children's privacy in children's court proceedings. This is set out in s74 which provides as follows:

> **Publication of information relating to proceedings**
>
> 74. No person may, without the permission of a court, in any manner publish any information relating to the proceedings of a children's court which reveals or may reveal the name or identity of a child who is a party or a witness in the proceedings.'

The challenge is that when a case is heard in the High Court, there is no express protection of children's privacy.

- Some real-life examples in recent years involved children who were in Hague Convention Child Abduction cases, which are always heard in the High Court. In some of these cases children's photos and their names have been published in the media.
- After two children were accidentally swopped in a hospital at birth, there was a court case in the High Court to decide whether they should be returned to their biological parents or remain with their de-facto parents. Because there is no legislative protection for children's privacy in High Court matters - to stop the media from publishing the children's names, the lawyers had to ask the court to make a special order.
- The case of Zephany Nurse also started off in the High Court, where her lawyers had to rush to court to ensure the protection of her true identity, and the High Court made a special order.

7.2 How to address the challenge

The protection provided by s74 should be extended to children's cases heard in the High Courts.

7.3 The proposed amendments and our submissions

The bill proposes to delete s74, which currently protects children's privacy in children's court proceedings, and replace it with a new section 6A as follows:

> **Children's right to privacy and protection of personal information**
>
> **6A.** (1) A child's right to privacy and the protection of personal information is subject to the Films and Publication Act, 1996 (Act No. 65 of 1996), the Protection of Personal Information Act, 2013 (Act No. 4 of 2013), the Promotion of Access to Information Act, 2010 (Act No. 2 of 2010), the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or any other law protecting the privacy and protection of personal information of the child.

This new clause simply lists a range of privacy laws. This is trite because obviously, all those laws need to be respected. The Children's Act does not need to say this. Furthermore, this list is incomplete, as it has omitted the Divorce Act and the Maintenance Act, which also provide important provisions on the protection of children's identity in court proceedings and by deleting s74, the Act will no longer provide protection in children's court proceedings.

If the bill is passed as is, the Act will no longer provide for the protection children's privacy in children's court proceedings, nor will it extend protection to children in High Court proceedings. We assume that this is simply a mistake.

✎ We therefore propose that Parliament should replace the proposed section 6A with the following section:

> **Protection of children's privacy**
>
> 6A (1) No person may, without the permission of a court, in any manner publish any information, including any image, or picture which reveals or may reveal the name or identity of a child who is or was a party or a witness in the proceedings of any court or who is or was

subject to an order of any court: Provided that a person may waive, in writing, the protection of his or her privacy as contemplated in this section upon reaching the age of 18 years.".

(2) Notwithstanding subsection (1) a designated social worker conducting an investigation for the purposes of finding that a child may be in need of care and protection or that such child may be made available for adoption, publish information for identification of the child including images or pictures of the child in the prescribed manner, for the purpose of tracing the child's parent(s) or family."

Note that this is the wording that appeared in the July 2018 draft of the bill.

If the Portfolio Committee does not accept this proposal and elects to retain the draft proposed in the bill, then it is vitally important that section 74 is not deleted and continues to operate to protect the identity of children in children's court - because to do otherwise is regressive – ie, provides less protection to children than the current Act.

Summary table:

Section	Concerns	Proposal
6A	This amendment simply lists a range of privacy laws. This is trite because obviously, all those laws need to be respected, and the Children's Act therefore does not need to say this. Furthermore, the list of laws is incomplete, as it omits the Divorce Act and the Maintenance Act, which also provide important provisions on the protection of children's identity in court proceedings.	6A (1) No person may, without the permission of a court, in any manner publish any information, including any image, or picture which reveals or may reveal the name or identity of a child who is or was a party or a witness in the proceedings of any court or who is or was subject to an order of any court: Provided that a person may waive, in writing, the protection of his or her privacy as contemplated in this section upon reaching the age of 18 years. (2) Notwithstanding subsection (1) a designated social worker conducting an investigation for the purposes of finding that a child may be in need of care and protection or that such child may be made available for adoption publish information for identification of the child including images or pictures of the child in the prescribed manner, for the purpose of tracing the child's parent(s) or family."

74	By deleting s74, and replacing it with the proposed 6A, the Act will no longer provide protection in children's court proceedings. Nor will it extend protection to the High Court.	See our proposal for a new s6A above. If this is accepted, then we agree with the deletion of s74.

8. PARTIAL CARE AND EARLY CHILDHOOD DEVELOPMENT

8.1 Introduction

A strong early childhood development sector would mean all young children in South Africa are thriving and accessing inclusive, holistic and quality early childhood development ("**ECD**") services. Supporting children in their early years is crucial to reduce poverty and inequality, and to contribute to human capital, and therefore national, development. It is also a fundamental and universal human right.

Most children in South Africa are deprived of access to quality ECD services. Currently, 3.2 million children under 6 years of age are not accessing any ECD programmes.[53] Of those who do access some form of ECD programme, 2.9 million children are in unregistered programmes, and only about 800 000 children are in registered centres.[54] Only about 627 000 young children are obtaining subsidised care and learning.[55] This is a

[53] Ilifa Labantwana's analysis of Statistics SA's *General Household Survey 2018*, available at: www.statssa.gov.za/publications/P0318/P03182018.pdf (last accessed on 1 November 2020). Also see the infographic on Ilifa Labantwana's website, available at: https://ilifalabantwana.co.za/ (last accessed on 4 November 2020). Figures on registered centres and subsidies are obtained from the national DSD.

[54] Above

[55] Department of Social Development Media Release *Social Development Sets up Workstreams to Conduct Risk Assessment and State of Readiness for the Early Childhood Development (ECD) Sector* 4 June 2020, available at: ttps://www.dsd.gov.za/index.php/latest-news/21-latest-news/183-social-development-sets-up-workstreams-to-conduct-risk-assessment-and-state-of-readiness-for-the-early-childhood-development-ecd-centres (last accessed on 1 November 2020).

recipe for disaster when more than 6 out of 10 children face extreme poverty.[56] Worse still, the effects of extreme poverty on young children will have life-long, often irreversible consequences.

The country's first National Integrated ECD (NIECD) Policy is laudable, and sets out clear goals of universal access to equitable, quality and comprehensive ECD services, in particular, promoting interventions to reach the most vulnerable young children and their families. The legal framework can either enable the achievement of these goals or it can impede the achievement of the government's stated objectives by being unaligned, overly onerous or unrealistic.

The introduction of the Children's Amendment Bill could have been an opportunity to address the regulation of ECD services in a holistic, coordinated way and with the aim of facilitating universal access to quality ECD services. However, core challenges facing the ECD sector are not substantially addressed by the Bill. *The Bill also fails to comprehensively align with the policy intentions expressed in the NIECD Policy.* Instead, the Bill's approach of simply cutting and pasting provisions relating to Partial Care under a new Part headed "Early Childhood Development Centres" reflects a fundamental failure to engage with ECD reform in a holistic and meaningful way. By adopting this approach, the Bill in fact creates additional burdens and challenges for the ECD sector.

Moreover, the Bill fails to respond to the imminent shift of responsibilities in respect of ECD services from the Department of Social Development ("**DSD**") to the Department of Basic Education ("**DBE**").

The key issues requiring legislative reform, and which will be addressed in this section of our submission relate to:

1. A simpler, one-step registration process for ECD providers;
2. Recognition of different types of ECD programme providers;
3. Inaccessible compliance standards and overlapping roles and responsibilities;
4. Assistance to ECD providers servicing poor communities;
5. The conditional registration framework; and
6. The provision of infrastructure support.

[56] Statistics SA Media Release *More than 60% of South African children are poor* 7 July 2020, available at: http://www.statssa.gov.za/?p=13438 (last accessed on 1 November 2020).

This section will be structured in relation to each of the key issues identified above, with reference to the current sectoral challenges, the Bill's proposed amendments, and our proposals for amending the Bill.

It must be emphasised that this section seeks to identify key overarching issues impacting on the ECD sector. We aim to provide guiding considerations for the comprehensive reform of the ECD regulatory framework which must be read holistically. To this end, we do not deal with each and every proposed amendment made by the Bill. A failure to deal with any specific clause in the Bill should not be read to suggest that we necessarily accept or endorse those proposed amendments.

8.2 Registration of ECD providers

Challenges in the Children's Act: **onerous "dual registration"**

Under the current legislation, partial care facilities that care for more than 6 children who are younger than school going age, must provide an ECD programme. This means that an ECD programme provided out of a partial care facility needs to register twice: first, as a partial care facility and second, as the provider of an ECD programme. Each registration process has its own regulations, norms and standards and requirements. This creates unnecessary duplication and an additional administrative and financial burden[57] for the provider, and the multiple government departments involved in registration duties.

[57] By way of illustration, the following regulations are duplicated across the two registration processes in the General Regulations Regarding Children, 2010 GN 261 in *GG* 33076:

1. Particulars of the applicant: Reg 14(3)(a) and (b) are identical to Reg 24(3)(a) and (b)
2. Programme description: Reg 14(3)(f) is very similar to Reg 24(3)(d)
3. Clearance certificate: Reg 14(4)(e) is identical to Reg 24(3)(h)
4. Number of children: Asked on both Form 11 and Form 16 (although more details is required on Form 16)
5. Exposition of staff skills: Asked for on both Form 11 and Form 16

How to address the challenges: **simplified "one-step registration"**

The sector is calling for a **one-step registration process**. All aspects of ECD such as physical space, health and safety and programmatic elements ought to be dealt with in a single registration process guided by regulations and norms and standards that allow for different types of ECD programme providers.

In our view, a one-step registration process will be most effective together with more holistic reforms which a) recognises different modalities of ECD provisioning and b) ensures that registration requirements are adequate and not unduly onerous.

This holistic reform is entirely achievable; however, **the current Bill needs to be significantly reconsidered in order to achieve this**. We urge the responsible departments and their respective portfolio and select committees (including local government and the Department of Health) to, in the process of finalising this Bill, engage stakeholders on the holistic model for such reform and to consider comprehensive amendments to ensure a streamlined and effective registration process is achieved.

The Bill's proposed amendments and our submissions on how the Bill needs to be changed

Section	**Concerns**	**Proposal**
103C (new insertion) "Any person, Department, provincial head of social development or organisation may establish or operate an early childhood development centre provided that the early childhood development centre—	The Bill not only fails to address the challenges of the dual-registration process but also now introduces the possibility of a third registration requirement. Under the Bill, a facility which provides ECD programmes for more than six children from birth to school-going age will be considered as **both** a partial care facility and an ECD centre.	**a) A simplified one-step registration process is required**. In order to achieve this, drafters of the Bill must engage stakeholders on the holistic model for such reform with comprehensive amendments to ensure that a streamlined and effective registration process (inclusive of different modalities of provisioning) is achieved. In particular, we urge that all aspects of ECD provisioning are consolidated under an integrated chapter that provides for a one-step registration process under the Children's Act. It also bears emphasis that the current regulations prescribed under the Act relating to ECD provisioning will

(a) is registered with the provincial government of the province where the centre is situated;" **Read together with:** - the definition of Early Childhood Development Centre (introduced by clause 1(j) of the Bill); - the existing provisions relating to the definition and registration of partial care (Sections 76 and 80 of the Children's Act); and - the provision of ECD programmes by partial care facilities (section 93(5) of the Children's Act amended by clause 47(e) of the Bill).	This means that such an ECD programme provider may be required to comply with **three separate registration requirements** (i.e. registration as a partial care facility, registration as an ECD centre and registration of its ECD programmes). We note that the Bill (proposed sections 103(C)(4) and 103(C)(5)) caters for a registered partial care facility (that provides ECD programmes) being regarded as having been registered as an ECD centre for a period of 5 years from the date on which the amendments take effect.[58] However, it is not clear that these provisions apply to partial care facilities established *after* the amendments come into effect. Moreover, after the five-year deeming period has elapsed, it would appear that the triple registration regime would apply to all facilities providing ECD programmes.	need to be carefully revised in line with adopted reforms. The process of regulatory overhaul should be considered in tandem with the legislative amendment process to ensure coordinated, consistent and holistic reform. b) The Bill, in the least, needs to be amended to avoid the potential for triple registration. In particular, the confusing overlap between the scope and regulation of partial care and ECD centres needs to be addressed. While this requires a holistic approach, amendments may include the following: (i) Providing for an overarching definition of an "ECD provider" that is broad enough to include different types of ECD provisioning (and to exclude some types of provisioning where appropriate); **and** (ii) The removal of provisioning of ECD programmes from the scope of partial care entirely by deleting section 93(5)(a) of the Children's Act; **and** (iii) Excluding the care of a child by an ECD provider (as contemplated under Chapter 6, Part II) from the scope of partial care under section 76 of the Children's Act;

[58] Clause 55 of the Bill, introducing proposed section 103C(4) and 103C(5).

	We doubt that this is the intended effect of the legislation and therefore amendments have to be made to avoid this outcome.	**and** (iv) "early childhood development services" as contemplated in section 91(2) of the Act for children up to school going age needs to be removed as a type of partial care from regulation 12(1)(a) of the General Regulations regarding Children.

8.3 Recognition of different types of ECD providers

Challenges in the Children's Act: **inappropriate "one-size-fits-all" approach**

The Act does not explicitly provide for different types of ECD programme provisioning. The Act does not accommodate non-centre based programmes. Under the current legislation, it has been arguable that certain modalities of ECD provisioning (e.g. sessional programmes such a playgroups) do not fall within the scope of the definition of "partial care" and should therefore not be subject to those onerous registration requirements (and need only register as an ECD programme). However, even with this approach the current Act does not adequately address the need for a fully differentiated approach to different types of ECD providers.

Non-centre based programmes can reach hundreds of thousands of children in areas where ECD infrastructure is limited or not desirable, such as in geographies with a small child population. Importantly, they offer caregivers alternate early care and learning programmes which may better suit their needs. They must be recognised as distinct from partial care (or ECD centres) and ought to be registered, regulated and funded accordingly.

How to address the challenges: **differentiated approach to various ECD providers**

Different types of ECD programme modalities (for example, centre-based and non-centre based which includes playgroups, toy libraries and home-based ECD) must be expressly recognized and they must have differentiated norms and standards applicable to their modality.

The Children's Act should expressly delineate different types of providers of ECD programmes. Alternatively, the Children's Act should expressly allow the Minister to determine different types of providers through regulations. Further, the Minister must have the power to provide for differentiated norms and standards.

The Bill's proposed amendments and our submissions on how the Bill needs to be changed

Section	**Concerns**	**Proposal**
1 "early childhood development centre" means a centre that provides an early childhood development programme as contemplated in section 91(3) for more than six children from birth to school going age"	The introduction of a new definition of 'ECD centre' seems to focus on centre-based provisioning. The Bill therefore still fails to adequately recognise and regulate different types of ECD modalities. Further, the provisions relating to ECD centres are simply a cut and paste from the partial care chapter, including the norms and standards framework. This leads to even more duplication and confusion in the regulation of the ECD sector.	a) The legislature must reconsider the terminology and definitions utilised in the Bill, in particular the definition "ECD centre". This reconsideration is necessary as the current Bill insufficiently accommodates different types of ECD provisioning. In addition, as mentioned at point 6.2 above, the definition adopted must also align with the objective of achieving a streamlined, one-step registration process. b) The Children's Act should expressly provide for the recognition of different types of providers for ECD programmes. This can be achieved by requiring the Minister to make regulations concerning different types of ECD programme delivery and for differentiated norms and standards in respect of these different modalities of provisioning.

8.4 Compliance standards and overlapping roles and responsibilities

Challenges in the Children's Act: **inaccessible health and safety standards and duplication of local and provincial roles and responsibilities**

The Act is not clear on who is ultimately responsible for: a) developing health and safety standards; and b) ensuring compliance with health and safety standards for ECD programme providers. The legislation simply states that an applicant must comply with *all* prescribed requirements including those of the municipality. This creates the conditions for overlap and duplication between provincial and local government's health and safety checks. The Act is also surprisingly silent on local government's responsibilities in respect of "child care facilities" which is a competency of local government as per Schedule 4B of the Constitution.

As it stands, compliance standards for ECD providers are set out in the Children's Act; the Health Act and various local government by-laws. This creates an untenable administrative burden on the State and on the applicant, who has to comply with multiple sets of requirements.

Further, the norms and standards that an ECD provider is required to comply with has increased significantly, with higher standards being introduced by the National Environmental Health Norms and Standards ("**NEHNS**") in 2015. These higher norms and standards are driven by "international best practice",[59] underpinned by higher living standards internationally. Many of the Norms and Standards as determined under the Children's Act are also unrealistic. Standards in South Africa have become excessive and for this reason, largely unattainable by the overwhelming majority of ECD providers who serve poor communities. According to an analysis of the General Household Survey from StatsSA, together with data from DSD, it is estimated that of the 3.7 million children who do access some form of ECD programme, two-thirds access programmes that are unregulated and unregistered.[60]

How to address the challenges: **reasonable and appropriate health and safety standards and clearly defined and monitored roles and responsibilities**

National legislation must clearly define roles and responsibilities of the different levels of government in relation to ensuring a safe and healthy environment for children. Local government's competencies in terms of the Constitution must be considered. The legislation should provide

[59] Section 1 of the NEHNS.

[60] See Ilifa Labantwana's analysis of Statistics SA's *General Household Survey 2018*. (above)

guidance to local government to minimize excessive and unrealistic health and safety standards as well as ensure that provinces play a role in monitoring and oversight of local government responsibilities (rather than duplicating their roles and responsibilities).

The Water Services Act 108 of 1997 offers one example of how the appropriate allocation of roles and responsibilities between different levels of government in respect of a Schedule 4B functional competency may be achieved.

Amendments to legislation in relation to health and safety standards must be accompanied by a complete overhaul of all existing regulations (including the NEHNS). Regulations concerning health, safety and programme standards must be streamlined and appropriately determined considering the differing contexts in South Africa as well as the modality of ECD provisioning.

The Bill's proposed amendments and our submissions on how the Bill needs to be changed

Section	**Concerns**	**Proposal**
103B (new insertion) norms and standards for early childhood development centres Read with existing sections of the Act dealing with partial care	The Bill makes no attempt to clarify the roles and responsibilities of the levels of government in respect of ensuring a healthy and safe environment for children which means the requirements to comply with multiple different standards remains. The overlap between partial care facilities and ECD centres and with the provisions of partial care simply being cut and pasted for ECD centres also creates much confusion. The insertion of Part II in the Children's Amendment Bill for ECD centres replicates and duplicates the existing framework for norms and standards of partial care in relation to ECD centres.	a) Legislation should clearly outline the duties, planning and reporting processes of *local* government. Local government duties should include the duty to ensure a healthy and safe environment for children and appropriate planning and reporting in respect thereof. b) Legislation should clearly outline the duties, planning and reporting processes of the *provincial* and *national* government. In respect of ensuring a healthy and safe environment for children these should be limited to powers of monitoring and intervention so as to avoid duplication with local government (see Chapter 8 of the Water Services Act as an example of national legislation clearly setting out the scope of national and provincial monitoring and oversight obligations). d) At the same time, health, safety and programme standards relating to ECD provisioning must be simplified and streamlined across all prescribed requirements. These reforms can only be properly achieved through a comprehensive re-evaluation of existing legislation and regulations, including the NEHNS.

norms and standards.	It also simply duplicates the provisions in relation to the responsibilities of government.	

8.5 Assistance to ECD providers servicing poor communities

Challenges in the Children's Act: **Failure to utilise the "power to assist" clauses to enable registration and compliance with minimum norms and standards**

Express powers already exist in the Act to empower the DSD to support facilities to comply with any number of the requirements contained in various national norms and standards frameworks,[61] as well as municipal by-laws.[62] The DSD has the power to assist if there has been cancellation of registration and in the process of considering an application for registration.[63] Funding or other forms of support can be provided to help with compliance when a facility or programme is in the process of registering. This power is not contingent on conditional registration. However, there is little evidence of this power being utilised over the last decade. Part of the problem is that provinces have never had to report on the use of this power and there is no provision mandating the allocation of budget to this.

How to address the challenge: **Strengthen "power to assist" clauses and create accountability mechanism**

The power to assist clauses must be retained, national and provincial departments must be required to consider the need to assist ECD providers in their strategies (including allocation of budget resources) and must report to the Minister on progress achieved.

[61] As laid out in the General Regulations, the National Norms and Standards for ECD Programmes, and the NEHNS.

[62] Section 82(5) of the Children's Act, under the title "consideration of application" and section 84(3), under the section entitled "cancellation of registration". Similar powers exist in respect of ECD programme registration in section 97(5) and 99(3) of the Children's Act.
"The provincial head of social development may assist a registration holder to comply with the prescribed national norms and standards contemplated in section 79, any requirements as may be prescribed or any provision of this Act where the cancellation was due to non-compliance with those national norms and standards, conditions, requirements or provision."

[63] Sections 82(5); 84(3); 97(5) and 99(3)) of the Children's Act.

The Bill's proposed amendments and our submissions on how the Bill needs to be changed

Section	Concerns	Proposal
78(4) "**[The funding of partial care facilities must be prioritised]** The MEC for social development may prioritise and fund partial care facilities and services" 93(4): **[The funding of early childhood development programmes must be prioritised-** **(a) in communities where families lack the means of providing proper shelter, food and other basic necessities of life to their children; and** **(b) to make early childhood development programmes available to children with disabilities.]** "The MEC for social development may prioritise and fund early childhood development programmes"	**De-prioritisation of poor communities** The current law requires that the funding of ECD programmes to poor communities *must* be prioritised. The Bill turns this obligation into a discretionary power by providing that funding of partial care facilities and ECD programmes to poor communities *may* be prioritised. This undermines the realisation of the right to ECD for all children and is a regressive proposal.	Proposals to turn the obligation to prioritise poor communities to a discretionary power must be removed. The following amendments should accordingly be **rejected**: Amendment to s78(4). Amendment to s93(4).
82(5) 'Notwithstanding section 78(3) a provincial head of social development may assist the owner or manager of a partial care facility where registration with	**Narrowing of the "power to assist" clauses**	a) The "power to assist" clauses must remain as broad as possible.

conditions is granted, to comply with the prescribed national norms and standards contemplated in section 79 and such other requirements as may be prescribed." 78(3A) 'A partial care facility registered with conditions qualifies for funding notwithstanding only partial compliance with the prescribed national norms and standards.' **Amendment 47 introducing section 93(3A)** in relation to early childhood development programmes as follows: ''(3A) A conditionally registered early childhood development programme may qualify for funding notwithstanding only partial compliance with the prescribed national norms and standards.''	The current Act empowers the Department of Social Development to assist partial care facilities and programme providers to comply with prescribed norms and standards (the so-called "power to assist" clauses). The power to assist allows for budget to be allocated for the purposes of assisting with compliance with norms and standards (including, for example, infrastructural improvements or other types of support). The Act already makes it clear that the provincial head of social development has the power to assist non-compliant facilities if there has been cancellation of registration and in the process of considering an application. That is, a facility does not already have to be registered in order for assistance to be provided. The Bill reverses this position where partial care facilities are concerned	The following amendments should accordingly be **rejected**: Amendment to s82(5) b) In addition, the "power to assist" clauses should be strengthened. This can be achieved by a) strengthening reporting on the power to assist and b) incorporating the power to assist in planning. *a) Amendments to ensure national and provincial report on utilisation of the power to assist* Amending section 82 of the Act in order to ensure that provincial departments report on the exercise of the power to assist by inserting after subsection (5) the following section: "(5A) The provincial head of social development must make an annual report to the Minister on progress achieved in respect of section 82(5)." Amending section 97 of the Act by inserting after subsection (5) the following section: "(5A) The provincial head of social

	and makes the use of the "power to assist" contingent on the granting of registration with conditions. This is therefore a narrowing of the powers. Even though proposed amendments introducing clauses 78(3A) and 93(3A) appear to recognise that funding may be provided where there has been "only partial compliance with national norms and standards", those provisions apply to *conditionally registered* facilities and programmes. Together with the ongoing confusion around the meaning of conditional registration (addressed below), these provisions do not alleviate the difficulty of ensuring that facilities and programmes that have not been able to meet registration requirements may qualify for funding assistance.	development must make an annual report to the Minister on progress achieved in respect of section 97(5)." *b) Amendments to ensure that national and provincial strategies consider the need to assist facilities* Amending section 77(1), 77(2), 91(1) and 92(2) to ensure that national and provincial strategies duly consider the need to assist facilities to comply with norms and standards and other registration requirements. This can be achieved by cross referencing the relevant "power to assist" clauses in the list of things the Minister or MECs must give due consideration to. For example: "(1) The Minister, after consultation with interested persons and the Ministers of Education, Finance, Health, Provincial and Local Government and Transport, must include in the departmental strategy a comprehensive national strategy aimed at ensuring an appropriate spread of partial care facilities throughout the Republic, giving due consideration to section 82(5) and as provided in section 11, to children with disabilities or chronic illnesses."

8.6 The conditional registration framework

Challenges in the Children's Act: **No clear distinction between "conditional registration" and registration with conditions**

The Act currently includes the possibility of "conditional registration". This term has not been consistently understood or applied as allowing for the registration of providers who are not yet meeting all the requirements of registration. It is sometimes understood as only referring to the attaching of conditions to fully registered providers.

Therefore, under the current Act, the concepts of "conditional registration" and "registration with conditions" are not clearly distinguished, which leads to confusion and limits the effectiveness of conditional registration as a tool for increasing subsidised early learning and for the progressive realisation of norms and standards.

How to address the challenges: **A clear "conditional registration framework"**

It needs to be clear that "conditional registration" of programme providers is possible prior to meeting the full requirements of registration and will therefore be granted based on lower threshold requirements. These providers should be supported to meet full registration requirements within a specified period.

There should also be express recognition of "registration with conditions", which is a distinct concept but also serves an important purpose.

The Bill's proposed amendments and our submissions on how the Bill needs to be changed

Section	**Concerns**	**Proposal**
78(3A)"A partial care facility registered with conditions qualifies for funding notwithstanding only partial compliance with the prescribed national norms and standards."	The proposed amendments do not clearly accommodate and/or differentiate between "conditional registration"; "conditions relating to registration" and "registration with conditions" and the terms are used differently in relation to partial care,	**a) The use of conditional registration for the purposes of progressive realisation of norms and standards or relevant requirements should be made clear.** Such clarity can be achieved, by for example:

83 "**[Conditional registration]** Conditions relating to registration— The registration or renewal of registration of a partial care facility may be granted on such conditions as the provincial head of social development may determine, including **[conditions]**— *(a)* conditions specifying the type of partial care that may or must be provided in terms of the registration; *(b)* **[stating]** the period for **[which the conditional registration will remain valid**] compliance with the conditions referred to in paragraph *(a)*; and *(c)* **[providing]** any other matter that may be prescribed**.**" **93(3A)** 'A conditionally registered early childhood development programme may qualify for funding notwithstanding only partial compliance with the prescribed national norms and standards.'' 98 "**[Conditional registration] Conditions for registration of early childhood development programme** The registration or renewal of registration of an early childhood development programme may be granted on	ECD programmes and ECD centres. It is therefore unclear whether DSD is able to grant conditional registration if there is non-compliance with registration requirements as prescribed. As explained above, both conditional registration and registration with conditions serve an important purpose and should be expressly accommodated. However, the Bill continues to conflate and confuse these two concepts. On the one hand, the proposed amendments seem to entrench the "narrow" interpretation that the granting of full registration is dependent on the fulfilment of all conditions. Yet on the other hand, and while not a model of clarity, the amendments to the funding provision (with the insertion of 78(3A) and 93(3A) also discussed above in relation to the power to assist, appears to envisage some form of registration being possible where there is only partial compliance with the prescribed norms and standards. These	Amending sections 83 and 98 as follows: "(1) The registration or renewal of registration of a partial care facility (early childhood development programme) may be granted on such conditions as the provincial head of social development may determine, including conditions— (a) specifying the type of partial care (early childhood development programme) that may or must be provided in terms of the registration; (b) stating the period for which the conditional registration will remain valid; ~~and~~ (bB) specifying the period by which the applicant must comply with the prescribed requirements for registration; and (c) providing for any other matters that may be prescribed." *Similar proposed amendments should also be made to section 103F and 103B which have been inserted in Part II of Chapter 6.* **b) It should also be made an express provision that regulations may be issued relating to the procedure**

such conditions as the provincial head of social development may determine, including **[conditions]**- (a) conditions specifying the type of partial care that may or must be provided in terms of the registration; **(b) [stating the period for which conditional registration will remain valid]** the period for compliance; and **(c) [providing for]** any other matters that may be prescribed." 103F "**Conditions for registration of early childhood development centres** (1)The registration or renewal of registration of an early childhood development centre may be granted on such conditions as the provincial head of social development may determine, including— (a) conditions specifying the type of early childhood development services that may or must be provided in terms of the registration; (b) the period for compliance; and (c) any other matters that may be prescribed." (Read together with references to "conditional registration" in proposed sections 103D and 103E.)	provisions are, however, not entirely clear and there is no similar provision for ECD centres. In relation to ECD centres, proposed sections 103D and 103E make reference to "conditional registration", however the proposed section 103F does not make provision for conditional registration at all, only "conditions for registration". This inconsistency and confusion is untenable.	**for obtaining conditional registration and progressively attaining full registration.** Amending sections 90 and 103 of the Act as follows: By the insertion of paragraph aA after paragraph (a): "(aA) the procedure to be followed in connection with the granting of conditional registration and the process by which full registration may thereafter be obtained."

8.7 Provision of infrastructure support

Challenges in the Children's Act: **Failure to give effect to infrastructure provisions in the National ECD Policy**

Under the Act, there is no prohibition on funding of infrastructure improvements for partial care facilities located on private property. Such funding is, in fact, permissible in light of the "power to assist" clauses.

However, the Act fails to give effect to the ECD infrastructure provisions in the National ECD Policy. These include: the development of an infrastructure plan; local government obligations regarding the maintenance and public provision of ECD centres in poor areas and requiring the Minister to develop norms and standards for public provision of ECD centres. This hampers the proper implementation or realisation of those policy objectives.

How to address the challenges: **Clear support for infrastructure needs of the sector to be legislated**

The legislation must clearly outline government duties, particularly duties of municipalities to expand access to public ECD programme infrastructure; the maintenance of ECD programme infrastructure and of existing facilities on private property and ensuring poor communities have access to sufficient and appropriate ECD providers.[64] The legislation should require that an infrastructure plan be developed to ensure equitable and universal access to early childhood development programmes.[65]

The Bill's proposed amendments and our submissions on how the Bill needs to be changed

Section	Concerns	Proposal
s 78 (5) The funding for infrastructure of partial care facilities does not apply to private	Parliament ought to reject the proposed blanket ban on government investment to improve infrastructure for partial care facilities on private property as this will further	a) **Existing funding provisions should be retained and amendment 35(e) must be deleted in its entirety.** Proposed section 78(5) must be **rejected**.

[64] Clause 9.5(3)(g) of the ECD Policy.

[65] Clause 9.5 of the ECD Policy.

homes of registered non-profit organisations, private homes in general, business properties or properties not owned by a non-profit organisation.	marginalise mostly poor children. Any concerns government may have in respect of protecting their financial investments for their social impact goals in ECD, can be mitigated against with other checks and procedures. The Bill makes no attempt to include key policy amendments relating to infrastructure.	b) **The infrastructure needs of the sector must additionally be supported by including the following:** Legislation should clearly outline government duties, particularly the duties of municipalities, in respect of providing for and maintaining sufficient and appropriate ECD programme infrastructure in their jurisdictions. In addition, legislation should include the following in relation to infrastructure for ECD programmes: (3) The Minister, in collaboration with provincial departments and local government including with the Department of Basic Education, the Department of Health and the Department of Cooperative Governance and Traditional Affairs must develop a costed national infrastructure plan to ensure equitable and universal access to early childhood development programmes.

8.8 Conclusion

The early childhood development sector has been severely impacted by Covid-19, with the second NIDS-CRAM survey estimating that only 13% of children aged 0-6 years are attending ECD programmes. Access to quality, holistic ECD services is one of the most significant human development interventions that can be made, it is guaranteed to ensure that more children get an equal opportunity in life, improving lives for all. The current state of the ECD sector is therefore a disaster for children and our country. But as we have explained above, the ECD sector has been facing significant, long-standing challenges much related to a legal and regulatory system that is not enabling.

If there ever was a time to find the political will to fix these challenges, it is now. We hope that the Children's Amendment Bill process does not become another missed opportunity. We call on all MPs to urgently ensure that real reform of the legal framework for ECD is taken seriously and that our proposed submissions are accepted.