Children in Distress
CINDI
Networking for children affected by AIDS

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Ms Lindiwe Ntsabo
Portfolio Committee on Social Development
National Assembly, Parliament
childrens-amendment-bill@parliament.gov.za

27th November 2020

Dear Ms Ntsabo

Re. Children in Distress Network submission on the Children's Amendment Bill [B18-2020]

I have pleasure in attaching a submission on the Children's Amendment Bill from the Children in Distress Network (CINDI) in KwaZulu-Natal.

Founded in 1996, CINDI's vision is to see a world where children thrive into adulthood regardless of background or circumstance. We aim to achieve this through a three-fold approach:

- Coordinating a network of civil society organisations capable of implementing diverse, effective and sustainable programmes for children and youth at ***provincial level*** within KwaZulu-Natal
- Working with strategic partners in the children's sector at ***national level*** to carry out research to inform advocacy and support responsive practice
- Participate actively as a member of the Family for Every Child ***global alliance*** through the sharing of knowledge, skills and expertise in support of the alliance's collective goal to see children growing up in a safe, caring and permanent family

CINDI appreciates the opportunity to make submissions on the Children's Amendment Bill [B18-2020] to the Portfolio Committee on Social Development.

Children should spend their childhoods in safe, caring and nurturing families. They deserve the best care and stability possible to be happy and feel cared for. For this to happen, we need to drive more efforts towards family preservation and the prevention of family separation. Policy and practice must recognise and adequately respond to the complexities of family composition and needs in South Africa.

In line with this, CINDI's submission focuses on four areas within the Children's Amendment Bill which serve to ensure safe, nurturing family-based care for all children, regardless of circumstance or background. These are:

- Orphaned and abandoned children in the care of family members
- Parental rights and responsibilities of unmarried fathers
- Adoption
- Corporal punishment

Yours sincerely,

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Orphaned and Abandoned Children in the Care of Family Members

Kinship care (the care of children by family members or close friends of the family) is one of South Africa's strongest assets in ensuring that children grow up in safe, caring families. 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]

In 2017, CINDI carried out some research on the unnecessary loss of family-based care. Kinship caregivers in this research consistently referred to the financial situation in the family as the highest risk factor for the loss of family-based care:

> *"The only help I need is food. Here at home there is only one person who is working and the food just finish in the middle of the month so I would really be grateful if I can get help with food."*

This financial need was often coupled with narratives of complex family relationships; ill-health of the caregiver; children behaving in ways that the parent or carer finds difficult to cope with including 'bad' friendships, drug or alcohol use and being violent:

> *"Everything is challenging because no one is helping me and I am no longer working, I am only getting a pension. Now it is challenging because she will need everything from me but I have no cash. ‹…› When she is told not to do something she will do it. ‹…› Just like her dating. We warned her about it but she would not listen. ‹…› her mind is on boys, not on school. Because when she gets home she is supposed to be studying… but she does not do that she ‹…› she just goes to her boyfriends than I cannot do anything about it. We tried punishing her but that did not work."*

The National Department of Social Development's Child Care and Protection Policy notes that the majority of family members caring for orphaned or abandoned children require support from the state, but not supervision or statutory services.[2] As CINDI's research indicates, 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.

Many children in kinship care, however, are not receiving this support because its provision has been coupled with foster care. The foster care system is 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

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

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 safely already in the care of family members.

This situation has resulted in children in kinship care receiving less than adequate financial support from the State - in 2018 only 50% of the 600 000 eligible children living in kinship care were in receipt of the Foster Child Grant (FCG) and 20% were receiving no form of grant at all. The administrative requirements of a high foster care caseload have over-burdened social workers making them less available to carry out preventive services to families (such as family counselling and support or parenting support) and adequately respond to children in need of care and protection because of abuse, neglect or exploitation.

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 new applications by family 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.

[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

We therefore make the following recommendations per clause with regards to the amendments proposed in the Children's Amendment Bill [B18-2020] in relation to children in the care of family members:

Clause	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.	
Gaurdianship **s24**	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	**s24 Assignment of guardianship by order of court** (1) 'Any person having an interest in the care, well-being and development of a child may apply to the

& **s45 (1) (c)** **&** **S45(3)**	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.	High Court or the children's court for an order granting guardianship of the child.' **s45 Matters children court may adjudicate** (1) '(bA) guardianship of a child as contemplated in section 24'
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 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	'A child who has been abandoned or orphaned and is not in the care of a family member as defined in section 1'

	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 **s159 (2A)**	*More information in needed from DSD as to why this amendment is needed and how it will further children's best interests* 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	'(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.

	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.	
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	<u>(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).</u>

	terminated. This needs to be explicitly prevented as it will constitute regressive action for the families already in receipt of the foster care grant.	
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.	

The Parental Rights and Responsibilities of Unmarried Fathers

Parental care, inclusive of fatherhood, is a child's right. The engaged presence of a non-residential father in a child's life is linked to positive developmental outcomes[5]. 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 Children's 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 the unmarried father automatically acquires 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). The Act conceptualises the acquisition of PRRs separately from the exercise of PRRs, and when exercise of rights is being considered, the focus shifts to the best interests of the child.

Currently, s21 is straightforward between parents and families in a cooperative relationship. However, when disputes exist a child may be denied their right to fatherhood if the mother disputes that the father has fulfilled the s21 requirements. The onus then rests on the father to prove his fitness as a father through mediation or through a court 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.

In addition to infringing on child's right to fatherhood, the challenges faced by unmarried fathers in exercising their PRR can lead to the denial of other rights for children. The case study below from CINDI's research on the loss of family-based care explains this further (note the case study is fictitious to protect identities but is representative of a typical case from the research).

> *"Vuyo was born in South Africa to a mother from Lesotho and a father from South Africa. His parents were in a relationship at the time of his birth but not married or co-resident. Their relationship ended on unfriendly terms within his first year of life and his mother returned to Lesotho. His father tried to remain up to date with Vuyo's development, although response from his mother was sporadic and normally only took place when she needed financial assistance. His father did not have a passport to travel to Lesotho. When Vuyo was 11, his mother passed away and he was left in the care of an elderly relative in Lesotho. Finding it increasingly difficult to financially support Vuyo, the relative contacted his father and Vuyo moved to stay with him in South Africa. At the time of his birth, Vuyo's*

[5] Sonke Gender Justice & Human Sciences Research Council (2018), State of South Africa's Fathers
[6] S18

mother did not have her paperwork with her to register him and returned to Lesotho before completing this process. As a result, Vuyo did not have a birth certificate. His father was unable to obtain a court order and/or afford the paternity test required by Home Affairs to prove the relationship between Vuyo and his father to register his birth. As a result, his father was unable to register Vuyo at a school and access the child support grant to help supplement his income from part time garden work. Concerned about his son's exclusion from education, his father eventually sent Vuyo back to live with the elderly relative in Lesotho. Vuyo by now was 12 and presenting with some challenging behaviour which the elderly relative tried to remedy with harsh physical punishment. Vuyo ran away from home and came back to South Africa where he lived on the streets for close to a year until being placed in the care of a CYCC. When asked how he could be supported to return to live with his father, Vuyo replied that he needed a birth certificate so that his father could get a grant to care for him and so he could return to school."

The case study highlights the considerable and unnecessary knock-on effects that the inability of unmarried fathers to exercise their PRR has on the care and wellbeing of their children. We therefore make the following recommendations with regards to the amendments proposed in the Children's Amendment Bill [B18-2020] with regards to the parental rights and responsibilities of unmarried fathers:

Sections in bold in square brackets are deletions

Words <u>underlined</u> are additions

Amendment	Text of section	Support or oppose?	Our proposal for revision	Motivation
21(1) (a)	**Parental responsibilities and rights of unmarried fathers** (1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child - ''*(a)* if at the time of the child's **[birth he]** <u>conception, or any time between the child's conception and birth, the biological father</u> is living with the <u>biological</u> mother **[in a permanent life-partnership]**; or'';	Support		
21 (1) (b)	''*(b)* if he, regardless of whether he has lived or is living with the <u>biological</u> mother—''; ''(ii) contributes or has attempted **[in good faith]** to contribute to the child's upbringing **[for a reasonable period]**; and''; ''(iii) contributes or has attempted **[in good faith]** to contribute towards expenses in connection with the maintenance of the child **[for a reasonable period]**.'';	Support		Removing adjectives which require value judgments will make the section more accessible to parents and more consistent interpretation by the courts.

21 (1A) **(new sub-section)**	The Amendment Bill is proposed a new sub-section 1A: ''(1A) A family advocate 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, and (ii) the biological father has shown to the satisfaction of the family advocate that he has automatically acquired full parental responsibilities and rights in terms of subsection (1)*(a)* or (1)*(b)*.'';'	Support with an additional sub-section.	Insert the underlined sub-section. ''(1A) A family advocate 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, <u>or</u> <u>(ii)the mother's whereabouts are not known or she is deceased;</u> and	The Act needs to cater for the situation where the mother has abandoned the family or she has died. This insertion would enable an unmarried father to apply for a certificate from the family advocate to recognise his s21 rights as a father. This process is likely to be more accessible than a court process.

			(iii) the biological father has shown to the satisfaction of the family advocate that he has automatically acquired full parental responsibilities and rights in terms of subsection (1)*(a)* or (1)*(b)*.'';|	
21(3)(a)	''*(a)* If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (1)*(a)* or *(b)*, the matter must be referred for mediation to a family advocate,**[social worker,]** social service **[professional]** practitioner or other suitably qualified person as may be prescribed.''	Support		This amendment will make mediation more accessible.
21 (3)(b)	**[(b) any party to the mediation may have the outcome of the mediation reviewed by a court.]**	Oppose	The motivation behind deleting this 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.	Section 45(3) makes it clear that the High Court can always review any matter. But will parents be able to have the mediation reviewed by the children's court if this amendment is made?
24(1)	**Assignment of guardianship by order of court**	This section needs to be amended	Insert underlined words:	The Act should be clear that the children's court

No amendment is included in the bill	'(1) Any person having an interest in the care, well-being and development of a child may apply to the High Court for an order granting guardianship of the child to the applicant.'		''(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.'	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.
24(3) **No amendment is included in the bill**	**Assignment of guardianship by order of court** '(3) In the event of a person applying for guardianship of a child that already has a guardian, the applicant must submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child."	This section needs to be amended	Insert underlined words: ''(3) In the event of a person applying for guardianship of a child that already has a guardian, the applicant <u>must indicate whether he or she is applying for co-guardianship with the existing guardian or</u> submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child."	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 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.
45 (1) (bA)	**Matters children's court may adjudicate** (1) Subject to section 1(4), a children's court may adjudicate any matter, involving - (a) the protection and well-being of a child;	Support but recommend different amendments	<u>"bA guardianship"</u> or <u>"(*bA*) guardianship where the application is brought by the child's unmarried father or other family member of the child"</u>	Remove restriction to orphaned or abandoned children and extend children's court jurisdiction to hear all guardianship matters. This will ensure parents , including unmarried

	(b) the care of, or contact with, a child; *(b*A*)* guardianship of an orphaned or abandoned child as contemplated in section 24;'' (c) paternity of a child;'		And (cA) confirmation of an unmarried father's rights in terms of s21, or review of mediation in terms of s21(3).	fathers, can also approach the children's court to resolve guardianship matters. Make it clear that the children's court can also issue an order confirming s21 rights and review mediation with regards to s21 rights
45(3A) & (3B)	''(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 a child.''.	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.

Adoption

Adoption is a key service to be considered for a child who does not have the prospects of permanent care by his or her biological parents. Adoptions is one of the designated child protection services as stipulated by the Children's Act (Act 38 of 2005). Adoption entails a legal process according to which the parental responsibilities and rights of biological parent/s or guardian/s in respect of a child are vested in the adoptive parent/s. In most instances the legal implication is a permanent termination of the responsibilities and rights of the biological parent/s or guardian/s. It therefore has permanent legal consequences as a child's legal identity is changed.

In South Africa, the Children's Act (38 of 2005) and the Adoption Policy Framework and Strategy (DSD, 2010a) prioritises adoptions as a preferred form of permanent alternative care for young adoptable children in line with The United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child .The purpose of adoptions is to protect children and to promote the goals of permanency by providing stable permanent alternative family care. The emphasis is on the fact that children have a right to grow up in permanent and stable families, and that adoption should be based on the child's best interest and rights. Adoptions is evidenced to be the best option for children who have been abandoned and who have no family or kin network or care. Although there is a lack of formal statistics on the number of child abandonments reported, service providers working in this area have reported a significant growth in numbers compared to 2019. The Gauteng Department of Health issued a report stating that 118 babies had been abandoned in Gauteng hospitals during lockdown. In cases where children have no family alternative to institutional care, adoption has robust developmental and emotional benefits over long term institutional care, in particular for younger children. The Children's Act is explicit about the importance of considering adoptions as a means to achieve permanence.

In cases of potential adoptable children where family could be traced the National DSD Adoption policy framework applies and the responsible service provider considers alternatives for permanent care or adoption within the child's extended family.

According to the Social Service Professions Act (110 of 1978) adoption is a specialised area in the field of childcare and protection. The Children's Act (38 of 2005), the Children's Second Amendment Act (18 of 2016) and the Social Service Professions Act prescribe who may legally provide adoption services. Adoption services may be provided by:

- Accredited adoption social workers in private practice who have a speciality in adoption services and are registered in terms of the Social Services Professions Act, 1978 (Act No.110 of 1978) to render adoption services.
- Designated and accredited Child Protection organisations.
- Social Workers in the employment of DSD who have a speciality in adoption services and are registered in terms of the Social Services Professions Act, 1978 (Act No.110 of 1978) to render adoption services.

The majority of social workers in the employ of the DSD were historically excluded from rendering adoption services. They therefore frequently do not meet the prescribed requirements to register a speciality. The SACSSP and the national DSD are currently discussing a possible resolution to provide interim measures for registration of DSD social workers as specialist in adoption to address the current impasse. This process has not been finalised, so no measures have been implemented yet.

Currently there are 59 adoption social workers in private practice and 93 designated and accredited child protection organizations (**"DCPO's**") mandated to render professional adoption services nationally. There are 10 accredited DCPO's mandated to render intercountry adoptions within the framework of DSD approved working agreements. The bulk of adoption expertise lies within the accredited DCPO's and adoption social workers.

Another important factor is that adoption numbers remain relatively low when compared to other forms of alternative care and sadly the numbers show a consistent decline. During the 2010/11 financial year there were 2436 adoptions registered in SA, compared to only 1186 registered during the 2017/18 financial year. These numbers are inclusive of the number of related or family adoptions.

The Table below provides statistics of children by care placement arrangement for 2017, 2018 and 2019. This information confirms the low number of adoptions compared to other forms of care.

Children according to childcare placement, 2012, 2017/18 & 2019

Number of children in foster care 2019	Estimated number of children in residential care facilities 2018	Number of adoptions registered in SA 2017/2018
386 019	21 000	1 186

There is also no additional financial support or adoption grant for adoptive parents, as is the case with foster care. Adoptive parents could potentially access the Child Support Grant, if they pass the means test due to having an income lower than R4500/month if single or R9000 if a couple.

The Children's Act (Act 38 of 2005) prescribes fees that may be charged by adoption accredited DCPO's for professional adoption services. Most accredited DCPO's charge a nominal adoption fee based on this provision. The income derived from these fees enables DCPO's to employ (and retain) experienced social workers, and to cover general operating costs, since not all DCPO's receive a subsidy for the rendering of child protection and adoption services. Although the State pays partial subsidies for the rendering of child protection services, not all accredited adoption service providers receive such financial support from the State.

Those that do receive subsidies often only receive partial and limited financial support which often **only covers** approximately **50 %** of the social work posts and programs. DCPO's do not make **ANY** profit through fees charged since these fees mostly just cover expenses incurred. It should also be mentioned

that the salaries paid by DCPO's are significantly less when compared to salaries received by their counterparts employed by DSD.

Adoption costs include both expenses in relation to professional time of adoption service providers (salaries), secondly expenses relating to general operating costs (rent, transport, petrol, etc.) and lastly costs incurred for actual expenses for services in relation to children and legal finalisation of the adoption (medical, psychological, tracing & advertisements and sheriff). The majority of organizations also make use of an income based sliding scale and often render services free of charge when applicants cannot afford to pay a fee for professional services, ensuring that the service is accessible to all.

Adoptions are strictly regulated and monitored, particularly with regard to finances. The tariff in Regulation 107 of the Children's Act No. 38 of 2005 limits the amount that may be charged in each category of adoption work. Before any adoption proceeds, a breakdown of all Regulation 107 costings must be provided to the court for inspection. Before any parent or caregiver signs consent to adoption, the presiding officer must ensure that there has been no enticement or duress, be it financial or otherwise, and attestation under oath is made by the signatory in this regard and countersigned by the presiding officer. Various Monitoring and Evaluation protocols are in place and in addition to complying with all requirements for not for profit entities, child protection organisations must submit audited financial statements.

3. *Proposed Submission* PROVISION	**RATIONALE FOR PROPOSED AMENDMENT**	**ALTERNATIVE PROPOSAL**	**POTENTIAL IMPACT /MOTIVATION**
Section 249 ***No consideration in respect of adoptions***	1.To delete reference to all fees	1. Instead of deleting the section 249 2. Amendment of subsection (2)(c), (d) and (e) by deleting the words: *"receiving the prescribed fees".* 3. Amendment of subsection (d) by including: "a child protection organisation or an adoption social worker in a private practice accredited in terms of section 251 to provide adoption services".	1. Removal of section 249 in its entirety will not be recommended since it could allow for criminal exploitation. 2. By deletion of the words "receiving the prescribed fees" the objective aimed at removing the regulating professional fees for adoption services from the Children's Act will be achieved, since it will not place a complete prohibition on the charging of fees. 3. Professional fees charged will however still be regulated by the relevant respective professional bodies and councils
Section 239 (1)(d)	Section 239(1)(d) be accompanied by a letter by the provincial head of social development [recommending] confirming compliance with the requirements in terms of this Act regarding the adoption of the child: (1) Provided that when the provincial head does not issue the letter within 30 days of it being requested, the provincial head must report the reason for such	This will resolve the delays experienced in getting these letters and it will then comply with the current case law that the letter may be dispensed with due to unreasonable delay to deliver	

	failure to the children's court within 14 days from the date on which the letter was due; and (2) if the provincial head fails to provide the report required in subsection (1), the letter may be dispensed with;		
Section 46 of the principle Act **Section 156 (1)(iii)**	Insertion in subsection(1) after paragraph (C) of the following paragraph (cA) an order, in the prescribed form, placing a child in temporary safe care pending an application for the adoption of such child, including with prospective adoptive parents, notwithstanding the provisions of section 167(2) (e) if the child has no parent or caregiver or has a parent or caregiver but that person is unable or unsuitable to care for the child, that the child be placed in- (iii)) temporary safe care, pending application for, and finalization of, the adoption of the child, which placement may include placement with prospective adoptive parents in appropriate circumstances;	This inclusion will compliment section 156 that allows the placement of a child in temporary safe care pending adoption once the children's court enquiry concludes the child is adoptable This will allow that the child can be placed in family care as soon as possible	

Implementing the Ban on Corporal Punishment in the Home

On 18 September 2019, Chief Justice Mogoeng Mogoeng announced the Constitutional Court's decision on corporal punishment in the home. 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.[7] 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 and can be charged with assault.

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 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 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 Children's Amendment Bill submitted to Parliament presents an opportunity to create awareness, and to develop programmes to support parents to learn positive discipline so that we end the need to use corporal punishment.

Definition – what is corporal punishment?

The Child Protection Policy gives a definition of corporal punishment based on the guidance from the UNCRoC:[8]

> ***'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.* [9]

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.'*[10]

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:

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[7] Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others [2019] ZACC 34 at para 74.
[8] 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
[9] Department of Social Development (2019) National Child Care and Protection Policy, p7.
[10] Department of Social Development (2019) National Child Care and Protection Policy, 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.* [11]

We recommend that the definition used in the policy is inserted into the Act.

Repeating the prohibition in the Children's Act

South Africa's Child Care and Protection Policy October 2019 as approved by Cabinet 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.*"[12]

Is it necessary for the Children's Act to include an explicit ban on the use of corporal punishment in the home?

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 explicit 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. the prohibition was confirmed in legislation. These countries include Costa Rica, Nepal, Israel, Namibia, Zambia and South Africa[13]. In South Africa, the Abolition of Corporal Punishment Act was adopted in 1997 following the Con Court judgement in 1995 in the *State v Williams et al, case no. CCT/20/94* effecting ending juvenile whipping as it was cruel, inhuman and degrading.

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

> 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.

Promoting positive parenting

An obligation to raise-awareness and support behaviour change

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. There are a few possibilities in this regard. Firstly, the definition of care should be amended to correspond to the definition used the Policy. Secondly, section 18 of the Children's Act details parental responsibilities and rights. It should be amended to include specific reference to the responsibility to discipline children without resorting to violence.

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[11] Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others [2019] ZACC 34 at para 38.
[12] Department of Social Development (2019) National Child Care and Protection Policy, p72.
[13] See https://endcorporalpunishment.org/human-rights-law/national-high-level-court-judgments/

Clarifying parental responsibilities and rights

The definition of "care"

Changing the definition in the Children's 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 Children's Act is aligned with the definition in the policy:

> (*g*) guiding the behaviour of the child in a humane manner [using positive parenting and non-violent disciplinary methods];

Proposed amendment to section 18 on Parental Responsibilities and Rights

Add a new subsection:

> (6) A person who has care of a child, including a person who has parental responsibilities and rights in respect 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

The Children's 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 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 programme.

144. Purposes of prevention and early intervention programmes:

Add a new subsection:

(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

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.*[14]

Does the current legal framework enable this?

Criminal prosecution as a last resort

[14] Department of Social Development (2019) National Child Care and Protection Policy, p73.

We cannot have a law for which there are no consequences for transgression.

Assault is a criminal offence and a child or anyone acting in the best interests of a 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." Where 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. Where 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 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 **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." 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 skills in positive parenting. 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. Section 114 (1) details which cases must be entered it reads:

> "114. Contents of Part A of Register.—
> (1) Part A of the Register must be a record of—
> (a) all reports of abuse or deliberate neglect of a child made to the Director-General in terms of this Act;"

Section 110 (5) places the obligation on social services to submit reports to the Director-General, but it confines it to "such particulars as may be prescribed". Where the regulations and the Form 23 state that only section 110(1) reports involving physical injury, deliberate neglect or sexual abuse must be reported on a Form 23 to the Director-General are to be submitted. In practice the form 23 is only submitted at the end of an investigation when a child is deemed to be in a child in need of care and protection. To ensure that only substantiated reports are include we recommend the following amendment:

> 114. Contents of Part A of Register.—
> (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;"

Why did the court ban corporal punishment?

Below is a summary of some the research that the Children's Institute presented to the Court in their 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.[15] 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.[16]

- *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,

[15] Durrant J & Ensom R (2012) Physical punishment of children: lessons from 20 years of research. *Canadian Medical Association Journal*, 184(12): 1373–1377.
[16] 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.

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).

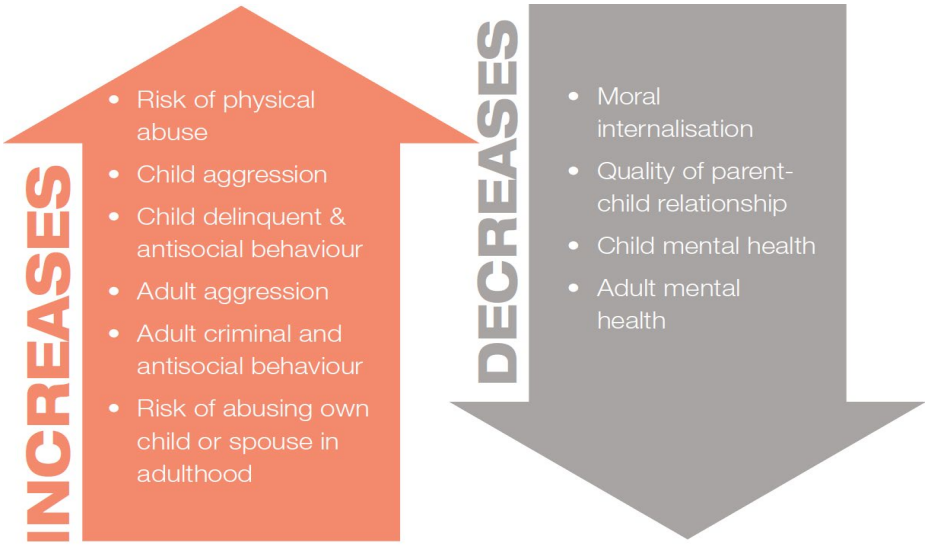

Figure 1: **Associations between corporal punishment and negative outcomes.**
Figure based on Gershoff ET (2002) Corporal punishment by parents and associated child behaviours and experiences: A meta-analytic and theoretical review. *Psychological Bulletin,* 128(4): 539-579.

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.[17] 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).[18] Female children who experienced maltreatment are at an increased risk of becoming victims of intimate partner violence in adulthood.[19] 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.

[17] 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.
[18] Fulu (n 4 above).
[19] Fulu (n 4 above).

- *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'.[20] In other words, corporal punishment does not teach children better behaviour.

Clause commented on	**Proposal**	**Motivation**
Section 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, but 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, pinching, biting, pulling hair or boxing ears, caning, forcing children to stay in uncomfortable positions, burning, scalding, or forced ingestion.	• 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. • A definition clarifies that all forms of violence no matter how light or the threat of force are a violation of child rights. • A definition is required to give effect to the changes proposed to section 12(11) – the proposed definition is based on the definition used in General Comment No. 8 by the United Nations Convention on the Rights of the Child. It also reflects South Africa's Child Care and Protection Policy October 2019, as approved by Cabinet.
Section 12	Add the following sub-clause:	• This mirrors the principles in the National Policy. It is necessary to

[20] Gershoff, E. T. 2013. Spanking and Child Development: We Know Enough Now to Stop Hitting Our Children *Child Development Perspective* 7(3):133-137.

	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.	increase public awareness, and correct implementation of the Children's Act
Section 18	Add the following sub-clause: S 18(6) A person who has care of a child, including a person who has parental responsibilities and rights in respect 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.	• 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
Section 110	Amend section 110(2) by inserting the word in bold: (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 worker to assess the situation and refer parents to a suitable prevention and early intervention programme such as positive parenting or anger management
Section 114 Contents of Part A of Register	Amend section 110(2) by inserting the word in bold: 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 deems the child to be in need of protection.
Section 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	• 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

	b) programmes promoting positive discipline at home and in alternative care are available across the Republic.	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.