SUBMISSION ON THE CHILDREN'S AMENDMENT BILL: [B 18—2020]

Jelly Beanz Child Trauma Centre

Jelly Beanz is a Non-Profit Company (NPC) which provides both response and preventive child protection services to children and their families in the Western Cape. The organisation has been in existence for a period of 10+ years, and accepts referrals from a broad range of service providers in the child protection field including the FCS SAPS Units, Department of Social Development, Department of Health, Department of Basic Education and registered Child Protection Organisations and other NGOs. Preventive services are run in communities such as Dunoon and Khayalitsha.

Jelly Beanz is also well known for training and annual African Regional Conferences aimed at providing vital education and updated child protection research findings to professionals working in the field of child protection and mental health. The organisation conducts research into child protection issues and feeds the information gained into the improvement of service provision in the wider child protection network.

Jelly Beanz expresses its concern about the dysfunctionality of child protection services in South Africa at present, and the fact that many children slip through the cracks in the system and are not provided with the protection that is their right. It is noted that these (almost cosmetic) changes to the Children's Act as proposed by the Bill have to be accompanied by the urgent reorganisation and coordination of the child care and protection system. Unchecked violence against children will perpetuate the continued cycle of gender based violence across generations.

Section 5: Inter-Sectoral implementation of Act.

One of the most concerning features of the Child Protection System in South Africa is the failure of the system to work as a collective across all role players in the system, including both government and civil society organisations. (Van Niekerk, 2018; Matthias and van Niekerk, 2019). This causes painful and long lasting secondary trauma to children and their families.

In focus groups convened to research the need for information for families and children in the child protection system, comments underlined the urgent need for the coordination of all services providers

> *'So at some point someone finds out something is happening to a child and the system social workers, police come in and gets what they need in terms of asking questions and then move out and then you are kind of left to then deal with "okay? [What next?]".' (Respondent, caregiver within the system FGD).*

> *'They didn't even bother to explain. You're a child, aach. Then next, then next. You see when you are taking a packet of something? I was like that. I was a packet.' (Respondent, children within the system FGD).*

At present there is no recommendation in the Act that *all* roleplayers, including designated child protection organisations, providing services to children in terms of the Children's act are brought into the system to improve coordination and mutual accountability. At present NPOs and civil society organisations providing services are not mentioned in the coordination section (5) and yet provide the majority of services provided for in this act. Although no change relating to this section is contained in the Bill, JBCTC recommends as follows:

Clause commented on	Proposal: Words inserted are underlined.	Motivation
None in the Bill; S5 in the existing children's Act	S5 To achieve the implementation of this Act in the manner referred to in S4, all organs of state in the National, Provincial and, where applicable, local spheres of government, <u>designated child protection and civil society organisations</u> must cooperate in the development of a uniform approach aimed at coordinating and integrating the services delivered to children.	Child protection organisations and civil society organisations as a sector must be brought into the implementation clause as implementing partners to ensure coordination of services offered by the child protection system and mutual accountability

Section 6A: A child's right to Privacy and the Protection of Personal information

The intention here is welcomed. Many children fear exposure of the personal details in the press and in many communities there is still a stigma attached to particularly to the rape of girls. However this section on its own is not adequate. JBCTC therefore supports the proposal put forward by the Children's Institute and the Centre for Child Law as follows:

Clause commented on	Proposal	Motivation
Clause 3, inserting section 6A And Clause 35, deleting s74	Proposal: Delete 6A in its entirety and replace it with the proposal that appeared in the July 2018 draft of the Bill as follows: (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." <u>And r</u>etain clause 35 (which deletes s74)	Our recommendation would expand the protection of the Children's Act to ensure protection of children's privacy in all courts, not only the Children's Court

Sections 4, 5 and 6 of the Bill, amending Ss 7,8 and 12 are seen as positive developments as they protect all children regardless of disability, nationality and gender.

Recommendations: implementation of the ban on corporal punishment and support of positive parenting:

The banning of corporal punishment through the Constitutional Court judgement on 18th September 2019 was explained by Chief Justice Mogoeng Mogoeng who stated that 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. It is therefore important to ensure that the ban is implemented, parents are educated in positive parenting and that restorative justice principles are applied when corporal punishment is reported.

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. • The definition is needed to give effect to the changes proposed to section 12(11) and is based on the definition used in General Comment No. 8 by the United Nations Convention on the Rights of the Child, and contained in South Africa's Child Care And Protection Policy Oct 2019, approved by Cabinet.
Section 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.	• This mirrors the principles in the National Policy. It is necessary to 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 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.	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 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.	• A prohibition of corporal punishment and other cruel, inhuman and degrading punishment in itself will not change behaviour. DSD needs to provide programmes to promote positive parenting. • 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.

		• The proposed subsection 144(4)(b) emphasises that all role-players need to understand what their role is in ensuring positive discipline.

Parental Rights and responsibilities of unmarried fathers

Jelly Beanz actively supports and promotes the importance of father's participation in the care of their children and mediation processes when parents find it difficult to agree on parental rights and responsibilities and parenting plans. Research supports the benefits of father's involvement in their children's lives.

Amendment	**Text of section**	**Support or oppose?**	**Proposal for revision**	**Motivation**
21(1) (a)	**Parental responsibilities and rights of unmarried fathers** (1) The biological father of 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]** conception, or any time between the child's conception and birth, the biological father is living with the biological mother **[in a permanent life-partnership]**; or'';	Support		It clarifies the position of the unmarried father. Ditto above.
21 (1) (b)	''*(b)* if he, regardless of whether he has lived or is living with the biological 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	Support		Simplifies the provision.

	maintenance of the child **[for a reasonable period]**.'';			
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 words and sub-section. ''(1A) A family advocate **<u>or the Presiding Officer of a Children's Court</u>,** 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 <u>(iii)</u> the biological father has shown	The Family Advocates office may be less accessible. 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.

			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.	Section 45(3) makes it clear that the High Court can always review any matter. This right should not be removed.
24(1) **No amendment is included in the bill**	**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 High Court for an order granting guardianship of the child to the applicant.'	This section needs to be amended	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.'	The Act should be clear that the children's court also has jurisdiction to hear guardianship applications to enable greater child friendliness and accessibility.
24(3) **No amendm**	**Assignment of guardianship by order of court**	This section needs to	Insert underlined words:	In terms of s30(1) the Act clearly envisages that more than one person can hold PRRs

ent is included in the bill	'(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."	be amended	''(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."	with respect to one child. 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; (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;'	Support but recommend different amendments	"bA guardianship" or "(*bA*) guardianship where the application is brought by the child's unmarried father or other family member of the child" And (cA) confirmation of an unmarried father's rights in terms of s21, or review of mediation in terms of s21(3).	Remove restriction to orphaned or abandoned children and extend children's court jurisdiction to hear all guardianship matters. This will ensure parents , including unmarried fathers, can also approach the more accessible 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,	Support		This amendment is strongly supported as it enables easier access to a court to resolve guardianship issues. 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

	suspension or termination of guardianship in respect of a child.''.			s24 is amended as suggested above.

Rules for the Children's Court (S27 of the Bill):

The additions in S 27 of the Bill (S52 (2) (a) (ii) are welcomed as it will facilitate the ability of children with disabilities to communicate in the Court.

Child protection services

Provision of designated child protection services S56

Provision	Accepted	Proposal	Motivation
Insertion of sub section 6 in S105 of the Act ''(6) The Department must develop and conduct a quality assurance process for the evaluation of child protection services as prescribed.''.	Yes but with an amendment	The Department, in conjunction with Designated Child Protection Organisations must develop and conduct a quality assurance process for the evaluation of child protection services as prescribed	The provision of child protection services is shared across the Department and Designated Child Protection Organisations. Quality assurance developed and conducted in a spirit of partnership.
S60 (S110) (a) The deletion of the words "concludes" and "conclusion" and replacement with "suspects" and "suspicions"	accepted		The words "concludes" and "conclusion" have caused confusion as to who may investigate child protection matters

The Child Protection Register Part B

It is strongly recommended that this register be discontinued and instead those who work with children are screened against the criminal records register.

Rationale:

- International research indicates that the cost benefits of offender registers are poor and contribute little to the protection of children.
- This register has a poor track record in terms of prompt screening and response to queries
- The register is, in part, duplicated by the National Sexual Offenders Register
- It does not record all offences that could place children at risk such as multiple offences related to drunk driving or assaults that indicate poor self control.
- The register is expensive to maintain, involving poor use of scarce resources, both material and personnel.

Children in need of care and Temporary: Ss 82 to 84 of the Bill: Ss 150 – 154 of the Children's Act

Jelly Beanz supports the recommendations of the UCT Children's Institute below. The organisation works with many children whose safety is neglected as social workers struggle to keep up with the system of foster care reporting. This lack of service delivery means that children remain in unsafe environments and are repeatedly abused because the social worker is unable to respond to all referrals. This makes a mockery of child protection week and 16 days of activism during which those who are victimised are encouraged to report this. Often when children have reported and are not provided with a service, they are in even greater danger. If the alleged offender is aware of the disclosure, the child may be punished for this and then effectively silenced.

Clause	**Concerns**	**Proposal**
S1. Definition of orphan	*Support*	
Abandoned child **S1**	It is unclear why this definition has been changed.	
Definition of a child in need of care and protection **S150(1)(a)**	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. The words "suitable and able" are unnecessary as covered in another subsection (1)	'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>
Orders when child is found to be in need of care and protection **s156(1) (cA)**	Supported with an 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 biological parent to enable family reunification.	'46. (1) A children's court may make the following orders: <u>(aA) an order confirming or granting parental responsibilities and rights in terms of s23 and 24 to a family member caring for a child'</u>
Duration and extension of alternative care orders **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	<u>'(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,</u> a court may

	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.	extend an order 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	<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>

	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.	
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.	

Adoption

Jelly Beanz supports the recommendations of the Adoption Alliance. We express great concern about children who languish in child and youth care centres when adoptive parents are available, simply because of a unnecessary limitations on adoption practice. Institutional care should be a last resort and permanent placements in family care the preferred option.

Surrogacy

Section 149, referring to S295 of the Children's Act refers:

The Bill	Recommendation	Motivation
Section 149 (e)(dA)(i), referring to S295 of the Children's Act "a report from a psychologist containing a psychosocial assessment of all parties to the agreement;"	"a report from a psychologist or clinical social worker containing a psychosocial assessment of all parties to the agreement;"	Social workers have expertise in psychosocial assessments and are qualified and competent to provide this service.

Our thanks are extended to the Children's Institute (UCT) and the National Coalition for Children's Rights who provided guidance and assistance with submissions.