SONKE GENDER JUSTICE

SUBMISSIONS ON THE CHILDREN'S AMENDMENTS BILL B18-2020
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ATTENTION: Lindiwe Ntsabo
childrens-amendment-bill@parliament.gov.za

Prepared by Namuma Mulindi
Policy Development and Advocacy Specialist
Sonke Gender Justice
Email: namuma@genderjustice.org.za
And
Wessel van den Berg
Email: wessel@genderjustice.org.za
Tel: 021 423 7088
And
Suleiman Henry
Email: suleiman@genderjustice.org.za

Introduction

Sonke Gender Justice is a non-partisan, non-profit organisation, established in 2006. Today, Sonke has established a growing presence on the African continent and plays an active role internationally. Sonke works to create the change necessary for men, women, young people and children to enjoy equitable, healthy and happy relationships that contribute to the development of just and democratic societies. Sonke pursues this goal across Southern Africa by using a human rights framework to build the capacity of government, civil society organisations and citizens to achieve gender equality, prevent gender-based violence and reduce the spread of HIV and the impact of AIDS.

Sonke has worked in various ways to promote positive parenting practices that include positive discipline strategies, a healthy supportive relationship between co-parents and supporting a child's education, health and wellbeing. To encourage even wider acceptance of nonviolent parent-child relationships, Sonke drives a national, multipronged campaign to

prohibit corporal punishment in all spaces in South Africa, and to promote the use of positive discipline strategies by parents.

Sonke welcomes the opportunity to make written submissions on the amendments to the Children's Bill. Sonke's submissions will focus primarily on the aspects of corporal punishment (Part 1) and its relation to ending violence of all forms against children, and on the rights of unmarried fathers in Part 2. Should the opportunity arise, Sonke would also be available to make oral submissions in parliamentary hearings on the same sections.

Part 1: Regarding corporal punishment and its relation to ending violence of all forms against children

1.1 Background to commentary on corporal punishment.

The judgement meted by the Constitutional Court on the 18th September 2019 changes the playing field with respect to the discussion on corporal punishment in homes in South Africa. It is the duty of the Courts to develop common law in accordance with the Constitution and as such, the court has the locus standi to render aspects of common law unconstitutional. Whereas in previous instances submission clauses on corporal punishment have been excised from Amendment Bills there is now an onus on the Legislature to take cognizance of these submissions and seek to develop legislation considering this latest development.

This submission shall address corporal punishment as follows:

- The Constitutional Court Decision
- Relationship between Corporal punishment and violence in South Africa
- NSP-GBVF specifically Pillar 2 and pillar 6
- Concerns regarding regulation of corporal punishment
- Recommendations on wording of clauses on corporal punishment.

1.2 *Freedom of Religion South Africa v Minister of Justice and Constitutional Development &Others 2019(11) BCLR 1321 (CC)*

The Constitutional Court was called upon to make a ruling on the High Court decision declaring the common law defense of "reasonable and moderate chastisement' to a charge of assault as unconstitutional. The Court referred to the definition of the crime of assault stating "assault is the unlawful and intentional application of force to the person of another or inspiring a belief in that person that force is immediately to be applied or threatened. "[1] The court also relied upon a dictionary definition of violence as "behavior involving physical force intended to hurt damage or kill someone or something."[2] These definitions give context

[1] At par 37
[2] At par38

to the decision of the Constitutional Court and have bearing on the case to be made against corporal punishment.

The decision of the Constitutional court in the light of the definitions above was primarily based on Section 12 (1)(c) of the Constitution which provides as follows:

"(1) Everyone has the right to freedom and security of the person, which includes the right --
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…..
(c) to be free from all forms of violence from either public or private sources"

The Court in its ruling clarifies "Chastisement does, by its very nature entail the use of force or a measure of violence"[3] The Court also bring to the fore an argument raised by those in the field of Child rights. Parental authority and the entitlement to chastise children has been an escape route from prosecution. This means despite the existence of s 12 of the Constitution the rights of children went unprotected in the light of this defense. Thereby prejudicing a vulnerable group who thereby had no other form of recourse. The Court expounds on this in its discussion of section 28 of the Constitution which provides that "a child's best interests are of paramount importance in every matter concerning the child". The court acknowledged that some of the children are so young and incapable of lodging complaint about abusive or potentially injurious treatment or punishment however well intentioned. The Court stated, in its decision on the reasonable chastisement, the best interests of the child are paramount in respect of potential abuse. The State is also obliged to respect, promote and fulfil section 28 of the Constitution.[4]

A poignant statement by the court in this judgment is the declaration that "All forms of violence: means moderate, reasonable and extreme forms of violence. The Court further quoted the case of ***S v Williams***[5]and said "a culture of authority which legitimizes the use of violence is inconsistent with the values for which the Constitution stands.[6]

1.3 <u>Relationship between Violence in South Africa and corporal punishment.</u>

More attention needs to be placed on the relationship between corporal punishment and the culture of violence that permeates South Africa. Research has shown intimate partner violence and use of corporal punishment share certain risk factors. For instance, cultural common risk factors include patriarchal beliefs, hierarchical and authoritarian households with the male figure being at the top of the hierarchy and the children at the bottom. Another common risk factor for both is low levels of marital satisfaction and corresponding levels of

[3] At par 39
[4] At par 55, par 56.
[5] 1995(7) BCLR 861 (CC) at para 52
[6] At par 43

marital conflict. There are also common individual risk factors such as alcohol and drug dependency, violence in the family of origin, low educational attainment and low socio-economic status. Intimate partner violence and corporal punishment are however differentiated by gender. Men approve the use of violence in both cases to a higher degree than women however, women use corporal punishment more often. This is simply because their role as caregivers. [7]

In 2014, The African Committee of Experts on the Rights and Welfare of the Child called on South Africa to ban corporal punishment in the home and to promote and provide information and training on positive disciplining. This followed extensive research that evidenced the damaging effect on children's neurological development that corporal punishment has and how it is very likely to compromise cognitive development. This compromised development in turn results in increased aggression. It has found that, the trauma of corporal punishment may result in long-lasting intergenerational effects and increases the risk of the child perpetrating physical violence.[8]After witnessing intimate partner violence on a frequent basis, children may respond by externalizing behaviour. They may imitate their role models, their parents.[9]

1.4 National Strategic Plan on Gender Based Violence and Femicide (NSP-GBVF)

The NSP-GBVF seeks to provide a cohesive strategic framework to guide the National response to the scourge of GBVF. The NSP-GBVF was also drafted in response to recommendations from the review of the responses to violence against women and children commissioned by the Department of Planning, Monitoring and Evaluation DPME.[10] The Children's Bill needs to be developed with the goals of the NSP-GBVF in mind.

Pillar 2: Prevention and Rebuilding of Social Cohesion focuses on the elimination of the social acceptance of **all forms of violence** against women and children. It looks at factors that contribute to the normalization of violence and how to address these. The Children's Bill ought to be developed considering how the normalization of corporal punishment has been a contributing factor in GBVF in South Africa. [11]

Pillar Six: Research and Information Management Systems. The purpose of this pillar is to ensure strategic, multidisciplinary research and integrated information systems that are nationally coordinated and decentralized thereby shaping a strengthened response to GBVF in South Africa[12] A lot more research sharing needs to be done to raise awareness on the

[7] Dawes, A., Kafaar, Z., & de Sas Kropiwnicki, Z.O., Pather, R. & Richter, L. (2004). Partner violence, attitudes to child discipline & the use of corporal punishment: A South African national survey. Cape Town: Child Youth & Family Development, Human Sciences Research Council.
[8] https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1316-corporal-punishment-feeds-the-violence-in-society
[9] Supra 7
[10] DPME Report on Diagnositc Review of Response of the State to Violence Against Women and Children (2016)
[1111] NSP-GBVF at p44-45
[12] Supra at p55

relationship between corporal punishment and GBVF. Enacting legislation that expressly outlaws corporal punishment in the home shall indeed cause public outcry in some quarters. Having said so this in turn is likely to fuel research in this field and increase knowledge awareness. Once again there is a duty on legislators to enact the Children's Bill in accordance with the NSP-GBVF in order to raise public awareness on the effects of corporal punishment and how this plays a role in the culture of violence.

1.5 Concerns with respect to express Regulation of Corporal Punishment via legislation

Some proponents of corporal punishment argue that if we prohibit corporal punishment, we will criminalise parents. The Constitutional Court noted there is a reasonable foreseeability of a proliferation of assault cases against parents.[13] It is unlikely that the prohibition of corporal punishment will lead to increased prosecution and imprisonment of parents. Since the handing down of the judgment in September 2019 there is no record of and has been no marked increase in the number of assault cases against parents. The Constitutional Court Recommended that Parliament allow itself to be guided by extensive consultations and research before it pronounces on the regulatory framework. [14]
The intention of the proposed amendments to the Children's Act is to enable parents to be referred to parenting courses and other early intervention programmes. Imprisoning parents for hitting their child is – in most instances – not in the best interest of the child and will therefore not be the preferred option for dealing with parents who use corporal punishment. The Children's Act provides for different types of early intervention measures that can be used to assist parents to develop alternative forms of discipline.

Furthermore, prosecutors will continue to have discretion whether or not to prosecute cases of assault. According to the legal principle of *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.

1.6 Recommendations regarding corporal punishment

We propose to add a new section 12A as per the submission framework below.

Submission framework

Clause commented on	Proposal	Motivation
Section 1	Add a definition for 'corporal punishment': 'Corporal punishment' or 'physical punishment' means any punishment	• A definition is required to give effect to the changes proposed to section 12A – the proposed definition is

[13] FORSA Case at par 74
[14] ibid

	in which physical force or action is used and intended to cause some degree of pain or discomfort, however light. 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.	based on SOUTH AFRICA'S CHILD CARE AND PROTECTION POLICY October 2019, as approved by Cabinet. It also reflects the definition used in General Comment No. 8 by the United Nations Convention on the Rights of the Child.
Section 12A(1)	Insert the following clause: S 12A(1) 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.	• 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." P 72. • 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 • If no explicit mention of corporal punishment, the provision will be interpreted inconsistently with some courts arguing

		that 'cruel, inhuman or degrading' punishment includes corporal punishment while other courts will say the opposite.
	S 12A. (2) No child may be subject to corporal punishment or be punished in a cruel, inhuman or degrading way. Hitting a child is assault.	• As stated in the FORSA Constitutional Court Case "All forms of violence" means moderate, reasonable and extreme forms of violence"
	S 12A (3) A parent, guardian, care-giver or any person holding parental responsibilities and rights in respect of a child who is reported for subjecting such child to any inappropriate form of punishment, including corporal punishment, must be referred to a prevention and early intervention programme as contemplated in section 144.	Parents/caregivers should be referred to prevention and early intervention programmes so that they can get parenting support to develop non-violent discipline. These programmes are outlined in section 144 of the Children's Act.
	S 12A (4) The Department in partnership with relevant stakeholders, must ensure (a) the implementation of education and awareness-raising programmes across the Republic concerning– (i) the effect of subsections (1) and (2); (ii) positive forms of discipline; (b) the availability of programmes promoting positive discipline at home and in alternative care across the Republic; and (c) capacity building of all relevant government and civil society role-players to understand their role in the promotion of positive discipline	• 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 12A(4)(a) will ensure that DSD budgets for and undertakes education and awareness-raising programmes. These

		should not only focus on the prohibition of corporal punishment, but also include information on positive discipline to inform caregivers about non-violent discipline. • The proposed subsection 12A(4)(c) 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.
	S 12A (5) When prevention and early intervention services have failed, or are deemed to be inappropriate, and the child's safety and wellbeing is at risk, the designated social worker must assess the child in terms of section 110.	In general, criminalisation of parents for using corporal punishment should be considered a last resort. There may however be instances in which it is necessary to prosecute parents/caregivers. Where corporal punishment and other degrading punishment constitutes any physical abuse, and as defined according to section 110(1) of the Children's Act, social

		workers must follow the process outlined in section 110(8) of the Children's Act and must report the possible commission of an offence to the police.

Part 2: Regarding the rights of unmarried fathers

2.1 Background

Sonke Gender Justice is the co-founder of the MenCare Global Fatherhood campaign, and publisher of the State of South Africa's Fathers report. Sonke has also implemented work with fathers to improve gender equality and better care for children since the inception of the organization in 2006. Sonke has also been involved in advocating for improved parental leave for all parents, and was an important contributor to the eventual adoption of the Labour Laws Amendment Act of 2018 that defined new parental leave provisions for all parents in South Africa including fathers.

Within this context, Sonke hereby provides commentary and recommendations on the parts of the proposed Third amendment to the Children's Act that pertains to the rights of unmarried fathers. This text matches a position developed by the Children's Institute, which we endorse.

2.2 Changes to the requirements that an unmarried father must meet ito s21

The Amendment Bill contains amendments that attempt to address some of the challenges that have arisen in respect of section 21 of the Children's Act.

2.2.1 Co-habiting unmarried fathers

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

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

2.2.2 No-cohabiting unmarried fathers

The Bill deletes the phrases "in good faith" and "for a reasonable period" from paragraphs (ii) and (iii) of section 21(1)(b). Thus, an unmarried father will no longer have to prove that he contributes or has attempted 'in good faith' to contribute to the child's upbringing and expenses in connection with the child's maintenance for 'a reasonable period'. He will have to prove only that he contributes or has attempted to contribute to the child's upbringing and expenses in connection with the child's maintenance. Heaton submits that the deletions are intended to create certainty in

law and not open the circumstances to varied interpretations and value judgments. The drafters appear to have followed the SCA guidance in the case of *KLVC v SDI*[15].

2.3 New provision for obtaining a 'certificate' from the family advocate

The Bill inserts subsection (1A) into section 21 of the Act. In terms of the new subsection, the family advocate may issue a certificate confirming that an unmarried father has automatically acquired full PRRs in terms of subsection (1)(a) or (1)(b). This addition is a positive development as it could reduce the number of instances in which unmarried fathers have to approach the court for an official document to confirm his PRRs. The family advocate's certificate will now provide the requisite documentation without the need to incur expenses related to obtaining a court order. However, this will be dependent on the capacity of the office of the family advocate to meet the demand.

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

> *Proposal:* Insert an additional sub-section into 1A (c) providing for the situation where a mother's whereabouts are not known or she is deceased.

Is this certificate process a possible solution to the challenges experienced by unmarried fathers when a government department or insurance company will not recognise their parental rights and responsibilities?

> *Answer from an organisation assisting fathers in Makhanda*: "This is dependent on how the office of the family advocate will be capacitated. For example, in Makhanda in the Eastern Cape there is no family advocate, so the only option fathers have is to approach the children's court. The closest offices of the family advocate are in Port Elizabeth and East-London that are both further than 120km from Makhanda. This is true for many smaller towns that are far from offices of the family advocate. A concern about this amendment is that children's court may take the position that it is now the job of the family advocate to recognise s21 rights and that these matters will only be dealt with by the children's court in exceptional circumstances. While the proposed amendment does use the word "may" it can easily be construed to mean "must" and

[15] KLVC v SDI 2015 1 All SA 532 (SCA).

could result in placing the burden on the family advocates alone. This would leave many fathers unable to access the office of the family advocate. Even if they were to have access to that office, the family advocates are often underfunded and overworked and will struggle to have the capacity to deal timeously with these applications. “

Based on these concerns, it would be important to make it clear that a father can approach the children’s court for a s21(1A) certificate if he is unable to access the family advocate’s office due to distance, costs or service delivery delays at that office.

Furthermore, a s21(1A) certificate should not be made a legal requirement with respect to birth registration by an unmarried father. It should only be required in cases where there this a dispute between the mother and father at the time of registration as to whether or not to include the father on the birth certificate. If the mother is deceased or her whereabouts are unknown, a s21(1A) certificate should not be required.

2.4 Changes to the mediation process

The Bill removes the reference to "social worker" and "social service professional " and replaces both with the term "social service practitioner". This means a child and youth care worker and auxiliary social worker can also provide mediation services. The objective of these amendments is to ensure consistent use of the term "social service practitioner" in the Act and broaden the number of practitioners available to assist fathers. However, only the family advocate will be able to issue a certificate confirming that the unmarried father has acquired parental responsibilities and rights. The other mediators will not be able to issue any documentation.

Finally, the Bill seeks to delete subsection (3)(b) from section 21. This subsection states that any party to the mediation referred to in section 21(3) may have the outcome of the mediation reviewed by a court.

The memorandum to the bill does not explain why this sub-section is being deleted. We therefore need to speculate. It could be because its unnecessary to state that mediation can be reviewed by a court because this is obvious or already covered by s45 (1) (c) or 45 (4). Or is the intention of the deletion it to prevent court review of the mediation.

Comment from an organisation assisting fathers in Makhanda: “This is an important question. In principle, the mediation process should be reviewable. While it is not an

arbitration process where the arbitrator makes a binding decision, the mediators can sometimes be biased or the views of one of the parties can be ignored. We often see a clear bias against the fathers, with social workers and practitioners preferring mothers and female family members over the biological fathers of the children."

We recommend that Parliament ask for further clarity on the reason for this deletion.

2.5 Birth registration

The Births and Deaths Registration Act 51 of 1992 deals with the registration of births and deaths. Section 10 refers specifically to the notice of birth of a child born out of wedlock. It states that the notice shall be given under the surname of the mother, or at the joint request of the mother and the father if he acknowledges in writing that he is the father of the child, under the surname of the father. This section prevents unmarried fathers from registering their children's births in circumstances where the mother is undocumented, deceased or has abandoned the family.

The unmarried fathers in such situations are often left in limbo with no parental responsibilities and rights and are not able to apply for their child's birth certificates in cases where the child is undocumented. In practice, the unmarried fathers are referred by Home Affairs to social workers for assistance with the application for the birth certificate as Home Affairs considers these children to be 'orphaned or 'abandoned' and in need of a Children's Court Order ito s156. The social workers often are unable to assist the fathers due to lack of capacity and refer the unmarried fathers to Legal Aid for assistance with applications for guardianship to the High Court, however Legal Aid processes take very long.

Section 10 of the BDRAct was declared unconstitutional by the Eastern Cape High Court in 2019[16] (the *'Naki'* case) and then referred to the Constitutional Court for confirmation. Judgement is expected in early 2021. If confirmed, Home Affairs will be obliged to accept birth registration applications from unmarried father's in cases where the mother is undocumented, deceased or her whereabouts are unknown. Home Affairs will no longer be able to insist on a court order in these cases.

Section 26(1)(a) of the Children's Act requires the mother's consent if amendment of the child birth registration is being sought. In terms of s 26(1)(b), an order confirming the man's paternity may be sought only if the child's mother withholds consent to the amendment of

[16] Centre for Child Law v Director-General, Department of Home Affairs and Others 2020 (6) SA 199(ECG).

the birth registration, is incompetent to give consent due to mental illness, cannot be located or is dead. While section 26(1) of the Children's Act and section 11(4) of the BDRA therefore provides a process for for unmarried father to apply for an amendment to the child's birth certificate, the law (BDRA read with Children's Act) does not anticipate the circumstances where a child is not yet registered and the mother is deceased, undocumented or has abandoned the child with his or her biological father. The Naki case now obliges Home Affairs to allow unmarried fathers to register in these circumstances and Home Affairs is grappling with the question of what proof they will require from the fathers. The Children's Act could possibly assist by specifying what proof suffices in these circumstances.

2.6 Making guardianship applications more accessible for unmarried fathers

Section 45(1) of the Act stipulates that the Children's Court can adjudicate on any matter that relates to the well-being of the child. However, in terms of s45(3) and s24 the adjudication of guardianship applications is excluded from the scope of the Children's Court and falls within the exclusive jurisdiction of the High Court.

We therefore support the proposed amendments to s45(3) which would expand the jurisdiction of the Children's Court to include applications for guardianship, including by unmarried biological fathers. The consequence will be that unmarried fathers, who do not have the financial means to approach the High Court for assistance, will be able to go to the Children's Court instead. However, we propose that s24(1) also be amended to provide this clarity and that the proposed amendment to s45(1) be changed to remove the restriction to cases of abandonment or orphaning.

Furthermore, the requirement in s24(3) that an unmarried father must prove why the mother of the child is not suitable to be the child's guardian should be removed. Guardianship can be held by more than one person and is typically held by both parents.

Recommendations to strengthen the Children's Amendment Bill
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 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 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—	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—	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.

	(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)*.'';		*(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 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) **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 <u>or the children's court</u> 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. 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	Support but recommend different amendments	<u>"bA guardianship"</u> or "(<u>*bA*</u>) <u>guardianship where the application is brought by the</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 fathers, can also

	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;'		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).	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.