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Submissions on the Children's Amendment Bill, 2020

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1. My background in Child Law

I have specialised in the law relating to children in South Africa for over 25 years. I was a member of the SA Law Reform Commission Committee that drafted the original Children's Bill, and was a member of the team that drafted the regulations. I have frequently assisted the Department of Social Development with advice regarding policy drafting and legal amendments. I am an Advocate of the High Court and have argued many landmark children's rights cases in the Constitutional Court, the Supreme Court of Appeal and the High Courts.

2. Request to make oral submissions

I hereby humbly request to make oral submissions to the Portfolio Commttee on Social Development, to provide further detail arising from these written submissions, and any other matters the Committee may wish to hear from me about.

3. Overview of these submissions

These submissions take a chronological approach, but will focus on the following issues:

Privacy of children subject to court proceedings regarding identification in the media

Corporal punishment

Privacy of children (non-publication of identity in media)

Parental responsibilities and rights, including guardianship

Foster care – comprehensive legal solution

Children referred to CYCCs under Child Justice A

Clause and section Proposed amendment in the Bill	Supported/ not supported	Proposal	Reasons
Clause 1(a) amending **section 1 Definition** **'Abandoned child'** **Subsection (c) to be inserted**	**Not supported**	**Preferred wording:** **'has parents or guardians who cannot be traced by the relevant authorities'**	**This definition works better for children abandoned with relatives**
Care	**New proposal**	**New proposal:** **Insert wording in subsection (g)** (g) Guiding the behaviour of the child in a humane manner <u>using positive parenting and non-violent disciplinary methods.</u>	**Current wording too vague, this proposal brings the law in line with the judgment of the Constitutional Court on corporal punishment.**
Commissioning parents	**New proposal**	**New proposal** **'[commissioning]** <u>intending</u> parent' means a person who enters into a surroga<u>cy</u>**[te motherhood]** agreement	Why replace the word commissioning with intending? Surrogacy is altruistic in SA Law, but commissioning sounds commercial. 'Intending parent' is the term used internationally. This would require. Explanation for change to surrogacy is explained below.
Corporal punishment	**New proposal**	**New proposal** If a new definition is to be included, I recommend the following: <u>Corporal punishment or</u>	This is the definition used by the UN Committee on the Rights of the Child. It is also used in DSD's Child Care and

		physical punishment means any punishment in which force or action is used and intended to cause some degree of pain or harm. It involves, but is not limited to hitting children in any environment or context, including in a 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	Protection policy.
Clause 1(q) **Orphan** A child whose parent or both parents are deceased	**Supported**		The wording is clearer and less open to interpretation that current wording
Surrogate motherhood agreement **New proposal**	**New Proposal**	**Proposed alternative wording** Surrogacy**[te motherhood]** agreement	The description 'surrogate motherhood agreement' focuses on the mother instead of the child. It is therefore advisable to remove the reference to motherhood and call it the 'surrogacy agreement'– here and everywhere in the Act where 'surrogate motherhood agreement' appears. Obviously,

			when referring to the surrogate mother *per se*, that is fine, so definition of surrogate mother does not require amendment.
Clause 3 amending **Section 6** **Children's privacy**	**Not supported**	**Proposed alternative wording** <u>(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.".</u> <u>(2) Notwithstanding subsection (1) a designated social worker</u> <u>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</u>	**What is this about?** This is about children who are the subject of court proceedings to have their identities protected in the media. The stories of their cases can be told – but information that identifies them may not be revealed. The current law provides protection, but only in the children's court. The amendment I am proposing aims to ensure that the protection extends to children in all courts. This is in line with two Constitutional Court judgments. **Please note something very concerning:** The current Bill has removed the protection of privacy for children in children's court proceedings. The July 2018 version of the Bill also removed section 74, but section 6C in that Bill covered the protection of all children, appearing in all courts. The current version of

		purpose of tracing the child's parent(s) or family.".	the Bill does not do so, thus leaving children in children's courts unprotected. Therefore if my proposal here is not accepted (although it is not controversial) it is essential that at least section 74 of the Act must remain as it currently stands.
Clause 5 amending section 8 – Application **"This Act applies to every child in the Republic of South Africa**	**Supported**		This clarifies that all accompanied, separated and unaccompanied children are protected. This is crucial as unaccompanied migrant children are considered under our law as children in need of care and protection. Furthermore if a child living with parents is in the country and is abused or neglected, they would have to be dealt with under the Children's Act. This is already the case, but it is better to spell it out, as the proposed amendment does.
Section 12 - New proposal on corporal punishment	New proposal	Add the following new wording: Section 12(11) No child may be subject to corporal punishment or be punished in a cruel, inhuman and	This is in line with the Constitutional Court's judgment in the FORSA case, so all it does is reflect the law as it currently stands. Also in line with DSD's

		degrading manner.	policy.
Clause 8 amending **Heading of Part 1 of chapter3**	**Supported**	***[Acquisition and loss]*** *Automatic acquisition of parental responsibilities and rights*	Yes, this reflects what comes under the heading, better than the current wording.
Clause 10 amending section 21	Supported	I support all the proposed amendments, but would like to add some suggestions: I propose a new subsection 3(c) Where there is no dispute between the biological father and the biological mother of the child,or the mother is deceased or has abandoned the child, and the father requires an order proving that he has full parental responsibilities and rights, he may make an application to the children's court in the prescribed manner, and, if the court is satisfied that the father has shown that he has automatically acquired parental responsibilities and right, it may issue such order.	I support the proposed amendments because they create more certainty, help to resolve disputes and provide the unmarried father with a piece of paper to prove his parental responsibilities and rights. The reason the new proposed 3(c) is needed is that 3 (a) deals only with disputes between the father and mother. But what if it is between the father and the maternal grandmother? – a common scenario. Also sometimes he simply needs an order for a third party such as an insurance policy, then he should be able to obtain this at the children's court.
Clause 12 inserting a new (2A) in section 22	**Supported**		This gives effect to the child's right to have his or her views heard and taken into consideration in decisions about him or her, in line with art 12

			of the CRC.
Proposed new amendment to section 24	**New proposal**	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."	This is an essential amendment. There are approximately 2 million children living with relatives who are not their guardians, and these persons must be able to access guardianship to carry out certain responsibilities. Historically guardianship was always done at the High Court level, but this is an outdated approach. After all, adoption is an even more drastic change in t a child's life, but all adoptions are done in the children's court.Section 24(3)
Section 24(3)	**New proposal**	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</u> or submit reasons <u>why a sole guardianship order is required</u> **[why the child's existing guardian is not suitable to have guardianship in respect of the child]**."	The current wording of the law implies that a child can have only one guardian, which is not true, and that the current guardian has to be unsuitable, also not true. Please note that any existing guardian would always have to be given notice that such an order is being sought, as legal procedure requires that.
		Applications by non-South African citizens for guardianship of a child	This is to avoid guardianship being used as a way to 'get around' the requirements of inter-

		25. (1) **[When]** Subject to section 45(4), when an application is made in terms of section 24 by a non-South African citizen for guardianship of a child, the application **[must be regarded as]**, if heard in the High Court, must be referred to a children's court having jurisdiction to be dealt with as an application for an inter-country adoption for the purposes of the Hague Convention on Inter-country Adoption and Chapter 16 of this Act, unless such court, including the children's court if the application for guardianship had been lodged in such court, finds that exceptional circumstances warrant the application for guardianship to be granted. (2) The Central Authority of the Republic contemplated in section 257 (1)*(a)* must be cited as a respondent in the event of an application referred to in subsection (1).	country adoption, which has happened in the past. But it also recognises that there are exceptional circumstances where it is necessary. Eg Unmarried father of a child does not have automatic PRR, and he lives in Zimbabwe. Mother dies and he comes to collect the child and bring him to Zimbabwe. He will have to apply for guardianship first,but there is no need for him to adopt. Court will obviously consider carefully in each case.
Clause 24 amending section 45 **Matters a children's court may adjudicate**	**Partially supported** **I support the amendments**	The current wording in the amendment Bill should be amended as follows: bA guardianship **[of an orphaned or abandoned**	Strongly in favour of guardianship being granted by the children's court, as this provides access to justice for children and

	to clause (h) inserting **3A and 3B, relating to concurrent jurisdiction**	**child]** as contemplated in section 24	their caregivers who need guardianship and cannot afford a High Court application and live far away from the High Court. The words of an orphaned or abandoned child place unnecessary limits. This would mean that an unmarried father or a grandmother of a child who is not orphaned or abandoned must still go to the High Court for guardianship? There is no rationale for this. There are safeguards within section 24 so the reference to 'as contemplated in section 24' is quite helpful.
New proposal **Insertion into s 46** **Parental responsibiltiies and rights for family members caring for child**		Proposal: 46(1) A children's court may make the following orders: (aA) an order confirming or granting parental responsibilities and rights in terms of s 23 and 24 to a family member caring of a child.	If the intention behind the insertion of sub-section (cA) was to cater for the need to formalise the care arrangements of orphaned or abandoned children living with family members, it would be better to make an amendment to s46 (1) and phrase it as I have proposed.
Clause 39 amending **Section 83** **Conditional registration**	**Not supported**	**New wording proposed:** Conditions relating to Registration 83. The registration or	The idea of conditional registration is meant to be enabling – to allow partial care facilities to come in line with the

		renewal of registration of a partial care facility may be granted on such conditions as the provincial head of social development may determine, including— (a) conditions specifying the type of partial care that may or must be provided in terms of the registration; (b) the period for compliance with the conditions referred to in paragraph (a); and (c) any other matter that may be prescribed.	requirements. The current proposed wording does not do that and is purely regulatory rather than enabling or developmental. This goes agains the whole philosophy of social development and the child care and protection policy.
Clause 47 amending **Section 93 - Provision of ECD programmes**	**Not supported**	**Proposed alternative wording for subclause (e)** The 'may' should be changed back to 'must'	Retrogression of children's socio-economic rights is impermissible.
Clause50 substituting section 98	**Not supported**	**Proposal: Retain the current section 98 as it appears in the Act**	The idea of conditional registration is meant to be enabling – to allow ECD centres to come in line with the requirements. The current proposed wording does not do that and is purely regulatory rather than enabling or developmental. This goes agains the whole philosophy of social development and the child care and protection policy.
Clause 65 **Amending section 117**	**New proposal**	**There should be consideration to delete all provisions that deal with Part B of the register towards use of the criminal record**	The criminal record system (administered by SAPS) is already in place and contains a record of all convictions. This is cost effective,

		system – and a regime to prevent the employment of any persons with a relevant criminal record from working with children	efficient and reliable. Similar proposals have been made to the Justice Portfolio Committee regarding the National Register for Sex Offenders. Only one central criminal justice register is needed.
Clause 66 **Amending section 119**	**The proposal in the Bill is supported**		This limits the effects of the register to adult offenders, and comes in line with the case of J v NDPP which ruled in respect of the National Register for Sex Offenders that automatic inclusion of child offenders names was unconstitutional.
Clause 82 amending **Section 150** **Children in need of care and protection** Proposed amendment: A child who has been abandoned or orphaned and **[does not have the ability to care for himself or herself and such inability is readily apparent]** has no parent, guardian, family member or care-giver who is able and suitable to care for that child.	**Partially supported**	**I would like to propose an alternative wording for section 150(1)(a)** 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>"	**Please note** that the wording of this clause is crucially important because it is the central component of the **'comprehensive legal solution'** required by the Gauteng High Court in regard to the foster care crisis. This section has already been amended previously, but it did not solve the problem. The wording I propose has the benefit of not casting the net too wide. The wording in the Bill is still open to interpretation,due to words such as 'able and suitable'. The wording I

			propose (and which has broad support among civil society organisations), is easy to determine factually. This will close the door to new foster care applications via the children's court process by relatives. The current proposed wording in the Bill aims to do the same thing, but is less clear.
Clause 86 amending **Section 159** **Duration and extension of orders**	**Partially supported:** The possibility of an extension of a lapsed order may be useful, but it should be time bound so that at some stage social workers get back to doing their work within the required time bound and limited to	'(2A) For five years from the date of commencement of this Act, in relation to orphaned or abandoned children in foster care with family members, a court may extend an order that has lapsed or make an interim extension of an order for a period not exceeding six months, on good cause shown and if such an extension is in the best interests of the child. In addition, I offer a proposal for the insertion of a new (2B)" ((2B) In relation to an orphaned or abandoned child placed in foster care with a family member in terms of s156, before or	The proposed 2A is part of the transitional process out of the foster care crisis, but should not permit bad habits of letting orders lapse. Rationale for new proposal is to permit the transition from children who were previously placed in foster care with their relatives, so that they can continue to receive grants (otherwise retrogression of socio-economic rights will occur)

		on the date of commencement of this Amendment Act, a court may extend the order in terms of s159(2) or s186 (2), notwithstanding the amendment affected to s150(1) (a) by this Amendment Act.	
Clause 87 amending Section 167 **Alternative care**	Amendment to section 167(1)(b) is not supported		**This proposed amendment is strongly rejected.** The effect of this amendment will be that children that have been referred to child and youth care centres by a Child Justice Court will not be considered to be in alternative care. This will have major implications for these children, as all the protective measures for children in alternative care (eg abscondment) will no longer apply to them. A department cannot unilaterally divorce itself from thousands of children for whom it has been responsible under the law. The Children's Act 38 of 2005 created secure care for child offenders, and also transferred the previously named 'reform schools' from the Dept of Education to

			the Dept of Social Development. This was in line with policy developed by the Inter-Ministerial Committee for Children at Risk, which was a cabinet mandated Committee led by Minister Geraldine Fraser Moleketi. Therefore this amendment is ominous and is a major turnaround from the intention of the Children's Act. There is no other legal framework that relates to the care of this category of children. If they are no longer going to be considered to be children in alternative care, an alternative legal framework will need to be developed. Under which law would such provisions reside? The Children's Act is the logical place because CYCCs fall under the Children's Act.