

Centre for Child Law submissions
On the
Children's Amendment Bill, 2020

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**CENTRE FOR
CHILD LAW**

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(PLEASE COMPLETE COLUMNS 1-4)

Clause number	Clause title	Proposed amendment/addition	Reasons/Rationale
1. Section 1 – definitions	Abandoned child	Proposed amendment This definition is not supported	We are of the view that South Africa should consider baby savers to combat the critical issue of unsafe infant abandonment, which has severe consequences, including infant mortality. Research by Rosenberg indicates that baby savers provide a secure option for mothers to relinquish their infants safely, significantly reducing the risk associated with unsafe abandonment in perilous locations such as toilets and open fields. The anonymity offered can alleviate fears of social stigma or legal

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			<p>repercussions, encouraging women to opt for this safe alternative. In her study, Rosenberg proposes the urgent introduction of baby savers and/or “baby safe haven laws” (as proposed by Namibia), drawing on successful models from other countries and Namibia's experience. The alarming number of infant abandonment cases in South Africa highlights this need; in 2020 alone, of the 83 reported abandoned infants, 49 were found dead. This situation calls for immediate action to prevent further tragedies associated with unsafe infant abandonment. Some of the cases go unreported, and some of the statistics are not clear. Furthermore, we argue that</p>

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			<p>criminalising baby savers would be another reactive measure, focusing on penalising a potentially life-saving action rather than providing a preventative solution to a complex societal problem.</p> <p>The focus should be on implementing and supporting mechanisms like baby savers that offer a safe harbour for abandoned infants, thereby upholding their fundamental rights, rather than criminalising these potentially life-saving initiatives. Such criminalisation would likely exacerbate the existing problem of unsafe infant abandonment and infant mortality in South Africa.</p>
	Adoption service	No proposed amendment	The inclusion of “guardian” ensures that all those who have parental

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			responsibilities and rights in relation to the child are supported in the process of consenting to an adoption.
	After-care	No proposed amendment	We welcome the insertion of <u>auxiliary social workers or social service practitioner responsible for adoption services</u> into the definition as auxiliary social workers play a crucial role in supporting and assisting professional social workers by providing essential frontline services. In contrast, the role of social service practitioners providing after-care for adoption services is invaluable in ensuring that both the child and the adoptive family succeed in the long term. They provide essential emotional, educational, and practical support to foster healthy adjustment, protect

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			the stability of the family, and help children and parents thrive in their new family dynamic.
	Clerk of the court	No proposed amendment	
	Family counsellor	Supported No proposed amendment	We are of the view that it is important that counsellors are trained to mediate in cases where there is family conflict, particularly between parents who are separated or divorced. In such cases, counsellors must use therapeutic and conflict resolution techniques to help parents work together in the best interests of the child, ensuring that care and contact arrangements are made with the child's emotional and psychological needs in mind.
	Genital Mutilation	Supported No proposed amendment	The substitution of the definition will ensure that we are aligned with the international law definition of genital

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			mutilation which is broader and aims to provide better protection.
	Inter-country adoption	No proposed amendment	
	Midwife	No proposed amendment	
	Nurse	No proposed amendment	
	Separated migrant child	Supported No proposed amendment	This definition aligns with the universal definition used internationally and nationally. It must be noted that most of these children are often undocumented.
	Sexual abuse		We welcome and note the insertion of <u>any sexual offences against children</u> this definition is broad enough to cover sexual abuse as defined in the Criminal Law (Sexual Offences and Related Matters Act) 32 of 2007.
	Temporary safe care	No proposed amendment	
	Unaccompanied migrant child	Proposed amendment:	The definition in the United Nations Convention on the Rights of the Child does not include the word

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		“Unaccompanied migrant child” means a child [from a foreign country] who has been separated from both parents or other adult family members and is not being cared for by an adult who, by law or custom, is responsible for doing so”.	“citizen”. As such, this should be deleted and replaced with the proposed amendment.
2. General principles	Amendment of section 6 of Act 38 of 2005 – 6(2)(d)	Supported No proposed amendment	We welcome the substitution in paragraph 6(2)(d), as any form of discrimination against children must be prohibited
	Section 6(2)(f)	Supported No proposed amendment	The inclusion of <u>accessible and inclusive</u> makes the obligation to accommodate the needs of children with disabilities very clear.
3. Section 6A	Children’s right to privacy and protection of personal information	Proposed amendment: We then propose the following: <u>Section 6A(a)</u> <u>No person may, without permission of a court, in any manner publish any information relating to the proceedings of a</u>	The insertion of protection of children’s right to privacy and personal information must be line with legislation that protects both privacy and personal information is hereby welcomed. This must be made clear

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		<p><u>court which reveals or may reveal the name or identity of child who is a party or a witness in the proceedings;</u></p> <p>6A(b), a <u>person mentioned under para (a) above must comply with legislation relating to the right to privacy and the protection of personal information is subject to the Film and Publication Act, 1996 (Act No. 65 of 1996); Protection of Personal Information Act, 2013 (Act No 4 of 2013); the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000); the Criminal Procedure Act, 1977 (Act No. 51 of 1977) or any other law protecting the privacy and protection of personal information of the child.</u></p>	
4. Section 7	Amendment of Section 7	<p>Supported</p> <p>No proposed amendment</p>	<p>The deletion of “<u>and</u>” is supported, and the insertion of paragraph (o) of <u>any special needs that a child may have</u> is supported.</p>

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5. Section 8	Amendment of Section 8	Supported No proposed amendment. The current amendment – <u>(4) This Act applies to every child in the Republic of South Africa</u> is supported.	The amendment will ensure that unaccompanied, separated children have access to care and protection without any discrimination. Particularly considering that most of them lack documentation such as birth certificates or passports.
6. Section 12	Amendment of Section 12 – age of consent to marriages	Supported No proposed amendment of section 12(2)(a)	The insertion of the word <u>must</u> is welcome as it ensures that no child below the age of 18 must consent to marriage of any sort. This is a step in the right direction to address the issue of child marriages and practices of Ukuthwala and also ensure that the legislation that governs marriages in South Africa are harmonised and prohibits child marriages.

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	Section 12(3) – genital mutilation or circumcision	Supported No proposed amendment	This is supported as it is in line with the African Charter on the Rights and Welfare of the Child.
7. Section 13	Amendment of section 13	No proposed amendment	We support the amendment of disabled with... <u>with disabilities</u> .
8.	Amendment id heading of Part 1 of Chapter 3 of Act 38 of 2005 – <u>Automatic acquisition</u> of parental responsibilities and rights	No proposed amendment	The separation Part and Part 1A are clear.
9. Section 19	Amendment of section 19 – Parental Responsibilities and Rights of Mothers	Proposed amendment: We propose deleting the word <u>custody</u> under subsection (2)(a). We further propose that in Section 1 of the definitions, the word “residence” should be included and defined.	This is because the word is outdated and the preferred terms are “care and contact”
10. Section 21	Amendment of section 21 – Parental Responsibilities and Rights of Unmarried Fathers	Not supported, we proposed the following:	The insertion of the provision in section 1A will create disputes and become an additional barrier to

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		21(1)(b)(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or <u>has complied with required customary law practices.</u>	<p>fathers in particular and does not advance the approach of ensuring that children form a relationship with both their parents. It is regressive to include that cultural practices "must" be complied with before a father obtains parental responsibilities and rights, and actually, such a clause is open to a constitutional challenge.</p> <p>Our proposed reframing of the current section 21(1)(b)(i) is a better option that recognises customary practices without elevating them above the best interests of the child.</p> <p>The cases of <i>Hlope v Mahlalela</i> 1998 (1) SA 449 (T) and <i>Maneli v Maneli</i> 2010 (7) BCLR 703(GSJ) make this point clear.</p>
11.	Insertion of heading Part 1A after section 21	No proposed amendment	

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12. Section 22	Amendment of section 22	Supported No proposed amendment	We welcome the insertion of subsection 2(A), which clearly indicates the importance of child participation. We support any further insertions and deletion of subsection (7).
13. Section 23	Amendment of section 23	No proposed amendment	
14. Section 28	Amendment of section 28	No proposed amendment	
15. Section 29	Amendment of section 29 – court proceedings	No proposed amendment	
16. Section 30	Insertion of section 30A – residence of a child	No proposed amendment	The insertion of section 30A is supported in its entirety.
17.	Deletion of Part 3 of Chapter 3		
18. Section 34	Amendment of section 34 of the Principal Act	No proposed amendment	
19. Section 35	Amendment of section 35	No proposed amendment	The amendment is supported.
20. Section 40	Amendment of section 40	No proposed amendment	
21.	Insertion of Section 41A Regulations	Proposed amendment:	There has been a development in case law in South Africa on this issue, and there may be a need for regulations.

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		We propose that paragraph (k) be inserted, which will provide for the provisions of section 40 of the Act.	
22. Section 44	Amendment of section 44 – geographical jurisdiction	Proposed addition: “(3) <u>A matter may, on request by a party or a person affected by the matter,</u> be transferred from a children’s court to another children’s court having jurisdiction if it would be in the best interest of the child.”	The proposed provision does not indicate who can initiate such a transfer of the matter. Furthermore, the provision reads as if the matter can be transferred from a children’s court to another court, i.e., a regional or high court. Our proposed wording makes the section neat and clear that the transfer of the matter is between two children’s courts.
23.			
24. Section 46	Amendment of section 46	Supported No proposed amendment	The insertion of section 1(c.A) and (c.B) regarding guardianship order is supported as now the guardianship application process will be accessible to everyone wishing to make the application.

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25. Section 49	Amendment of section 49- Forum hearings	No proposed amendment	
26. Section 52	Amendment of section 52 – Rules and court proceedings	No proposed amendment	
27. Section 57	Amendment of section 57- compulsory attendance of persons involved in proceedings	No proposed amendment	
28. Section 62	Amendment of section 62 – Professional support		
29. – 63	Amendments	No proposed amendments on clauses 29 – 63	
65.	Amendment of section 146	Proposed amendment: 146(4)(c) “to make prevention and early intervention programmes available to children below and <u>above to school-going age</u> ”.	It is opined that service delivery for young children must be prioritised in accordance with the Welfare White Paper. While children of school going age access services through schools, the majority of children under school going age are not accessing services. However, there may be children of school-

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			going age who are not in school- it is thus important not to lose vulnerable groups based on age.
66.	Amendment of section 147	No proposed amendment	
69.	Amendment of section 170	Proposed amendment: The insertion of subsection 5A when reading paragraphs (b) and (c) does not read well, and we proposed merging the two paragraphs to read as one.	This is to avoid confusion, particularly in practice.
70. - 101	Amendments	No proposed amendments on clauses 70 – 101.	
102.	Amendment of section 251	Proposed amendment: In subsection 1(B), there is a letter missing, and we propose that it be amended and read as <u>fraud</u>	Spelling error.
103. – 118.	Amendments	No proposed amendments to clauses 103 to 118.	
118.	Amendment of section 295	Proposed amendment:	Make sure that surrogate motherhood agreements are properly regulated and also taking

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		We proposed that paragraph (c) (vi) and (vii) should not be deleted. We further proposed that there should be an insertion of paragraph (c) (viii), which provides that <u>a woman should not be a surrogate mother more than 3 times</u>	into account the health and well-being of the surrogate mother. This argument is supported by recent court judgments relating to surrogacy in South Africa. ¹
		Proposed amendment: We further proposed in section 295 that there should be an insertion under paragraph (e) (x) indicating that <u>the best interests of the living children of the surrogate mother must be considered.</u>	This is also informed by recent judgments where the Court asked the question whether, in the report compiled by the psychologist or counsellor the children of the surrogate are considered. Taking into account their age and level of maturity. ² While the court found that a psychological report is not always necessary, the interests of the children of the surrogate must always be considered.

¹ The judgment is attached.

² The judgment is attached hereto.

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