



**Commissioner
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26 November 2020

For Attention: Ms Lindiwe Ntsabo

The Committee Secretary

Portfolio Committee on Social Development

By email: childrens-amendment-bill@parliament.gov.za

Intsabo@parliament.gov.za

Dear Madam

Child Government Monitors and Western Cape Commissioner for Children submission on the Children's Act Amendment Bill [B18 2020]

I, Christina Nomdo, the Western Cape Commissioner for Children tender this submission on the Children's Amendment Bill B18 2020 (hereinafter the Amendment Bill), in partnership with the Child Government Monitors (hereinafter referred to as monitors) in my Office (see Addendum 1 on the mandate of the Western Cape Commissioner for Children).

On 1 June 2020, when I commenced my tenure as the Commissioner for Commissioner, I established an engagement forum directly with children – named Child Government Monitors - to enable them to participate in governance (see Addendum 2 on the composition and aims of the Child Government Monitors). The engagement is facilitated primarily via online methods such as WhatsApp chat, Email and Facebook messenger and includes children in urban and rural areas as well as children living with their parents and



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those in state care. As a result, children have been able to discuss the matters they believe to be most important when reforming the Children's Act 38 of 2005. Their inputs were analysed in relation to pertinent clauses in the Children's Amendment Bill [B18 2020] and making proposals for law reform. Therefore, this submission sets out the main issues the Child Government Monitors want to address and reframes or proposes clauses for the Amendment Bill.

The Child Government Monitors would appreciate the opportunity to make an oral submission during the public hearings process. I will act as a liaison between the Portfolio Committee of Social Development and the Child Government Monitors. I can be contacted via Email: childrens.commissioner@wccc.gov.za and WhatsApp: 083 776 7067.

I wish to avail myself to the Committee to support the development of a child-friendly process for all children, who made submissions, to be heard in the public hearings process.



Sincerely

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Introduction

Children's right to participate in decisions affecting their lives forms one of the pillars of a child rights approach framed in international and domestic laws¹. Thus, children's rights to protection from harm, provision of services for wellbeing and participation in decision making must be promoted and protected by the primary duty bearers of child rights. Parents and legal guardians are primary duty bearers and the government of the Republic of South Africa are secondary duty bearers to deliver on child rights². This submission focusses on the issue of *the ethos of care* provided to children by their parents, legal guardians and government. Child Government Monitors have drawn from their lived realities to share with us recommendations of the way government can support parents and legal guardians to play a more positive and empowering role in children's lives (see Addendum 3 which presents two poems from the Child Government Monitors on parenting). The monitors make recommendations in relation to developing and supporting parenting competencies, enabling a shift from using corporal punishment to improved relationships, and knowing when government must step in to assume care responsibilities, as well as providing equal rights to good biological fathers and mothers or parents in a non-binary parenting relationship. The topic is introduced, monitors views are presented, their recommendations are listed, and proposals for redrafting clauses of the law are tabulated. In conclusion, the key messages of the submission are reiterated.

¹ United Nations Convention on the Rights of the Child, African Charter for the Rights and Welfare of the Children, Constitution of the Republic of South Africa, Children's Act 38 of 2005, s6(5) & s10

² See Children's Act 38 of 2005, s18 The role of parents specifically is articulated in the articles that give expression to child rights in these international laws and domestic law. Ratifying these international laws binds the government to ensure children's rights are protected and promoted. When parents as primary duty bearers cannot or will not fulfill their children's rights, the government is obliged to fulfill this role.



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Developing and supporting parenting competencies

Parents, caregivers and guardians are a critical resource in the lives of children. They provide the needed support and guidance for children to realise their rights. However, monitors have noted that the relationship between children and their primary caregivers are not always ideal. The Children's NDP report has noted that children's relationships with their primary caregivers are strained resulting in feelings of alienation³. Monitors conducted a discussion of their understanding of good and bad parenting practices. Some of their views on good parenting are represented below:

"V: Good parents, are parents that let their child or children do what's best for themselves as in their future and reprimand them when they start going off lane. Also, good parents are parents that let their children make a mistake so that they learn from it."

"Am: I would define good parenting as two adults (regardless of gender) who does whatever they can to provide for their child's basic needs. And who doesn't violate the rights of the children, whether it be social rights, cultural rights, constitutional rights."

"I: Good parents are parents who give them the best they possibly can, they want the absolute best for their child, good parents teach their kids right from wrong and good parents will do anything for their children."

R, B and H: 'n Goeie ouer is iemand wat hul kinders probeer opbou en op die regte pad hou. En ook iemand wat sy kind drome laat waar word en goeie maniere leer. En nie sy/haar sin gee nie. (A good parent is someone who empowers their children and keeps them on a good path. And someone who fulfils their child's dreams and teaches their child good manners. And does not always give their child the right to do anything they want to.)"

"Ms Sh: Good parents are parents who won't do things that will encourage their children to do wrong steal, fight, disrespect even though they don't say it, they don't criticize their children and don't blame their children for things they went through in the past because the child never asked to be born. Good parents teach their children manners they

³ National Planning Commission (2019) Children's participation in governance: Lessons from the Children's NDP initiative. Pretoria. National Planning Commission, p 12.

<https://www.nationalplanningcommission.org.za/assets/Documents/Childrens%20NDP%20Analysis.pdf>



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value, care, love, uplifts, are there for their children, do everything that is best for the child not for themselves, making them know their existence is appreciated."

Monitors note that good parents are ones who provide moral guidance, provide space for autonomy, instil good manners and boundaries, provide children with their basic requirements for wellbeing and do not violate their rights or force them into illegal behaviour.

Their recommendations for improving the Children's Act are to:

- emphasise that parents need to love their children
- help build the knowledge and skills of parents to understand their children
- ensure children have good parents

Clause in Children's Act 38 of 2005	Proposed amendment to the clause
1 (c) Definition of 'after-care'	(c) by the substitution for the definition of "after-care" of the following definition: " 'after-care' means the supportive service provided by a social worker [or] , a social [service professional] <u>auxiliary worker or a social service practitioner responsible for adoption services</u> , to monitor progress with regard to the child's developmental adjustment <u>and the appropriateness of the parenting approach</u> as part of— (a) family preservation or reunification services; (b) adoption or placement in alternative care; or (c) discharge from alternative care;"
1 (d) Definition of 'care'	(d) by the substitution for paragraph (a) in the definition of "care" of the following paragraph: "(a) within available means, providing the child with— (i) a [suitable] place to live; (ii) living conditions that are conducive to the child's health, well-being and development; [and] (iii) the necessary financial support; <u>and</u> (iv) <u>loving and competent parents, caregivers, legal guardians.</u> ";



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1 (aa) Insert definition of 'love/loving'	<u>(aa) by the insertion of the definition of "love/loving" the following definition:</u> <u>"(a) love is a bond of attachment and demonstration of affection towards the child that results in a competent parent, caregiver, guardian always considering what is in the best interest of the child."</u>
1 (bb) Insert definition of 'competent parent, caregiver, guardian'	<u>(bb) by the insertion of the definition of "competent parent, caregiver or guardian" the following definition:</u> <u>"(a) competent parents, caregiver, guardian is—</u> <u>(i) a designated person who demonstrates love and understanding of the developmental phases of the child and provides appropriate guidance and support to the child."</u>
18 (2) (a) Insert obligation for parents to love their children	18 Parental responsibilities and rights (2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right – (a) to <u>love and</u> care for the child; (b) to main contact with the child; (c) to act as a guardian of the child; and (d) to contribute to the maintenance of the child.
18 (3) (c) Remove a parent's rights to consent to a child marriage	18(3) (c) give or refuse any consent required by law in respect of the child, including – [(i)consent to the child's marriage];

Enabling a shift from using corporal punishment to improved relationships

Children still experience violence in all settings — it is ubiquitous. This is a matter for grave concern as it 'affects their interpersonal relationships and acts as a lever key driver of gender-based violence⁴.' Child abuse is referred to 62 times in the current Children's Act but protecting children from abuse in their homes has been undermined by the common law defence of reasonable chastisement by parents. The recent Constitutional Court ruling helps the South African society to understand that any physical violence and humiliating treatment of a child (even by their parents), infringes on their fundamental rights. The law

⁴ Ibid, p3



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needs to play a transformative role by articulating stronger support to parents to adopt non-violent means of disciplining their children. The monitors discussed what was required to change the culture of violence in homes. Their views about why physical violence is used as punishment or ways of disciplining children are represented below:

"V: They (parents) have to be punished by law. Since most parents know this law already, why do they break it? Some (children) grow up with the thought of it (violence) as a right thing."

"Ms. Si.: It's also abuse even if a woman does it and therefore, they should also be arrested as fathers are arrested when they abuse. When woman get abused by men the men get arrested. When a woman is being abused, they shouldn't then abuse the children in retaliation."

"Z: Some people use the excuse of being beaten up by their parents to beat up anyone they want to and then they are not charged because apparently they have anger issues. And some children get mental problems when beaten."

Monitors recognised that corporal punishment is still being used in homes, ostensibly to discipline children. They noted this practice comes from previous models of parenting. However, they also understand it results in adverse consequences for the child. They believe physical violence of children in their homes must stop and the law must help to bring about this change in behaviour amongst parents. They also considered alternatives to violence, saying:

"K: How do you help people who don't know and don't admit they have a problem?"

"L: Parents don't know how to bring them down to children's level and communicate with them. Also there is this thing (attitude) where I am older and I am right mentality which they have taken on themselves. Where you are doing things from a fixed mindset. My solution to this is creating a space for communication with no consequences, where a child can share their feelings openly. Cause children only misbehave if when they want or need attention or specific affection from their parent. A child's behaviour is the result of the parent's performance in their lives and their job. Peer pressure has no effect on a child that knows that he or she is loved, valued, respected and validated by their parents. I don't completely



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blame parents because they as well are the results of their parents, and so the cycle goes on. So, we need to end this cycle through open communication and freedom of expression. Through programmes as suggested.”

“K: ‘Mommy n Me’ programmes... especially for teenagers. And it must not be a one-time thing... it must be practiced and become a norm. Sometimes mothers act like they were never our ages. When we cry and have moods swings...it is known as DRAMATIC.”

“Y: If a child is taught to respect their parents and other individuals from a young age, parents should not have a struggle with behavioural issues. Many parents resort to beating because they feel it is more effective than other methods, but would you really need an effective method if you just taught your child morals when you are younger? (Then), when a parent says they’re disappointed, it makes the child feel more guilty.”

The monitors note that a change in behaviour will result from a change in the mindset of parents. Parents approach parenting from the position of power and control instead of empathy, guidance and support. This needs to change by giving children clear guidance for respectful relationships, understanding the life phase of the child, building a sense of belonging and affirming the child when they demonstrate good behaviour. In many discussion sessions, monitors recognised the structural challenges that parents face to enable their families to survive. They acknowledge this causes parents stress.

Their recommendations for improving the Children's Act are:

- support parents to change their violent behaviors
- enable parents to understand the development, emotions and behavior of their child
- provide children with a means to signal that they need help to change experiences of unhealthy parenting



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Clause in Children's Act 38 of 2005	Proposed amendment to the clause
1 Amend definition of care	1 (g) guiding the behaviour of the child in a humane manner <u>using positive parenting and non-violent disciplinary methods;</u>
1 Insert definition of corporal punishment	<u>'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.</u>
12 Insert section to abolish corporal punishment in the home	<u>12. (11) No child may be subject to corporal punishment or be punished in a cruel, inhuman or degrading way. Hitting a child is assault.</u>
18 Add explicit reference to corporal punishment	<u>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.</u>
110 Criminalisation of parents for corporal punishment should be a last resort	110 (2) Any person who on reasonable grounds believes that a child <u>has been abused or neglected or</u> 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.
110 Provides an opportunity for a child to have their account listened to	110(5) The provincial department of social development or a designated child protection organisation to whom a report has been made in terms of subsections (1), (2) or (4) must - (b) make an initial assessment of the report <u>including giving the child an opportunity to share their account;</u>



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<p>114 Provides that corporal punishment is not added to the child protection register automatically</p>	<p>114. (1) (a) all <u>substantiated</u> reports of abuse or deliberate neglect of a child made to the Director-General in terms of this Act;"</p>
<p>144 Insert new section to help parents change their style of disciplining a child</p>	<p><u>144. Purposes of prevention and early intervention programmes.—</u> <u>Add a new subsection:</u> <u>(4) The Department in partnership with relevant stakeholders, must take all reasonable steps, to ensure that -</u> a) <u>education and awareness-raising programmes concerning positive parenting are implemented across the Republic; and</u> b) <u>programmes promoting positive discipline at home and in alternative care are available across the Republic.</u></p>
<p>144 Amending the aims of prevention and early intervention programmes to be more child-centred, supportive of families and recognising structural issues that create challenges for families to thrive</p>	<p>144 Purpose of prevention and early intervention programmes (1) Prevention and early intervention programmes must focus on – (a) [preserving the family structure] ensuring healthy families; ... (i) avoiding the <u>necessity for</u> removal of a child from the family environment. (2) Prevention and early interventions programmes may include- (aa) <u>supporting families to recognise and overcome the structural impediments that trap them in poverty;</u> (a) assisting families to obtain the basic necessities of life; (b) empowering families to <u>build skills to help support themselves</u> [obtain such necessities for themselves]; (c) providing families with information to enable them to access services intended to mitigate the effects of structural poverty such as the social welfare system;</p>



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Knowing when government must step in to assume care responsibilities

Government must step in, as secondary duty bearers, when parents are unable or unwilling to fulfil their parenting responsibilities towards a child. When parents abuse or neglect their children, urgent intervention is required to ensure the safety and welfare of the child. Monitors considered why it is so difficult for children to disclose abuse, they say:

“Ai: Because they are usually very afraid of their abuser and most likely scared that if they said something, something much worse might happen.”

“Am: Children’s minds are conditioned and cultures in so many ways, like some children were taught “Ons praat nie uit die huis uit nie (We don’t talk about what happens in our house”, so children are subjected towards their parents’ abuse and are scared to speak up and some don’t even have any of these opinions because they might end up in a sewer or dump site.”

“R, B and H: Die staat moet die kind vat, want die kind kan nie ‘n slegte lewe lei nie. Hulle moet hom/haar ‘n beter lewe gee. Hulle moet hom/haar in beter sorg sit. Die staat kan die kind laat aanneem van mense wat beter af lewe as die kind se biologiese kinders. (Government must remove a child from abusive parents because a child should not live a bad life. Government must give them a better life. They must put the child in alternative care with foster parents who will give the child a better life than abusive biological parents).”

- “Mr G.: We would advise that all parents support their children, because some children end up on the streets because the parents lose hope due to poverty.”

Monitors are clear that government must step in to support a child whose basic needs are not met and to rescue a child from abusive parents. It is difficult for children to talk about being abused because they are not sure which adult to trust. The culture of abuse is pervasive, and they may not find an adult who will help them out of the situation. They are afraid that the reports of abuse will reach their abusive parents and result in more harsh treatment. Instead, the child yearns to live in a place that is safe and healthy.



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Some monitors who are in state care also provided insight into their experiences in these care institutions, they said:

“Ms. S: The government should fulfil their basic needs and also give them a bit of freedom especially teenagers because if you keep a teenage always under supervision the moment they are let out they will do worse things than they would've done if they allowed out. Children who are removed from their parents should be allowed to have freedom to gain experience of the real world experience because if you keep them indoors the moment they're free they will do crazy things that could put them in danger because they don't have experience about the outside life.”

“Ms. Si: The government helps you when you are facing difficult circumstances. For instance, when you are not being treated well where you live the government will take you to a home where you will be treated well, where you will be able to study without distraction, you'll have better clothes than before, there will be food for you there and the government will constantly be keeping an eye on you ensuring that you're well taken care of. If you were still a minor when you were placed at the home you leave there being educated. When you become of age you must go back home or if the situation is still bad you will be moved into a new home for people 18 years old and above.”

Monitors in state care report being better off in child and youth care centres than they were at home. They are treated well and given support to complete their education. However, some felt restricted in the institutional environment. They noted that autonomy is not being developed as children grow into teenagers.

Their recommendations for improving the Children's Act are:

- There must be consequences for abusive parents
- Children must be removed from parents to places of safety
- Places of safety must provide more healthy environments than living with their abusive parents



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Clause in Children's Act 38 of 2005	Proposed amendment to the clause
150 Agree that adults must take responsibility for the care of a child	Section 150 of the principal Act is hereby amended— (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph: “(a) has been abandoned or orphaned and [does not have the ability to support 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;”
178 Disagree with the change in process for actions to be taken against persons in alternative care settings and child and youth care centres that abuse or harm a child and conduct an enquiry into the management of the institution.	Section 178 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: “(1) If a child in alternative care is seriously injured or abused, the management of the child and youth care centre, person or organisation in whose care or temporary safe care the child has been placed must immediately report the matter to the provincial head of social development, who must cause an investigation to be conducted into the circumstances of the serious injury or abuse.” <i>Insert clause</i> <u>(2) where the investigation reveals negligence on behalf of the foster parents or the child and youth care centre management the HOD may transfer the child to another form of care in terms of section 174, and cancel the registration of the centre in terms of section 221.</u>
178 Insert consequences for social service professionals who do not fulfil their duty to promote and protect children's rights	



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Providing equal rights to good parents

Good mothers and fathers do not enjoy the same parental responsibilities and rights, especially good unmarried fathers. Equality is a fundamental value in our Constitution⁵. This supreme law goes further to guide that there can be no unfair discrimination based on gender⁶. Good unmarried fathers are prejudiced simply on the basis that they were not married to the biological mother. They are not automatically considered a good parent as is the case with the biological mother. Even though we have compelling evidence of toxic masculinity in our country, if we prejudice good fathers, we will not be helping to change these narratives. The monitors considered whether fathers and mothers should have equal rights and what factors should be taken into account when considering if parents are unfit for these responsibilities and rights. Some of their views on good fathers are represented below:

“C: Surely if the father and the mother are not married it is still both their child.”

“Z: The same as the mothers cause if they support and raise their kids why can't they have the same rights as a mother.”

Especially some male monitors note unmarried fathers should have the same rights as unmarried mothers if they fulfil their duty of care well. The group also discussed the intricacies of toxic masculinity. They noted the following:

“Ai: Well if I'm speaking for myself, I wouldn't want my dad to just come and say he wants to be completely involved in my life like my mother cause he gave up that right when he left when I was seven.”

“Am: What if the mother tries to keep the child away from the father due to abuse, violence prior the birth of the child? Isn't it unjust that the unmarried father has full rights in a scenario like this?”

⁵ Constitution of South Africa, s1 & s9

⁶ Ibid s9(4)



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Monitors were very aware of the struggle for gender equality and women's empowerment. They also educated each other on toxic masculinities by sharing views and personal experiences. The monitors also extended this discussion on equality in a parenting relationship to non-binary relationships. They grappled with the meaning and relevance of the parenting responsibilities and rights sections of the law from a non-binary perspective, one monitor noted:

"X: The heteronormative and cisnormative views needs to be addressed. When it comes to parental rights, how does it work for a non-binary person or a queer person when they become parents? What are the rules there? I believe there should be a larger discussion with more educated people about these issues. A larger discussion is needed on the rights of single parents, the adoption process, and when it comes to custody battles. When parents don't want to be together anymore, which is valid, it does result in trauma for the children. There needs to be more care for the children. Children need to be kept in mind."

Monitors are concerned that the language in the Children's Act is not inclusive and the Children's Act Amendment Bill does not move to more inclusive language. The gender of either parent is only considered at the time of the birth of the child, no provision is made for a change in gender of either parent thereafter. Contrary to contemporary understandings, gender is thus considered static and unchanging. This is unhelpful in building understandings and acceptance of queer identities.

Their recommendations for improving the Children Act are:

- give good fathers and good mothers and good parents with queer identities equal parental responsibilities and rights in a parenting relationship
- protect children from bad fathers and bad mothers or bad queer parents
- make the language in the parental responsibilities and rights section more inclusive to recognise that gender identity may not be static and to recognise queer parents



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Clause in Children's Act 38 of 2005	Proposed amendment to the clause
22 Agree with the insertion of a child's right to participate in the decision on parental agreements	Section 22 of the principal Act is hereby amended— (a) by the insertion after subsection (2) of the following subsection: <u>“(2A) A child who is the subject of a parental responsibilities and rights agreement, must be given the opportunity to express his or her views regarding the content of such agreement: Provided he or she is of sufficient maturity and mental capacity to do so.”;</u> (b) by the substitution in subsection (4) for paragraph (a)
40 Agree that replacing the word [spouse] with the word <u>partner</u> creates more inclusive language but only for children born from artificial insemination	The following section is hereby substituted for section 40 of the principal Act: “[Rights of child conceived by artificial] Artificial fertilisation 40. (1) (a) Whenever the gamete or gametes of any person other than a [married person or his] birth mother or her [spouse] partner have been used with the consent of both such [spouses] partners for the artificial fertilisation of one [spouse] partner, any child born of that [spouse] birth mother as a result of such artificial fertilisation must for all purposes be regarded to be the child of those [spouses] partners [as if the gamete or gametes of those spouses had been used for such artificial fertilisation] . (b) For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both [spouses] partners have granted the relevant consent. (2) Subject to section 296, whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman. (3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when— (a) that person is the [woman who gave birth to that child] birth mother; or (b) that person was the [husband] partner of such woman at the time of such artificial fertilisation. (4) In this section 'partner' must be read to include a spouse or a domestic partner.'”.



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Conclusion

The Child Government Monitors make recommendations for a new Children's Act in relation to:

- developing and supporting parenting competencies,
- enabling a shift from using corporal punishment to improved relationships,
- knowing when government must step in to assume care responsibilities, as well as
- providing equal rights to good biological fathers and mothers or parents in a non-binary parenting relationship.

Their key messages with this submission are:

- All children are worthy of love from their caregivers
- All children deserve good parents
- Good parents are not determined by gender identity
- Government must support parents to become good parents