SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 103

Project 110

Review of the Child Care Act

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CHAPTER 1

INTRODUCTION

1.1 Introduction

As was shown in the First Issue Paper on the Review of the Child Care Act,[1] apartheid policies, deep-rooted poverty and unemployment, poor or non-existent schooling, the breakdown of family life and the strains on a society in transition have left the majority of South African children in an extremely vulnerable position. In particular, children, the voiceless members of society, have suffered directly as result of the unequal application of the fragmented laws affecting them. These factors alone provide compelling justification for the reformulation of all law affecting children in a comprehensive, holistic manner. Furthermore, constitutional imperatives and South Africa's international legal obligations flowing from, inter alia, the ratification of the UN Convention on the Rights of the Child (hereinafter CRC), accentuate the necessity of undertaking a comprehensive review of child legislation.

1.2 Background

The Child Care Amendment Act, 1996 drew widespread and divergent responses. A key concern was that piece-meal amendments to comply with constitutional imperatives and the ratification of the CRC would not resolve deep-seated concerns about the content and application of the present law, nor indeed the relevance of its underlying philosophy to present day South Africa. The need for a comprehensive rewrite of the Child Care Act, 1983, the need to Africanise child care and protection mechanisms and, as is mandated by the ratification of the CRC, the need to review all relevant child related legislation, have since become increasingly clear.[2] The concept of a Children's Code was raised at the Gordon's Bay Conference, **Towards Redrafting the Child Care**

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[1]Hereinafter 'Issue Paper 13'. The issue paper was released by the South African Law Commission for public comment in May 1998.

[2]For a situational analysis, see the **White Paper for Social Welfare**, February 1997, p. 23 et seq.

Act, held on 26 to 28 September 1996.[3]

Following recommendations from the Minister of Welfare and Population Development, the then Minister of Justice requested the South African Law Commission to include a review of child care legislation in the Commission's programme. The Commission decided on 4 April 1997 to include the investigation on its programme and to establish a project committee. The first meeting of the project committee (the Committee) was held in Durban on 28 July 1997.

1.3 **First Issue Paper**

Issue Paper 13 was published in May 1998 to wide acclaim. The scope of Issue Paper 13 was extremely wide, including a review of the common law rules and a variety of statutes affecting children, as well as discussion of the position of children under customary law and various religious laws. The document focussed attention on the law as it relates to the many marginalised children in South African society: street children, children infected and affected by HIV / AIDS, children with disabilities, children in residential care, to mention but a few examples. Issue Paper 13 has been circulated widely for comment and input, and numerous people and organisations have availed themselves of this opportunity.

As part of a strategy to involve ordinary people from all walks of life in the implementation of children's rights and the creation of a legal framework to benefit all children in South Africa, the Committee embarked on a series of workshops held between May and August 1998. It would not have been possible to undertake this consultative process without the technical and financial support of the following donors: the Department for International Development in Southern Africa, Rädda Barnen (SA), the Carl & Emily Fuchs Foundation, and UNICEF.

At least two workshops were hosted in each province, in large cities and in rural areas, and vigorous attempts were made to ensure the participation of role-players from all sectors of the community. Such was the interest from the public that, in most instances, far more people than had

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[3]See also **Towards Redrafting the Child Care Act : Recommendations of a Conference of the Community Law Centre (UWC) and the Portfolio Committee on Welfare and Population Development**, Gordon's Bay, 26 - 28 September 1996.

been anticipated (often nearly double the expected number) arrived to participate in the workshops.

The workshops were attended by representatives of sectors as diverse as educational NGO's and officials, health workers, social workers, justice staff, children's rights activists, disabled persons' interest groups, staff working with children in residential care facilities, religious leaders and service deliverers from religious organisations. Special efforts were made to include the disabled, with sign language interpretation being provided at a number of the venues. Interestingly, it appears that the workshops in the poorer provinces, and in the more rural areas, were often those that attracted the largest numbers of participants. The workshops were therefore truly multi-sectoral and community-based.

In addition, with donor assistance, the Committee produced user-friendly materials on which to base the workshops. A set of transparencies was developed to assist Committee members in presenting the wide range of issues which needed to be covered at the workshop. A detailed questionnaire was used to capture the feedback from the workshops. These questionnaires have been collected and analysed by a contract researcher. A flier aimed at encouraging child participation was designed and promoted at the workshops, participants being encouraged to hold discussions with children. In addition to the broad-based public workshops, a number of briefings were undertaken of targeted constituencies, including the National Programme of Action for Children Steering Committee, the Portfolio Committees on Welfare and Justice, the Human Rights Commission, the Youth Commission, national NGO's, the NICC, and the Council of Traditional Leaders. In addition to the feedback from workshops and briefings, the committee has received 42 written responses to Issue Paper 13.

Participant feedback from the workshops has been most encouraging. Participants have commented on the amount of information imparted about children's rights in this country, including detail and substance on the Constitution, the CRC, and present South African law as it impacts upon children. The overwhelming feeling was that the workshops were most educative and that the discussions equipped participants better to understand the legal and children's rights ramifications in their own spheres of interest or work. Another comment frequently made concerned the usefulness of the inter-sectoral approach, enabling common ground to be built between different sectors to the long-term benefit of mutual working relationships.

For the Committee, the workshops illustrated the value of involving lay people as well as professionals in the process of law-making. By deepening the Committee's understanding of the overall constitutional and international framework for children's rights, the workshops proved to be an excellent educational opportunity, providing a sound basis for drafting laws that would further the implementation of children's rights. The Committee was greatly assisted by the quality of responses received in answer to the questions taken to the public. There is no doubt, too, of the advocacy aspect of the workshops, as virtual consensus has been recorded to the effect that children's lives can and will be bettered with appropriate, modern and constitutionally-sound legislation.

It is important at this point to highlight one particular concern relating to resources (or rather the lack thereof) raised over and over again. It was said repeatedly that any proposals made for law reform must be accompanied and supported by the necessary human and financial resources.[4] This placed the Commission in a rather invidious position: Does it make recommendations within the current resource framework which all accept to be wholly inadequate, even for present purposes, or does it make proposals in the belief that additional resources simply will have to be found? In the end the Commission decided to adopt a pragmatic approach where it attempted to find a balance between the current resources and structures available, their optimal use and application, and the realisation that welfare services and other services to children in South Africa will continue to need massive injections of resources for the foreseeable future in order to fulfil the basic needs of the most vulnerable members of our society.

1.4 **Research papers**

As was stated in Issue Paper 13,[5] the original idea was to prepare three issue papers. At that stage, it was envisaged that the other two issue papers would deal with the status of children (including adoption) and children in care proceedings and related matters. This idea was abandoned at the meeting of the Committee held on 1 and 2 October 1998. The Committee

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[4]See also Julia Sloth-Nielsen and Belinda van Heerden "The Political Economy of Child Law Reform: Pie in the Sky?" in Davel (ed) **Children's Rights in a Transitional Society** Pretoria: Protea Book House 1999, p. 107 at 120 et seq.

[5]Paragraph 1.5.

determined that, having raised a broad range of issues on which considerable information had been received, it should move to the discussion paper and draft legislation stage which would consolidate the work undertaken and in which a clear direction could already be taken. The Committee agreed further that whilst there were many issues on which the Committee could immediately move to drafting the discussion paper, there were certain areas in which further detailed research and additional consultation were needed. The Committee called this combined approach 'consultative research'.

The plan was that the members of the Committee, or contract researchers, would draft a position paper, called a research paper, for each of the selected issues, as background documents to stimulate debate. A group of people selected for their particular knowledge, experience or interest was then brought together for a consultative meeting regarding each one. They were provided with the research paper prior to the meeting, and the purpose of the meeting was to pose questions, discuss issues and debate solutions.

The Committee identified the following areas as those in which further consultative research was required:

° **'Parent'- child relationship**[6]

This includes issues relating to the definition of 'parent' and 'family', the legal relationship between parents and their children, parental responsibility, surrogate motherhood, assisted reproduction techniques, and the position of unmarried fathers.

° **Categories of children in need of special protection**[7]

(a) Children living with HIV/AIDS[8]

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[6]Professor Belinda van Heerden (now Judge) drafted the paper. The focus group discussion was held at the Breakwater Lodge, Cape Town on 12 -13 March 1999.

[7]On the use of this terminology, see 13.1 below.

[8]The research paper was prepared by Ms Catherine Barrett, Dr Neill McKerrow and Ms Ann Strode. The focus group discussion was held at the Regional Office of the Department of Justice,

(b) Children living on the street[9]

This placed emphasis on these two groups of particularly vulnerable children and investigated how their needs could best be met in a comprehensive children's statute.

° **Types of fora and forum orders**[10]

This includes an examination of both judicial and administrative systems, the question of lay participation, and also decisions about the status and content of orders made by the forum.

° **Legislating for child protection**[11]

This includes abuse and neglect, removal criteria, assessment of a child in need of care, family preservation, and preventative assistance.

° **Children in residential care**[12]

This includes an investigation into models of residential care, management of facilities, measures for protection and safety of children, and inspections.

Durban on 26 March 1999.

[9]Mr Miles Ritchie prepared the research paper. The focus group discussion was held at the offices of the South African Law Commission, Pretoria on 8 April 1999.

[10]Professor Noel Zaal prepared the research paper. The focus group discussion was held at the offices of the South Africa Law Commission, Pretoria on 15 April 1999.

[11]Drs Jackie Loffell and Carmel Matthias drafted the paper. The focus group discussion was held at the offices of the South African Law Commission, Pretoria on 29 April 1999.

[12]The paper was prepared by Dr Sonia Human of the University of Stellenbosch. The focus group discussion was held at the Regional Office of the Department of Justice, Durban on 29 and 30 May 2000.

° **Substitute family care**[13]

This includes adoption, international adoptions, foster care and its variations.

° **Early childhood development (ECD)**[14]

Early childhood development is an umbrella term which applies to the processes by which children from birth to at least 9 years grow and thrive physically, mentally, emotionally, spiritually, morally and socially. It covers day-care and pre-school services.

For the benefit of the Committee, research was also commissioned into social security for children,[15] local government and the provision of child care facilities,[16] and monitoring.[17] These research papers were not workshopped.

As was the case with the workshops on Issue Paper 13, the consultative research meetings were very well attended.

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[13]The research paper on adoption as substitute family care was prepared by Professor Tshepo Motsikatsana of Wits University; the paper on foster care as substitute family care was prepared by Mrs Petro Brink of Pietermaritzburg. The focus group discussion was held at the President Protea Hotel, Bantry Bay, Cape Town on 27 and 28 June 2000.

[14]Given the availability of well-researched documents such as the Interim Policy for Early Childhood Development by the Department of Education; the draft Guidelines for Day Care by the Department of Welfare; Sindile Tabata **Childcare (pre-school) provision in South Africa** (Nadel research report no. 10), 2000, and submissions made inter alia by the Law Review Project and the Early Learning Resource Unit, the Committee decided not to prepare a specific research paper. The focus group discussion was structured on the basis of a pre-prepared worksheet and it took place at the offices of the South African Law Commission, Pretoria on 30 March 2000.

[15]Ms Debbie Budlender undertook the research.

[16]The research was conducted by Messrs Tony Loubser and Johann Mettler of the University of the Western Cape,

[17]By Ms Louisa Stuurman of the Commission.

1.5 The child participation process

The envisaged reform of all child care legislation directly affects children, and it is therefore appropriate that the opinions of children also be heard as is indeed prescribed by Article 12 of the CRC. The Committee was very keen to take the views of children into consideration in the preparation of the draft legislation accompanying the discussion paper and would like to produce a children's perspective report alongside the Commission's report on the Review of the Child Care Act. In this way, children can participate in and impact upon the law-making process.

In order to enable the Committee to consult with children, Professor Belinda van Heerden (the then project leader) and Mr Gordon Hollamby initiated contact during the first part of 1998 with the Southern African office of the Save the Children Fund (SCF). Professor van Heerden followed up this initial contact with the UK branch of SCF while on a study visit in August 1998. As a result of these contacts, Mr John Errington of SCF (UK) visited South Africa in late October early November 1998 to assess the viability of a consultation exercise by holding a series of meetings with partner organisations identified by the Commission with the intention of exploring the characteristics of the child care sector and the potential for transferring experience on consultation with children and young people from the English programme.

The idea of consulting with children in general and on the Review of the Child Care Act in particular received overwhelming support and Mr Errington left South Africa convinced that SCF (UK) should support this consultation process as 'a key part of the implementation of the country strategic plan and as a contribution to the development of a new children's rights structure in South Africa'.

Mr Errington proposed that the consultation should involve children and young people from 5 to 18 years of age from as wide a range of areas and circumstances as possible. He further proposed that the consultation should commence after a training event in early February 1999, and should involve two sessions of group work before April 1999 when the results would be collated and passed to the Committee, with a further group session arranged subsequently to feed back the details of the report on the consultation and to inform the children and young people involved of the outcome of the process.

SCF (UK) offered to prepare the materials to be used for training staff and conducting the consultation. SCF (UK) sent out this material for comment to a small group of research or child care staff in South Africa to ensure that the material was usable with groups in different social, economic and cultural circumstances. Children with special learning needs were also to be accommodated. Mr Errington was of the view that the most cost-effective method to train the key staff members of each consultation group would be to post out the materials in January 1999 and to run up to six workshops in early February 1999 in key locations across South Africa. This allowed for attendance on a one-day basis from all of the provinces. Mr Errington further proposed that ten groups be established around each of these locations making a possible maximum of sixty reports back to the Committee. Ms Buyi Mbambo, a freelance social work consultant and member of the Committee, undertook to do the selection, administration and support work for the groups in the period leading up to the consultation.

With very generous financial and technical support from Rädda Barnen and Save the Children (UK), it was possible to hold six training sessions in the following key locations throughout South Africa:

°	Pretoria	3 February 1999
°	Johannesburg	4 February 1999
°	Durban	5 February 1999
°	Port Elizabeth	9 February 1999
°	Kimberley	10 February 1999
°	Cape Town	12 February 1999

Interest in the training sessions was overwhelming and far more people attended the sessions than was anticipated.

The structure and content of the child consultation process were based upon three group sessions with adaptions to the materials to make them relevant to different age groups, skills and disabilities. As far as possible, existing groups of children working with staff already known to them were used. This had several advantages: the membership of the groups was easier to identify, they knew each other well enough to work together at once and the exercise did not contribute to tensions within communities in the lead up to the general election. The main function of the first session was to give information on the overall task, the law, children's rights and the use of the information that would be obtained from the exercise. The second session was based on a focus group model and

gathered information on a range of topics identified by the Committee, such as the age of majority, child participation in decision-making, measures needed to protect children in institutions, foster care arrangements etc. The purpose of the third session is to provide feedback on the outcomes of the exercise to the children involved.

In the information-gathering session use was made of a pre-prepared worksheet. Forty completed worksheets were received. The Community Law Centre, University of the Western Cape, was contracted to prepare a report based on this information. This report was used in the drafting process of this discussion paper and draft legislation being proposed. Where appropriate, the input made by the children are reflected in boxes similar to this:

What the children said:

The Committee plans to repeat the child participation process with this discussion paper and accompanying draft legislation as basis. This made it important for us to have an independent evaluation of the child participation process done. Tenders for such an evaluation process were called for and the task of evaluation was awarded to Clacherty and Associates Education Consultants. The Committee is aware of considerable national and international interest in our child participation process and the possibility of preparing a generic blue-print for future child participation processes is being investigated. Obviously, an effective methodology that will inform future child consultation processes will be to the benefit of other legislative reform initiatives designed to empower children.

1.6 Scope of the investigation

It became very clear from the outset that a wide range of intersecting and overlapping laws, principles and policies would require review in this investigation. The Child Care Act, 1983 and its 1960 predecessor cannot be isolated from other legislation affecting children, nor can they be divorced from other laws regulating the relationship between parents and children and between families and the State. This was also the overwhelming opinion of those who attended the workshops, made submissions, or participated in the consultative research meetings. There was

also tremendous support for the idea of a single comprehensive children's statute bringing together in one 'Children's Code' the currently fragmented laws affecting children.

Exactly how comprehensive such a Children's Code should be was the subject of serious debate and forms the subject matter of Chapter 2.

It is important to point out that this investigation is not the only investigation relating to children on the programme of the Commission. Two sister investigations on the programme deal with youth justice[18] and sexual offences.[19] The Committee has taken cognisance of this fact and has attempted to integrate the work of the other project committees of the Commission into its process and deliberations and in its proposed draft legislation.

1.7 The Commission's working methodology

The project is aimed at a comprehensive review of the Child Care Act, 1983, and related legislation in the light of the Constitution of the Republic of South Africa Act, 1996, and South Africa's international legal obligations in terms of, inter alia, CRC. The Department of Social Development, as the lead department, is responsible for enacting and implementing initiating and ultimately drafting legislation to implement the process of reform arising out of the project.

The project is managed by a project committee established under the auspices of the South African Law Commission. The project committee plans the investigation, does or has the necessary research done, and will submit reports in the form of issue papers, research papers, discussion papers and reports to the Commission. The report(s) with draft legislation will be submitted to the Ministers of Justice and Constitutional Development and of Social Development who may then implement the recommendations proposed by adopting the draft legislation.

Professor Noel Zaal[20] is the project leader and chairperson. The other members of the Committee

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[18]Project 106: Juvenile justice.

[19]Project 107: Sexual offences.

[20]Professor Zaal became project leader after Dr Maria Mabetoa resigned. Dr Mabetoa in turn took over the reigns from Professor (now Judge) Belinda van Heerden.

are:

Dr Jacqueline Loffell
Dr Carmel Matthias
Ms Buyi Mbambo
Mr Mbongeni Mtshali
Ms Zubeda Seedat
Ms Ann Skelton
Professor Julia Sloth-Nielsen

Judge Belinda van Heerden resigned from the Committee on 7 March 2001.

Ms Helen Starke, Mr Mike Masutha, Mr Peter Setou, Dr Maria Mabetoa, Dr Eddie Harvey, Ms Elmarie Swanepoel, and Ms Jacoba Cronje, who represented the then Department of Welfare and Population Development, were replaced or relinquished their positions on the Committee for various reasons.[21] The representatives of the Department on the Committee at the time of finalising this discussion paper were:

Ms Agness Müller
Ms Lulu Siwisa-Pemba
Mr Ashley Theron

The Committee brings together experts from various disciplines and constituencies - from law and social science - from government, the NGO and the private sector. This reflects the realisation of the need for a multi-disciplinary approach, inter-sectoral co-operation, and the importance of involving all stakeholders in the process of drafting legislation.

It is Commission policy to publish first an issue paper and then to consult broadly on the issue paper. After this consultation process a discussion paper is prepared taking into account the submissions

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[21]Ms Starke and Messrs Masutha and Setou resigned from the Department, while Dr Mabetoa and Ms Swanepoel were reassigned within the Department. Dr Harvey and Ms Cronje retired at the end of 2000 and beginning of 2001 respectively.

made and inputs received. The discussion paper contains the preliminary recommendations of the Commission. These recommendations are usually embodied in the draft legislation that accompany the discussion paper. The discussion paper and draft legislation are subjected to a comprehensive consultation process where particular emphasis is placed on the draft legislation. After taking into account the comments made and submissions received, a report is prepared. The report contains the final recommendations of the Commission. These final recommendations are embodied in the draft legislation which forms part of the report. Once the report is handed to the relevant Minister, the Commission becomes *functus officio*. It remains the prerogative of the Minister to implement the recommendations made by the Law Commission by introducing the draft legislation in Parliament.[22] Once introduced in Parliament, another process starts.[23]

It is also important to ensure that the community is involved when these processes are taken forward. The voice of the community, and especially the voices of children, must continue to be heard. A broad process of consultation will continue to be followed and will involve various state departments, tertiary institutions, local and international experts, various bodies supporting democracy, other relevant NGO's, FBO's, CBO's, and obviously children. The Commission believes a properly conducted consultation process on the discussion paper and draft legislation will ensure broad support for the eventual legislation introduced in Parliament. Such a consultation process will also bring to light deficiencies and gaps in the draft legislation before the Parliamentary legislative process starts. In our experience, insufficient consultation at draft discussion paper stage can actually delay the eventual passage of the legislation in Parliament.

The Committee is planning to present to the Minister a set of draft regulations to accompany the new comprehensive children's statute as contained in the Commission's report. The absence of draft regulations in an investigation of this nature can delay the implementation of the eventual

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[22]Before the Minister will introduce the legislation as contained in the report in Parliament, the Commission's report is considered by the Department's legal advisers. These legal advisers advise the Minister as to whether the Commission's recommendations (in the form of draft legislation) ought to be implemented.

[23]The draft legislation is usually considered by the relevant Portfolio Committee, the legislation is tabled in the two Houses, hearings are held, the Bill is voted on, and certified before it becomes law.

legislation, especially where such regulations are to be drafted by persons who have had no exposure to the drafting of the principal legislation. However, it will serve no purpose to draft regulations before it is clear what the final legislation will look like. For this reason, the drafting of the regulations to the principal legislation should not commence until after the legislation has been introduced in Parliament.

The Committee likewise is planning to present to the Minister a costing analysis on the envisaged children's statute as part of the Commission's report. Given the serious budgetary implications of the existing legislation, the possible additional resources required, and the reality of limited resources, such a costing of the new comprehensive children's statute is absolutely imperative. Indeed, in order to obtain Cabinet approval for the introduction of any legislation, a costing analysis is required. In order to conduct such a costing analysis in a scientific manner, expertise not available at the Commission or in the Committee will be required.

1.8 **Conclusion**

This discussion paper represents the culmination of a major research initiative involving, inter alia, the workshop process on the issue paper, the focus group discussions on the research papers, and the child participation process. The Commission would like to take this opportunity to thank everybody concerned for their contributions and hard work.

CHAPTER 2

THE SCOPE OF THE INVESTIGATION

2.1 Introduction

The challenge facing the Commission is to develop a systematic and coherent approach to child law: an approach which is consistent with constitutional and international law obligations of equity, non-discrimination, concern for the best interests of the child, participation of children in decisions affecting their interests and protection of children in vulnerable circumstances. The Commission is also considering how to maximise the State's commitment to the promotion of family and community life, so that removal of children to residential care facilities will be needed in fewer cases. The twin principles of enabling a child's growth and development within a family environment, and protecting children in vulnerable situations, therefore inform the Commission's vision of the new children's statute.

2.2 The Committee's vision for comprehensive child legislation

For ease of reference, the vision of the Committee as depicted diagrammatically in Issue Paper 13 is repeated.[1]

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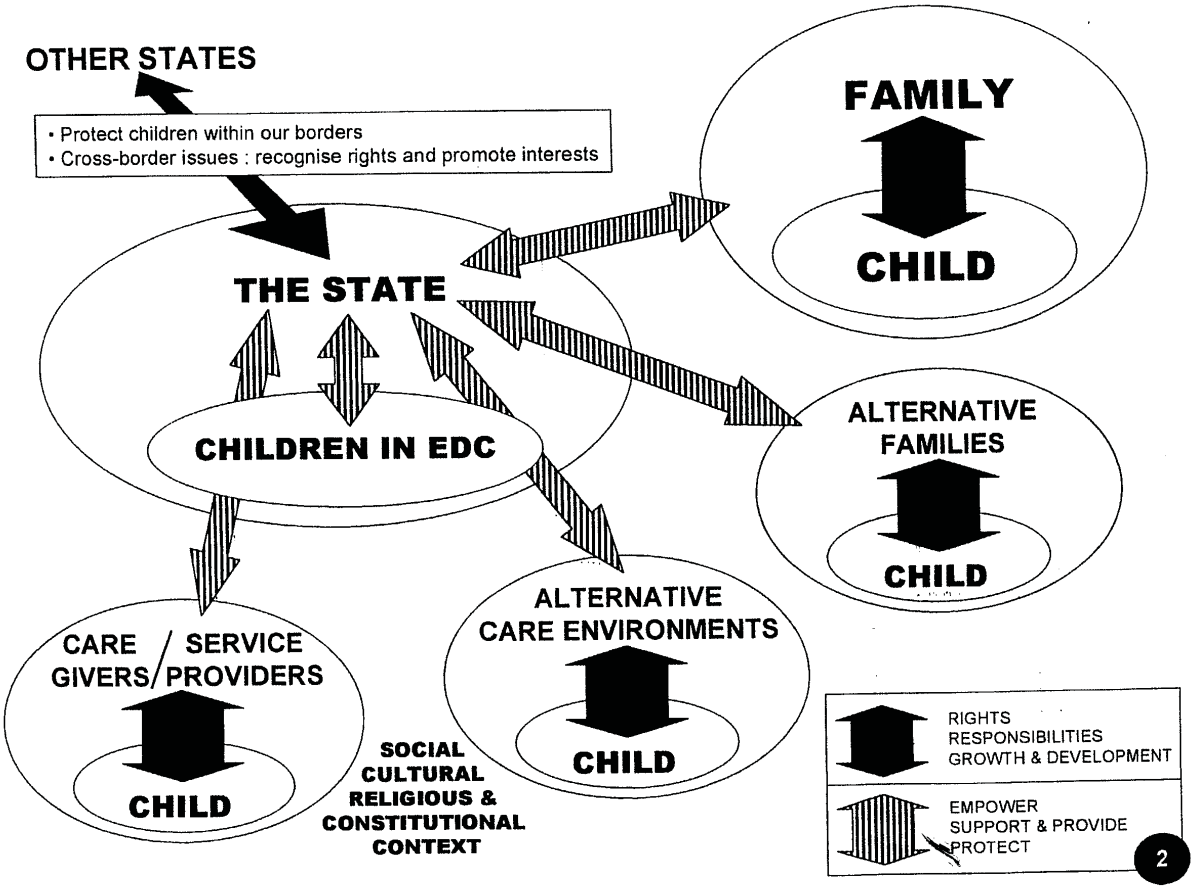
[1]This vision is set out in Chapter 2 of Issue Paper 13.

Diagram 1



The Committee has proceeded from the starting point of the concentric relationships that affect and protect children. First, their growth and development in a family environment, and the legal relations between child, parent(s) and other members of the extended family or community. The goal here is to respect the responsibilities of parents, families and communities as regards the rearing of the young, and to provide a legislative and policy environment in which the State is supportive of family life.

Second, the relations between child and State warrant reflection in a precise legal framework which proceeds from a model of the State's obligation to protect children from 'maltreatment, abuse,

neglect and degradation,[2] yet at the same time respects children's rights to alternative care of a quality which approximates a family environment. This model must support children's rights to procedures, processes and institutions in which they can participate in decisions affecting their lives and requires a system in which the requisite checks and balances over the exercise of administrative and judicial authority are adequately provided for.

Thirdly, the Committee realises that it must bear in mind the relations between the South African State and other states regarding children, especially where international issues may arise: refugee or displaced non-citizen children in our country, international adoption, international abduction as well as jurisdictional and cross-border issues in private law. Here, the model envisages spelling out the State's duty to protect all children within its borders and to promote the interests of its child citizens and nationals in cross-border issues.

Fourthly, the Committee believes that it is necessary to ensure non-discrimination with regard to different groups of children, addressing especially the cross-cultural conflict of laws that may arise for children subject to one or another religious or customary legal system. The model proposed by the Committee sees a future child law system in which core children's rights and concerns are equally respected and protected, independent of the system of personal law in which a child is raised, while at the same time ensuring that the State honours to the maximum extent the cultural and religious rights of children and families.

Fifth, specific mention will be made throughout the proposed model to children in especially difficult circumstances, such as children living on the street, refugee children, and children with disabilities.

2.3 **Testing the vision**

At the workshops the vision of the Committee as depicted above received overwhelming support, particularly because of its holistic, all-inclusive and child-friendly approach, which emphasises the best interests of the child. However, while respondents demanded that the new legislation should be accessible and user-friendly, it was pointed out that one comprehensive statute might not be able to deal with all issues affecting children as it could become too cumbersome and inflexible.

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[2]Section 28(1)(d) of the Constitution.

An alternative suggested was the creation of an interrelationship between the various statutes dealing with children through cross-referencing, and the removal of all inconsistencies. One such possibility suggested involved the drafting of the new Act to follow the pattern of a child's life (conception through to adulthood).

Some respondents argued that the responsibilities of the various organs of State and other organisations involved in this diagram need to be clarified to avoid duplication. Others felt that the relationship between rights and responsibilities should enjoy specific attention in relation to children's issues. Legislation must therefore avoid becoming 'parent-unfriendly'.

2.4 The scope of the existing legislation

In order to comprehend the full extent of the vision to draft a comprehensive children's statute, it is necessary to briefly take stock of what is already covered by the present Child Care Act, 1983 and the regulations issued in terms of this Act. This is done by comparing, in table form, the main elements of the Child Care Act 74 of 1983 with the Children's Act 33 of 1960. Such a comparison will also highlight another problem faced by the Commission, namely what provisions ideally belong in the principal act and what belongs in the regulations.

Main subject	**Child Care Act, 1983**	**Regulations**	**Children's Act, 1960**
Definitions	Chapter 1		
Children's Courts and Commissioners of Child Welfare	Chapter 2	R 2 - 16	Chapter 1
Protection of children	Chapter 3	R 39A - 39 B	Chapter 2
Adoptions	Chapter 4	R 17 - 28	Chapter 7
Places of safety, children's homes and places of care	Chapter 5	R 30 - 35	Chapter 5
Special provisions regarding pupils, foster children and other children in need of care, including financial assistance	Chapter 6	R 37 - 39	Chapter 4
Contribution orders	Chapter 7	R 29	Chapter 6

Prevention of ill-treatment and unlawful removal of children, and prohibition of employment of certain children	Chapter 8		Chapter 3
General provisions	Chapter 9	R 40	Chapter 8

As this table shows, there is no marked difference in the coverage of the two Acts drafted more than twenty years apart. It also shows how limited the existing Child Care Act is in scope and gives further credence to the calls for a comprehensive review of all legislation affecting children.

2.5 **The scope of a new children's statute**

Issue Paper 13 pertinently raised the issue of what the appropriate scope of a comprehensive children's statute for South Africa should be.[3] Again the overwhelming majority of respondents at the workshops was supportive of the view that a new children's statute should be all embracive and include all children's issues (child and family; child and State; child and community; child and education; child and child; child and religion, and so forth). It was said that such a statute should be the core law on all aspects of the life of children and should set the minimum standards to which all laws affecting children must conform. It should be the filter through which all other laws relating to children must pass; thus a coordinating piece of legislation revealing an interdisciplinary approach. However, should such an exercise prove impractical, the new Act should at least contain cross-references to the other sources.

Other workshop participants were of the opinion that the scope of the legislation should reveal a developmental approach and should deal with protection, empowerment, and survival of the child as well as the participation of the child in matters affecting him/herself. Some respondents opined that the CRC should serve as a blueprint for determining the issues that are to be contained in a comprehensive children's statute and that the principles contained in the CRC should underpin the new children's statute.

The view was also expressed that the legislation, while inclusive of all elements relating to children,

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[3]See paragraph 11.1 of Issue Paper 13. Several of the 100 questions posed in Issue Paper 13 also deal with this aspect.

should retain a large measure of flexibility to deal with different groups according to their needs. While all cultures must be accommodated within a children's statute, there would be a need for cross-cultural training. Customary unions should be dealt with according to core constitutional principles and guided by the best interests of the child

This general approach in favour of an inclusive, all embracive children's statute is very evident from the responses to a tick-box grid contained in every worksheet used at the various workshops. This tick-box grid contained a list of issues relevant to the scope of the new legislation and participants were asked to suggest which issues should be fully, partially or not at all be covered in a new children's statute.

ISSUES WHICH SHOULD BE COVERED IN A NEW CHILDREN'S STATUTE AND THE EXTENT TO WHICH THEY SHOULD BE COVERED

(Figures are reflected as a percentage of responses received)

Issues	Fully	Partially	Not at all
Guardianship	91	9	0
Custody	1	12	87
Adoption	90	10	0
Age of majority	79	19	2
Education	64	34	2
Early childhood development	72	26	2
Criminal offences against children	87	10	3
Maintenance	77	21	2
Domestic violence	67	26	7
Social security for children	84	16	0
Health care for children	75	20	5
Juvenile Justice	74	24	2
Protection of children against abuse & neglect	96	3	1
Abandoned children	93	6	1
Children living in severely impoverished situations	87	10	3
Children with disabilities	83	16	1
Children with HIV/AIDS	87	12	1
Street Children	89	10	1
Children exposed to armed conflict	80	18	2
Child labour	87	12	1

The following are some of the specific issues raised by respondents for inclusion in a comprehensive children's statute:

* Provisions on training for magistrates / prosecutors / court officials.
* Provisions compelling State intervention and detailing circumstances when this should take place.
* Parental responsibility in child rearing.

Participants at the workshops were specifically asked whether a comprehensive children's statute should regulate issues such as day-care (including after-school care), children's rights in health, children's rights in school, and the right of street children to education. The majority view, as summarised the following table, was in favour of all these issues being included in a comprehensive children's statute.

Should a comprehensive children's statute regulate the issues listed below?	Group[4] Yes	Group No	Individual[5] Yes	Individual No
-day care	56	6	30	
-children's rights in health	49	9	31	
-children's rights in school	39	4	30	1
-street children's right to education	58	4	27	

Respondents who argued for the inclusion of provisions on day care in the new statute were of the opinion that the training of personnel, minimum standards and the licensing of such centres should also be included.

Most respondents had no difficulty with the concept of providing for children's rights to health and children's right to education, in addition to the new children's statute, in health and education specific legislation respectively. Great emphasis was placed, however, on the relevancy of the education to be provided and it was inter alia suggested that life skills training should be implemented.

In the discussions on children in need of special protection[6] at the workshops, participants were asked to what extent the special needs of various categories of children should be covered in a new

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[4]In total 43 individual worksheets and 96 group worksheets were processed.

[5]Ibid.

[6]At the time of the workshops, the phrase 'children in especially difficult circumstances' was still in vogue.

children's statute. The following categories of children in need of special protection were targeted:

- children with disabilities, including mentally handicapped and deaf children
- abused and neglected children
- abandoned children
- children living with HIV/AIDS
- children in severely impoverished circumstances
- children living on the street
- children displaced by, or recruited for armed conflict
- child labourers
- displaced foreign children ('Illegal aliens' and refugees)
- illiterate children and the school drop-outs
- children as gangsters and young offenders
- children who have been exposed to crime or gangs or to places of detention.

The general consensus at the workshops was that all these categories of children in need of special protection should be offered the protection of a new comprehensive children's statute with the guiding principle being the best interests of the child. This would, it was felt, prevent discrimination and encourage equal access to services for all children. Also, it was felt that emphasis should be placed on children with special needs with the aim being the empowerment[7] of these children.

As stated before, Issue Paper 13 was focussed primarily on the scope of the new children's statute. Numerous of the 100 questions posed pertinently raised the issue of whether certain aspects need to be covered or be provided for in a new children's statute. The issues ranged from whether the present provisions of the Child Care Act, 1983 (as amended) adequately cover the circumstances in which legal representation should be provided at State expense to a child in children's court proceedings and whether such grounds should be incorporated in the new statute[8] to whether the new statute should specify that the child, if capable, has the right to give evidence and express

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[7]Some respondents linked the provision of aid to job creation initiatives for these children to enable them to gainfully enter the labour field once they are ready to do so. This highlights the need to train and empower children with special needs to lead a productive adult life.

[8]Question 54 in Issue Paper 13.

views.[9] Some very specific questions were also asked such as to what extent the existing provisions of the Guardianship Act should be incorporated in a children's statute,[10] whether such a statute should include reference to the consequences and regulation of alternative reproductive techniques and surrogacy arrangements,[11] and whether provisions governing the registration of births should be included in the statute.[12]

For present purposes it is not necessary to dwell on these questions, but to concentrate on those dealing with children in need of special protection.

2.5.1 Children with disabilities

In Issue Paper 13 the following question was posed:

> Should provisions to meet the needs of children with disabilities be incorporated in a general children's statute rather than being dealt with separately by other legislation?

From the submissions[13] it appeared that there was overwhelming support for the incorporation of provisions to meet the needs of children with disabilities in a general children's statute rather than their being dealt with separately by other legislation. This tallied with the responses from the workshops.

2.5.2 Children living on the street

In Issue Paper 13, the question was posed as to how legislation can best provide for the situation

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[9]Question 50 of Issue Paper 13.

[10]Question 37 of Issue Paper 13.

[11]Question 36 of Issue Paper 13.

[12]Question 35 of Issue Paper 13.

[13]Health / Human Watch; S A National Council for Child and Family Welfare; S A Federation for Mental Health; NICC; National Council of Women of South Africa; Departments of Paediatrics and Child Health, UCT; Natal Society of Advocates; Johannesburg Institute of Social Services; the Durban Committee; Disabled People South Africa; ATKV; Mr D S Rothman.

of, and problems faced by, children living on the street.[14] In particular, it was asked in what way legislation could protect the rights of street children to, for example, education and protection against exploitation.

From the submissions[15] it appeared that the majority of respondents were in favour of some kind of legislative provision to meet the needs of children living on the street in a children's statute. This should include provisions on the management of shelters, education and protection against exploitation. This tallied with the responses from the workshops.

2.5.3 Children living with HIV/AIDS

Although not stated directly, the Commission premised its deliberations on children living with HIV/AIDS on the basis that the protection of such children fall squarely within its mandate and therefore need to be addressed in the new children's statute. The questions posed in Issue Paper 13 therefore went beyond merely asking whether the new statute should contain provisions on children living with HIV/AIDS to matters of implementation and practical reality.[16] These questions and the responses thereto are better discussed elsewhere.[17]

The Commission also considered the issue of children living with HIV/AIDS of such importance that a special research paper and focus group discussion were dedicated to this topic. Readers are referred to Chapter 13 of this Discussion Paper where this aspect is dealt with extensively.

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[14]Question 11.

[15]S A National Council for Child and Family Welfare; NICC; National Council of Women of South Africa; Natal Society of Advocates; Cape Law Society; Durban Committee; ATKV; Mr D S Rothman.

[16]The questions relate to the appropriate forms of alternative community and cluster care options that will assist children affected by HIV/AIDS (Question 6), the legal issues that need to be addressed in developing these options (Question 7), and the HIV testing of children, including children in residential care (Question 8).

[17]See 13.3 below.

For present purposes it suffices to say that there seemed to be consensus[18] that the needs of children living with HIV/AIDS should be addressed holistically in the new children's statute.

2.5.4 Child labour

Respondents were asked to reply to the following question in Issue Paper 13:

> If detailed child labour provisions remain in dedicated labour legislation, what protective mechanisms should the proposed children's statute contain with regard to child labour?

Child labour was one of the areas where respondents were not unanimous in their approach. Some respondents would have liked to address the problem of child labour through integrative government responses,[19] some regarded the existing situation where child labour is covered in labour legislation as adequate,[20] others seemed to be comfortable with cross-references to the relevant labour legislation,[21] and others would have preferred to incorporate provisions on child labour in the new children's statute.[22] This stood in contrast to the workshop response where 87% of respondents were fully in favour of covering child labour in a new children's statute.

2.5.5 Child health

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[18]This is also in line with the responses from the workshops where 87% of those who responded where fully in favour of incorporating provisions on children living with HIV/AIDS in the new children's statute.

[19]NICC; Department of Health. The S A National Council for Child and Family Welfare suggested that the State should provide a maintenance grant and or material assistance to the parents of child labourers, while the Johannesburg Institute of Social Services suggested that special grants be made available to enable children forced to work to continue their education.

[20]Natal Society of Advocates; Cape Law Society.

[21]Mr D S Rothman; the Durban Committee.

[22]National Council of Women of South Africa.

The following question was posed in Issue Paper 13:

> Should children's health issues be protected through health legislation? Or is it more appropriate to locate them in this investigation? Alternatively, should some health matters continue to be regarded as part of a children's statute, whilst others are more appropriately dealt with in health legislation? If so, which issues/matters should fall where?

Child health care was yet another area where respondents were not unanimous in their approach. Some regarded the existing provisions regarding consent to medical care and operations as contained in the present Child Care Act, 1983 as adequate,[23] while others wanted more.[24] Some seemed to be comfortable with cross-references to the relevant health legislation, others would have preferred to incorporate provisions on child health and the provision of health services in a children's statute,[25] while others would not have.[26] Others seemed to prefer a dual approach where child health provisions are to be found in both health care and child care legislation.[27] At the workshops 75% of respondents were fully in favour of covering health care for children in a new children's statute.[28]

2.5.6 Displaced foreign children

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[23]Johannesburg Institute of Social Services argued for the maintaining of the present status quo inter alia because the Department of Social Services cannot cope with its current workload.

[24]SANCA Pietermaritzburg Alcohol and Drug Centre, for instance, pointed out that the Drug Act 20 of 1992 does not make specific provision for minor children to be committed to rehabilitation centres. The Child Health Unit, UCT was of the opinion that where child health provisions are incorporated is not as important as ensuring that the health rights of children are protected. Disabled People South Africa warned of the danger of treating children with disabilities as a health issue rather than a human rights developmental issue. The Department of Health was in favour of specific legislation targeting the health of children and young people.

[25]Health / Human Rights; NICC; ATKV; Mr D S Rothman.

[26]National Council of Women of South Africa; Natal Society of Advocates.

[27]S A National Council for Child and Family Welfare. The Cape Law Society contended that the focus of the new children's statute should be children in need of care.

[28]20% of respondents were partially in favour of covering health care for children in a new comprehensive children's statute and 5% were not in favour.

The following question was posed in Issue Paper 13:

> Should displaced foreign children fall under a future children's statute or should immigration legislation apply to them? If they are to be included in this investigation, should all foreign children ('illegal aliens' and refugees) be included, or only those who are unaccompanied by parents?

Although the majority view[29] seemed to be that provisions on displaced foreign children (whether accompanied by their parents or not) should be included in the new children's statute, some organisations such as the Natal Society of Advocates and the Cape Law Society held that displaced children should rather be dealt with in terms of immigration legislation. Regardless of what position one takes, it seems clear that some dovetailing between these two pieces of legislation will be necessary.

2.5.7 Children as learners in school

The questions posed in Issue Paper 13 on this issue reads as follows:

> Bearing in mind the comprehensive nature of the Schools Act and other recent legislation in this area, to what extent, if any, should matters relating to school education, be covered in a children's statute? Are there residual matters (such as safety in schools, or minimum standards) that could or should be addressed?

Education was another area where there seemed to be no clear mandate for inclusion in a new children's statute.[30] There seemed to be general agreement, however, that what must avoided at

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[29]S A National Council for Child and Family Welfare; NICC; National Council of Women of South Africa; Mr D S Rothman. Contra ATKV. The Johannesburg Institute of Social Services argued that the safety, welfare and care aspects relating to displaced foreign children should be dealt with in terms of child care legislation while issues relating to citizenship, refugee status, and deportation should remain in the immigration legislation. Professor C J Davel shared this latter view provided the children involved are unaccompanied.

[30]The Society of Advocates of Natal submitted that it is unnecessary to cover matters relating to school education in a children's statute. This was also the view of the Johannesburg

all cost is inconsistencies where different pieces of legislation deal with the same issue.[31] This was also reflected in the workshop responses where 64% of respondents were in favour of education being fully covered in a new children's statute, 34% said partially and 2% said not at all.

Amongst the residual (educational) matters identified by respondents for inclusion in the children's statute were the right of parents to 'home-school' their children,[32] the exemption of foster children and children in children's homes and institutions from paying school fees,[33] the banning of corporal punishment in schools,[34] mandatory reporting of child abuse by school teachers,[35] the prohibition of dangerous weapons on school premises,[36] measures to combat violence at school,[37] the regulation of schools of industries,[38] and measures to ensure appropriate education for various categories of children in need of special protection who are at risk of being marginalised.

2.5.8 Children living under customary law

Aspects relating to customary law as it affects children are dealt with below in Chapter 21. For present purposes we need to concentrate on the question of whether customary law affecting

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Institute of Social Services, the Cape Law Society, Professor C J Davel, and the Durban Committee.

[31]Disabled People South Africa; Mrs J Smith; S A National Council for Child and Family Welfare; NICC; ATKV; Mr D S Rothman.

[32]Mrs J Smith.

[33]S A National Council for Child and Family Welfare.

[34]NICC. Contra Mrs J Smith who called for the reintroduction of corporal punishment in schools. Corporal punishment may not be administered to a learner at a school: section 10(1) of the South African Schools Act 84 of 1996.

[35]NICC.

[36]Mrs J Smith.

[37]S A National Council for Child and Family Welfare. Contra NICC, the Society of Advocates, the Cape Law Society, the Durban Committee, the Johannesburg Institute of Social Services who argued that issues relating to safety in schools and minimum standards should be addressed in the education legislation.

[38]Mr D S Rothman.

children should be incorporated in a new children's statute.

The questions posed on customary law in Issue Paper 13 read as follows:

> Question 84: To what extent should customary law affecting children be directly or indirectly incorporated in the proposed new legislation? And, if it is decided not to incorporate detailed customary law provisions in the new children's statute, to what extent should the fundamental principles underpinning such a statute be made sensitive to and compatible with existing principles of customary law?

The majority of respondents were in agreement that there should be basic minimum standards or principles of equality and dignity applicable to all children.[39] These 'universal' principles regarding children should transcend customary and religious laws and should be statutorily protected and enforced.[40] Thus, a children's statute should overrule customary and religious practices in order to effectively protect the child. Some respondents were adamant that this should be the case when customary or religious law practices could harm the child physically or emotionally. Several respondents were of the opinion that the Constitution determines the role of customary and religious law sufficiently.

On the other hand, several respondents cautioned that religious and customary practices deserve sensitive treatment and said that these practices and laws should be acknowledged in so far as these are not detrimental to the rights of children.[41] Others wanted more clarity with regard to the areas of conflict between statutory and / or common law and customary law.

2.6 **Evaluation and Recommendations**

In determining the proper scope of this investigation, the Commission had to reconcile the vision of a single comprehensive new children's statute with the demands that such a new statute be

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[39]S A National Council for Child and Family Welfare, NICC, Natal Society of Advocates; Johannesburg Institute of Social Services; Cape Law Society, the Durban Committee.

[40]ATKV.

[41]The Cape Law Society, the Durban Committee, Professor C J Davel, Disabled People South Africa.

understandable, user friendly and accessible. Unfortunately, comprehensiveness and size are closely related and the more comprehensive the new statute becomes, the bulkier it gets. The right balance therefore needs to be found.

The Commission remains committed to drafting a single comprehensive children's statute. We see the following advantages in such an approach:[42]

- The children's statute can serve as an advocacy tool for children's rights;
- Such statute can encourage changes in societal attitudes towards children and enhance recognition of their rights;
- The statute will encourage better treatment for children;
- The statute can make the law relating to children more accessible and understandable, thereby protecting children's rights;
- The statute will give effect to the constitutional protection afforded children in South Africa;[43]
- Redrafting provides the opportunity to 'Africanise' the outdated child care legislation inherited from our colonial past;
- As such, the children's statute will address indigenous South African problems such as children living with HIV/AIDS and children living in extreme poverty;
- Reviewing the existing child care legislation gives effect to South Africa's international commitments as embodied in the CRC and the African Charter on the Rights and Welfare of the Child;

The Commission recommends that a new children's statute should contain provisions on the following aspects:

- Definitions

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[42]See also Catarina de Albuquerque "Consultancy on the question of a Mozambican child rights code and other legal reform in favour of children's rights", Maputo, September 2000 for a discussion of a similar process in Mozambique.

[43]As provided for in section 28 of the Constitution of the Republic of South Africa Act 108 of 1996.

- Principles underlying the legislation
- Status of children
- Children's rights and responsibilities
- Parental rights and responsibilities (including provisions on the rights of fathers of children born out of wedlock, access, custody, and guardianship)
- Children's Courts, the officers of such courts, and the orders such a court can make
- Prevention of ill-treatment and unlawful removal of children, and prohibition of employment of certain children
- Protection measures and care for children
- Substitute family care (adoption and foster care)
- Residential care, places of safety, children's homes and places of care
- Private international law aspects related to the Hague Conventions (inter-country adoptions and child abduction)

In addition, respondents were fairly unanimous that provision should also be made for various categories of children in need of special protection. These include abandoned children, children living in severely impoverished situations, children with disabilities, children living with or affected by HIV/AIDS, street children, and children exposed to armed conflict. The Commission recognises that each of these categories has unique needs and requires special protection. This issue will be dealt with comprehensively in Chapter 13.

In the light of the submissions made **the Commission also recommends that the following aspects specifically be addressed in the new children's statute**:

- Age of majority
- Early childhood development
- Reporting of child abuse and neglect
- Social security for children.

While it is recommended that the new children's statute should contain provisions dealing with the above aspects, the manner in which this is to be done and the amount of detail required still need to be determined.

The Commission does not recommend, however, that the following Acts be repealed and their provisions be incorporated in the new children's statute:

- The Divorce Act 70 of 1979
- The South African Schools Act 84 of 1996
- The Maintenance Act 99 of 1998
- The Domestic Violence Act 116 of 1998.

As for areas of the law, **the Commission does not recommend the inclusion, save for cross-referencing to the relevant legislation or where a specific aspect relating to children needs to be addressed, provisions on the following in the new children's statute**:

- Children in trouble with the law
- Sexual offences by and against children
- Measures to make it easier for children to give evidence in court
- Child health issues
- Labour.

CHAPTER 3

THE CONSTITUTIONAL IMPERATIVES RELATING TO CHILDREN

3.1 Introduction

When the process of child law reform started in earnest after the conference **Towards Redrafting the Child Care Act** in 1996, South Africa still basked in the glory of its first democratic elections. This was a great period of transformation not only of the country and the way it was governed but also of the legal system. It is in this context and with South Africa=s poor record of protecting children in mind that the idea of a comprehensive review of our child care legislation took root.

There were also key concerns raised in relation to the existing Child Care Act, 1983, and the way in which this Act was being amended on a piecemeal basis to comply with constitutional imperatives and South Africa=s international obligations following the ratification of the UN Convention on the Rights of the Child (hereinafter CRC).[1] Since then the Constitutional and other Courts have had the opportunity to consider various aspects related to children and generally the verdict has been less than favourable. Various sections of the Child Care Act, 1983 have been declared unconstitutional in some highly published cases. This Chapter focusses on these constitutional issues.

3.2 Section 28 of the Constitution, 1983

Section 28 of the South African Constitution provides an important benchmark in the protection of children in South Africa as principles derived from international law on children's rights are now enshrined as the highest law of the land.[2] The section reads as follows:

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[1]See 1.2 above for an exposition of the underlying reasons for the review of South Africa=s child care legislation.

[2]See, in general, L C Haupt and J A Robinson >=n Oorsig oor die ontwikkeling van kinderregte met verwysing na die benaderings van die sogenaamde *kiddie libbers* en *kiddie savers*= (2001) 64 **THRHR** 23.

(1) Every child has the right-

(a) to a name and a nationality from birth;

(1) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that-

(i) are inappropriate for a person of that child's age; or
(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(7) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(8) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(1) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years.

3.3 **Comments and submissions received**

Before we embark on a discourse of section 28 (the children=s rights clause) of the Constitution 1996 it is appropriate to consider what the children themselves said in response to two questions posed in the child participation process.[3]

Areas of shared life experience that prompted selection	**Category**	**No of worksheets returned**
Children in foster care	A	9
Children in alternative care	B	6
Children in trouble with the law	C	5
Children in residential care	D	2
Children who had suffered abuse & neglect (including sexual abuse)	E	2
Deaf children	F	2
Street Children	G	2
Children with behavioural problems	H	1
Other (Groups that were not identified)	I	7

3.1.1 What rights do you think children should have (in addition to universal rights, which everyone has)?

[3]Note: In this section we have categorised the responses according to the nature of the groups of children. The table below gives a breakdown of the nature of the category and identifies the category by a letter of the alphabet. The group from the after-school centre and the group from the religious school were placed with Group I (other). There is a degree of overlap where, for example, street children are now in an alternative care facility. In most instances we have grouped these worksheets under group B (alternative care). The responses are all group responses (except where indicated). Of course certain groups generated more responses than others to a particular question, and the aggregate of responses does therefore not match the number of groups.

Categories

Responses	A	B	C	D	E	F	G	H	I
Protection against any kind of harm, including the provision of medical care	5	1	1	1	1		1		1
The right to be consulted, listened to and respected by adults, including people in authority, particularly when decisions are made in matters affecting children.	8	4	3		1		4	2	1
The right not to be expected to make adult decisions such as >whether you want to go to school=.				1					
The right to be treated fairly, and not be discriminated against because of the fact that they live in institutions. (e.g. some children are denied access to the school matric dances if their parents can't pay fees)	7	2		1			2		
The right to decide on their future placement (as foster children).	1								
The right to choose their own friends	2	1					1		
The right to decide on and implement their own laws (also expressed as the freedom to choose). In the case of one group of street children this was expressed by the children as the right to have their glue.	1		1		1	1	2		
The right to say no to adults	1	1					1		
The right to knowledge (access to information, particularly about their rights and the distinction between right and wrong).	3	1					1		
The right not be beaten (or otherwise physically abused).	4	1		1			1		
The right to recreational activities and entertainment.	1		1			1			
The right to food and water.	2	1	1				1		2
The right to have good foster parents.	1								
The right to receive pocket money.	1								
The right to substance abuse rehabilitation programmes for youths awaiting trial.			1						
Children under 15 should have a right not to enter the labour market (including, for example, working for their parents)	4		1						
The right to have an identity document.							1		
Children under the age of 18 should have the right not to be detained in police cells.	1								
Children (particularly those living on farms) should have the right to receive a free formal education.	2	1	1	2		1	1		2
The right to live with (or be re-unified with) their family.	3				1		1		
The right to be clean.	1						1		

The right not to have to have sex.	1								
The right to go to University.	1	1							
The right to a sign language interpreter of one's own choice						2			
The right to express oneself in one's own language						1			
The right to choose a legal representative			1						
The right to have a roof over one's head				1					
The right to choose with whom to live (if their parents are incapable of providing for them)					1				
The right to be happy.	1								

Clearly the right which was emphasised by the majority of responses was the right to be heard, consulted, respected, taken seriously etc. One group suggested the establishment of an organisation (youth parliament) where children would have the vote and would be given an opportunity to share their opinions with the country/world as a means to give practical content to this right.

At the focus group discussion on the >Parent - child relationship= held at the Breakwater Lodge on 12 - 13 March 1999 the following question was posed:

> How can children=s rights effectively be incorporated in a new comprehensive children=s statute? What about the responsibilities of children? Should the rights (and responsibilities) of children be qualified and, if so, what should be the criteria? Should children=s rights be the corollary of parental responsibilities?

Participants at the focus group discussions held at the Breakwater lodge were adamant that children=s rights should not be seen in isolation and that children=s rights should not be correlated with parental responsibilities. The **needs** of children are central and it should be very clear that a child will not break the law by not fulfilling his or her responsibilities. Universal support was expressed for the right of the child to express an opinion and it was suggested that the Ghanaian approach set out on page 57 of the research paper be adopted.

Ms C Grobler on behalf of the Family Advocate said that although they are in favour of the incorporation of children=s rights in a new comprehensive children=s statute, the responsibilities of children should also be defined and included. She expressed the opinion that although children=s rights are universally the same, particular family dynamics should be taken into consideration.

Ms Wilona Petersen of the Department of Social Welfare, Bloemfontein was of the opinion that the rights of children effectively can be incorporated in a new comprehensive children=s statute through the principle of the best interest of the child. She said it should be made clear that along with rights comes responsibilities and is in favour of children=s rights being the corollary of parental responsibilities.

Ms M D Nchabeleng of the Department of Health and Welfare, Nylstroom said children=s rights can effectively be incorporated in a new comprehensive children=s statute by giving children the right to express freely their opinions, to be listened to attentively and to participate in decision-making processes affecting their well-being. She believed the rights (and responsibilities) of children should be qualified, but did not see children=s rights as the corollary of parental responsibility. Ms V K Mathakgane of the Department of Developmental Social Welfare, Kimberley said children=s rights should be qualified, and that children=s rights should be the corollary of parental responsibilities.

Ms Denise Mafoyane of the Department of Social Welfare, Bloemfontein opined that there is a need to qualify the rights and responsibilities so as to ensure that these rights and responsibilities are not absolute. She further said that parental responsibilities should be determined by the rights of children and not the other way around so as to ensure that the needs of the child are met.

Ms S M van Tonder of SANCA, Kimberley pointed out that the rights of children, as all other rights, are subject to limitation. The rights of children in particular are often qualified by the principle of the best interest of the child. She warned, however, that children=s rights and responsibilities should not be viewed in isolation and that emphasis should not be placed solely on the rights of children to the exclusion of the rights of parents or the community at large.

Ms L Opperman and her colleagues at the Christelik-Maatskaplike Raad, Bellville stated that the rights of children presently appear to be >out of proportion=, probably the legacy of there being no rights at all for many years. They said the scale should be balanced by children also having responsibilities in accordance with their age, development and capacity. Children should respect the rights given to parents to carry out their responsibilities and it is important that children learn to accept responsibility for their own actions and the impact of these on others. Ms Opperman and her colleagues also said children=s rights should not be allowed to impact negatively on their best

interests. They were of the opinion that the former must be subordinate to the latter.

The National Coalition for Gay and Lesbian Equality said the Constitution provides a broad framework for the concept of children=s rights. In the absence of specific contexts, it is difficult to specify the content of such rights with sufficient particularity. The Coalition submitted a general provision capable of inclusion is the right of the child to be to be heard in all major decisions regarding him or her, in a manner appropriate to the child=s stage of development. Any child above the age of 12 should be presumed to be able to form a view, subject to the qualification of the >best interests of the child=.

The Coalition said specific rights should be included by incorporation into various sections of the proposed new legislation, impacting on areas such as the acquisition of parental responsibility, parenting plans, and the revocation of parental responsibility. In these areas, the child should also be granted a right to be heard.

However, the Coalition pointed out that the vesting of rights in children does not mean that children have legally enforceable responsibilities. The Coalition felt all parents, family members and other caregivers of children should be obliged to encourage children to respect diversity, community and the environment. The Coalition opined furthermore that anyone with parental responsibility must provide an appropriate environment conducive to fostering the development of such respect.

Professor C J Davel of the Centre for Child Law, University of Pretoria proposed as inclusion as a right of the child the Ghanaian provision which provides that a child has the right to express an opinion, to be listened to, and to participate in a manner commensurate with his or her understanding in decisions which affects his or her well-being. Professor Davel was not in favour of incorporating children=s responsibilities in a new children=s statute. She said children=s rights are not always subjective rights, but more in the nature of fundamental human rights. Subjective rights always imply corollary duties which is not the case with human rights. Professor Davel used the following example to illustrate her point: Say children have the right to be taken seriously and the responsibility to listen to others. This could mean that a child has the duty (responsibility) to bow to peer pressure and take drugs when told to do so by bad friends. This surely cannot be and emphasised her point that children=s rights do not have a corollary such as children=s responsibilities.

Mr D S Rothman, a commissioner for child welfare, Durban pointed out that children=s rights are set out in the Constitution and other international documents. These must be manifestly seen to be upheld in practice and provisions of those instruments must be incorporated in where appropriate. Mr Rothman regarded the responsibilities of the child as set out by the African Charter on the Rights and Welfare of the Child as wholly inappropriate because it expects the child to become a guardian of national interests and ambitious of Africa, but provides very little with regard to the child=s own personality and family considerations. He posed the question as to whether there is an African Charter for adults as well. Mr Rothman said the responsibilities of the child should be contained within the realm of childhood and those characteristics that will make a better adult of the child. This is to be done at a family and not a national level. He continued:

> Children are parents in the making, Their time will come. They should have rights (privileges) and responsibilities to go hand in hand with these.

3.4 Judicial interpretation of section 28 of the Constitution, 1996

The judiciary has on several occasions had cause to deal with aspects of the children's rights clause, and has through its judgments provided further guidance as to the interpretation to be accorded to aspects of constitutional children's rights. A brief overview of the most significant judicial interpretations of children's rights principles is provided next.[4]

The series of cases that commenced with **Fraser v Children's Court, Pretoria North and others**[5]

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[4]The Constitutional Court=s approach in **Minister of Welfare and Population Development v Fitzpatrick and others** 2000 (7) BCLR 713 (CC) has been dealt with comprehensively in Chapter 3 above and is consequently not addressed in this Chapter. See also Julia Sloth-Nielsen >Children=s rights in the South African courts: An overview since ratification of the UN Convention on the Rights of the Child=, paper presented at the Miller Du Toit Conference >Family Law in a Changing Society: From the Margins to the Mainstream=, Cape Town, 1 -2 February 2001, p. 4 et seq.

[5]1997 (2) SA 218 (T). See also **Fraser v Children=s Court, Pretoria North and others**

concerning the rights of an extra-marital father in relation to an adoption order of the children's court, culminated in a Constitutional Court decision which put an end to three years of litigation. The narrow point on which the Constitutional Court was finally called to decide was whether to grant leave to appeal against the decision of the Supreme Court of Appeal which had upheld the original adoption order. Putting an end to Mr Fraser's quest for his son, the Constitutional Court determined that the best interests of the child outweighed the usual procedural ground for setting aside lower court decisions, that is, whether there were reasonable prospects for success on the merits of the case. The rights of the adopted child were regarded as central to the resolution of whether it was in the interests of justice to allow the litigation to continue. Since three years had elapsed since the first placement of the child, and since he was happily ensconced with his adoptive parents, his best interests determined that litigation concerning the adoption should not be allowed to continue, as this would imply continued uncertainty as to his status and the adoptive placement. Not only does this decision illustrate the paramountcy of the best interests criterion, even in the face of settled law concerning the test to be applied when seeking leave to appeal, but implicit in the Constitutional Court's approach is a premise that stable and secure placements in family environments are indeed in the best interests of children. This is an important consideration in weighing the relative roles of foster care (which is intended as a temporary placement of a child in need of care) and adoption (being the permanent transfer of parental responsibility to the prospective adoptive parents) in the proposed new legislation. Further, the judgment supports the notion of minimum interference in a child's life, where the child is not at risk of harm.[6]

The allocation of custody of children upon divorce was the addressed in **V v V**,[7] a case in which an application by a mother for joint custody of her children was opposed by the father, in part based on the fact that the mother was involved in a lesbian relationship. The father did not want her to exercise access when her partner was sleeping over, lest the children themselves adopted a gay or lesbian orientation. The Court emphasised that access rights are to be considered as a rights of the child, although it was pointed out that 'it is artificial to treat them as being exclusive of parent's

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1997 (2) SA 261 (CC); **Naude and another v Fraser** 1998 (4) SA 539 (SCA).

[6]The minimum interference principle has found statutory favour in jurisdictions such as the United States of America and Scotland.

[7]1998 (1) SA 169 (C).

rightsY[T]he rights which a child has to have access to it's parents is complemented by the rights of parents to have access to the child'.[8] The court was of the view that whereas the common law usually approached issues concerning access and custody from the vantage point of the parent, section 28(1)(b) of the Constitution entailed that the whole issue had to be addressed as part of the child's right to parental care, or to alternative care when removed from the family environment. The Court discussed the changing nature of the relationship between parents and children over the last few years, and referred to the shift in thinking from parental power of the parents to one of parental responsibility. The judicial acknowledgment of the changes that flow from a constitutional children's rights approach, as evidenced in this case, suggests support for the inclusion of clearly articulated principles concerning both parental responsibility and children's rights in the proposed statute.

The child=s right to parental care as contained in section 30 of the Interim Constitution was discussed in **SW v F**.[9] The case concerned adoption of a child by foster parents, in whose care the child had originally been placed when his mother was imprisoned. The child had spent all save he first four months in their care, and was by now six years old. On appeal, it was alleged that the right of the child to parental care in section 30 was incorrectly not used to interpret the applicable provisions of the Child Care Act. However, the Court held that the right to parental care did not mean the right to the care of a natural or biological parent. The provision was therefore no bar to an adoption order being granted.

An interpretation of the child's right to parental care in section 28(1)(b) was also the subject matter of the decision in **Jooste v Botha**,[10] insofar as the claim for delictual damages was occasioned by the extra-marital father's failure to acknowledge, communicate or show any interest in his son. Alleging that as a result of this neglect, the child had suffered emotional distress and loss of the amenities of life, the root issue was whether the father was under a legal obligation to render the

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[8]At 189C-E.

[9]1997 (1) SA 796 (O).

[10]2000 (2) BCLR 187 (T). See also G J van Zyl and J C Bekker >Case discussion: *Jooste v Botha* Case no 1554/1999 (T) (unreported)= (2000) 33 **De Jure** 149; J M T Labuschagne >Die omgangsreg van die ongehude vader en sy buite-egtelike kind en die vraagstuk van deliktuele aanspreeklikheid binne konteks van >n interaksiereg= (2001) 64 **THRHR** 308.

plaintiff love and affection. There was no suggestion that the father had not supported the child materially, as maintenance was regularly provided. The Court held that, since common law did not provide a source of authority for the claim, it had to be founded on the provisions of section 28(1)(b) of the Constitution or fail. Interpreting the constitutional provision, the Court held that section 28(1)(b) required family care, or care by a single parent where such parent had custody of the child. However, the Court was of the view that the law cannot enforce the impossible: '[I]t cannot create love and affection where there is none. Not between legitimate children and their parents and even less between illegitimate children and their fathers. That fact leads compellingly to the conclusion that the drafters of the Constitution could not have intended that result'.[11] Therefore, the right to parental care as enshrined in section 28(1)(b) does not impose upon a parent the obligation to love and cherish a child.[12]

The judge remarked further that section 28 (1)(b) is primarily applicable in the 'vertical sphere', that is, between the individual and the State.

> Primarily, s 28(1)(b) is aimed at the preservation of a healthy parent - child relationship in the family environment against unwarranted executive, administrative and legislative acts. It is to be viewed against the background of a history of disintegrated family structures caused by government policies.[13]

However, a somewhat contrary view on whether the section is primarily of horizontal or vertical application was expressed by the Constitutional Court in **Government of the Republic of South Africa v Grootboom and others**.[14] In the **Grootboom** judgment, the central issue that Constitutional Court was obliged to consider was the relationship between everyone=s right to

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[11]At 197F.

[12]Some reservation about the correctness of this decision is articulated by B Bekink and D Brand >Constitutional protection of children= in CJ Davel (ed) **Introduction to Child Law in South Africa** Cape Town: Juta 2000 at 184, as the plaintiff was not seeking a mandamus to compel the parent to show love and affection, but damages for emotional distress.

[13]At 195 F-G.

[14]2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC).

housing in section 26 of the Constitution, and children=s right to shelter as provided for in section 28(1)(c) of the Constitution. The lower court[15] had held that section 28(1)(c) imposes an obligation upon the State to provide shelter for children in the event that their parents are unable to do so. The Constitutional Court, however, proceeded to analyse the rights concerned by pointing to the evident overlap between the rights in sections 26 and 27, which create the right of access to socio-economic rights for **everyone**, and those in section 28(1)(c), which concern the rights of **children alone**.[16] Because of this, and because the Constitutional Court was of the opinion that viewing the right to housing and the right to shelter as being distinct would render the 'carefully constructed constitutional scheme' for the progressive realization of socio-economic rights nugatory, it was found that section 28(1)(c) did not create a 'direct and enforceable' claim upon the State by children. The Court concluded that section 28(1)(c) did not create rights that are separate and independent rights for children and their parents.[17] The Court warned that the constitutional provisions concerning progressive realization of socio-economic rights would make little sense if they could be trumped in every case by the rights of children to get shelter from the State on demand.[18]

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[15]See **Grootboom v Oostenberg Municipality and others** 2000 (3) BCLR 277 (C).

[16]See also P de Vos >The economic and social rights of children and South Africa=s Constitution= (1995) **SAPL** 233, >Pious wishes or directly enforceable human rights? Social and economic rights in South Africa=s 1996 Constitution= (1997) 13 **SAJHR** 67; Scott and Alston >Adjudicating constitutional priorities in a transitional context: A comment on *Soobramoney=s* legacy and *Grootboom=s* promise= (2000) 16 **SAJHR** 206; G van Bueren >Alleviating poverty through the Constitutional Court= (1999) 15 **SAJHR** 52; Julia Sloth-Nielsen >Chicken soup or chainsaws: Some implications of the constitutionalisation of children=s rights in South Africa= (1996) **Acta Juridica** 6, >The child=s right to social services, the right to social security, and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*= (2001) 17 **SAJHR** 210; and Ellie Parker and Maurice Sunkin >Needs: Resources and abhorrent choices= (1998) 61 **Modern LR** 401.

[17]Par [74].

[18]Par [75].

The Court was consequently of the view that section 28(1)(b) must be read together with section 28(1)(c),[19] the former defining those responsible for giving care to children, whilst the latter lists various aspects of the care entitlement (the right to basic nutrition, to shelter, to basic health care services and to social services). The judgment suggests clearly that the right in section 28(1)(b) is primarily of horizontal application (that is, between individuals), as the obligation for fulfilment of the rights enumerated in section 28(1)(c) was regarded as lying primarily upon parents.

The judgment of the Constitutional Court in the **Grootboom** case appears to have established several other subsidiary principles of relevance to this investigation. First, the Court elaborated upon the **nature** of the State's obligation in relation to section 28 rights. Yacoob J stated that where children are in parental or familial care, the State's obligation would normally entail passing laws and creating enforcement mechanisms for the maintenance of children and for their protection from abuse, neglect or degradation.[20] The State would, the Court conceded, incur such primary obligation where children are removed,[21] or lack a family[22] environment, such as where they have been orphaned or abandoned. It is therefore implicit that insofar as children **are** removed, abandoned or orphaned, the State does in fact bear a primary responsibility to provide for those children=s basic material needs. However, the Court did not detail precisely when parental care may be regarded as being 'lacking'. Thus, it could be argued that children living on the street, and

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[19]Par [76].

[20]Par [78]. See also Geraldine van Bueren >Alleviating poverty through the Constitutional Court= (1999) 15 **SAJHR** 52 who argues that constitutional human rights litigation has the potential to play an important role within a broader eradication of poverty strategy. She says new litigation tools need to be developed which are more appropriate for litigating on economic and social rights, including human rights budgets and indicators.

[21]Par [77].

[22]The meaning of >family= in the context of the judgment is not explicit, and it has often been pointed out that the South African notion of >family= is an extremely fluid one. The Roman Dutch common law duty of support is, however, based on a Western definition of biological ties within a narrow nuclear family structure.

other categories of children[23] who (for whatever reason) are de facto not in parental care, could be included as beneficiaries of this primary State obligation, in addition to all children in alternative care settings, such as children in foster care or those residing in children=s homes.[24] The principle established by the **Grootboom** case is that legislative and other steps must be taken in order to ensure that the State does meet its commitments in this regard.

Further to the above, Yacoob J refers directly to child maltreatment, abuse and degradation, the right provided for in section 28(1)(d).[25] In commentary upon the **Grootboom** case, it has been

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[23]Such as displaced children.

[24]Par [77] where Yacoob J states that >section 28 does not create any primary obligation ... if children are being cared for by their parent= (emphasis added). Children in alternative care are mentioned at par [79] of the decision. See also Julia Sloth-Nielsen >The child=s right to social services, the right to social security, and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*= (2001) 17 **SAJHR** 210 at 230: >What is left of children=s socio-economic rights in the aftermath of *Grootboom* could well be a fallback position, premised on the role of the state as primary provider to children without families. In this scenario, if drafters of new children=s legislation wish to put the >mouth= where the >money= is, child protection services should be weighted towards intervention and out-of-home placement, because it is in these settings that neglected and deprived children=s constitutional claims to state resources may be optimally realised. Taking *Grootboom* at face value, this fall-back position would focus on fulfilling the state=s primary obligation towards children in foster care, children in institutional settings, abandoned and orphaned children and children living on the street. (It may well require a veritable army of social workers, providing state services to the ever- increasing numbers of children without adult caregivers, as well as sharp increases in state subsidisation of foster care and institutions for orphaned and abandoned children.) As this option accords little or no priority (or fiscal commitment) to families and parents attempting to support their own children, it would impel social workers to remove children whose neglect or abuse stems from parental poverty=.

[25]It seems that the responsibilities of parents and families with regard to children=s development are linked thematically to their protection from abuse and neglect. Article 19 (1)of the CRC provides that 'States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury of

argued that the State appears to be directly responsible for ensuring fulfillment of this right, whether children are in parental, familial, or alternative care.[26] Section 28(1)(d) does not, on the face of it, create a right which is subject to progressive realisation. In Yacoob J's view, the scope of the obligation to protect children from maltreatment, abuse, neglect and degradation normally includes passing laws and creating enforcement mechanisms degradation, and providing for the prevention of such occurrences.[27]

The right to social services, it would appear, has no direct counterpart in treaty law. In commentaries on this section in South African literature thus far, little content analysis of the likely meaning of the right to social services has been attempted. There would appear to be two possible approaches regarding the possible scope and meaning of the right to social services in section

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abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardians(s) or any other person who has care of the child'. Subsection 2 of this Article continues: >Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have care of the child, as well as for other forms or prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement'. S Detrick **A Commentary on the United Nations Convention on the Rights of the Child** (1999) 322 comments, with regard to the above provisions, that the travaux preparatoires show that it was generally felt that emphasis should be placed on preventive action, and that this led to the reference to social and educational measures being incorporated in the final version of Article 19, as well as to the reference to the need for establishing social programmes to provide support for the child *and* for those who have care of the child. She alludes to a compromise that was achieved between those countries supporting a weighting towards judicial intervention in child abuse cases (mainly the USA), and those, chiefly from the then East Block, preferring an approach to child abuse which focussed more on social programmes to look after children in need.

[26]Julia Sloth-Nielsen >The child=s right to social services, the right to social security, and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*= (2001) 17 **SAJHR** 210 at 230 - 231.

[27]Par [78].

28(1)(c). The first approach would accord this notion a broad interpretation, and the right to social services would then take on a broad developmental hue, and include rights that properly fall under the category 'social spending' as evidenced in World Bank reports. The right to social services seen in this light focuses on the word 'social' in the sense of a community development model, encompassing services provided by a range of departments at different tiers of government.

A different idea of the scope of the right to social services can be discerned in a resource book on socio-economic rights published by Liebenberg and Pillay.[28] In a section on social welfare rights, the authors clearly link social security, social assistance and children=s rights to social services.[29] This narrower view would focus more pertinently on developmental social welfare programmes and services as normally provided by the Department of Social Development. The judgment of the Constitutional Court in **Grootboom** refers to social **welfare** programmes,[30] which supports a welfarist reading of the right to social services, as oppose to an unbounded environmental and community development reading.[31]

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[28]S Liebenberg & K Pillay (eds) **Resource Book on Social and Economic Rights** Community Law Centre, University of the Western Cape (2000).

[29]S Liebenberg & K Pillay (eds) **Resource Book on Social and Economic Rights**, p. 315. The interpretation of social services rights that these authors deduce from the CRC comprises the following: protection of children from physical or mental abuse or neglect, protection and assistance to children temporarily or permanently separated from their families, assistance to children with disabilities, protection of children from economic exploitation, drug abuse, sexual exploitation and abuse, and they refer too to the obligation in article 39 of the Convention to promote recovery and reintegration.

[30]See para [75] and [88] of the judgment.

[31]Julia Sloth-Nielsen >The child=s right to social services, the right to social security, and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*= (2001) 17 **SAJHR** 210 at 220, footnote 51. See too I Jamie >Court offers little shelter for basic rights= (February / March 2001) 5(35) **Children First** 13.

It has been suggested[32] further that the right to social services in section 28(1)(c) cannot be viewed on the same footing as the other 'care' rights in this section (nutrition, health care and shelter), and that the right to social services is possibly intended to refer to those social welfare services that the State must provide **only** when children lack a family environment or have been removed. Such view would accord with the narrower reading of the right to social services discussed above, and avoid the slightly incongruous idea that social welfare services form part and parcel of the parental duty of support.

[32] Julia Sloth-Nielsen >The child=s right to social services, the right to social security, and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*= (2001) 17 **SAJHR** 210 at 220.

Based on the above interpretation, the judgment in **Grootboom** may well have bestowed a degree of immunity upon the existing foster care system and welfare subsidies to children in out-of-home care, in view of the rationale that the State must make appropriate provisioning for children who lack parental or familial care. At minimum, any review downwards of the level of funding of the foster care grant might require 'compensatory' steps in relation to other grants which promote children=s and family services, notably increases in the overall level of the child support grant,[33] and additional welfare programmes[34] aimed at providing appropriate care to children who lack a family environment.[35]

It could be argued that the approach of the Constitutional Court in **Grootboom** is premised on the notion that the role of the State is only to provide resources where children are without families. The risk exists, however, that this approach may lead to child protection services being weighted towards intervention and out-of-home placement, because it is in these settings that neglected and deprived children=s constitutional claims to state resources can be optimally realised. This could have the undesirable result that sharp increases in State subsidisation of foster care and institutional care for orphaned and abandoned children are experienced, because little priority (or fiscal commitment) is accorded to families and parents attempting to support their own children; this

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[33]Sandy Liebenberg >The right to social assistance: The implications of *Grootboom* for policy reform in South Africa= (2001) 17 **SAJHR** 232 discusses the implications of the **Grootboom** judgment for social assistance, including the child support grant.

[34]Such as professional foster care programmes, similar to the one being piloted in the Tsolo region of the Eastern Cape.

[35]See also the discussion of the issue of grants in Chapter 25 below.

policy could impel social workers to remove children whose neglect or abuse stems from parental poverty.

However, the view has also been put forward that the **Grootboom** judgment recognises that children=s right to protection from abuse, neglect, maltreatment and degradation in section 28(1)(d) is a right that is directly enforceable against the State. Given the links between parental poverty and child abuse, it may be argued that the State is obliged, where children=s neglect stems from poverty alone, to adopt meaningful preventive measures, which must include some level of financial allocation for family preservation. Yacoob J does refer to the possible establishment of social welfare programmes providing maintenance and other material assistance to families in need in defined circumstances, albeit in the context of section 27 of the Constitution which the State need only implement progressively and within available resources. However, the constitutional right to protection from abuse and neglect in section 28(1)(d) is not limited by this qualification, nor even by the limitation inherent in the formulation as the right to 'have access to' such protection.

In the light of the above reasoning, the Commission has included a chapter in this Discussion Paper and draft Bill relating to the prevention of child abuse and neglect, in order to ensure that the State does meet its commitments as regards the implementation of section 28(1)(d).[36]

[36]See Chapter 9 below.

Christian Education South Africa v Minister of Education[37] concerned a constitutional challenge to the provision of the South African Schools Act 84 of 1996 which prohibits the administration of corporal punishment at schools to learners.[38] The matter was pursued by a consortium of parent bodies of independent schools, who argued that the blanket ban upon corporal correction in schools invaded their 'individual, parental and community rights to freely practice their religion'.[39] It was contended that the imposition of corporal punishment by teachers, with parental consent, was a vital aspect of the Christian religion.[40] The Minister of Education opposed the application, relying on the equality clause,[41] the right to human dignity,[42] the right to freedom and security of the person,[43] and the rights of children to be protected from maltreatment, neglect abuse and degradation.[44] The Minister also referred to the provisions of the CRC, stating that articles 37, 19 and 28(2) of this treaty **required** the abolition of corporal punishment in schools.[45]

The Constitutional Court declined to decide whether the prohibition on corporal punishment was a practice that was in violation of the Bill of Rights, preferring instead to address the issue via a consideration of the limitations clause in section 36 of the Constitution. On the assumption that the blanket prohibition did indeed violate the applicants constitutional rights to religious and cultural freedom, the central question posed by Sachs J was 'whether the failure to accommodate the appellant's religious belief and practice by means of an exemption for which the appellants asked,

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[37]2000 (4) SA 757 (CC).

[38]Section 10. See also the Abolition of Corporal Punishment Act 33 of 1997.

[39]Par [2].

[40]Par [4].

[41]Section 9 of the Constitution. Because the applicants only sought an exemption as regards the administration of corporal punishment upon boys in school, arguing that it was well-known that girls were better disciplined than boys: par [15].

[42]Section 10 of the Constitution.

[43]Section 12 of the Constitution.

[44]Section 28(1)(d) of the Constitution.

[45]Par [13].

can be accepted as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality'.[46] The Constitutional Court was of the view that the Schools Act did not deprive parents of their general right to bring up their children according to Christian beliefs, but that it merely limited their capacity to empower or authorise teachers to administer corporal punishment in their name.[47] The Court held further that the failure to provide for an exemption to accommodate the appellant's beliefs was reasonable and justifiable under the limitations clause contained in section 36 of the Constitution, for reasons which are set out fully in the judgment. These include the need for uniform norms and standards in schools, the constitutional duty upon the State to help diminish the amount of public and private violence in our society, and the duty incurred upon ratification of the CRC to 'take all appropriate measures to protect the child from violence, injury or abuse'.[48] Allusions were also made to the symbolic and principled function of introducing such a prohibition, given the authoritarian past which had prevailed in South Africa.[49] Judge Sachs found wide support for the stance that corporal punishment in schools was in itself a violation of the dignity of a child.[50]

The Court did not offer a view on whether corporal punishment, applied moderately by parents, would amount to a form of violence from a private source, since this was not necessary on the facts before it. This was, however, in issue in the recent case before the European Court of Human Rights in **A v United Kingdom**.[51] The European Court held unanimously that the repeated beating of a 9 year old boy by his step-father amounted to torture or inhuman or degrading treatment of punishment in contravention of article 3 of the European Convention. The government of the United Kingdom was held liable for failing to take measures to protect the child, in that the European Convention imposed an obligations upon States to implement laws which provided sufficient protection of children from serious breaches of personal integrity. The common law in the United

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[46]Par [32].

[47]Par [38].

[48]Par [40], referring to Articles 4, 19 and 34 of the CRC.

[49]Par [50].

[50]Par [52].

[51][1998] 2 FLR 959.

Kingdom allowed parents, and other acting *in loco parentis*, to raise the defence of 'moderate and justified chastisement' in circumstances such as this, where the punishment was obviously of a level of severity which fell within the scope of Article 3.[52]

The European Court has not, however, gone so far as to declare all forms of physical discipline (such as smacking) to be violations of the right to freedom from inhuman or degrading punishment, although a number of (mainly European) countries have prohibited the administration of corporal punishment upon children by their parents.[53]

Despite the fact that the Constitutional Court did not pronounce on the constitutionality of the common law rules pertaining to parental chastisement, there is a reference in the judgement to the matter of 'supervised regulation' of parental corporal punishment as a way of fulfilling the state=s constitutional and international law obligations.[54] The Court alluded to the question whether or not 'the common law had to be developed so as to further regulate or even prohibit caning in the home',[55] but declined to express an opinion on this.

As regards discrimination against extra-marital children, of relevance is the Supreme Court of Appeal's decision in **Mthembu v Letsela and another**.[56] The rule of primogeniture in intestate succession where children born of customary unions are concerned was challenged as constituting unfair discrimination on the grounds of sex and gender. The purported heir was the illegitimate

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[52]JMT Labuschagne >Case discussion: *A v United Kingdom* 1998-09-23, ECHR 1998-VI 2692, NJ 1999, 532' (2000) 33 **De Jure** 146 points out that the English law on moderate chastisement is very similar to the South African common law, and raises the question as to whether this area of the law is not in need of reform.

[53]See S Pete >To smack or not to smack: Should the law prohibit South African parents from imposing corporal punishment on their children?= (1988) 14 **SAJHR** 430 for cogent arguments and a plea for the introduction of a ban on parental corporal punishment.

[54]See para [48] and [59].

[55]Par [48].

[56]2000 (3) SA 867 (SCA).

daughter of a black man who died intestate. The Court rejected the claim that the laws of intestate succession constituted discrimination on the ground of sex or gender, but did not pursue any inquiry into whether the rules of customary law did not discriminate on the basis of illegitimacy or the child's status by virtue of her birth. The Court, further, saw no need to intervene with the rule of customary law which prohibits all illegitimate children (male and female) from inheriting. Such an approach, however, violates the provisions of the CRC, which prohibit discrimination based on a child's birth or other status.[57]

The best interests principle[58] contained in section 28(2) of the Constitution has been frequently cited by South African Courts. In **Minister for Welfare and Population Development v Fitzpatrick**,[59] Goldstone J expressed the view that 'the plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1)'.[60] However, the best interests standard is clearly not without limitation.

In **Sonderup v Tondelli and another**,[61] the issue was whether the statute incorporating the Hague Convention on the Civil Aspects of International Child Abduction in South African municipal law (the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996), was constitutional. Since the basis of the claim was that the Act was inconsistent with the Constitution on the basis that it does not recognize the best interests of the child, the Constitutional Court considered whether such inconsistency would be justifiable under the provisions of section 36 of the Constitution. Holding that the Hague Convention provides both for a long term evaluation of a child=s best interests in the determination of custody disputes, as well as for a consideration of the

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[57]Article 2.

[58]The best interests of the child principle is discussed in more detail in the following section.

[59]2000 (7) BCLR 713 (CC).

[60]Par [17].

[61]2001 (1) SA 1171 (CC). See also the discussion of this case in 22.3.3 below.

interplay between child=s short-term and long-term bests interests, the Court was of the opinion that the obligation to order prompt return was ameliorated by the provisions of section 13 of the Hague Convention, demonstrating a close relationship between the purpose of the Convention and the means sought to achieve that purpose. Further, a Court is empowered to tailor an order, and impose substantial conditions, designed to mitigate any interim prejudice to any child caused by a court-ordered return. Accordingly, it was held that the limitation in the Hague Convention situation on considering the individual child=s immediate best interests was reasonable and justifiable.

3.5 Conclusion

Protection of children=s rights leads to a corresponding improvement in the lives of other sections of the community, because it is neither desirable nor possible to protect children=s rights in isolation from their families and communities. Further, as pointed out by Geraldine van Bueren,[62] the essence of children=s economic and social rights[63] is transformative and redistributory, because these rights create a legitimate claim for children to benefit from an equal share in the state=s resources. South Africa is therefore fortunate to have enshrined, as a constitutional imperative, the rights of children in section 28 of the Constitution, 1996.

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[62]>Alleviating poverty through the Constitutional Court= (1999) 15 **SAJHR** 52 at 55.

[63]See P de Vos >The economic and social rights of children and South Africa=s Constitution= (1995) **SAPL** 233; E Muneirik >Beyond a charter of luxuries: Economic rights in the Constitution= (1992) 4 **SAJHR** 464. See further D Parker >Resources and child rights: An economic perspective= in J R Himes (ed) **Implementing the Convention on the Rights of the Child: Resource Mobilisation in Low Income Countries** (1995) 35 - 37; P Imbert >Rights of the poor, poor rights? Reflections on economic, social and cultural rights= (1995) 55 **International Commission of Jurists Review** 85; R E Robertson >Measuring state compliance with the obligation to devote the Amaximum available resources@ to realising economic, social and cultural rights= (1994) 16 **Human Rights Quarterly** 694; K Tomasevski >Justiciability of economic, social and cultural rights= (1995) 55 **International Commission of Jurists Review** 203. For an interesting discussion of the possibility to bring criminal charges for the >stealing= socio-economic entitlements, see J M T Labuschagne >Diefstal in biopsigiese oorlewingsnood: Opmerkinge oor die strafregtelike spanningsveld tussen die menslike lewe en lewenskwaliteit= (2001) 64 **THRHR** 289.

CHAPTER 4

CHILDHOOD: ITS BEGINNING AND END

4.1 Introduction

In this Chapter we concentrate on the definition of a child. The Chapter will discuss possible formulations as to when childhood begins and ends, and issues related to the attainment of majority.

4.2 The definition of a child

International law, as set out in the CRC, defines a child, for the purpose of the Convention, as 'every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'.[1] The African Charter on the Rights and Welfare of the Child defines a child, for its purposes, as 'every human being below the age of eighteen years'.[2] Although the 18th birthday seems to be the generally accepted as the end of childhood, some international instruments define a child, for the purpose of that instrument, as a person below an age younger than eighteen years.[3]

On a comparative basis, most countries in the world define a child as any person below the age of 18 years.[4] In some foreign legislation, however, 'child' or 'minor' is defined with a limit below that

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[1]Article 1.

[2]Article 2.

[3]See Article 1(a) of the European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children 1980 where a child is defined as a person of any nationality, so long as that person is under the age of 16 years and has not the right to decide his or her own place of residence under the law of his or her habitual residence, the law of his or her nationality, or the internal law of the State Party involved.

[4]See, for instance, clause 2(1)(d) of the Indian Children's Code Bill, 2000; section 105 of the UK Children Act 1989; section 121 of the UK Care Standards Act, 2000; section 3(1) of the Tasmanian Children, Young Persons and their Families Act, 1997; section 1 of the Ghanian Children's Act, 1998; article 3 of the Uganda Children's Statute, 1996; clause 3(1) of the Ireland

of eighteen years, notably when the legislation relates to juvenile offenders. The Zambian Law Reform Commission,[5] for instance, points out that the Zambian Juveniles Act, 1956 defines a child as a person who has not attained the age of sixteen years. The Zambian Law Reform Commission accordingly recommended that the age be increased and has defined a child as a person who has not attained the age of eighteen years.[6] The New Zealand Children, Young Persons, and their Families Act (No. 24 of 1989) defines a child, for the purposes of their legislation relating to children and young persons who are in need of care and protection or who offend against the law, as 'a boy or girl under the age of 14 years'.[7] A 'young person' is defined in terms of this Act, as a boy or girl of or over the age of 14 years but under 17 years who is or has not been married. The Victoria Community Services Act 1970 defines a child as a person under the age of 15 years.[8] This Act establishes the Department of Community Welfare Services and regulates family welfare services, school attendance, the employment of children, etc. The Tasmanian Child Care Act, 1960 defines a child as a person who has not attained the age of 17 years. The Queensland Child Care Act 1991 defines a child simply as 'a minor'. In their review of the law relating to child guardianship, custody and access, the Alberta Law Reform Institute has recommended that Alberta legislation should define 'child', for purposes of guardianship, as an unmarried person under the age of 18 years.[9]

For the purposes of section 28, the 1996 Constitution defines a child as a person below the age of

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Children Bill, 199; clause 1 of the draft Namibian Child Care and Protection Act, 1996; clause 2 of the draft Kenya Children Bill, 1994; clause 2(1) of the revised Children Bill, 1998 (see also the definition of a 'child of tender age' in this draft).

[5]**Report on the Law related to the Child (Part 1: Reform of the Juveniles Act)**, May 1999, p. 12.

[6]See clause 2 of the draft bill accompanying the Report.

[7]Section 2(1).

[8]Section 3. A 'young person' is defined as a person of or over the age of 15 years and under the age of 21 years.

[9]**Child Guardianship, Custody and Access** (Report for Discussion No. 18.4), October 1998, p. 79, recommendation no. 6.4. The Institute justified the exclusion of married persons from the definition of 'child' on the basis that a married person under 18 years of age has moved out of the sphere of parental control and has taken on the responsibilities of adult life.

18 years. Therefore only persons below 18 years of age are entitled to the rights enshrined in section 28 of the Constitution. The Child Care Act, 1983 also defines a child as any person under the age of 18 years.[10] The Age of Majority Act 57 of 1972, however, provides for attainment of majority at age 21 years.[11]

Given the international examples, it would appear that it would be possible to define 'child' in one of three ways: The first is the standard definition where a child is defined as a person under 18 years of age; the second is to define a child as a minor; and the third option is to define a child as a person under 18 years of age who is not married. The second and third options are to some extent linked: In most jurisdictions a minor who marries becomes a major. Given that it would be possible to attain majority status in more than one way, the Commission feels greater legal certainty will prevail should we retain the more universal definition of a child as being a person under the age of 18 years. **The Commission therefore recommends, particularly in the light of section 28(3) of the Constitution and the developments following the adoption of the CRC, that a child be defined for purposes of the new children's statute as a person under the age of 18 years**.

It is interesting to note that although all legislation is clear when childhood should end, none gives any indication of when it begins. The legislation and international instruments consulted avoid this difficulty by stating that a child is a 'person' or a 'human being'. This would in effect mean that

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[10]As does the Social Assistance Act 59 of 1992. Sometimes the term 'minor' is used: see in this regard the definition of 'minor' in the South African Citizenship Act 88 of 1995 and the South African Passports and Travel Documents Act 4 of 1994.

[11]For a discussion of this Act, see 4.3 below.

childhood begins at birth[12] - i.e when the birth is complete[13] and provided the child is then alive.[14]

The association of legal personality with birth could, the Romans found, have hard consequences for a child who had the misfortune to be born after its father's (or, indeed, anyone else's) death. Thus, if a father bequeathed his estate to 'my children' and died at a time when he had, say, two children and his wife was pregnant with a third, the posthumous child would not share the inheritance with its more fortunate siblings. The reason was that at the date of the father's death - the relevant date for determining who were the 'children' in whom the right to inherit vested - the as yet unborn child was not a legal person capable of having legal rights. And when this child was subsequently born and acquired legal personality, it was too late: the inheritance had already vested in the other children. This led Roman lawyers to develop a gloss upon the general rule that legal personality begins at birth - the so-called nasciturus rule - which states that an unborn child in the mother's womb is deemed to have been born, and therefore to have acquired legal personality, prior to the date of its actual birth, if this would be to its advantage.[15]

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[12]Legal personality begins at birth. See also Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 28.

[13]Some authors, notably Van der Vyver and Joubert **Persone- en Familiereg** 59 and 61, prefer to state this as only a general rule, subject to a proviso allowing for legal personality to begin at conception: 'Regsubjektiwiteit [legal personality] van 'n natuurlike persoon ontstaan gewoonlik by geboorte van die persoon maar as dit tot die persoon se voordeel is, by konsepsie'. The exceptio created by the proviso in the second part of the statement relates to the operation of the nasciturus rule of fiction.

[14]For the purposes of the Births and Registration Act 51 of 1992 'birth' is defined as 'in relation to a child ... the birth of a child born alive' (section 1). See also M Slabbert 'The fetus and embryo: Legal status and personhood' 1997 **TSAR** 234 at 239 for an alternative interpretation of the term 'birth'. In **Van Heerden v Joubert NO** 1994 (4) SA 793 (A) at 796F it was held that the word 'person' in the Inquests Act 58 of 1959 did not include an unborn child. Consequently, the Inquest Act did not make provision for an inquest into the death of a stillborn child (at 798H).

[15]D 1.5.7, 1.5.26, 50.16.231; Grotius 1.3.4; Voet 1.5.5, 39.5.12; Van der Keesel **Th** 45; **Maasdorp's Institutes I Persons** 1; Hahlo and Kahn **The Union of South Africa: The Development of its Laws and Constitution** London: Stevens 1960 347; Barnard, Cronjé & Olivier

The Roman and Roman-Dutch writers, and earlier South African cases, applied the nasciturus rule to grant a posthumus child a right of inheritance,[16] and an action in its own right for the unlawful killing of its father before the child's birth.[17] In **Pinchin N O v Santam Insurance Co Ltd**[18] the novel question arose whether the nasciturus principle legitimately could be extended to allow a child, after birth, to sue for injuries suffered by the child while still in the womb, as a consequence of injuries inflicted upon the mother.[19] Although the court was prepared to hold that the action was available in principle, its view was rendered obiter by its finding that the causal connection between the disability with which the child was born and the injuries sustained by his mother before his birth had not been sufficiently proved.[20] The child's action therefore failed on the facts. The **Pinchin**-decision none the less provides a firm basis in our law for a delictual action for pre-natal injuries.[21]

More than thirty years after this decision new questions regarding the protection of foetal interests are being raised.[22] One is abortion. Another relates to forcing medical treatment on pregnant women. Yet another issue is whether a child who is born with abnormalities may sue the attending medical practitioner for negligently failing to disclose the risk of such abnormalities to the child's parents during the pregnancy, thus preventing them from choosing to terminate the pregnancy.

South African Law of Persons and Family Law (3rd edition) Durban: Butterworths 1994 13 -14.

[16]See e.g. **Ex parte Boedel Steenkamp** 1962 (3) SA 954 (O).

[17]**Chisholm v East Rand Proprietary Mines Ltd** 1909 TH 297.

[18]1963 (2) SA 254 (W).

[19]Note that the concern here is with an action brought by the child itself, in its own right, though represented by a guardian. Of course, the mother has her own action for her own injuries.

[20]Although the trial judge considered it 'necessary to decide the law point because it is relevant to costs' (see 1963 (2) SA 254 (W) at 263C), the Appellate Division, in dismissing an appeal from his judgement on the facts, refrained from deciding whether his decision on the law was correct.

[21]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 38.

[22]For the developments in the USA, see Robert H Mnookin and D Kelly Weisberg (eds) **Child, Family and State** (3rd edition) Boston: Little, Brown and Co 1995 4 - 55.

Such a 'wrongful life' action[23] seeks to compensate the child for having to live an abnormal life, not because of any injury inflicted in the womb, but simply because it was, through the negligence of the defendant, allowed to be born. A further instance of the application of the nasciturus rule arises where a woman who is party to an action for divorce is pregnant. To obviate the necessity for further legal proceedings at a later stage, the court may make provision in its order for the custody, after its birth, of the child in *utero*.[24]

Whether or not the nasciturus rule gives the foetus the status of a legal person remains an open question. As McCreath J remarked in **Christian Lawyers Association of SA v Minister of Health**:[25]

> It is not necessary for me to make a firm decision as to whether an unborn child is a legal *persona* under the common law. What is important for purposes of interpreting s 11 of the Constitution is that, at best for the plaintiffs, the status of the foetus under common law may, as at present, be somewhat uncertain.

The Commission is likewise of the opinion that it is not necessary for us to express any opinion as to whether an unborn child is a legal person under the common law. However, given our definition of a child above (any **person** under the age of 18 years), **it should be clear that the Commission, for the purposes of the new children's statute, does not see the new statute as applying to unborn children**.

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[23]There is a growing literature on wrongful life actions in South Africa. See P Q R Boberg 'An action for wrongful life' (1964) 81 **SALJ** 498; S Brownlie 'Wrongful life: Is it a viable cause of action in South Africa?' 1985 **Responsa Meridiana** 18; P F Louw 'Wrongful life: 'n Aksie gebaseer op die onregmatige veroorsaking van lewe' 1987 **TSAR** 199; M Blackbeard 'Die Aksie vir "Wrongful Life": To be or not to be' (1991) 54 **THRHR** 199; L Meintjes-Van der Walt 'The right to be born' (1991) 286 **De Rebus** 745. See also Glanville Williams 'The foetus and the right to life' (1994) **Cambridge LJ** 71 at 78; contra L M du Plessis 'Jurisprudential reflections on the status of unborn life' (1990) **TSAR** 44.

[24]**Shields v Shields** 1946 CPD 242.

[25]1998 (4) SA 1113 (T) at 1121G.

4.3 **The attainment of majority**

Today, South Africans of both sexes normally attain majority on reaching the age of 21 years.[26] It is also possible to acquire adult status by means of marriage and 'express emancipation' as is provided for in the Age of Majority Act, 1972. The effect of 'tacit emancipation' as a means of acquiring adult status, on the other hand, has been the subject of much controversy and is not dealt with, and it has been submitted that this institution has lost its old potency to promote a minor to majority.[27]

4.3.1 **The attainment of majority by age**

In law, there is an 'instantaneous transformation' from childhood to adulthood at a specified age.[28] As stated above, in South Africa a person is considered to be legally an adult at the age of 21 years.[29] Section 1 of the Age of Majority Act 57 of 1972 reads as follows:

> All persons, whether males or females, attain the age of majority when they attain the age of twenty-one years.

As Van Heerden et al[30] point out, it is not self-evident that this is the most appropriate age for the

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[26]Section 1 of the Age of Majority Act 57 of 1972.

[27]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 466, 473 et seq.

[28]R Ludbrook 'Children and the political process' (1996) 2(2) **Australian Journal of Human Rights** 278, 283.

[29]See also the definition of 'major' or 'person of age' in the Births and Deaths Registration Act 51 of 1992. It is proposed that this definition be amended by bringing it in line with the Constitution (i.e. 18 years): See in this regard section 1 of the Births and Deaths Registration Amendment Bill, 2001, published as General Notice 1891 of 2001 in Government Gazette No. 22552 of 3 August 2001.

[30]Boberg's **Law of Persons and the Family** (2nd edition) 461.

attainment of majority in modern times.[31] The desirability of reducing the age of majority was considered by the S A Law Commission in its **Report on the Investigation into the Advancement of the Age of Majority**.[32] The Commission recommended that the status quo be retained for the following reasons:

> Except from a minor's view an age of majority of 21 years has no disadvantages, except perhaps for some minor inconvenience of having to involve his parents in some of his decisions. The law makes adequate provision cases where it is undesirable for the minor to be dependent on his parents' decisions. The Commission believes that there is no real need for the advancement of the age of majority and that the young person can only benefit from the protection of the law while he is gaining experience of life.

This conclusion is supported by P J J Olivier[33] who contends that there is 'no social need for lowering the limit from 21 years of age'. A different view is taken by J D van der Vyver,[34] who argues as follows:

> The legislature will ... be well advised to substitute 18 for 21 years as the age of majority. Improvement of educational standards and access to secondary education, increased exposure of young people through the mass media and otherwise to information and influences that contribute to their early maturity, and cultivation of all kinds of responsibilities in young persons through the strains and stresses of modern living conditions must surely count to demonstrate that the Age of Majority Act has fallen behind our times.

4.3.2 **The attainment of majority by marriage**

It has always been clear that, on marriage, the husband attains the status of majority for all

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[31] In England, the age of majority was reduced to 18 years by section 1(1) of the Family Law Reform Act 1969. For a comparative survey, see D Rosenthal 'The age of majority' (1971) 88 **SALJ** 106, who argues for a similar reduction in the South African age.

[32] Project 43, 1985.

[33] 'Minority and the parental power' 1983 **Acta Juridica** 97 at 98.

[34] 'Constitutionality of the Age of Majority Act' (1997) 114 **SALJ** 750 at 754. See also J D van der Vyver 'Beperkte en volledige emansipasie' (1979) 42 **THRHR** 309 at 315; Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 462, footnote 2.

purposes.[35] He keeps his status even if the marriage is dissolved[36] by death or divorce before he reaches the age of 21 years.[37] It matters not that the spouse reside under the parental roof.[38]

The fate of the wife used to be somewhat less clear-cut, but now all women who are minors when they marry will acquire majority status in the same way as men, however they choose to be married.[39] A woman widowed or divorced before she is 21 years old will retain the majority her marriage gave her.[40]

It must also be pointed out that in terms of section 26 of the Marriage Act 25 of 1961, no boy under the age of 18 years and no girl under the age of 15 years is capable of contracting a valid marriage except with the written permission of the Minister for Home Affairs or his or her designated official. A marriage officer may also not solemnise a marriage between parties of whom one or both are minors unless the necessary consent to such marriage has been granted and furnished in writing.[41] The Commission has recommended in its **Report on the Review of the Marriage Act 25 of 1961**[42] that section 26 of the Marriage Act 25 of 1961 be amended to provide that no person under the age

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[35]However, a married person below the age of 21 years will be regarded as a minor for the purposes of section 13(1)(a) of the Prescription Act 68 of 1969. See **Santam Verskeringsmaatskappy Bpk v Roux** 1978 (2) SA 856 (A).

[36]Majority is not, however, retained where the marriage is annulled on the ground that it was void or voidable. If it was void it did not confer majority status in the first place; if it was voidable the decree of nullity operates with retroactive effect.

[37]Grotius 1.6.4, 1.10.2; Voet 4.4.6, 7; **Santam Versekeringsmaatskappy Bpk v Roux** 1978 (2) SA 856 (A) at 864F-H; **Stassen v Stassen** 1998 (2) SA 104 (W) at 108H; H R Hahlo 'The legal effect of tacit emancipation' (1943) 60 **SALJ** 289 at 292.

[38]Voet 1.7.13.

[39]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 467.

[40]She is therefore competent to assume guardianship of her children, and requires no assistance to contract a second marriage.

[41]Section 24(1) of the Marriage Act 25 of 1961.

[42]Project 109: **Report on the Review of the Marriage Act 25 of 1961** (April 2001), paragraph 2.20.9.

of 18 years shall be capable of contracting a valid marriage, except with the written permission of the Minister or a court. Should this proposal be accepted, then the minimum age for marriage will be 18 years of age for both sexes.[43]

4.3.3 **The attainment of majority by express emancipation**

The Age of Majority Act 57 of 1972 introduced a form of express emancipation in South Africa.[44] Unlike *venia aetatis*,[45] this is granted by the High Court itself, on the application of any person who has attained the age of 18 years.[46] The application must be supported by an affidavit stating:[47]

(a) the applicant's full names, ordinary place of residence and date of birth;

(b) such particulars as will place the Court in a position to judge whether the applicant is a fit and proper person to manage his own affairs, with due regard to his

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[43]See further Chapter 10 below on the prohibition of harmful cultural practices such as child betrothals.

[44]For detailed analyses of the provisions and implications of the Act, see Erwin Spiro 'The Age of Majority Act 1972' (1973) 90 **SALJ** 48; JA v S D'Oliveira 'Venia aetatis, emancipation and release from tutelage revisited: The Age of Majority Act 1972' (1973) 90 **SALJ** 57. The question whether emancipation by complete release from parental authority has fallen into disuse or has, by implication, been abolished by the Age of Majority Act 57 of 1972, was raised but not decided in **Grand Prix Motors WP (Pty) Ltd v Swart** 1976 (3) SA 221 (C).

[45]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 470, footnote 45 convincingly argues that the institution created by the Age of Majority Act 1972 is more aptly described as 'express emancipation'.

[46]Section 2. The Act is silent as to whether the applicant (who *ex hypothesi* is still a minor) can bring the application without the assistance of his or her parent(s) or guardian(s). See Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 470 footnote 45 in this regard.

[47]Section 3.

behaviour, mental development and business acumen;[48]

(c) whether the applicant lives with his parents and, if so, whether he intends to continue living with them;

(d) whether the application is supported by the parents or guardian of the applicant and, if so, an affidavit by the parents or guardian to that effect shall be annexed thereto;

(e) full particulars of any immovable property which the applicant has or expects to have;

(f) full particulars of any movable or immovable property which the applicant holds subject to certain restrictions;

(g) 'any other relevant information that will place the Court in a position to judge whether it is necessary or desirable in the interests of the applicant to grant the application'.

The court is empowered, after considering the application, any objections thereto and replies to such objections, to grant, refuse or postpone the application. The court may issue a rule *nisi* with directions as to service, call for further evidence, and make such order as to costs as it thinks just.[49] No provision exists, however, for the making of a qualified or conditional order, or for withholding any of the normal incidents of majority.[50] If the court decides to grant the application, it issues an order declaring the applicant to be a major. The effect of such an order is stated in section 7: 'Any

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[48]This does not mean that the applicant must actually run a business of his or her own. The question, on a broad basis, is whether the applicant is 'capable of getting along in the commercial world': D'Oliveira (1973) 90 **SALJ** 57 at 66.

[49]Section 6(1)(b), (c), (d).

[50]P J J Olivier 'Minority and the parental power' 1983 **Acta Juridica** 97 at 100 argues that 'it would have been wise to have allowed the court a discretion to give a qualified or conditional order, as it is in any event regarded as the upper guardian of minors and so in a position to give the order which would be in his best interests'. See also D'Oliveira (1973) 90 **SALJ** 57 at 68.

person to whom an order declaring him to be a major is granted, shall for all purposes be deemed to have attained the age of majority'.

The Age of Majority Act 57 of 1972 offers no express guidance on the question as to how the court should come to its decision whether or not to grant the order sought. Van Heerden et al[51] argue that it may be inferred that the matters listed in section 3, required to be contained in the supporting affidavit, are the factors to which the court should have regard in reaching its decision. More particularly, it appears from section 3(g) that the paramount consideration is whether the interests of the applicant would best be served by anticipating his or her majority. In the only two reported judgments to date,[52] the courts have adopted a strict approach and have indicated that it is insufficient for an applicant merely to establish that he or she is competent to administer his or her own affairs. Although such competence is a necessary condition for the application to succeed, it is not a sufficient condition[53] and the applicant will be required to establish additional reasons why it is 'necessary or desirable' that majority should be advanced. It is doubtful whether such a restrictive interpretation of the Age of Majority Act is justified.[54]

4.3.4 **The attainment of majority in customary law**[55]

What is common among different systems of customary law is that childhood is not related to a particular age, but rather to factors such as initiation, marriage and the formation of a separate

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[51]**Boberg's Law of Persons and the Family** (2nd edition) 472.

[52]**Ex parte Botes** 1978 (2) SA 400 (O); **Ex parte Smith** 1980 (2) SA 533 (O).

[53]**Ex parte Botes** 1978 (2) SA 400 (O) at 401G-402A.

[54]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 473. See also Spiro (1973) 90 **SALJ** 48 at 53; A C Beck '*Ex parte Botes* and the declaration of majority' 1979 **De Rebus** 528 at 569; Annél van Aswegen 'Meerderjarigheidsverklaring deur die Hof - 'n Oorsig' (1981) 22(2) **Codicillus** 31 at 36; Barnard, Cronjé & Olivier **Law of Persons and Family Law** 98; Alfred Cockrell **Bill of Rights Compendium** 3E23.

[55]See also Chapter 21 below.

household.[56] In Xhosa customary law, for example, until the rite of initiation has been undertaken by a male, that person remains a child even if he is well over the age of 21 years. Although there appears to be some uncertainty as to whether the Age of Majority Act 57 of 1972 used to apply in customary law cases, it is now clear that the Act does apply.[57]

4.4 **Comments and submissions received**

In Issue Paper 13 it was said that in view of the definition of child in both the Constitution and the CRC, and bearing in mind the changed political, social and economical circumstances in South Africa, it is arguable that the Commission's earlier decision in its 1985 **Report on the Investigation into the Advancement of the Age of Majority** that there is no real need for the age of majority to be lowered, needs reconsideration.[58] In this regard the following question was posed:[59]

> How would commerce be affected if the age of majority for all purposes were to be lowered to eighteen years? Do any further age limits require attention during this investigation?

Very few of the respondents addressed this question in detail. The Durban Committee submitted that it can be argued that people who have not attained at least the age of 21 are not emotionally mature enough to make decisions relating to questions of business.

Mr DS Rothman stated that lowering the age of majority to 18 will certainly widen the scope of the risk factor for commerce. Regarding marriages he observed that the commissioner for child welfare

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[56]Ann Skelton (ed) **Children and the Law**, p. 39.

[57]Section 9 of the Recognition of Customary Marriages Act 120 of 1998 provides that despite the rules of customary law, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972. Although it is not clear whether the legislature intended this provision to apply to children born of customary marriages (or only to spouses to the marriage), nothing prevents such an interpretation. See also South African Law Commission **Report on Customary Marriages** (August 1998), par 6.2.2.25. The Commission also recommended that 18 years be fixed as the minimum age for marriage for all persons in the South Africa (par. 5.1.19).

[58]Issue Paper 13, p. 61 - 62, 55.

[59]Question 28.

is empowered to grant consent to marry a minor whose parents are unable to give consent. The commissioner may also instruct that a social worker investigate the matter before approving, and may decide whether or not an ante-nuptial contract should be entered into. He agreed that it does seem like an anomaly that a children's court commissioner can grant consent to a minor to marry while the High Court must be approached for a declaration of a minor to be a major in order to engage in commerce.

In the worksheet used in the consultation process, the question was put more directly and respondents were asked whether they thought the age of majority should be lowered to 18 years. The responses indicated no clear preference for either maintaining the current age of majority at 21 years or for lowering it to 18 years.[60] However, respondents were in general agreement that children mature much younger in current times and that children are generally able to fend for themselves at 18 years of age. On the other hand, some respondents pointed out that by lowering the age of majority certain protections for children would be removed and that this would further prejudice disadvantaged children. It was pointed out, for instance, that in disadvantaged communities it is not uncommon to find persons of 19 years of age still at school.

The worksheet also specifically posed the question as to whether the general age of majority should apply to persons living in a customary setting.[61] Here the majority of respondents indicated that one age of majority should apply, also to children (and persons) living in customary settings.[62] The

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[60]Nine individual responses and 12 group responses were in favour of lowering the age of majority to 18 years, while 1 individual respondent and 15 group responses supported the status quo.

[61]Majority and minority status in customary law are not determined by age as they are under the Age of Majority Act 57 of 1972. Even social rituals like initiation which indicate adulthood in a social sense do not equal legal majority. Instead, for males, legal majority is generally achieved upon marriage and the establishment of a home. Before the advent of the Recognition of Customary Marriages Act 120 of 1998, women, on the other hand, never reached majority and were considered minors throughout their lives: Ann Skelton (ed) **Children and the Law** Pietermaritzburg: LHR 1998, p. 35. See also Chapter 21 on the child in customary law below.

[62]Twelfth individual responses and 36 group responses said that the age of majority should apply to children in customary settings while 1 group response reflected that it should not.

general feeling was that there is a need for uniformity and that it may be discriminatory to have the age of majority not apply in customary settings.

As to the exceptions, the respondents were fairly united in their stance that children should not be allowed to own fire-arms, and that ownership of fire-arms should be linked to attaining the age of majority. The view was also expressed that a distinction should be drawn between independence and age as separate criteria determining majority. Thus exceptions should apply in the opposite direction as well so that mentally and physically challenged children, and children with special needs, could remain 'children' for longer. There was strong echoing of the view that parents should be obliged to support their dependent children even if they are older than 18 years (or any other legally set age threshold for attaining adulthood).

Conflicting views on whether the age for attainment of majority should be lowered and to what age if at all were voiced at the focus group discussion held at the Breakwater Lodge on the parent - child relationship.[63] However, after vigorous debate it seemed that consensus was that the age of majority could be lowered to 18 years subject to all kinds of qualification.[64] The observation was made that support in the family context implies a reciprocal duty which is not limited to age. The implication of such a statement is that it can also be expected of children to take care of their parents.

What the children said:

In the child participation process children were asked the following questions:

3.3.1 *When do you think that you become an adult and what does this involve?*

The groups of children said that a child becomes an adult when he or she reaches

[63]Question 12 of the worksheet. The workshop was held on 12 - 13 March 1999.

[64]Children at school and university, mentally disabled children, etc.

the age of 21 years,[65] when a child can take responsibility for his or her own actions,[66] at 18 years of age,[67] when a child becomes economically independent,[68] when a child has a child,[69] when a child acquires a driver's licence,[70] when a child marries,[71] when a child works,[72] or at 16 years of age.[73]

Many of the reasons that were advanced for having 18 years as the indicator of adulthood, were also advanced in respect of the 21 year threshold. These were the reasons reflected above (ability to make decisions, economic independence etc.). Also, a number of the responses were based on inaccurate assumptions and linked to existing thresholds for the age of majority (e.g. '18 years because then you can have children'. Or '21 years because then you can get married'.)

3.3.2 *What should you (as a child) be free to do?*

The children indicated that they should be free to make their own decisions, but with guidance from adults;[74] to live happily, to help around the house, to get an education;[75] to participate in sport and other recreational activities without fear, to

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[65] 13 groups.

[66] 12 groups.

[67] 10 groups.

[68] 9 groups.

[69] 2 groups.

[70] 1 group.

[71] 1 group.

[72] 1 group.

[73] 1 group.

[74] 22 groups.

[75] 1 group each.

vote;[76] to drive a car, to have sex;[77] to get married, to carry a licensed firearm;[78] to conclude legal contracts;[79] to use alcohol and to express yourself.[80]

3.3.3 *At what age do you think that children should be able to make their own decisions (without the permission of their parents or care-giver) to marry or establish their own family?*

9 groups felt that 18 years was the appropriate age.
17 groups felt that 21 years was the appropriate age.
3 groups felt that 25 years was more appropriate.

3.3.4 *Are there any exceptions that should be allowed to this?*

The following are the exceptions mentioned.

Cases where children should be assisted with decision-making	
Children with special problems/ needs should be protected (such as children in extreme poverty, deaf children and persons who are mentally challenged - in spite of the fact that they may have reached the age of majority).	4
Persons who have not yet completed school (irrespective of whether they might have reached the age of majority)	3
The decision to have an abortion (it was not stated who should be involved in this decision besides the pregnant child).	1
Cases where children should not be obliged to obtain assistance in decision-making	
Children who are heads of households	4
Children who are 'mature enough'.	2

[76] 3 groups each.

[77] 5 groups each.

[78] 2 groups each.

[79] 3 groups.

[80] 1 group each.

The completed worksheets[81] do not offer any clarity on the vague concept of when a child is 'mature enough'. One example given was marriage which, it was felt, should be used as an indicator of the child having reached a sufficient level of maturity to make his or her own decisions. Another example was that of the child who is working and living independently of his or her parents.

4.5 **Evaluation and recommendation**

From the lack of formal (adult) response and the scarcity of reported cases, the impression could be gained that few problems are encountered in practice with the Age of Majority Act 57 of 1972. One could go even further and argue that the time is now ripe for the advancement of the age of majority to eighteen years. Seen from the (adult) workshop report and the perspective of children, however, it would appear that the issue is not that clear-cut. Indeed, there was considerable majority support amongst the groups of children interviewed for keeping the age of majority at 21 years, while some even suggested extending the age of majority to 25 years. As stated above, these propositions might be indicative of misunderstandings relating to the existing legal position, but this is by no means certain.

In this regard, the Commission wishes to point out that the law[82] imposes a duty upon one person to support another when three requirements are satisfied:[83]

(a) the person claiming the support must be unable to support himself or herself;
(b) the person from whom support is claimed must be able to support the claimant; and
(c) the relationship between the parties must be such as to create a legal duty of support between them.[84]

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[81]Six groups felt that no exceptions should be allowed. Ten groups left this question unanswered.

[82]I.e. duties of support arising by operation of the law - *ex lege* - not with duties imposed by agreement - *ex contractu* - which are different in nature.

[83]P J Visser and J M Potgieter **Introduction to Family Law** (2nd edition) 210.

[84]A step-parent has no legal duty of support in respect of his or her stepchildren: **Mentz v Simpson** 1990 (4) SA 455 (A).

In the case of a parent,[85] the mere existence of a relationship creates a rebuttable presumption of a duty of support: there is no necessity to allege and prove the need for support and the ability to supply it where a child claims maintenance.[86] Where a child claiming maintenance has reached the age of majority, he or she bears the onus of proving that the parent is obliged to support him or her.[87]

The Commission further wishes to point out that the attainment of majority does not *per se* terminate the parental duty of support; it is the child's ability to maintain himself or herself that is important.[88] Simply put, the duty of parents to maintain their children ceases when the children become self-supporting.[89] Thus the obligation to maintain a crippled or otherwise handicapped child might persist throughout the child's life.[90] In appropriate circumstances, a child may be entitled to a university or other post-school education, possibly even if it extends beyond the attainment of majority.[91] Similarly, a duty which ceased when a son started work or a daughter married[92] may revive when the child faces financial difficulties.[93] There is no presumption that

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[85]The duty to support not only rests on parents, but on grandparents, brothers and sisters, and children in respect of their parents: P J Visser and J M Potgieter **Introduction to Family Law** (2nd edition), p. 210 -211. See also John Eekelaar 'Are parents morally obliged to care for their children?' in Eekelaar and Šarčević (eds) **Parenthood in Modern Society** Dordrecht: Martinus Nijhoff 1993, p. 51.

[86]**Gildenhuys v Transvaal Hindu Educational Council** 1938 WLD 260 at 262.

[87]**Sikatele v Sikatele (2)** [1996] 2 All SA 95 (Tk).

[88]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 247. See too Spiro **Law of Parent and Child** (4th edition) 402 -3; **Kanis v Kanis** 1974 (2) SA 606 (RA) at 611; **Bursey v Bursey** [1997] 4 All SA 580 (E); **Sikatele v Sikatele** [1996] 1 All SA 445 (Tk).

[89]Voet 25.3.16; **Goldman NO v Executor Estate Goldman** 1927 WLD 64 at 69; **Vermaak v Vermaak** 1945 CPD 89 at 96; **Bursey v Bursey** [1997] 4 All SA 580 (E).

[90]Per Jansen J in **Kemp v Kemp** 1958 (3) SA 736 (D) at 737.

[91]See **Richter v Richter** 1947 (3) SA 86 (W) at 92. See too **Ex parte Jacobs** 1982 (3) SA 276 (O) at 278.

[92]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 247, footnote 75 point out that the primary duty to support a spouse falls upon the other spouse, not his or her

support is needed and that the parent is able to supply it here; a major child must discharge the onus of proving that both these requirements of the duty to support are satisfied.[94] It has been held, however, that a major child is not entitled to support on as a generous scale as a minor child of the same parents.[95]

It is also worth noting that children may be obliged to support their parents in appropriate circumstances as the duty of support between parents and their children is reciprocal.[96] The source of the obligation is filial duty, and the requirements for its existence are: (a) the parents must be indigent, i.e. unable to maintain themselves; and (b) the children must be able to maintain their parents, with due regard to their own needs.[97]

However, given the divergence of opinion expressed by the respondents, the Project Committee decided at its 15th meeting held in Pretoria on 13 - 15 January 2000 to present three different options, without taking a particular position. These options are:

(a) that the age of majority be left at 21 years with the proviso that the child will obtain certain rights when he or she turns 18;
(b) that the age of majority be lowered to 18 years with the proviso that any protection under the common law (and statutory law) can be extended;
(c) that the age of majority be left at 21 years, but with an increase in the number of exceptions

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parents.

[93]**Gliksman v Talekinsky** 1955 (4) SA 468 (W) at 469. In casu the father was held liable to contribute towards the support of his widowed daughter and her six minor children.

[94]**Grobler v Union Government** 1923 TPD 429; **Gliksman v Talekinsky** 1955 (4) SA 468 (W); **Hoffmann v Herdan** 1982 (2) SA 274 (T).

[95]It has been held that such a duty is confined to necessities: **B v B** [1997] 1 All SA 598 (E).

[96]**Oosthuizen v Stanley** 1938 AD 322 at 327-8; **Anthony v Cape Town Municipality** 1967 (4) SA 445 (A). However, in the case of a parent claiming support, an allegation that the support is necessary because the claimant is unable to support himself or herself constitutes an essential ingredient of the cause of action: **Waterson v Maybury** 1934 TPD 210.

[97]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 248 - 252.

for independence where persons between 18 and 21 years will be able to exercise certain categories of freedom.

The Commission, however, would like to recommend that the age of majority be 18 years, with a proviso that parental responsibility and or State support, where appropriate, in respect of such a person may be extended by the court beyond that person's eighteen birthday in special circumstances.[98]

To provide for the possibility of extending parental responsibility and or State support in respect of a person beyond the age of eighteen years in special circumstances, the Commission recommends the inclusion of the following provision in the new children's statute:

Extension of parental responsibility and State support beyond 18 years

(1) Parental responsibility and State support in respect of a child may be extended by the court beyond the child's eighteen birthday until that person's twenty-first birthday if the court is satisfied upon application or of its own motion that special circumstances exist with

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[98]Legislation already provides for such special circumstances. See, for instance, section 33(3)(a) of the Child Care Act 74 of 1983 in terms of which the Minister for Social Development may approve that a foster child or pupil remain in the custody of the foster parent or institution after he or she has attained the age of 18 years in order to allow that person the opportunity to complete his or her education or training. Section 16(3) of the same Act provides that the Minister may order that any former pupil of or pupil in a school of industries whose period of retention has expired or is about to expire, return to or remain in that school of industries for any period which the Minister may fix or extent: 'Provided that no such order or extension shall extend the period of retention of any pupil beyond the end of the year in which that pupil attains the age of 18 years'. See also Chapter 19 on residential care below and the recommendation that the protection be extended until **the end of the year in which the child turns 18** to allow such child the opportunity to finish his or her schooling or training. See also clause 22(1)(d) of the Immigration Bill 2000 published in Government Gazette 20889 of 15 February 2000 which allows for the permanent residence permit of a foreigner to be extended to such foreigner's spouse and children younger than 21 years of age.

regard to the welfare of that person that would necessitate such extension being made.

(2) An application under this section may be made before the child's eighteen birthday by -

(a) the parent or primary care-giver of the child;
(b) any person with parental responsibility for the child;
(c) the Director-General: Social Development; or
(d) the child himself or herself.

The Constitution[99] and the African Charter on the Rights and Welfare of the Child[100] define child as every person under the age of 18 years, while the CRC goes further where it says a child is every human being below the age of 18 years, 'unless, under the law applicable to the child, majority is attained **earlier**'.[101] It is of significance that the CRC does not extend its protection to persons older than 18 years by providing for the attainment of majority later. The Commission is convinced that the changed political, social and economic circumstances in South Africa justify the advancement of the age of majority to 18 years. In this context the Commission inter alia considers that as the HIV/AIDS pandemic spreads, more and more children will assume greater responsibilities by assuming leadership roles in households, by taking care of younger siblings (and parents), by entering the labour market, leaving school, and so forth. The Western notion that children leave school at 18 to pursue a tertiary education, still under the parental wing, which held force when the Age of Majority Act 57 of 1972 was passed, simply do not apply.

If age of majority is advanced to 18 years, then little justification for the Age of Majority Act 57 of 1972 remains, and the Act can be repealed. However, realising that a child aged 16 years

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[99]Section 28(3) of the Constitution, Act 108 of 1996.

[100]Article 2. See also the Council of Europe Resolution (72)29 on the Lowering of the Age of Full Legal Capacity 1972. The Resolution recommended that the age of majority be lowered below 21 years and, if deemed advisable, to fix that age at 18 years, provided that State Parties may retain a higher age of capacity for the performance of certain limited and specified acts in fields where they believe that a higher degree of maturity is required.

[101]Our emphasis. Article 1.

may leave school and lawfully enter the labour market, the Commission did entertain the possibility that such a child may wish to apply for a declaration to become a major. In such an instance, provisions similar to those in the Age of Majority Act 57 of 1972 will be required in the new children's statute. Such a step, i.e. providing for the declaration of 16 year old children as majors is not recommended at present, but the Commission would like to keep such option open for the moment.

However, whether or not the Age of Majority Act 57 of 1972 is incorporated in the new children's statute, it seems clear that the existing provisions of this Act can be strengthened by providing express guidance on the question as to how the court should decide whether or not to grant the order for advancement of majority and to include a provision to allow the court a discretion to grant a qualified or conditional order. The Commission accordingly recommends that such amendments be affected to the Age of Majority Act 57 of 1972.

CHAPTER 5

THE PRINCIPLES UNDERPINNING THE NEW CHILDREN'S STATUTE, THE BEST INTERESTS OF CHILDREN-STANDARD, AND THE RIGHTS AND RESPONSIBILITIES OF CHILDREN

5.1 Introduction

This Chapter flows from the preceding two chapters and poses the question whether, and if so, what principles should underpin the new children's statute. The Chapter further gives content to the best interests of the child-standard and enumerates the rights and responsibilities of children.

5.2 The principles underpinning the new children's statute

The Child Care Act 74 of 1983 does not contain a list of principles to guide decision-makers in the implementation of its provisions, although it is provided that in adoption matters, the best interests of the child should play a determining role. It has been trenchantly argued that amendments to the Child Care Act proposed in the period after 1994 failed to adequately assimilate the important principles contained in the South African Constitution and the CRC, and that the objective of enshrining a children's right approach in municipal child protection legislation needed to be clearly identified.[1] In the light of both the constitutional imperative, and international law obligations, it has been mooted that law reform in this sphere should be accompanied by a clear articulation of the fundamental principles which form a backdrop to the vision of the statute.

The trend in modern child legislation is increasingly towards the inclusion of central principles underpinning how decisions should be made in regard to children in domestic legislation.[2] Principles can be derived from international law such as the African Charter on the Rights and

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[1]Julia Sloth-Nielsen and Belinda van Heerden 'Proposed amendments to the Child Care Act and regulations in the context of constitutional law developments in South Africa' (1996) 12 **SAJHR** 247, 'The Child Care Amendment Act 1996: Does it improve children's rights in South Africa?' (1996) 12 **SAJHR** 649.

[2]See, for example, the UK Children Act, 1989; the Uganda Children Act, 1996; and Julia Sloth-Nielsen and Belinda van Heerden 'New child care and protection legislation for South Africa? Lessons from Africa' (1997) 8 **Stellenbosch LR** 261.

Welfare of the Child, from policy documents (such as the IMC's Interim Recommendations for the Transformation of the Child and Youth Care System), from South African common law and case law,[3] as well as from accepted social work practice.

In 1996, it was argued that, at minimum, the following key principles should play a central role in legislative reforms:

- **The best interests of the child** as the paramount consideration for administrative and judicial decisions involving children subject to proceedings under this legislation.
- **Non-intervention and de-institutionalisation**, based on the premise that except where it is in the best interests of the child, the child should not be separated from his or her parents and family, and that institutionalisation of children should be restricted to a step of last resort, and where possible, children should be returned to a family environment as soon as this is possible.
- **The child's right to participate in decision-making about his or her life**, which is a cardinal feature of the modern children's rights approach as evidenced in the provisions of article 12 of the UN Convention on the Rights of the Child.

A further consideration that impels legislative drafters towards the consideration of fundamental principles relates to the socio-economic and political realities facing South Africa at the present time. The Child Care Act 74 of 1983 has been described as heavily interventionist[4] and largely modelled on first world approaches which are not necessarily appropriate for a developing country. The 1983 Act followed a series of legislative enactments that commenced with the Child Protection Act 25 of 1913, which was based on equivalent legislation in Britain. The 1913 Act applied only to white and coloured children, however, and did not take the cultural differences which prevail in this country into account.[5] A strong need to Africanise legislation in this sphere has been articulated, and the Commission is of the view that the inclusion of culturally appropriate principles and values can further such goals.

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[3]See, for example, **McCall v McCall** 1994 (3) SA 201 (C).

[4]Issue Paper, par. 4.1.

[5]B Mabandla 'Survey of child protection legislation in South Africa' in **International Conference on the Rights of the Child** (1992), Centre for Development Studies, 127. See, for example, section 33(3) of Act 25 of 1913, which required white children to be kept separately from coloured children in government industrial schools.

The skewed provisioning of welfare services in favour of privileged race groups and towards service provision in urban centres has been a signal feature of the child protection system in this country throughout the 20th century.[6] South Africa also faces widespread child poverty, and it is estimated that six out of ten children[7] grow up in poverty.[8] The escalating numbers of reported cases of child abuse and neglect in recent times,[9] as well as the crisis faced by South Africa as regards the HIV/AIDS pandemic also provide cogent reasons as to why clearly formulated principles are desirable in future child protection legislation. Not only can they serve to further the best interests of children, but, in addition, principles can guide decision-makers and encourage them to focus on the appropriate allocation of scarce social resources and services to those children who are most at risk of suffering harm, and to ensure that the needs of the most vulnerable groups of children are taken into account.

In Issue Paper 13, the question was posed how best the principles relating to children embodied in the various international instruments and in the Constitution can be incorporated in a comprehensive children's code. Further, it was suggested that the 'best interests of the child' principle could possibly be defined in legislation, and respondents were further asked to suggest how legislation could assure to children the right to participate meaningfully in all matters affecting them.

Numerous respondents to Issue Paper 13 provided suggestions as to principles that could be included in draft legislation. Mention was made of possibility of including a non-discrimination

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[6]Issue Paper, par. 4.3. See also S Liebenberg 'The right to social assistance: The implications of *Grootboom* for policy reform in South Africa' (2001) 17 **SAJHR** 232 at 234 - 237 for further statistics showing how poverty affects children.

[7]S Robinson and M Sadan **Where Poverty hits hardest: Children and the Budget in South Africa** Cape Town: Idasa 1999 vii. Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 266 point out that during 1997 it was maintained that 14,3 million children under the age of 15 years were living with care-givers earning less than R800 per month.

[8]See also Geraldine van Bueren 'Alleviating poverty through the Constitutional Court' (1999) 15 **SAJHR** 52.

[9]J Loffell 'Dilemma's and critical choices for child protective legislation in a developing country', unpublished paper presented at the ISPCAN Conference, Durban 2000, 3.

principle, specifically to protect children living with HIV/Aids.[10] Further Rev A Dwoyer referred to the best interests of the child and the right of the child to participate in decisions affecting him or her. The SA National Council for Child and Family Welfare submitted that principles should be woven into both the Preamble and to relevant clauses of the Act. These, they argued, should cover the primacy of the child's well-being and safety, safeguarding of the child's dignity and worth so as to ensure the protection and normal development of the child. The NICC, however, was of the view that principles (as opposed to basic rights for children) cannot be legislated for. Their view is that principles can be included in the Preamble, and can act as the overarching framework which informs the Act.

Disabled People South Africa was of the opinion that principles should be included in the primary legislation, in view of their educative effect. The ATKV expressed the view that certain basic principles were essential, and Mr DS Rothman, Commissioner of Child Welfare, Durban, submitted that the inclusion of principles will assist in achieving the stated objectives of law reform.

Widespread support was articulated for the inclusion in legislation of provisions concerning children's participation in matters affecting them. The NICC argued that clear provision should be made at all levels to ensure that there are opportunities for children to air their views on matters affecting them. The Natal Society of Advocates suggested that guardians ad litem should be appointed to assist children and thereby assure their right of meaningful participation in lower court matters. Professor C Davel, Department of Private Law, University of Pretoria, was optimistic that legislation could contribute to the voice of children being heard. Mr D Rothman and the Durban Committee of Family Lawyers both noted that the child should be capable of expressing his or her views, and the former respondent suggested that where a child was not old enough to understand decision making processes, an appropriately qualified person should be appointed to speak on his or her behalf.

The Commission accordingly recommends the inclusion of the following objects and general principles and guidelines-provisions in the new children's statute:

CHAPTER X: OBJECTS, GENERAL PRINCIPLES AND GUIDELINES

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[10]Submission of the Department of Health: Directorate HIV/AIDS and STD's and Lawyers for Human Rights.

Objects

1. The objects of this Act are -

(a) to make provision for structures, services and means for promoting the sound physical, mental, emotional and social development of children;

(2) to utilize, strengthen and develop community structures which provide care and protection for children;

(c) to prevent, as far as possible, any ill-treatment, abuse, neglect, deprivation and exploitation of children;

(d) to provide care and protection for children who are suffering ill-treatment, abuse, neglect, deprivation or exploitation or who are otherwise in need of care and protection; and

(e) generally, to promote the well-being of children.

General principles and guidelines

2. (1) (a) Any court or any person making any decision or taking any action under this Act in respect of any child must always ensure that such decision or action is in the best interest of the child.

(b) The best interest of a child must be determined having regard to all relevant facts and circumstances affecting the child and having regard to the objects, principles and guidelines set out in this Act, in the Constitution and in any other law.

(2) Children should, whenever possible, be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a family environment.

(3) A child's family must, whenever appropriate, be involved in any decision-making affecting the child.

(4) Whenever a child is in a position to participate meaningfully in any decision-making affecting him or her, he or she must be given the opportunity so to participate and proper consideration must be given to the child's opinion, views and preferences, bearing in mind the child's age and maturity.

(5) A child's physical and emotional security and his or her mental, emotional, social and cultural development are important factors which must be given proper consideration whenever any decision is taken in respect of the child.

(6) It is the duty of everyone who performs any function in respect of a child or takes any decision affecting a child -

(a) to respect the child's inherent dignity;

(b) to treat the child fairly and equally;

(c) to protect the child's fundamental human rights set out in the Constitution and in Chapter X;[11]

(d) to protect the child from unfair discrimination on any ground, in particular from unfair discrimination on the ground of the child's age, his or her health or HIV-status or that of his or her parents, the child's status with regard to his or her birth within or out of wedlock, or any disability from which the child may be suffering.

(7) In any proceedings relating to a child or any action taken in respect of a child, delay must as far as possible be avoided.

(8) Primary prevention and early intervention services should seek to -

(a) enable and strengthen children and their families to function optimally;
(b) prevent the removal of children from their families;
(c) prevent the recurrence of problems in the child's family and reduce the

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[11]See 5.4 below for the enumeration of the rights and responsibilities of children.

negative consequences of risk factors;

(d) divert children away from either the child and youth care or the criminal justice system.

(9) Whenever any major decision or action which may significantly affect a child or a child's life circumstances is contemplated in respect of that child, every person who is a parent or guardian or care-giver of the child, and where the child is capable of appreciating the significance of such decision or action, the child himself or herself, must be informed.

(10) In any proceedings or in any action taken in respect of any child under this Act an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided.

5.3 **The 'best interests of the child'-standard**

Section 28(2) of the Constitution, article 3(1) of the CRC, article 4 of the African Charter on the Rights and Welfare of the Child, and articles 16(1)(d) and (f) of the UN Convention on the Elimination of All Forms of Discrimination against Women enshrine the 'best interests of the child' standard as 'paramount' or 'primary' consideration in all matters concerning children. However, it has been argued that the 'best interests' standard is problematic in that, inter alia, (i) it is 'indeterminate';[12] (ii) the different professionals involved with matters relating to children have

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[12]See e.g. J Heaton 'Some general remarks on the concept "Best interests of the child"' (1990) 53 **THRHR** 95; Brigitte Clark 'Custody: The best interests of the child' (1992) 109 **SALJ** 391 at 394; Vivienne Goldberg 'The right of access of a father of an illegitimate child: Further reflections' (1996) 59 **THRHR** 282 at 288 - 9; E Bonthuys 'Of biological bonds, new fathers and the best interests of children' (1997) 13 **SAJHR** 622 at 623 - 4, 636 - 7. As is pointed out by Helen Reece 'The paramountcy principle: Consensus or construct?' (1996) 49 **Current Legal Problems** 267 at 286, the indeterminacy, value-laden nature and subjectivity of the 'paramountcy principle' has allowed other principles and policies, extraneous to the child's welfare, to 'smuggle themselves into children's cases'.

different perspectives on the concept;[13] and (iii) the way in which the criteria is interpreted and applied by different countries (and indeed, by different courts and other decision-makers within the same country) is influenced to a large extent by the historical background to and the cultural, social, political and economic conditions of the country concerned, as also by the value system of the relevant decision-maker.[14] Another factor which needs to be borne in mind in evaluating the best interests test is the importance of parental acceptance of the decision of the court.[15]

Nevertheless, as Van Heerden et al[16] have pointed out, the best interests standard is deepening

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[13]See e.g. E E A Lambiase & J W Cumes 'Do lawyers and psychologists have different perspectives on the criteria for the award of custody of a child?' (1987) 104 **SALJ** 704; G Mudie 'Custody and access determination in divorce: A family and developmental approach' 1989 **De Rebus** 686 ; Elsje Bonthuys 'Epistemological envy: Legal and psychological discourses in child custody evaluations' (2001) 118 **SALJ** 329; Kirk Heilbrun 'Child custody evaluation: Critically assessing mental health experts and psychological tests' (1995) 29 **Family Law Quarterly** 63; Vivienne Roseby 'Uses of psychological testing in a child-focused approach to child custody evaluations' (1995) 29 **Family Law Quarterly** 97; S P Okpaku 'Psychology: Impediment or aid in child custody cases?' (1976) 29 **Rutgers LR** 1117-53.

[14]See e.g. Philip Alston 'The best interests principle: Towards a reconciliation of culture and human rights' (1994) 8 **International J of Law and the Family** 1; B Rwezaura 'The concept of the child's best interests in the changing economic and social context of sub-Sahara Africa' (1994) 8 **International J of Law and the Family** 82; Savitri Goonesekere 'The best interests of the child: A South Asian perspective' (1994) 8 **International J of Law and the Family** 118 and cf Stephan Parker 'The best interests of the child - Principles and problems' (1994) 8 **International J of Law and the Family** 26. See also Robert Pfennig 'The best interests of the child. Do the courts' subjective factors in determining "best interests" really benefit the child?' (1996) 17 **Journal of Juvenile Law** 117 at 128 - 9.

[15]Brigitte Clark 'Custody: The best interests of the child' (1992) 109 **SALJ** 391 at 395: 'The best-interests tests involves a comparison of the parties as parents. In some cases the best-interests test may be the more just solution, but there is always the danger that a parent who has been, in the child's earlier years, the primary care-taker, perhaps to the detriment of his or her own material advancement, may well be prejudiced by such a test. The best-interests test is unpredictable and to some extent dependent on the subjective opinions of a judge'.

[16]**Boberg's Law of Persons and the Family** (2nd edition) 503, with reference to Parker op cit (1994) 8 **International J of Law and the Family** 26.

its hold in domestic and international instruments and is certainly the standard which normally applies in guardianship, custody and access matters in South Africa and Western legal systems. In the Commission's consultation processes, a great majority of respondents supported the inclusion of the best interests standard and its elaboration to a certain extent,[17] even though there was an awareness that the decision as to what is in the best interests of a particular child is inevitably to some extent influenced by subjective factors. Only the Natal Society of Advocates and the Durban Committee of Family Lawyers disagreed with the proposition that the best interests of the child should be further defined, although the latter suggested that guidelines could be drafted to assist social workers, Family Advocates and other persons involved in decision-making.

In order to find ways in which the principle can be applied with some degree of 'predictable operation',[18] courts in South Africa have attempted to list the most important criteria which inform judicial decision-making in this regard. In **McCall v McCall**,[19] King J held:[20]

> In determining what is in the best interests of the child, the Court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following:
>
> (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
> (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
> (c) the ability of the parent to communicate with the child and the parent's insight into,

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[17]See also Brigitte Clark 'An overview of the best interests of the child as applied in South Africa', paper presented at the Miller Du Toit Conference 'The changing concept of the best interest of the child', Breakwater Lodge, Cape Town, 28 - 29 January 1999 and the other papers presented.

[18]Parker (1994) 8 **International J of Law and the Family** 26. See also John Eekelaar 'The interests of the child and the child's wishes: The role of dynamic self-determinism' (1994) 8 **International J of Law and the Family** 42.

[19]1994 (3) SA 201 (C). See also **Bethell v Bland and others** 1996 (2) SA 194 (W); J A Robinson 'Die beste belang van die kind na egskeiding - Enkele gedagtes na aanleiding van *McCall v McCall* 1994 (3) SA 201(K)' (1995) 58 **THRHR** 472.

[20]At 204J - 205F.

understanding of and sensitivity to the child's feelings.
(d) The capacity and disposition of the parent to give the child the guidance which he requires;
(e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs - generally speaking, the provision of economic security;
(f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
(g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
(h) the mental and physical health and moral fitness of the parent;
(i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo;
(j) the desirability or otherwise of keeping siblings together;
(k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
(l) the desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy ... should be placed in the custody of his father; and
(m) any other factor which is relevant to the particular case with which the Court is concerned.

To establish what was in the best interests of the children involved in **Märtens v Märtens**,[21] a matter of disputed parental custody, the court relied on certain guidelines set out in earlier case law.[22] These were:[23]

- the sense of security of the children, involving an examination of the extent to which a parent makes the children feel wanted and loved;
- the suitability of the custodian parent, involving and examination of the character of the custodial parent, with particular reference to the ability of the parent to guide the moral, cultural and religious development of the children;
- material considerations relating to the well-being of the children; and
- the wishes of the children.

While the Commission accepts that the application of the 'best-interests' standard does create problems in practice, the question to be determined is whether it should be left to the courts to develop the standard on a case-by-case basis or whether legislative intervention is necessary.

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[21](1991) 4 SA 287 (T). See also the discussion of this case by Brigitte Clark 'Custody: The best interests of the child' (1992) 109 **SALJ** 391.

[22]**French v French** 1971 (4) SA 298 (W).

[23]At 292H - 293A.

In its report **For the Sake of the Children**,[24] the Canadian Special Joint Committee on Child Custody and Access recommended that decision makers, including parents and judges, should consider a list of criteria in determining the best interests of the child. The Special Joint Committee said that the list should include:

- The relative strength, nature and stability of the relationship between the child and each person entitled to or claiming a parenting order in relation to the child;
- The relative strength, nature and stability of the relationship between the child and other members of the child's family who reside with the child, and persons involved in the care and upbringing of the child;
- The views of the child, where such views can reasonably be ascertained;
- The ability and willingness of each applicant to provide the child with guidance and education, the necessaries of life and any special needs of the child;
- The child's cultural ties and religious affiliation;
- The importance and benefit to the child of shared parenting, ensuring both parents' active involvement in his or her life after separation;
- The importance of maintaining and fostering relationships between the child and the child's siblings, grandparents and other extended family members;
- The parenting plans proposed by the parents;
- The ability of the child to adjust to the proposed parenting plans;
- The willingness and ability of each of the parties to facilitate and encourage a close and continuing relationship between the child and the other parent;
- Any proven history of family violence perpetrated by any party applying for a parenting order;
- There shall be no preference in favour of either parent solely on the basis of that parent's gender;
- Except in an emergency, the unilateral removal of a child from the family home without suitable arrangements for contact between the child and the other parent is contrary to the best interests of the child; and
- Any other factor considered by the court to be relevant to a particular shared parenting dispute.

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[24]December 1998, recommendations 16, 21 and 39.

In the case of divorce, the Canadian Special Joint Committee on Child Custody and Access[25] recommended that it is in the best interests of children that they have the opportunity to be heard when parenting decisions affecting them are being made; those whose parents divorce have the opportunity to express their views to a skilled professional, whose duty it would be to make those views known to any judge, assessor or mediator making or facilitating a shared parenting determination; a court have the authority to appoint an interested third party, such as a member of the child's extended family, to support and represent a child experiencing difficulties during parental separation or divorce; and that children of divorce have a need and a right to the protection of the courts, arising from their inherent jurisdiction.

Section 68F of the Australian Family Law Act 1975 (Commonwealth) is one of the legislative provisions which attempt to give guidance to the court in determining what is in a child's best interests. It reads as follows:

> 68F **How a court determines what is in a child's best interests**
>
> (1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).
>
> (2) The court must consider:
>
> (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
>
> (b) the nature of the relationship of the child with each of the child's parents and with other persons;
>
> (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
>
> (i) either of his or her parents; or
>
> (ii) any other child, or other person, with whom he or she has been living;
>
> (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
>
> (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
>
> (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;
>
> (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
>
> (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or

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[25] **For the Sake of the Children**, December 1998, summary of recommendations, recommendation 3.

(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;

(h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(i) any family violence involving the child or a member of the child's family;

(j) any family violence order that applies to the child or a member of the child's family;

(k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(l) any other fact or circumstance that the court thinks is relevant.

(3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

(4) In paragraph (2)(f): Aboriginal peoples means the peoples of the Aboriginal race of Australia. Torres Strait Islanders means the descendants of the indigenous inhabitants of the Torres Strait Islands.

Section 68G of the Australian Family Law Act 1975 (Commonwealth) gives guidance on how the wishes of a child are to be expressed as is required as per section 68F(2)(a) quoted above. Section 68G(2) reads as follows:

(2) The court may inform itself of wishes expressed by a child:

(a) by having regard to anything contained in a report given to the court under subsection 62G(2); or

(b) subject to the applicable Rules of Court, by such other means as the court thinks appropriate.

Clearly, such a list can be adapted to South African circumstances with little difficulty. **The Commission therefore recommends that decision makers, including parents and judicial officers, must have regard to a list of criteria in determining the best interests of a child. Such a list of criteria should be included in the new children's statute**. However, it is worth pointing out that it is also possible to give substance to the best interests criteria in an schedule or the regulations to the act.

Section 4 of the Uganda Children Statute 1996, for instance, provides that the welfare principles set out in the First Schedule to the Statute shall be the guiding principles in the making of any decision based on the provisions of the Statute.[26] The relevant part of the First Schedule reads as follows:

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[26]The provisions are derived from section 1 of the UK Children Act 1989.

(1) Whenever the state, a court, a local authority or any person determines any question with respect to -
   (a) the upbringing of a child or,
   (b) the administration of a child's property or the application of any income arising from it,
   the child's welfare shall be the paramount consideration.

(2) In all matters relating to the child, whether before a court of law or before any other person, regard shall be had to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.

(3) In determining any question relating to circumstances set out in paragraphs (a) and (b) of paragraph (1), the court or any other person shall have regard in particular to-
   (a) the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding;
   (b) the child's physical, emotional and educational needs;
   (c) the likely effects of any changes in the child's circumstances;
   (d) the child's age, sex, background and any other circumstances relevant in the matter;
   (e) any harm that the child has suffered or is at risk of suffering;
   (f) where relevant, the capacity of the child's parents, guardians or others involved in the care of the child in meeting his or her needs.

The Commission is convinced of the need to include guidance to the courts and other users of the new children's statute as to what exactly it means when it is said that a particular decision or action must be in the best interests of a particular child. In this regard, we recommend that such guidelines be included in the body of the substantive act, ideally following on the confirmation that in all matters concerning children, the best interests of the child shall be paramount.[27] We accordingly recommend that the following provisions be include in the new children's statute:

Best interest of children

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the paramount consideration.

Determining what is in a child's best interests

(1) Subject to subsection (3), in determining what is in the child's best interests by public or private social welfare institutions, courts of law, administrative authorities

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[27]As is provided for in section 28(2) of the Constitution, 1996.

or legislative bodies, the matters set out in subsection (2) must be considered.

(2) Public or private social welfare institutions, the courts, administrative authorities and legislative bodies must consider:

(a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that are relevant to the weight it should give to the child's wishes;

(b) the nature of the relationship of the child with each of the child's parents and with other persons;

(c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

(i) either of his or her parents; or

(ii) any other child, or other person, with whom he or she has been living;

(d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;

(f) the child's maturity, sex and background (including any need to maintain a connection with the extended family, tribe, culture or tradition) and any other characteristics of the child that are relevant;

(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:

(i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or

(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person; or

(iii) inappropriate or harmful relationships;

(h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(i) any family violence involving the child or a member of the child's family;

(j) that there should be no preference in favour of any parent or person

solely on the basis of that parent or person's gender;[28]

(k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(l) any other fact or circumstance that is relevant.

(3) In all matters relating to the child, whether before a court of law or before any other person, regard shall be had to the general principle that any delay in determining any question with respect to the upbringing of a child or the administration of a child's property or the application of any income arising from it, is likely to be prejudicial to the welfare of the child.[29]

(4) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

Clearly the criteria listed here must be of general application. However, given the dynamics of family law and the endless range of possibilities it must be realised that this list of criteria by its very nature must remain an open-ended list. In some areas of family law, notably custody and access, the best interests of the child criteria has undergone (and will undergo) further refinement as we have seen above. In this regard we feel it is more appropriate to include such topic specific criteria in the new children's statute when dealing with that particular topic.[30]

5.4 **The rights and responsibilities of children**

Obviously children are entitled, as persons, to all the other constitutional rights[31] and protections provided for by the Constitution. Children therefore have the right to human dignity, to life, to freedom and security of the person, the right to housing, health care, food, water and social security, education and so forth. However, the Constitution contains no express provision

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[28]As per recommendation 16 of the Canadian Special Joint Committee on Child Custody and Access **For the Sake of the Children**, December 1998.

[29]As per section 4(2) of the Uganda Children Statute, 1996.

[30]See Chapters 17 (Foster Care), 18 (Adoption) and 19 (Residential Care) below.

[31]Save the right to vote and to stand for political office, which are the sole right of 'adult' citizens. See section 19(3) of the Constitution.

protecting the right to family life.[32] Families come in many shapes and sizes and the definition of family also changes as social practices and traditions change.[33] In terms of the Constitution, South Africa must nevertheless meet its obligations imposed by international human rights law. It is in this regard that it has been argued that the state must protect the institutions of marriage and family as important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children.[34]

While children are afforded constitutional rights, **the Commission considers it necessary to, in addition, formulate for inclusion in the new children's statute certain rights and responsibilities for children**. In this regard, the Commission took care not to repeat or duplicate the existing provisions of Chapter 2 of the Constitution, 1996, but to include only supplementary rights (and responsibilities) in the new children's statute.

The Commission also decided to include a provision on the responsibilities of children in the new children's statute.[35] This was done with hesitation as the Commission is of the

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[32]**Dawood and another, Shalabi and another, Thomas and another v Minister of Home Affairs and others** 2000 (8) BCLR 837 (CC), par [28]; **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996** 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), par [97].

[33]See **National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others** 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC), para [47] - [48]; **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996** 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), par [99].

[34]Per O'Regan J in **Dawood and another, Shalabi and another, Thomas and another v Minister of Home Affairs and others** 2000 (8) BCLR 837 (CC), par [31]. See also A van der Linde 'Die (moontlike) erkenning en beskerming van fundamentele regte ten aansien van die gesin - Omskrywing van die begrippe "gesin" en "gesinslewe"' (2000) 33 **De Jure** 1; J A Robinson 'The child's right to parental and family care: Some brief remarks' (1998) **Obiter** 329; P J Visser 'Die moontlike uitdruklike erkenning en beskerming van fundamentele regte ten aansien van die huwelik en gesin (familie) in die finale Grondwet van Suid-Afrika' (1996) 29 **De Jure** 351.

[35]See clause 15 below. See also A Domanski 'Stemming the blood-dimmed tide of lawlessness: The rediscovery of duties' (2000) XXXIII **CILSA** 248.

opinion that the corollary of any right is the responsibility or duty to respect the rights of others. The Commission's sense of reluctance to include a provision on the responsibilities of children was further strengthened by the simple fact that neither the Constitution nor any of the international instruments such as the CRC and the African Charter on the Rights and Welfare of the Child impose a similar obligation on adults. Providing for the responsibilities of children, however, is a feature of the African Charter on the Rights and Welfare of the Child. It is on the strength of this instrument and the need to Africanise the new children's statute that the Commission was swayed to include the provision. The Commission would appreciate comment on the wisdom of its approach in this regard.

The Commission accordingly recommends the inclusion of the following children's rights and responsibilities in the new children's statute:

CHAPTER XY : CHILDREN'S RIGHTS AND RESPONSIBILITIES

1. The rights which a child has in terms of this Chapter are supplementary to any rights which a child has in terms of the Bill of Rights contained in Chapter 2 of the Constitution.

Unfair discrimination prohibited

2. (1) No state institution, state official or any person may unfairly discriminate directly or indirectly against any child on the ground -

(a) of the race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth of the child or of his or her parents, legal guardian, primary care-giver or any family member of the child; or

(b) of the family status, health status, socio-economic status, HIV-status, or nationality of the child or of his or her parents, legal guardian, primary care-giver or of any of his or her family members.

(2) Discrimination on any of the grounds listed in subsection (1) is presumed

to be unfair unless it is established that the discrimination is fair.

Best interest of children

3. (1) Every child has the right that in any action or decision taken in respect of him or her by any person in authority over him or her or by the state or a state official or by a court of law, his or her best interest shall be given prime consideration as being of paramount importance.

(2) Every child who is capable of participating meaningfully in any judicial or administrative decision-making affecting him or her has the right to be given the opportunity so to participate and his or her opinion or views must be given due consideration, regard being had to the child's age and maturity.

Right to name, nationality and identity

4. (1) Every child has the right to have his or her name registered as soon as possible after his or her birth, in accordance with the Births and Deaths Registration Act 1992 (Act No. 51 of 1992);

(2) Subject to the provisions of this Act relating to adoption, every child has the right that his or her identity and nationality be preserved.

Family relationship

5. (1) Every child has the right not to be separated from his or her parents against their will and against the will of the child where such child is capable of expressing his or her will, except where a court of law or a commissioner of child welfare determines, in accordance with the provisions of this Act, that such separation is in the best interests of the child.

(2) The child, in person or through a representative, and all parties having an interest in the matter, must be given the opportunity to participate in any proceedings which may result in the separation of the child from his or her parents.

(3) A child who has in terms of the provisions of this Act been separated from his or her parents has the right to maintain personal relations and contact with his or her parents on a regular basis, unless a court of law has determined that such relations or contact would be contrary to the best interests of the child.

(4) Unless the court orders otherwise, the provisions of this section do not apply to a child in relation to his or her biological parents if the child is being or has been adopted.

Property

6. Every child has the right to have his or her property administered in a just and fair manner by his or her legal guardian.

Protection of children from maltreatment, abuse, neglect, exploitation and other harmful practices

7. (1) Every child has the right to be protected, through administrative, social, educational, punitive or other suitable measures and procedures, from -

(a) all forms of torture, physical violence, mental harassment, injury, maltreatment, neglect, sexual abuse, degradation, and sexual exploitation;

(b) inducement, coercion or encouragement to engage in-

(i) prostitution or any other form of sexual activity;
(ii) pornographic activity or any form of pornographic performance.

(2) Every child who has been molested, abused, maltreated or neglected has the right to have access to support services and, where appropriate, to medical treatment, if needs be, at state expense.

Protection of children from harmful social and cultural practices

8. (1) Every child has the right to be protected from harmful social and cultural practices which affect the welfare, health or dignity of the child.

(2) No child-marriage or the engagement of girls and boys below the minimum ages set by law for a valid marriage shall be permitted.

(3) Female genital mutilation and the circumcision of female children are prohibited.

Protection of children from exploitative labour practices

9. Every child has the right to be protected from economic exploitation and from performing any work-

(1) that is inappropriate for a person of that child's age; and

(2) that places the child's well-being, education, physical and mental health, or spiritual, moral or social development at risk.

Education

10. (1) Every child has the right to -

(a) basic education; and

(b) access to further or higher education on the basis of equal opportunities for all;

(c) access to educational and vocational information and guidance; and

(d) receive education and information through a medium which makes such education and information accessible to him or her, having regard to his or her personal circumstances and any disability from which he or she may suffer.

(2) The education of a child must be directed to-

(a) the development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) the development of respect for human rights and fundamental freedoms;

(c) the development of respect for his or her parents, his or her cultural identity, language and values, and for the national values of his or her country;

(d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes and friendship among all peoples and ethnic, national and religious groups; and

(e) the development of respect for the natural environment.

(3) Every child has the duty to make full use of opportunities created for his or her physical, mental and emotional development and to respect the fundamental human rights of others.

Refugee children

11. Every child who is seeking refugee status or who is considered to be a refugee in accordance with international or domestic law shall, whether he or she is unaccompanied or accompanied by his or her parents or by any other person, have the right to receive protection and humanitarian assistance in order to enjoy appropriate rights set out in this Chapter, and in particular, assistance, if he or she was separated from his or her parents or family, to be re-united with his or her parents or family.

Children with disabilities

12. (1) Every child with a physical or mental disability has the right to enjoy a full and decent life in conditions which ensure dignity, promote self-reliance and facilitate his or her active participation in the community.

(2) Every child with a physical or mental disability has the right to receive special care and such financial assistance for which he or she may qualify.

Leisure and recreation

13. Every child has the right to rest and leisure and to engage in play and recreational activities appropriate to his or her age.

Representation of children in civil proceedings

14. Every child has the right to have a legal practitioner assigned to him or her at state expense in civil proceedings affecting him or her, if substantial injustice would otherwise result.

Responsibilities of the child

15. (1) Every child shall have responsibilities towards his or her family and society, the state and other legally recognised communities and the international community.

(2) The child, subject to his or her age and ability, and such limitations as may be contained in this Act and other legislation, shall have the duty to support family life.

Limitation, enforcement and interpretation of rights

15. Sections 36, 37, 38 and 39 of the Constitution apply with regard to the limitation, enforcement and interpretation of the rights set out in this Chapter.

CHAPTER 6

THE CHILD CARE ACT 74 OF 1983

6.1 Introduction

This Chapter is a foundational and introductory chapter. It is not intended to deal with all aspects relating to the Child Care Act 74 of 1983 in every detail as these form the subject of separate and subsequent chapters of this discussion paper.

The Child Care Act 74 of 1983 came into operation on 1 February 1987, its immediate predecessor being the Children's Act 33 of 1960. According to the Minister of Health and Welfare at the time of promulgation of Act 74 of 1983, the change in name signalled a recognition of 'the general principle that the family is the normal social and biological structure within which the child must grow and develop. The legislation does not, therefore, focus solely on the child, or solely on the child's parents, but on both. The emphasis is, therefore, on the care of the child by his parents or by those entrusted with the custody of the child'.[1]

Several South African writers have, however, questioned whether the Child Care Act, in its original form (particularly the provisions relating to the criteria for the removal of children from parental care and for initiating children's court inquiries), really gave expression to the legislative purpose ostensibly underpinning it, viz. the encouragement and protection of the family unit as 'the natural social structure for the growth and development of the child' by creating a proper balance between parental rights, duties and powers, on the one hand, and children's rights, on the other hand.[2]

The Children's Act 33 of 1960 was repealed by the Child Care Act, 1983 except insofar as it (the 1960 Act) related to the appointment of probation officers and the establishment, maintenance and management of schools of industries and reform schools. Section 58 of Act 33 of 1960

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1 House of Assembly Debates (Hansard) of 9 May 1983 6560, as cited by Spiro **Law of Parent and Child** (4th edition) (1985) 350; JA Robinson 'Children' in **LAWSA** Volume 2 (First Reissue 1993) para 176; Fiona McLachlan 'The New Child Care Act - In the Best Interest of Family, Parent or Child' (unpublished paper, University of Cape Town, December 1983) 1-2.

2 See, for example, Graham E Barlow 'Child Care Bill - Best Interests of the Child?' 1982 **De Rebus** 341; Julia Sloth-Nielsen and Belinda van Heerden 'Proposed amendments to the Child Care Act and Regulations in the context of constitutional and international law developments in South Africa' (1996) 12 **SAJHR** 247, 'The Child Care Amendment Act 1996: Does it improve children's rights?' (1996) 12 **SAJHR** 649; F N Zaal 'Child Removal Procedures Under the Child Care Act : Some New Dangers to Contend With' (1988) 105 **SALJ** 224; JA Robinson 'Artikel 12(1) van die Wet op Kindersorg en die Posisie van die Maatskaplike Werker' (1992) 55 **THRHR** 74; Fiona McLachlan (unpublished paper, UCT) 2-3, 8-10.

(dealing with the appointment and functions of probation officers) was subsequently repealed by section 20 of the Probation Services Act 116 of 1991, while the provisions of the 1960 Act relating to the establishment, maintenance and management of reform schools and schools of industries were repealed by section 113(1) of the Education Affairs Act (House of Assembly) 70 of 1988. Far-reaching amendments were in turn made to the Child Care Act, 1983 in terms of the Child Care Amendment Act 86 of 1991 (date of commencement 19 June 1991),[3] the Child Care Amendment Act 96 of 1996 (date of commencement 1 April 1998 with the exception of section 8A, which is yet to come into operation), and the Child Care Amendment Act 13 of 1999 (date of commencement 1 January 2000).

The Commission had the opportunity to discuss a draft version of this Chapter with the Portfolio Committee on Social Development in Parliament on 6 June 2001. The Commission also had the opportunity of working through the current Child Care Act, 1983 and the Regulations with officials of the Department of Social Development.[4] The Commission benefited greatly from these processes and would like this opportunity to thank all those involved for their inputs and comments.

6.2 **Meaning of 'child' for the purposes of the Child Care Act, 1983**

The Child Care Act, 1983 defines a child as any person under the age of 18 years.[5] In this regard, it is in line with the definition of a child contained in both the South African Constitution[6] and in the CRC.[7] There are, however, circumstances in which certain provisions of the Child Care Act apply to persons over the age of 18 years. So, for example, a children's court may make an order in respect of any person who, at the commencement of the relevant children's

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3 Despite the comments below (6.4.1) of the 1993-amendments going rather far in the direction of a child-centred approach, it must be stated that a degree of secondary focus upon parental conduct has been retained.

4 The meeting was held at the offices of the (national) Department of Social Development on 26 June 2001. It was attended by Ms Elmarie Swanepoel, Ms Suzette Moss, Ms Marieka Bloem, Ms Loeloe Siwisa, Dr Jackie Loffell, Professor Noel Zaal, Ms Louisa Stuurman and Mr Gordon Hollamby. Ms Saar Snyman, a commissioner of child welfare, also attended the meeting.

5 Section 1 of the Child Care Act, 1983. See also Chapter 4 above.

6 Section 28(3) of the Constitution, 1996.

7 Article 1.

court inquiry, was under the age of 18 years, but has attained the age of 18 years before the date of the order.[8]

The Commission has recommended in Chapter 4 above that, for the purposes of the new children's statute, a child be defined as a person under the age of 18 years.

6.3 Provisions that empower (or could empower) children

6.3.1 Legal representation for children in children's court proceedings

In an apparent attempt to give substance to the constitutional right of every child to have a legal representative assigned to him or her by the state, and at state expense, in civil proceedings, section 8A(1) of the Child Care Act[9] provides that '[a] child may have legal representation at any stage of a proceeding under this Act'.[10] In terms of this section the children's court must inform a child 'who is capable of understanding, at the commencement of any proceeding, that he or she has the right to request legal representation at any stage of the proceeding'.[11]

In terms of section 8A(3) of the Child Care Act, 1983 a children's court may be required to approve the appointment by a parent of a legal representative for the child concerned, 'should the children's court consider it to be in the best interest of such child'. According to Sloth-Nielsen and Van Heerden,[12] this interesting addition flies in the face of expressed concerns about the potential for a conflict of interests, where parents (who may be akin to defendants in a removal enquiry) are empowered to appoint a legal representative for the child. Recent research by Professor F N Zaal entitled 'Do children need lawyers in children's courts?' indicates that in 90% of the children's court enquiries in his sample where private lawyers did appear, they defended **parents** in removal proceedings; the same research suggests that in the

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8 Section 15(4) of the Child Care Act, 1983. As regards the estimation of the age of a person when such age is a relevant fact in any proceedings under the Child Care Act but there is no or insufficient evidence in respect thereof, see section 54.

9 Inserted by section 2 of Act 96 of 1996. For a critical analysis of the wording of section 8A, see Julia Sloth-Nielsen and Belinda van Heerden (1996) 12 **SAJHR** 469 at 469 - 470; F N Zaal 'When should children be legally represented in care proceedings? An application of section 28(1)(h) of the 1996 Constitution' (1997) 114 **SALJ** 334 at 335-6.

10 See also Regulation 4A which specifies the circumstances in which the Commissioner for Child Welfare must give consideration to requiring the appointment of a representative for the child.

11 Section 8A(2).

12 (1996) 12 **SAJHR** 649 at 650.

rare cases where children are represented by private lawyers (1%), these are often paid for by family members other than the parents.

Furthermore, the provision of legal representation for a child at state expense may be ordered by the children's court, at the commencement or at any other stage of the proceeding, the test again being whether or not the court considers this to be in the best interest of the child in question.[13] If legal representation for the child at state expense is indeed ordered, then sections 8A(5) and (6) provide for appointment of the child's legal representative by the Legal Aid Board, followed by a detailed evaluation and report on the matter by the Board - essentially in order to determine whether the cost of the legal representation can be recovered from the parent/s of the child, his or her guardian or any other party to the proceedings.

The overt emphasis on cost considerations evident from sections 8A(5) and (6) creates the danger that the level of legal representation for children in children's court proceedings will not be substantially increased - there is the very real risk that the cost factor will prove to be more compelling than the possibility of 'substantial injustice' to the child.[14]

Section 8A is yet to come into operation. However, these provisions concerning legal representation for children in children's court proceedings are unsatisfactory in several different respects.[15] Perhaps most importantly, it is still not mandatory for the children's court **properly** to consider the issue of legal representation for the child in all such cases. For those commissioners of child welfare who **do** in fact consider the issue, no guidelines are provided by the legislation to assist them in making a decision one way or the other. The meaning of the phrase 'who is capable of understanding' is unacceptably vague; however, it is obvious that many children who are involved in children's court inquiries will not be 'capable of understanding' because of their tender years. It is also unclear what the responsibility of the commissioner is when a child **does** request legal representation - it would seem from section

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13 Section 8A(4). At the meeting with the officials of the Department of Social Development held on 26 June 2001, no agreement could be reached as to what weight the recommendation by a social worker to the court that a child be provided with legal representation at state expense as is provided for in Regulation 4A(1)(b) should carry.

14 See Julia Sloth-Nielsen and Belinda van Heerden 'The Child Care Amendment Act 1996: Does It Improve Children's Rights in South Africa?' (1996) 12 **SAJHR** 649 at 650-651.

15 See, for instance, D S Rothman 'The need for legal representation for children in children's court proceedings - fact or phobia?' (2001) 4.1 **The Judicial Officer** 4: 'The draconian nature of the legislation on legal representation for the child as provided for in section 8A and regulation 4A, respectfully said, appears to present an unrealistic and almost phobic approach to the matter on the part of well-meaning role-players who regrettably have little insight of how the children's courts work and, indeed, may never even have set foot in one!'

8A that such a request can simply be denied.[16] Conversely, if a child refuses legal representation (as frequently happens with children in juvenile criminal courts), it would appear that the matter can simply be left there - there is no obligation on the children's court to go further and consider whether the best interests of the child require legal representation notwithstanding such refusal.

In view of the abovementioned shortcomings of section 8A, it would seem that this section, even if it comes into operation now, in many cases will not give adequate protection to the child's constitutionally guaranteed right to legal representation at state expense, in civil proceedings affecting the child.[17] This new section also appears to fall short of the standard set by article 12 of the CRC, which article obliges State Parties to 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters [including any judicial or administrative proceedings] affecting the child, the view of the child being given due weight in accordance with his or her age and maturity'. This participation by the child may be achieved through hearing the child in person or through a representative or an appropriate body.[18]

It must be concluded that, although it represents the latest of a whole series of attempts to draft an appropriate provision, section 8A of the Child Care Act is too disjointed, and uses too broad a ground,[19] to offer sufficient guidance on the important question of when children should have an enforceable right to representation in care proceedings.[20] More specific guidelines are required. This can be done by incorporating the grounds provided for in the current Regulation 4A(1) of the Child Care Act in the new children's statute. **The Commission accordingly recommends that legal representation, at State expense, must be provided**

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16 In terms of Regulation 4(2), the commissioner is obliged, however, to enter in the minutes of the court proceedings its reasons for the decision not to order that such legal representation be provided for the child.

17 See Constitution of the Republic of South Africa Act 108 of 1996, section 28(1)(h).

18 See Julia Sloth-Nielsen 'Ratification of the United Nations Conventions on the Rights of the Child: Some Implications for South African Law' (1995) 11 **SAJHR** 401 at 410-411; Marie-Françoise Lücker-Babel 'The Right of the Child to Express Views and to be Heard: An Attempt to Interpret Article 12 of the UN Convention on the Rights of the Child' (1995) 3 **International J of Children's Rights** 391.

19 In sections 8A(3) and (4) it is stated that such representation 'may' be provided at private or state expense if a presiding commissioner determines that this 'is in the best interest' of the child.

20 For other criticisms, see Julia Sloth Nielsen and Belinda Van Heerden 'The Child Care Amendment Act 1996. Does it Improve Children's Rights in South Africa?' (1996) 12 **SAJHR** 649.

automatically[21] for a child involved in any[22] proceedings under the new children's statute, in the following circumstances, *if substantial injustice would otherwise result*:[23]

(a) where it is requested by the child;[24]

(b) where it is recommended in a report by a social worker or an accredited social worker;[25]

(c) where it appears or is alleged that the child has been sexually, physically or emotionally abused;[26]

(d) where the child, a parent or guardian, a parent-surrogate or would-be adoptive or foster parent contest the placement recommendation of a social worker who has investigated the current circumstances of the child;[27]

(e) where two or more adults are contesting in separate applications for placement of the child with them;[28]

(f) where any other party besides the child will be legally represented at the hearing;[29]

(g) where it is proposed that a child be trans-racially placed with adoptive parents who differ noticeably from the child in ethnic appearance;

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21 Contra D S Rothman (2001) 4.1 **The Judicial Officer** 4 at 8, with particular reference to proceedings relating to abandoned infants.

22 Contra D S Rothman (2001) 4.1 **The Judicial Officer** 4 at 8.

23 Our emphasis. In this regard, the Commission agrees with D S Rothman (2001) 4.1 **The Judicial Officer** 4 at 11 that there is a marked difference between the concepts 'substantial injustice' and 'best interests of the child'.

24 Regulation 4A(1)(a). See also D S Rothman (2001) 4.1 **The Judicial Officer** 4 at 10, who says a child should be left to choose whether to ask for legal representation, regardless of the circumstances listed under regulation 4A(1), where such child is capable and mature enough to understand the implications of the choice made, after this has been carefully explained to him or her.

25 Regulation 4A(1)(b). The Project Committee debated this issue at length. On the one hand, some members of the Committee argued that a social worker, as a non-legal person, should not be able to dictate to the court on what is basically a legal issue. On the other hand, it was pointed out that the social worker makes a **recommendation** to the court. It was also pointed out that there is no incentive for the social worker to make such a recommendation as this will involve more work for him or her. At the same time, the social worker is in a position to have insight into e.g. the power dynamics in an abusive family or any conflicts which are in process with regard to a child. The social worker should therefore be alert to the implications of a lack of legal representation for a child affected by such factors.

26 Regulation 4A(1)(d).

27 Regulation 4A(1)(e). The term 'parent' should be broadly interpreted to include parents of extra-marital or artificially procreated children.

28 Regulation 4A(1)(f).

29 This point was reiterated at the meeting held on 26 June 2001 with officials from the Department of Social Development. See also Regulation 4A(1)(c).

(h) in any other situation where it appears that the child will benefit substantially from representation either in regard to the proceedings themselves or in regard to achieving the best possible outcome for the child.[30]

The Commission recommends that where the above circumstances are present or if substantial injustice would otherwise result, the court must order legal representation, at State expense, for the child. The Commission further recommends that where the court denies the child the right to such legal representation, the court must enter in the minutes of the court proceedings its reasons for its decision not to order that such legal representation be provided for the child.[31] The proposal to include representation in the case of obviously trans-racial placements is based upon the fact that it has been widely recognised that these sometimes involve difficult decision-making because of the longer-term danger of an identity crisis for the child which has to be balanced against the advantages of the placement.[32]

The Commission does not recommend that Regulation 4A(1)(g), which provides that where the child is capable of understanding the nature and content of the proceedings, but differences in languages used by the court and the child prevent direct communication between the court and the child, **a legal representative who speaks both the languages must be provided**, be included in the above list of criteria. Indeed, the Commission sees such a provision as unworkable in practice and could lead to confusion of role of legal representative and of interpreter.[33]

6.3.2 The Children's Court Assistant

Children's court assistance as envisaged under section 7 and regulation 2 of the Child Care Act used to provide at least some child advocacy services. However, as junior members of the court staff, they tended to lack independence; and an absence of legal training also often further

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30 See Regulation 4A(1)(j).

31 See Regulation 4A(2) for the possible wording of such a provision.

32 On the dilemmas involved in transracial placements, see generally: F N Zaal 'Avoiding the Best Interests of the Child. Race-Matching and the Child Care Act 74 of 1983' (1994) 10 **SAJHR** 372; and Tshepo L. Mosikatsana 'Transracial Adoptions: Are We Learning the Right Lessons From the Americans and Canadians: A Reply to Professors Joubert and Zaal' (1995) 112 **SALJ** 606.

33 This is also the view of D S Rothman (2001) 4.1 **The Judicial Officer** 4 at 10. See also Chapter 23 (Courts) below.

reduced their effectiveness.[34] In 1992, however, the Department of Justice ended the practice of having full-time, professionally qualified assistance, and so ended even this limited resource for children.[35]

References to the duties of the 'children's court assistant' appear in many parts of the Act. For example, assistants are envisaged as involved in administrative matters preliminary to an actual children's court inquiry. Where the court assistant is in attendance at an inquiry, she or he has the right to examine / cross-examine any witness, call witnesses, request for information, reports, documents, or for the appearance of any person as deemed necessary. A proper completion of these tasks will often be vital to an appropriate disposition of a case. The assistant can even be cross-examined, which appears to be a confusion of her role as a court officer.

Although the question of appropriate training needs careful consideration,[36] it may be concluded that the concept of a children's court assistant is essentially a sound one under the Act as presently framed. In English and Scottish law, specialist officers carry out tasks similar to some of those of the children's court assistant.

Because of the basic and vital support that this officer can provide even under the current wording of the Act, involvement of assistants needs to become mandatory in all children's court proceedings. Their name should be changed to indicate a better status - perhaps to 'Family Law Officer' as recommended by Mr D S Rothman.[37]

As regards difficulties in practice, these have largely resulted from the decision to remove professionally trained children's court assistants in 1992. This left commissioners in the ethically difficult position of having to serve both as the adjudicator and as the person who

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34 It was usually social workers who served as children's court assistants. For a discussion of their role, see C R Matthias 'Are we making progress: The 1996 Child Care Bill and some fundamental aspects of practice and procedure in the children's courts' (1996) 32(3) **Social Work** 242 at 243-4. See also F N Zaal and Ann Skelton 'Providing effective representation for children in a new constitutional era: Lawyers in the criminal and children's courts' (1998) 14 **SAJHR** 539 at 545.

35 See Department of Justice circular 1 /2/2/3/5 of 1992. For criticism of this decision and discussion of its consequences, see C R Matthias and F N Zaal (1996) **Acta Juridica** 51 at 58. See also Zaal and Skelton (1998) 14 **SAJHR** 539 at 546.

36 There is a school of thought which prefers the idea of children's court assistants as being predominantly trained in social work, rather than in law. Ideally, however, the assistant needs dual training or experience in both social work and law - especially court procedure.

37 As quoted by Matthias and Zaal 'Can we build a better children's court? Some recommendations for improving the processing of child-removal cases' 1996 **Acta Juridica** 51 at 58.

conducts each case. This has not been to the advantage of the vulnerable children who appear before them. Many commissioners have resorted to desperate measures such as borrowing criminal court prosecutors to serve as children's court assistants in some of their more complex cases. However, the use of prosecutors as children's court assistants is and has not been successful. The adversarial work style which prosecutors require in order to function effectively in criminal proceedings tends to be destructive when imported to the rather different environment of the children's courts. In the latter, it tends to damage efforts to produce a climate that may be conducive to rebuilding dysfunctional parent-child relationships. An important aim of many children's court cases is thus often compromised if prosecutors are used as children's court assistants.[38] The fact that even investigating social workers have sometimes found themselves pressed into inappropriate duties as child advocates is another consequence of the failure to supply children's courts with a necessary resource in the form of appropriately trained children's court assistants.

What, then, is the solution to the problem of finding a suitable assistant in the children's court? The present situation, in which social workers have been systematically removed from posts as assistants and replaced by clerical staff, is certainly unacceptable. It has severely undermined the standing and efficiency of the children's court, *inter alia*, by placing commissioners in the ethically difficult situation of having to take on many of the tasks of an assistant - such as decisions about what witnesses should appear before them and cross-examination during hearings. What is surely needed is a return of professional children's court assistants to the children's court as originally intended. But what they obviously require by way of preparation is exposure to the skills and methodologies of both social work and the law. Persons who are prepared to have experience and preferably training in both fields should be sought. As a court with unique tasks, the children's court requires genuine child advocates with a thorough knowledge of court procedures combined with the sensitivity to know how to avoid destroying the last vestiges of a damaged child-parent relationship.[39]

Thought must also be given to rendering children's court assistants ('family law officers') sufficiently independent of the commissioner that they can carry out their functions properly.

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38 Matthias and Zaal 'Can we build a better children's court? Some recommendations for improving the processing of child-removal cases' 1996 **Acta Juridica** 51 at 57: 'The results of our research indicate that the presence of prosecutors as assistants in the children's court has tended to be rather a mixed blessing. The traditional adversarial mode of these officials at a child care hearing is often rather akin to having a bull in a china shop'.

39 Matthias and Zaal (1996) **Acta Juridica** 51 at 58.

Expansion of the existing family advocates' offices to take on the rather different child advocacy functions required in the children's courts is a possible solution which needs consideration. If family courts become a reality, the role of family advocates will, in any case, be inevitably expanded. In converting the Act into the nucleus of a Children's Code, thought needs to be given to new duties which will make the present concept of a children's court assistant more cost-effective.

Another staff member to be found in the children's courts is the clerk of the children's court. As with the commissioners, this officer will in most jurisdictions combine part-time children's court work with clerical duties pertinent to civil and criminal magistrates courts and will thus be expected to be something of a 'Jack of all trades'. In the absence of professionally trained children's court assistants, the clerks of the children's court are often expected to undertake duties such as reading investigating social workers' reports in order to see whether they are ready to be presented at an inquiry. This is not always obvious because clerical staff are now sometimes wrongly referred to as 'children's court assistants'. It is true that they are now compelled to fulfil some of the functions of children's court assistants, but they usually have no special training, expertise or qualifications fit for the position of children's court assistant. It is recommended that clerks should only have to carry out clerical and secretarial tasks, and not those expected of a children's court assistant.

The Commission has provided for an expanded role of 'children's court assistants' in this Discussion Paper. See Chapter 23 (Courts) below.

6.3.3 The right of children to self-expression

At the stage of the child's first appearance at a court she or he already has a great deal at stake. The commissioner (as the law presently stands) will now decide whether the child is to be the subject of an inquiry which may drastically affect her or his long term future and, in the short term pending the inquiry, the commissioner may well decide to have the child detained in a place of safety.[40] As the child's liberty is thus often at stake, it is a matter of concern that the Child Care Act does not provide the child with a clear right to express views and wishes if able to do so. Regulation 9(2)(d), which deals with the information on which the commissioner may act at the 'opening', refers to information provided by 'the parent of the child and the children's

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40 However, the definition of 'place of safety' in the Child Care Act is broad enough to include the child remaining in the custody of a parent or any other person pending the enquiry.

court assistant or the social worker, police officer, or authorised officer', but does not refer to the child's evidence.

The absence of a clear right to give evidence (if old enough and otherwise able to) by the person most affected is an example of a lack of child-centredness in the Act. Unfortunately, the same criticism applies to other areas such as those provisions dealing with the presentation of evidence at the actual inquiry itself.[41] The Child Care Act thus needs to be amended so as to afford the child a clear right to describe his circumstances and wishes,[42] both at the 'opening' and at the inquiry, and in all other types of appearances, and for due consideration to be given to these by the court. If the child is not able to take advantage of this right due to tender age, illness or other good reason, then this must be recorded as a finding of fact by the commissioner. This reform is necessary both from a due process perspective and because of the problem of powerlessness of children who are the subject of children's court hearings. Children must not, however, be pressured into expressing views they may be uncomfortable with - for example, where they feel unhappy that they may be choosing sides between parents if they express a view on a certain matter.

Accordingly the Commission recommends that the new children's statute should explicitly allow children to give evidence, if capable of doing so, in any proceedings under this Act. Where the court decides not to allow a child to so testify, the court must record the reasons for its decision not to allow such child to give evidence in the minutes of the court proceedings.

6.3.4 Consent to medical treatment or surgical intervention[43]

In terms of section 39(4) of the Child Care Act, 1983[44] a child who has reached the age of 18 years is competent to consent, without the assistance of his or her parent or guardian, to the performance of any operation upon himself or herself,[45] while a child over the age of 14 years is competent to consent, without such assistance, to the performance of any medical treatment

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41 Neither section 8 (entitled, 'Procedure in children's courts') nor section 14, ('Holding of inquiries') specifies that children who are capable have a right to give evidence.

42 See also Sloth-Nielsen and Van Heerden (1996) 12 **SAJHR** 247 at 264.

43 See also Chapter 11 below.

44 As substituted by section 14 of Act 86 of 1991.

45 Section 39(4)(a) of the Child Care Act, 1983.

of himself or herself or of his or her child.[46] Unfortunately, the concepts 'operation' and 'medical treatment' are not defined in the Act and this may give rise to difficulties in practice.[47]

In the case of **G v Superintendent, Groote Schuur Hospital and Others**,[48] counsel for all parties accepted that the proposed abortion on a 14-year-old girl should be regarded as 'an operation' and not simply as 'medical treatment'.[49] It is, however, probable that, in South African law, the dispensing of contraception (perhaps with the exception of the insertion of inter-uterine devices) qualifies as 'medical treatment' in terms of section 39(4), so that a child aged 14 years or more can receive such contraception without the consent of a parent or guardian.[50]

The provisions of section 39(4) do not exclude parental rights, but do mean that, in the cases covered by the section, if the child's views regarding medical treatment or surgical intervention differ from those of his or her parent or guardian, the child's views will enjoy priority. Seen from a different perspective, the question may be posed as to whether a child can refuse medical treatment or surgery against the wishes of his or her parents or guardian? One view is that, if the child is of sufficient age and maturity to understand fully the implications of his or her decision and to be capable of making up his or her own mind in an informed manner, then he or she can indeed refuse treatment or surgery in such cases.[51] If, however, the child were to refuse surgery or treatment necessary to preserve his or her life or to save him or her from serious and lasting physical injury or disability, then it would appear that the High Court, in its capacity as the upper guardian of all minors, would be able to authorise such treatment or surgery against the child's wishes so as to serve the best interests of the child.

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46 Section 39(4)(b). According to the Memorandum on the Objects of the Child Care Amendment Bill, 1991, this provision was introduced, *inter alia*, to enable the supply of birth control services to minors without the knowledge or consent of their parents or guardians, as also to deal with the practical problems arising in the provision of clinic services to an unmarried minor mother and her child in the absence of the minor's parents.

47 See IAJ Loftus, JP Nel and DJ Maartens 'Toestemming deur Minderjariges : Grys Area tussen Operasie en Mediese Behandeling' 1994 **De Rebus** 486; Charles Ngwena 'Health Care Decision-Making and the Competent Minor : The Limits of Self-Determination' in Raylene Keightley (ed) **Children's Rights** (1996) 132 at 139, 143-145; SA Strauss **Doctor, Patient and the Law** (3rd edition) (1991) 7-8.

48 1993 (4) SA 255 (C).

49 At 262 G.

50 See discussion above; see also SA Strauss **Doctor, Patient and the Law** 171-174.

51 See SA Strauss **Doctor, Patient and the Law** 7; Charles Ngwena in Raylene Keightley (ed) **Children's Rights** 136-138; Cf. the English House of Lords decision in **Gillick v West Norfolk and Wisbech Area Health Authority** [1986] 1 AC 112 at 186, 188-189 (per Lord Scarman); Maria Ruegger 'Children's Rights in Relation to Giving and Withholding Their Consent to Treatment' in Deborah J Lockton (ed) **Children and the Law** (1994) 43.

6.4 Provisions that protect (or could protect) children

6.4.1 The removal of a child to a place of safety pending an enquiry

In order to provide for a speedy and expeditious means of protecting a child pending an enquiry to determine whether such child is need of care,[52] the Child Care Act, 1983 confers the power to effect the removal of a child to a place of safety on children's courts,[53] commissioners of child welfare,[54] the police, social workers, authorised persons,[55] and the Director-General: Social Development.[56]

° Removals in terms of section 11 of the Child Care Act, 1983

The children's court may effect the removal of a child to a place of safety on either of two grounds: First, that the child has no parent or guardian, and second, that it is in the interests of the safety and welfare of the child that he or she be taken to a place of safety.[57] The children's court enjoys a wide discretion in this regard, in that its powers may be exercised when it 'appears in the course of proceedings' that either ground exists in relation to 'any child'.[58] In contrast, a commissioner of child welfare may only act on the strength of information given on oath which gives rise to 'reasonable grounds' for believing that either ground exists, and only in relation to 'any child who is within the area of his jurisdiction'.[59]

Removal by a children's court is effected by order of that court, while a commissioner may effect the removal by issuing a warrant in the form of Form 3.[60] It is not necessary for purposes of the warrant to state the name of the child.[61]

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52 On the way in which children come into care, see F N Zaal and C R Matthias 'The child in need of alternative care' in CJ Davel (ed) **Introduction to Child Law in South Africa** Durban: Juta 2000 116 at 120.

53 Section 11(1) of the Child Care Act, 1983.

54 Section 11(2) of the Child Care Act, 1983.

55 Section 12(1) of the Child Care Act, 1983.

56 Section 42(2) of the Child Care Act, 1983.

57 Sections 11(1) and (2) of the Child Care Act, 1983.

58 Section 11(1).

59 Section 11(2) of the Child Care Act, 1983. See also Schäfer 'Young persons' in Clark (ed) **Family Law Service** Durban: Butterworths, par E114.

60 Regulation 9(1).

61 Section 11(4) of the Child Care Act, 1983.

At the meeting with the officials of the Department of Social Development on 26 June 2001, it was recommended that the existing section 11 of the current Child Care Act, 1983 be retained in the new children's statute. **The Commission supports this recommendation**.

° **Removals in terms of section 12 of the Child Care Act, 1983**

The police, a social worker or an authorised officer[62] may, without a warrant from the commissioner, remove a child to a place of safety if such official has reason to believe that the child is need of care and that the delay in obtaining a warrant could be prejudicial to the safety and welfare of the child.[63] Where the police, social worker or authorised officer removes a child without warrant, such official must grant authority, in the form of Form 4, to the place of safety for the detention of the child.[64] The police person, social worker or authorised officer who has so removed a child must as soon as possible thereafter (but within 48 hours)[65]

(a) inform the parent or guardian of the child or person in whose lawful custody the child is of the removal 'if such parent, guardian or person is known to be in the district from where the child was removed and can be traced without undue delay';
(b) inform the children's court assistant of the reasons for the child's removal; and
(c) bring the child before the children's court of the district in which is situated the place from where the child was removed.[66]

These notification requirements apply *mutatis mutandis* where a police person, social worker or authorised officer removes a child pursuant to a warrant issued by a commissioner in terms of section 11(5) of the Child Care Act, 1983.

There is concern that the current Form 4 procedure is being abused. As we have seen, this procedure allows for the removal of a child in need of care, without a warrant, 'if the delay in

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62 At the meeting with the officials from the Department of Social Development on 26 June 2001, it was recommended that the definition of 'authorised officer' in section 1 of the Child Care Act, 1983 be amended by the deletion of the words 'social worker or policeman'.

63 Section 12(1) of the Child Care Act, 1983.

64 Regulation 9(2)(a).

65 Regulation 9(2)(b)(i). If this period expires on any court day after 4pm, or on any day that is not a court day, the period is deemed to expire at 4pm on the next succeeding court day. If it expires before 4pm on a court day, the period is deemed to expire at 4pm on that day: Regulation 9(2)(b)(iii).

66 Section 12(2) of the Child Care Act, 1983.

obtaining the warrant will be prejudicial to the safety and welfare of the child'.[67] In practice, the tendency has developed to use the Form 4 in all cases, even in non-emergencies. At the meeting with officials from the Department of Social Development held on 26 June 2001 it was pointed out that social workers in private practice paid by interested parties are making placements as 'authorised officers' and also use the Form 4 procedure.[68] It was further pointed out that some commissioners of child welfare collude in the incorrect use of Form 4.

There also appears to be some confusion as to whether the military police[69] or municipal or metropolitan police officers,[70] on the wrong assumption that they are 'policemen', are entitled to remove children without a warrant in terms of section 12 of the Child Care Act, 1983. This prompted the meeting to recommend that the purpose and grounds for Form 4 removals be spelled out in far greater detail. The meeting further recommended that the police, social workers, or authorised officers should be held accountable for removing children in non-emergency cases under a Form 4 by having to explain to the court why it was necessary to use the Form 4 process in that particular instance.[71] The Department of Social Development is also considering linking the Form 4 process with the National Child Protection Register[72] in order to monitor the removals.

The Commission supports the recommendations made by the meeting with the officials from the Department of Social Development and supports amendments to section 12 of the Child Care Act, 1983 to spell out clearly that removals without a warrant are only to take place in emergency situations and in clearly defined circumstances. The

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67 See also Noel Zaal (1988) 105 **SALJ** 233; Ben van Huyssteen 'Verwydering van Kinders Sonder 'n Lasbrief: a 12 van die Wet op Kindersorg van 1983' (1989) 24 **The Magistrate** 15 at 17-18; AP du Plooy 'Die Prosedure vir die Verwydering van Kinders Ingevolge die Bepalings van die Wet op Kindersorg 74 van 1983' (1991) 26 **The Magistrate** 61 at 62-63; JA Robinson (1992) 55 **THRHR** 75-76.

68 See the definitions of 'accredited social worker' and 'social worker' in section 1 of the Child Care Act, 1983. Section 12 of the Act only provides for the police, 'social workers', and authorised officers to use the Form 4 process.

69 In **S v Robinson** 1986 (2) SA 458 (C) the Court held, having regard to the definitions of 'the force' and of 'member of the force' in section 1 of the Police Act 7 of 1958 (now repealed), that a military policeman was prima facie not a member of the police force. This position has not changed. See now the definition of 'member' and section 5(2) of the South African Police Service Act 68 of 1995, read with section 3(4) of the Defence Act 44 of 1957.

70 See, in this regard, sections 5 and 64 of the South African Police Service Act 68 of 1995. Members of the municipal police are also not members of the police force.

71 See also Chapter 23 (Courts) below on the possibility of the court issuing a 'personal accountability order' against such person. It has also been suggested that a process similar to the High Court Rule 43 process (sworn affidavits, notice to the other party, right of reply, summary hearing, etc) be adopted in Form 4 removals.

72 As provided for in Regulation 39B.

Commission recommends that officials who do remove children without a warrant should be held accountable to the court (and the court should report them to their professional organisations or superiors where appropriate) where children are removed in non-emergency situations under the Form 4 process. However, the Commission does concede that a major cause of the misuse of the Form 4 procedure relates to the high workloads of some courts, agencies and the Department of Social Development. This is another reason why better resourced children's courts and welfare services are needed.

The Commission further recommends that authorised officers, as well as (state) social workers and members of the SAPS, remain the only persons who may remove a child without a warrant to a place of safety in terms of the current section 12. While there are certainly situations where the court could authorise an interested third party such as a relative to remove a child to a place of safety, the Commission is of the opinion that it would be improper for a social worker in private practice being paid by an interested party to be so authorised. If this practice is continued, any person could simply pay a social worker in private practice to remove, without a warrant, a child to a place of safety. **The Commission therefore recommends that social workers in private practice be specifically excluded from the definition of 'authorised officer' in section 1 of the Child Care Act, 1983**.

° **Removal to a place of safety by the Director-General: Social Development**

In terms of section 42(2) of the Child Care Act, 1983 the Director-General may issue a warrant for the removal of a child to a place of safety or hospital where the Director-General has received notification from a dentist, medical practitioner, nurse, social worker, teacher or person employed by, or managing, a children's home, place of care or shelter, of such person's suspicion that the child he or she has examined, attended to or dealt with has been ill-treated, deliberately injured or is suffering from a nutritional deficiency disease. Upon receipt of the notification, the Director-General must immediately require the police officer, social worker or authorised officer to remove the child to a place of safety and bring him or her before a children's court.[73] The Director-General must also request a social worker or any other person to conduct a preliminary investigation into the circumstances giving rise to the notification. If this investigation reveals reasonable grounds to believe that the child has been ill-treated or deliberately injured, the Director-General may direct that the perpetrator be removed from direct

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73 Regulation 39A(2)(a).

contact with children, and that the matter be referred to the police with a view to possible prosecution of that person.[74]

The Commission does not recommend any amendments to section 42(2) of the Child Care Act, 1983.

6.4.2 Bringing children before the children's court

The Child Care Act 1983 provides for three ways[75] in which a child may be brought before a children's court.[76] First, any child removed to a place of safety by virtue of a children's court order, a warrant issued by the Director-General: Social Development or a commissioner, or authority issued by a policeman, social worker or authorised officer must be brought before the children's court of the district in which he or she was removed.[77] Second, a child may be brought before the children's court of the district in which he or she resides, or happens to be, by any policeman, social worker or authorised officer, or by a parent, guardian or other person having custody of the child, in circumstances where a children's court assistant is of the opinion that the child is need of care.[78] Third, where a child has been placed in the custody of his or her parents, guardian or custodian by order of a children's court order or by virtue of a ministerial transfer, the supervising social worker may bring such child before a children's court if such social worker is of the opinion that the conditions prescribed by the court or the Minister, as the case may be, have not been complied with.[79]

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74 Regulation 39A(3)(a).

75 Section 254 of the Criminal Procedure Act 51 of 1977 allows a criminal court to refer an accused child to the children's court in lieu of sentencing that child. This causes Matthias and Zaal (1996) **Acta Juridica** 51 at 52 to identify five different legal provisions which may be used to initiate proceedings that may lead to a children's court inquiry into whether a child should be removed.

76 Schäfer 'Young persons' in Clark (ed) **Family Law Service** Durban: Butterworths, par E129.

77 Where a child is removed to a place of safety by virtue of a children's court order, he or she must be brought before the children's court 'as soon as may be thereafter': section 11(1). A child removed by virtue of a warrant issued by a commissioner must remain at the place of safety 'until he can be brought before a children's court': section 11(2). A child removed by a policeman, social worker or authorised officer without a warrant in terms of Form 4, or by virtue of a warrant issued by the Director-General, must be brought before a children's court as soon thereafter as possible: section 12(2)(c) and Regulation 39A(2)(a).

78 Section 13(2) of the Child Care Act, 1983. It is not a jurisdictional prerequisite that the person who removes the child in these circumstances must make a formal allegation that such child is need of care: **Jordaan v Evans NO** 1953 (2) SA 475 (A).

79 Sections 15(2) and 34(1A)(b) of the Child Care Act, 1983. The social worker concerned must furnish the child's parents, guardian or custodian with an original copy of a notice in the form of Form 6A; a true copy must be handed to the children's court assistant.

In all cases, the children's court before which a child has been brought is required to conduct an inquiry to determine whether the child is in need of care.[80] The fact that the child is subject to an existing custody order does not preclude the court from conducting a section 13(3) inquiry and from making an appropriate order.[81] The court may not, however, make an interim custody order in terms of section 14(3) during any postponement of an inquiry which conflicts or competes with an existing High Court custody order.[82] Similarly, a children's court does not have jurisdiction to consider whether a child, not presently in need of care, might subsequently become in need of care.[83]

The children's court process in a removal case begins when the child first appears briefly before the court at the so-called 'opening' of the inquiry. At this stage, the child may already have been temporarily removed from his or her previous environment in terms of a Form 4 order. If so, then the commissioner will consider both the validity of the removal of the child and how (or whether) the child should be further detained pending the date of the actual enquiry in the children's court. If the commissioner decides upon an inquiry, then he or she must also ensure that a specific state department or welfare agency has been designated to undertake an investigation into the child's circumstances and to present a report at the inquiry recommending what should happen to the child. If the commissioner confirms detention pending the inquiry, then he or she must also check to see that accommodation in a place of safety has been found for the child.[84]

It has been pointed out that it is a matter of concern that the Child Care Act, 1983 does not provide the child with the clear right to express his or her views should he or she be able to so, even at the stage of the child's first appearance in the children's court.[85] The Commission has accordingly recommended that the new children's statute should be explicit in this regard and allow children the opportunity to express their views freely when able to do so.[86]

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80 Section 13(3) of the Child Care Act ,1983.

81 **Murphy v Venter** 1967 (4) SA 46 (O).

82 **Raath v Carikas** 1966 (1) SA 757 (W).

83 **Spence-Liversedge v Byrne** 1947 (1) SA 192 (N).

84 Matthias and Zaal (1996) **Acta Juridica** 51 at 53. See also Zaal and Matthias 'The child in need of alternative care' in C J Davel (ed) **Introduction to Child Law in South Africa** 116 at 120.

85 Matthias and Zaal (1996) **Acta Juridica** 51 at 53.

86 See 6.3.3 above.

Some child commissioners tend to allow a maximum of about eight weeks between the initial appearance or 'opening' and the date set down for the inquiry. The purpose of having a delay between the two dates is to allow the designated social worker to undertake an investigation into the circumstances of the child. However, research conducted by Matthias and Zaal[87] suggests that many commissioners tend not to insist upon an early date for the inquiry and sometimes even allow the social worker to choose the date of the final hearing. This tends to mean that the time period between the opening and finalisation of the inquiry can be anything from about eight weeks to sixteen weeks, and sometimes even longer. Obviously, any delay in finalising children's court inquiries is a matter of great concern, especially while the child 'languishes in a ... place of safety'.[88]

However, Matthias and Zaal also point out how the interim period is sometimes used:[89]

> Conscientious social workers try to use the interim period between the opening and finalisation of the children's court inquiry not merely to report on the circumstances of the child, but also to engage in what are termed 'reconstruction services' with the parents or guardian of the child in the hope of being able to recommend the happiest solution of all, namely, return of the child to his family group, rather than placement elsewhere. Even if the latter appears likely, some of the most reputable institutions ... require one-week trial attendance periods or psychological assessment reports which, again, a conscientious social worker will try to achieve during the interim period so that she is in a position to recommend placement in a good institution.

At the meeting with the officials of the Department of Social Development on 26 June 2001, it was recommended that there should always be a formal 'opening' of an enquiry, even in the absence of Form 4. It was further recommended that the children's court, at this initial hearing, should have the power to order the provision of certain services (such as family group conferencing) to the child and or its family, as interim measures. **The Commission supports these recommendations**.

6.4.3 Children 'in need of care'

In terms of the Child Care Amendment Act 96 of 1996, the primary ground for compulsory removal has been changed to the child being 'in need of care,' rather than the previous ground

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87 (1996) **Acta Juridica** 51 at 54.

88 Ibid. See also Zaal and Matthias 'The child in need of alternative care' in C J Davel (ed) **Introduction to Child Law in South Africa** 116 at 125.

89 Ibid 54 - 55. See also Zaal and Matthias 'The child in need of alternative care' in C J Davel (ed) **Introduction to Child Law in South Africa** 116 at 122 et seq.

which required that the parents be found 'unfit' or 'unable' to care for the child.[90] With this amendment, the legislature moved care proceedings from a predominantly fault or parent-based approach to a predominantly[91] child-centred approach. This dramatic shift may be defended as being in line with section 28(2) of the Constitution in terms of which a child's best interest is of paramount importance in every matter concerning the child.

However, it is arguable that children's best interests might most efficiently have been served by a balanced set of removal grounds. Both child and parent-centred approaches should have been equally allowed for in the Child Care Act. There is a view that the shift of focus from the 'unfit parent' to the child in need of care might be seen as a charter for parental irresponsibility.[92] At the same time there was prior to the 1996 amendment a strong body of opinion among social workers that the adversarial scenario which had been created by making the labelling of the parent the central focus of the proceedings was proving to be seriously counter-productive.[93]

Despite the criticisms mentioned above of the new South African legislation as going rather far in the direction of a child-centred approach, it must be conceded that a degree of secondary focus upon parental conduct has been retained in the 1996 amendment. For example, in the situation of child abuse the new section 14(4)(aB)(vi) uses, as an indication of a child being 'in need of care' as required by the Act, the fact that the child:

> has been physically, emotionally or sexually abused or ill-treated by his or her parent or guardian or the person in whose custody he or she is;[94]

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90 The latter provision is to be found in section 14(4)(b) of the Act in its previous form. The alternatives to this were that the child had no parent or guardian (section 14(4)(a)); or the parent or guardian could not be traced (section 14(4)(aA)). See also Sloth-Nielsen and Van Heerden (1996) 12 **SAJHR** 649 at 653.

91 D S Rothman (2001) 4.1 **The Judicial Officer** 4 at 8: 'All but one of the provisions of section 14(4) of the Act are actually "child-friendly", and that is the one that reflects against the child's behaviour in section 14(4)(Ab)(ii), thereby suggesting that the problem may lie with the child'.

92 Interview with five social workers from the Durban offices: Department of Social Welfare and Population Development on 10 March, 1995 and corroborated by Matthias **Removal of children and the right to family life: South African law and practice** (Community Law Centre, University of the Western Cape, 28 February 1997), p. 16, 56.

93 J Loffell 'Naming and blaming: Section 14(4)(b) of the Child Care Act' (1992) 5(1) **'Burning Issues': Social Work Practitioner-Researcher** 29 - 31. See also F N Zaal 'Child removal procedures under the Child Care Act: Some new dangers to contend with' (1988) 105 **SALJ** 224.

94 See section 5 of the Child Care Amendment Act 96 of 1996 as published in the Government Gazette vol 377 No 17606 of 22 November 1996.

The question of the extent to which removal grounds should be parent-centred, as opposed to child-centred, is a difficult one.[95] Sammon, writing from a Canadian perspective, appears to favour a parent-centred approach when he states that the 'central issue in protection proceedings' is the question 'are the individuals under scrutiny adequate parents?'[96] English law, on the other hand, is predominantly child-centred. A care order or a supervision order can only be issued in England if the court is satisfied 'that the child concerned is suffering or is likely to suffer, significant harm'.[97] However, English law has achieved a powerful and appropriate emphasis on parental responsibilities by making them a starting point in the Children Act 1989, and by giving attention to their definition and allocation.[98]

The Children (Scotland) Act 1995 uses a different concept. In Scotland, a child may be in *need of compulsory measures* if one of the following conditions is satisfied with respect to such child:[99]

- the child is beyond the control of any relevant person;
- the child is falling into bad associations or is exposed to moral danger;
- the child is likely to suffer unnecessarily, or is impaired seriously in his or her health or development, due to a lack of parental care;
- any of the offences against children to which special provisions apply has been committed against a child, or the child is likely to become a member of the same household as a child in respect of whom such an offence has been committed, or a person who has committed such an offence;
- the child is, or is likely to become, a member of the same household as a person in respect of whom a specified sexual offence has been committed;
- the child has failed to attend school regularly;
- the child has committed an offence;
- the child has misused alcohol, drugs or inhaled a volatile substance;

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95 See also Sloth-Nielsen and Van Heerden (1996) 12 **SAJHR** 247 at 258 - 260.

96 Sammon **Advocacy in child welfare cases. A practitioner's guide** (1985) 79.

97 Section 31 of the 1989 Children Act. For further discussion of this ground see Timms **Children's representation: a practitioner's guide** (1995) 143 .

98 See also section 1 of the Lesotho Children's Protection Act 6 of 1980 for use of the 'child in need of care' provision; section 4 of the Tasmanian Children, Young Persons and their families Act 1997, which uses the concept of a child 'at risk'.

99 Section 52 of the Children (Scotland) Act 1995.

•• the child is being *looked after*[100] by the local authority and special measures are necessary for the child's adequate supervision in that child's interest or the interest of others.[101]

The Commission, in adopting a child-centred approach, recommends retaining the use of the 'child in need of care' primary removal ground. In this regard, the Commission wishes to point out that a change in formulation to 'child in need of *alternative* care'[102] would limit section 14(4) to those situations where the child has been removed from the family environment. Such a limitation does not accord with the Commission's view that State intervention should be focussed on keeping the child within the family rather than to order the removal and placement of the child in alternative care.

If the detention of the child in the place of safety is confirmed, the next step is to bring the child before the children's court of the district in which the child resides or happens to be for the purposes of an inquiry to determine whether the child is a child 'in need of care'.[103] Here too the test is an objective one : the children's court must decide whether the child **is** in fact a child in need of care within the meaning of the Act.

In terms of section 14(4) of the Act,[104] the children's court holding an inquiry must determine whether the child in question is a child in need of care in that :

(a) the child has no parent or guardian; or

(aA) the child has a parent or guardian who cannot be traced; or

(aB) the child -

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100 See section 17(6) of the Children (Scotland) Act 1995 for a definition of this phrase.

101 On a comparative perspective, see further section 31(1) of the New Brunswick Family Services Act, 1983, ('the security or development of a child may be in danger'; section 22(2) of the Nova Scotia Children and Family Services Act, 1990, ('child in need of protective services'); section 37(2) of the Ontario Child and Family Services Act, R.S.O. 1990, c. C-11.

102 Zaal and Matthias 'The child in need of alternative care' in C J Davel (ed) **Introduction to Child Law in South Africa** 116 at 126 argue that the legal designation 'in need of care', as used in the Child Care Act, is not ideal as all children are in need of care and they point out that most children do not need statutory intervention in the form of care proceedings. The authors therefore recommend the use of formulation 'in need of alternative care' as more appropriate and in accordance with section 28 of the Constitution.

103 Section 13(1).

104 As amended by section 5 of Act 86 of 1991 and by sections 5(b) - (d) of Act 96 of 1996. See further Sloth-Nielsen and Van Heerden (1996) 12 **SAJHR** 649 at 653-4; F N Zaal 'Child removal procedures under the Child Care Act: Some new dangers to content with' (1998) 105 **SALJ** 224 et seq.

(i) has been abandoned or is without visible means of support;

(ii) displays behaviour which cannot be controlled by his or her parents or the person in whose custody he or she is;

(iii) lives in circumstances likely to cause or conduce to his or her seduction, abduction or sexual exploitation;

(iv) lives in or is exposed to circumstances which may seriously harm the physical, mental or social wellbeing of the child;

(v) is in a state of physical or mental neglect;

(vi) has been physically, emotionally or sexually abused or ill-treated by his or her parents or guardian or the person in whose custody he or she is; or

(vii) is being maintained in contravention of section 10.

The Commission recommends that the criteria in terms of which a child may be found to be in need of care as listed in section 14(4) of the Child Care Act be retained and supplemented. In this regard, the Commission recommends that the wilful failure of a person who has parental rights and responsibilities in respect of a particular child to fulfil his or her parental rights and responsibilities in respect of that child should constitute a criteria for finding a child in need of care.[105] In line with the Commission's recommendation that section 10 of the current Child Care Act, 1983, be repealed and be dealt with under the adoption regime, the Commission also recommends that section 14(4)(aB)(vii) be repealed.

However, **the Commission wishes to point out that finding a child to be in need of care should not necessary constitute a ground for removal of that child** - indeed, under the new children's statute the aim should rather be to support that child and his or her family in order to ensure that that child remains with its family.

It deserves pointing out that clause 70(2) of the Child Justice Bill in the Commission's **Report on Juvenile Justice**[106] provides for referral of a matter from the child justice court to the children's court when it becomes evident that a child has been assessed on more than one occasion in regard to 'minor offences committed to meet the child's basic need for food and

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105 See 8.6 below on the suspension and termination of parental rights and responsibilities.

106 Project 106: Juvenile Justice, July 2000.

warmth' and is on the present occasion before the child justice court again alleged to have committed or proved to have committed such a (survival) offence. Similarly, the matter must be referred to the children's court where the child does not live at home or in appropriate substitute care and is alleged to have committed a minor offence, the purpose of which was to meet the child's basic need for food and warmth. Obviously, these referrals would require a children's court inquiry into the question of whether that child is a child in need of care.

At the meeting with the officials of the Department of Social Development on 26 June 2001, it was pointed out that the Department of Social Development is envisaging linking the criteria listed in section 14(4)(aB) (the 'child in need of care'-criteria) to the National Child Protection Register.[107] In this regard, it was pointed out that the mandated reporting provision and the registration process be confined to cases involving actual or suspected physical injury, sexual abuse, severe neglect which appears to be intentional, and child labour. The meeting noted that section 14(4)(a) allows for the possibility that a children's court may find a whole family of children, in the child-headed household scenario, in need of care and therefore subject to possible removal. The meeting also recommended that the lack of visible means of support,[108] i.e. poverty, should remain a ground for finding a child in need of care, although in most cases supportive services rather than children's court processes should preferably be used.

The Commission does not support linking the criteria for reporting, in terms of the mandatory reporting provisions,[109] to the 'child in need of care'-criteria, as these will serve different purposes and need to be tailored accordingly. The idea is specifically to restrict the mandatory reporting function to clearly defined serious protection issues, and these need to be categorised much more specifically in a section of the new children's statute dealing with reporting and registration. The section 14(4) criteria on the other hand, need to be broad enough to take in many situations, hence as they stand they apply to too many children who never will or should come before the courts.[110]

The Commission, however, does recommend that all children's court cases be recorded as a separate component of the National Child Protection Register. Statistics in this regard would be of great value for planning and resourcing - the type of order made

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107 Provided for in Regulation 39B of the regulations to the Child Care Act, 1983. See further 10.5 below.

108 Section 14(4)(aB)(i) of the Child Care Act, 1983.

109 Section 4 of the Prevention of Family Violence Act 133 of 1993; section 42 of the Child Care Act, 1983.

110 Where would one start and stop if every child experiencing physical or mental neglect had to be reported?

would be of important to know in addition to the grounds upon which the order was made. At present no-one knows e.g. how many children are being committed to foster care annually by the courts. This would require an amendment to Regulation 39B of the regulations to the Child Care Act, 1983.

Proper notice of the pending inquiry in the children's court must be given to the parents, guardian or custodian of the child, who are required to attend the inquiry.[111] Failure to give such notice may constitute an irregularity vitiating the proceedings.[112] The inquiry takes place in camera, if possible in a room other than an ordinary court room and the procedure is generally less formal than that followed at a trial.[113] However, as children's courts are courts of law, the ordinary rules of procedure and evidence must be observed, unless departure from such rules is specifically authorised.[114] One notable example of such a departure is the court's power to receive and take action upon the reports of social workers, despite the fact that these reports often contain hearsay statements and opinions.[115] The parents[116] or adoptive parents of the child concerned, the child himself or herself, the respondent and any other person who, in the opinion of the commissioner, 'has a substantial interest in the proceedings' are all parties to the proceedings, having the same rights and powers to examine witnesses, adduce evidence and address the court as a party to an ordinary civil action in a magistrate's court.[117]

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111 Sections 13(5)(a) and (b) of the Child Care Act, 1983.

112 See, for example, **Weepner v Warren and Van Niekerk NO** 1948 (1) SA 898 (C); **Philips v Commissioner of Child Welfare, Bellville** 1956 (2) SA 330 (C); **Snyder v Steenkamp** 1974 (4) SA 82 (N); **J and Another v Commissioner of Child Welfare, Durban** 1979 (1) SA 219 (N); **"S" v Kommissaris van Kindersorg, Brakpan** 1984 (3) SA 818 (T).

113 Sections 8 and 9.

114 See **Napolitano v De Wet NO** 1964 (4) SA 337 (T) at 342F, 344A; **Snyder v Steenkamp** 1974 (4) SA 82 (N) at 87 D-H. At inquiries to determine whether a child is in need of care, the child, his or her parent(s) or adoptive parent(s), any respondent and any other person permitted by the commissioner to join the proceedings, have the same rights and powers as a party to a civil action in a magistrate's court in respect of the examination of witnesses, the production of evidence and the right to address the court: Regulation 4(1).

115 See **Napolitano v De Wet NO** 1964 (4) SA 337 (T) at 343-344 and Regulations 5(1) and (2).

116 In the case of **Fraser v Children's Court, Pretoria North and Others** [1996] 3 All SA 273 (T), Preiss J held that the natural father of an extra-marital child is a 'parent' within the meaning of Regulation 4(1) and, as such, vested with the rights and powers of a party to a civil action in a magistrate's court in respect of the examination of witnesses, the production of evidence and of addressing the court (at 283a - 285d).

117 Regulations 4(1) and (2).

If the children's court concludes that the child before it is indeed a child in need of care, it may make one of the following orders :[118]

(a) that the child be returned to the custody of his or her parents (or, if the parents are divorced or separated, of the parent designated by the court), guardian or custodian, under the supervision of a social worker and subject to such conditions as the court may impose on the child, parent/s, guardian or custodian;[119]
(b) that the child be placed in the custody of a suitable foster parent under the supervision of a social worker;[120]
(c) that the child be sent to a children's home designated by the Director-General; or
(d) that the child be sent to a school of industries designated by the Director-General.[121]

If the child is to be removed the range of court options is limited. The children's court can order that the child be placed in the custody of any suitable person who is available to serve as a foster parent; secondly, in a children's home, or, as its last resort, in a school of industries.

As suggested by numerous respondents and at the meeting with the officials of the Department of Social Development on 26 June 2001, it was agreed that the children's court needs broader powers. In this regard it was suggested that the children's court, in addition to its existing powers, should have the power to make interim orders; to order family group conferences and similar processes; to order the child, parents or other family members to undergo any form of assessment which the court deems necessary and to engage in therapy or treatment or any appropriate form of service;[122] to order the payment of maintenance; to limit the access of a parent or other family member to a child; to order the placement of a child in a facility registered by the Department of Health or Education if this is the best available option (e.g. school for the deaf or for children with cerebral palsy); to order the removal of an abusive parent or other family member from the child's home; and to order temporary emergency relief in the form of

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118 See also Zaal and Matthias 'The child in need of alternative care' in C J Davel (ed) **Introduction to Child Law in South Africa** 116 at 127et seq.

119 If such conditions are not complied with, the social worker may bring the child before the court again and it may vary its order so as to deal with the child in any of these different ways : section 15(2).

120 On foster care in general, see Chapter 17 below.

121 Section 15(1).

122 At present, the children's court can give instructions in regard to a parent or guardian only where the child is to be left with that person. See Regulation 13 of the Child Care Act and Matthias and Zaal (1996) **Acta Juridica** 51 at 59.

a grant in some instances. **The Commission is recommending that the powers of the children's court be extended**.[123]

A designation of a children's home may not be made by the Director-General unless the management of the home in question agrees to admit the child concerned.[124] Once the Director-General has designated a children's home or school of industries, he or she must immediately notify the relevant commissioner of child welfare and social worker of the particulars of the designation.[125] The commissioner of child welfare must then arrange for the child to be taken to the designated children's home or school of industries.[126] If the Director-General cannot make the designation for whatever reason, he or she must without delay furnish the Minister with a report in connection with the child concerned and, after considering this report, the Minister may transfer the child to any other custody or institution or discharge the child from the place of safety where he or she is.[127]

A deficiency in the Act which adversely affects the efficacy of the work of the children's courts is the lack of control that they have over reviewing, changing or even implementing their court orders. Particularly when the children's court orders that the child be placed in an institution, there can be a delay or even failure in implementation of the children's court order because officials who work under the Director-General of Social Development are not answerable to the children's court. Unfortunately, sometimes it takes so long for these officials to find a place for the child that even after two years (which is the longest period that a children's court order can run for) the child is still languishing in a place of safety awaiting placement.

The legislature has recognised this problem, but has not effectively solved it. The response of the legislature was to promulgate an amendment to section 15 of the Act in 1991. This amendment permits the Minister to change the type of institutional placement ordered by the children's court without even referring back to the children's court. And further, where there has been a failure to secure a placement for the child before the final day of the children's court order, the amendment to section 15 permits the Minister to release the child.[128] It is submitted

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123 See Chapter 23 below.

124 Regulation 11(3).

125 Regulation 11(4).

126 Regulation 12(1).

127 Section 15(5).

128 Sections 15(5)(a) and (b) of the Act.

that this provision, which allows the Minister to entirely disregard the placement order of a children's court, is unconstitutional. In terms of section 28(1)(b) of the Constitution every child has the right 'to family care, parental care, *or appropriate alternative care when removed from the family environment*'.[129] It would seem that a removed child's constitutional right to 'appropriate alternative care' will not be fulfilled if the officials of the Minister do not place the child in an institution as directed by the children's court, and simply leave him or her to languish in the original place of safety until the effluxion of the children's court order.

However, the fact that section 28(1)(b) of the Constitution may eventually be used to counter this problem is not sufficient. The children's courts must be given far greater powers to review and amend their own placement orders than they currently have. Obviously, a change of circumstances may render a placement no longer appropriate for the child concerned. Also, children, particularly those placed in institutions, often encounter horrendous conditions such as bullying or other forms of abuse in which even their most basic human rights are regularly disregarded. Unfortunately, at present neither the staff of institutions nor the social workers who work with such children nor even the officials who work under the direction of the Minister for Education or Minister for Social Development are really accountable in a practical and effective way.

In view of the problems noted above it would seem necessary to amend the Act in such a way as to achieve both a channel of communication for children in need of care and more accountability for the adults who control them. One way to do this might be to give the courts the power or even duty to monitor certain of their child placement orders by having the child brought back to court at regular intervals. The child should also be able to demand to return before the courts on the basis of a prima facie case of a complaint or need for variation. Legislative provisions of this kind will help to give children a real voice, and will subject those adults who deal with them to a valuable and ongoing scrutiny from an authoritative, entirely independent source.

Staff under the authority of the Minister for Education and the Minister for Social Development currently have extensive powers to deal with children. In the case of children who are the subject of children's court orders, these powers should be greatly reduced. Instead, it is the

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129 Our emphasis.

courts which should be given the power to monitor and, if necessary, amend their own orders.[130] It needs to be enacted that child care orders of the court are mandatory and must be implemented within a stipulated deadline. Consideration could be given to possible sanctions for failure to meet such deadlines.

Subject to the provisions of section 34 (ministerial powers to transfer children from one custody or institution to another), a children's court order lasts for a maximum period of two years or for such shorter period as the court may have determined.[131] The order will then lapse unless the Minister extends it for a further period or periods not exceeding two years at a time - any such extension cannot, however, operate after the day on which the child turns 18.[132] If necessary, the Minister may also order that any former pupil of or pupil in a school of industries whose 'period of retention' therein has expired or is about to expire, return to or remain in that school of industries for such further period as he or she may fix. This period may be extended by the Minister from time to time, but no such order or extension may last beyond the end of the year in which the pupil turns 21 years of age.[133]

In order to enable such a child or pupil to complete his or her education or training, the Minister has the power, on the application of or with the consent of a foster child or former foster child or pupil and his or her parents (if they can be traced) to approve that the foster child or pupil concerned should remain in the custody of the relevant foster parent or institution after he or she has turned 18 years old, or has been discharged by ministerial order, or after the relevant children's court placement order has lapsed without being extended by the Minister.[134]

Section 34 empowers the Minister to transfer children from one custody or institution to another. When the Minister acts under this section to effect such a transfer in the case of a child to whom a children's court order applies, then the court order is deemed to have been varied by the Minister's order.[135] The Minister is also empowered to order, at any time, that a child be

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130 For a more detailed discussion see Matthias and Zaal 1996 **Acta Juridica** 62-66; Zaal and Matthias 'The child in need of alternative care' in C J Davel (ed) **Introduction to Child Law in South Africa** 116 at 127 et seq.

131 Section 16(1).

132 Section 16(2).

133 Section 16(3). However, see the discussion in 4.5 above in respect of the protection of persons in the age group 18 to 21 years.

134 Section 33(3). See also Chapter 19 (Residential Care) below where it is recommended that the protection be extended **to the end of the year in which the child turns 18** years of age.

135 Section 34(2).

discharged from an institution or custody, if he or she 'considers it desirable in the interests of the child' in question.[136] Finally, a commissioner of child welfare who considers it desirable that a child be removed from the institution or custody in which he or she is without delay may order that such child be taken to a place of safety pending the Minister's decision as to his or her future.[137] There is no stated requirement that such decisions must be taken in the best interests of the child, nor is there any opportunity provided for the child to express an opinion about these decisions. This is quite simply unacceptable, and the provision in the U N Convention on the Rights of the Child[138] for the child's right to express his or her views should be inserted in the new children's code as a matter of principle. In any event, a better proposal developed by Matthias and Zaal,[139] is that the children's court itself should be granted the necessary power to review its decisions after a set period to ensure that the best interests of the child are still being met.

The effect of a children's court order placing a child in an institution or in the custody of a person other than his or her parent or guardian is to divest the parent or guardian of his or her rights of control over and custody of the child, transferring these rights (including 'the right to punish and to exercise discipline') to the management of the institution or the custodian concerned.[140] A parent retains his or her common-law right of access to the child, however,[141] as also the power to deal with the child's property, the power to consent to the child's marriage and the power to consent to an operation or medical treatment entailing serious danger to life.[142]

Where the children's court places the child in the custody of his or her parent(s) or guardian under the supervision of a social worker, the parent(s) or guardian must exercise his, her or their parental control over the child in accordance with the directions received from the supervising social worker.[143]

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136 Section 37.

137 Section 36(2).

138 Article 12.

139 (1996) **Acta Juridica** 51 at 62 - 64. See also Sloth-Nielsen and Van Heerden (1996) 12 **SAJHR** 247 at 260.

140 Section 53(1).

141 See **Van Schoor v Van Schoor** 1976 (2) SA 600 (A).

142 Section 53(3).

143 Section 53(2).

Previously no appeal lay against a children's court finding that a child is in need of care or against any placement order made by a children's court.[144] However, section 16A[145] of the Child Care Act, 1983 now allows for an appeal against any order made or any refusal to make such an order to any competent division of the High Court of South Africa.

An aggrieved party or the commissioner himself or herself may also bring the matter before the High Court on review. The High Court will not interfere with the commissioner's decision upon the merits, but may set it aside if there was such irregularity in the proceedings that the applicant or the child may possibly be prejudiced thereby.[146]

6.4.4 Children placed with persons other than their parents or custodian

The Child Care Act 1983 recognises, in the absence of any evidence to the contrary, that children are best cared for by their parents. To this end, section 10 of the Child Care Act, 1983[147] prohibits any person other than the managers of certain specified institutions[148] or certain specified relatives[149] to receive any child under the age of 7 years or any child 'for the purpose of adopting him or her or causing him or her to be adopted' and care for such child apart from his or her parents or custodian for longer than 14 days unless such person has applied for the adoption of the child concerned or, in the case of the first-mentioned category of child, has obtained the consent in writing of the commissioner of child welfare of the district in which the child was residing immediately before he or she was received. In considering an application for such consent, the commissioner must have regard to the religious and cultural

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144 See, for example, **Jordan v Evans NO** 1953 (2) SA 475 (A) at 478; **Ex parte Commissioner of Child Welfare : In re Schmidt** 1956 (4) SA 787 (T) at 789 B; **Young v Swanepoel and Others** 1990 (2) SA 54 (C) at 57C-F.

145 This section was inserted by section 2 of Act 13 of 1999.

146 See, for example, **Weber v Harvey NO** 1952 (3) SA 711 (T); **Jordan v Evans NO** 1953 (2) SA 475 (A); **Ex parte Commissioner of Child Welfare : In re Schmidt** 1956 (4) SA 787 (T); **Ex parte D** 1958 (2) SA 91 (GW); **Ex parte Kommissaris van Kindersorg : In re Steyn Kinders** 1970 (2) SA 27 (NC); **Malan v Commissioner of Child Welfare, Witbank** 1973 (4) SA 508 (T); **Snyder v Steenkamp** (supra); **Gold v Commissioner of Child Welfare, Durban** 1978 (2) SA 301 (N).

147 As amended by section 3 of Act 96 of 1996 and by section 1 of the Welfare Laws Amendment Act 106 of 1997.

148 Namely, maternity homes, hospitals, places of safety or children's homes: section 10(1).

149 Namely, the grandparent, sibling (whether of the full or of the half blood), uncle or aunt of the child in question (provided such relative is over the age of 18 years), as also so-called 'designated relatives' as provided for in section 10(4) : section 10(1)(iii). Section 10(4) provides that the Minister may determine that a person who is a spouse of one of the abovementioned relatives of the child or who *'is related to a child in the third degree of affinity or consanguinity'* is such a 'designated relative' for the purposes of section 10(1)(iii)(b).

background of the child concerned as against that of the applicant.[150] It has been held, however, that, as section 10 does not provide for any penalty for the contravention of the provisions thereof, such contravention does not constitute an offence for the purposes of the Child Care Act.[151]

At the meeting with officials from the Department of Social Development it was said that section 10 should ideally be incorporated with the provisions on adoption. It was said that section 10, outside the adoption sphere, serves little purpose in practice as large numbers of children are living apart from their parents or are being cared for by persons other than the defined category of family members or 'designated relatives' for long periods of time. This is especially the case in the rural areas where children are sometimes left either on their own or with strangers while the parents search for employment. The meeting accordingly recommended that the parts of section 10 dealing with adoption be incorporated under the current section 18 of the Child Care Act, 1983. **The Commission agrees with this proposal and recommends that section 10 be repealed and that the parts of the section relating to adoption be incorporated under the general adoption provisions**.[152]

Comments are invited as to which further legislative amendments can be affected to prevent trafficking in children.

6.4.5 Ill-treated and abandoned children; children whose parents fail to maintain them properly

There does not exist an offence called 'child abuse' in South African law. However, provisions in the Child Care Act, 1983, other legislation such as the Sexual Offences Act, 1957, and the common law prohibit various criminal acts such as rape and assault that can be classified under the umbrella term 'child abuse'.

In terms of section 50(1)(a) of the Child Care Act, 1983,[153] for instance, any parent or guardian of a child or any person having the custody of a child who ill-treats that child or allows him or her to be ill-treated, is guilty of an offence. An offence is also committed by 'any other person'

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150 Section 10(2), read with section 40.

151 See **S v La Grange** 1991 (1) SACR 276 (C) at 278-279.

152 See further 16.4 and 18.6.3 below.

153 As amended by section 18(a) of Act 86 of 1991.

who ill-treats a child. 'Ill-treatment' is not defined in the Act and appears to include ill-treatment by omission.[154] The fact that the accused's conduct constitutes the common-law crime of assault does not prevent it from also amounting to a contravention of section 50(1)(a).[155] As regards the offence of 'allowing ill-treatment', this section appears to impose a duty on a parent or guardian of a child or a person having custody of a child to prevent such child from being ill-treated by any other person.[156]

'Abandonment' of a child by a parent or guardian or the person having custody of the child also constitutes an offence.[157] Either a wilful omission[158] or a wilful commission[159] can constitute abandonment. It has, however, been held that it is only in exceptional circumstances that a parent who leaves his or her child with the other parent will be guilty of 'abandonment' in terms of this section.[160]

Any person legally liable to maintain a child who, while able to do so, fails to provide that child with adequate food, clothing, lodging and medical aid, is also guilty of an offence.[161]

The maximum penalties upon conviction for any offence in terms of section 50 are a fine of R20 000,00 or imprisonment for a period of five years or both such fine and such imprisonment.[162]

Children do have the constitutional right to be protected from 'maltreatment, abuse, neglect or degradation'. It therefore follows that should this right be infringed, appropriate relief should be provided to such children. It also gives justification for criminalising the acts of those parents or care-givers who wilfully infringe this right. **The Commission therefore recommends that section 50(1)(a) of the Child Care Act be amended by substituting the word 'ill-treats' with the words 'maltreats, abuses, neglects or degrades'. It is not considered necessary to**

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154 See **S v Maree** 1990 (3) SA 365 (C) at 370D-E. Cf **S v B en 'n Ander** 1994 (2) SA 237 (EC).

155 See **S v Lamprecht** 1977 (1) SA 246 (EC) at 248.

156 See FFW van Oosten and AL Louw 'Children, Young Persons and the Criminal Law' in JA Robinson (ed) **The Law of Children and Young Persons in South Africa** (1997) 119 at 139-140.

157 Section 50(1)(b).

158 See, for example, **R v Kruger** 1943 OPD 111 at 112-113.

159 See, for example, **S v Gadebe** 1971 (1) PH H (S) 37 (T); **S v Khumalo** 1995 (2) SACR 660 (W).

160 **S v Mnyankama** 1992 (1) SACR 43 (C).

161 Section 50(2).

162 Section 50(3).

define the concepts 'maltreatment, abuse, neglect or degradation' in the new children's statute.[163] Maltreatment is not limited to physical injury but includes emotional and psychological harm and abuse.

It must also be pointed out that the physical, emotional or sexual abuse or maltreatment of a child by a parent or guardian constitutes a ground for finding a child in need of care, and therefore a ground for removal, in terms of section 14(4)(aB)(vi) of the Child Care Act, 1983.[164] **The Commission recommends that the abuse or maltreatment of a child by a parent or guardian should remain a ground for finding a child in need of care**.

6.4.6 Reporting of suspected instances of ill-treatment, abuse or undernourishment of children

Both the Prevention of Family Violence Act 133 of 1993 and the Child Care Act, 1983 impose obligations to report the suspected ill-treatment and abuse of children.[165] Section 42(1) of the Child Care Act requires any person who examines, attends or deals with a child in circumstances giving rise to the suspicion that the child has been ill-treated or deliberately injured or suffers from a nutritional deficiency disease, immediately to notify the Director-General or any officer designated by him or her for this purpose, of those circumstances. The Director-General or the designated officer may then order the removal of the child concerned to a hospital or a place of safety,[166] and must thereafter arrange that the child and his or her parents receive such treatment as may be determined by the Director-General or the said officer.[167] Although failure to comply with these reporting obligations constitutes an offence,[168] the classes of obligated reporters are exempt from all liability (both civil and criminal) in respect of any notification given in good faith in accordance with section 42.[169]

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163 See also 10.2.2 below.

164 See 6.4.3 above.

165 See also section 6A of the Aged Persons Act 81 of 1967 for a reporting obligation in a different context.

166 Section 42(2).

167 Section 42(3).

168 Punishable upon conviction by a fine not exceeding R4 000,00 or imprisonment for a period not exceeding one year or both : section 42(5), read with section 58).

169 Section 42(6).

In terms of section 4 of the Prevention of Family Violence Act 133 of 1993, any person who examines, treats, attends to, advises, instructs or cares for any child in circumstances which ought to give rise to the reasonable suspicion that such child has been ill-treated, or suffers from injury the probable cause of which was deliberate, must immediately report such circumstances to a police official, a commissioner for child welfare, or a social worker. Failure to comply with the reporting obligation constitutes a criminal offence.[170] With the repeal of section 6 (which criminalised the failure to report) of the Prevention of Family Violence Act 133 of 1993 by the Domestic Violence Act 116 of 1998, it would appear that the reporting obligation in the Prevention of Family Violence Act 133 of 1993 was deprived of any teeth. **The Commission therefore has no hesitation in recommending the repeal of section 4 of the Prevention of Family Violence Act 133 of 1993**.

The Commission's discussion paper on **Sexual Offences: Process and Procedure**[171] highlights another anomaly pertaining to the non-reporting of prohibited sexual abuse of girls under 16 years of age which is justified in terms of the confidentiality provision[172] of the Termination of Pregnancy Act 92 of 1996. Some medical practitioners are said to be performing terminations of pregnancy on girls under 16 years of age (who are technically victims of 'statutory rape')[173] and do not report such suspected cases of abuse in terms of the Child Care Act, 1983 on the basis that they are obliged to keep the identity of women seeking terminations of pregnancy in confidence. **The Commission is of the opinion that such instances of suspected sexual abuse must be reported in terms of the current law and would recommend that it be made clear in the new children's statute that this reporting obligation exists where there are reasonable grounds to suspect sexual abuse despite the confidentiality provision in the Termination of Pregnancy Act 92 of 1993**.

Mandatory reporting of child abuse is dealt with comprehensively in Chapter 10 below. It is pointed out there, in a context where there is a serious lack of backup resources, mandatory reporting can increase the vulnerability of children, and set them up for secondary abuse. To date the range of people required to report has been repeatedly expanded, without the necessary attention to the limitations of the child protection system which is supposed to be responding to reports. Further, we have two separate and unco-ordinated laws governing

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170 Section 6(2) of the Prevention of Family Violence Act 133 of 1993.

171 See 6.9.3. above.

172 Section 7 of the Termination of Pregnancy Act 92 of 1996.

173 As it is defined in section 14(1) of the Sexual Offences Act 23 of 1957.

reporting, and a lack of proper procedures associated with either of them. The outcome of this is that confusion abounds, many people are ignoring the law, and the system is not working at all in most of the country.

6.4.7 Necessary medical operation or treatment of children[174]

Where an operation or any treatment requiring parental consent is considered necessary for a child, and the parent or guardian refuses to consent, or cannot be found, or is mentally unable to give consent, or is deceased, then the Minister may consent in his or her stead.[175] The Minister acts on the report to this effect of a medical practitioner, provided that the Minister agrees with the opinion of the medical practitioner that the operation or treatment is indeed necessary. In an emergency situation, where the medical superintendent of a hospital (or the medical practitioner acting on his or her behalf) is of the opinion that an operation or medical treatment is necessary to preserve the child's life or to save him or her from serious and lasting injury or disability, and that the need for the operation or treatment is so urgent that it ought not to be deferred to obtain parental consent, such medical superintendent or practitioner may himself or herself supply the necessary consent.[176]

In both the above cases, the person who is obliged to maintain the child is liable for the cost of the operation or treatment.[177]

In terms of section 53(4) of the Child Care Act, 1983, if the head of an institution or the person in whose custody a pupil or child is, has reasonable grounds for believing that the performance of an operation upon or the provision of medical treatment to the pupil or child is necessary to preserve the life of the child or to save such child ‘from a serious and lasting physical injury or disability and that the need for the operation or medical treatment is so urgent that it ought not to be deferred for the purpose of consulting the parents or guardian of the pupil or child, or the Minister’, the head of the institution or the person concerned may authorise its performance upon or provision to the pupil or child.

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174 See also Chapter 11 below.

175 Section 39(1).

176 Section 39(2), as substituted by section 14 of Act 96 of 1996.

177 Section 39(3).

6.4.8 Commercial sexual exploitation[178]

The aim of section 50A in the Child Care Act, 1983[179] on commercial sexual exploitation is to protect children subject to this form of abuse.[180] 'Commercial sexual exploitation' is defined as the 'procurement of a child to perform a sexual act for a financial or other reward payable to the child, the parents or guardian of the child, the procurer or any other person'. The definition is in keeping with the definition agreed upon at the Stockholm World Congress.

The offence of commercial sexual exploitation of children is regulated by a new section 50A. This section reads as follows:

> (1) Any person who participates or is involved in the commercial sexual exploitation of a child shall be guilty of an offence.
> (2) Any person who is an owner, lessor, manager, tenant or occupier of property on which the commercial sexual exploitation of a child occurs and who, within a reasonable time of gaining information of such occurrence fails to report such occurrence at a police station, shall be guilty of an offence.
> (3) Any person who is convicted of an offence in terms of this section, shall be liable to a fine, or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

Two components of the section are intended to strengthen protection for children who are subject to commercial sexual exploitation. The first is by the creation of an offence to criminalise participation in the commercial sexual exploitation of a child. This makes the client's actions subject to criminal sanctions, in sharp contrast to the situation under the Sexual Offences Act 23 of 1957. Secondly, subsection (2) targets the owner, lessor, manager or occupier of property on which child prostitution is taking place who, whilst being aware of such occurrences, fails to report this to the police.

The definition of 'commercial sexual exploitation' is obviously critical. The definition as adopted in the Child Care Act refers to the notion of procurement of a child, a concept which does not appear elsewhere in the Act, but one which echoes the terminology of section 9 of the Sexual Offences Act 23 of 1957. The dictionary definition of procurement is the acquisition or obtainment or getting of something (in this instance a child's sexual services). However, the

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178 See also 22.5.4 below in regard to trafficking of children for purposes of commercial sexual exploitation.

179 The section was inserted by means of the Child Care Amendment Act 13 of 1999.

180 See also sections 9 and 20 of the Sexual Offences Act 23 of 1957.

meaning of procurement in the context of section 9 of the Sexual Offences Act has not yet been the subject of judicial consideration. This may be problematic in interpreting the new definition and offences created by the amendment to the Child Care Act.

The provisions on the commercial sexual exploitation of children in the Child Care Act, 1983 are critically analysed by the Commission in its discussion paper on **Sexual Offences: The Substantive Law**. For present purposes the Commission does not need to go any further save to **recommend that section 50A of and the definition of 'commercial sexual exploitation' in the Child Care Act, 1983 be repealed** as this issue will be comprehensively dealt with in the new sexual offences legislation.[181]

6.4.9 Unlawful removal of children

Two sections in the Child Care Act, 1983 have as their focus the protection of children from unlawful removal after they have been placed in statutory care. Sections 51 and 52 of the Act read as follows:

> 51 **Unlawful removal of children**
>
> Any person who abducts or removes any child or pupil, or directly or indirectly counsels, induces or aids any child or pupil to abscond from any institution, place of safety or custody in which the child or pupil was lawfully placed, or knowingly harbours or conceals a child or pupil who has been so abducted or removed or has so absconded, or prevents him from returning to the institution, place of safety or custody from which he was abducted or removed or has absconded, shall be guilty of an offence.
>
> 52 **Unlawful removal of foster child or pupil from Republic**
>
> Any person who without the approval of the Minister removes a foster child or pupil from the Republic shall be guilty of an offence.

The Commission recommends that these two provisions be retained in the new children's statute.

6.4.10 Child labour

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181 See also **Discussion Paper 85: Sexual Offences: The Substantive Law**.

Child labour is dealt with extensively in Chapter 13 below. For present purposes it suffices to say that despite the fact that child labour is a serious problem in South Africa, the statutory provisions regulating child labour are not very extensive.[182] In terms of both section 52A of the Child Care Act[183] and section 43 of the Basic Conditions of Employment Act 75 of 1997, it is a criminal offence to employ a child under the age of 15 years.[184] Section 43 of the latter Act also makes it a criminal offence to employ a child in employment '(a) that is inappropriate for a person of that age; (b) that places at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development'. Subject to the South African Constitution, all forced labour is prohibited and a person who, for his or her own benefit or for the benefit of someone else, causes, demands or imposes forced labour commits an offence.[185]

As far as the Child Care Act is concerned, the Minister may, on conditions determined by him or her, by notice in the Gazette exclude any employment or any work from the provisions of section 52A(1).[186] Exemption from the provisions of section 52A(1) may also be granted by the Minister to 'any particular person, or persons generally'.[187] In what has been described as a 'laudable attempt to curtail the Minister's discretion',[188] previous attempts at amending the Child Care Act, 1983 removed or curtailed the Minister's power to grant blanket exceptions for categories of work (such as farm labour). However, these attempts came to nought and it has been suggested that the general overriding conditions which are to govern all child labour should be contained in the new children's statute, rather than in the regulations, as was the case with the June 1995 draft Bill. Sloth-Nielsen and Van Heerden[189] argue that these conditions, aimed at ensuring that child employment or work neither exploit the child, nor place

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182 Although extensive new provisions concerning child laboured appeared in two draft Bills prior to the adoption of the Child Care Amendment Act 96 of 1996. See further Sloth-Nielsen and Van Heerden (1996) 12 **SAJHR** 247 at 261-2 in this regard.

183 As inserted by section 19 of Act 86 of 1991.

184 Or, in terms of section 43(1)(b) of the latter Act, to employ any child who is under the minimum school-leaving age in terms of any law, if this is 15 years or older (see section 31(1) of the South African Schools Act 84 of 1996 in this regard).

185 Section 48 of the Basic Conditions of Employment Act 75 of 1997.

186 Section 52A(2)(a). So, for example, in 1994, the advertising industry was thus exempted (GN R723 in GG 15639 of 22 April 1994).

187 Section 52A(2)(b). See further Sloth-Nielsen and Van Heerden 'Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Legal Developments in South Africa' (1996) 12 **SAJHR** 247 at 261-262.

188 By Sloth-Nielsen and Van Heerden (1996) 12 **SAJHR** 247 at 261.

189 (1996) 12 **SAJHR** 247 at 262.

at risk his or her well-being, education, health or development, are important as protective mechanisms.

6.4.11 **Appeals**

Appeals on and the review of orders made by the children's court are dealt with extensively in Chapter 23 (Courts) below. For present purposes it is sufficient to refer to the existing appeal provisions in the Child Care Act, 1983 dealing with appeals. Section 16A reads as follows:[190]

> An appeal shall lie against any order made or any refusal to make an order in terms of section 11, 15 or 38(2)(a), or against the variation, suspension or rescission of such order, to the competent division of the High Court of South Africa, and if brought, shall be noted and prosecuted as if it were an appeal against a civil judgement of a magistrate's court.

The remedy of appeal is only available in a few, narrowly defined situations.[191]

Mr D S Rothman pointed out that the right to appeal against the variation, suspension or rescission of orders made in terms of sections 11, 15, or 38(2)(a) of the Child Care Act, 1983 is impossible, given a correct reading, because no provision is made in the Act in the first place for variations, suspensions or rescissions of such orders.[192] Mr Rothman continues:

> Only in the case of contribution orders as provided for in section 43(4) is this [an appeal against the variation, suspension or rescission of orders] possible but then provision for appeals has always been made for contribution orders in section 48 of the Act! This is a stupendous insertion and should be deleted.

One cannot but agree with Mr Rothman that it is rather senseless to provide for a right of appeal against something not legally possible. However, this problem can be addressed by **making it possible for commissioners of child welfare to vary, suspend or rescind orders made in terms of sections 11, 15 and 38(2)(a). In addition, the Commission recommends that an appeal should also lie against sections 16, 34, 37 and 38 of the Child Care Act, 1983**.

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190 Inserted by the Child Care Amendment Act, 1999.

191 Removal to a place of safety order (section 11); the standard 'section 15' orders; and the return order after abscondment (section 38(2)(a)).

192 'The need for legal representation for children in children's court proceedings - fact or phobia' (2001) 4.1 **The Judicial Officer** 4 at 5.

Orders of adoption or orders rescinding (terminating) adoption orders are subject to an appeal to the High Court. In terms of section 22(2) of the Act, an appeal against the order of adoption of the children's court can be brought by the parent or guardian of the adopted child. In terms of section 22(3), where the children's court has rescinded an order of adoption, an appeal against this termination of the order can be brought by a parent, guardian or adoptive parent who did not apply for the rescission.[193] It is of course possible that the children's court might refuse an application to rescind one of its own adoption orders. Such a refusal can also be appealed against to the High Court.[194]

6.4.12 **Deadlines**

Generally, the Child Care Act, 1983 is deficient in that there is a lack of restriction as to how long children's court inquiries can go on for. Cases frequently continue for many months, sometimes years. This often amounts to secondary abuse, especially in cases involving very young children, where time is of the essence for providing them with the bonding opportunities which are crucial for their normal development.

In the consultation processes, the need for speedy processes and for enough time for proper attempts at investigation and reconstruction by the social worker emerged as very significant but inherently conflicting considerations. Balancing these and, in appropriate cases, giving more weight to one or the other, are tasks which will often require great skill and sensitivity to a variety of considerations. The commissioner will also have to decide whether the best interests of the child require the commissioner to adopt a more pro-active or else passive work-style in relation to the efforts of the social worker during the period between the opening and finalisation of the inquiry.[195]

The Commission has earlier recommended that in all matters relating to a child, regard shall be had to the general principle that any delay in determining any question with respect to the upbringing of that child or the administration of that child's property is likely to be prejudicial to the best interests of the child.[196] Obviously the younger the child, the greater the need for

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193 For the circumstances in which the children's court may decide to rescind an order of adoption, see section 21 of the Act.

194 See sections 22(4)-(5) of the Act.

195 Matthias and Zaal (1996) **Acta Juridica** 51 at 55.

196 See 5.3 above.

speedier resolution of issues regarding the child. It is in this context and as a result of numerous submissions that the Commission has considered the call for strict deadlines in the Act, together with effective sanctions for failure to meet them.

The Commission is mindful of the dangers inherent in imposing deadlines on our severely under-resourced current children's court and social welfare systems. **The Commission would therefore rather recommend, on the basis of a proper assessment and the place of the child in the system (criminal justice versus child protection), that commissioners be held accountable to the Magistrates Commission[197] for inordinate delays in finalising children's court inquiries. This can be done by requiring commissioners to report on a monthly basis, on the basis of information supplied to the commissioner by the children's court assistant, to the Magistrates Commission the number of unresolved children's court inquiries outstanding for longer than say four or six months and to require reasons from the commissioners for the delays in finalising those cases. The Magistrates Commission should then in turn in terms of section 7(1)(f) of the Magistrates Act 90 of 1993 report such statistics to the Minister of Justice and Constitutional Development for the information of Parliament**. The Minister of Justice and Constitutional Development should then forward these statistics to the Minister for Social Development for his or her information.

6.5 Provisions that affect (or could affect) children

6.5.1 Procedure in the children's court

A children's court is a court of law and not merely an administrative tribunal.[198] It is therefore bound to observe the same rules of evidence and procedure, except where a departure is expressly permitted.[199] Unless otherwise provided, the Magistrates' Court Act and its Rules apply *mutatis mutandis* to children's courts in relation to the appointment and functions of officers; the issue and service of processes; the appearance in court of legal counsel; the conduct of proceedings; the execution of judgments; the imposition of penalties for non-

197 Established in terms of the Magistrates Act 90 of 1993.

198 Schäfer 'Young Persons' in Clark (ed) **Family Law Service**, E87.

199 **Napolitano v De Wet NO** 1964 (4) SA 337 (T).

compliance with orders of court, contempt of court and obstructing the execution of judgments, etc.

However, it is generally recognised that a children's court may adopt a less formal procedure when, for instance, it deals with an inquiry into whether a child is in need of care than when it deals with an adoption inquiry.[200] The High Court also tends to relax its own rules of procedure and evidence when acting in its capacity as upper guardian of children.[201]

A children's court sits in a room other than a room in which any other court ordinarily sits, unless none is suitable and available.[202] No information relating to proceedings in a children's court which reveals or may reveal the identity of any child concerned may be published, unless the Minister or the commissioner who presided authorises the publication of so much information as he or she may deem just and equitable and in the interest of any particular person.[203] Hearings are held in camera and no person, other than those whose presence is necessary for the proceedings and his or her legal representative, may be present.[204]

At the meeting with the officials of the Department of Social Development held on 26 June 2001, it was agreed that it is necessary for the new children's statute to state that the procedure adopted in the children's court must be informal. The Commission deals with the nature of the proceedings in the children's court in more detail in Chapter 23 below.

6.5.2 Maintenance of children in need of care and contribution orders

No person or children's home is obliged to receive or resume the custody of any child under the Child Care Act.[205] However, once a person or the management of a children's home has received or admitted a child placed in the custody of that person or sent to that children's home under the Act, that person or children's home (as the case may be) is deemed to have the custody of the child concerned and is obliged to maintain and care for him or her until

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200 **Napolitano v Commissioner for Child Welfare, Johannesburg** 1965 (1) SA 742 (A).

201 See, e.g. **Zorbas v Zorbas** 1987 (3) SA 436 (W), in which Van Schalkwyk AJ (as he then was) held that the court, as upper guardian, should take cognisance of inadmissible evidence in certain circumstances.

202 Section 8(1) of the Child Care Act, 1983.

203 Section 8(3) of the Child Care Act, 1983. Violation of this prohibition is an offence and may, upon conviction, be visited with a fine or imprisonment, or both.

204 Section 8(2).

205 Section 41(1).

(a) the child dies; or

(b) the child is transferred to another custody or institution by order of the Minister; or

(c) the child is removed from the custody of that person or from that children's home by ministerial order; or

(d) any financial grant or contribution payable by the Minister towards the maintenance of the child is discontinued.[206] These provisions do not affect any obligation imposed by any other law on any person to care for and maintain the child.[207]

The Minister may, with the concurrence of the Minister of Finance, out of moneys appropriated by Parliament for this purpose, and on such conditions as may be prescribed, contribute towards the maintenance of any foster child by his or her foster parent,[208] of any pupil in any institution,[209] and of any child in any institution where such child has been admitted with the approval of the Director-General.[210] The Minister may also, with the concurrence of the Minister for Finance, give approval for a grant to be paid to an organisation for the care of children (between the ages of one month and seven years) of *bona fide* working mothers who must of necessity work away from home, or *bona fide* work-seeking mothers.[211] Place of safety grants for children detained in private (non-state) places of safety may be approved by a commissioner of child welfare, the amount of such grants being determined by the Minister with the concurrence of the Minister of Finance.[212]

A contribution order[213] may be made against a parent or other person legally liable to maintain a child.[214] Jurisdiction to make such an order depends on the respondent's residing, carrying

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206 Sections 42(1) and (2). HM Bosman-Swanepoel and PJ Wessels **A Practical Approach to the Child Care Act** (1995) 73 raise the question as to whether provision should have been included in section 41(2) concerning the discharge of a child from a custody or institution by ministerial order.

207 Section 42(3).

208 See Regulation 36.

209 See Regulation 37 re children's homes.

210 Section 56(1).

211 Regulation 38.

212 Regulation 39.

213 Defined in section 1 as ‘an order for the payment or recurrent payment of a sum of money as a contribution towards the maintenance of a child in a place of safety or in any custody wherein he was placed under this Act or the Criminal Procedure Act, 1977'.

214 Section 43 and Regulation 29.

on business or being employed within the court's[215] jurisdiction. Where the respondent is outside the court's jurisdiction, but is resident in a 'proclaimed country' within the meaning of section 1 of the Reciprocal Enforcement of Maintenance Orders Act 83 of 1963, a provisional contribution order may be made against him or her, which order then has the effect of a provisional maintenance order under that Act.[216]

A contribution order may be enforced by ordinary execution, or by a garnishee order requiring the respondent's employer to deduct payments from his or her wages.[217] In addition, a contribution order has the legal effect of a 'maintenance order' under the Maintenance Act 23 of 1963, and failure to comply with it thus constitutes an offence under that Act.[218] Payments under a contribution order are made, not to the person or the institution in whose custody the child is, but to an officer of the court.[219] A contribution order may be varied, suspended, rescinded or reviewed after rescission by any children's court or magistrate's court in whose jurisdiction the respondent resides, carries on business or is employed, after completion of the prescribed inquiry or on application of the respondent.[220] Appeal against the making, variation, rescission or revival of a contribution order lies to the High Court.[221]

6.5.3 **Permanency Planning**

The regulations to the Child Care Act, 1983 define 'permanency planning' as 'giving a child the opportunity to grow up in his or her family and where this is not possible or not to his or her best interests, to have a time-limited plan which works towards life-long relationships in a family or community setting'.[222] Strangely enough, however, the words 'permanency planning' appear nowhere else in the regulations to the Child Care Act, leaving the definition standing in a vacuum.

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215 Viz. either a children's court in the case of a child brought before that court for the purposes of an inquiry under the Child Care Act or a magistrate's court in the case of *'any child or any pupil'* (section 43(1)).

216 Sections 43(2) and 44(1)).

217 Section 46.

218 Section 44.

219 Section 45.

220 Section 43(3). If any court other than the court which issued the contribution order concerned varies, suspends, rescinds or revives the contribution order, the clerk of the first-mentioned court must inform the clerk of the last-mentioned court of such variation, suspension, rescission or revival: section 43(4).

221 Section 48.

222 Regulation 1.

The main aim of permanency planning is to prevent multiple, temporary placements of children and to give children a sense of permanency.[223] One very serious implication of permanency planning is the termination of parental responsibilities. When actively using the permanency planning approach as currently understood, therefore, the biological family has a limited period of time to rehabilitate before facing the possibility of the loss of all control over the child, for example through his or her adoption. This is in order for the child to have a sense of permanency in his or her new situation. Permanency planning is not prescribed by the Child Care Act, 1983 and the words 'permanency planning' are not found in the current Act.

In many foreign systems, permanency for the child implies either adoption or long-term foster-care where the foster family has some aspects of legal guardianship. Substitute family care is dealt with separately below.

Under the Child Care Act the maximum period for which a children's court order can remain in effect is two years.[224] At the end of this two-year period, it seems to have been assumed that the child should normally be able to return home permanently. Failing this, the order could be renewed; however, renewal of the order was, prior to the implementation of the 1996 amendments to the Act, a ground for dispensing with parental consent to adoption.[225] The original intention behind this limited time period was to pressurize the social worker and biological parents to engage in intensive reconstruction work. At the end of this two-year period, it was thought that the social worker and the biological parents should be able to evaluate the child's chances of either returning home or some other permanent plan being made. However, in practice, what seems to happen is that most children's court orders get renewed for multiple two year-periods, without steps being taken toward adoption, and with the social worker being expected to continue to provide reconstruction services to the biological parents for as long as the child is in substitute care, even if there is an ever-decreasing chance of the child returning home.

The maximum two-year duration period of children's court orders has thus failed to achieve its purpose. Different mechanisms are needed to compel sufficient reconstruction services and

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223 C R Matthias **Removal of children and the right to family life: South African law and practice** Bellville: Community Law Centre, UWC 1997, p. 41.

224 Section 16(1).

225 The previous section 19(b)(v).

case monitoring and to ensure permanency planning.[226] The court may need freedom to issue orders of, in some cases, longer than 2 years, in order to increase a sense of security for the child.

Although social workers are expected, in terms of current practice, to implement permanency plans for children, children's courts often do not recognise either these plans or the service contracts drawn up with biological parents for their implementation. Later down the line, it often happens that neither the courts nor the relevant officials of the Department of Social Development recognise the need, where services to the family have failed to bear fruit over a specified period, to cease efforts towards rehabilitation and move towards settling the child with an alternative family. This negates the permanency planning orientation underlying the regulations to the Child Care Act and sabotages social work services and the well-being of the child.

What emerges generally from the findings in regard to reconstruction services and permanency planning is a need for reform of the Child Care Act.[227] New provisions must be promulgated which encourage a short, intensive period of reconstruction services, but which in an integrated manner bring the child and his or her family together for such services if this is feasible. If this fails to have the desired effect because of lack of progress and cooperation from the parents, then agencies and courts must become geared to making arrangements for the permanent care of children in alternative settings.

Whilst it is necessary to avoid keeping children in limbo by several times renewing an original care order, it is also necessary to guard against leaving them unprotected because no action was taken at all when the original care order terminated. If the necessary report is not submitted to recommend renewal of an order, the order will then lapse, leaving a child unprotected and without financial support. Under the 1960 Act, once a child had been found ‘in need of care’, he or she remained under state protection until discharged from the Act.

A further feature of the situation is that there is a high proportion of stable and satisfactory foster care placements which do not warrant serial biennial reports by social workers.[228] The current

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226 See also 10.4 and 23.10.6 below.

227 C R Matthias **Removal of children and the right to family life: South African law and practice** Bellville: Community Law Centre, UWC 1997, p. 44.

228 As is required by Regulation 15 read with section 16 of the Child Care Act, 1983.

requirement produces an immense administrative burden for social workers in the post-court phase the central purpose of which, in practice, is to ensure that the foster care grant is renewed. It is therefore submitted that, in order to release social workers for tasks that are generally more critical, the Child Care Act should be amended to allow for only one post-court report if a foster care placement is rated as not requiring further direct court monitoring.[229] The children's court, acting on the recommendation of the social worker, should be the forum required to make a ruling about whether a particular foster care placement merits such a single post-hearing report after the period of the initial children's court order. This suggestion must be integrated with the earlier suggestion that in more problematic types of placement and those involving active reunification services there should be much more, and not less, monitoring of the placement.

Section 16(3) (which deals with duration and extension of orders) has also caused problems by creating a distinction between pupils in schools of industries and reform schools on the one hand, and children in foster care or adoption on the other. It is possible to extend the legal protection of pupils in the first two types of placement to enable them to complete their education. This does not apply in the same way to those in residential or foster care - they may remain where they are and have a grant paid for them only if continuation of the placement is with their parents' as well as their own permission.[230] There are cases in which this requirement is disadvantageous to the young person. Mental health workers have also made the point that in cases of mental disability in either the child or the parent there are specific problems with this section.

6.5.4 Reunification Services

As has been noted above, an important concept in social work is that of reunification services. Where a child has had to be removed from his parents, such services ideally involve regular contact between the social worker and both the child (in his or her institution or foster home) and the parents for the purpose of intensive work aimed at rebuilding both the self-image and dysfunctioning of the family concerned and, ultimately, the parent-child relationship. Overseas studies and local experience have shown that where reunification services are properly and regularly carried out, they can gradually heal the parent-child relationship to the extent that it

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229 See Chapter 17 (Foster Care) below.

230 By changing the age of majority to 18 years these inequalities will be removed. The need for parental consent would also fall away.

sometimes becomes possible to return the child to his or her family.[231] One of the original aims of the Child Care Act was to 'galvanise' social workers into providing more consistent and better quality reunification services in situations where children had been removed and placed in care by the state. Unfortunately, as Matthias and Zaal[232] point out, this aim had not been realised and reconstruction services generally tend to remain as erratic and inadequate as they were under the 1960 Children's Act.[233] According to social workers, this is predominantly due to the inability of cash-strapped welfare organisations to employ sufficient social workers to manage the workload involved, and to retain the services of those with skill and experience in this area due to poor working conditions.

In a study of one South African children's home, Michael Gaffley[234] found that 54% of the children had been there for longer than two years. His conclusion was that very few, if any, of these children would ever be reunited with their families, since in many cases all contact with their families had been lost. The fate of these children, as he saw it, would be either staying on at that institution until they turned eighteen, or transfer to a similar institution, school of industry or, in extreme cases, to a reformatory. Both Gaffley's findings and that of Matthias[235] highlight an urgent need for reunification services to become a more important priority in South Africa.

The Child Care Act needs to be amended from the point of view of requiring reunification services in appropriate cases with a view to avoiding or reducing the time span of care placements and a lack of permanency planning. Subsidized adoption must be rendered easily available as an option where poverty is a barrier to a permanent placement.[236] Attention to workload norms in, and the resourcing needs of, the structures carrying out these services is also essential.

Under the Act as presently framed there is a relatively weak emphasis upon the reunification services that are so vital in attempting to return children in care to their families. Only in

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231 Matthias and Zaal (1996) **Acta Juridica** 51 at 63. The authors refer to the discussion of the case of **Ricky K** by the judge concerned in P R Kfoury **Children Before the Court: Reflections on Legal Issues Affecting Minors** (2nd edition), 1991 4-6 as a striking example of success involving even a mentally disordered child.

232 (1996) **Acta Juridica** 51 at 63.

233 See D Levine et al 'One year later: A critical look at the Child Care Act' (1988) **The Child Care Worker** 11.

234 'Work with children' (1996) 14(6) **Child and Youth Care Worker** 1 at 15.

235 **Removal of children and the right to family life: South African law and practice**, p. 39.

236 C R Matthias **Removal of children and the right to family life: South African law and practice**, p. 44.

Regulation 15, under the title of 'Reconstruction', does one find a brief instruction that the relevant Minister must be furnished with a social worker's report concerning 'the possibility or desirability of restoring the child to the care of his parents' not later than three months before the expiry of a court order or an extension thereof. Information obtained during the course of our research indicates that the Minister often alters or extends children's court orders without obtaining a social worker's report at least three months beforehand. Such children are then subsequently dealt with illegally by the Minister concerned.[237]

6.5.5 Adoption of children

The adoption of a child obviously has a dramatic effect on his or her legal position. The Child Care Act, 1983 contains numerous provisions on adoption and these are discussed fully elsewhere.[238]

6.5.6 Leave of Absence from a Placement

Section 35 of the Child Care Act was intended to cover short periods of leave from custody in which a child has been placed by a court order, as well as Ministerial extension thereof. Subject to specified requirements, it allows for the child to take a holiday with friends or even a biological parent, for example. However, this section has ended up, inappropriately, being the standard way of testing out the viability of a move of a child from an institution into foster care, or back into the care of the parents, before recommending an order of transfer. Even worse, sometimes it is used as a way of 'clearing' institutions to enable the majority of staff to have uninterrupted (Christmas) holidays.

In terms of the 1960 Act, this purpose was served by the issuing of a licence, which was operative for a maximum of two years. The licence could immediately be used, in the cas e of a foster care placement,[239] to apply for a foster care grant, or in the case of a child's return to the care of a parent, to access the then maintenance grant if the parent was eligible. But leave of absence as it now stands is not an arrangement which qualifies for state aid. The licence under the 1960 Act could be revoked if a serious problem arose and the child could then be

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237 Matthias and Zaal (1996) **Acta Juridica** 51 at 66.

238 See Chapter 18 below.

239 See further Chapter 17 below.

speedily returned to the children's home, whereas transfer under the current Act is a slow, bureaucratic process.

The Commission accordingly recommends that a 'release on licence' provision similar to that in the 1960 Act be included in the new children's statute.

6.5.7 Absconder's Inquiries

According to section 38 of the Child Care Act, any child who has been placed by either a children's court or a juvenile court in the custody of a person or in any institution - meaning a place of safety, a children's home, a school of industries or a reform school - will be subject to an absconder's hearing if he or she runs away and is subsequently apprehended. Apart from the point (above) that a court should not usually be involved, the absconder's hearing as framed by section 38 of the Act gives rise to some serious points of concern. For one thing, it is laid down that at the hearing the commissioner of child welfare must simply 'interrogate' the child 'as to the reasons why he absconded'.[240] There is no reference to any right of the child, for example, to have legal representation or to have any other person present acting on his or her behalf.[241] It does not appear that the child even has a right to call witnesses who might be able to explain why he or she absconded. Surely, if the matter is serious enough for a court hearing, these basic rights should be specified in legislative form.

Another point of concern with absconder's hearings is the severely limited powers of the children's courts. According to section 38(2)(a) of the Act, the commissioner can do only one of two things after 'interrogating' the child. The commissioner may either order that the child be returned to the custody or institution from which she absconded or, 'if the commissioner is of the opinion that there are good reasons why the pupil or child could not be returned', then the commissioner can only order that the child be kept in a place of safety 'pending any action by the Minister'. This is an example of the restricted powers which show the undeserved, secondary status of the children's courts as almost quasi courts that are unable to protect children from Ministerial bureaucracies. It seems entirely wrong that the children's court, having

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240 See section 38(2)(a).

241 Legal representation might, however, be possible under the new section 8A of the Act. See the discussion above. However, in order to be of more practical assistance to children, this right should have been specifically included with the sections of the Act dealing with absconder's hearings. If this is not done, the present situation, in which children almost never receive legal representation at absconder's inquiries, is likely to continue.

had its hearing, should not be able to offer a new, positive solution in respect of a child who has been found to have had good reasons for absconding.

It may well be that since the time when the child was originally placed in an institution the situation at home has improved or else some other factor may have arisen which makes a different placement from the original one appropriate. The children's court, surely, should be able to direct a new placement for the child in the light of new circumstances, rather than having to incarcerate the child in a place of safety awaiting a new arrangement, perhaps for a very long period of time.

CHAPTER 7

ESTABLISHING PARENTHOOD AND THE STATUS OF CHILDREN

7.1 Introduction

In order to allocate parental rights and responsibilities, it is necessary to determine parentage. In this Chapter we will therefore consider aspects such as legitimacy, proof of parentage, artificial insemination, and surrogacy.

7.2 Legitimacy of children

A legitimate[1] child is one whose parents were married to each other at the time of his or her conception or at the time of his or her birth, or at any time in between these dates.[2] Where the parents' marriage, though invalid, fulfils the requirements of a putative marriage, children born of the union are legitimate for all purposes, and will on application be declared so by the court.[3]

At common law, annulment of a voidable marriage rendered children born or conceived of the union retrospectively extra-marital. In modern South African law, however, the status of children born or conceived of a voidable marriage which is subsequently set aside by the court is regulated by the Children's Status Act 82 of 1987.[4] In terms of this Act, the annulment of the marriage has no effect

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[1]Objections have been raised to the use of the terms 'legitimate' and 'illegitimate' on the grounds that especially the latter term stigmatises the child concerned and may be offensive: see South African Law Commission **Report on the Investigation into the Legal Position of Illegitimate Children** (October 1985), para 6.25.- 6.26. The Commission therefore suggested the use of the term 'extra-marital' instead of 'illegitimate' in legislation.

[2]See also Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 327, footnote 3 on the marriage requirement.

[3]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 328. See also the South African Law Commission's investigations into the Review of the Marriage Act 25 of 1961 (Project 109) and Domestic Partnerships (Project 118).

[4]In its **Report on the Investigation into the Legal Position of Illegitimate Children**, the Commission proposed legislation to place children born or conceived of a voidable marriage which

on the status of children born or conceived of it;[5] such children retain their legitimate status and, if minor or dependent at the time of the annulment, are treated as if the marriage had been terminated by a decree of divorce.[6]

Adoption, which is not confined to extra-marital children, is discussed fully in another chapter.[7] It is, however, important to point out that in terms of section 20(2) of the Child Care Act, 1983, an adopted child 'shall for all purposes whatever be deemed in law to be the legitimate child of the adoptive parent, as if he was born of that parent during the existence of a lawful marriage'.

In the past considerable disadvantages attached to being an adulterine child, and the penalties for the fruit of incest were even greater.[8] Today the notion that it is proper to visit the sins of the parents upon their innocent children has happily passed away, and it makes little difference into what class of illegitimacy a person falls.[9]

Since the legitimacy of a child depends on the status of his or her parents at the relevant time, it is necessary to determine who those parents are. Rapid advances in medical science over the past few decades have made such determination very problematic in certain cases, notably in cases involving so-called 'artificial fertilization'[10] techniques. These particularly tricky cases will be dealt

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is subsequently annulled in the same position as children born or conceived of a valid marriage which is subsequently dissolved by divorce. The Children's Status Act 82 of 1987 arose from the recommendations made by the Commission in this regard.

[5]Section 6.

[6]Section 7.

[7]See Chapter 18 below.

[8]The distinctions between the different categories of illegitimate children were relevant particularly in regard to succession rights and to legitimisation by subsequent marriage (for details see Hahlo and Kahn **The Union of South Africa: The Development of its Laws and Constitution** Cape Town: Stevens 1960 356.)

[9]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 332.

[10]The term 'artificial fertilization' is used by the Commission in its **Report on Surrogate Motherhood** (1993) to refer to inter alia the procedures of artificial insemination and *in vitro*

with first, followed by a discussion of the proof of paternity in other situations.

7.3 **Artificial insemination**

It appears to be uncontroversial that a child born as a result of the artificial insemination of a married woman with the semen of her husband[11] is a legitimate child, whether or not the husband in fact consented to this means of conception.[12] Under the common law, a child born as a result of the artificial insemination of an unmarried woman or as a result of the artificial insemination of a married woman with the semen of a man other than her husband[13] was ordinarily extra-marital even if, in the latter case, the husband was a consenting party.[14]

Section 5 of the Children's Status Act 82 of 1987 brought about far-reaching changes to the common law in this regard. In terms of section 5(1)(a), whenever the gamete or gametes of any person other than a married woman or her husband have been used for the artificial insemination of that woman with the consent of both spouses, any child born as a result of such artificial insemination is deemed for all purposes to be the legitimate child of the spouses. There is a rebuttable presumption that both spouses have in fact granted their consent in this regard.[15]

The fact that section 5(1) of the Children's Status Act 82 of 1987 appears to require nothing more

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fertilisation. See also the Commission's **Report on the Investigation into the Legal Position of Illegitimate Children** (October 1985). For a criticism of the word 'artificial' in this context, see Graig Lind 'Sexual orientation, family law and the transitional Constitution' (1995) 112 **SALJ** 481 at 490, footnote 48.

[11]The so-called 'homologous' artificial insemination or AIH.

[12]**V v R** 1979 (3) SA 1006 (T) at 1008. See also Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 334, footnote 19 for further references.

[13]The so-called 'heterologous' artificial insemination or AID / DI.

[14]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 334.

[15]Section 5(1)(b) of the Children's Status Act 82 of 1987.

than *informal* consent creates numerous problems.[16] After analysing these problems, Van der Walt suggests,[17] inter alia, that formal written consent is essential for the proper application of the statutory provisions and that the legislation should be amended in this regard. Although there is merit in this suggestion, the Commission is of the opinion that the presumption created in section 5(1)(b) of the Act adequately covers the concern and that the consent in most instances will be in writing anyway. It is also worth noting that in terms of Regulation 9(e), a medical practitioner intending to effect the artificial insemination of a recipient shall 'make sure that (1) before any artificial insemination is effected on a recipient, the recipient *and her husband in the case of a married person*[18] receive advice and information from appropriate experts concerning - (aa) the possibilities, if any, of the recipient's being able to conceive in a natural manner; (bb) all the implications of artificial insemination including ... the consequences to the marriage in the case of a married person, and the ethical, psycho-social and educational implications of artificial insemination ... and legal advice which may be obtained with regard to artificial insemination'.[19] Regulation 5(d) provides further that the 'written permission' from the donor's spouse in the case of a married person be obtained and that such permission be filed in the donor's file.

Until fairly recently, the regulations[20] issued in terms of the Human Tissue Act 65 of 1983 provided that the artificial insemination could be carried out only on a married woman and then only if both spouses had consented to this in writing.[21] This restriction on the availability of artificial

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[16]See, for instance, Lirieka van der Walt 'Toestemming en die vestiging van ouerskap oor die kunsmatig verwekte kind' (1987) 8 **Obiter** 1 and F F W van Oosten 'Die leerstuk van ingeligte toestemming in surrogaatmoederskapsgevalle' (1990) 23 **De Jure** 340.

[17]With reference to the then clause 5 of the Children's Status Bill 30 of 1987. See (1987) 8 **Obiter** 11.

[18]Our emphasis.

[19]Of the Regulations regarding the Artificial Insemination of Persons, and Related Matters (GN R 1182 GG 10283 of 20 June 1986 (as amended by GN R 1354 GG 18362 of 17 October 1997). See also Regulation 9(e)(v)(aa).

[20]Ibid.

[21]The regulations of June 1986 are for the most part not applicable to 'homologous' artificial insemination (AIH). Chapter 2 of the Regulations, which carries the heading "Donors, Donations and Related Matters', is also not applicable to cases of in vitro fertilisation (IVF) in which the

insemination to married women was, however, the subject of severe criticism[22] and the regulations were subsequently amended so as to make it possible for unmarried woman legally to access donor sperm and to undergo artificial insemination procedures.[23]

Despite these developments, the provisions of section 5 of the Children's Status Act 82 of 1987 remain unchanged. As Van Heerden et al point out,[24] the common law therefore still applies to cases where an unmarried woman has been artificially inseminated or a married woman has been artificially inseminated with donor semen without her consent or the consent of her husband, with the result that the child in question will be considered extra-marital.

AH van Wyk[25] points out that section 5(1) of the Children's Status Act 82 of 1987 applies only to in cases of *artificial* insemination. Therefore, if a child is born as a result of sexual intercourse between its mother and a man other than her husband, the child is extra-marital (subject, of course, to the presumption *pater es quam nuptiae demonstrant*), even if the mother's husband consented to this manner of conception. Van Wyk also points out that, because of the way in which 'artificial insemination' and 'artificial fertilisation' are defined in the relevant Acts, the 'pure' donation of an

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gametes of a husband and his wife are united in vitro and the resultant embryo implanted in the wife's uterus. See Louise Tager 'Surrogate motherhood, legal dilemma' 1986 (103) **SALJ** 381 - 382; R Pretorius 'Surrogaat-moederskap: Implikasies in die Suid-Afrikaanse Regstelsel' 1987 **De Rebus** 270; S A Law Commission **Report on the Investigation into the Legal Position of Illegitimate Children**, par 10.12; M Schutte 'Artificial insemination and in vitro fertilisation' 1985 **De Rebus** 347 at 348 and 349.

[22]See Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 336, footnote 30 for references.

[23]See GN R1354 GG 18362 of 17 October 1997, deleting regulation 8(1) and amending regulations 5(d) and 9(e).

[24]**Boberg's Law of Persons and the Family** (2nd edition) 336.

[25]'*Mater hodie semper incerta est?* : 'n Evaluasie van artikel 5 van die Wet op die Status van Kinders van 1987' 1988 **TSAR** 465 at 469.

ovum,[26] as also a 'pure' embryo donation,[27] fall (for present purposes) completely outside the ambit of both the Children's Status Act 82 of 1987 and the Human Tissue Act 65 of 1983.[28] If either of these two procedures is utilised, the legal status of the child born as a result will have to be determined in accordance with the common law.

As regards the legal position of the donor of male or female gametes used in a process of artificial insemination, section 5(2) of the Children's Status Act 82 of 1987 provides that there will be no legal ties between a child born as a result of the artificial insemination of a woman and the donor of the male or female gametes used for this procedure unless (a) the donor of the female gametes is the woman who gave birth to the child, or (b) the donor of the male gametes is married to such woman at the time of the artificial insemination.[29] This provision is very widely phrased and applies whether or not the woman giving birth to the child is married and whether or not the consent of either the woman or of her husband to the artificial insemination has been obtained.[30]

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[26]I.e. the extraction of ripe *ova* from the ovaries of one woman using a laparoscopy procedure and the transfer of these *ova* into the uterus of another woman, followed by fertilisation of the *ova* through 'natural' sexual intercourse.

[27]I.e. the flushing (lavage) and transfer of an embryo which has been created by natural means through fertilisation *in utero / vivo*.

[28]See also Lirieke van der Walt 'Toestemming en die vestiging van ouerskap oor die kunsmatig verwekte kind' 1987 (8) **Obiter** 1 at 4; see further on these procedures M L Lupton 'The right to be born: Surrogacy and the legal control of human fertility' 1988 (21) **De Jure** 36 at 37.

[29]However, in surrogacy cases it is tried to achieve the opposite effect: i.e. the intention is that the commissioning parents acquire all the rights and responsibilities while the role of the surrogate mother is for all practical purposes equated to that of a donor in artificial insemination cases.

[30]S A Law Commission **Report on the Investigation into the Legal Position of Illegitimate Children**, par 10.34. Here too, it should be pointed out that section 5(2) applies only in cases of 'artificial insemination' as defined in section 1, with the result that, in circumstances falling outside the ambit of this definition, the question as to whether there are any legal ties between the child and the donor of the male or female gametes utilised in the process of his or her conception will have to be answered with reference to the common law.

The Human Tissues Act 65 of 1983 and the regulations issued under it also contain provisions to ensure that the donors of gametes used in an artificial insemination procedure remains anonymous.[31] Thus, in terms of section 33(1)(c) of the Act,[32] no person may publish 'to any other person' any fact by which the identity of a living person from whose body any gamete has been removed for the purposes of artificial fertilization of another person may possibly be established, unless the donor concerned has consented in writing to such publication. Apart from these provisions, a donor's file may not be made available to any other person for inspection 'unless any law otherwise provides or any court so orders'.[33] Several writers, both in South Africa[34] and abroad,[35] have argued that these kinds of restrictions contravene the fundamental right of children born as a result of artificial insemination procedures to know about their biological origins and thus to have access to biological information concerning their genetic parents. In view of these arguments and of the fact that adopted children in South Africa are entitled to have access to their adoption records once they reach the age of 21 years, the 'confidentiality provisions' of the Human Tissue Act and regulations may need amendment.[36]

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[31]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 338.

[32]Read together with section 19(c) of the Human Tissues Act 65 of 1983.

[33]Regulation 6(2)(e).

[34]See M L Lupton 'The status of children born by artificial insemination in South African law' 1985 **TSAR** 277, 'Artificial insemination in South Africa in the light of the Human Tissue Act 65 of 1983' (1985) 48 **THRHR** 210 at 217 'The right to be born: Surrogacy and the legal control of human fertility' (1988) 21 **De Jure** 36 at 37, 'Human fertilization outside the womb - Law and policy' 1997 **TSAR** 746 at 758-9; J M T Labuschagne 'Die reg op afkomskennis as mensereg' (1996) 7 **Stell LR** 307 at 311-12.

[35]See, eg, Michael Freeman 'The new birth right? Identity and the child of the reproductive revolution' (1996) 4 **International J of Children's Rights** 273 and authorities there cited. See also Sarah Wilson 'Identity, geneology and the social family: The case of donor insemination' (1997) 11 **International J of Law, Policy and the Family** 270; Katherine O'Donovan 'A right to know one's parentage' (1998) 2 **International J of Law and the Family** 27; Danny Sandor 'Federal IVF law would harm not help children's rights', press release by Defence for Children International - Australia, 20 August 2000.

[36]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 340.

7.4 Evaluation and recommendations

As pointed out by Van Heerden et al[37] section 5 of the Children's Status Act 82 of 1997 does not apply to cases where an unmarried woman has been artificially inseminated or a married woman has been artificially inseminated with donor sperm without her consent or the consent of her husband, with the result that the child in question will be considered extra-marital. Section 5 of the Children's Status Act 82 of 1987 also does not apply to an arrangement involving a 'pure' ovum donation or a 'pure' embryo donation. After considering the issue, **the Commission recommends that section 5 of the Children's Status Act 82 of 1987 be amended to also cover these three instances**. Consequently, a similar amendment of the definition of "artificial fertilisation" in the Human Tissue Act 65 of 1983 might be opportune. These recommendations will be incorporated in the reformulation of the present section 5 of the Children's Status Act 82 of 1987. However, **the Commission does not consider it appropriate to extend the operation of section 5 of the Children's Status Act 82 of 1987 to instances where a woman (whether married or not) has been artificially inseminated with donor sperm without her consent, or in the case of a married woman, also without the consent of her husband. The Commission also refrains from covering the situation where a child is born as a result of sexual intercourse between the child's mother and a man other than the mother's husband**. In the latter instance, we specifically see a continued role for the common law.[38]

The Commission recommends that the provisions of the Children's Status Act 82 of 1987, as to be amended, be incorporated in the new children's statute. The Children's Status Act 82 of 1987 can then be repealed.

The Commission would also like to reiterate its position that all legal ties between a child and a donor of gametes with which the child was conceived be severed.[39]

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[37]**Boberg's Law of Persons and the Family** (2nd edition) 336.

[38]For a comparative perspective, see Samson O Koyonda 'Assisted reproductive technologies in Nigeria: Placing the law above medical technology' (2001) XXXIV **CILSA** 258.

[39]S A Law Commission **Report on the Investigation into the Legal Position of Illegitimate Children**, par 10.38.

Some respondents feel strongly that, while the child (and indeed the parents or the recipient husband, if applicable) should have access to the **medical and other information** set out in Regulations 6(1)(a)(ii),[40] 6(1)(a)(iii) and 6(1)(b),[41] information regarding the **donor's identity** should not be available to the recipient or the child. It would also appear that many medical practitioners performing artificial insemination procedures feel that disclosure (or potential disclosure) of donor identifying information will 'put off' most donors.[42] **The Commission accordingly recommends that neither the recipient nor the child should have access to the information regarding the donor's identity**.[43] However, the Commission is convinced that children born as a result of artificial insemination procedures have the right to know about their biological origins and to have access to the biological and medical information concerning their genetic parents. **The Commission therefore recommends that the confidentiality provisions in the Human Tissue Act 65 of 1983 be amended to allow children born of artificial insemination access to biological and medical records, but not to information identifying the donor, when such child reaches the age of 18 years, similar to the case of adopted children**.[44] We would like to stress that we see this as the right of the **child**, and not that of the donor or recipient of the gametes.[45]

Accordingly we recommend the incorporation in the new children's statute of the following provisions:

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[40]Presently available to the recipient - see Regulation 4(d)(iii).

[41]Presently available to the medical practitioner performing the AI, **not** the recipient - see Regulation 4(d)(iv).

[42]Personal communication between Judge Belinda van Heerden and Dr Dalmeyer, President of the South African Society for Reproductive Science and Surgery.

[43]See the minutes of the 20th meeting of the Project Committee held on 11 - 12 August 2001.

[44]See also Regulation 28 of the regulations under the Child Care Act, 1983.

[45]Obviously the recipient of the gametes (and her husband, if she is married) is entitled to numerous details in respect of the donor. However, this does not include information relating to the **identity** of the donor. See regulation 6(2)(b), read together with regulation 6(1)(a) (ii); regulation 6(2)(c), read together with regulation 4(a) and with regulations 6(1)(a)(ii) -(v), (b) and (c) issued in terms of the Human Tissue Act 65 of 1983.

CHAPTER X: STATUS OF CHILDREN

Presumption of paternity in respect of child born out of wedlock

1. If in any legal proceedings at which it has been placed in issue whether any particular person is the father of a child born out of marriage it is proved by judicial admission or otherwise that he had sexual intercourse with the mother of the child at any time when that child could have been conceived, it shall, in the absence of evidence to the contrary, be presumed that he is the father of that child.

Presumption on refusal to submit to taking of blood samples

2. (1) If in any legal proceedings at which the paternity of any child has been placed in issue it is adduced in evidence or otherwise that any party to those proceedings, after he or she has been requested thereto by the other party to those proceedings, refuses to submit himself or herself or, if he or she has parental responsibility for the child to cause that child to be submitted to the taking of a blood sample in order to carry out scientific tests relating to the paternity of that child, it shall be presumed, until the contrary is proved, that any such refusal is aimed at concealing the truth concerning the paternity of that child.

(2) The Court may order that a blood sample be taken and the scientific tests relating to the paternity of a child be conducted, where appropriate, at state expense.

Legitimation of children by subsequent marriage

3. Any child born of parents who marry each other at any time after his or her birth shall, even though his or her parents could not have legally married each other at the time of his or her conception or birth, as from the date of the marriage be in all respects the legitimate child of his or her parents.

Effects of artificial insemination

4. (1)(a) Subject to the provisions of section xx,[46] whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both spouses for the artificial insemination of one spouse, any child born of that spouse as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of those spouses as if the gamete or gametes of those spouses were used for such artificial insemination.

(b) For purpose of paragraph (a) it shall be presumed, until the contrary is proved, that both spouses have granted the relevant consent.

(2) Whenever the gamete or gametes of any person have been used for the artificial insemination of a woman with her written consent, any child born of that woman as a result of such artificial insemination shall for all purposes in law be deemed to be the child of that woman.

(3) No right, duty or obligation shall arise between any child born as a result of artificial insemination of a woman and any person whose gamete or gametes have been used for such artificial insemination and the blood relations of that person , except where -

(a) that person is the woman who gave birth to that child ; or

(b) that person is the husband of such woman at the time of such artificial insemination.

(4) For purposes of this section -

"artificial insemination",[47] in relation to a woman -

(a) means the introduction by other than natural means of a male gamete or

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[46]Qualification re surrogacy arrangements.

[47]This expanded definition will also have to replace the current definition of 'artificial fertilization' in section 1 of the Human Tissue Act 65 of 1983.

gametes into the internal reproductive organs of that woman; or

(b) means the extraction of female gametes from one woman and the transfer of these gametes into the uterus of another woman, followed by fertilization of these gametes [in utero / vivo] through natural means; or

(c) means the placing of the product of a union of a male and a female gamete or gametes which have been brought together outside the human body, in the womb of that woman, or

(d) means the flushing and transfer of the product of a union of a male and female gamete or gametes which has been created by natural means [through fertilisation in utero / vivo] from one woman to the uterus of another woman,

for the purpose of human reproduction;

"gamete" means either of the two generative cells essential for human reproduction.

Access to biographical information concerning genetic parents

5. A child born as a result of artificial insemination shall have access to the biographical and medical information concerning his or her genetic parents from the date on which the child reaches the age of 18 years.

Status of children of voidable marriage

6. (1) The status of any child conceived or born of a voidable marriage shall not be affected by the annulment of that marriage by a competent court.

(2) No voidable marriage shall be annulled until the court concerned has enquired into and considered the safeguarding of the interests of any minor or dependent

child of that marriage, and the provisions of section 6 of the Divorce Act, 1979 (Act No. 70 of 1979), and of section 4 of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), shall, with the necessary changes, apply in respect of any such child as if the proceedings in question were proceedings in a divorce action and the annulment of the marriage were the granting of a decree of divorce.

(3) The provisions of section 8(1) and (2) of the Divorce Act, 1979, shall, with the necessary changes, apply to recission or variation of a maintenance order or an order relating to the custody or guardianship of, or access to, a child, or the suspension of a maintenance order or an order relating to access to a child, made by virtue of the provisions of subsection (2).

(4) A reference in any law -

(a) to a maintenance order or an order relating to custody or guardianship or access to a child under the Divorce Act, 1979, shall be construed as a reference also to a maintenance order or an order relating to the custody or guardianship of, or access to, a child under the said Act as applied by subsection (2);

(b) to the recission, suspension or variation of such an order under the Divorce Act,1979, shall be construed as a reference also to the recission, suspension or variation of such an order under the said Act as applied by subsection (3).

7.5 **Surrogate motherhood**

As it is first and foremost the parents of a child who have parental responsibilities and parental rights in respect of that child, it is important to be able to determine who those parents are. Rapid advances in medical technology over the past few decades have made this determination very problematic in certain circumstances, notably in cases of so-called ‘artificial fertilization' (perhaps

less objectionably sometimes referred to as 'alternative' or 'assisted' fertilization)[48] and particularly in the context of 'surrogate motherhood'.[49]

A surrogate mother is a woman who (usually before becoming pregnant) agrees (for financial or compassionate reasons)[50] to bear a child for another person or for a couple (the 'commissioning' person or couple), with the explicit intention of handing over the child to the commissioning person or couple after the birth.[51] It is further intended by the parties to this agreement that the child should become, for all legal purposes, the child of the commissioning person or couple and that neither

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[48] See Craig Lind 'Sexual Orientation, Family Law and the Transitional Constitution' (1995) 112 **SALJ** 481 at 490 n48. It is worth noting that surrogacy can be effected through natural means - it need not be effected by means of 'artificial fertilization'.

[49] On surrogate motherhood in general, see Tager (1986) 103 **SALJ** 381; M L Lupton 'Surrogate parenting: The advantages and disadvantages' (1986) 11 **TRW** 148, 'The right to be born. Surrogacy and the legal control of human fertility' (1988) 21 **De Jure** 36; Pretorius 1987 **De Rebus** 270, 'A comparative overview and analysis of a proposed surrogate mother agreement model' (1987) 20 **CILSA** 275, 'Practical aspects of surrogate motherhood' (1991) 24 **De Jure** 52; 'Surrogate motherhood: A detailed commentary on the draft bill' 1996 **De Rebus** 114; Clark (1993) 110 **SALJ** 769; P L Volpe 'My mother, my sister' 1989 **De Rebus** 369. For an Israeli perspective, see Carmel Shalev 'Halakha and patriarchal motherhood - An anatomy of the new Israeli surrogacy law' at http://mishpatim.mscc.huji.ac.il/ilr/ilr32_1c.htm .

[50] Surrogacy arrangements are sometimes referred to as 'altruistic' where the surrogate mother is motivated to enter into the arrangement not by the prospect of financial gain, but by the altruistic desire to assist another person or couple to have a child. In many of these cases, the surrogate mother is a friend or relative of the commissioning person or couple. By contrast, 'commercial' or 'paid' surrogacy is undertaken in exchange for payment, viz the commissioning person or couple undertake to pay the surrogate mother a fee which is greater than the costs incurred (and income lost) in conceiving and bearing the child. See SA Law Commission **Report on Surrogate Motherhood**, par. 2.1.6; Strauss **Doctor, Patient and the Law** 188; Tager (1986) 103 **SALJ** 381 at 391 - 2; Pretorius 1987 **De Rebus** 270; Van Wyk 1988 **TSAR** 465 at 473; Brigitte Clark 'Surrogate motherhood: Comment on the South African Law Commission's Report on Surrogate Motherhood (Project 65)' (1993) 110 **SALJ** 769 at 780.

[51] Van Heerden et al **Boberg's Law of Persons and the Family** (2 nd edition) 340.

the surrogate mother (nor her husband, if she is married) should have any parental rights or responsibilities in respect of the child.[52]

A distinction is usually drawn between *partial surrogacy* and *full surrogacy*. Where the pregnancy of the surrogate mother is achieved through the implantation into her uterus of an embryo which has been 'created'[53] using the gametes of the commissioning person or couple or of donors (or of a combination of these persons), the process is referred to as 'full' surrogacy or 'gestational' surrogacy. In such cases, the surrogate mother carries and gives birth to a child to whom she is not genetically related.[54] If, on the other hand, the surrogate mother's own *ovum* is fertilised (either naturally or through 'artificial' fertilization) using the semen of the commissioning man or of a donor, or where the surrogate mother's *ovum* is extracted, fertilised *in vitro* using the semen of the commissioning man or of a donor and the resultant embryo replaced in her womb, the process is known as 'partial' surrogacy. In such cases, the surrogate mother is both the genetic and the gestational mother of the child. Thus, depending on the technique utilized, a child born as a result of a surrogacy agreement could have as many as six different 'potential' parents: the genetic 'parents' (the donors of the semen and *ovum*), the commissioning 'parents', the surrogate mother who carries the baby to term and, if she is married, the surrogate's husband.[55]

Although the concept and practice of surrogate motherhood raises a host of difficult legal, moral, religious and philosophical questions, the most important issue for the purposes of this investigation is the effect of a surrogacy arrangement as regards the parental rights and responsibilities of the parties involved. Other important questions relate to whether and under what circumstances a surrogacy agreement should be recognized by South African courts as a valid agreement and be enforceable, including the qualifications required for a surrogate mother and for a commissioning person or couple.

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[52]SA Law Commission **Report on Surrogate Motherhood**, par 2.1.1.

[53] Either naturally, through sexual intercourse, or *in vitro*, by combining semen and *ova* in a glass container under laboratory conditions.

[54]The case studies discussed by Pretorius 'Practical aspects of surrogate motherhood' (1991) **De Jure** 52 at 56ff provide interesting examples of different full surrogacy situations.

[55]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 341, footnote 51.

There is as yet no legislation in South Africa dealing specifically with surrogacy arrangements.[56] The 1986 Regulations Regarding the Artificial Insemination of Persons, and Related Matters, issued in terms of the Human Tissue Act 65 of 1983,[57] were apparently not intended to include surrogacy within their ambit, but nevertheless do not preclude it.[58] Similarly, although the Children's Status Act 82 of 1987 (and more specifically section 5 thereof) was apparently also not intended to address the issue of surrogacy, this Act nevertheless has far-reaching implications for many cases of surrogate motherhood. The definition of 'artificial insemination' in section 5(3) of the Act[59] is wide enough to cover many of the procedures utilized to give effect to surrogacy agreements. Thus, in those situations of surrogacy to which the Act applies, the effect of section 5(1)(a) is that the child will be deemed for all purposes to be the legitimate child of the married gestational mother (the surrogate mother) and her husband, provided that both spouses consented to the 'artificial' insemination process.[60] In terms of section 5(2), the persons whose semen and/or *ova* were used in the conception process, except in circumstances which are of no relevance here, have no rights, obligations or duties towards the child. This would be so even in a case of full surrogacy where the gametes of both the commissioning 'parents' have been used so that they are the genetic parents of the child. If, on the other hand, the legal requirements set out in section 5(1)(a) are not complied with, ie the surrogate mother is unmarried or, if she is married, the 'artificial' insemination process has taken place without her husband's consent, then the common law will apply and the child will

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[56] Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 341.

[57] And amended in 1997 so as to make it legally possible for unmarried women to undergo 'artificial' fertilization procedures and hence to access donor semen: see Government Notice R1354 in Government Gazette 18362 of 17 October 1997. Prior to these amendments, 'artificial' insemination could legally only be carried out on a married woman and then only with the written consent of her husband.

[58] SA Law Commission **Report on Surrogate Motherhood**, par. 4.2.1. See also M Schutte 'Artificial insemination and in vitro fertilisation' 1985 **De Rebus** 347; Clark (1993) 110 **SALJ** 769 at 770; Lupton (1986) 11 **TRW** 148 at 149; Pretorius (1987) 20 **CILSA** 275 at 284 and 291, footnote 85.

[59] In terms of section 5(3), 'artificial insemination' is defined in relation to a woman, as '(a) the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of that woman; or (b) the placing of the product of a union of a male and female gamete or gametes which have been brought together outside the human body in the womb of that woman' (ie *in vitro* fertilization or IVF). This definition is virtually identical to the definition of the 'artificial fertilization of a person' in terms of section 1 of the Human Tissue Act 65 of 1983. See the proposed amendment to this definition set out in section 7.4 above.

[60] There is a rebuttable presumption that both spouses have in fact granted their consent in this regard: section 5(1)(b).

be considered to be the extra-marital child of the surrogate mother.[61] In all these situations, the resultant legal status of the child is entirely contrary to the objective of the parties to the surrogacy agreement, namely that the child should be for all legal purposes the child of the commissioning person or couple.[62]

Under the current South African law, the only way in which the commissioning person or couple can become the *legal* parents of the child is by adopting him or her,[63] even if the surrogate mother (and her husband, if she is married) are prepared to give effect to the surrogacy agreement and hand over the child to the commissioning person or couple. In terms of the Child Care Act 74 of 1983, the surrogate mother (and, if she is married, her husband) must consent to the adoption of the child, unless the children's court is prepared to dispense with such consent on one of the grounds set out in section 19. Adoption could give rise to problems in a situation of commercial surrogacy, since section 24 of the Child Care Act criminalises the payment or receipt of remuneration in respect of the adoption of a child, except as prescribed under the Social Work Act 110 of 1978 (which exception is not relevant in the present context).[64] From Regulation 21(1)(b)(iii) of the Regulations issued under the Child Care Act (as inserted by the 1998 Amendments), it would appear that it is permissible for the adoptive parents to compensate the natural mother for her actual expenses incurred without falling foul of section 24. In a surrogacy situation, this would probably include expenses relating to the fertilization, pregnancy and birth of the child (possibly including loss of earnings by the surrogate mother).

Under the present South African law, if the surrogate mother breaches the agreement and refuses to hand over the child to the commissioning person or couple, it seems likely that the South African courts will regard the agreement as *contra bonos mores* and hence unenforceable, perhaps on the grounds that it 'constitutes a possible devaluation or distortion of the concept of the family and the

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[61]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 342.

[62]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 342.

[63]Section 17(a) of the Child Care Act, 1983 makes it possible for a commissioning couple to adopt a child born of surrogacy jointly even if both of them are the genetic parents of the child.

[64]See, however Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 343, footnote 64 and the authority quoted.

marriage relationship' by the introduction of a third party (the surrogate).[65] Thus, apart from an application for the adoption of the child (which is unlikely to succeed given the surrogate mother's refusal to give up the child)[66] and the possibility of an application to the High Court for guardianship or custody of or access to the child, the commissioning person or couple are left without any real remedy. It must be stressed, however, that although surrogacy is a very complicated and technical issue to legislate, in practice very few problems are encountered. Data reflect an absence of significant adverse effect of surrogacy on all participants.[67] The fact that a surrogate mother could wilfully surrender 'her' child for altruistic reasons and that it may be in the child's best interests for her to do so has become an acceptable idea.[68]

The unsatisfactory legal state of affairs sketched above - and, in particular, the historic conception

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65 SA Law Commission **Report on Surrogate Motherhood**, par 2.9; Tager (1986) 103 **SALJ** 381 at 385, 389-90, and 395 -7; Pretorius 1987 **De Rebus** 270 at 274, (1987) 20 **CILSA** 276 at 282; Lupton (1988) 21 **De Jure** 36 at 55-6; Brigitte Clark (1993) 110 **SALJ** 769 at 770, 'Gender Issues' in Schäfer **Family Law Service** para L 15.

66 A children's court is unlikely to regard the refusal by the surrogate mother to consent to the adoption of her child by the commissioning person or couple as 'unreasonable' in terms of s 19(b)(vi) of the Child Care Act.

67 JJ Weltmann 'Points to consider on the subject of surrogacy' The American Surrogacy Centre Inc (TASC) 1997 says there has been 5000 surrogacy contracts in 15 years of which 12 resulted in litigation and 2 resulted in partial custody being awarded to the gestational mother. D E Lascarides 'A plea for the enforceability of gestational surrogacy contracts' www.hofstra.edu/law/lawrev/lascar.html states that only one percent of surrogates change their minds and seek custody of the child. According to the Brazier Review (Surrogacy review for Health Ministers of current arrangements for payment and regulation) Secretary of State for Health (Cmnd 4668, October 1998), p. 26, in Britain evidence seems to suggest that only in a handful of cases (perhaps 4-5% of surrogacy arrangements) does the surrogate mother refuse to hand over the child. These statistics may explain the few court decisions on surrogacy contracts. In fact, there are far more law review articles on the topic of surrogacy than court decisions.

68 Where the surrogate mother refuses to hand over the child, the international practice has been not to uphold the surrogacy contract, but to place the child with the commissioning parents on the basis of family law principles. See further **In re Baby M** 109 NJ 396 A2d 1227 (1988) where the court held that the surrogacy contract was invalid and unenforceable, but that it was in the best interest of the child to stay with the commissioning parents; the surrogate mother was granted visitation rights only. See also **In re Mathew B** Cal. Rptr 18 (Ct App) (1991).

and birth of surrogate triplets carried by their 48-year-old married grandmother for her own daughter and son-in-law who were the genetic parents of the children - gave rise to an investigation by the South African Law Commission into the legal and other implications of surrogate motherhood. Following the circulation of a Questionnaire on Surrogate Motherhood in November 1989, the Commission published (in 1991) a Working Paper on the topic, incorporating a draft bill.[69] This was in turn followed by the publication in 1993 of a **Report on Surrogate Motherhood**, containing final recommendations and a further draft bill.[70] Matters did not, however, end here.

The Commission's Report was referred by Parliament to an Ad Hoc Select Committee for investigation and report. The Draft Bill contained in Schedule A to the Commission's Report was published on 14 June 1995, members of the public being requested to make written representations on the Bill to the Committee by 30 July 1995. The Ad Hoc Committee also conducted public hearings, called for written submissions through advertisements, conducted study tours in the North-West, Northern Province, Eastern Cape and KwaZulu-Natal and visited the United States of America and the United Kingdom to investigate how surrogate motherhood is dealt with in other jurisdictions. The Ad Hoc Committee completed its final report in February 1999. This report was tabled in Parliament on 19 March 1999 and was referred to the Minister of Justice for further action. Draft legislation is pending.

The Commission took the view that surrogacy should not be banned or criminalized in South Africa, but should rather be recognized and regulated by legislation. This view is shared by the Ad Hoc Committee. However, on many other aspects, the approaches of the Commission and the Ad Hoc Committee differ quite widely, particularly as regards the issues identified above as being most important for the purposes of this investigation.

According to the Commission, surrogate motherhood should be restricted as an option to commissioning parents who are lawfully married to each other and who act jointly as a couple. This recommendation was criticized on the ground that a refusal to allow a single person or an unmarried couple (whether heterosexual or of the same sex) to enter into a surrogacy agreement should be based on established empirical evidence that such persons are less capable parents and

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69 **Working Paper 38: Surrogate Motherhood** (Project 65) (April 1991).

70 **Report on Surrogate Motherhood** (Project 65) (1993).

that it is not in the best interests of the child. However, research has indicated that there is no evidence of increased likelihood of psychiatric, gender-identity or other disorders in children raised by single persons or unmarried couples (even same-sex couples).[71] It could also be argued that restricting the category of 'acceptable' commissioning persons in this way is unconstitutional: not only does it discriminate unjustifiably against persons on the grounds of their marital status or sexual orientation,[72] but it may also be regarded as impairing or limiting the right of certain persons `to make decisions concerning reproduction'.[73] Insofar as the provision effectively denies to certain persons the opportunity to become parents, it also appears to violate their rights to dignity and privacy.[74] While the best interests of the child or the potential of harm to the commissioning parent or parents might in principle justify this restriction, it is difficult to see how either of these considerations could arise from the *mere* fact that the commissioning parent is a single person or that the commissioning couple happens to be unmarried (whether heterosexual or same-sex).[75]

It would appear that some of these arguments influenced the Ad Hoc Committee in coming to the conclusion that, subject to the other qualifications required for commissioning parents, a single person (whether married or unmarried), an unmarried couple (whether of the same sex or heterosexual) and a married couple (whether married in terms of the common law or customary law or by religious rites) should be eligible to enter into a surrogacy agreement as a commissioning person or couple. The Ad Hoc Committee emphasised, however, that legislation should in all respects protect the best interests of children, especially as regards providing a child born in the context of a surrogacy agreement with a stable home. The Ad Hoc Committee was of the view that persons who are not able to provide a stable home for the child or who are physically, psychologically or otherwise unfit or unsuitable to be commissioning parents should be eliminated through the compulsory screening process recommended.

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71 See Brigitte Clark 'Surrogate Motherhood: Comment on the South African Law Commission's **Report on Surrogate Motherhood** (Project 65) (1993)' 110 **SALJ** 769 at 772. See also Craig Lind (1995) 112 **SALJ** 481 at 496 ff; Elsje Bonthuys 'Awarding Access and Custody to Homosexual Parents of Minor Children: A Discussion of *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W)' (1994) 5 **Stell LR** 298 at 310 ff; Frans Viljoen 'Signs of the Times: Changing Attitudes Under the New Constitution' (1995) 6 **Stell LR** 232 at 234 ff; Divya Singh 'Discrimination against Lesbians in Family Law' (1995) 11 **SAJHR** 571 at 576-7.

72 Section 9(3) of the Constitution.

73 Section 12(2)(a) of the Constitution.

74 Sections 10 and 14 of the Constitution.

75 See Alfred Cockrell `The Law of Persons and the Bill of Rights' in **Bill of Rights Compendium** para 3E28.

As regards the qualifications for a surrogate mother, the Commission recommended that only a woman who has already given birth to at least one child and who is married, divorced or a widow should be allowed to become a surrogate mother. This provision also appears to discriminate unfairly against persons who have never been married, as also against childless persons. According to the Commission, a surrogate who is married with children of her own 'will have experienced the physical and emotional consequences of bearing a child and should be better able to judge whether she can cope with the physical and psychological consequences of a surrogate pregnancy'.[76] Much the same sort of thinking appears to have led the Ad Hoc Committee to its conclusion that, subject to the other qualifications required for a surrogate mother, a woman should be allowed to act as a surrogate mother irrespective of her marital status (including whether she is or has ever been married), or of her sexual orientation, but that a surrogate mother must have at least one child of her own. Here too, there may be potential problems. It could be argued that, as recommended by both the Commission and the Ad Hoc Committee, careful screening of a potential surrogate mother to establish her physical and psychological suitability to act as such should be an essential prerequisite for a surrogacy arrangement. If a childless woman (whether married or not) 'passes' this screening process successfully, then it is arguable that preventing her from being a surrogate mother unjustifiably limits her constitutional rights (to equality, privacy, dignity and reproductive freedom).[77]

The Ad Hoc Committee agreed with the Commission recommendation that surrogacy agreements should only be available as a 'last resort'. Because the Commission Report restricted surrogacy as an option to a lawfully married commissioning couple, its 'last resort' recommendation was to the effect that surrogacy would only be available if the commissioning wife was for medical reasons incapable of giving birth to a child and this condition was permanent and irreversible. In line with the more liberal view of the Ad Hoc Committee as regards eligibility to be a commissioning parent, the Ad Hoc Committee's 'last resort' recommendation requires that the commissioning person or couple must, owing to biological or medical factors (or both), be unable to give birth to a child and that this condition must be permanent and irreversible. After all, if the commissioning person is a single man or the commissioning couple is a same-sex couple, then such persons are indeed permanently and irreversibly incapable of giving birth to a child - not for medical reasons, but

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76 **Report** para 8.2.3.

77 Sections 9, 10, 12 (2)(a) and 14 of the Constitution.

because of biological realities!

The Ad Hoc Committee also accepted the view of the Law Commission that the use of donor gametes should not be permitted where it is possible to use the gametes of the commissioning parents. Thus, in the case of a commissioning couple, surrogate motherhood should only be permitted if the gametes of both commissioning parents or, where this is not possible, of at least one of the commissioning parents is used: in other words, the child must be genetically related to at least one if not both of the commissioning parents. As regards a single commissioning person, the Committee recommended that he or she should only be eligible to enter into a surrogacy agreement if his or her gametes (semen or *ova*, as the case may be) are used in the conception of the child, viz that a single commissioning parent should be genetically related to the child. If the commissioning person is or both of the commissioning couple are infertile, then the Ad Hoc Committee was of the view that allowing surrogacy would amount to what Professor Meyerson calls a 'commissioned adoption'[78] and that this is not acceptable. As the child will in such cases not be genetically related to the commissioning person or to either of the commissioning couple, the approach of the Ad Hoc Committee is that 'ordinary' adoption will in such cases adequately serve the needs of the person or couple concerned. It must, however, be remembered that adoption will *not* always be possible in such cases: there is a lengthy waiting list for adoption (particularly for new born 'white' babies), the person or couple might be too old to qualify as an adoptive parent or parents, potential problems arise in the case of trans-racial or transcultural adoptions even where these are possible, etc.[79] Although it could be argued that this provision (that the commissioning person or at least one of the commissioning couple must be genetically related to the child) is aimed at restricting 'undesirable practices such as shopping around with a view to creating children with particular characteristics',[80] there is the counter-argument that, if subjected to constitutional scrutiny, this provision may be regarded as violating the right of an infertile person to 'make decisions concerning reproduction',[81] as well as such person's rights to dignity and privacy.

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78 Denise Meyerson 'Surrogacy Arrangements' in Christina Murray (ed) **Gender and the New South African Legal Order** (1994) 121 at 123.

79 See Rika Pretorius 'Practical Aspects of Surrogate Motherhood' (1991) 24 **De Jure** 52 at 59-61 and 'Surrogate Motherhood: A Detailed Commentary on the Draft Bill' 1996 **De Rebus** 114 at 117-119.

80 See **Report on Surrogate Motherhood** par 8.2.

81 Section 12(2)(a) of the Constitution.

As regards permissible types of surrogacy, the Commission took the view that partial surrogacy should not be permitted: the surrogate mother's own *ovum* should not be used in the conception of the child. Furthermore, if the surrogate mother is married, then the semen of her husband should also not be used. The reasoning underlying this prohibition on partial surrogacy is apparently that it would be unconscionable to force a mother to part with her natural child and that a surrogate mother who is not genetically related to the child will be able to relinquish him or her more easily. But this reasoning has been convincingly criticized - not only does it suggest (without any real substantiation) that it is genes rather than gestation which create a bond between mother and child, but it also fails to take account of the fact that full surrogacy 'may be potentially more exploitative of poorer women than partial surrogacy and at the same time more attractive to the wealthier couple who can obtain a child who is genetically their own'.[82] Furthermore, because full surrogacy entails complex and very expensive medical and surgical procedures with a relative low success rate (particularly in cases where the commissioning woman is infertile and a donated *ovum* has to be used),[83] partial surrogacy will in many cases be the only practically and financially feasible option open to the commissioning person or couple.

Despite these considerations, the Ad Hoc Committee also regarded full surrogacy as the 'preferred option' and is only prepared to allow partial surrogacy in circumstances in which, for biological or medical reasons, it is not possible to use the *ovum* of a commissioning parent in the conception process. Here too, the Ad Hoc Committee's recommendation may be problematic in certain cases, for example, those in which the commissioning person or couple simply cannot afford the procedures required for partial surrogacy, even though it is biologically and medically possible to use the *ovum* of a commissioning parent.

Most important for the purposes of this investigation are the approaches taken by the Commission and the Ad Hoc Committee as regards the effect of a surrogacy arrangement on the parental rights and responsibilities of the parties involved. The Commission's view was that a child born of a

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82 Brigitte Clark (1993) 110 **SALJ** 769 at 773.

83 *Ovum* donation requires risky hormone treatment and surgical extraction of the *ovum*. And even if the commissioning woman is fertile and merely needs the surrogate mother to carry the baby to term, the embryo ('created' either naturally or *in vitro*) will still have to be implanted in the surrogate mother after artificially manipulating her cycle. This operation is also 'prohibitively expensive, high-tech, and usually unsuccessful': Meyerson 'Surrogacy arrangements' in Murray **Gender and the New South African Legal Order** 138.

surrogate mother in terms of a surrogacy arrangement that satisfied the prescribed requirements[84] should, from the moment of birth, for all purposes be deemed to have the legal status of a legitimate child of the commissioning couple. The commissioning parents should therefore be regarded as the child's lawful parents and neither the surrogate mother nor her husband should have any rights or obligations towards the child. The surrogate mother should be required to hand over the child to the commissioning parents at his or her birth or as soon thereafter as is reasonably possible and can be forced to do so against her will. If, on the other hand, the surrogacy agreement fails to comply with the prescribed requirements, then it should be invalid and the child should for all purposes be deemed to be the child of the surrogate mother (subject to the provisions of section 5 of the Children's Status Act).

The Ad Hoc Committee recommended that, in cases of full surrogacy, there should be so-called 'direct parentage'. The child should be regarded from birth as the child of the commissioning person or couple and should be registered as such. So too, the surrogate mother should be obliged to hand over the child to the commissioning person or couple immediately after birth (or, in exceptional cases, within a reasonable period after birth) and, if she refuses to do so voluntarily, she should be forced to do so. Neither the surrogate mother nor any of her relatives should have any parental rights or responsibilities in respect of the child, although it should be possible for the parties to the surrogacy agreement to include in the agreement provisions regulating, inter alia, 'visitation rights' to the child.

In cases of partial surrogacy, the Ad Hoc Committee recommended the so-called 'transfer of parentage' or 'fast-track adoption' approach that is utilised in England in terms of section 30 of the Human Fertilisation and Embryology Act 1990. The child is, at birth, regarded as the child of the surrogate mother (and, if applicable, of her husband) and is registered accordingly. The commissioning person or couple will then have to apply to court for a change of parentage (parental) order, the effect of which will be to make them, in law, the parents of the child. Once the order is granted the child is issued with a new birth certificate reflecting the commissioning person or couple as the parent(s) of the child. Such an order must be applied for within 6 months of the child's birth and cannot be made unless the surrogate mother gives her unconditional consent.

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84 And that is confirmed by the court prior to the implementation of the agreement, ie prior to the 'artificial' fertilisation of the surrogate mother. In considering whether or not to confirm the agreement, the court's overriding consideration should be the best interests of the child that is to be born.

Because it is felt that she should not make a final decision as to whether or not to 'give up' the child during the first six weeks after birth, any consent which she purports to give during those six weeks is ineffective. The Ad Hoc Committee's idea was that, as in England, the child should be handed over to the commissioning person or couple immediately after birth (or, in exceptional cases, within a reasonable period after birth) and that, until the change of parentage order is made, a guardian *ad litem* should be appointed to protect the child's interests. Unlike its recommendation in cases of full surrogacy, the Ad Hoc Committee recommended that, in cases of partial surrogacy, the failure or refusal of the surrogate mother to give her unconditional consent to a change of parentage order should result in the retention of the status quo (ie the child should continue to be regarded in law as the child of the surrogate mother and, if applicable, of her husband).

As regards the Ad Hoc Committee's recommendation in respect of the use of the direct parentage model in cases of full surrogacy, it has been argued that to compel the surrogate mother to surrender the child amounts to 'sacrificing a woman's reproductive autonomy to the principle *pacta servanda sunt*',[85] and that the physiological and psychological changes experienced by the surrogate mother during pregnancy, coupled with her exposure to the physical risks of pregnancy and with the fact that it is her body which makes possible every aspect of the child's development, justify the law in refusing to force a surrogate mother (against her will) to relinquish a child she has carried, even in cases of full surrogacy (where she is not genetically related to the child).[86] It is also possible that specific enforcement of a surrogacy agreement against the surrogate mother would be unconstitutional, violating the surrogate's rights to dignity, privacy and bodily autonomy,[87] as well as the child's right to dignity.[88]

As regards the enforceability of the surrogacy agreement against the commissioning parents, it would appear that the prevailing view in South Africa is that the surrogate mother ought to be able to force the commissioning parents to take responsibility for the child, if necessary with the assistance of the court, in cases where the commissioning parents attempt to abdicate such

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85 Clark (1993) 110 **SALJ** 769 at 777.

86 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 351, footnote 90, with reference to Denise Meyerson 'Surrogacy agreements' in Murray **Gender and the new South African Legal Order** 139-40, 145.

87 Sections 10, 14 and 12(2) of the Constitution.

88 See Alfred Cockrell **Bill of Rights Compendium**, 3E28.

responsibility for some or other reason.[89]

In considering the effect of surrogacy on the status of the child, a slight shift in perspective may perhaps present a better rationale and assist future discussions of this issue. While reference is regularly made to the fact that the welfare of the **child** must be accorded the highest priority, all further reasoning is usually centred around the rights of the **adults** involved, and in particular the surrogate mother. While the Commission acknowledges the rights of parents, in its opinion the foremost consideration in this regard should indeed be the best interests of the child, as is mandated by section 28(2) of the Constitution. **The Commission would therefore recommend a more child-centred approach, accepting however that the child's best interests are closely linked to those of his or her parents and the interests of the family as a whole**.[90]

From a child's vantage point, legal ties to parents confer status in society. That status carries rights of care, support, inheritance, etc. The child's identity is furthermore vested in the family unit, and birth into the unit endows the child with a heritage and a history.[91]

The effects of surrogacy on a child could perhaps better be illustrated by an example evaluating the position of a child, born as a result of *full* surrogacy,[92] at the age of seventeen years. At the

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[89]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 351, footnote 90.

[90]Michael Freeman 'The new birth right? Identity and the child of the reproductive revolution' (1996) 4 **International J of Children's Rights** 273 at 286.

[91]M L Lupton 'Artificial reproduction and the family of the future' (1998) 17 **Med Law** 93 at 95.

[92]The position regarding partial surrogacy may present more of a problem as the child will be genetically related to the surrogate mother as well as the commissioning father. From the child's point of view, he or she will therefore only be living with one genetic parent irrespective of which party is chosen. The determining factor will once again be the family law principles as considered by the court before conception. Ananda Louw 'Reproductive rights and alternative methods of reproduction including surrogacy', paper presented at the Miller Du Toit Conference on Family Law in a Changing Society held in Cape Town on 1 and 2 February 2001 rightfully poses the question

moment of birth, the gestational mother, more than anyone else, is the person who has made the largest biological and psychological investment in the child. But, however primary this relationship is, it is readily supplemented and gradually replaced by other caring aspects of parental commitment in the social relationship.[93]

If a child aged seventeen years, genetically linked to both parents, as well as to an extended family of grandparents, uncles, aunts, nephews, nieces and possibly siblings, and nurtured by them for seventeen years would look back at his or her birth, it would be difficult to imagine that the nine months before he or she was born, spent with the surrogate mother, would play a significant role in that child's future psychological health. The child's history would present a happy picture of parents who went to the ends of the earth in order to have him or her as miracle child and a special woman who made this possible. The child would also in many cases have known the surrogate mother throughout his or her life since chances are good that she would be a relative or good friend of the family.

Compare this to a child at the same age who was denied the opportunity to live with his or her genetic parents and family in order to live with the surrogate mother and her family to whom such child is not related at all. That child would, as is often the case in adoption cases, experience anguish about his or her origin and roots and would need to have questions answered as to his or her identity, personal history, medical background and the reasons why he or she was not allowed to grow up within his or her genetic family. That child's history could be one of disputed custody, bitterness and enforced separation from his or her genetic parents. Where all the arrangements went awry chances of amiable contact between the parties would furthermore be slim.

It would be very difficult to argue that it would be in the best interests of a child who has the opportunity to grow up with his or her genetic parents who would at the same time also be his or her social parents (and which parents have been found by the court to be suitable parents for that child) to be compelled to live with the surrogate mother. In considering competing interests one should therefore not only weigh up the interests of the surrogate mother as against that of the

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whether full and partial surrogacy should not therefore be treated in the same way.

[93]R Tong 'Feminist bioethics toward developing a "feminist" answer to the surrogate motherhood question' (1996) 6.1 **Kennedy Institute of Ethics J** 37.

commissioning parents, but also against the interests of the child.

7.6 Evaluation and recommendations

The Commission has taken note of the criticism raised in respect of its report on surrogacy, but for present purposes it is not necessary to deal with these, except as far as it relates to the status of children. The introduction of draft legislation on surrogacy in Parliament is pending, and it is therefore premature for the Commission to revisit its recommendations on surrogacy.

To give effect to the vision of a single comprehensive children's statute, **the Commission recommends that the provisions in the envisaged new Surrogacy Act on the status of children born of surrogacy be mirrored in the new children's statute. In this context, it is recommended that a distinction between full and partial surrogacy be maintained. In the case of *full* surrogacy, the Commission recommends the establishment of direct parentage between the child born of surrogacy and the commissioning parent(s) from the time of birth of that child. In this scenario, the commissioning parent(s) are entitled to immediately register the child as their child. In the case of *partial* surrogacy, the Commission recommends the use of a '*delayed direct parentage*' model. In terms of this model, the commissioning parent(s) would automatically become entitled to register the child as their child after a short 'period of grace'[94] (say 60 days) has lapsed after the birth of the child**. The acquisition of parental rights and responsibilities by the commissioning parent(s) is therefore merely delayed by a 'cooling-off period' in which the surrogate mother has the right to change her mind and keep the child. Should the surrogate mother decide to keep the child, then the commissioning parents have no rights in respect of the child.[95]

Our recommendation will have the effect that **direct** parentage will be established for children born

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[94]See further Clark (1993) 110 **SALJ** 769 at 777-8; Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 352, footnote 90.

[95]In such a case, the commissioning parent(s) should be able to reclaim from the surrogate mother all money paid to her and expenses, etc incurred. It might even be possible to claim damages from the surrogate mother for her breach of contract.

of both partial and full surrogacy, with one difference, as explained above.

In the case of **full** surrogacy, if the child is with the commissioning parents, then the child will grow up with at least one genetic parent. If the child grows up with the surrogate mother, then the child will not be growing up with any genetic parent at all. In the case of **partial** surrogacy, the child will grow up with at least one genetic parent (either the surrogate mother or commissioning parent(s)).

Recent international developments have centred on the child's right to (genetic) identity.[96] In this context, identity has been described as an organising framework for holding together our past and present while providing some anticipated shape to future life.[97] Interest in genetic origins and the question as to whether identity should be based on genetic ties are being investigated and debated. This notion of identity should however not be seen to emphasise the importance of genetic parenthood over the commitment involved in bringing up a child as a social parent.[98] However, the Commission recognises the claim that there is a psychological need in all people to know their backgrounds, their genealogy and their personal history.[99]

In line with our recommendation regarding the amendment of the confidentiality provisions in the Human Tissue Act 65 of 1983 in respect of artificial insemination above,[100] the Commission recommends that a child born as a result of a surrogacy arrangement should have access to the surrogate contract and all biographical and medical information concerning his or her generic parents from the date on which he or she reaches the age of 18 years.

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[96]See, eg, Michael Freeman 'The new birth right? Identity and the child of the reproductive revolution' (1996) 4 **International J of Children's Rights** 273 and authorities there cited. See also Sarah Wilson 'Identity, geneology and the social family: The case of donor insemination' (1997) 11 **International J of Law, Policy and the Family** 270; Katherine O'Donovan 'A right to know one's parentage' (1998) 2 **International J of Law and the Family** 27.

[97]Freeman (1996) 4 **International J of Children's Rights** 290.

[98]Wilson (1997) 11 **International J of Law, Policy and the Family** 270.

[99]See also O'Donovan (1998) 2 **International J of Law and the Family** 30.

[100]See 7.4 above.

Accordingly the Commission recommends that the following provisions be included in the new children's statute:

Effect of surrogate motherhood agreement

1. (1) The effect of a valid surrogate motherhood agreement will be that -

(a) a child or children born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of the child's birth;

(b) the surrogate mother will be obliged to hand the child over to the commissioning parent or parents as soon as is reasonably possible after the birth;

(c) the surrogate mother or her husband, partner or relatives will have no rights of parenthood or custody of the child;

(d) the surrogate mother or her husband, partner or relatives will have no right of access to the child unless provided for in the agreement between the parties;

(e) subject to sections 2 and X,[101] no surrogate motherhood agreement may be terminated after the artificial fertilisation of the surrogate mother has taken place;

(f) the child will have no claim for maintenance or of succession against the surrogate mother, her husband or partner or any of their relatives.

(2) Noncompliance with the requirements of the Surrogacy Act (Act xx of 2001) or the surrogate motherhood agreement will not affect the determination of parenthood under this Act.

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[101]Allowing the surrogate mother to abort the child in terms of the Choice on Termination of Pregnancy Act 92 of 1996.

Termination of surrogate motherhood agreement

2. (1) A surrogate mother who is also a genetic parent of the child concerned, may, at any time prior to the lapse of a period of sixty days after the birth of the child, terminate the surrogate motherhood agreement by filing written notice with the court.

(2) The court will vacate the order entered pursuant to section xy of the Surrogacy Act (Act xx of 2001)[102] upon finding, after notice to the parties to the agreement and a hearing, that the surrogate mother has voluntarily terminated the agreement and that she understands the effects of the termination.

(3) The surrogate mother will incur no liability to the commissioning parents for exercising her rights of termination pursuant to this section, except for compensation for any payments made by the commissioning parents in terms of the Surrogacy Act (Act xx of 2001).

Effect of termination of surrogate motherhood agreement

3. The effect of the termination of a surrogate motherhood agreement in terms of section 2 above will be that: -

(1) where the agreement is terminated after the child is born any parental rights established in terms of section 1 above will be terminated and will be vested in the surrogate mother and her husband or life-long partner, if any.

(2) where the agreement is terminated before the child is born, the child is the child of the surrogate mother and her husband or life-long partner, if any, from the moment of the child's birth;

(3) the surrogate mother and her husband or life-long partner, if any, shall be obliged

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[102]Such provision to provide that the surrogate motherhood agreement must be in writing and confirmed by the court.

to accept the obligation of parenthood;

(4) subject to subsections (1) and (2) above, the commissioning parents will have no rights of parenthood and can only obtain such rights through adoption;

(5) subject to subsections (1) and (2) above, the child shall have no claim for maintenance or of succession against the commissioning parents or any of their relatives.

CHAPTER 8

THE PARENT / CHILD RELATIONSHIP

8.1 Introduction

This Chapter is one of the core chapters underlying the new children's statute. It lays the foundation for the move away from the concept of parental authority[1] or power to a focus on parental and children's rights and responsibilities.[2] As such the Chapter covers the codification of what is currently a large part of our private law on the law of parent and the child.[3] More specifically, the Chapter will deal with the diversity of family forms in South Africa, the shift from parental power to parental responsibility, the meaning and content of parental responsibility, the allocation of parental responsibility, the acquisition of parental responsibility by persons other than biological parents, the management of parental responsibility where several people simultaneously have parental responsibility or incidences thereof in relation to a child, and the termination of parental responsibility.

8.2 The Diversity of Family Forms in South Africa

8.2.1 Current South African law and practice

South African law has no single definition of a 'family'. Different pieces of legislation recognise individual relationships for particular purposes. It is, however, abundantly clear that the 'traditional nuclear family form', based on the relationship of a married man and woman and their biological or adopted children, does not reflect the reality of South African society.

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1 Visser and Potgieter **Introduction to Family Law** (2nd edition) 199 defines parental authority or power as 'the sum of rights, responsibilities and duties of parents with regard to their minor children on account of their parenthood, and which rights, responsibilities and obligations must be exercised in the best interests of such children and with due regard to the rights of the children'.

2 See generally J A Robinson 'Die ouer-kind verhouding in die lig van 'n menseregteakte - 'n beknopte oorsig oor die posisie in Duitsland' (1992) 7 **SAPL** 228; Van Heerden and Clark 'Parenthood in South African law - Equality and independence? Recent developments in the law relating to guardianship' (1995) 112 **SALJ** 140 at 142 et seq.

3 That is the basic principles of family law which developed from Roman-Dutch law. See further P J Visser and J M Potgieter **Introduction to Family Law** (2nd edition) Kenwyn: Juta 1998 1.

National surveys have illustrated that responsibility for a child is by no means synonymous with biological parenthood. So, for example, according to the October household survey of 1996, weighted to reflect the 1996 census results,[4] the household location of children under seven years of age was as follows:

Household location of children under 7 years of age					
	African	Coloured	Indian	White	Total
With neither parent	18%	11%	5%	7%	17%
With mother only	43%	37%	16%	10%	40%
With father only	1%	1%	1%	0%	1%
With both parents	38%	51%	78%	83%	42%
Total	100%	100%	100%	100%	100%

As regards children under the age of 18 years, the figures are as follows (revealing not only that a slightly higher proportion of this age group is *not* with their parents, but also that a slightly higher proportion is with *both* parents):

Household location of children under 18 years of age					
	African	Coloured	Indian	White	Total
With neither parent	22%	14%	5%	6%	20%
With mother only	38%	30%	18%	11%	35%
With father only	2%	1%	1%	1%	2%
With both parents	38%	55%	76%	83%	44%
Total	100%	100%	100%	100%	100%

4 The following tables were prepared by Ms Debbie Budlender of Statistics SA. Her analysis used the October household survey of 1996, weighted to reflect the 1996 census result. The survey covered 16 000 households across the country and the weights adjust the results to reflect the full population. The assistance of Ms Debbie Budlender in this regard is gratefully acknowledged.

A third table drawn from the same analysis looks at the marital status of mothers of those children (under 18 years) said to be living with the mother. Just under two-thirds are recorded as `married'. However, not all of these women will be married to the father of the child in question.

Marital status of mothers living in household with their children					
	African	Coloured	Indian	White	Total
Uncoded	1%	0%	0%	0%	0%
Never married	23%	20%	4%	3%	20%
Married under civil law	33%	61%	73%	87%	41%
Married under traditional / religious law	29%	3%	13%	2%	24%
Cohabiting	6%	6%	1%	2%	5%
Widow	6%	5%	4%	2%	5%
Divorced / Separated	3%	4%	5%	5%	4%
Total	100%	100%	100%	100%	100%

Of children under 18 years living apart from their parents, 62% were said to be the grandchildren of the head of household. Strangely, 1% were said to be the grandparent of the head of household. However, the table below suggests some miscoding or incorrect responses to the questionnaire. If ages are correctly recorded, one can assume that `grandparent' in this 1% group actually means `grandchild'. The 11% said to be the child of the head of household could indicate (a) miscoding, (b) that the mother's or father's codes were not recorded or (c) that the concept `child' is conceived more broadly than the opposite question as to whether the mother or father is present in the household. The latter could be the case where the child is said to be the `child' of a non-biological (e.g. foster, adoptive or step) parent, but the adult is not recorded as the (biological) mother or father of the child. The questionnaire itself suggests this as the relationship question asked about `son, daughter, stepchild or adopted child'. The problem appears most acute in respect of white children, but refers to only 38 unweighted cases.

Relationship to head of household of children under 18 years living apart from parents					
	African	Coloured	Indian	White	Total
Unspecified	0%	0%	0%	2%	0%
Head	2%	0%	4%	5%	2%
Spouse	0%	1%	2%	8%	1%
Child	11%	11%	15%	37%	11%
Sibling	10%	2%	0%	8%	9%
Parent	0%	0%	0%	0%	0%
Grandparent	1%	0%	7%	0%	1%
Grandchild	63%	63%	43%	31%	62%
Relative	13%	15%	24%	2%	13%
Unrelated	1%	8%	6%	9%	2%
Total	100%	100%	100%	100%	100%

The same analysis for children under 7 years of age yields the patterns indicated in the table below. While there is clearly some miscoding, as before this is exaggerated by the small absolute numbers involved in all but the African group.

Relationship to head of household of children under 7 years living apart from parents					
	African	Coloured	Indian	White	Total
Unspecified	0%	0%	0%	0%	0%
Head	1%	0%	0%	8%	1%
Spouse	1%	0%	5%	13%	1%
Child	11%	6%	16%	49%	12%
Sibling	5%	4%	0%	4%	4%
Parent	0%	0%	0%	0%	0%

Grandparent	1%	0%	0%	0%	1%
Grandchild	72%	68%	34%	22%	70%
Relative	9%	16%	45%	0%	9%
Unrelated	0%	6%	0%	5%	1%
Total	100%	100%	100%	100%	100%

Other studies have indicated that prevalent family forms other than nuclear families include the following:

° three generational female-headed household, including the grandmother (while the male is often absent or 'non-existent') - often several families share the home and care of the children;

° two generational female-headed household with a breadwinner in the 30 to 45-year category, and school-going or unemployed children;

° two generational female-headed household with absentee middle generation;

° two or three generational families with male heads.[5]

This diversity of family forms is not unique to South Africa or even to the African continent, but is increasingly encountered throughout the world.[6] Rising divorce rates and an increase in the number of children born out of wedlock have resulted in a growing number of children living in single-parent households or with one biological parent (usually the mother) and another person who is either married to that parent (a step-parent) or cohabiting with him or her. In addition, in South Africa, apartheid policies such as the migrant labour system and influx control measures had a devastating effect on family life, particularly as regards African families, resulting in the emergence of many 'social families', viz. family units in which children are brought up wholly or partly by

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5 Shirley Robinson & Linda Biersteker (eds) **First Call - The South African Children's Budget** (IDASA 1997) 94-5.

6 See, in general, John Eekelaar & Thandabantu Nhlapo (eds) **The Changing Family: International Perspectives on the Family and Family Law** (1998).

persons who are not biological or legal parents, including relatives such as grandparents, and other persons who are not related to the child in question.

The CRC recognises the fact that there is a broad range of persons who may take responsibility for children. In terms of Article 5, States Parties are obliged to respect 'the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention'. This Article thus provides the CRC with a broad and flexible definition of `family', reflecting the wide variety of kinship and community arrangements in which children are brought up around the world. The importance of the family is emphasised in the Preamble to the CRC: '. . . the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance, so that it can fully assume its responsibilities in the community', and '. . . the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'.

In 1997, the Department of Welfare and Population Development (as the Department of Social Development was then known as) released its **White Paper on Social Welfare**. Section 1 of Chapter 8 of the White Paper deals specifically with the family. Of specific relevance is paragraph 12, which reads as follows:

> The social, religious and cultural diversity of families are acknowledged as well as the effects of social change on the nature and structure of families.
>
> Families have been particularly affected by the social, economic and political policies of the past, the inequitable distribution of resources, social changes, migration patterns, the growing subculture of violence, and changes in the traditional roles of women and men. Past policies such as influx control and the migratory labour system, in addition to divorce and desertion, and the lack of housing, have redefined household structures in South Africa.

In the glossary, the White Paper defines a 'family' as:[7]

> Individuals who either by contract or agreement choose to live together intimately and

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7 Page 68 of the White Paper on Social Welfare.

> function as a unit in a social and economic system. The family is the primary social unit which ideally provides care, nurturing and socialisation for its members. It seeks to provide them with physical, economic, emotional, social, cultural and spiritual security.

It is not certain as to which family forms or structures the White Paper refers.[8]

Recent legislative developments in South Africa have given some recognition to the reality of different 'family' structures in this country. Probably the best example of this is the introduction of the new child support grant to replace the state maintenance grant (which is being phased out over a three-year period). In terms of the amendments made to the Social Assistance Act 59 of 1992 by the Welfare Laws Amendment Act 106 of 1997, the child support grant (R110 per month from 1 July 2001) is available for children under the age of 7 years who live in households with an income of below R9 600 per annum or R13 200 per annum if the child and his or her primary caregiver either live in a rural area or in an informal dwelling.[9] The grant is payable to the child's 'primary care giver', defined as 'a person, whether or not related to the child, who takes primary responsibility for meeting the daily care needs of the child' in question.[10] Despite the numerous bureaucratic difficulties that have reportedly been encountered in the administration of the child support grant,[11] the legislative recognition of the notion of the `primary care-giver' is significant, in that it represents an attempt to grapple with the importance in children's lives of a range of persons other than their biological or legal parents.

Another interesting example is the definition of 'domestic relationship' in section 1 of the Domestic Violence Act 116 of 1998. This definition is relationship-focussed and reads as follows:

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8 A van der Linde 'Die (moontlike) erkenning en beskerming van fundamentele regte ten aansien van die gesin - Omskrywing van die begrippe "gesin" en "gesinslewe"' (2000) 33 **De Jure** 1 at 17. See also 'Recent case law: *Hoge Raad 19 Mei 2000, NJ* 2000, 545' (2001) 34 **De Jure** 185 by the same author.

9 See further the Regulations Regarding Grants and Financial Awards to Welfare Organisations and to Persons in Need of Social Relief of Distress in terms of the Social Assistance Act, 1992 (Government Notice R.418 in Government Gazette 18771 of 31 March 1998), as amended by Government Notice R. 704 in GG 22525 of 27 July 2001.

10 Section 1 of the Social Assistance Act, as amended by section 3 of the Welfare Laws Amendment Act. The definition of 'primary care-giver' excludes '(a) a person who receives remuneration, or an institution which receives an award, for taking care of the child; or (b) a person who does not have an implied or express consent of a parent, guardian or custodian of the child'.

11 See, for example, Alison Tilley 'The New Child Support Grant : Theory and Practice' unpublished paper (June 1998).

'**domestic relationship**' means a relationship between a complainant and a respondent in any of the following ways:

(a) they are or were married to each other, including marriage according to any law, custom or religion;

(b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;

(c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);

(d) they are family members related by consanguinity, affinity or adoption;

(e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or

(f) they share or recently shared the same residence;

Yet another example is the broad definition of 'parent' in the South African Schools Act 84 of 1996. This definition reads as follows:

'**Parent**' means -

(a) the parent or guardian of the learner;
(b) the person legally entitled to custody of the learner; or
(c) the person who undertakes to fulfil the obligations of a person referred to in paragraphs (a) and (b) towards the learner's education at school.

In South Africa, the concept of 'parental power' or 'natural guardianship' is also closely linked to the nuclear family model. 'Parental power' vests equally in both parents of a child born in wedlock,[12] whilst it is only the mother of an extra-marital child who automatically has parental power over such child.[13] The natural father of an extra-marital child can, of course, apply to the High Court for guardianship or custody of or access to the child, which application will only be granted if the court

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12 See section 1(1) of the Guardianship Act 192 of 1993. See also sections 2, 8(3) and 8(4)(d) of the Recognition of Customary Marriages Act 120 of 1998. See also section 8.5.2.1 below.

13 In terms of section 3 of the Children's Status Act 82 of 1987, where the unmarried mother of an extra-marital child is herself a minor, the guardianship (in the narrow sense, excluding custody) of that child vests in the mother's guardian or guardians while the mother has custody of her child.

is satisfied that it is in the best interests of the child.[14] Similarly, the High Court may, in its capacity as upper guardian of minors, make guardianship, custody and access orders in respect of children in favour of non-parents, provided that such an order is regarded by the court as being in the best interests of the child concerned. South African case law illustrates that it is only in exceptional circumstances[15] that the High Court will be prepared to award guardianship or custody of a child to a non-parent to the *exclusion* of the natural parents and that it is highly unusual for the court to appoint non-parents as guardians or custodians to act as such *together* with the parents of the child in question.[16] Legal recognition of the parenting role of 'social' or 'psychological' parents in this country thus appears to be fairly limited, despite the wide diversity of family forms referred to above.

8.2.2 **Comparative review**

Recent law reform endeavours in the area of child law in other African countries also reflect an increased willingness to recognise both a broad range of family forms and the role of 'social parents', viz. persons who are not biological parents but who fulfil parental functions by taking care of children or being otherwise involved in their upbringing. Thus, the Ghanaian Children's Act of 1998 defines a 'parent' as including (apart from a natural parent) *'a person acting in whatever way as parent'* (section 124), while section 5 provides for the child's right '*to live with his parents* ***and family****'* (emphasis added). In terms of the 1996 Namibian Draft Child Care and Protection Act, 'family' is defined as meaning 'a child, the child's parents, any legal custodian or guardian of the child other than the child's parents, and any other person who acts as a primary caretaker for the child or acted as a primary caretaker for the child immediately prior to a removal or placement of

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14 Prior to 4 September 1998, such an application had to be made under the common law, the court exercising its common law powers as upper guardian of minors. The Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 (date of commencement 4 September 1998) now contains specific provisions relating to applications by natural fathers for guardianship or custody of, or access to, their extra-marital children.

15 For example, if neither of the parents is fit or willing to fulfil the functions of guardian or custodian in respect of the child.

16 One case in point is that of **Ex parte Kedar** 1993 (1) SA 242 (W), in which an application for joint guardianship brought by the mother of an extra-marital child and her employer (i.e. a third party), was granted. Both the mother (a domestic worker) and her child had become an integral part of the employer's family and the award of joint guardianship was necessary in order to enable the child to be enrolled at a local primary school (the school had refused to admit the child on the ground that his guardian did not own property in the vicinity of the school). In the circumstances of this case, the court was satisfied that the order sought was in the best interests of the child.

such child in terms of this act'.[17]

It would appear that, in New Zealand, there is a growing realisation that confining 'guardianship' (the means of establishing a parental relationship with a child in New Zealand) to the natural parents 'does not always accord with the practices and values of non-European cultures'.[18] Thus, it is legally possible (and apparently not uncommon) in that country for a variety of people to be appointed as additional guardians of a child, or even in some cases as substitutes for the natural parents.[19] Guardianship and custody orders may be made in favour of non-parents in terms of the Guardianship Act 1968 or the Children, Young Persons and their Families Act 1989. The focus of the latter Act (the primary legislation dealing with children in need of care and protection) is on sustaining the family group and *whanau*. Although the word 'family' is not defined in the 1989 Act, 'family group' is defined as follows:

> "Family group", in relation to a child or young person, means a family group, including an extended family -
>
> (a) In which there is at least 1 adult member -
>
> (i) With whom the child or young person has a biological or legal relationship; or
>
> (ii) To whom the child or young person has a significant psychological attachment; or
>
> (b) That is the child's or young person's *whanau* or other culturally recognised family group.

In terms of the 1989 Act, custody and guardianship orders may only be made (by a Family Court) after the court has made a declaration that the child in question is in need of care and protection.

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17 Clause 1. 'Primary Caretaker' is in turn defined as 'a person other than the parent or other legal custodian of a child, whether or not related to the child, who takes primary responsibility for the daily care of the child with the express or implied permission of the child's custodian'.

18 W R Atkin & C A Bridge 'Establishing Legal Relationships: Parents and Children in England and New Zealand' (1996) 17 **New Zealand Universities LR** 13 at 15.

19 'Maori, for example, readily accept that parenting may and sometimes should be done by other relatives. Maori understand the child as belonging to the family group or *whanau* rather than to the nuclear family model upon which the law tends to be built': Atkin & Bridge (1996) 17 **New Zealand Universities LR** 13.

Such a declaration may not be made unless a 'family group conference' has been held.[20] Thus, at least as far as children in need of care and protection are concerned, the New Zealand legal position is based on the recognition of family relationships which include, in addition to status connections (biological, legal and *whanau* connections), also functional connections between children and adults (psychological attachments).

As will be discussed more fully below, the concept of 'parental power' has been replaced, in countries such as England, Scotland and Australia, with the concept of 'parental responsibility'. While legal recognition has been given in these countries to the existence of diverse family forms and domestic relationships in legislation dealing with family/domestic violence, the allocation of parental responsibility proceeds from the starting point of the child's biological parents (all mothers and all *married* fathers in the English and Scottish context; all parents, regardless of their marital status, in the Australian context). There are, however, detailed provisions in the English Children Act 1989, the Children (Scotland) Act 1995 and the Australian Family Law Act 1975 (as extensively amended by the Family Law Reform Act 1995) enabling the acquisition (by court order) of parental responsibility (or aspects thereof) by persons other than parents. Attempts have also been made to clarify the legal position of persons who, while not having parental responsibility for a particular child, nevertheless have the *de facto* care of the child, either on a temporary or part-time basis or on a longer term or full-time basis. So, for example, section 3(5) of the English Children Act of 1989 provides as follows:

> A person who -
>
> (a) does not have parental responsibility for a particular child; but
> (b) has care of the child,
>
> may (subject to the provisions of this Act) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare.

While there is apparently some doubt about the exact scope of this provision, it seems that it does not empower the caregiver to take 'major', as opposed to 'minor' or day-to-day, decisions in relation

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20 See further on the Children, Young Persons and their Families Act 1989, J A Robinson 'Multi-Kulturaliteit en die Familiereg: Enkele Gedagtes oor die Posisie in Nieu-Zeeland' (1996) 7 **Stell LR** 210 and 'An Overview of Child Protection Measures in New Zealand with Specific Reference to the Family Group Conference' (1996) 7 **Stell LR** 313.

to the child. Nor does it give the caregiver any legal right to retain the care of the child.[21]

The Scottish provision goes somewhat further than its English counterpart. In terms of section 5 of the Children (Scotland) Act 1995:

> (1) Subject to subsection (2) below, it shall be the responsibility of a person who has attained the age of sixteen years and who has care or control of a child under that age, but in relation to him either has no parental responsibilities or parental rights or does not have the parental responsibility mentioned in section 1(1)(a) of this Act,[22] to do what is reasonable in all the circumstances to safeguard the child's health, development and welfare, and even though he does not have the parental right mentioned in section 2(1)(d)[23] of this Act, give consent to any surgical, medical or dental treatment or procedure where -
>
> (a) the child is not able to give such consent on his own behalf; and
>
> (b) it is not within the knowledge of the person that a parent of the child would refuse to give the consent in question.[24]
>
> (2) Nothing in this section shall apply to a person in so far as he has care or control of a child in a school ("school" having the meaning given by section 135(1) of the Education (Scotland) Act 1980).

8.2.3 **Comments and submissions received**

In the research paper on the parent-child relationship,[25] the following questions were posed:

(1) What is the most appropriate way to give legal recognition, in a comprehensive children's statute, to the diversity of family forms and 'parental'/child relationships existing in South

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21 Andrew Bainham **Children : The Modern Law** (2nd edition) 176. It is interesting to note that a provision almost identical to section 3(5) of the Children Act has been incorporated in the revised draft Kenya Children Bill of 1998, clause 20(5).

22 Viz. the responsibility 'to safeguard and promote the child's health, development and welfare'.

23 Viz. the right 'to act as the child's representative'.

24 As is pointed out by Kenneth McK. Norrie **Children (Scotland) Act 1995** 36 - 37, the power to give medical consent under this provision is 'limited by its protective context. It will not include treatment designed for the benefit of others, such as circumcision or organ donation, nor elective treatment such as contraception or abortion (unless this can be shown to be necessary to safeguard the child's welfare). It may not cover cosmetic surgery (unless this is therapeutic). Experimental treatment for research cannot be consented to under this provision. Power to consent includes power to refuse, because 'consent' is simply a shorthand way of expressing the power of medical decision-making'.

25 The research paper was prepared by Professor (now Judge) Belinda van Heerden. The focus group discussion was held at the Breakwater Lodge in Cape Town on 12 - 13 March 1999.

African society?

(2) Should a more pluralistic and functional legal definition of 'the family' be incorporated in a comprehensive children's statute? If so, what should this definition be and for what purposes should it be utilised?

There was broad consensus among respondents that the diversity of family forms and 'parental'/child relationships existing in South African society must be recognised. There was, however, less clarity on how this recognition should be embodied in legislation. Some respondents supported the inclusion in the children's statute of a definition of *'family unit*' or *'family group*' and suggested that this definition should be based on a combination of the Namibian definition of '*family*' and the New Zealand definition of *'family group'*. Other respondents proposed that the concept *'parental responsibility*', rather than *'family unit'*, be defined, and that the children's statute should also include a non-exhaustive list of guidelines of what 'parental responsibility' includes. Many respondents[26] were of the view that legal recognition of family forms should not only be based on biological parenthood, but should take into consideration the wide variety of kinship and community care arrangements in which South African children are being brought up.

The detailed submission of the National Coalition for Gay and Lesbian Equality ('NCGLE') supported the recognition of the diverse range of family relationships and structures existing within South Africa, including unmarried heterosexual couples, same-sex partnerships, religious marriages, and relationships between family members such as siblings who live together and owe each other a mutual obligation of support. In particular, the Coalition submitted that, in order to enforce the best interests of the child, new child care legislation must expressly prohibit unfair discrimination against any child, parent or family member. In addition to the prohibited grounds of discrimination listed in the Constitution, the Coalition proposed that family status (relating to discrimination on the basis of biological relationships), nationality and socio-economic status be included as grounds of non-discrimination. The non-discrimination clause proposed by the Coalition reads as follows:

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26 Including Ms Wilona Petersen and Ms Denise Mafoyane of the Department of Social Welfare (Bloemfontein), Mr D S Rothman, Commissioner of Child Welfare (Durban), Mrs S M Van Tonder of SANCA (Kimberley), Ms M De Beer, a social worker at the Department of Health and Welfare (Nylstroom), Ms L Opperman and six of her senior colleagues at the Christelik-Maatskaplike Raad (Bellville) and Ms C Grobler of the Office of the Family Advocate (Pretoria).

> No person shall unfairly discriminate, whether directly or indirectly, against any child, parent or family member who is identified by one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, family status, nationality or socio-economic status.
>
> This prohibition on unfair discrimination includes unfair discrimination on the basis of -
>
> (a) a characteristic or perceived characteristic that appertains generally to persons identified by one or more grounds; or
>
> (b) a characteristic or perceived characteristic that is generally attributed to persons identified by one or more grounds.
>
> Disability includes "the presence in the body of organisms capable of causing disease or illness".[27]

There was also overwhelming support among respondents for the incorporation of a more pluralistic and functional legal definition of the family in a comprehensive children's statute. Here too, however, there was less clarity as to what this definition should be and as to the purposes for which such a definition should be utilised.

Professor C J Davel of the Centre for Child Law, University of Pretoria, supported the idea of broadening the concept of '*family*' in a comprehensive children's statute. Professor Davel favoured the New Zealand approach because it provides for a primary care-giver and acknowledges not only the biological/legal relationship, but also functional relationships (psychological attachment) and the role of the extended family. Ms L Opperman and her colleagues, Ms Wilona Petersen and Ms Denise Mafoyane, largely share Professor Davel's view. The Thasamoopo Welfare Social Workers argued that the reality of South African society dictates a definition of 'family' that goes beyond the context of the traditional nuclear family form and recognises the existence of child-headed households. This organisation would define 'family' as 'an environment in which there are rules, enculturation, definition of rules and responsibilities, guardians and an adult regarded as a parent.'

A more pluralistic and functional legal definition of 'family' was also supported by Ms M De Beer, who proposed that any such definition should contain the following elements:

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[27] This formulation by the Coalition ensures that people living with HIV/AIDS are protected from unfair discrimination.

- at least one adult member;
- biological or legal ties with the child;
- a child or children;
- a relationship between the members;
- the addressing of basic needs;
- frequency and interaction between members; and
- membership of a community/society.

According to the NCGLE, a clear trend is being established in South African public policy and law so as to include non-conventional families and partners in definitions of 'family' or 'spouse'. Pointing to the constitutionally-entrenched right of a child 'to family care or parental care, or to appropriate alternative care when removed from the family environment', the NCGLE submitted that a comprehensive children's statute must give content to this right by expressly including definitions of both 'family' and 'parent' in an inclusive manner which acknowledges the reality of families in South Africa. The NCGLE argued that respect for and protection of diversity suggests that a definition of 'family' should be based on the **roles** that families fulfil, and not on the particular **forms** that they may take. Such a definition of family is important in order to facilitate -

- broader access to services which are either reserved for families, or to which families have priority - access to such services has historically been limited to traditionally defined families;

- the prevention of the removal of a child and his or her placement in foster care with strangers or in institutions - by failing to acknowledge and recognise diverse forms of family, children have historically been removed from the care of non-traditional and extended family structures.

The following definitions were suggested by the NCGLE:

> A **child** is any person under the age of 18 years.
>
> A **family** means a collection of individuals who - by contract, agreement or kinship - choose to function or in fact function as a unit in a social and economic system.
>
> In relation to a **child**, a **family member** means any member of a **family** -

(a) with whom the **child** or young person has a biological or legal relationship;

(b) with whom the **child** or young person has developed a relationship based on a significant psychological or emotional attachment; or

(c) who acts as a care-giver to the **child**, has acted as a care-giver to the **child**, or has indicated an express intention to act as a care-giver.

What the children said:

Before we proceed to the analysis and recommendation section it is important to take note of what the children said in response to the following question:[28]

3.3.1 There are many different kinds of families in South Africa, and the new law will have to make sure that children's rights are always respected, no matter where they are living or whom they are living with. Would it be a good thing if the law said what the responsibilities were of the parents and families towards children?

"Yes" responses		**"No" responses**	
No reason given	13	"The government and people who are in positions of care should be responsible."	1
So that parents and other people who care for children can be educated and be made aware of their responsibilities.	7	No reason given	1
So as to prevent child abuse	1		

8.2.4 **Evaluation and recommendation**

The Commission recommends that the diversity of family forms and parent/child relationships in South Africa can best be recognised by means of the inclusion, in the new children's statute, of a section expressly prohibiting unfair discrimination against children on any of the grounds set out in section 9(3) of the Constitution, in article 2 of the CRC, as

28 The answers given here are grouped into broad 'yes' and 'no' categories. The table above represents the substantiations for the 'yes' and 'no' answers given as well as the number of responses, which were aligned with these statements.

also on the grounds of the family status, health status, socio-economic status, HIV-status or nationality of the child or of his or her parents, legal guardian, primary care-giver or any of his or her family members.[29]

The Commission recommends that the new children's statute should contain a definition of 'family member', which definition should be relationship-focussed and should entrench a non-traditional approach to family relations. The definition of 'family member' proposed by the NCGLE appears to give effect to most of the submissions received, although the Commission is aware of the possible need for different definitions of 'family' for different purposes, for example adoption, foster care, access to services and so on.

The Commission accordingly proposes the following definition of ‘family member’:

> **“family member”** in relation to a child means -
>
> (a) a parent, grandparent, brother, sister, uncle or aunt of the child;
>
> (b) the child’s guardian or any other person who is legally responsible for the care and welfare of the child;
>
> (c) any primary care-giver of a child;
>
> (d) any other person with whom the child has developed a significant relationship based on psychological or emotional attachment which significantly resembles a family relationship.

8.3 The Shift from ‘Parental Power' to ‘Parental Responsibility'

8.3.1 Current South African law and practice

Although the Guardianship Act 192 of 1993 still uses the language of parental ‘rights, powers and

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29 See 5.4 above for the formulation of the unfair discrimination clause.

duties', it has been recognised in South Africa that the 'parental power' (or 'natural guardianship') is in fact concerned more with the duties and responsibilities of parents than with parents' rights and powers - the modern emphasis in this regard being on the rights and interests of children rather than parents. As stated by Foxcroft J in the recent case of **V v V**:[30]

> There is no doubt that over the last number of years the emphasis in thinking in regard to questions of relationships between parents and their children has shifted from a concept of parental power of the parents to one of parental responsibility and children's rights. Children's rights are no longer confined to the common law, but also find expression in s 28 of the Constitution of the Republic of South Africa Act 108 of 1996, not to mention a wide range of international conventions.

As mentioned above, article 5 of the CRC introduces the concept of parents' and others' 'responsibilities' for children, linking them to parental rights and duties, which are needed to fulfil responsibilities. Article 18 also expands on the concept of parental responsibilities, requiring States Parties to 'use their best efforts' to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of their child: 'Parents or, as the case may be, legal guardians, have primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern'. Although the CRC does not contain a specific definition of 'parental responsibilities', the content of the whole CRC appears to be relevant in this regard.[31]

The **Guidelines for Periodic Reports**[32] requires information to be provided (to the Committee on the Rights of the Child) on 'the consideration given by law to parental responsibility, including the recognition of the common responsibilities of both parents in the upbringing and development of the child and that the best interests of the child will be their basic concern. Also indicate how the principles of non-discrimination, respect of the views of the child and the development of the child to the maximum extent, as provided for by the CRC, are taken into account'.[33] As pointed out by

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30 1998 (4) SA 169 (C) at 176D.

31 See article 5, in terms of which parents (and other persons) have responsibilities to provide 'appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.'

32 General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties under Article 44, Paragraph 1(B), of the Convention (adopted by the Committee on the Rights of the Child at its 343rd meeting (thirteenth session) on 11 October 1996).

33 Paragraph 65.

Rachel Hodgkin and Peter Newell, the implication is that legal concepts of parental rights and powers should be translated into the concept of parental responsibilities and that the latter concept should be reflected and defined in the law of States Parties, using the framework of the CRC.[34]

Thus, not only can it be argued that the South African common law concept of 'parental power' is outmoded and unsatisfactory, it would also appear that, as a State Party to the CRC, South Africa has an international legal obligation to recognise in its legislation the shift away from this concept towards the concept of parental responsibility. There was also overwhelming support in the submissions on and responses to Issue Paper 13 for legislative recognition of this shift in emphasis. At the same time it was felt that an appropriate balance should be struck between the responsibilities of parents towards their children and the rights and powers needed to enable parents to fulfil their responsibilities. Care should be taken to avoid new legislation becoming 'parent-unfriendly'.

8.3.2 **Comparative review**

In 1984, the Committee of Ministers of the Council of Europe adopted a Recommendation[35] specifically dealing with the topic of parental responsibilities, it being agreed that 'the term "parental responsibilities" described better the modern concept according to which parents are, on the basis of equality between the parents and in consultation with their children, given the task of educating, legally representing, maintaining etc. their children. In order to do so they exercise powers to carry out duties in the interests of the child and not because of an authority which is conferred on them in their own interests'.[36]

The term 'parental responsibility' was introduced into English law by the pioneering Children Act 1989, which came into force in 1991. It was subsequently adopted in the domestic legislation of

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34 Rachel Hodgkin & Peter Newell **Implementation Handbook for the Convention on the Rights of the Child** (UNICEF 1998) 76-7 and 227-8.

35 Recommendation No R (84) 4.

36 Paragraph 6 of the Explanatory Memorandum to the Recommendation, as cited by N V Lowe 'The Meaning and Allocation of Parental Responsibility - A Common Lawyer's Perspective' (1997) 11 **International Journal of Law, Policy and the Family** 192 at 193.

other UK jurisdictions such as the Isle of Man,[37] Northern Ireland[38] and Scotland.[39] Australia too has recently adopted this key concept, in terms of the far-reaching amendments made to the Family Law Act 1975 by the Family Law Reform Act 1995 which came fully into operation in June 1996. This trend is also evident from recent child legislation or draft legislation in several African countries. So, for example, section 7(1) of the Ugandan Children Statute 1996 (in force from 1997) provides that '[e]very parent shall have parental responsibility for his or her child'. So too, section 6 of the Ghanaian Children's Act of 1998 is headed 'Parental duty and responsibility' and section 6(3) enumerates certain specific duties which parents have in relation to their children. The revised draft Kenya Children Bill of 1998 contains detailed provisions governing the meaning, allocation and acquisition of 'parental responsibility', parental responsibility agreements and the transmission of parental responsibility on the death of one or both parents of a child.[40]

8.3.3 Comments and submissions received

Both Issue Paper 13, as also the research paper on the parent-child relationship, posed the question as to whether a comprehensive children's statute should incorporate the concept of parental responsibility to replace the common-law concept of parental power.

There was a great deal of support in the submissions on and responses to Issue Paper 13 for a legislative recognition of the shift in emphasis from 'parental rights' to 'parental responsibilities', although some respondents[41] were of the view that this was not necessary. Respondents to the research paper as well as participants at the focus group discussion agreed overwhelmingly that the move from the concept of 'parental power' to 'parental responsibility' is justified. However, as indicated above, several respondents[42] cautioned that an appropriate balance should be struck between the responsibilities of parents towards their children and the rights and powers needed to

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37 Under the Manx Family Law Act 1991.

38 The Children (Northern Ireland) Order, which came into force in November 1996.

39 The Children (Scotland) Act 1995, which came into force as regards the parental responsibility provisions in November 1996.

40 Part 111 of the Bill.

41 Such as the Durban Committee of Family Lawyers, ATKV and Mr D S Rothman.

42 Ms S M van Tonder, Mr D S Rothman, Ms Wilona Petersen, Ms Denise Mafonyane, Ms L Opperman and her colleagues and Ms V K Mathakgana (Chief Social Worker, Department of Developmental Social Welfare, Kimberley).

enable parents to fulfil their responsibilities. Thus, according to Ms C Grobler from the Office of the Family Advocate, Pretoria:

> Although it is necessary to recognise the paradigm shift from the power concept to responsibility, the importance of the parental role (e.g. guidance) should not be undermined. Children should also be taught that they have certain responsibilities vis-à-vis their relationship with their parents.

The NCGLE pointed out that the concept of 'parental power' focuses on control by parents over their children's lives at the expense of providing such children with appropriate direction or guidance. The control model disempowers children by rendering them unable to assert their rights and to understand their concomitant responsibilities. The Coalition therefor submitted that the common-law concept of parental power is incompatible with our Constitution, which expressly recognises that particular rights are vested in children. Referring to the judgment of Foxcroft J in **V v V**,[43] the Coalition argued that, to serve the purposes of consistency, legal certainty and the protection of children's rights and interests, the concept of 'parental power' must be expressly replaced in the new children's statute.

8.3.4 Recommendation

The Commission recommends that the new children's statute should replace the common-law concept of '*parental power*' with a new concept of *'parental responsibility*', while at the same time striking the correct balance between the responsibilities of parents and the rights and powers needed to enable parents to fulfil their responsibilities.

8.4 The Meaning and Content of Parental Responsibility

8.4.1 Introduction

What does 'parental responsibility' mean and how does it differ from 'parental power' or 'parental rights and duties'? It is obviously important that parental responsibility be definable in some way in order to determine what those persons who have it are entitled or bound to do in relation to the

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[43] 1998 (4) SA 169 (C) at 176D.

child concerned. The question thus arises as to whether such definition should be contained in a general statutory provision or simply left to case law and statutory provisions dealing with specific points. In this regard, different approaches have been followed in various legal systems which have incorporated the concept in their legislation.

8.4.2 Current South African law and practice

In terms of section 1(2) of the Guardianship Act 192 of 1993 both parents of a minor child of their marriage are competent to exercise independently of each other, and without the consent of the other, any guardianship rights, powers or duties. The Act is silent on whose view[44] should prevail if there is disagreement between the parents over the exercise of any of these rights, powers and duties. Hawthorne[45] submits that the High Court, in its capacity as upper guardian, should resolve such disagreement on the basis of what is in the best interest of the child.

As far as the parental responsibility of parents to maintain their children is concerned, the position is that both parents must support their children according to their means.[46] This is a joint, but not necessary equal (in monetary terms) responsibility of both parents.

8.4.3 Comparative review

An early attempt to define the concept is to be found in the abovementioned Recommendation adopted by the Committee of Ministers of the Council of Europe in 1984, describing parental responsibilities as 'a collection of duties and powers which aim at ensuring the moral and material welfare of the child, in particular taking care of the child, by maintaining personal relationships with him and by providing for his education, his maintenance, his legal representation and the administration of his property'.

Central though the concept is to the English Children Act 1989, this Act does not contain a

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44 Previously, where there was a difference of opinion between parents exercising parental power the father's rights were considered superior to those of the mother. See **Calitz v Calitz** 1939 AD 56; **H v I** 1985 (3) SA 237 (C).

45 'Children and Young persons' in B Clark (ed) **Family Law Service** E 32.

46 **Lamb v Sack** 1974 (2) SA 670 (T); **Sager v Bezuidenhout** 1980 (3) SA 1005 (O); **Zimelka v Zimelka** 1990 (4) SA 303 (W); **Osman v Osman** 1992 (1) SA 751 (W).

comprehensive definition of what ‘parental responsibility' comprises. Instead, the statutory definition is essentially a ‘non-definition',[47] in that it merely refers to the general law (i.e. common law and other statutes) to reveal the content of the ‘new' concept. Thus, section 3(1) states that:

> In this Act, ‘parental responsibility' means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.

In defining the concept in this way, the Act implemented the strategy recommended by the English Law Commission in its Report entitled **Family Law - Review of Child Law - Guardianship and Custody**.[48] The view of the Law Commission was that, although it would be ‘superficially attractive' to provide a comprehensive list of the incidents of parental responsibility, it was impractical to do so. Such a list would have to change from time to time to meet differing needs and circumstances and would also have to vary with the age and maturity of the child and the circumstances of each individual case. In the absence of a comprehensive definition, various English writers have attempted to give some guidance by listing the major components of parental responsibility. Thus, Bromley and Lowe suggest that the concept ‘comprises at least the following:

a. Providing a home for the child.
b. Having contact with the child.
c. Determining and providing for the child's education.
d. Determining the child's religion.
e. Disciplining the child.
f. Consenting to the child's medical treatment.
g. Consenting to the child's marriage.
h. Agreeing to the child's adoption.
i. Vetoing the issue of a child's passport.
j. Taking the child outside the [country] and consenting to the child's emigration.
k. Administering the child's property.
l. Protecting and maintaining the child.
m. Agreeing to change the child's surname.

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47 So described by Lord Meston in the debate on the legislation: **Hansard** HL, Vol 502, col 1172 (1989).

48 Law Com No 172 of 1988, para 2.6.

n. Representing the child in legal proceedings.

o. Burying or cremating a deceased child.

p. Appointing a guardian for the child'.[49]

The English legislative approach has, however, been criticised as unsatisfactory: 'it immediately throws one back to the rights and duties concept which "responsibility" was supposed to replace'.[50] Despite this criticism, the Australian Family Law Reform Act 1995, which drew very substantially on the provisions of the English Children Act 1989, does not take the matter any further. Section 61B of the Australian Family Law Act 1975, as amended by the 1995 Act, provides as follows:

> In this Part, "parental responsibility", in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

In **B and B: Family Law Reform Act 1995**,[51] the Family Court, referring to the above definition, stated:

> 9.24 This definition provides little guidance, relying as it does on the common law and relevant statutes to give it content. It would appear to at least cover guardianship and custody under the previous Pt. VIII and may be wider . . .
>
> 9.25 It omits any reference to rights. While this omission is understandable, given the philosophy of the amendments, it is doubtful whether that achieves any practical effect other than to make it clear that there are no possessory rights to children, insofar as this could be said to have been the case prior to the amendments.

The English and Australian position may usefully be contrasted with that in Scotland. The Scottish Law Commission was of the view that there would be advantages in having a general statutory statement of parental responsibilities. Such a statement would make explicit what was already implicit in the law; it would counteract any impression that a parent had rights but no responsibilities; and it would enable the law to make it clear that parental rights were not absolute

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49 P M Bromley & N V Lowe **Bromley's Family Law** (8th edition) 30.

50 N V Lowe 'The meaning and allocation of parental responsibility - A common lawyer's perspective' (1997) 11 **International Journal of Law, Policy and the Family** 192 at 193. See also the Scottish Law Commission **Report on Family Law** (Scot Law Com No 135 of 1992) para 2.18 : 'Child law is of concern to a great many people who are not lawyers and who do not have access to complete sets of law reports. It is, we think, unsatisfactory and unfair to expect people to work with a definition of parental rights which says, in effect, that parental rights are what the common law says they are, without providing further assistance'.

51 (1997) 21 Fam L R 676.

or unqualified, but were conferred in order to enable parents to meet their responsibilities.[52]

In accordance with the recommendations of the Scottish Law Commission, the Children (Scotland) Act 1995 spells out the content of the concept of 'parental responsibilities' as follows:

> [A] parent has in relation to his child the responsibility -
>
> (a) to safeguard and promote the child's health, development and welfare;
>
> (b) to provide, in a manner appropriate to the stage of development of the child -
>
> (i) direction;
> (ii) guidance,
>
> to the child;
>
> (c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and
>
> (d) to act as the child's legal representative,
>
> but only in so far as compliance with this section is practicable and in the interests of the child.[53]

The Act goes even further by listing certain rights which parents have in order to enable them to fulfil their parental responsibilities. Thus, in terms of section 2(1), a parent:

> has the right –
>
> (a) to have the child living with him or otherwise to regulate the child's residence;
>
> (b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;
>
> (c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and

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52 Scot Law Com No 135 of 1992, para 2.1.

53 Section 1(1). It is important to note that the responsibilities of parents to support and educate their children are explicitly spelt out in other Scottish statutes: see, on the duty of support, the Family Law (Scotland) Act 1985, section 1 and the Child Support Act 1991, section 1, and on the duty in relation to education, the Education (Scotland) Act 1980, section 30. These duties are not affected by the provisions of section 1(1) - in terms of section 1(4), the parental responsibilities referred to in section 1(1) 'supersede any analogous duties imposed on a parent at common law; but this section is without prejudice to any other duty so imposed on him or to any duty imposed on him by, under or by virtue of any other provision of this Act or of any other enactment'.

(d) to act as the child's legal representative.[54]

The Scottish approach has been applauded by several commentators, being described as a 'distinct improvement [on the English legislation] . . . more thoughtful, better-focussed but most importantly more child-centred than that found in the Children Act 1989'.[55] It has been pointed out that the Scottish legislation 'neatly handles the problem of dealing with children of different ages and maturity by the simple expedient of stating that the responsibility to give direction and guidance should be "in a manner appropriate to the stage of development of the child" and [that] by making separate provisions for responsibilities and rights it grapples with the problem of having to deal with the parent-child relationship not simply between parent and child (in which context the expression "responsibility" seems absolutely right), but also as between the parents themselves and between parents and third parties (in which context the expression "rights" seems appropriate). It also avoids the problem of being too specific'.[56]

Turning to the African continent, the Ugandan Children Statute 1996 follows the English and Australian approach by defining parental responsibility as meaning 'all rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child'.[57] However, the Ugandan legislation does not stop there - it goes on to enumerate certain basic responsibilities on the part of parents and other caregivers as follows:

> 6(1) It shall be the duty of a parent, guardian or any person having custody of a child to maintain that child and, in particular that duty gives a child the right to -
>
> (a) education and guidance;
> (b) immunisation;
> (c) adequate diet;
> (d) clothing;
> (e) shelter; and
> (f) medical attention.
>
> (2) It shall be the duty of any person having custody of a child to protect the child from

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54 In terms of section 2(5), the parental rights listed in section 2(1) 'supersede any analogous rights enjoyed by a parent at common law; but this section is without prejudice to any other right so enjoyed by him or to any right enjoyed by him by, under or by virtue of any other provision of this Act or of any other enactment'.

55 Michael Freeman 'The Next Children's Act?' [1998] 28 **Family Law** 341 at 346.

56 Lowe (1997) 11 **International Journal of Law, Policy and the Family** 192 at 196.

57 Section 2.

discrimination, violence, abuse and neglect.[58]

....

8. It shall be unlawful to subject a child to social or customary practices that are harmful to the child's health.[59]

9. No child shall be employed or engaged in any activity that may be harmful to his or her health, education, mental, physical or moral development.'[60]

A similar 'blend' of parental responsibilities and children's rights is to be found in the Ghanaian Children's Act of 1998. Sub-Part I of the Act is headed 'Rights of the child and parental duty' - the children's rights provided for in this Sub-Part and in other sections of the Act[61] appear to encompass all the rights contained in the 'children's rights' provisions[62] of the 1992 Constitution of the Republic of Ghana, and many of the rights in the UN Convention, including socio-economic rights.[63] Although there is no definition of 'parental responsibility' in the Act, Sub-Part I contains a statement of 'parental duty and responsibility' reading as follows:

(1) No parent shall deprive a child [of] his welfare whether –

(a) the parents of the child are married or not at the time of the child's birth; or
(b) the parents of the child continue to live together or not.

(2) Every child has the right to life, dignity, respect, leisure, liberty, health, education and shelter from his parents.

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58 Section 6.

59 Section 8.

60 Section 9. Certain additional responsibilities are imposed on the parents of children with disabilities (and the State), namely to take appropriate steps to ensure that such children are (a) assessed as to the extent and nature of their disabilities as soon as possible; (b) offered appropriate treatment; and (c) afforded facilities for their rehabilitation and equal opportunities to education (section 10).

61 Such as clause 38 dealing with the rights of the child in proceedings before a Family Tribunal, which clause provides for the child's rights to privacy, to legal representation and to express his or her opinions in such proceedings.

62 Section 28.

63 Some of these rights are of particular interest, such as the right to reasonable provision out of the estate of a parent (whether the child is born in or out of wedlock), the right to refuse to be betrothed or to be married, and the right not to be subjected to cultural practices which dehumanise the child or are injurious to his or her physical and mental well-being: see further Julia Sloth-Nielsen & Belinda van Heerden 'New Child Care and Protection Legislation for South Africa? Lessons from Africa' (1997) 8 **Stell L R** 261 at 270-1.

(3) Every parent has rights and responsibilities whether imposed by law or otherwise towards his child which include the duty to -

(a) protect the child from neglect, discrimination, violence, abuse, exposure to physical and moral hazards and oppression;

(b) provide good guidance, care, assistance and maintenance for the child and assurance of the child's survival and development;

(c) ensure that in the temporary absence of a parent, the child shall be cared for by a competent person and that a child under eighteen months of age shall only be cared for by a person of fifteen years and above;

except where the parent has surrendered his rights and responsibilities in accordance with law.[64]

The revised draft of the Kenya Children Bill 1998 defines 'parental responsibility' as meaning 'all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child'.[65]

The Kenyan legislation goes on to provide that:

(2) the duties referred to in sub-section (1) include in particular -

(a) the duty to maintain the child and in particular to provide him with -

(1) education and guidance;
(2) immunisation;
(3) adequate diet;
(4) clothing;
(5) shelter;
(6) medical attention;
(7) leisure and recreation;

(b) the duty to protect the child from neglect, discrimination and abuse;

(c) the right to -

(i) to give parental guidance in religion;
(ii) determine the name of the child;

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64 Section 6.

65 Clause 20(1).

(iii) appoint a guardian in respect of the child;
(iv) receive, recover, administer and otherwise deal with the property of the child for the benefit [and] in the best interests of the child;
(v) arrange or restrict the emigration of the child from Kenya;
(vi) give notice of dissent to the marriage of a child;
(vii) upon the death of the child, to arrange for the burial or cremation of the child.[66]

As was pointed out in Issue Paper 13, the Children Act 1989 (UK), the Children (Scotland) Act 1995 and the Australian Family Law Reform Act 1995 made significant changes to the terminology of court orders relating to children. The major objectives of these changes were as follows:

° to reduce disputes between parents following their separation, by removing the 'proprietary' notion of children inherent in custody battles. An important psychological aspect was the idea that neither parent should be considered more important, regardless of where the children live or who is the child's primary care-giver;

° to direct attention to the rights and interests of children rather than the needs and concerns of their parents in post-separation arrangements and decision-making. The legislative changes sought to emphasise the idea that children have 'rights' while parents have 'responsibilities'. Thus, in all three jurisdictions, the former powers of guardianship (long-term responsibility) and custody (day-to-day responsibility) that were vested in the parents of a child were replaced by a single concept of 'parental responsibility'. A new range of court orders (referred to in the Australian legislation as 'parenting orders') replaced the previous custody and access orders, namely, orders for 'residence', 'contact' and 'specific issues'.

The effect of court orders in relation to children was also changed by the new legislation in England, Scotland and Australia. The legislation made it clear that parental responsibility for children remains unaffected by the separation of the parents or the child's living arrangements. Unlike the previous 'custody' order, a 'residence' order does not vest the person concerned with sole decision-making power for day-to-day matters; it simply regulates the arrangements as to the person or persons with whom the child is to live. Similarly, while the previous 'access' order gave the non-

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66 Section 20(2).

custodian parent a 'right of access' to the child, a 'contact' order simply regulates the arrangements for maintaining personal relations and direct contact between a child and a person with whom the child is not, or will not be, living.

The legislation in all three jurisdictions makes it clear that a parenting order in relation to a child in favour of one person does not take away or diminish any aspect of the parental responsibilities or parental rights of any other person in respect of the relevant child, except to the extent (if any) expressly provided for in the parenting order and / or necessary to give effect to the parenting order.

Since Canadian support legislation recognises that a child can have several 'parents' for the purposes of support applications, issues have arisen as to which parent(s) should have the primary obligation. Ontario's Family Law Act specifies that a child support order should 'recognise that the obligation of a natural or adoptive parent outweighs the obligation of a parent who is not a natural or adoptive parent'.[67] In the absence of specific legislation, some Canadian judges have ruled that all 'parents' have the same responsibility, and support orders should simply be prorated between parents in accordance with their income. The common judicial view seems to be similar to that put forward in the Ontario statute, namely that 'natural parents are primarily responsible for supporting their children'.

In their **Report on Family Law**,[68] the Scottish Law Commission observed that, provided each holder of parental responsibility can exercise that responsibility independently of the other, then the completely absent parent (whether married or not) is not a problem since the care-giver parent can make any decision about the child's upbringing without consulting the other. The Scottish Law Commission accordingly recommended that, where two or more persons have parental rights, each of them may exercise that right without the consent of the other person or persons, unless any decree or deed conferring the right provides otherwise. However, the Scottish Law Commission recommends that none of those persons should be entitled to remove the child from, or to retain a child outside, the United Kingdom without the consent of the parent (or other person entitled to control the child's residence) with whom the child is habitually resident in Scotland.[69]

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67 RSO 1990, c F3, s 33(7)(b).

68 Scot Law Com No 135, para 2.38.

69 Scot Law Com No 135, para 2.56. This recommendation is embodied in the Children (Scotland) Act 1995 as section 2(2).

The Scottish Law Commission also stated that the fact that a person has parental responsibilities or rights in relation to a child does not entitle that person to act in any way which would be incompatible with any court order relating to the child, or the child's property, or any supervision requirement relating to the child made by a children's court.[70]

The English Children Act, 1989 is also perfectly clear on this issue, and provides that, where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility.[71] Adoption and freeing for adoption require the agreement of all parents and guardians but not other people with parental responsibility or a local authority.[72] Where a child wishes to marry under the age of 18 years, he or she requires the consent of all parents and guardians and the local authority if it has parental responsibility.[73] If there is a residence order, the consent required is that of the person with whom the child lives under the order. Both changing the child's name and removing the child from the United Kingdom for more than four weeks require the consent of all persons with parental responsibility.[74] Where consent is not forthcoming the court may approve the proposed action without it.

The Children Act 1989 also restricts certain decisions where there is a court order. No one may act incompatibly with an order even though they have parental responsibility.[75] However, it is not clear whether limitations on behaviour have to be explicit or can be inferred from the circumstances.[76] Where the child is subject to a care order the local authority has power to determine how the parents may exercise their parental responsibility. Despite these provisions the fact that two or more estranged parties have parental responsibility for a child is likely to increase the opportunities for dispute rather than resolve problems.[77]

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70 Scot Law Com No 135, para 2.57.

71 Section 2(7).

72 Section 16(1) of the Adoption Act 1976; sections 12(3) and 33(6) of the Children Act 1989.

73 Section 3(1A) of the Marriage Act 1949.

74 Section 13(1) of the Children Act 1989.

75 Section 2(8) of the Children Act 1989.

76 The English Law Commission (Report No 172, para 2.11) gave the example of a non-residential father arranging to have the child's hair done in a way which would lead to the child's exclusion from the school selected by the mother.

77 Cretney and Masson **Principles of Family Law** (5th edition) 514.

The unilateral exercise by one parent of the power to make decisions about a child's upbringing can be prevented under the English Children's Act by the other parent obtaining a court order, such as, for instance, a 'specific issue' or 'prohibited steps' order under section 8.

In Australia, the Family Law Act 1975 (Cth), as amended, merely provides that each parent has parental responsibility notwithstanding any changes to their relationship.[78] As Bailey-Harris observes,[79] this does not expressly state whether that responsibility can be exercised by one parent *severally* as well as by both *jointly*. This silence on a matter of such importance is described 'unfortunate':[80]

> How, for instance, are decisions about a child's education or medical treatment to be taken? Jointly, or severally by parents who do not live together? Both interpretations of the relevant Australian provisions are possible. On the one hand s 60B speaks of *shared* responsibilities, whereas on the other s 61C states that *each* parent has parental responsibility - the latter terminology suggesting that one can make decisions independently of the other. In any event disputes will have to be resolved by one parent obtaining a specific issue order.

8.4.4 Comments and submissions received

The research paper on the parent-child relationship posed various questions as to whether a new children's statute should contain a definition of the concept of parental responsibility and, if so, how this concept should be defined.

The overwhelming majority of respondents agreed that it was necessary for a new children's statute to contain a definition of the concept of parental responsibility and that there should be an attempt (as, for example, in Scotland) to enumerate more specifically the components of parental responsibility. Several respondents proposed certain amendments to the Scottish model. Thus, for example, Professor CJ Davel supported the inclusion under parental responsibility of provisions similar to those contained in the Ugandan and Ghanaian legislation so as to make it unlawful to subject a child to social or cultural practices that are harmful to the child's health, as well as to make

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78 Section 61C.

79 'The Family Law Reform Act 1995 (Cth): A New Approach to the Parent / Child Relationship' (1996) 18 **Adelaide LR** 83, 90.

80 Ibid.

provision for the child's right to refuse to be betrothed or married.

Other respondents also supported the Scottish provision, while recommending that this provision should be expanded to include, inter alia, the following parental responsibilities:

- to provide for the basic needs of children;

- to protect the child from discrimination, violence, abuse or neglect, as well as harmful social or cultural practices;

- to provide suitable alternative care for a child in the absence of a parent;

- to provide or ensure an education for the child;

- to ensure that the child is immunised;

- to provide an adequate diet, clothing, shelter and medical attention to the child; and

- to protect the child from harmful employment and other practices.[81]

On the other hand, Ms C Grobler of the Office of the Family Advocate (Pretoria) was in favour of defining the concept of parental responsibility without listing the specific components of such responsibility (in other words, the English/Australian approach). This was also the approach of the Thasamoopo Welfare Social Workers and of Ms Denise Mafoyane. Yet another approach was that suggested by Mr D S Rothman, who recommended that parental responsibility should be defined by incorporating '*parenting elements*' that would largely avert the circumstances listed in section 14(4)(aB) of the Child Care Act.

The research paper also posed the question as to whether a comprehensive children's statute should, in addition to a definition / statement of parental responsibility / responsibilities, also contain

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81 See the submissions by Ms Jacqui Gallinetti of the Legal Aid Clinic (University of Cape Town), Ms L Opperman and her colleagues, Ms S M Van Tonder, Ms Wilona Petersen, Ms M De Beer and Ms V K Mathakgana.

a definition / statement of parental rights and, if so, exactly what parental rights should be included.

In this regard, the vast majority of respondents were of the opinion that a new children's statute should contain a definition / statement of parental rights, provided that it is made clear that such rights are not absolute. Parental rights should include rights that parents can exercise against their children, the other parent, third parties and the State.[82] While respondents recognised that persons with parental responsibility do need the affirmation that they have certain parental rights in order to enable them to exercise their parental responsibilities, any definition of parental rights should be an open-ended one.

Certain respondents linked the concepts of parental responsibility and parental rights so as to ensure that whatever rights a parent has in relation to a child are limited by respect for and protection of the child's best interests.[83]

The NCGLE argued that, without such an express relation between the two concepts, the shift from parental power to parental responsibility would be difficult to achieve. The formulation proposed by the Coalition reads as follows:

> A **parent** is any **family member** who has **parental responsibility**.
>
> **Parental responsibility** means the responsibility a **parent** has in relation to a **child**, including -
>
> (a) safeguarding and promoting the **child's** health, development and welfare;
>
> (b) providing direction or guidance in a manner appropriate to the stage of development of the **child**;
>
> (c) providing an appropriate environment to foster respect for diversity, community and the environment;
>
> (d) maintaining personal relations and regular, direct contact with the **child** if he or she is not living with the **parent**; and
>
> (e) acting as the **child's** legal representative,

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82 See, for example, the submission by Ms Jacqui Gallinetti of the Legal Aid Clinic (UCT).

83 See, for example, the submissions by Ms L Opperman and her colleagues and Professor CJ Davel.

but only insofar as compliance is practicable and based on the best interests of the **child**.

A p**arent** has those rights which are necessary to fulfil his or her **parental responsibility**, including the right-

(a) to have the **child** living with him or her or otherwise to regulate the **child's** residence;

(b) to direct or guide the **child's** upbringing in a manner appropriate to the **child's** stage of development;

(c) if the **child** is not living with him or her, to maintain personal relations and regular, direct contact; and

(d) to act as the **child's** legal representative,

but only insofar as those rights are exercised in a manner consistent with the constitutionally recognised rights of the **child**.

In addition to the parental rights included in the Scottish legislation, certain respondents supported the inclusion of the following additional parental rights in the new children's statute:

– to protect the child from abuse and neglect, discrimination, oppression, violence and exposure to physical or moral hazards;
- to provide guidance, care, assistance and maintenance to the child to ensure the survival and development of the child;
- the right to have a say in all matters related to the well-being of the child;
- the right to access to and custody of the child where it is in the best interest of the child; and
- the right to have access to information regarding the development of the child where the child is not living with the parent concerned.[84]

Issue Paper 13 posed the question as to what would be appropriate terms, in a South African context, for the components of parental responsibilities and parental rights that are presently encapsulated in the concepts of guardianship, custody and access. While certain respondents[85]

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84 See the submissions by Mrs S M Van Tonder and Ms Denise Mafoyane.

85 For example the South African National Council for Child and Family Welfare, the National Interim Consultative Committee on Developmental Social Services ('the NICC') and the Cape Law Society.

submitted that consideration should be given to adopting the terminology now used in the English, Scottish and Australian legislation, there were other respondents who held the view that it was unnecessary to embark on an exercise of amending terminology which is internationally known and which has functioned adequately in the past.[86] Both the office of the Chief Family Advocate, as also the Afrikaanse Taal en Kultuurvereniging ('the ATKV'), pointed out that changes to terms such as 'guardianship', 'custody' and 'access' are not of absolute importance and that, even if the wording is changed, people will not necessarily act differently, although a change in terminology may help to emphasise parental responsibilities instead of rights. Mr D S Rothman (Commissioner of Child Welfare, Durban) argued that it would be unwise to replace terms such as 'guardianship' and 'custody' with terms that are not universally known and used in South Africa. Mr Rothman pointed out that 'guardianship' is implied in the concept of 'parental power' as 'parental guardianship', as supposed to 'legal guardianship' awarded to a non-parent by a court of law. 'Sole guardianship' is to the total exclusion of the other parent, in contrast to the co-guardianship normally exercised by both parents. According to Mr Rothman, the present term 'custody' presents similar complexities.

At the focus group discussion held at the Breakwater Lodge, respondents were asked their views on the following question:

> **Question 10 :** If parental responsibility is to be exercised by several people (parents or otherwise) simultaneously, how should the exercise thereof be managed? Should decision-making by the persons with parental responsibility be exercised jointly or individually? Should there be a general duty to consult by the respective holders of parental responsibility (or incidences thereof) on matters affecting a particular child?

Group 2[87] felt that in the case of a married couple, whether married by customary or civil law, parental responsibility should be exercised jointly with the best interests of the child as guiding principle. The same should apply where the couple is still married but living apart. However, where a couple is divorced a parental plan should be concluded and registered, which plan should deal with the exercise of parental responsibility.

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86 See, in this regard, these submissions of the Natal Society of Advocates, the Johannesburg Institute of Social Services, the Durban Committee of Family Lawyers and the National Council of Women of South Africa.

87 Due to time constraints, Group 3 did not address this question.

It was also suggested that, in cases of important decisions pertaining to the child, the respective holders of parental responsibility should have a general duty to consult with each other. Group 2 also suggested that an open-ended list could be drawn up to serve as a guideline in identifying cases where there is a duty to consult.

Professor C J Davel of the Centre for Child Law at the University of Pretoria said it might be very difficult to manage the exercise of parental responsibility where it is to be exercised by several persons simultaneously. For her, proper management goes to the root of her problem of extending parental responsibility to persons other than biological and adoptive parents.

Apart from parents, whether married or unmarried, sharing responsibility of their child jointly, and aside from adoptive parents doing the same, Mr D S Rothman, a commissioner of child welfare in Durban, thought it is ill-advised for parental responsibility to be shared by several people. Mr Rothman said this will be confusing to any child and could give rise to competition in the absence of the natural bond. He said decision-making should be done jointly by parents (natural or adoptive) having parental responsibility where the issues are important enough to both of them. Each should accordingly be consulted. Mr Rothman also pointed out that one parent could veto some situations.[88]

Ms Gallinetti of the Legal Aid Clinic, UCT said where parental responsibility is shared by the biological parents decision-making should be based on the best interests of the child and should as far as possible be based on consensus. She said family group conferences should be used whenever appropriate. Where parental responsibility or incidents thereof are assigned to persons other than the biological parents, the exercise of such responsibility should always be subject to joint decision-making and consultation. Disputes as to the exercise of parental responsibility should be adjudicated by an independent forum.

Ms S M van Tonder of SANCA, Bloemfontein opined that if parental rights and responsibilities are to be exercised by several people simultaneously, then decision-making by such persons should be done jointly with the best interests of the child at heart. She further believed there should be a general duty to consult by the respective holders of parental rights or responsibilities or incidents

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88 Cf. where application is made for a passport for a child.

thereof. This view was shared by Ms Denise Mafoyane of the Department of Social Welfare, Bloemfontein, Ms V K Mathakgane of the Department of Developmental Social Welfare, and Ms C Grobler on behalf of the Family Advocate.

Ms L Opperman and her colleagues at the Christelik-Maatskaplike Raad, Bellville seemed to suggest that the management of parental responsibility where exercised by several people simultaneously must be prescribed by a very explicit, formal contract binding all the parties involved and covering each and every aspect to be addressed. Such contract must then be made an order of court. They regarded consultation by the respective holders of parental responsibility and with the child on matters affecting that child as imperative. Mrs O M Mogoane of the Department of Health and Welfare, Nylstroom favoured a formal agreement endorsed by the court to outline clearly the respective responsibilities of the persons exercising parental responsibility simultaneously. She said decision-making by the persons with parental responsibility may be exercised both jointly and individually depending on the seriousness of the matter. Delicate issues that need joint decision-making should be outlined in the agreement cum court order.

Ms Wilona Petersen of the Department of Social Welfare, Bloemfontein said the biological parents should always be involved in the management of parental responsibility. Where the responsibility is to be shared, decision-making should be exercised jointly. She felt it will be in the interest of the child to consult should there be various holders of parental responsibilities in a particular instance.

The National Coalition for Gay and Lesbian Equality was of the opinion that the guiding principles in the management and allocation of various incidents of parental responsibility should include -

- flexibility and practicality;
- where practicable, agreement by consultation; and
- minimal and necessary state interference.

The Coalition believed parents should be afforded every opportunity to resolve disputes relating to the management of parental responsibility and to contract freely on their responsibilities towards their children before any party has recourse to a court or any other appropriate forum. An aggrieved party may approach a relevant forum for relief only after he or she has attempted to resolve these matters by using such non-judicial remedies, and only where he or she is able to

show that the best interests of the child are threatened. The Coalition then proposed the following formulation:

> Where *parental responsibility* is to be exercised by several *parents*, each *parent* may act alone and without the consent of any other *parent* in exercising that responsibility. This excludes *parental responsibility* relating to any *major decision*.
>
> In matters relating to a *major decision* -
>
> (a) a *parent* with whom the *child* is ordinarily resident may only exercise his or her *parental responsibility* after consultation with all other *parents*, if their whereabouts are known or can be practicably ascertained;
> (b) a *parent* with whom the *child* is not ordinarily resident may only exercise his or her *parental responsibility* in consultation with the *parent* or *parents* with whom the *child* is ordinarily resident.
>
> A *parent* may approach an appropriate forum for an order preventing the exercise of another *parent's parental responsibility* if he or she is able to show that such an exercise of *parental responsibility* is not in the *child's* best interests.
>
> A *major decision* means any decision involving a significant change to the *child's* -
>
> (a) social, educational or physical environment;
> (b) physical, spiritual or psychological integrity; or
> (c) legal status;
>
> including, but not limited to -
>
> (i) consenting to the *child's* emigration or relocation;
> (ii) determining the *child's* religion;
> (iii) determining the *child's* education; and
> (iv) consenting to the *child's* medical treatment.
>
> Any decision exercised in the context of an emergency does not constitute a *major decision*.

8.4.5 Evaluation and recommendations

8.4.5.1 Parental rights and responsibilities

The Commission is in favour of defining the term 'parental responsibility', which definition should enumerate the components of parental responsibility in a non-exhaustive manner. The Commission also recommends that a new children's statute should contain a statement of parental rights, which rights should mirror the components of parental responsibility. In this regard, the Commission is in favour of formulations along the lines of those included

in the Scottish legislation, with certain amendments and additions. The suggested statutory provision reads as follows:

Parental Rights and Responsibilities

A parent has in relation to his or her child the right and the responsibility -

(a) to **care** for his or her child;
(b) to have and maintain **contact** with his or child; and
(c) to act as **guardian** for his or her child.

The Commission recommends that these three components of parental rights and responsibilities be clearly defined so as to make it possible for the court to allocate all or some of these components (or sub-components thereof) to one or more persons. These definitions are set out below.

8.4.5.2 **Changes in terminology and the components of parental rights and responsibilities**

The Commission is of the view that the components of 'parental responsibility' presently encapsulated in the terms 'guardianship', 'custody' and 'access' should also be defined in a new children's statute. The most appropriate term for a person's responsibility, and corresponding right, to maintain personal relations and direct contact with a child who is living with another person would appear to be the term '**contact**'. This term would include both physical contact with the child (i.e. visiting the child or being visited by the child), as also other means of communication with the child (for example, telephonic or e-mail contact).

As regard an appropriate term for the responsibilities, and corresponding rights, vested in a person with whom the child is to live, the Commission considered various options, such as the retention of the term 'custody' or the replacement of the concept of 'custody' with a new concept of 'residence', 'care' or 'day-to-day care'. Because of the difference in the legal position of a person who has the *de facto* care of the child, and the legal position of a person who has the *de jure* care

of a child, the preferable option would appear to be either to retain the term '**custody**' (as has been done in the Ghanaian Children's Act of 1998 and in the revised draft of the Kenya Children Bill of 1998) or the introduction of the concept of '**residence**' (as in the English, Scottish and Australian legislation).

Later in this Discussion Paper[89] the Commission recommends, in the context of children caught up in divorce proceedings, that a shift to new, less 'loaded' terminology can reduce conflict in divorce. In this context, the Commission has recommended that the current Divorce Act 70 of 1979 term 'custody' be replaced with the term 'care', as the use of words such as 'custody' and 'sole custody', besides their negative connotation with police and prisons, promotes a potentially damaging sense of winners and losers. Given this decision, and to ensure uniformity, **the Commission recommends that the concept 'custody' be replaced with the concept 'care'**.

As regards '*guardianship*', the Commission recommends that this term should be retained, but should be defined so as to encompass the residual aspects of parental responsibility (viz. those not covered by 'care' and 'contact').[90]

To summarise, the Commission recommends the following changes in terminology:

'Access'	**• •**	**'Contact'**
'Custody'	**• •**	**'Care'**
'Guardianship'	**=**	**'Guardianship'**

In this regard, the Commission proposes the following definitions of *care*, *contact* and *guardianship*:

'**Care**' includes the right and responsibility of a parent to -

(a) to create, within his or her capabilities and means, a suitable **residence** for the child and living conditions that promote the child's health, welfare and development;

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89 See 14.5 below.

90 Cf. in this regard clause 97 of the revised draft of the Kenya Children Bill.

(b) to safeguard and promote the **well-being** of the child;

(c) to **protect** the child from ill-treatment, abuse, neglect, exposure, discrimination, exploitation and from any other physical and moral hazards;

(d) to **safeguard** the child's human rights and fundamental freedoms;

(e) to guide and **direct** the child's scholastic, religious, cultural, and other education and upbringing in a manner appropriate to the stage of development of the child;

(f) to guide, **advise** and assist the child in all matters that require decision-making by the child, due regard being had to the child's age and maturity;

(g) to **guide** (discipline) the child's behaviour in a humane manner; and

(h) generally to ensure that the **best interest** of the child is the paramount concern in all matters affecting the child.

'**Contact**' includes the right and responsibility of a parent, if the child is not living with him or her, to maintain personal relations with and to have direct access to his or her child on a regular basis.

To act as '**guardian**' means the right and responsibility of a parent to -

(a) administer and safeguard the child's property;

(b) to assist and represent the child in contractual, administrative and legal matters, and

(c) to give or refuse any *consent*[91] which is legally required in respect of his or her child.

8.4.5.3 **The management of parental rights and responsibilities**

The Commission recommends, on the basis of sections 2(5) - 2(11), read with section 3(4), of the UK Children Act, and clauses 21(4) - 21(8) of the revised Kenya Children Bill, 1998, that:

° **more than one person may have parental rights and responsibility, or components thereof, in respect of the same child at the same time;**

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91 For the instances where such consent would be required, see 8.4.5.3 immediately below.

- **a person who has parental rights and responsibility for a child at any time shall not cease to have those rights and responsibility simply because some other person subsequently acquires parental rights and responsibility for that child;**
- **where more than one person has parental rights and responsibility in respect of a child, each of them may act alone and without the other(s) in fulfilling that responsibility, with certain exceptions mentioned below;**
- **the fact that a person has parental rights and responsibility shall not entitle such a person to act in any way which would be incompatible with any order made in respect of that child in terms of the new children's statute;**
- **a person who has parental rights and responsibility for a child may not surrender or transfer any part of those rights and responsibility to another but may arrange for some or all of it to be undertaken by other appropriate persons on his or her behalf**.

The Commission is of the opinion that the consent of *all persons* who have parental rights and responsibilities in respect of a child must be obtained:[92]

- **when the child wishes to conclude a marriage;**
- **when the child is to be adopted;**
- **when the child is to be removed from the Republic;**
- **when an application is made by or on behalf of the child for a passport; and**
- **when the immovable property or any right to immovable property belonging to the child is to be alienated or encumbered**.

As a consequence, section 1(2) of the Guardianship Act 192 of 1993 can be repealed.

Our formulation reads as follows:

Fulfilment of parental responsibility and exercise of parental rights

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92 This recommendation is based on section 1(2) of the Guardianship Act 192 of 1993 which provides that the consent of both parents of a child shall be necessary in respect of the five incidences listed here.

(1) More than one person may have parental responsibility for the same child at the same time.

(2) Where more than one person have parental responsibility and parental rights in respect of a child at the same time, each of them may act alone and without the other (or others) having such parental responsibility and parental rights in meeting that responsibility and exercising those rights except where this Act or any other law requires the consent of more than one person in any matter affecting the child.

(3) A person who has parental responsibility and parental rights in respect of a child may not surrender or transfer that responsibility or those rights to any other person, but may arrange for some or all thereof to be met by one or more persons, including a person who already has parental responsibility for the child concerned, acting on his or her behalf.

(4) The making of any such arrangement shall not affect any liability of the person making it which may arise from any failure to meet any part of his or her parental responsibility for the child concerned.

(5) Subject to any order of a competent court to the contrary or any right, power or duty which a person has or does not have in respect of a child, the consent of all persons who have parental responsibility and parental rights in respect of the child shall be necessary in respect of -

(a) the contracting of a marriage by the child;

(b) the adoption of the child;

(c) the removal of the child from the Republic of South Africa by one of the parents or by any other person;

(d) the application for a passport by or on behalf of the child;

(e) the alienation or encumbrance of immovable property or any right to immovable property belonging to the child.

(6) Whenever any person who has parental responsibility and parental rights in respect of a child is reaching any major decision which involves the child, that person must give due consideration -

(a) to the views and wishes of the child, if the child wants to express such views and wishes and has reached an age and stage of maturity where he or she is capable of expressing such views and wishes in a meaningful manner; and

(b) to the views of any other person who has parental responsibility and parental rights in respect of the child and who wants to express such views.

(7) For purposes of subsection (6) “major decision” involving a child means -

(a) in relation to a child, any decision -

(i) in connection with any matter referred to in subsection (5);

(ii) relating to contact with or care or guardianship of the child, including a decision as to the appointment of a parent-substitute under sections XX (1) and (2);

(iii) which is likely to change or affect the child’s living conditions, education, health, personal relations with parents or family members or, generally, the child’s welfare, in a significant manner; and

(b) in relation to any other person having parental responsibility in respect of the child, any decision which is likely to have a material effect on the fulfilment by such person of his or her parental responsibility or the exercise of his or

her parental rights in respect of the child, including a decision as to the appointment of a parent-substitute under sections XX (1) and (2).

8.4.5.4 **Parent-substitutes**

The Commission recommends that provision be made in the new children's statute for the appointment of testamentary 'parent-substitutes' in the event of a parent's death.[93] Provision should also be made for the appointment, by the court, of a person to be a child's parent-substitute if the child has no parent with 'parental responsibility' for him or her or if the person in whose favour a 'care order' in respect of the child has been made dies while such order is in force and no other 'care order' has been made in favour of a surviving parent of the child.[94]

Accordingly the Commission recommends the inclusion of the following provisions in the new children's statute:

Assignment of parental responsibilities and parental rights where child has no parent

If it appears to a court that a child has no person with parental responsibilities and parental rights, or with certain aspects of parental responsibilities and parental rights, in respect of him or her, the court may, of its own accord or on the application of any adult person or persons who is or are concerned with the care, welfare and development of the child and who is willing and competent to undertake parental responsibilities and parental rights or certain aspects of parental responsibilities and parental rights in respect of the child, order that such adult person or persons shall have parental responsibilities and parental rights or specified aspects of parental responsibilities and parental rights in respect of such child.

Assignment of parental responsibilities and parental rights to a parent-substitute

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93 See section 7 of the Children (Scotland) Act 1995, section 5 of the English Children Act 1989 and clauses 98-99 of the revised draft of the Kenya Children Bill.

94 See, in this regard, the provisions of clause 100, read together with clause 24, of the 1998 Kenya Children Bill.

(1) A parent who has parental responsibilities and parental rights in respect of his or her child may appoint another individual (hereinafter referred to as a 'parent-substitute') to have parental responsibilities and parental rights in respect of the child in the event of the parent's death, provided that -

(a) such appointment shall be of no effect unless it is made in writing and signed by the parent;

(b) the parent-substitute shall have only those aspects of parental responsibilities and parental rights which the parent, at the time of death, had (or would have had if he or she had survived until after the birth of the child); and

(c) any parental responsibilities and parental rights (including the right to appoint a parent-substitute under this section) which a surviving parent has in respect of a child shall subsist with those which the parent-substitute has under or by virtue of this Act.

(2) A parent-substitute may appoint another individual to take his or her place (with the same parental responsibilities and parental rights in respect of the child) in the event of the former's death, provided that -

(a) such appointment shall be of no effect unless it is made in writing and signed by the person making it; and

(b) the provisions of paragraphs (b) and (c) of subsection (1) above shall apply mutatis mutandis to such appointment.

(3) An appointment of a parent-substitute under subsection (1) or (2) above shall not take effect until accepted, either expressly or impliedly by acts which are not consistent with either other intention.

(4) If two or more persons are appointed as parent-substitutes, any one or more

of them shall, unless the appointment expressly provides otherwise, be entitled to accept appointment, even if both or all of them do not accept the appointment.

(5) An appointment made under subsection (1) or (2) above revokes an earlier such appointment (including one made in an unrevoked will) made by the same person in respect of the same child, unless it is clear (whether as a result of an express provision in the later appointment or by any necessary implication) that the purpose of the latter appointment is to appoint an additional parent-substitute.

(6) Subject to subsection (7) below, the revocation of an appointment made under subsection (1) or (2) above (including one made in an unrevoked will) shall not take effect unless the revocation is in writing and signed by the person who made it.

(7) For the avoidance of doubt, an appointment made under subsection (1) or (2) above in a will is revoked if the will itself is revoked.

(8) Without prejudice to any of its powers in terms of other sections of this Act, the court may, at any time after the death of the person who has appointed a parent-substitute under subsection (1) or (2) above, terminate such appointment, or vary, restrict or limit in any way the parental responsibilities and parental rights of the parent-substitute thus appointed -

(a) on the application of any person who has parental responsibility for the child;

(b) on the application of the child concerned, with the leave of the court;

(c) on the application of any other interested person, or

(d) of its own accord in any proceedings affecting the child,

if the court considers this to be in the best interests of the child concerned.

The Commission was made aware of the fact that apparently some magistrates in the former

KwaZulu continue to rely on the provisions of Chapter 6 of the Natal Code of Zulu Law.[95] This Chapter of the Natal Code inter alia states that the father shall be the legal guardian of his legitimate minor offspring born of his marriage[96] and regulates the position where a legal guardian dies or becomes incapacitated.[97] The Chapter also provides that any person claiming, as guardian, the custody of a minor may make application therefor to the district officer.[98] In this regard it must be pointed out that the Guardianship Act 192 of 1993 was made applicable to KwaZulu by section 2, read with Schedule 1 of the Justice Laws Rationalisation Act 18 of 1996. In so far as there is conflict between the provisions of these two Acts, the Guardianship Act 192 of 1993 should prevail.[99]

8.5 The Acquisition of Parental Responsibility and Parental Rights

8.5.1 Introduction

As stated above, article 18 of the CRC provides that '[p]arents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child'. Although it is clear from this article that no distinction is drawn between extra-marital children and those born in wedlock, emphasis *is* placed on the primacy of parents in the allocation of parental responsibilities. Elsewhere in the CRC, however,[100] it is recognised that family structures vary and that a child's extended family or community can play an important role in the child's upbringing.

Other articles of the CRC which emphasise the primacy of the parent/child relationship are article 7 (which gives children the right, 'as far as possible', to know and be cared for by their parents) and article 9 (which gives children the right to live with their parents or, if separated from one or both parents, the right to maintain personal relations and direct contact with both parents on a regular basis, unless this is contrary to the child's best interests). So too, article 16(1) of the UN

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95 As proclaimed in Proclamation No. R. 151 of 1987 and published in Government Gazette 10966 of 9 October 1987.

96 Section 27(1) of the Natal Code of Zulu Law.

97 Section 28 of the Natal Code of Zulu Law.

98 Section 34 of the Natal Code of Zulu Law.

99 See also **Prior v Battle and others** 1999 (2) SA 850 (TkD).

100 See, for example, article 5, as discussed above.

Convention on the Elimination of All Forms of Discrimination against Women (1979) directs States Parties to take all appropriate measures to ensure that men and women have 'the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children',[101] as also 'the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children'.[102] Also relevant in this regard is the Bill of Rights in the South African Constitution[103] (Act 108 of 1996) which outlaws unfair discrimination on the grounds, *inter alia*, of sex, birth and marital status,[104] guarantees equality and equal protection of the law for all persons,[105] entrenches rights to privacy and human dignity,[106] and every child's right to 'family care, parental care, or to appropriate alternative care when removed from the family environment'.[107]

A discussion of the allocation of parental responsibility gives rise to questions such as the following: should parental responsibility automatically vest in all biological parents whether they are married or not? Should persons (or bodies) other than parents be able to acquire parental responsibility and, if so, who, how and in what circumstances? If such third parties do acquire parental responsibility, what effect does or should this have on the legal position of the biological parents?[108]

8.5.2 Biological parents

8.5.2.1 Current South African law and practice

As pointed out above, South African law gives preference to the mother in the context of the parental power over extra-marital children. While the parental power over (or 'natural guardianship' of) a legitimate child vests equally in both parents, in the case of an extra-marital child it is the

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101 Para (d).

102 Para (f).

103 Act 108 of 1996.

104 Sections 9(3) and (4).

105 Section 9(1).

106 Sections 14 and 10.

107 Section 28(1)(b).

108 See Lowe (1997) 11 **International Journal of Law, Policy and the Family** 192 at 197.

mother who is its natural guardian (and also its custodian) to the exclusion of the father.[109] The father may, on application to the High Court, be granted access to, or custody or guardianship of, his extra-marital child if he can satisfy the court that this is in the best interests of the child. In considering such an application, the court has to take into account, 'where applicable', a non-exhaustive list of factors, including the relationship between the applicant father and the natural mother; the relationship of each of the natural parents (or of any other person) with the child; the effect of separating the child from the applicant father or the natural mother (or from any other person); the attitude of the child to the granting of the application; the degree of commitment that the applicant father has shown towards the child, and whether the child is the offspring of a customary union or of a marriage concluded under any system of religious law.[110]

If an extra-marital child is to be adopted, the mother's consent is required,[111] as well as that of the child himself or herself if he or she is over the age of 10 years.[112] At present, the father's consent to the adoption of his or her extra-marital child is not required and it would appear that the father is not even entitled to notification of the intended adoption.[113] However, in response to the much-publicised Constitutional Court decision in the case of **Fraser v Children's Court, Pretoria North**,[114] the Adoption Matters Amendment Act 56 of 1998 has been enacted.[115] Section 4 of this Act amends section 18(4)(d) of the Child Care Act so as to provide for the granting of consent by *both* parents to the adoption of a child born out of wedlock, provided that the natural father has acknowledged himself in writing to be the child's father and has made his identify and whereabouts

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109 See further 8.2.1 above.

110 Natural Fathers of Children Born Out of Wedlock Act 86 of 1997, section 2(5). This Act came into operation on 4 February 1999. Reference should also be made to the effect of the Recognition of Customary Marriages Act 120 of 1998. In terms of the latter Act, existing valid customary marriages (i.e. valid at customary law), as also new customary marriages which comply with the requirements set out in the Act, are recognised 'for all purposes' as valid marriages. This means that children born of such customary unions will be regarded in South African law as legitimate children and will fall under the (equal) parental power of both parents.

111 Child Care Act 74 of 1983, section 18(4)(d), as amended.

112 Ibid, section 18(4)(c).

113 See **Naude v Fraser** [1998] 3 All SA 239 (SCA).

114 1997 (2) SA 261 (CC). In this case, section 18(4)(d) of the Child Care Act was declared to be unconstitutional to the extent that it dispenses with the father's consent for the adoption of his extra-marital child in all circumstances. However, in the interests of justice and good government, Parliament was given a period of two years (i.e. until 4 February 1999) to rectify the defects therein. Pending its correction by Parliament or the expiry of the two year period, section 18(4)(d) was to remain in force.

115 The Act came into operation on 4 February 1999.

known. The father's consent may be dispensed with in the following circumstances:[116] if the father has failed to acknowledge himself as the father of the child or has, without good cause, failed to discharge his parental duties with regard to the child; if the child was conceived as a result of an incestuous relationship between the parents; if the father has been convicted of the crime of rape or assault of the mother of the child, or has been found by a children's court, on a balance of probabilities, to have raped or assaulted the mother of the child; if the father has failed to respond, within 14 days, to a notice served upon him informing him of the fact that the mother has given her consent to the adoption of the child and giving him the opportunity to, *inter alia*, apply for the adoption of the child himself.[117] Provision is also made for the amendment of the Births and Deaths Registration Act 51 of 1992 so as to allow the natural father of an extra-marital child to apply to the Director-General, with the mother's consent, for the amendment of the child's birth registration so as to record the father's acknowledgement of paternity and his personal particulars. Where the mother's consent is not forthcoming, the father will be able to apply to the High Court for a declaratory order confirming his paternity and dispensing with the requirement of the mother's consent.[118]

Despite these legislative improvements in the legal position of the father of an extra-marital child in South Africa, there are persons who argue that, especially in view of the constitutional and international legal provisions set out above, the law of parent and child should be reformed so as to incorporate full sharing by both parents of all parental rights and responsibilities, regardless of whether the child is born in or out of wedlock.[119] On the other hand, it has been pointed out that, while it is true that the maternal preference[120] in this context 'appears to violate a requirement of **formal equality**, there are strong arguments in favour of the view that the maternal preference does not violate a deeper notion of **substantive equality** which underpins our constitutional commitment to egalitarianism'.[121] Substantive equality requires us to examine the actual social and economic

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116 In addition to the existing grounds for dispensing with parental consent, as set out in section 19 of the Child Care Act, 1983.

117 Subparagraphs (vii) to (x) of para (b) of section 19 of the Child Care Act, as inserted by Act 56 of 1998.

118 Sections 11(4) - (6) of Act 51 of 1992, as inserted by Act 56 of 1998.

119 See, for example, June Sinclair **The Law of Marriage** Volume I (1996) 124-6, Jacqueline Heaton 'Family Law and the Bill of Rights' in **Bill of Rights Compendium** para 3C32.2.

120 See also 14.5 below on the 'maternal preference' or 'tender years' doctrine in divorce.

121 Alfred Cockrell 'The Law of Persons and the Bill of Rights' in **Bill of Rights Compendium** para 3E25.

conditions that prevail in South Africa and, in particular, the gender-based division of parenting roles and the economic subordination of women occasioned in the main by their childcare responsibilities. Despite the constitutional commitment to equality, the reality in this country is still that it is predominantly women who care for children, whether born in or out of wedlock. This sexual division of labour is further exacerbated by the inadequate provision of child-care facilities, keeping women out of the formal work sector because they have no one to look after their children.[122] As Sandra Burman has observed, the common pattern in South Africa (at least where there is no marriage between the parents under any system of law) is that the mother bears practically the full responsibility for caring for and rearing the child, with little or no material assistance from the father or members of his family.[123] So too, in the abovementioned decision of the Constitutional Court in the **Fraser** case, Mahomed DP emphasised the need for Parliament to be 'acutely sensitive to the deep disadvantage experienced by single mothers in our society'.[124] These considerations may justify the conclusion that, at the current stage of South African societal and economic development, the *mere* existence of a biological tie should not in itself be sufficient to justify the automatic vesting of all parental responsibilities and rights in the father, where the father has not availed himself of the opportunity of developing a relationship with his extra-marital child and is not willing to shoulder the responsibilities of the parental role.

8.5.2.2 **Comparative review**

From a comparative perspective, it is interesting to note that recent law reform endeavours in the area of child law in some other African countries appear to proceed from the assumption that the marital status of parents should **not** affect their parental responsibilities in respect of their children. So, for example, the Ugandan Children Statute 1996 confers parental responsibility on `every parent' of a child, apparently irrespective of whether or not the child was born in wedlock.[125] This statute contains a procedure for a declaration of parentage and provides that such a declaration 'shall have the effect of establishing a blood relationship of father and child or of mother and child

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122 See P Govender et al **Beijing Conference Report : 1994 Country Report on the Status of South African Women** 20.

123 Sandra Burman 'The Category of the Illegitimate in South Africa' in Sandra Burman & Eleanor Preston-Whyte (eds) **Questionable Issue : Illegitimacy in South Africa** (1992) at 29-30.

124 Paragraph 44.

125 Section 7(1).

. . . accordingly, the child shall be in the same legal position as a child actually born in lawful wedlock towards the father or the mother'.[126] However, a declaration of parentage does not have the effect of automatically conferring 'rights of custody' in respect of the child upon the 'declared' mother or father.[127] The court may make an order concerning the custody of the child at the same time as a declaration of parentage, or at any other time. The court's primary consideration in making decisions on questions of custody (as with all questions concerning the upbringing of a child or the administration of a child's property) is the 'welfare of the child'.[128] The First Schedule to the Statute lists various factors to which the court 'or any other person' must have regard in making decisions about children, including 'the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding'.[129]

The section of the Ghanaian Children's Act of 1998 dealing specifically with 'parental duty and responsibility' applies to all parents, regardless of their marital status and of whether or not they are living together.[130] Both parents are responsible for the registration of the birth of their child and the names of both parents must be reflected on the birth certificate unless the father of the child 'is unknown to' the mother.[131] Any parent, family member or other person 'who is raising a child' may apply to a Family Tribunal for custody of the child, while a parent, family member or other person 'who has been caring for a child' may apply to this tribunal for periodic access to the child.[132] When making orders for custody or access, a Family Tribunal is enjoined 'to consider the best interest of the child and the importance of a young child being with its mother', as also certain listed factors including 'the views of the child if the views have been independently given'.[133]

In terms of the revised draft of the Kenya Children Bill of 1998, where a child's parents were not married to each other at the time of the child's birth and have not subsequently married each other,

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126 Section 73(1).

127 Section 73(2).

128 Section 74, read together with para 1 of the First Schedule. The latter provision in fact refers to the child's welfare as 'the paramount consideration'.

129 Paragraph 3 of the First Schedule.

130 Section 6.

131 Section 6(4).

132 Sections 43 and 44.

133 Section 45.

the mother has automatic parental responsibility for the child, but the father does not have such parental responsibility unless he acquires it in one of the following three ways:

(i) By an order of court made upon the father's application;

(ii) By entering into a '*parental responsibility agreement with the mother*'; or

(iii) By cohabiting with the child's mother subsequent to the child's birth for a period or periods which amount to not less than twelve months, or by acknowledging paternity of the child, or by maintaining the child – in any of these circumstances, the father acquires parental responsibility for the child, 'notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child'.[134]

In order to be effective, a parental responsibility agreement between the parents of a child born out of wedlock must be made 'substantially in the form prescribed by the Chief Justice'.[135] Such a parental responsibility agreement may only be terminated by a court order made on the application of any person who has parental responsibility for the child concerned, or by the child himself or herself with the leave of the Court (such leave to be granted only if the Court is satisfied that the child has sufficient understanding to make a proposed application).[136]

The Namibian Draft Children's Status Act of 1996 vests 'equal guardianship' in the parents of a child born out of wedlock, subject to the proviso that 'the rights and responsibilities of guardianship shall apply only to parents who have voluntarily acknowledged parentage'.[137] A non-custodian parent who has not voluntarily acknowledged parentage may apply to the court for equal guardianship.[138] In the absence of a court order to the contrary, however, it is the mother of an

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134 See Clause 21(2), read together with Clause 22, of the revised draft of the Kenya Children Bill of 1998.

135 See Clause 23(1) and cf section of (2) of the UK Children Act 1989.

136 See Clause 23 of the Kenya bill and cf Section 4(2) – (4) of the UK Children Act 1989.

137 Clause 11(1).

138 Clause 11(7).

extra-marital child who has ‘sole custody' of such child, whether she is a major or a minor.[139] The father (even if he is a minor) may apply to court for an order giving him sole custody of the child,[140] while provision is also made for both parents jointly to apply to court for an order giving them joint custody of their extra-marital child.[141] As regards access to an extra-marital child, the Draft Act provides that the non-custodian parent who has voluntarily acknowledged parentage has a right of reasonable access to the child (in the absence of a court order to the contrary). This right does not, however, accrue to the father of a child conceived as a result of the rape of the mother.[142] A non-custodian parent who has not voluntarily acknowledged parentage of an extra-marital child may obtain reasonable access to such child by application to court, if the court considers this to be in the best interests of the child.[143]

In England, Scotland and Australia, there was no dispute that parental responsibility shoul

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139 Clause 12(1).

140 Clauses 12(2) and (5).

141 Clause 12(6). Such an order may be made if the court 'is of the opinion that it will be in the best interests of the child'.

142 Clauses 10(1) and (2).

143 Clause 10(9), read with clause 10(7).

144 Law Com Working Paper No 74 **Illegitimacy**.

145 Law Com Report No 118.

CHAPTER 9

PREVENTION AND EARLY INTERVENTION SERVICES FOR CHILDREN AND THEIR FAMILIES

9.1 Introduction

In 1996, the Inter-ministerial Committee on Young People at Risk (hereafter, IMC) proposed a four-tier system for the transformation of the child and youth care system in South Africa. It was suggested that the first two levels of the new system must be prevention of harm to children and early intervention where harm occurs. Prevention and early intervention as the first two components in the four-tier system were officially put forward in the IMC's practice guide entitled **Minimum Standards: South African Child and Youth Care System**[1] and again in the financing policy document of the Department of Social Development entitled **Financing Policy: Developmental Social Welfare Services**.[2]

Prevention is very broadly defined in the **Financing Policy** document as 'any strategies and programmes which strengthen and build the capacity and self-reliance of families, children, youth, women and older persons'.[3] Early intervention services are defined in the document as services that: 'target children, youth, families, women, older persons and communities identified (through a developmental risk assessment) as being vulnerable or at risk and ensure, through strengths-based developmental and therapeutic programmes, that they do not have to experience statutory intervention of any kind'.[4] The **White Paper for Social Welfare**[5] also states that programmes for families and children should be based on the principle that interventions should concentrate first on 'prevention, by enhancing family functioning, then on protection, and lastly on the provision of statutory services'.

As can be seen from the quotations in the previous paragraphs, prevention and early intervention services have been recognised as vitally important components in any future strategy on behalf of

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[1] May 1998.

[2] March 1999.

[3] **Financing Policy: Developmental Social Welfare Services**, March 1999 at p.10.

[4] Ibid at p.11.

[5] February 1997, par. 44(g).

children in South Africa. The attempts made by the IMC and the Department of Social Development to define these services indicate a need for specificity which, if it can be sufficiently achieved, will help with the framing of legally-enforceable rights for children who need prevention and early intervention services. The question which arises is whether it is possible to support such children by drafting laws which facilitate or even mandate the provision of prevention and early intervention services.

Prevention activities generally occur at three levels: primary, secondary and tertiary. Primary prevention involves approaches and activities which provide education and resources to enable and strengthen families to function optimally, and which protect against some of the major stress factors which generate abuse. Primary prevention activities are directed at the general population with the goal of stopping the occurrence of maltreatment and abuse before they start. Secondary prevention or early intervention activities focus efforts and resources on families where there are children known to be at greater risk of maltreatment, in order to prevent the development of full-scale or ongoing abuse.

Early intervention services have the following primary goals:

° To prevent the removal of children from their families.
° To prevent the recurrence of problems and reduce the negative consequences of risk factors.
° To divert children away from either the child and youth care system or the criminal justice system.

In this regard it might be worth recalling that the Commission did recommend[6] the inclusion of a general principle in the new children's statute which states that primary prevention and early intervention services should seek to:

•• enable and strengthen families to function optimally;
•• prevent the removal of children from their families;
•• prevent the recurrence of problems and reduce the negative consequences of risk factors;

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[6]See 5.2 above.

and

•• divert children away from either the child and youth care or the criminal justice system.

In the **National Strategy on Child Abuse and Neglect**, it is pointed out that there is at present no clear strategy for the prevention of child abuse and neglect, and no planning process which systematically links preventative approaches with provision for intervention.[7] The Strategy recognises that resources must be allocated in such a way as to assure an appropriate balance between preventive-developmental services on the one hand, and investigation and treatment on the other. The Strategy says:[8]

> Formal child protection services must whenever possible be delivered within the context of broader strategies to assist communities to holistically address their fundamental needs, of which protection is one. It is apparent that the risk of abuse is greatly increased in situations where e.g. there are no proper child care facilities and children are roaming unattended while their parents work. Problems with homelessness, overcrowding and inadequate policing appear to be contributory factors in many cases. ... It is necessary to systematically attend to those factors which impede the ability of parents, families and communities to act protectively towards children. Essential services and basic support systems must be in place in every community in order for intervention strategies to operate effectively. Preschool educare provision, whether formal or informal, centre- or home-based, is a crucial form of preventative and promotion provision, as also is after-school care provision. Concerted attention must also be paid to related social problems which play a role in generating child abuse and neglect, such as teenage pregnancy, alcoholism and drug dependency.

The Strategy says in addition preventive education for adults and children must be built into the overall approach. Such education should take into account the cross-cultural issues which are involved in the South African context, and the effectiveness of current preventive education programmes, many of which are first-world orientated, should be researched with this in mind.

9.2 Existing legal position in South Africa

Primary and secondary prevention do not feature prominently in the Child Care Act, 1983. The emphasis in this Act is on tertiary prevention which involves dealing with abuse once it has occurred

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[7]Paragraph 3.1 of the National Strategy on Child Abuse and Neglect.

[8]Ibid.

in order to prevent its continuation.

Prevention and early intervention services are referred to in regulation 2(4)(b) of the Child Care Act, 1983. In giving guidance to the social worker as to how his or her section 14(2) report to the children's court should be compiled, the regulation provides that the report must include a summary of prevention and early intervention services rendered in respect of the child and his or her parents and a brief background of previous statutory interventions in respect of the child, where applicable. Neither prevention nor early intervention services are defined, and it must be considered whether it is necessary to include such definitions in the new children's statute. There is also no guidance in the existing Child Care Act, 1983, or the Regulations, as to who is legally obliged to provide such prevention and early intervention services, when such services should be supplied and what form they should take. Without specificity in regard to all of these aspects, it will not be possible to provide effectively for such services.

Social workers report that they are undertaking a substantial amount of informal or 'non-statutory' work. The term indicates that work of this kind, which includes preventative services designed to make resort to care (and court) proceedings unnecessary, must inevitably take second place to duties associated with the children's court (the statutory work). **The Commission believes that the new children's statute should indicate that preventative work should be given high priority, and that it should not be undertaken only when other duties permit**. Although the Commission takes comfort in the shift in service delivery to prevention services as set out in the **White Paper for Social Welfare** and the **Financing Policy**, it must be clear that such a shift would require major resource allocations, especially in the short and medium term.

9.3 Comparative review

The UK Children Act, 1989 imposes a general duty on every local authority to safeguard and promote the welfare of children within their area who are in need, and, so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs.[9] In addition, local authorities in the United

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[9]Section 17(1). For the purposes of this section a child is considered to be *in need* if the child is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a

Kingdom must provide such day care for children in need within their area who are aged five or under and not yet attending school as is appropriate.[10] Local authorities must also take reasonable steps to identify the extent to which there are children in need within their area; open and maintain a register of disabled children within their area; and assess the needs of such children in need.[11]

Schedule 1, Part I of the UK Children Act, 1989 is illustrative of the manner in which positive duties can be imposed on local authorities to prevent child abuse and neglect. Some of the provisions of this Part read as follows:

> Every local authority shall take reasonable steps, through the provision of services under Part III of this Act, to prevent children within their area suffering ill-treatment or neglect.[12]
>
> Where (a) it appears to a local authority that a child who is living on particular premises is suffering, or is likely to suffer, ill treatment at the hands of another person who is living on those premises; and (b) that other person proposes to move from the premises, the authority may assist that other person to obtain alternative accommodation.[13]
>
> Every local authority shall provide services designed (a) to minimise the effect on disabled children within their area of their disabilities; and (b) to give such children the opportunity to lead lives which are as normal as possible.[14]
>
> Every local authority shall take reasonable steps designed (a) to reduce the need to bring proceedings for care or supervision orders with respect to children within their area; criminal proceedings against such children; any family or other proceedings with respect to such children which might lead them being placed in the authority's care; or proceedings under the inherent jurisdiction of the High Court with respect to children; (b) to encourage children within their area not to commit criminal offences; and (c) to avoid the need for children within their area to be placed in secure accommodation.[15]

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reasonable standard of health or development without the provision of services by a local authority for such child; the child's health or development is likely to be significantly impaired, or further impaired, without the provision of such services, or where the child is disabled. Section 17(10) of the UK Children Act, 1989.

[10]Section 18(1).

[11]Schedule 2, Part I of the Children Act, 1989.

[12]Section 4(1) of Schedule 2, Part I.

[13]Section 5(1) of Schedule 2, Part I.

[14]Section 6 of Schedule 2, Part I.

[15]Section 7 of Schedule 2, Part I.

As can be seen from this selection, local authorities in the United Kingdom are responsible for the provision of a myriad of prevention and early intervention services.[16]

Scottish law requires local authorities to operate a range of services geared towards reducing the risk of children coming into care. Section 22 of the Children (Scotland) Act of 1995 describes these services, in a general manner, as those necessary to 'safeguard and promote the welfare of children in their area who are in need'. These services must, where appropriate, 'promote the upbringing of such children by their families'. In providing such services, the local authority 'shall have regard so far as practicable to each child's religious persuasion, racial origin and cultural and linguistic background'.

Section 23(3) the Children (Scotland) Act of 1995 requires a local authority to carry out an assessment of a disabled child who is within the authority's area if requested to do so by the child's parent or guardian. The purpose of the assessment is to ensure that the local authority provides appropriate services in accordance with the disabled child's special needs. An assessment may also be requested where it is not the child who is disabled but another member of the child's immediate family and this has an impact on the child. A definition of a disabled person is offered in section 23(2): 'a person is disabled if he is chronically sick or disabled or suffers from a mental disorder…'. Section 24 of the Scottish Act renders a local authority liable to carry out an assessment of a person who 'provides or intends to provide a substantial amount of care on a regular basis' for a disabled child. This assessment must be made if the carer requests it. The purpose of the assessment will be to ensure that appropriate care for the child is provided by the local authority in order to supplement whatever care the child is already receiving.

In the Ugandan Children Statute of 1996, section 11 requires every local government council from village to district level to 'safeguard and promote the welfare of children within its area'. This must be done by maintaining a register of children with disabilities in order to provide assistance, providing help and accommodation to lost children, and finding missing parents. The Councils are

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[16]See also the UK Children (Leaving Care) Bill, 2000, which provides inter alia for further duties of local authorities towards children, personal advisers and pathway plans, and advice and assistance for certain children and young persons.

also required to designate one of their members to be responsible for the welfare of children and this person is referred to as the 'Secretary for Children's Affairs'.

Namibia's draft Children's Act, 2001 also includes a provision on preventative assistance and services. Section 29 of this draft Act reads as follows:

> (1) The Minister shall, out of moneys appropriated by Parliament for the provision of preventative assistance and services under this Act, provide such assistance and services to children and to their families and communities as he or she considers appropriate so as to
>
> (e) prevent the neglect, abuse or inadequate supervision of children or other failure to meet children's needs;
> (f) promote every child's well-being and the realisation of his or her full potential; and
> (g) actively involve and promote the full participation of families in identifying and resolving their own problems.
>
> (2) The preventative assistance and services referred to in subsection (1) include, without being limited to, assistance with the basic necessities of life, including the empowerment of families to obtain such basic necessities.
>
> (3) In the development and implementation of preventative assistance and services referred to in subsection (1) particular emphasis shall be placed on addressing the problems of families who are unable to provide proper care for their children because of lack of food, shelter, child care or other resources.

In terms of section 13(1) of the Children and Family Services Act, 1990, of Nova Scotia, Canada, where it appears to relevant Minister or agency that services[17] are necessary to promote the principle of using the least intrusive means of intervention and, in particular, to enable a child to remain with the child's parent or guardian or be returned to the care of the child's parent or guardian, the Minister and the agency involved must take 'reasonable measures to provide services to families and children that promote the integrity of the family'.

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[17]Services to promote the integrity of the family include services provided for the following purposes: improving the family's financial position; improving the family's housing position; improving parenting skills; improving child care and child-rearing capabilities; improving home-making skills; counselling and assessment; drug or alcohol treatment and rehabilitation, child care; mediation of disputes; and self-help and empowerment of parents whose children have been, are or may be in need of protective services: section 13(2).

An interesting approach to prevention is found in Chapter VII of the new India Children's Code Bill, 2000. Although Chapter VII of the Bill is headed 'Provisions regarding health and nutrition', the bulk of the provisions clearly are preventative and early intervention measures. Section 51(1) of the Bill, for instance, places an obligation on the State Government to provide adequate health services and facilities to children, 'both before and after their birth and through the period of growth', to ensure their full physical, mental and social development. The section further provides that the scope of such services must be progressively increased so that within a targeted period all children in the country are provided with and enjoy optimum conditions in health care for their balanced growth. Section 51(2) of the Bill reads as follows:

> For the purposes of increasing the rate of child survival in the country, especially the girl-child and increasing child health, special emphasis and importance shall be given in the following areas, namely: -
>
> (a) the prevention of child marriages;
> (b) the age of the mother in relation to child birth, the spacing of pregnancies, the services to be provided and care to be received during pregnancy and child birth;
> (c) care of the new born;
> (d) time-bound immunization programme and properly spaced scheme till the child attains five years of age;
> (e) adequate nutrition and health care;
> (f) safe water supply and basic sanitation.

Section 52 of the India Bill states that the State Government must formulate suitable schemes to provide sufficient care to women during pregnancies which may 'include early registration of pregnant women for anti-natal care, universal coverage, tetanus injection supplemented with iron and folic acid, timely identification and treatment of maternal complications, promotion of clean deliveries by trained personnel, which may include imparting of training to the local mid-wives or dais in modern methods of handling deliveries and recognising them as such, increasing the institutional delivery rates, management of obstetric emergencies, birth spacing, timing and limitation, improvement of maternal care facilities, and media efforts to promote the awareness of safe motherhood in the community'. This provision is built on the recognition that maternal death affects the rate of child survival and is detrimental to the health and development of the child.

To address the particular problem of female feticide and infanticide,[18] section 53 of the Bill provides that Government must take necessary steps to prevent pre-natal sex determinations. The section further provides that where abortion of a pregnancy occurs and the child is a female child, and it is proved that a pre-natal sex determination test was done, it shall be presumed, unless the contrary is proved, that the offence of feticide had been committed.[19] Where the death of a female child occurs during the first year of age, and it is proved that proper care had not been give to that child, it shall be presumed, until the contrary is proved, that the offence of female infanticide had been committed.

From these examples it is clear that it is possible to legislate on prevention and early intervention for children. Indeed, the inclusion of such provisions seems to be the modern trend.

9.4 Comments and submissions received

In Issue Paper 13 the following question was asked: 'How can legislation enable the transition from remedial modes of intervention towards prevention?'[20] In responding to this question, the South African National Council for Child and Family Welfare stated that the key issue is how to provide sufficient human and other resources necessary for the provision of prevention services. The practical point was made that, if such resources were not allocated, there was the risk of producing idealistic legislation which cannot be implemented.

The Natal Society of Advocates did not feel that prevention services could be provided for in legislation. The Johannesburg Institute of Social Services felt similarly that prevention services are a welfare policy and financing issue and therefore need to be addressed on that level. By contrast, the ATKV was strongly in favour of prevention legislation. The ATKV submitted that prevention legislation instead of legislation aimed at circumstances surrounding the removal of children from their environments is the ideal. Establishing such legislation, they contended, would be a long-term process because the economic development within the country and the circumstances of most children is not what they should be. Mr DS Rothman, a commissioner of child welfare in Durban,

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[18]See also Chapter III of the draft Bill for special provisions relating to the girl child.

[19]Section 53(3).

[20]Question 16.

was in favour of giving more prominence to prevention services. In his response to Issue Paper 13, he submitted that this objective could be achieved by introducing a system whereby the role of prevention services by social workers receives priority. He added that the burden of finance should shift from the remedial to the preventative mode. He also remarked that it is the heavy caseloads of social workers that seem to limit the availability of prevention services at present.

Since there was support for legally-mandated prevention services expressed in some of the responses to Issue Paper 13, further inquiries were made. A research paper entitled 'Legislating for Child Protection' was presented at a focus group discussion in Pretoria on 29 April 1999 and subsequently circulated.[21] Question 1(c) of this research paper asked: 'How do you believe an appropriate balance can be achieved in legislation between formal protective measures and supportive / preventive services?'

Ms S Leslie of the SA National Council for Child and Family Welfare pointed out that much of the abuse and neglect of children in South Africa is caused by the lack of personal, economic / material and psychological resources within the family system. In order to assist families that are dysfunctional, one has to render protective and preventive services. The State should invest more resources for preventive services. At the focus group discussion of 29 April 1999 participants supported a balance between preventive services and protective measures. A concern expressed at the focus group discussion was that resources would have to be allocated if there are to be effective prevention services in South Africa. At a consultative meeting held in Umtata on 27 May 1999, participants supported child abuse prevention services in the form of continuous educational programmes. They favoured early intervention that would provide support through counselling.

In the **Legislating for Child Protection** research paper, question 9 read as follows: 'Should a comprehensive children's statute include mandatory or discretionary provision, or both, for primary and secondary prevention for child abuse?' Ms Leslie of the SA National Council for Child and Family Welfare and the Umtata Child Abuse Resource Centre indicated that there is a definite need in a children's statute to include both mandatory and discretionary provision for primary and secondary prevention of child abuse. Ms Leslie noted that there should be provision to ensure that the rights of children and their needs are met. Ms T Odayar, Ms D Ritter and the Grahamstown

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21 J Loffell and C R Matthias **Legislating for Child Protection** (S A Law Commission, 1999).

Child and Family Welfare Society were of the view that there should be financing of preventive and early intervention programmes by the State. Ms P Gerrand of the Johannesburg Child Welfare Society, reporting back at the 29 April 1999 focus group discussion highlighted a difference of opinion in her group. The group favoured a reference to prevention and early intervention services in new child care legislation. However, group members were divided on the question of implementation. Some members considered that there should always be a discretion whether or not to supply such services. Other members felt that grounds should be indicated for situations where it would be mandatory for the government to supply such services. The members who considered that prevention services should be discretionary felt that South Africa does not have the resources to make prevention mandatory on a national basis.

At the focus group discussion held on 29 April 1999, participants indicated the following forms of primary and secondary prevention which should be focussed on: establishment of safe houses, support programs for abused children and volunteer training programs;[22] developmental programs operated by State Departments, NGO's, CBO's and support groups for young mothers as part of health care provision;[23] continuous preventive education programs and support/counselling in relation to child abuse and children who have been subjected to abuse;[24] and targeting of vulnerable mothers and children in the hospital setting, both at the time of birth and subsequently, eg, through the appointment of hospital social workers;[25] and via parenting programs and support groups.[26]

Ms Fran Cleaton-Jones cited research results indicating that most abusive parents are under 25 years of age, and that children of very young parents tend to be disadvantaged. She recommended school-based parenting education as being useful both in delaying the onset of parenting and of providing coping skills. The need for inclusion of parenting education in the school curriculum was also emphasized by Ms S Leslie, who also supported the employment of school social workers as a preventive measure.

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[22]Ms T Odayar, Ms D Ritter, and the Grahamstown Child and Family Welfare Society.

[23]The Umtata Child Abuse Resource Centre.

[24]Umtata consultative meeting.

[25]Ms S Leslie, SA National Council for Child and Family Welfare.

[26]Group 2 at the Workshop.

The National Coalition on Gay and Lesbian Equality (NCGLE) noted that the **White Paper on Social Welfare** had shown a fundamental shift from the traditional approach in South Africa of responding to the symptoms of child abuse, by highlighting the need for approaches which provide for financial support and programs which enable and promote development so as to ensure that people can sustain themselves through times of crisis and vulnerability. The NCGLE also highlighted the vulnerable position of gay and lesbian youth who, due to current myths and prejudices, were particularly liable to rejection, assault and violence, discrimination in the school environment, and homelessness and street life with all their associated dangers. The following priority areas for preventive strategies were identified:

° the training and education of people in positions of authority over children, including police officials within other child protection agencies and teachers;
° … programmes which foster a non-discriminatory environment in schools ... (to address discrimination, prejudice and harassment directed against any group of people);
° empowering lesbian and gay youth through the provision of support for programmes focussing on sexuality education … and specialised physical and mental health information and counselling services.

The preponderance of responses received by the Commission was strongly in favour of greater attention being given to the provision of prevention and early intervention services. Many respondents felt that a legislative framework for such services would assist in the derivation of the necessary resources. Another argument advanced by respondents was that such a framework would also provide children who need such resources with rights that are genuine in that they can actually be enforced. In view of the weight of opinion as conveyed to the Commission in the responses received **it is recommended that provision should be made for prevention and early intervention services in a new children's statute**.

In its research paper entitled **Legislating for Child Protection**, the Commission posed the following questions:

> Is present legal provision in South Africa for the involvement of local government in the prevention of abuse of children adequate? If not, what changes should be made?

Responses to these questions were provided at the focus group discussion on child protection held on 29 April 1999. Subsequently, additional responses were received by the Commission. In these responses there was considerable support for a much greater degree of local government involvement in the provision of services to children. For example, Ms Leslie of the SA National Council for Child and Family Welfare indicated in her response that she considered that current local government involvement in South Africa is generally inadequate. Ms Linda Vara of the South African National Council for Child and Family Welfare indicated that local government should be more involved and visible. Ms Tilly Odayar, Ms Dalene Ritter and the Grahamstown Child and Family Welfare Society suggested that local government authorities should be required by law to allocate a substantial portion of their budget to prevention programs.[27] At the focus group discussion, many of the delegates felt that if local governments are to be given more authority, there needs to be better accountability from representatives of local government. Mr D van Heerden of the Department of Welfare of the Northern Cape Province felt that legislation should make specific provision for local government to take responsibility for creating a child-friendly environment, for example, recreational facilities, housing, water and sanitation.[28]

Taken as a whole, the responses provided at the focus group discussion on 29 April 1999 and those subsequently received support the view that there should be provisions in the new children's statute to empower local authorities financially and to require them to take on a much greater role in the provision of prevention services, early intervention services and more generally the promotion of the welfare of children.

9.5 Going beyond prevention: promotion of the well-being of children

Although prevention services have not previously been legislated for in any detail in South Africa, the concept is relatively well understood within the welfare sector. **It is therefore recommended that the concept of prevention should be used in the new children's statute**. However, the term does have negative connotations. It has been argued by the New South Wales Child Protection Council that the term 'prevention':

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27 SA Law Commission **Legislating for Child Protection** (unpublished collation of responses, Children's Code project, 1999) pp. 31-32. Some respondents recommended a minimum budget allocation of 9%.

28 Id at p.3

> reflects a negative, problem-focussed approach, where the objective is preventing a social ill rather than the promotion of positive, life-enhancing strategies, such as good interpersonal relationships, appropriate parenting and pro-child policies. Thus, any models framed around prevention rather than promotion may be considered to offer somewhat restrictive means to address social ills.[29]

Tomison points out that the promotion focus incorporates the strengths-based approach which emphasises the strengths and capabilities of families rather than their weaknesses.[30]

In a discussion of the UK 1989 Children Act, Hargreaves and Hadlow indicate that the term 'prevention' has been supplanted by a general duty upon local authorities in England to safeguard and promote the welfare of children.[31] Whilst safeguarding of children remains a central tenet of the 1989 Act, promoting the welfare of children replaces the preventive theme of earlier English Acts. The term 'prevention' is, however, still mentioned in Schedule 2 (para. 4) of the 1989 Act. Hargreaves and Hadlow argue that '[t]he legislators clearly favoured the term "promote the welfare of" omitting the term "prevention" (except for a reference to it in Schedule 2) as this was seen to be an unnecessarily negative term'.[32]

They further note that the terms 'promote' and 'safeguard' seem to be consistent with the concept of parental responsibility:

> …parental responsibility fits well with the role of the social worker in "promoting" the welfare of children as this has the sense of initiating and furthering the progress of something. To promote and / or support does not imply a taking over of responsibility. Therefore, if a social worker describes work as to promote and or/support the welfare of a child it does not have unhelpful connotations of parental shortcomings; it would also appear to facilitate working in partnership with parents…On the other hand, it could be argued that if a social worker describes his / her activity as 'preventive' there is a strong sense that the preventer is owning a considerable, if not total responsibility, for goal achievement, implicitly

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29 The New South Wales Child Protection Council as quoted by A M Tomison **Overcoming Structural Barriers to the Prevention of Child Abuse and Neglect- A Discussion Paper** (Australian Institute of Family Studies, undated) at p.11.

30 Ibid, p. 62.

31 R G Hargreaves and J Hadlow 'Preventive Intervention as a Working Concept in Child-Care Practice' (1995) 25 **British Journal of Social Work**, pp. 349-365, at p. 349.

32 Ibid, p. 363.

undermining the notion of parental responsibility.[33]

Section 11(1)(a) of the Ugandan Children's Statute of 1996 also uses the terminology of safeguarding and promoting the welfare of children. Given the advantages and more positive connotations of the concept of promotion of welfare of children, it is recommended that such a duty be incorporated in the proposed new children's statute.

It is recommended that a similar, balanced approach, using both the concept 'prevention' and 'promotion', be utilised in the new children's statute. For wording, the Commission supports the Namibian provision and accordingly recommends the inclusion of a preventive provision in the new children's statute. Our formulation reads as follows:

(1) Out of monies appropriated by law for the provision of preventative assistance and services under this Act, the Minister shall provide such assistance and services to children and to their families and communities as he or she deems appropriate to-

(a) prevent the neglect, abuse or inadequate supervision of children or other failure to meet children's needs;
(b) promote every child's well-being and the realisation of his or her full potential; and
(c) actively involve and promote the full participation of families in identifying and resolving their own problems.

(2) The preventative assistance and services referred to in subsection (1) include, without being limited to, assistance with the basic necessities of life, including the empowerment of families to obtain such basic necessities.

(3) In the development and implementation of such preventative assistance and services, particular emphasis shall be placed on addressing the problems of families who are unable to provide proper care for their children because of lack of food, shelter, child care or other resources.

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33 Ibid.

The Commission also recommends the inclusion of provisions along the lines of section 55 of the draft Indian Children's Code Bill 2000 on health, as preventative measures, in the new children's statute.[34] This is one area where the apparent overlap of women's rights issues and children's rights issues can benefit both categories.

9.6 Promotion, Prevention and Early Intervention: An Inter-sectoral Responsibility

The abuse, neglect and maltreatment of children is a complex phenomenon that reflects underlying problems in the family, community and society. In order to address these problems effectively and to promote the welfare of all children, it is necessary that an inter-sectoral approach be adopted. This entails that all government departments be mandated to promote the welfare of children and to provide prevention and early intervention services.

In this regard, the National Committee on Child Abuse and Neglect states that 'Government departments at all levels, in partnership with the broader public, must plan inter-sectoral preventive strategies which are designed to strengthen family and community life and to promote homes, schools, neighbourhoods and communities which are safe for children and which promote their full and healthy development'.[35] The Committee further states that '[k]ey role players for this purpose include structures responsible for education (including preschool care) and primary health care; NGO's and community-based organisations, religious and cultural groupings and traditional authority structures; employers, and the media'.[36] The National Strategy on Child Abuse and Neglect provides for local government to play a central role in inter-sectoral planning for the development of neighbourhoods which are safe and healthy for children, and in the provision of accessible venues from which a range of supportive and preventive services can be delivered on an inter-sectoral, one-stop basis. It further states that categories of children who are particularly vulnerable to abuse and neglect, including disabled children, and adults and juveniles who are

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[34] See 11.2.2 below.

[35] National Committee on Child Abuse and Neglect **Proposed National Strategy on Child Abuse and Neglect** Pretoria: Department of Welfare, 1996.

[36] Ibid.

known or potential perpetrators, should be targeted for specifically designed preventive strategies.[37]

To give effect to an inter-departmental, inter-sectoral approach in prevention and early intervention, the Commission recommends the inclusion of the following provisions in the new children's statute:

Integrated and sustainable prevention and early intervention strategies and programmes

(1) The Minister, in consultation with Cabinet, shall develop integrated and sustainable -

(a) prevention strategies and programmes which strengthen and built the capacity and self-reliance of families and children in these families;

(b) early intervention strategies and programmes targeting children and families as being vulnerable or at risk.

(2) The Minister, in consultation with the Minister of Finance, must seek to achieve the integrated, sustainable, and equitable social and economic development of the Republic as a whole by -

(a) ensuring integrated development planning for children and their families for the Republic as a whole;

(b) promoting infra-structural development and services for children and their families for the Republic as a whole;

(c) building the capacity of Government at all levels to perform its functions and exercise its powers where such capacity is lacking;

(d) promoting the equitable distribution of resources between all levels of

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[37]Ibid.

Government to ensure appropriate levels of prevention and early intervention services.

(3) Prevention and early intervention services must promote

(a) appropriate parenting skills and the formation of appropriate interpersonal relationships between parents, families and children;
(b) the preservation of family structures; and
(c) the capabilities of families and parents to safeguard the wellbeing and the best interests of their children.

(4) Prevention and early intervention services must actively involve and promote the full participation of families, parents and children in identifying and resolving their problems.

Prevention and early intervention services to be provided to children in need of care

(1) When any social worker's report is prepared in order to assist a court in determining whether a child is in need of care as is provided for in section X,[38] such report shall contain a summary of any prevention and early intervention services provided in respect of such child, and siblings of the child, and in respect of the child's family.

(2) A court may, prior to making any finding in terms of section Y[39] or prior to making any order in terms of section Z,[40] order that prevention or early intervention services be provided to the child and to his or her parents or family by the Department of Social Development or any other person or organisation with expertise in the rendering of prevention or early intervention services.[41]

(3) The order referred to in subsection (2) may be made for a specified period, but not

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[38]Currently section 14(2) of the Child Care Act, 1983.

[39]I.e. that a child is need of care; currently section 14(4) of the Child Care Act, 1983.

[40]Currently section 15 of the Child Care Act, 1983.

[41]See further 23.10.3 below.

for a period exceeding 6 months from the date upon which the order was made.

(4) Where a court makes an order referred to in subsection (2), the court shall postpone the matter for a period not exceeding 6 months to enable prevention and early intervention services to be provided, after which a report concerning the results of the prevention or early intervention services must be made available to the court by the Department or the person or organisation who rendered such services.

(5) After consideration of the report referred to in subsection (4), the court may make any order in terms of sections Y and Z[42] or may extend the date of postponement of the proceedings for a further period not exceeding 6 months.

(6) At the expiry of the period referred to in subsection (4), a report concerning the results of the prevention and early intervention services must be made available to the court by the Department or the person or organisation who rendered such services, which report must be considered by the court.

(7) After considering the report referred to in subsection (6), and after consideration of any other reports or evidence placed before the court, the court may make an order in terms of sections Y and Z, or the court may decline to make an order.

In respect of children in residential care, foster care and subsidised adoptions[43] it is recommended that:

(a) the public school fees of children in such forms of substitute family care be covered by the Department of Education for the duration of the placement;

(b) free basic health care be provided to such children by the Department of Health.

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[42]Currently sections 14 and 15 of the Child Care Act, 1983.

[43]See also Chapters 17, 18, and 19 below.

9.7 The Role of Local Government

9.7.1 Introduction

In some countries, as we have seen, it is specifically local government authorities which are responsible for providing certain important services for children. Often, these services include what have been described earlier in this Chapter as prevention services, early intervention services and promotion of the welfare of children. In these countries, unlike in South Africa, national legislation describes in some detail aspects of the child-services which local authorities are obliged or encouraged to provide. It is important to note that there is a distinction between legislation which compels local authorities to provide services and legislation which merely facilitates such services by encouraging local authorities to provide them. It is also important to note that in many countries local authorities are a vital component in the provision of services to children. It is intended, in this part of the Chapter, to recommend that in future local authorities need to play a much greater role in the provision of prevention services, early intervention services and promotion of the welfare of children in South Africa.

9.7.2 The present legal framework concerning local authorities

The Local Government Transition Act 209 of 1993, in Schedule 2A, includes the management of child care facilities as a function of local government. Neither 'management' in this context nor 'child care facilities' are defined in the Act. This failure to define is problematic. What 'child care facilities' are local authorities responsible for? How are local government authorities required to 'manage' these? Are local government authorities merely required to provide buildings 'to house the delivery of social services by others to children?'[44] Schedule 2A of the Local Government Transition Act raises many unanswered questions.

The next piece of legislation of relevance to the provision by local authority of services to children is the Development Facilitation Act (DFA) 67 of 1995. Under section 3 of that Act government authorities are required to make the best possible use of existing resources, including those relating

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[44] Johann Mettler and Tony Loubser **Local government and the provision of child care facilities,** research paper commissioned by the S A Law Commission, p. 5.

to social facilities. Local authorities are expected to make effective use of land under their control and of water, health and education facilities. The wording of this Act makes it possible for local authorities to work creatively with regard to, inter alia, the social service needs of children. For example, service providers for children in need could be given financial grants and exempted from rates, electricity and water charges. Unfortunately, the DFA suffers from the same shortcoming as the Local Government Transition Act, namely, that it does not explain what facilities local authorities are required to provide for children.

The next, and most important legislative development, was the promulgation of the Constitution Act 108 of 1996. The Constitution states that government in South Africa is constituted as national, provincial and local spheres of government. These three spheres are distinctive, interdependent and interrelated. Local government is a sphere of government in its own right, and is no longer a function of national or provincial government. It is an integral component of the democratic state.[45]

All spheres are government are obliged to observe the principles of cooperative government put forward in the Constitution. Cooperative government assumes the integrity of each sphere of government. But it also recognises the complex nature of government in modern society. No country today can effectively meet its challenges unless the components of government function as a cohesive whole. This involves:

° Collectively harnessing all public resources behind common goals and within a framework of mutual support.
° Developing a cohesive, multi-sectoral perspective on the interests of the country as a whole, and respecting the discipline of national goals, policies and operating principles.
° Coordinating their activities to avoid wasteful competition and costly duplication
° Utilising human resources effectively.
° Settling disputes constructively without resorting to costly and time-consuming litigation.
° Rationally and clearly dividing between them the roles and responsibilities of government, so as to minimise confusion and maximise effectiveness.[46]

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[45]**White Paper on Local Government**, 9 March 1998, section C, par. 1.1.

[46]**White Paper on Local Government**, section C, par. 1.1.

Intergovernmental relations are the set of multiple formal and informal processes, channels, structures and institutional arrangements for bilateral and multilateral interaction within and between spheres of government. In South Africa a system of intergovernmental relations is emerging to give expression to the concept of cooperative government contained in the Constitution.[47]

A system of intergovernmental relations has the following strategic purposes:

- To promote and facilitate cooperative decision-making.
- To coordinate and align priorities, budgets, policies and activities across interrelated functions and sectors.
- To ensure a smooth flow of information within government, and between government and communities, with a view to enhancing the implementation of policy and programmes.
- The prevention and resolution of conflicts and disputes.

To date, the development of a framework for intergovernmental relations has focused on the relationship between national and provincial government. The role of local government is being defined as it develops in practice over time. The establishment and recognition of organised local government structures is an important step in ensuring local government representation in intergovernmental processes and forums. In 1998 local government representatives nominated by the South African Local Government Association (Salga) took their place in the National Council of Provinces (NCOP). In the same spirit, there is also need to work towards ensuring that provincial local government associations are accommodated within the legislative processes of provincial governments.

Section 41(2) of the Constitution requires the development of an Act to establish or provide for structures and institutions to promote intergovernmental relations. The Department of Constitutional Development is currently drafting a discussion document to open debate on the question of intergovernmental relations, with a view to initiating discussions around the content of future legislation. The roles and responsibilities of each sphere within a system of intergovernmental relations will become clearer as this process unfolds.

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[47] Ibid.

'Child care facilities' are expressly referred to as a 'local government matter' in Schedule 4, Part B, of the Constitution. These facilities are not defined. Municipalities, in turn, have in terms of section 83(1) of the Local Government: Municipal Structures Act 117 of 1998 the function and power to inter alia provide for and regulate 'child care facilities'. It is important to note that a cross-reference in Part B to sections 155(6)(a) and (7) of the Constitution indicate that both provincial and national government authorities must monitor and support local government in its involvement with 'child care facilities'. **It is recommended that national government perform its function as envisaged under section 155(7) of the Constitution by creating national legislation that will oblige local government authorities to provide prevention services, early intervention services and other services which promote the welfare of children**. In the recommendations set out below in this Chapter, specific tasks to be carried out by local government, either directly or by delegation, are indicated.

It is not merely Schedule 4, Part B of the Constitution which obliges local government in a way which is relevant to the provision of services for children. Section 152(1) of the Constitution provides as follows:

> The objects of local government are –
> (a) to provide democratic and accountable government for local communities;
> (b) to ensure the provision of services to communities in a sustainable manner;
> (c) to promote social and economic development;
> (d) to promote a safe and healthy environment; and
> (e) to encourage the involvement of communities and community organisations in the matters of local government.

The aspects of promotion of social development and a safe and healthy environment seem particularly relevant with regard to the role of local government in providing or overseeing prevention and early intervention services for children.

Section 153 of the Constitution provides that:

> A municipality must
> (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
> (b) participate in national and provincial development programmes.

The needs of vulnerable children for prevention and early intervention services surely fall under 'the basic needs of the community' as referred to in section153(a) above. Provision of such services is surely also promotion of 'the social…development of the community' as required in section153(a).

It may be concluded that the Constitution provides a solid legislative foundation for service provision on behalf of children by local authorities. All that remains is for specific duties to be listed in more detail in additional legislation.

As already mentioned, municipalities have in terms of section 83(1) of the Local Government: Municipal Structures Act 117 of 1998 the functions and powers assigned to them in terms of sections 156 and 229 of the Constitution. This includes the provision and regulation of child care facilities. It is worrisome, however, to note that in the enumeration of the functions and powers of **district** municipalities[48] in section 84(1) of the Local Government: Municipal Structures Act 117 of 1998, no specific mention is made of 'child care facilities'. This means that there is no possibility, short of amending the Local Government Act, for municipalities at district level to share such resources.

9.7.3 Examples of local government initiatives in South Africa in respect of prevention and early intervention services

There have been instances where the perceived urgency of local needs has encouraged or obliged local authorities to plan for or provide social services from which children have benefited. Three examples of such initiatives are referred to below.

- **The 1997 Cape Metropolitan Areas Local Government Policy on Street People**[49]

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[48] A 'district municipality' is defined in section 1 of the Act as a municipality that has municipal and legislative authority in an area that includes more than one municipality, and which is described in section 155(1) of the Constitution as a category C municipality.

[49] The words 'street people' are used by the drafters of the Cape Metropolitan Areas policy on street people to include street children: **Street people: Mission statement and recommendations for local authorities in the Cape Metropolitan Area** as cited by Mettler and Loubser **Local government and the provision of child**

On 30 April 1997 the Cape Metropolitan Council decided to commit local government resources for the purpose of rehabilitating 'street people' with a view to enable their integration into society. Resources have been channelled to NGO's to permit them to improve and expand the services to street people in the Cape Metropolitan area. In addition, as part of the new policy, it was proposed that each municipal local authority must conduct an investigation in order to identify the needs of street people in its particular area. A second purpose of the investigation was to discover what steps local government could take in order to support service providers in the Cape Metropolitan area.[50]

•• **The Gauteng Welfare Relations Act 17 of 1998**

The main object of the Gauteng Welfare Relations Act is the delegation of certain welfare functions to officials in local government. It is stated in section 2 of the Act that decentralisation is necessary in order to provide 'quality welfare services'. It is also stated that local government needs to participate in the delivery of welfare services and its capacity must therefore be enhanced.[51] The mechanism by which these objects are to be achieved is indicated in section 3. Section 3 empowers the Member of the Executive Council who, at Provincial level, is responsible for welfare and population development. This member may 'by notice in the Provincial Gazette, delegate any power, function or duty conferred … by the Social Assistance Act 59 of 1992, except the power to make regulations, to officials in the service of local government in the Province'.[52] In terms of the Act, financial provision for the delegated functions is made by the Provincial Executive Council.

•• **Kwa-Zulu Natal**

The North/South Central Health Department in Durban has produced a discussion document on

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care facilities, pp. 23-24.

50 For further information in regard to this initiative see Mettler and Loubser **Local government and the provision of child care facilities**, pp. 23-25.

51 Section 2.

52 Section 3.

the role of local government in early childhood development (ECD). The document emphasizes the need for local government to ensure to children affordable access to basic infrastructure and services, as well as the establishment of support mechanisms to enable children living in poverty to have access to these services. The document recommends that the services to be provided must be made accessible to children affected by poverty. Amongst the recommendations made in the discussion document are: the imposition of a minimum permissible share of the municipal budget for child development purposes; and the establishment of an inter-sectoral co-ordinating body to plan and monitor child programmes, and the development of a strategic plan.[53]

9.7.4 Evaluation and recommendation

It might be argued that local authorities should not be directed by national legislation which sets down a single plan to which all local authorities would have to conform. It might be considered that flexibility is required so that local authorities may respond differently to the differing needs of children within their geographical areas. In the 1998 **White Paper on Local Government**, mention was made of the 'central responsibility of municipalities to work together with local communities to find sustainable ways to meet their needs and improve the quality of their lives'.[54] A stated objective of the White Paper was to create a framework within which municipalities could develop their own strategies for meeting local needs and promoting the social and economic development of their inhabitants.[55] However, because of the extreme vulnerability of children who require prevention and early intervention services, this is one area in which at least basic minimum national standards must be set.

As the three different examples in 9.7.3 above show, local government authorities in South Africa encounter situations where they, as a matter of urgency, need to provide social services. Services to children in need are an especially important category of social services. With reference specifically to prevention and early intervention services, these, by their very nature, must be quickly administered. There would therefore seem to be good reason for obliging and empowering local authorities to deliver prevention and early intervention services.

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53 Mettler and Loubser **Local government and the provision of child care facilities**, p. 30.

54 March 1998, p. 17.

55 **White Paper on Local Government**, p. 19.

In general, the Commission recommends that the new children's statute should empower local authorities to provide certain specified prevention services, early intervention services and programmes to promote the welfare of children.

More specifically, and in addition to the powers and functions a municipality has in terms of sections 156 and 229 of the Constitution and sections 83 and 84 of the Local Government: Municipal Structures Act 117 of 1998, each local authority[56] should be obliged, in terms of the new children's statute, to:

(a) safeguard and promote the welfare of children within its area;

(b) ensure integrated development planning in respect of child care facilities within its area;

(c) keep a register of the total number of children and record their ages, in its area of jurisdiction. The purpose of the register will be to assist in rational and appropriate budget allocations to and by the local authority. It will also be used in planning services for children in the area by government;

(d) undertake a needs analysis of children in order to determine the existing needs of children in the area of jurisdiction. Each local government should appoint a task team to determine what it needs to do in respect of the children in its area and to budget for such services. The analysis must be conducted at least once every three years. A format for the needs analysis should be included in the regulations to the new children's statute.

(e) keep records in the register of the number of lost or abandoned children, children living on the street, and disabled children within its area of jurisdiction and give assistance to them in order to enable them to grow up with dignity among other children and to develop their potential and self-reliance.[57] These children within the area of its jurisdiction are the special responsibility of the local authority. The local authority must see that such children have access to basic nutrition, shelter, basic health care services and social services. The latter must include, where appropriate,

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[56] Whether at municipal or district level.

[57] Taken from section 11(5) of the Uganda Children Statute 6 of 1996.

family tracing and family reunification services for the children;

(f) maintain a database of all available child care facilities in their area of jurisdiction;

(g) provide and maintain sufficient and appropriate recreational facilities for the children in its area of jurisdiction;

(h) ensure the environmental safety of the children in its area of jurisdiction;[58]

(i) conduct inspections of child care facilities to ensure maintenance of standards. This must occur in terms of a single, national standard set in the regulations of the new children's statute;

(j) provide for home visiting services to all new-born babies.

All of the above may be provided directly by employees of the local authority and/or delegated to non-employees or non-governmental organisations. Registered non-profit organisations[59] providing services to children and families must be exempted from payment of property rates. In addition, local authorities should consider entertaining applications for full or partial exemptions from payment of electricity and water tariffs by non-profit organisations providing social services for children. Obviously the local government's financial viability is a legitimate factor which can be taken into account in considering such applications. The discretion in regard to exemption from electricity or water tariffs should be used by each local authority as an aspect of its duty to 'safeguard and promote the welfare of children within its area' as indicated under item (a) in the above list of recommendations.

It is recommended that local governments must be enabled to develop '*one-stop centres*' for child and family services in their areas of jurisdiction. It is in this context that the omission of any reference to 'child care facilities' in section 84 of the Local Government: Municipal Structures Act 117 of 1998 is regretted as the omission prevents the sharing amongst municipalities of child care facilities at district level. The concept of a one-stop service is a feature of the 1997 White Paper for Social Welfare. The Greater Johannesburg Welfare, Social Service and Development Forum (GJWF) also refer to a one-stop service for children and their families. The implication of

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[58] Points (f) and (g) are in line with the international concept of 'child-friendly cities': see generally Wandile Zwane 'Child-Friendly Cities? Planning for a Young Urban World' (2001) 5 **Children First: A Journal on Issues Affecting Children and Their Carers** 3. However, points (f) and (g) are recommended for rural as well as urban areas.

[59] As is provided for in the Nonprofit Organisations Act 71 of 1997.

this type of service is that residents in a particular neighbourhood should be able to access a range of services housed in one building, for example, a clinic, a recreational centre, an ECD centre, an NGO office, etc. The combination of services will differ in different areas. These centres may be set up in consultation with other role players. In relation to provision of services at the one-stop centre, the local authority might take responsibility for the direct delivery of selected social services, or might allow NGOs, CBOs and / or provincial government structures to deliver services from those premises.

9.8 The Role of Traditional Leaders in the Delivery of Prevention and Early Intervention Services and in Safeguarding and Promoting the Welfare of Children

The Constitution recognises the institution, status and role of traditional leadership, according to customary law, subject to the Constitution.[60] The Constitution further provides that a traditional authority that observes a system of customary law may function subject to any applicable legislation and customs.[61] Section 81 of the Local Government: Municipal Structures Act 117 of 1998 gives traditional authorities, through their leaders, direct access to decision-making at local government levels and ensures their participation in local government affairs. Section 81(1) reads as follows:

> Traditional authorities that traditionally observe a system of customary law in the area of a municipality, may participate through their leaders, . . . in the proceedings of the council of that municipality, and those traditional leaders must be allowed to attend and participate in any meeting of the council.

Section 18(1)(f) of the KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990 clearly defines as one of the powers of the *amakhosi* or *iziphakanyiswa* to '... ensure the protection of life, person and property and the safety of bona fide travellers within his area ...'. Traditional authorities and their leaders can and should therefore play an important role in any preventive and early intervention strategy for children.

The Commission has noted that the White Paper process on Traditional Affairs is underway. In that

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[60]Section 211(1) of the Constitution, 1996.

[61]Section 211(2) of the Constitution, 1996. See also the KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990 which provides for the establishment of tribal, community and regional authorities.

process the following issues, among others, will be dealt with:

- The structure and role of traditional leadership and institutions.
- Principles relating to remuneration.
- A national audit of traditional leaders.
- The role of women.
- The role of traditional leaders in politics.
- The future role of the Houses and Council of Traditional Leaders.
- The rationalisation of current legislation dealing with traditional leadership and institutions.

The Department of Justice has indicated its intention to establish community law courts.[62] These courts will take cognisance of the advantages of customary law courts such as the fact that they are cheap, speedy, informal, conciliatory and accessible. Traditional leadership will enjoy special recognition in the new community law courts which will operate in rural areas.

The Department of Land Affairs is looking at various options of land tenure.

Some of the functions currently exercised by traditional authoities do not overlap with the constitutional functions of local government. Local government does not, for example, lend itself to judicial functions, nor can it speak on traditional affairs or act as the custodian of customs and culture. In some respects, however, the current responsibilities of traditional authorities and municipalities do overlap. This has been a source of tension and has hampered development in certain rural areas.

The Commission is of the opinion that traditional authorities, through their leaders, have a very important role to play in protecting and promoting the welfare of children living within its jurisdiction. **The Commission believes traditional authorities can best fulfil their role in this regard by participating at the government levels provided for by the Constitution and the Local**

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[62]See also South African Law Commission **Discussion Paper 82: Traditional Courts and Judicial Functions of Traditional Leaders** (Project 90: Customary Law, May 1999); Wilfried Schärf and Daniel Nina (eds) **The Other Law - Non-state ordering in South Africa** Cape Town: Juta 2001, chapter 3.

Government: Municipal Structures Act 117 of 1998. As far as local government level is concerned, traditional authorities will obviously exert their influence through the local government structures and the recommendations regarding local government made above will therefore also apply to traditional authorities where applicable. This is in line with the challenge identified by the **White Paper on Local Government** to ensure that, in practice, tribal leadership plays a supportive role to municipalities so as to enhance rural governance, development and nation building.[63]

9.9 Court-Instigated Services

The children's court needs to be part of a coherent strategy for delivering prevention and early intervention services for children. By virtue of its specialization, the court will be an appropriate forum for identifying cases where intensive services are required. It is therefore recommended that where the court decides on a balance of probability that such services provide a reasonable likelihood of avoiding the need to remove a child from his or her current caregiver, it may:[64]

1. Order an emergency, short-term, state-funded financial grant to be paid to the child or her primary caregiver either in a lump sum or in monthly payments over a maximum of four months (the maximum rate of payment will be set in the regulations); and / or

2. Refer the child and / or named family members to an approved family preservation programme. Each provincial government authority must maintain a list of approved family preservation programmes for court-referral purposes. Provincial government may either set up such programmes or outsource them to other appropriate service providers.

9.10 Conclusion

It should be evident that it is indeed possible and, in the Commission's opinion appropriate, to

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[63]Section D, par 4.3 of the White Paper on Local Government.

[64]For additional court orders, see 23.10.3 below.

legislate on prevention and early intervention services for children and their families.

CHAPTER 10

CHILD PROTECTION

10.1 Introduction

Formal measures for the protection of children from harmful actions and from negligence, especially by those immediately responsible for their care, are arguably the central focus of the Child Care Act of 1983. While the proposed new statute is likely to be much broader in its reach, protective measures will remain a crucial component.[1] Child protective measures as addressed in this Chapter are legal provisions and interventions sanctioned by the State, which are designed to deal with situations in which specific children are being harmed, or are at immediate risk of harm, through abuse or neglect. Exploitation and abandonment, being forms of abuse and neglect respectively, are included within the ambit of these protective measures. Preventive and early intervention measures which overlap with or flow from formal protection will be brought into the discussion where appropriate.

10.2 Scope of and guiding principles for child protective legislation

10.2.1 Scope of protective legislation, and needs and rights to be addressed

In South Africa the underpinnings for child protection measures can be found in sections 28(1)(d) to (g) of the Constitution. These sections spell out the child's right to protection from abuse, neglect, premature or exploitative employment, unnecessary detention and - if detention is unavoidable - exposure to conditions which are unsuitable for children. The constitutional provisions in turn give effect to articles 19, 20 and 32-37 of the CRC, which refer to the right to protection from abuse and neglect and to special protection if deprived of a family environment, as well as protection from child labour and various forms of exploitation, trafficking, 'cruel, inhuman or degrading treatment or punishment',[2] and deprivation of liberty. Articles 15, 16, 21, 25 and 26 are key provisions of the African Charter on the Rights and Welfare of the Child relating to child

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1 Ninety-six per cent of participants who completed a questionnaire after provincial workshops convened by the Project Committee in 1998 viewed 'protection of children against abuse and neglect' as an issue to be addressed by the new children's statute. This was the highest percentage for any of twenty major issues relating to the needs and rights of children which were listed.

2 Article 37.

protection. These refer to the rights of the child to protection from labour, abuse and torture, harmful social and cultural practices and sexual abuse, and the right to special assistance if deprived of a family environment.

10.2.2 Circumstances in which protective intervention may be required

Situations where protective measures may come into play generally fall into one or both of the following categories:

° *Neglect*

Here we are dealing with failure to meet the child's basic physical, intellectual, emotional, and social needs. A distinction is often cast between neglect which occurs because caregivers lack the resources to meet the child's needs, and neglect which occurs despite such resources being available. Especially in the latter case, neglect may be regarded as a form of abuse, depending on the type of definition used.

° *Abuse*[3]

Child abuse is typically understood as occurring when some form of harm is actively perpetrated against a child. Abuse may be *physical* – involving assault and possible injury; *sexual* – involving the use of a child for the gratification of an older or more powerful person; or *emotional* – involving e.g. constant attacks on the child's self-esteem, or terrifying threats.

Neglect and abuse may emanate from a number of sources, and it is not always easy to pinpoint who carries the primary responsibility. A combination of perpetrators may be involved. A child may e.g. be neglected or actively abused by family members or others in his or her home or neighbourhood, or by institutions which are responsible for assisting with his or her care and development, such as schools or health care services. State policies or practices may be neglectful or abusive of children, as was highly apparent under apartheid.

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3 Section 3 of the New South Wales Children (Care and Protection) Act, 1987, defines abuse, in relation to a child, as assault (including sexual assault), ill-treatment of a child, or exposure or subjecting a child to behaviour that psychologically harms the child, 'whether or not, in any case, with the consent of the child'. 'Ill-treat', however, is not defined.

10.2.2.1 Sub-categories and combined forms of abuse and neglect

Many children experience combinations of physical, sexual and/or emotional abuse and/or neglect. These may take on patterns which are deeply embedded in the child's socio-economic circumstances and/or the surrounding culture. Categories include:

° *Abandonment*

This involves a complete withdrawal from the child and is therefore sometimes regarded as the most extreme form of neglect. It may or may not involve leaving the child destitute or in life-threatening circumstances.

° *Child labour*[4]

Children who are exploited for their labour are, to varying degrees, denied their right to education, rest and leisure. They are at risk of physical, emotional and sometimes sexual abuse depending on the work environment involved. Such children are often caught up in a cycle of poverty which is repeated in the next generation. *Commercial sexual exploitation* is recognised as a particularly damaging form of child labour.

° *Harmful cultural practices*

While children, along with the rest of the population, have a right to respect for their religion and culture, some religious and cultural practices involve physical harm and potential emotional damage.

° *Children in need of special protection*

These are children who are continuously exposed to multiple forms of abuse and deprivation, i.e. those 'whose lives are lived daily in circumstances which place their survival, protection and

4 Child labour in general is discussed in Chapter 13 below.

development at risk' or 'those in circumstance which deny them their most basic human rights'.[5] Subcategories would include orphans, those involved in commercial sexual exploitation and child labour generally, children living on the street, children in out-of-home care, children with disabilities, poverty-stricken children, displaced or refugee children, children caught up in violence or armed conflict, children in conflict with the law, and children infected with and affected by HIV/AIDS.[6] Chapter 13 will deal in depth with some of these categories of children.

10.2.3 Broad statutory approaches to the protection of children

It is one thing to agree that children's needs must be met and that they must be protected from harm, and another to decide whether, when and how the state should intervene to ensure that this happens.[7] Legally sanctioned interventions, designed specifically to safeguard children who are in specified forms of danger, are only one component of any society's arrangements for protecting its children. A multiplicity of measures and processes, mandated by law or operating informally, help to meet the fundamental needs of children and ensure their normal growth and development, as part and parcel of the normal functioning of society. Others may be established specifically to prevent certain types of harmful situation from developing, or for purposes of intervening when problems are apparent but can be managed without the use of state authority.

The nature and emphasis of state intervention will depend in part on how a given society assigns the responsibility for the wellbeing of its children, and where it believes the risks to children are primarily located. Societies differ in the extent to which they lay the burden of responsibility with the biological parents on the one hand, or view the nurturing of children as a responsibility shared by the extended family, the community and the state on the other. Even where specific, identifiable individuals such as parents or caregivers pose an immediate danger to a child, abuse and neglect tend to be generated or at least aggravated by broader societal issues. High stress levels and a

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5 UNICEF/NCRC 'Children and Women in South Africa: a Situation Analysis', pp 6, 75.

6 While any such situation places a child at special risk, access to the appropriate resources may prevent that child from entering especially difficult circumstances – e.g. a child with a disability who has full access to the range of services and supports needed to enable him or her to develop to his or her full potential might not fall into this category; likewise an orphaned child who is fully absorbed into an extended family which has or is supplied with adequate resources to care for that child.

7 Dingwall 'Labelling children as abused or neglected' in Stainton Rogers et al (ed) **Child Abuse and Neglect - Facing the Challenge** London: Open University 1989, 164 points out that there is an important distinction between discourses about types of behaviour towards children, moral formulations in this regard, and the question of whether or not specific types of conduct should be policed.

lack of support for parents and caregivers are factors widely believed to promote abuse of children. Poverty and a lack of basic resources are prime generators of stress and disorganisation, as well as limiting the ability of parents and other caregivers to meet the needs of children. It is thus no accident that incidences of child abuse and neglect are markedly higher among poor families.[8] A number of writers and practitioners caution against an approach to child abuse which is over-preoccupied with ideas of personal or family pathology. Child abuse can be seen inter alia as a manifestation of underlying social problems, with families who are caught up in these becoming 'agents of structural violence'.[9] The view that child abuse is basically a matter of 'sick' behaviour within families enables society both to avoid engaging with the broader social causes, and to relegate the task of protecting children from the resulting harm to designated professionals, regardless of whether they have the necessary resources.[10]

If society as a whole has responsibilities for the protection and nurturing of children, and the causes of neglect and abuse are not located only in individuals or families, it follows that the types of statutory intervention for which provision is made should not be focussed only at the level of the individual child and family, and should not be predominantly of a controlling or punitive nature.

The body of legislation which serves to protect children should include at least the following components:

(a) Provision for mechanisms which are geared towards the broad population and which support parenting, family life and child wellbeing generally, thereby lowering the risk of abuse and neglect and reducing their effects;

(b) Provision for mechanisms through which help is offered on a voluntary basis to individual children and families who are experiencing stress or believed to be at risk;

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8 Corby 'Alternative Theory Bases in Child Abuse and Neglect' in Stainton Rogers et al (ed) **Child Abuse and Neglect - Facing the Challenge** London: Open University 1989, 30-39; Faller, K **Child Sexual Abuse - an Interdisciplinary Manual for Diagnosis, Case Management and Treatment** London: Macmillan 1989, 23; National Coalition for Child Protection Reform, 2000: Issue Paper 6 - "Child Abuse and Poverty", http://www.ncccpr/org/newissues.html.

9 Parton, N **The Politics of Child Abuse** London: Macmillan 1985, 167.

10 Loney, M 'Child Abuse in a Social Context' in Stainton Rogers et al (ed) **Child Abuse and Neglect -Facing the Challenge** London: Open University 1989, 88-96.

(c) Provision for mandatory measures which are exercised with or without the consent of those concerned, in which state authority is exercised to protect and provide care for the individual child who is deemed to be in danger in his or her own home or immediate environment;

(d) Criminal justice measures aimed at dealing with perpetrators of offences against children.

It can be argued that a sound balance between these components, in legislation as well as in policy frameworks and in resourcing, is essential for a society which wishes to protect its children effectively. It would appear, from the overwhelming weight of information supplied to the Project Committee, that in South Africa all these components are inadequate and in urgent need of strengthening. In efforts to reinforce them, the optimum possible balance should be sought.

The focus of the present chapter is on formal child protective services (CPS) which carry state authority, i.e. interventions contemplated in (c) and, insofar as they impact directly on the child, also (d) above. However it is necessary when designing CPS measures to ensure that they are linked to, and in proper balance with, other approaches. It becomes extraordinarily difficult, apart from being prohibitively expensive, to deal effectively with abuse and neglect through case-by-case protective intervention by state agents when essential social mechanisms required to ensure the wellbeing of children are weak or absent.

10.2.4. **Protective measures and mechanisms**

When abuse or neglect of a child has occurred, or there seems to be a risk thereof, one or more of a range of responses may be appropriate for those charged with legal child protection responsibilities. The options chosen will depend *inter alia* on the severity and context of the problem and the resources available. Legislation should include adequate provision for the range of options which are likely to be needed. Internationally, most interventions provided for in protective legislation seem to fall into one or other of the categories outlined below.

10.2.4.1 **Reinforcement of protective potential within the family or neighbourhood**

The extended family, friends, faith communities and neighbourhoods form natural support systems which, when functioning well, help to prevent abuse and neglect from arising. In addition, members

of such networks may intervene to offer support where are signs of stress in a household. A tendency towards social isolation has often been identified as one of the factors tending to be characteristic of abusive families. Conversely, 'children, young people and their families can thrive within a supportive and empowered family environment and within a caring and committed community' states Mbambo.[11]

In seeking to assist children identified as being at risk, child protection agencies often seek to mobilise support from within the extended family or community. The aim is to reduce stress and enhance the coping skills of caregivers, thus reducing or eliminating the risks of abuse and neglect.[12] In some parts of the world, there has been considerable investment in intensive 'family preservation programmes', through which a range of intensive supports and interventions are introduced with the aim of preventing the separation of children from their families. In some countries such programmes have legal status as protective options within the relevant legislation. Linkages with available social security provisions are essential to the functioning of such approaches, as financial support of the child within his or her home provides protection against neglect and abandonment as well as many forms of active abuse, including commercial sexual exploitation and child labour. Legislation providing for family social security is thus a critical component of a family preservation approach.

10.2.4.2 **Statutory protection of the child within the home**

Where it appears that safeguards can be built into the home environment to protect the child, but that these require the force of law behind them rather than being dependent on the voluntary cooperation of all concerned, a court or some other authority may issue an order which binds those concerned to adhere to certain requirements. For example, parents may be ordered to attend regular counselling and allow free access to a protective agency to visit, or they could be required to refrain from certain types of behaviour, and/or involve themselves in counselling or treatment for an alcohol problem. A process termed 'Family Group Conferencing' has been growing in popularity

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11 'Family Preservation: the South African Experience', paper prepared for Project Committee on the Review of the Child Care Act, 1998, p. 4.

12 Relatives, neighbours or people from within a faith community may be drawn in to provide support and guidance in child-rearing, or 'time out' for a stressed parent by sharing in child care tasks, or providing short-term care of a child in times of particular stress. In addition or alternatively, agencies may introduce formal supports such as homemaker services, full or partial day care services for children, crisis lines or drop-in services, professional or voluntary counselling, parenting skills training programmes or self-help groups.

in some parts of the world as a means of involving the immediate and extended family, and sometimes other members of a child's network, in developing a plan of action and arranging care for a child who is considered to be at risk. This may be due to his or her having come into conflict with the law, or having been abused or neglected, or being destitute.

10.2.4.3 Removal of an offender

Where a specific person has been identified as a threat to the wellbeing of a child, the most appropriate way to safeguard that child might be for this person to leave the home. Most typically this is a person who is physically or sexually abusing either his or her adult partner, or the child concerned, or both. Such a person might be arrested and incarcerated, or be formally ordered by a competent authority to stay away from the premises, with the prospect of criminal sanctions if such order is breached.

10.2.4.4 Placement of the child in substitute care: by order of court or by voluntary agreement

Where the child's safety cannot be assured through support of the family or removal of a perpetrator, removal of the child in terms of a court order may be the option of choice. Substitute family care - usually foster care - tends to be the preferred option.[13] However, some children need a more structured group care environment provided by a residential care facility, at least in the early stages of placement. Also, substitute family care may not be available and residential care may be the only option.

A less authoritarian option is entry into a voluntary care agreement, as is provided for in e.g. a number of North American jurisdictions. Here the relevant authority enters into a formal agreement with a parent or parents, in which there is a temporary transfer of custody of the child. This is linked with a service plan aimed at family reunification within a specified time.

In some countries, placement of a child is achieved by means of the designated child protection authority assuming legal custody and/or guardianship of the child. In others, such as South Africa,

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13 Where a child has been abandoned, or a parent has consented to such an approach, adoption may occur at the outset. In other cases, however, this option is usually exercised only much further down the line.

custody is transferred to the relevant substitute caregiver.

10.2.4.5 Combinations of criminal justice and protective measures

Care arrangements to ensure the safety of a child may occur in tandem with arrangements to prosecute a person who has committed a crime against the children. Criminal sanctions can be applied in such a way as to promote the rehabilitation of the offender, where possible, as well as the recovery of the child and the family as a whole. The risk of 'secondary abuse'[14] is, however, particularly high in situations of this kind, both because the number of role players increases and because of the particular risks which the criminal justice system involves for children.[15] Special arrangements are needed to coordinate the activities of practitioners from the justice and social service sectors as well as others who may be involved – e.g. practitioners in the health, welfare, education and correctional service fields. Such arrangements may be provided for by statute or set out in policies.

10.2.5 Basis for selection

Criteria outlined by Michael Wald have been influential in Britain and the USA in deliberations as to when official intervention to protect a child is justified, and when removal of the child from the home is warranted.

In Wald's view, court involvement would be indicated where:

- a child has suffered, or is likely in the near future to suffer, a non-accidental physical injury which could cause death, disability or other severe physical harm;
- a child has suffered or is likely to suffer serious injuries because of conditions which the parents have failed to correct or because of lack of adequate protection or supervision;
- a child shows symptoms of severe emotional damage and the parents are not willing to provide - despite being in a position to do so - or to allow the necessary help for the child;
- a child has been sexually abused by a member of his or her household;

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14 See 10.2.5.3 below.

15 See, for instance, Jolandi le Roux 'Kindermishandeling, die seksueel-mishandelde kind en getuienisaflegging' (2000) **Stellenbosch LR** 480, who emphasises alternative methods of testifying in criminal trials for child victims..

- a child is in urgent need of medical treatment, without which he or she will suffer severe ill-effects, and the parents are unwilling to ensure that this is done although they are able to do so;
- a child is involved in delinquent behaviour due to the active encouragement of the parents.[16]

According to Wald, the following would constitute grounds for removal of a child from the home rather than other statutory protective options such as court-ordered supervision:

- the child has been physically abused as described above and there is substantial evidence that he/she cannot be protected from further abuse while in the home;
- the child has been endangered in any other of the ways mentioned and there is '*clear and convincing*' evidence that the child cannot be protected from further harm of this type unless removed from his or her home.[17]

Decision-making can also be guided by consideration of the following: the primary location of the source of the abuse, the comparative risks involved in the various options for intervention, and the available resources.

10.2.5.1 **Locating the problem**

It is necessary, when selecting appropriate responses to a situation of actual or potential abuse, to examine the sources from which the hazards to the child seem to be emanating. Such factors can be broadly grouped into those associated with the parent(s) or caregiver(s), those associated with the child, those located within the family or household, and those operating in the broader society. Typically no single factor, but a number of pressures in combination, predispose potential perpetrators to abuse, and set children up to become victims.[18] The context in which the abuse

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16 From White, R 'Standards of parenting and the law' in Adcock and White (eds) **Good-Enough Parenting**, 33-4.

17 Ibid, 34.

18 Parents or caregivers may be young and unprepared for parenthood, may be emotionally disturbed or mentally ill, or may have an unresolved history of physical or sexual abuse or other forms of trauma in their own childhood. They may have experienced no healthy parenting in their own lives and may never have had their own childhood needs properly met. They may be dependent on alcohol or other drugs. Poor self image, difficulty in sustaining healthy relationships and limited impulse control are typical features of abusive caregivers. A child may have a feeding disorder, may cry excessively, or may have a disability or some other problem which makes special demands on parents. He or she may have been involved in previous experiences of violence or abuse and may, as a way of acting out the trauma of these experiences, engage in behaviour which puts him

occurs and the predominant causative factors will be relevant to the choice of intervention strategy. The choices made for a particular child will differ where, for instance, the abuse seems to arise from:

- a temporary situation of stress in a caregiver or caregivers;
- a violent behaviour pattern or severe, long-term emotional disturbance in a primary caregiver who rejects outside assistance; or
- acute poverty in a family which is able, with help, to provide adequate child care, but who live in an environment where violence and other social problems are rife.

10.2.5.2 **Available resources**

The resources which can be accessed for each form of intervention will also be of relevance to the choices made. For example, if family support services can be intensively applied it may be possible to avoid more drastic interventions, even where a fairly serious problem exists. But such services will offer no protection to the child if they are superficial or inconsistent. Likewise, if the available substitute care facilities are of an extremely poor standard, this will affect the choices to be made.

10.2.5.3 **Comparative risks, including secondary abuse**

Decision-making in child protection work involves a process of weighing up risks. Formal instruments for risk analysis may be used for this purpose, as will be discussed in 10.2.2.1 below. On the one hand, the risk of abuse to the child within his or her daily environment must be considered. On the other, the intervention of an external authority and the events which follow have the potential to be harmful in their own right. Collectively these factors are often termed 'secondary abuse'. In the first place, harm to the child can result from the trauma which may be brought about by e.g. removal from the home, and also from the fracturing of the family which may result,

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or her at risk of further such incidents. Some children will victimise others in their efforts to overcome their own feelings of pain and helplessness. Parents or other adult caregivers may be in conflictual relationships in which anger and frustration may be displaced onto a child who is then subjected to periodic assaults - physical, sexual or emotional. The child may become a scapegoat for the frustrations of siblings as well as parents. The family may be affected by broader social problems of unemployment, inadequate income, poor housing, lawlessness, a breakdown in norms and values and a 'culture of violence'. A child who is relatively safe in his or her own home may be endangered in a neighbourhood where such factors are prevalent. Neglect, or the failure or caregivers to meet a child's basic needs, may result from poverty or a lack of essential services and resources in the community. Poverty is a common denominator of many conditions which predispose children to abuse.

sometimes permanently, from such intervention. Secondly, harm can be caused by the exposure of the child to components of the protective system - e.g. court processes, medico-legal procedures etc., especially where these are inadequately handled. Thirdly, there is the possibility that the child may be physically or sexually abused or neglected by substitute caregivers.

Secondary abuse is also present when the service system fails to follow through with the activities which are supposed to proceed once initial protective intervention has been undertaken. Thus children can be removed from their homes to prevent further abuse, but thereafter be denied the help they need to deal with past traumas and become healthy and integrated persons. They may also become 'lost in the system' due to a lack of permanency planning, and may 'graduate' out of care as young adults who have been denied the experience of family life and may be ill-prepared to become productive adults and competent parents.

10.2.5.4 **Structural implications**

From the discussion thus far, at least the following elements can be identified as being required for a properly functioning child protection system:

- Provision for a range of possible interventions that can effectively address the different types of factors which place children at risk of abuse or neglect.
- Ongoing resourcing for each of these to the extent which is required for their continued availability and reliable functioning.
- Clarity as to the circumstances in which protective intervention backed by state authority is necessary.
- Mechanisms to assure that choices of intervention are made systematically and in such a way as to ensure, as far as possible, the most favourable outcome for the child concerned.
- In cases where a child has been separated from his or her family, provision for ongoing follow-up services and decision-making processes.

10.2.6 **Balancing the various dimensions of child protection legislation and practice**

10.2.6.1 Balancing formal child protective services with primary and secondary preventive measures

Where an overemphasis develops on formal child protective services (CPS) in proportion to other approaches, a number of hazards become evident. While the use of state authority to intervene on behalf of children in their own homes is a crucial component of any modern protective system, such interventions are 'double-edged'. They are in tension with social values such as privacy and respect for family autonomy, and have significant potential to undermine family life, especially where they are ineptly or superficially applied. Also, as previously mentioned, secondary abuse within the child protection system itself is an ever-present possibility.

An excessive focus on case-by-case investigations leads to a misdirecting of resources.[19] Waldfogel identifies one of several factors which are generating an ongoing crisis in American child protective services as being the 'overinclusion' of low-risk families.[20] The latter are dealt with in an unnecessarily adversarial fashion by an overloaded system which then pays inadequate attention to those who are at serious risk. She further comments that the American CPS system has a dual mandate requiring it both to protect children and to preserve families, leading to tensions as to which goal should predominate. She suggests that an attempt has been made to balance the goals by adopting a 'one-size-fits-all' approach, which is in many cases inappropriate.[21]

10.2.6.2 Balancing and linking preventive and protective approaches with criminal justice approaches

Duquette remarks: 'Child protection presents an interesting blend of social concern for the welfare of the child and his parents, and imposition of social control. Different countries have struck a different balance between compassion and coercion when it comes to protecting youngsters from harm'.[22]

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19 The National Coalition for Child Protection Reform in the USA claims that current definitions of neglect are too broad and that there is a tendency to confuse poverty with neglect. Hence,'when children known to the system die, it is usually because the system is overwhelmed with children who do not need to be in the system at all' (www.NCCPR/org/newissues.html).

20 'Reforming Child Protective Services' (Jan/Feb 2000) Vol. LXXIX no. 1 **Child Welfare** 45-6.

21 Ibid.

22 'Child Protection Legal Process' (1992) 54 **University of Pittsburgh Law Review**, 239 at 248.

Physical injury to, sexual acts with, serious and wilful neglect of, and abandonment of children are designated as crimes as well as being cause for protective intervention in many if not most countries. Emotional abuse is also recognised as an offence in some. However, the nature and extent of the criminalisation of these forms of abuse varies between countries and jurisdictions. Forms of abuse which arise directly out of acute poverty, such as abandonment and many forms of child labour, tend to give rise to considerable controversy as regards the appropriateness of a criminal justice approach.[23] Acts which emanate from a particular culture or belief system – e.g. virginity testing and female genital mutilation - are also handled differently from one legal system to another, although the CRC and specifically article 21 of the African Charter on the Rights and Welfare of the Child[24] are giving impetus to new measures to address such issues.

Achieving an appropriate balance between the resources and attention directed to criminal justice procedures on the one hand and educative, supportive and protective processes on the other is a major challenge. Also to be taken into account is the fact that an alleged perpetrator of child abuse is often a caregiver and/or family breadwinner, on whom the child and other family members are dependent for their survival, or with whom they have emotional ties. Hence criminal processes must be handled with particular care, and be balanced by other interventions if they are to protect children and not just increase their trauma. It has been noted with concern, particularly on the basis of British research, that there has over the years been a shift in emphasis from support and assistance to families of 'at risk' children, towards an increasing investment of available resources in coercive and adversarial measures including prosecution.[25]

10.2.6.3 **Balancing punitive with rehabilitative interventions**

The rehabilitation of perpetrators is a key consideration for the wellbeing of children who stand to

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23 While child labour is overtly condemned in much of the world, there are substantial variations in the extent to which it is legally permitted, regulated or treated as a form of criminal abuse. See UNICEF **The State of the World's Children** New York: Oxford University Press 1997, 58; see also country profiles in Bureau of International Labor Affairs **By the Sweat and Toil of Children – the Use of Child Labor in American Imports**, US Department of Labour, 1994 27ff.

24 States Parties are bound to take all appropriate measures to eliminate 'customs and practices prejudicial to the health or life of the child' and 'customs or practices discriminatory to the child in terms of sex or other status' (OAU , Addis Ababa, 1990).

25 Lachman, P **Reported Child Abuse in Cape Town** MD Thesis, UCT 1997.

be victims in the future. Perpetrators of child sexual abuse who are released after serving their sentences without the necessary treatment are likely to have had their problems deepened, and to present an increased danger.[26] Successful outcomes for children who have been abused within the family are in many cases associated with family reunification, or at least with positive contact with a parent who ceases to be a danger and is able to play a constructive role.

High levels of success have been achieved in the treatment of appropriately selected perpetrators who are court-ordered into well-designed behaviour management/treatment programmes as a condition of suspension of sentence, or are diverted from criminal processes. Success depends on their taking responsibility for their actions and complying in full with the relevant programmes. An opportunity for a parent to formally accept responsibility for his or her actions, and to work within a programme designed to help him or her to end the offending behaviour, can avoid the harm to the child which tends to be associated with adversarial court proceedings, even where protective mechanisms are in place. While only certain offenders can successfully be managed through diversion or similar approaches, experience here and elsewhere has shown that they represent a significant group. For these, the combination of judicial with therapeutic approaches is most positive for the child and the family as a whole, and far less costly to the taxpayer than imprisonment.[27]

Rehabilitation is a particularly pressing concern in relation to the growing numbers of teenage and younger child offenders, most of whom have been subjected or have witnessed abusive behaviour, and for whom imprisonment is not normally a just, appropriate or practical solution.

Treatment and rehabilitation of sexual offenders, including diversion processes, are extensively discussed in the Discussion Paper **Sexual Offences: Process and Procedure**, prepared by the South African Law Commission's Project Committee on Sexual Offences.

10.2.7 **Existing situation in South Africa**

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26 Jenkins, A **Invitations to Responsibility - the Therapeutic Engagement of Man who are Violent and Abusive** Adelaide: Dulwich Centre Publications 1990; Jones DN et al (ed) **Understanding Child Abuse** London: Macmillan Education 1987.

27 SA Law Commission 1997: Issue Paper 10: Sexual Offences Against Children, 70ff; Kempe RS and CH Kempe **The Common Secret - Sexual Abuse of Children and Adolescents** New York, W.H.: Freeman 1985; Giarretto, H **Integrated Treatment of Child Sexual Abuse** Palo Alto: Science and Behavior Books 1982.

Much of South Africa's child protection system is based on models developed in the First World, particularly Britain and North America. Formal child protection responsibilities are shared between a number of government sectors (e.g. welfare, police, justice, health) and various civil society organisations, particularly child and family welfare organisations. Child abuse is designated both as a crime and as a situation necessitating protection, care and treatment.

10.2.7.1 Formal protective interventions

Removal of a child who has been abused or is at risk of abuse is provided for in section 11 of the Child Care Act 74 of 1983. In a situation of urgency a child may be removed by a police officer, social worker or 'authorised officer' who must complete the required Form 4[28] and bring the removal to the attention of the court within 48 hours. A children's court inquiry is then held in terms of sections13 and 14, and a finding is made as to whether the child is 'in need of care'. The grounds for such a finding are found in section14(4).[29]

Options open to the court for dealing with a child found to be 'in need of care' are supplied in section15(1). These include supervision within the home, or placement of the child in foster care, a children's home or a school of industries. No distinction is spelled out as to the type of situation which would merit each option - any can be used at the discretion of the court.

The Child Care Act also provides for ongoing monitoring of the care arrangements of, and ongoing planning for, children who have been placed in substitute care by the court.[30] In addition the Act sets out conditions for and processes involved in adoptive placements for children who are unable to reside within their own families.[31] The Act further provides for the setting up of places of safety, children's homes, and secure care facilities for children awaiting trial or sentence.[32] Provision is also made for the registration and inspection of shelters, children's homes and other residential facilities for children.[33]

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28 Regulation 9(2)(a).

29 For the wording see 6.4.3 above.

30 Sections 15(2)-(5), section 16, and chapter 6.

31 Sections 7 - 27.

32 Sections 28 - 29.

33 Sections 30 - 31.

Parental rights may be terminated and children may be adopted where this is considered to be in their best interests.[34] Recent amendments to the Regulations have strengthened an already implicit emphasis in the Act on achieving stability for each child in substitute care through permanent placement, preferably within the child's own family or community, as soon as possible. This principle is strongly supported by the current policy framework as set out by the Inter-ministerial Committee on Youth at Risk (IMC).[35]

The Domestic Violence Act 116 of 1998 makes it possible for a court to exclude a known or alleged perpetrator of domestic violence from a child's home or other forms of access to him or her. The court may issue an 'interim protection order' followed by a 'protection order' against such a person, if satisfied that the child (or anyone else in the household) is at risk of domestic violence from him or her. The Act also provides for the setting of conditions to which contact with the child by an alleged perpetrator must be subject.[36] Domestic violence is very broadly defined in section1 of this Act, and includes e.g. physical, sexual, emotional and verbal abuse as well as intimidation and 'controlling or abusive behaviour'. A child may approach the court directly for a protection order without adult assistance, or a concerned adult may make such an approach on behalf of the child.[37]

10.2.7.2 Additional legislation with a protective dimension

In addition to the direct protective actions which are provided for by these Acts, other forms of statutory provision are in place which are designed to prevent children from becoming vulnerable to neglect and abuse, and/or to facilitate informal intervention in situations where children are seen to be vulnerable.

Some measures are specifically intended to protect certain children from the worst extremes of poverty. The Maintenance Act 99 of 1998 provides machinery intended to ensure the financial support of children by those who have responsibility for them. The Social Assistance Act 59 of

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34 Section 19.

35 See IMC **Minimum Standards – South African Child and Youth Care System** 1998, 5; also Department of Welfare **Project Go – Programme of Action** December, 1998. A central principle in making alternative care arrangements for children in terms of the Child Care Act, and of achieving permanency for them thereafter, is that of selecting the 'least restrictive and most empowering' option which is commensurate with each child's needs.

36 Sections 7(1) and (6).

37 Sections 4(3) and (4).

1992 provides for limited state assistance to certain categories of children in impoverished families, in the form of the Care Dependency Grant for children with severe disabilities, and the Child Support Grant for children under seven years. The state Old Age Pension and the Disability Grant, while not primarily directed to children, are in fact used to assist with the support of large numbers of the country's poorest children.[38] Section 5 of the Act provides for the payment of grants to NGO's by provincial welfare departments. These organisations between them carry out a range of supportive and preventive services.[39] The Act may undergo change in the future arising from the work of the Committee of Inquiry which was appointed by the Minister in March 2000 to conduct a comprehensive investigation with a view to presenting options for 'an integrated and comprehensive social security system'.[40]

Some additional provisions which are intended or have the potential to prevent the abuse and neglect of children are as follows:

° The Mediation in Certain Divorce Matters Act 24 of 1987 enables a court to call on the Family Advocate's Office to assist in the reaching of decisions, where possible through mediation, regarding custody and access in contested divorces and also in disputes arising after divorce.[41]

° Section 10 of the Child Care Act 73 of 1984 provides that children under seven years who are living by informal arrangement in the care of persons who are not members of their immediate or extended families must be brought to the attention of the commissioner of child welfare, and that his or her permission is required for such arrangements to continue. The intention here is, in part, to prevent trafficking of young children and undesirable adoptive placements.

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38 **Report of the Lund Committee on Child and Family Support**, Department of Welfare, 1996, 6-7.

39 Formal protective services by NGO's are also subsidised in terms of this provision.

40 See statement by Dr Zola Skweyiya, Minister for Social Development, on the appointment of a ministerial Committee of Inquiry into Social Security. The Minister for Social Development has mooted the idea of a Basic Income Grant for impoverished persons. Such a measure would hold vast potential for the strengthening of families, and the amelioration of conditions which place children at risk of neglect and abuse. It would also facilitate reunification in cases where children at present cannot be returned home from statutory care due to their families being destitute.

41 The Family Advocate's functions have since been expanded to include assistance to the High Court in disputes in matters where an unmarried father applies for custody, access or guardianship in terms of the Rights of Natural Fathers of Children Born Out of Wedlock Act 86 of 1997.

° Section 30 of the same Act requires that 'places of care' – i.e. formal and informal preschool, afternoon and holiday care facilities catering for more than six children - be registered with the Department of Social Development, and makes them subject to inspection and other controls. Shelters for children in especially difficult circumstances, which usually provide voluntary rather than court-ordered care for children on the streets, are also covered by section 30.

° The Northern Province Initiation Schools Act 6 of 1996 requires those holding circumcision schools, for either male or female initiates, to obtain permits and adhere to whatever conditions may be specified. The Act also empowers the Premier to issue regulations governing the operations of such schools, and every SA Police Service member is authorised to rescue a person who has been abducted or forcefully taken to a school.[42]

° The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 prohibits unfair discrimination on the ground of gender. Section 8 designates *inter alia* the following as forms of such discrimination: '(a) gender-based violence; (b) female genital mutilation; …. (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the dignity and well-being of the girl child; . . . (f) discrimination on the grounds of pregnancy'. The Act creates an 'equality court' to which complaints of infringements must be directed, and details a large number of options open to this court if discrimination is deemed to have taken place. These include e.g. restraining orders; orders of compliance; orders of payment for loss, damages or suffering; and referral of matters to the Director of Public Prosecutions.[43] In terms of section 28 the State is obliged, *inter alia,* to audit laws, enact appropriate laws and develop action plans with the aim of eliminating discrimination on the grounds of race, gender and disability.

° Corporal punishment has been declared unconstitutional in state-controlled and regulated

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42 See also the Application of Health Standards in Traditional Circumcision Act, 2001 (Eastern Cape) which provides that there must be proof in the form of a birth certificate that the prospective initiate is at least 18 years old (Annexure A of the Schedule) and requires parental consent of a prospective initiate who is under 21 years of age or who has not acquired adulthood (section 7(1)).

43 Sections 16 and 21.

institutions, including schools.[44]

10.2.7.3 Criminal justice measures

There is extensive provision for the prosecution of perpetrators of child abuse via the criminal justice system. Many forms of child abuse amount to common law crimes, e.g. homicide, assault, indecent assault, rape and incest. A range of statutes also prohibit specific abusive practices. In terms of section 50 of the Child Care Act, ill-treatment, or the permitting of ill-treatment, and abandonment of a child by a parent or guardian are criminal offences. Section 50A criminalises anyone involved in the commercial sexual exploitation of a child, including persons who own, occupy or manage property on which this takes place. Certain other forms of sexual behaviour with children are crimes in terms of the Sexual Offences Act 23 of 1957. This Act also defines the legal age of consent to sex, i.e. 16 for heterosexual and 19 for homosexual acts.[45] The Film and Publications Act 65 of 1996 prohibits the production, possession and distribution of pornographic material involving children, and the exposure of children to pornographic material. Section 45 of the Liquor Act 27 of 1989 prevents the sale of alcohol to persons under eighteen years and obliges holders of licences to exclude children from certain areas where liquor is being sold. Section 4 of the Tobacco Products Control Act 83 of 1993, as recently amended, prevents the sale or supply of any tobacco product to a person aged less than 16 years.[46] Section 43(1) of the Basic Conditions of Employment Act prohibits the employment of children under the age of 15, subject to the possibility of regulated work in terms of a sectoral determination, which may be negotiated for purposes of allowing children to be employed in advertising, sports, artistic or cultural activities.[47] Section 53(2) prohibits the employment of children of any age in work which places their normal development at risk.

The Criminal Procedure Act 51 of 1977 sets out criminal justice processes to be conducted in cases

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44 See the Abolition of Corporal Punishment Act 33 of 1997; section 10 of the South African Schools Act 84 of 1996.

45 This discriminatory situation is being addressed by the SA Law Commission Project Committee on Sexual Offences.

46 As of 1 October 2000 persons selling tobacco products to children under sixteen years will be liable to a fine of R10 000.

47 Sectoral determinations for any other type of employment are excluded by section 55(6) of the Basic Conditions of Employment Act. However, this limitation will fall away if the controversial Basic Conditions of Employment Amendment Bill is passed in the form as gazetted on 27 July 2000.

of alleged abuse of children. The amended section153 of the Act provides for various protective mechanisms to reduce trauma for child witnesses in criminal court proceedings. Children's court proceedings aimed at the protection of the child may be initiated independently of, or in tandem with, criminal justice processes.

10.2.7.4 Additional and cross-cutting provisions

Both the criminal law and the Child Care Act (in the case of offences by family members) allow for activities designed to promote the rehabilitation of offenders and abused children, although these are not clearly spelled out in either case, and there is a dearth of legal mechanisms to monitor treatment which is carried out in terms of a court order. Recent policy initiatives, including the Victim Empowerment Programme (VEP) within the National Crime Prevention Strategy (NCPS), and the National Strategy on Child Abuse and Neglect (NSCAN), have helped to promote inter-sectoral cooperation in bringing together criminal justice, medico-legal, educational, social service and corrective approaches in dealing with crimes against children.

10.2.7.5 Associated policy considerations

The **White Paper for Social Welfare** emphasises strategies which are '… family-centred, community-based and developmental'.[48] The 'family preservation' approach has been successfully utilised in pilot projects generated by the IMC.[49] 'Children, youth and families' make up one of the target groups specifically designated in the Department of Social Development's **Financing Policy**.[50]

10.2.8 Deficiencies in the existing system

From the above it is evident that the current legal system allows for a range of options to be exercised on behalf of children who have been subjected to, or are at risk of, abuse or neglect. All

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48 Ministry for Welfare and Population Development **White Paper for Social Welfare**, published as General Notice no. 1108 of 1997 in Government Gazette vol. 396 (18166), 57.

49 Mbambo 'Family preservation: The South African experience', paper prepared for the Project Committee on the Review of the Child Care Act, 1998.

50 Department of Welfare **Financing Policy – Developmental Social Welfare Services**, published as General Notice no. 463 of 1999 in Government Gazette vol. 405 (1988).

four types of approach mentioned in 10.2.3 above and all the protective mechanisms described in 10.2.4 above are in evidence in our legal system and policy framework, with the exception of the option of voluntary care agreements. However, practitioners, community groups and children canvassed by the Commission have all pointed out inadequacies in the manner in which the different elements of the protective system work in practice, both separately and together.

Central to the problems currently experienced in the South African CPS system are deficiencies in the following areas:

° scope, relevance and adaptability to specific needs;
° governance and coordination; and
° balance and provisioning.

In addition the Child Care Act, 1983, does not address itself to some specific child protection issues, notably corporal punishment and harmful cultural practices.

10.2.8.1 Deficiencies in scope, relevance and adaptability to specific needs

In discussions over the years about the need for reform of legislation dealing with children, the failure of the Child Care Act to address the needs of the broad masses of South African children has been a recurring theme.[51] Legislation has tended to address itself to problems of domestic abuse and neglect in a relatively small proportion of children who have some access to formal protective systems. Children affected by acute poverty and various forms of societal abuse have to a large extent fallen through the net. As will be discussed in more detail in Chapter 13, existing legislation has been found lacking in responsiveness to the problems of most categories of 'children in especially difficult circumstances'.

Problems in the functioning of the courts are addressed in Chapter 23. There have been many calls for an approach which does not fragment measures to protect children between judicial

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51 South Africa's child protection system shares some features which are common in developing countries which have inherited their child welfare systems from past colonial administrations. These systems, applied out of their original First World context, have tended to be unbalanced, emphasising statutory protective measures without effectively addressing the basic needs of children (MacPherson, S **Five Hundred Million Children – Poverty and Child Welfare in the Third World** Brighton: Wheatsheaf Books 1987, 144).

proceedings of different kinds, which minimises secondary trauma and which creates synchronicity between the various civil and criminal processes involved.[52]

Attention has also frequently been called to the lack of adaptability of the courts and the back-up resources used by them, to the needs of young people in different situations. Limited options may result in a 'one size fits all' approach.[53] For example, the use of state places of safety as court-ordered reception centres both for young people charged with violent crimes, and for those who are destitute or require protection from abuse or neglect, is a long-standing source of concern. This practice exposes children both to peer abuse and to criminal influences. While allowing for the considerable overlap which exists between the two groups, many practitioners feel that there is a need for young people charged with crimes of violence to be accommodated in secure care facilities designed specifically for them.

Similarly there is a lack of provision for children who have been abused or neglected and also have special needs, e.g. due to disability.[54] Not only do protective services including the court system tend to be inaccessible to them, but they often fall through the cracks in the system. Conventional care facilities tend to exclude them or to be without the facilities they require, and available forms of specialised care provision may be too costly. There is also no provision for children found to the 'in need of care' to be placed in care options which are licensed in terms of Acts other than the Child Care Act – e.g. facilities providing special care and education for deaf children or those with cerebral palsy.

10.2.8.2 **Deficiencies in governance and coordination**

The National Committee on Child Abuse and Neglect (NCCAN), an inter-sectoral body convened

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52 For example, the current inability of the children's court to order a perpetrator out of the child's home, to decide on issues of a child's residence or contact with one or other parent, or to issue a maintenance order are impediments to the effective functioning of the system. The lack of provision for an inquisitorial approach towards offenders, especially in intra-familial abuse, tends both to penalise the child and to allow many offenders to evade justice. The incompatability of the criminal court system with the needs of child victims, and its inability to accommodate to the dynamics of child abuse are further difficulties. Especially in incest, delayed disclosure, conflicting statements and subsequent retraction are typical due to the nature of the pressures which the perpetrator brings to bear: R Summit 'The Child Sexual Abuse Accommodation Syndrome' (1983) **Child Abuse and Neglect** 177-193. The lack of provision for restorative justice is a further defect.

53 To paraphrase Waldfogel – see 10.2.6.1 above.

54 See further 13.5 below.

by the national Department of Social Development, in 1996 identified the following problems:

> South Africa has no clear strategy (in relation to child abuse and neglect). There has been no analysis of what services are required, what such services cost to deliver effectively, or who should deliver them. In the rural areas in particular there is a lack of the basic resources required to ensure the protection of children. All over the country, existing services are fragmented and under-resourced … . There is no systematic process for ensuring that practitioners in the various disciplines which must deal with child abuse and neglect are equipped with the necessary skills, and no resource allocation for the required training. There are no workload norms, standard guidelines or management protocols in place for dealing with abused or neglected children and their families or with perpetrators, and hence no guarantee that a child entering the system will be dealt with in terms of acceptable procedures or protected from further harm ... . No strategy is in place for primary prevention …. The child protection system in its present form is so inadequate that many children referred for help are at risk of being worse off after referral than before.[55]

The NCCAN proposed an inter-sectoral National Strategy on Child Abuse and Neglect (NSCAN) as a component of the NPA. The status of the NSCAN remained uncertain for the next few years, but it is now under consideration by state departments with core child protection responsibilities, under the leadership of the Department of Social Development. Meanwhile the NCCAN has, with the aid of sponsorship from various sources, succeeded in facilitating the establishment of provincial child protection coordinating structures and provincial protocols to guide the management of abuse and neglect, and has begun to address some aspects of training and reporting. But the NCCAN emphasises that these efforts are unsustainable without comprehensive attention to all aspects of the CPS system, by all the relevant sectors of government in partnership with civil society.[56]

Some problems in the implementation of child protective legislation have to do with the fragmentation of the protective system, and particularly of the welfare sector, which is charged with many of the essential protective tasks either mandated or facilitated by legislation. It can be argued that formal child protective services, more than many other types of social service, require a measure of centralised planning, standard-setting and control, given that they involve far-reaching and potentially hazardous interventions. In most countries the implementation of formal protective interventions is the responsibility either of government directly, or of a very narrowly defined group

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55 NCCAN **National Strategy on Child Abuse and Neglect**, 1996, 2.

56 NCCAN **Proposed National Strategy on Child Abuse and Neglect**, Introduction to the Revised Version draft as at 19 July 2000).

of structures licensed and contracted by government for this purpose. In South Africa a host of NGO's and, of late, even some private individuals share in the responsibility for these actions.

In this regard, it must be pointed out that many of the key protective tasks set out in the Child Care Act have to be carried out by a social worker, defined in section 1 of the Act as 'a person registered as a social worker under the Social Work Act, 1978 ... and who ... is in the service of a state department or a provincial administration or a prescribed welfare organisation'. A 'prescribed' welfare organisation has in the past been normally understood to be one which is registered as such with the Department of Social Development. However the question of which bodies qualify to meet this criterion has become unclear in the course of recent amendments to the Child Care Act, and the shift of the registration process from the National Welfare Act of 1978 to the Non-Profit Organisations Act 71 of 1997. Not only NGO's but also social workers in private practice are now being permitted by some courts to initiate Children's Court proceedings, by being granted the status of 'authorised officers' as provided for in section 1. This raises questions as to the impartiality of the relevant investigations, given that fees are paid directly by one or other interested party in the case to the person making key recommendations to the court.

The NCCAN states as follows:

> Investigation of and intervention into situations of child abuse and neglect ... require the backing of the law and the assertion of authority, or at least the possibility of such measures being brought to bear. Such activities often involve the use of sanctions which limit the freedom of the individual and encroach on the privacy of the family and/or other parties. They are hence essentially functions of government. Should government delegate ... these functions to other parties, it remains obligated to ensure that such parties are adequately equipped to carry out the tasks in question, and that the delegated functions remain connected to a coherent and effective overall system.[57]

It has been suggested that the seeds of the current fragmentation in service delivery to children and families, and hence in the implementation of child protective legislation, are to be found in the history of social service development in South Africa. From the 1930's onward, official policy was

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57 NCCAN **National Strategy on Child Abuse and Neglect**, 1996, 8. The Department of Social Welfare in New Zealand makes the same point in listing the following direct social service tasks of government: 'Investigation of serious child abuse and the exercise of powers to remove children from their families (a regulatory and coercive function of government); the management of statutory processes in care and protection and youth justice (a regulatory function); ensuring that guardianship and custody responsibilities of (the) Director-General are carried out and met (a statutory responsibility) ...': **Strategic Directions**, Post-election Briefing Paper, Wellington, 1996, p. 47.

that the government should play as limited a role in welfare as possible, leaving the individual, the family, religious groups and the community to carry the central responsibility for the wellbeing of people. An early choice was made for government to subsidise approved community groups to undertake services rather than delivering them directly.[58]

The lack of direct accountability by the government for the implementation of child protection laws has created unevenness in service delivery and unpredictability in the nature and quality of the interventions carried out by CPS personnel. While section 28(1) of the Constitution sets out the child's right to protection from abuse, neglect and exploitation, and the Child Care Act and other statutes provide for intervention in cases where this right is being infringed, there is no explicit legal obligation for government to ensure that these provisions are carried out, or to ensure that resources are set aside for this purpose.

The lack of a coherent allocation of responsibilities also makes it difficult to set up effective systems for the operation of CPS. The introduction of standardised risk assessment tools and other assessment procedures, the implementation of permanency planning, the training of practitioners, and the monitoring of norms and standards are only some of the tasks which become difficult if not impossible in an excessively fragmented system. Although provincial and in some cases local protocols have been drawn up to guide multi-disciplinary intervention, these are informal agreements without legal or fiscal backing.

An additional problem for the management and delivery of both preventive and protective services in South Africa has been the lack of clarity as to the role of local government. As shown in the previous Chapter,[59] the Constitution provides the legislative basis for service provision for children

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58 Under apartheid, the subsidisation of services was used to promote the racial separation of services. Their division according to language, religion and culture was also actively encouraged. 'Hence an extraordinarily fragmented ... system developed, as the availability of services was dependent upon community initiative from and for particular groups, and whether or not they could ... obtain state and/or private sector support, rather than being based on any plan to ensure that everyone had access to the necessary services. Levels of state financing varied enormously according to the race of those served ... the result has been a proliferation of very unevenly spread and unequally resourced organisations, managed according to different principles and belief systems, which share with government and between themselves the responsibility for the implementation, inter alia, of the laws affecting children' (SA Law Commission Issue Paper 13, 49). On the positive side, the NCCAN **National Strategy on Child Abuse and Neglect**,1996, p. 8 notes that a feature of the present scenario is 'a particular richness of community involvement which should be valued and nurtured'. But services which are needed to make up the range of preventive and protective options in any given region are often missing. There is no form of structural provision to ensure that every child in the country who is in need thereof, has access to CPS.

59 See 9.7.2 above.

by local authorities. However, there is a lack of specific provision for the relevant duties of local authorities in additional legislation. The Child Care Act makes little mention of such duties.[60] In many other parts of the world, as shown elsewhere,[61] local government is required to play a pivotal role in child protection.

10.2.8.3 Deficiencies in provisioning for and balancing of components

While South Africa's child protection laws have followed the interventionist pattern set by Britain and North America, they are not backed by the well-developed human service systems which are in place in those countries; in addition South Africa does not have the benefit of the safety nets against absolute poverty which are in place in the First World. Child abuse both helps to generate and is facilitated by poverty, and the CPS system has to take this into account in order to be effective. All components of CPS are underfinanced, and there have been calls for all the relevant government departments (Social Development, Safety and Security, Justice, Education, Health, and Correctional Services) to budget specifically for their child protection functions.[62] The present high level of dependence on NGO's for delivery of CPS results in very uneven levels of service. Voluntary initiative and expertise, and the level of access which specific voluntary service-providers have to resources, become the deciding factors in service delivery in any given community. There is no assurance of state funding for protective services.

Meanwhile, there has been in recent years been an escalation of cases of reported child abuse. The SAPS specialist units dealing with child abuse alone report having dealt with more than 65000 cases of crime against children in 2000 - a doubling in incidence since 1998. This figure does not account for cases dealt with by non-specialised officers in the SAPS or for those, believed to be the vast majority, which were not reported to the police.

The **Financing Policy: Developmental Social Welfare**[63] issued by the Department of Social

60 Section 56(2) of the Child Care Act provides that 'a local authority may out of its own funds make grants to any association of persons working in its area for the protection, care or control of children'. Regulation 30(2)(b) requires that any children's home, place of care or shelter must show that it adheres to the building and health standards of the relevant local authorities as a condition of registration. These are significant but very limited roles.

61 See 9.3 above and 10.2.9.2 below.

62 NCCAN **National Strategy on Child Abuse and Neglect**, 1996, p. 49.

63 Government Gazette vol 405 (19888), Notice 463 of 1999, 26 March 1999.

Development designates services to 'children, youth and families' as a target area for financing, and gives priority for funding to prevention and early intervention. The intention is that state financing will be shifted within the next few years to reverse the current situation, in which most funding goes into 'Level 3' services – i.e. statutory interventions and the provision of court-ordered substitute care for children, somewhat less to 'Level 2' or early intervention, and least to 'Level 1', i.e. primary prevention. A concern voiced by NGO's is that none of the levels can be effectively addressed within the very small portion of the social development budget which is allocated to services.[64] Ninety per cent of this budget is spent on social security and 10 per cent on administration and social services. In some provinces expenditure on services is even less - e.g. the Northern Cape in 2000 spent 94, 7% of its social development budget on social security.[65] Hence children can neither be prevented from entering the statutory service and care level, nor be properly protected when they do. It has also been noted that the AIDS pandemic is set to create dependence and destitution on an unprecedented scale, driving more and more people including children into every available form of care.

The **Financing Policy** further provides for the phasing out of the 'per capita' grant for children in children's homes, and for these facilities to be subsidised on the basis of their programmes. This, it has been pointed out, makes these services vulnerable to the prevailing budgetary and political pressures on any given provincial welfare department at any given time, as programme funding is never guaranteed. If a provincial welfare department has the option of refusing to provide a basic level of support to children cared for by court order in a registered children's facility, the risk of deteriorating and even abusive standards of care in that facility is arguably increased.[66]

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64 While options which effectively prevent child abuse or provide successful early intervention are indeed less costly than long-term statutory care, their costs should not be underestimated. If too little is invested in them, they will not have the required impact. Indeed, superficial approaches in which corners are cut to keep costs low may heighten the dangers to such children. Mbambo 'Family preservation: The South African experience', p. 8 points out that, while family preservation as emphasised by the IMC makes for substantial savings in the long term, it requires substantial investment in the short term in order to be effective. The Johannesburg Child Welfare Society has expressed the opinion that the Department's financing policy lacks essential anchors, in that there has been no systematic analysis of the actual scope of the responsibilities of the welfare sector; neither has there been any proper costing of the tasks to be carried out, or attention paid to where the necessary funds are to come from. Further, there has been no clarification of the respective responsibilities of state and non-government structures, and there are no systems in place for the formal contracting out of legally mandated social services, including child protection services. At present these are supported, on a purely discretionary basis, with partial funding which is unrelated to the actual expenditure involved in effective delivery.

65 Cassiem et al **Child Poverty and the Budget 2000**, IDASA, 128, 135.

66 JCWS **Comments on Financing Policy: Developmental Social Welfare Services**, 1999, p. 4.

In the recent Constitutional Court judgement in the **Grootboom** case,[67] the point was made that where parental care fails, the state has a clear obligation to provide care for children.[68] Hence the question arises as to whether the state can both shift resources away from statutory care and carry out its constitutional obligations, unless there is a significant increase in provisioning for services to families and children at all levels.

As regards the balance between formal protective legislation and other types of legal approach, an issue which is regularly raised is the lack of provision in the Social Assistance Act for financial aid to impoverished children aged seven or more, due to which children enter the protective system unnecessarily. The NCCAN refers *inter alia* to a lack of social service and health care back-up resources for the effective implementation of court orders. This includes provision for the effective delivery of follow-up services aimed at e.g. treatment of traumatised children, family reunification and the rehabilitation of perpetrators. The result is a tendency for CPS activities to be excessively focussed on the initial stages of intervention, rather than on the services which need to follow if intervention is to succeed in the long run.[69] A need for a stronger rehabilitative dimension in criminal justice processes is also raised by many practitioners.

10.2.8.4 **Deficiencies in coverage of harmful or potentially harmful social and cultural practices**

° *Harmful social and cultural practices*

The Commission has made specific provision in formulating the rights and responsibilities of children for protecting children from harmful social and cultural practices.[70] As such, it will be recalled, children will have the right to be protected from harmful social and cultural practices which affects the welfare, health or dignity of children. The Commission further recommended that child-marriages and child betrothals and female circumcision be prohibited. It must also be noted that African customary law affecting children is dealt with in detail in Chapter 21 below.

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67 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC).

68 For a discussion of this case, see 3.4 above.

69 NCCAN **National Strategy on Child Abuse and Neglect**, 1996, 9-15.

70 See 5.4 above.

One cultural practice which has recently been giving rise to public concern is (male) circumcision. From media reports there appears to be an upsurge in the number of boys and young men who suffer severe infection, have to undergo drastic and traumatic surgery or die, due to this procedure being carried out ineptly or with unsterile instruments. The Northern Province Circumcision Schools Act of 1996 and the Application of Health Standards in Traditional Circumcision Act, 2001 (Eastern Cape)[71] offer some protection in the provinces in question; however there are no similar provisions in other provinces.

The Northern Province Act covers 'circumcision' of girls as well as boys. However, female genital mutilation bears minimal if any relation to male circumcision, and is a source of extreme, often lifelong, physical and mental health problems for girls women in many parts of the world.[72] There has to date been little evidence of this practice in South Africa, apart from muted rumours about customs among some groups in Northern Province. However, it is liable to become an increasing problem given the influx of immigrants.

Virginity testing appears to be on the increase in some parts of the country. Proponents see this practice as a means of restoring traditional values, and preventing early pregnancy and the spread of HIV. Opponents point out that virginity testing traditionally involved an individualised examination by a close female relative, who was also responsible for providing education regarding sexuality and related matters. This was in marked contrast to the current practice of mass inspections by someone who may be a stranger, with ulterior motives including a desire for financial gain. Also, the condition of the hymen does not reliably indicate sexual virginity. Testing creates the basis for stigmatisation of girls who do not pass, many of whom are likely to be sexual abuse victims. Further, this practice negates preventive messages about the right to body privacy, it can spread infections, and - given the myth that sex with a virgin cures AIDS - it is likely to lead to girls being targeted for abuse.[73]

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71 The Act was passed on 25 October 2001. See also the Eastern Cape Provincial Notice 24 of 2001 in ECP Gazette No 761 of 3 July 2001.

72 Nahid Toubia **Female Genital Mutilation: A Call for Global Action** 9; A I Ballal **Psychological Effects of Female Circumcision** New York: Vantage Press 1992 4 - 6; S A Law Commission **Discussion Paper 85: Sexual Offences: The Substantive Law**, par. 4.3.

73 Mkhize, P 'The Price of Chastity', **Sowetan Sunday World**, 20 August 2000; Warby, V 'Virginity testing comes under fire', **The Star**, 24 August 2000.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 prohibits female genital mutilation, and provides the basis for limited intervention in other gender-based practices.[74] However, it lacks direct provision for criminal sanctions or for specific protective procedures designed to meet the needs of children.

° *Child betrothals and child marriages*

In terms of section 26(1) of the Marriage Act 25 of 1961 no boy under the age of 18 years and no girl under the age of 15 years shall be capable of contracting a valid marriage except with the written permission of the Minister (of Home Affairs) or an officer authorised thereto by him or her.[75] The Minister or the officer so authorised may grant such permission if he or she considers such marriage desirable.

Section 24(1) of the Marriage Act 25 of 1961 stipulates that no marriage between parties of whom one or both are minors[76] shall be solemnised unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished in writing. However, notwithstanding anything to the contrary contained in any law or the common law a marriage between persons of whom one or both are minors shall not be void merely because the parents of guardian of the minor, or a commissioner for child welfare whose consent is by law required for the entering into of a marriage, did not consent to the marriage. Such marriages are voidable and may be dissolved by a competent court (the High Court) on the ground of want of consent upon application by a parent or guardian or by the minor before attaining majority or within three months thereafter.[77]

The Marriage Act 25 of 1961 also regulates the position when the consent of the parents or guardian cannot be obtained. In such circumstances, and provided the parent or guardian of the

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74 See 10.2.7.2 above.

75 The S A Law Commission has recommended in its **Report on the Review of the Marriage Act 25 of 1961**, par. 2.20.9 that a uniform minimum age requirement for marriage of 18 years be set for boys and girls.

76 A minor would be a person under the age of 21 years. Section 24(2) of the Marriage Act 25 of 1961 states that, for the purposes of section 24(1), a minor does not include a person who is under the age of 21 years and previously contracted a valid marriage which has been dissolved by death or divorce.

77 Section 24A. The court shall not grant an application unless it is satisfied that the dissolution of the marraige is in the interest of the minor. On the proprietary consequences of such marriages, see Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 841.

minor does not refuse to grant consent to the marriage, the commissioner of child welfare may in his or her discretion grant written consent to a minor to marry a specific person.[78] If the parent, guardian or commissioner refuses to consent to a marriage of a minor, such application may on application be granted by the High Court if the court is of the opinion that such refusal is without adequate reason and contrary to the interests of such minor.[79]

Both parties to an engagement must have the necessary capacity to act and a minor therefore requires the permission of his or her parents to become engaged. Due to the highly personal nature of an engagement the parents or guardian cannot conclude the engagement of a minor on his or her behalf.[80]

° *Corporal punishment*

South African courts have in recent years made successive rulings outlawing corporal punishment of adults and children in various contexts, with private schools being the most recent category to be brought within the ambit of the prohibition.[81] While moderate physical punishment by parents has traditionally been permitted, it is not clear whether this form of discipline would now stand up to legal challenge.[82] The Child Care Act gives no clarity in this regard.

10.2.9 Comparative review of systems in other countries

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78 Section 25(1) of the Marriage Act 25 of 1961. See also **Ex parte Visick and another** 1968 (1) SA 151 (D &CLD).

79 Section 25(4) of the Marriage Act 25 of 1961. See also **C en 'n Ander v Van T** 1965 (2) SA 240 (O); **Allcock v Allcock and Another** 1969 (1) SA 427 (N); **Kruger v Fourie en 'n Ander** 1969 (4) SA 469 (O); **De Greeff v De Greeff en 'n Ander** 1982 (1) SA 882 (O); **Ward v Ward and Another** 1982 (4) SA 262 (D); **B v B and Another** 1983 (1) SA 496 (N).

80 D S P Cronjé **The South African Law of Persons and Family Law** (third edition) 139.

81 **Christian Education South Africa v Minister of Education** 2000 (4) SA 757 (CC). See also J M T Labuschagne 'Delegasie van ouerlike tugbevoegdheid aan onderwyser: *Christian Education SA v Minister of Education* 1999 4 SA 1092 (SECLD)' 2000 **Obiter** 457, section 10 of the South African Schools Act 84 of 1996 and the Abolition of Corporal Punishment Act 33 of 1997.

82 See also J M T Labuschagne 'Kindermishandeling: 'n Juridiese perspektief' 1976 **De Jure** 189 at 194 - 195; 'Ouerlike geweldsaanwending as skending van die kind se reg op biopsigiese outonomie' 1996 **TSAR** 577; 'Tugtiging van kinders: 'n Strafregtelik-prinsipiële evaluasie' 1999 **De Jure** 23; 'Is lyfstraf in skole bestand teen 'n Akte van Menseregte?' 1993 **Obiter** 190; J Heaton 'Die tugbevoegdheid ten opsigte van kinders' 1987 **THRHR** 398; 'Aspekte rakende lyfstraf wat in skole toegedien word in stryd met die opdrag van 'n ouer' 1987 **SASK** 52.

It is difficult to assess child protective systems elsewhere in the world simply by examining the relevant legislation, as the shape of these systems will have at least as much to do with associated policies and resourcing as to the laws in question. Legislation which is impressive on paper may remain unused in practice due to a lack of infrastructure and budgetary commitment. Within these limitations, an attempt is made in the overview which follows to examine different legal approaches for the ways in which they affect the overall structure and emphasis of child protective systems. At stake here are e.g. the degree of state 'protectionism' or 'interventionism' which are reflected in the laws, and the type of balance which appears to have been sought between the elements mentioned in 10.2.3 above. This includes ways in which countries have sought to attend specifically to problems of poverty and to children in especially difficult circumstances in their protective legislation. Also of interest are the assigning of legal responsibility for child protection to government and other role players, and mechanisms to ensure coordination and effective implementation of services. Of special relevance are mechanisms to ensure or facilitate resourcing.

However, early marriage and betrothal is a practice which affects almost every country in Africa. It has the effect of defeating the population policy programmes of most African countries because of the ultimate effect it has of causing early motherhood. Apart from the African Charter on the Rights and Welfare of the Child and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[83] there is no (international) guidance on this practice. On a comparative perspective, therefore, limited reference in child care legislation is found to child betrothals and marriages.[84]

10.2.9.1 **Grounds for intervention by the state**

One factor which, in combination with others, points to the level of interventionism of a protective system is the range of situations in which the state is legally empowered to take criminal and/or

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83 CEDAW states in clear terms that the 'betrothal and the marriage of a child shall have no legal effect and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory'.

84 Section 14 of Ghana's Children's Act, 1998, for instance, reads as follows: '(1) No person shall force a child - (a) to be betrothed; (b) to be the subject of a dowry transaction; or (c) to be married. (2) The minimum age of marriage of whatever kind shall be eighteen years'. See also Human Rights Watch Kenya: Spare the child: Corporal punishment in Kenyan Schools September 1999, also available at : http://www.hrw.org/hrw/reports/1999/kenya/index.htm .

protective action on behalf of a child.[85]

An approach taken by some countries has been to incorporate the rights of children as defined in the CRC and/or other instruments and to make infringements of any of these a basis for action. For example, Brazil's Statute of the Child and Adolescent (1990) defines a wide range of rights of the child or young person.[86] Protective measures then become applicable 'whenever the rights recognised in this law are threatened or violated', whether this is by reason of 'act or omission of society or State', 'fault, omission or abuse on the part of parents or guardian', or the conduct of the children themselves.[87] The 1998 draft of the Kenyan Children Bill similarly outlines the rights of children,[88] including socio-economic rights and rights relating to disability, using both the CRC and the African Charter on the Rights and Welfare of the Child as a basis. Anyone believing that one of the rights of a child is being or is likely to be infringed is entitled to approach the High Court for redress. Persons convicted of infringing any of these rights are liable to imprisonment or a fine or both.[89] In Ghana, in terms of sub-part 1 of the Children's Act of 1998, any person contravening the rights of a child, including a parent who fails to carry out specified duties and responsibilities, is liable to incur criminal sanctions. In Uganda, section 12 of the Children Statute of 1996 provides for limited intervention in any infringement of the rights of a child, or failure of a parent, guardian or custodian to carry out his or her responsibilities, by a local government official or, where this does not succeed, the local Village Resistance Committee Court, with the aim of getting those concerned to provide properly for the child.

Even where all contraventions of child rights are actionable in one or other way, child protective legislation usually also includes a narrower range of grounds for protective intervention leading to the issuing of supervision or care orders.[90] Most countries set out grounds for state intervention to protect individual children which are similar to those set out in section 14(4) of the South African

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85 Others would include the level of compulsion to report abuse and, in particular, the level of resourcing which is in place for intervention.

86 These are grouped under the following headings: the Right to Life and Health; the Right to Freedom, Respect and Dignity; the Right to Family and Community Life; the Right to Education, Culture, Sports Practice and Leisure; and the Right to Vocational Training and Protection at Work.

87 Article 98.

88 Sections 3-17.

89 Sections 18 –19.

90 This applies in e.g. the Ghanaian and Ugandan statutes and the Kenyan Bill.

Child Care Act, 1983.[91] The following are examples of criteria introduced in African states to cover situations of poverty, abusive cultural practises or especially difficult circumstances: section 114(1) of the 1998 draft of the Kenyan Children Bill includes being destitute or a vagrant; being found begging or receiving alms; being the child of a parent who has been imprisoned; being prevented from receiving education; being subjected or likely to be subjected to 'female genital mutilation or early marriage or to customs and practices prejudicial to her life, education and health'; being exposed to domestic violence; being pregnant; being terminally ill or having a terminally ill parent; being disabled and confined or otherwise ill-treated; and being displaced due to 'war, civil disturbances or natural disasters'. In Ghana, section18(1) of the Children's Act of 1998 further includes being a victim or attempted victim of slave-dealing, acting in a manner indicative of soliciting; being involved in a major criminal offence while under the age of criminal liability, or being 'otherwise exposed to physical or moral danger'.[92]

While in several African statutes there is an effort specifically to cover children affected by poverty, in some First World countries there is detailed attention to psychological factors and family relationships. For example, Nova Scotia, Canada, provides for intervention where the child has suffered emotional harm, and a parent or guardian does not provide for appropriate remedial services.[93] New South Wales refers to situations in which the child's basic physical or psychological needs 'are not being met or are at risk of not being met', and where 'a parent or other caregiver has behaved in such a way towards the child or young person that ... (he or she) .... has suffered or is at risk of suffering serious psychological harm'.[94] Emotional abuse is a criminal offence in 24 American states.[95] New Zealand includes the impairment of a child's ability to form an attachment to a caregiver due to frequent periods of being in the charge of someone else, and 'serious differences' between the child and his or her caregivers, or between the caregivers themselves,

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91 See 6.4.3 and 10.2.7.1 above.

92 Section 18(1)(n).

93 Children and Family Services Act, 1996, section 22(2)(f).

94 Child and Young Persons (Care and Protection) Act 157 of 1998.

95 Such abuse is sometimes very broadly framed. The relevant statute in New Jersey, e.g., refers to '... inflicting upon a child unnecessary suffering or pain, whether mental or physical....'. [N.J. Stat. Ann. 9:6-1 (West Supp.1998)].

which are detrimental to the child's wellbeing.[96] The Australian Capital Territory[97] likewise includes relationship breakdown between the child and his or her parent or guardian.

There is wide variation in levels of state intervention in the area of corporal punishment. The growing international trend towards the outlawing of corporal punishment began in Sweden in 1979 with an amendment to the Parenthood and Guardianship code in which it is stated: 'Children ... may not be subjected to corporal punishment or any other humiliating treatment'.[98] In the view of the Swedish organisation Rädda Barnen, 'corporal punishment violates the human rights of children to physical integrity and human dignity' and serves to breed violence.[99] This practice is now unlawful throughout Scandinavia and also in Austria and Cyprus.[100] In contrast, in at least nine states in the USA, 'reasonable and moderate' corporal punishment is specifically excluded from definitions of child abuse for reporting purposes.[101] The 1998 draft of Kenya's Children Bill includes the following statement in a section on penalties for cruelty to and neglect of children: 'Nothing in this section shall affect the right of any parent or other person having the lawful control or charge of a child to administer reasonable punishment on him'.[102]

A further issue in terms of which differing legal approaches exist is that of a threshold for intervention. Countries differ in the extent to which they emphasise possibilities of risks of harm to a child, as opposed to actual evidence of harm. For instance, in Nova Scotia, Canada, a wide range of circumstances are listed as criteria for finding a child as being 'in need of protective services'. To each actual form of harm listed, 'substantial risk' of such harm is added as grounds for intervention.[103]

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96 Children, Young Persons and their Families Act, 1989, sections 14(1)(c) & (i), unofficial consolidated version, revised 1995.

97 Children's Services Act, 1986.

98 Chapter 6, Introductory Provisions, section 1.

99 Rädda Barnen 'The first anti-spanking law in the world', paper presented to the UN Committee on the Rights of the Child in Geneva in 1994.

100 Freeman, M 'The Next Children's Act?' June 1998 **Family Law** 346.

101 NCCANI 'Current Trends in Child Maltreatment Reporting Laws', Issue Paper, Child Abuse and Neglect States Statutes Series, September 1999.

102 Section 122(5).

103 Section 22(2), of the Children and Family Services Act 1990. See also section 31(1) of the New Brunswick Family Services Act, 1983; section 9, read with section 1 of the Lesotho Children's Protection Act, 1980

Although many countries use a list of criteria such as provided in section14(4) of the South African Child Care Act as a basis for use of any of the available protective options, it is not uncommon for more specific conditions to be used to decide whether removal of a child from the home environment is warranted, as per the Wald recommendations mentioned in 10.2.5 above. In Uganda, the Child and Family Court may issue a care or supervision order only 'after all possible alternative methods of assisting the child have been tried without success' and the child is liable to suffer significant harm unless removed from the home, or there is a situation of severe and immediate danger requiring immediate removal.[104] England's Children Act of 1989 provides that an emergency protection order to remove a child or to keep him or her in a designated place can only be made if the court is satisfied that the child would otherwise experience 'significant harm'.[105] In New Zealand, a court may not make a declaration that a child is in need of care of protection 'unless satisfied that it is not practicable or appropriate to provide care or protection for the child or young person by any other means'.[106]

The principle that the state should exercise the minimum possible intervention in the care provided by families to their children is a feature of protective legislation in some countries. In England, section 1(5) of the Children Act (1989) states: 'Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all'.[107]

10.2.9.2 **Protective options in other systems**

° *Care or supervision orders*

Most legislation internationally seems to provide for court-ordered support and monitoring of children at risk and their families, often termed 'supervision', within the community, and also for various types

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104 Sections 28(2)(a) and (b).

105 Section 44(1).

106 Section 73 of the Children, Young Persons and their Families Act 1989, unofficial consolidated version.

107 Similar provisions are set down in section16(3) of the Children (Scotland) Act, and in section 72(1) of the 1998 draft of the Kenyan Children Bill. The Ugandan committee responsible for developing that country's protective statute opted for a 'non-interventionist' approach. This is designed to limit statutory protective interventions, and especially the removal of children from their homes, to situations in which these are urgently needed (see Parry-Williams, J 'Legal reform and children's rights in Uganda' (1993) **International Journal of Children's Rights**, 1 at 49-69).

of *substitute care,* within family and or 'institutional' environments. Substitute care options are examined in depth elsewhere in this Discussion Paper.[108]

° *Family Group Conferencing*

Family Group Conferencing (FGC) has been provided for by statute in some jurisdictions.[109] Alternatively it may be incorporated within the framework of more traditional child protection strategies. One approach is for CPS professionals to set 'bottom lines' and parameters within which the family must operate for purposes of their plan.[110] The decision of the FGC may then be incorporated into a court order and made subject to monitoring processes. In New Zealand, except where there is believed to be a serious, immediate threat to the safety of a child, the seeking of a solution within the immediate or extended family is the first line of action. There a family group conference must be held before a court may issue a declaration that the child is in need of care or protection. Immediate and extended family members and other persons who are significant in the life of the child are among those who may be convened by a Care and Protection Coordinator. The latter's duties are clearly spelled out in law, together with those of the participants in the conference.[111] Where agreement is reached on the action to be taken in the interests of the young person concerned, and where the plan is considered by the Director-General of Social Welfare to be in keeping with specified principles relating to the child's wellbeing and safety, including the preservation where possible of the child's family and/or cultural ties, then the decisions of the family group conference are given legal recognition. They must be implemented by the police and other officials where appropriate. Where agreement cannot be reached between family members, or the plan does not receive the sanction of the child protection authorities, the matter is passed back to the referring social worker or police officer for appropriate further action. In Ireland, the Children Bill of 1999 also provides for family group conferencing as a component of the protection process.[112]

° *Removal or restraining of an offender/alleged offender*

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108 See Chapters 17 and 18 on foster care and adoption, respectively, below.

109 See sections 20-38, Children, Young Persons and their Families Act 1989 (New Zealand); also the Children Bill 1999 (Republic of Ireland).

110 University of Bath and University of Portsmouth, 'A Survey of Family Group Conferencing Across England and Wales'; Schmid, J, presentation to social workers and child care workers, Johannesburg, 2 February 2000.

111 Section 20ff, Children, Young Persons and their Families Act 1989, unofficial consolidated version, revised 1995.

112 In this context the term used is 'Family Welfare Conference' – see sections 7-15.

Provision exists in some jurisdictions for a confirmed or alleged perpetrator of abuse to be restrained from having contact with a child, by the court with core responsibility for the protection of the child.[113] In Canada the provinces of Nova Scotia, New Brunswick, Manitoba, Saskatchewan, Alberta and British Columbia have such provision.[114] In the United Kingdom the relevant person may be excluded from residing with or having contact with the child, as a component of an interim care and protection order.[115]

° *Transfers of custody*

In some jurisdictions, the relevant protective authority assumes the daily responsibility for the care of the child - e.g. in England the local authority is required to 'look after' specified categories of children in need. The local authority may take a child into its care, in which case it must provide accommodation and also 'maintain him in other respects …'.[116] Most Canadian provinces have provision for children to be placed in the custody of the child protection authority. In contrast, the approach in Quebec is to 'assume responsibility for the child's situation, not the child'.[117]

° *Temporary removal of a child believed to be in immediate danger*

In a number of jurisdictions there is provision for the temporary removal of a child who is believed by welfare authorities to be in immediate danger, with ratification by a court or other judicial structure being

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113 In South Africa this can only be achieved via a separate judicial process, set out in the Domestic Violence Act 116 of 1998.

114 FPWGCFSI 'Child Welfare in Canada', Minister of Supply and Services Canada, 1994, 5ff, 53ff.

115 Chapter 27, Schedule 6 of the Family Law Act 1996, amending the Children Act 1989.

116 Section 23 (1), Children Act 1989.

117 FPWGCFSI 'Child Welfare in Canada', Minister of Supply and Services Canada, 1994, 5ff. In terms of section 54 of that province's Youth Protection Act, the Director of Youth Protection may recommend a number of measures which the family may undertake voluntarily – e.g. that the child remains at home and the parents report periodically on the measures they have undertaken to correct identified problems; that certain persons refrain from contact with the child or vice versa; that the child be entrusted to other persons, or placed in foster care or a reception centre for a fixed period, that the child follow a course of training outside the school system; or that the child receive specified health care services. A voluntary agreement cannot last beyond a year. If such an agreement cannot be reached, or the year expires and the child is still believed to be at risk, the matter is referred to the Youth Court, which may impose any of the same measures or appoint the Director as permanent guardian.

required as soon as possible thereafter – e.g. Ghana,[118] Uganda,[119] Quebec.[120] Some require a court order even in this situation – e.g. England[121] and New Zealand.[122] In England, however, a police officer may remove a child for up to 72 hours where there would otherwise be a risk of 'significant harm'.[123] In Western Australia, where a child under six is admitted to hospital and there are grounds to suspect that he or she is in need of care or protection, the senior medical officer may order the detention of the child in the hospital for observation, assessment or treatment.[124]

° *Voluntary care agreements*

Some laws provide specific recognition for voluntary arrangements. In certain States in the USA and provinces in Canada the option exists of a 'temporary care agreement'. In Nova Scotia, Canada, for example, the care and supervision of the child may be transferred to an agency or the district office of the relevant government authority, with the agreement of the parents, for up to six months, renewable to a total period of not more than a year. This type of arrangement is typically used in cases of neglect rather than active abuse. A similar arrangement may be made in cases where the child has special needs – e.g. in the form of a disability or an emotional or behavioural problem.[125] New Zealand's Children, Young Persons and their Families Act of 1989 likewise provides for 'agreements for temporary care' for periods of up to 28 days, renewable once. With special permission, a care arrangement of this kind can be entered into for up to 6 months in the case of a child under 7 years, and up to a year for any other child.[126]

10.2.9.3 **Balancing between and provisioning of components in other systems**

Examples of legislation which explicitly seeks a balance between different types of approach to child

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118 Section 19(3) of the Children's Act, 1998.

119 Section 38(1) of the Children's Statute, 1996.

120 FPWGCFSI 'Child Welfare in Canada', Minister of Supply and Services Canada, 1994, 69ff.

121 Section 44 of the Children Act, 1989.

122 Section 39 of the Children, Young Persons and their Families Act, 1989.

123 Section 46 of the Children Act, 1989.

124 Section 29 of the Child Welfare Act, 1947.

125 FPWGCFSI 'Child Welfare in Canada', Minister of Supply and Services, Canada, 1994, 37ff.

126 Sections 139-140.

protection have not been easy to locate. One important example is provided by the USA, in which the federal statute governing child protection is the Child Abuse Prevention and Treatment and Adoption Reform Act (CAPTA), which falls within Title 42 of the US Code. Section 5106 provides for the federal government to make grants to every state, based on the population of children in each, to assist the State with comprehensively improving its formal CPS system. All States appear to have made structural and legal adaptations relating to the CAPTA requirements.

Section 5106 focuses primarily on the identification, investigation and management of individual cases of abuse and neglect. However, to be eligible for funding under this provision, a State has to show both that it has a comprehensive plan for child protective services and also that this plan is 'to the maximum extent practicable, ... coordinated with the State plan ... relating to child welfare services and family preservation and family support services ...'.[127] **Family preservation services** as envisaged in this legislation include programs seeking to help return children to families from whom they have been removed, or to place them for adoption, or to provide follow-up care after reunification, or to provide respite care to relieve family caregivers (including foster parents), or to 'promote parenting skills … with respect to matters such as child development, family budgeting, coping with stress, health and nutrition'. **Family support services** are 'community-based services … designed to increase the strength and stability of families (including adoptive, foster and extended families), to increase parents' confidence and competence in their parenting abilities, to afford children a stable and supportive family environment, and otherwise to enhance child development'.[128]

An example of Canadian legislation which emphasises family preservation approaches and which obligates government to provide for such approaches is the Child and Family Service Act of Nova Scotia, 1990. Section 13(1) states: 'Where it appears to the Minister or an agency that services are necessary to promote the least intrusive means of intervention and, in particular, to enable a child to remain with the child's parent or guardian or be returned to the child's parent or guardian, the Minister and the agency shall take reasonable measures to provide services to families and children that

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127 42 USC 620 et seq., Part B of Title IV : Child and Family Services. The services in question are provided for under a 1993 amendment to the Social Security Act. This provides for annual financial allocations from the federal government, aimed at 'encouraging and enabling each State to develop and establish, or expand, and to operate a program of family preservation services and community-based family support services' [subpart 2(a)]. The allocations were calculated so as to increase substantially between the fiscal years 1994-1998, and thereafter to be increased according to the inflation rate. A percentage of the annual allocation is reserved for research, training, technical assistance and evaluation processes relating to the programme [subpart 2 (b) and (c)].

128 Sections 431(a)(1) and (2).

promote the integrity of the family'.[129]

While North American legislation appears to be intended precisely to strike an appropriate balance between protection and family support and preservation approaches, there are heated debates between groups who emphasise one or the other. There has been a backlash in some quarters against the family preservation approach as a result of investigations into deaths of children who have been under protective supervision. These have been regarded by 'protectionists' as resulting from an excessive emphasis on family preservation.[130] There are claims, meanwhile, from within the family preservation lobby in the USA that, while the Family Preservation and Family Support Act does provide support for programmes to strengthen families, States in fact have an incentive to remove children. Far more funding is payable to them if they place children in foster care, given that funding of foster care is a legal entitlement. While family preservation costs less in dollar terms, it is nevertheless cheaper for counties to remove children - e.g. in Pennsylvania they receive an average 86c in the dollar back from the state and federal governments.[131]

In 1988 the National Association of Public Welfare Administrators in the USA called for 'a more narrowly focussed CPS (formal child protective service) component, with an expanded voluntary/preventive family support system, and an adequately funded child well-being system'.[132] Waldfogel calls for a more effective response to a more carefully selected group of children who need specialist protective intervention on the one hand, and a stronger investment in partnerships with community structures and informal helpers to provide support to families on the other.[133]

Uganda has very limited economic resources but strong extended family and community support

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129 Section 13(2) provides examples of services which may be provided to this end, including improvement of the family's financial or housing situation; improvement of their parenting, child care or home-making skills; counselling, drug or alcohol rehabilitation, or dispute mediation services; and child care provision.

130 An example is provided by the Gove Commission of Enquiry into Child Protection in British Columbia, Canada (1995), which perceived a shift to have occurred from 'child-centred' to 'family-centred' practice, giving rise, in the Gove Commission's view, to family unity being given priority over the safety and welfare of the child. Inquest juries and child fatality review committees have made calls in similar vein.

131 NCCPR Issue Paper 11, "Financial Incentives". Similar concerns have been raised in South Africa as regards the easier availability of state funding for court-ordered foster care and residential care of children in comparison to the assistance available to children in their own homes – see Department of Welfare **Report of the Lund Committee on Child and Family Support**, 1996, p. 83.

132 NAPWA, cited by Waldfogel 'Reforming child protective service' (January/February 2000) Vol. LXXIX no. 1 **Child Welfare** 45.

133 Ibid.

systems. The committee which spearheaded the child law reform process leading to the Children Statute of 1996 adopted an approach designed to keep authoritarian interventions to the minimum. It sought specifically to institutionalise responsibility for improving child protection within the community, particularly at the village level.[134]

Some of the choices at stake in shaping a child protection system are highlighted in the following statement in a Ministerial Briefing Paper issued by the Department of Social Welfare in New Zealand in 1996:

> Jurisdictions in Australia and the United States have responded to the focus on child abuse with heavily child protection orientated strategies: mandatory reporting of child abuse by a wide variety of occupational groups, detailed legislative procedures and a professional focus on family pathology, risk assessment and remedial services.
>
> New Zealand has not followed such a path … . The Department's advice has generally been against a narrowly defined child protection strategy because it tends to tie up resources in investigations, to reinforce an incident management approach, and to overuse expensive care facilities ... . Achieving the (Department's) vision requires ... a delicate balance between allowing and empowering families to deal with their own problems, in their own way, while not allowing them to be overwhelmed when they do need assistance, or where the safety of children is at issue.[135]

10.2.9.4 Governance, coordination and management in other systems

° *Responsibility for CPS interventions*

As mentioned earlier, South Africa is unusual in having a multiplicity of NGO's exercising statutory powers to intervene directly in situations of abuse and neglect. Elsewhere the norm, at least in legislation perused by the Commission, is either for this role to be limited to government or for provision to be made for limited delegation to other structures, e.g. in terms of a contractual arrangement.

In England the capacity to bring applications to court for care or supervision orders rests only with the

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134 Parry-Williams, J 'Legal reform and children's rights in Uganda' (1993) **International Journal of Children's Rights** 49-69.

135 Department of Social Welfare **Social Welfare in New Zealand: Strategic Directions**, Post-Election Briefing Paper, Wellington, 1996, pp. 132-3.

local authority and the National Society for Prevention of Cruelty to Children.[136] The formal protective role of other voluntary organisations seems to consist mainly of provision, in cooperation with the local authority, of substitute care for children.[137] Likewise, in Scotland the local authority takes central responsibility for the statutory care and protection of children who are at risk of abuse and neglect. In Uganda, the Secretary for Children's Affairs in the relevant local authority is responsible for investigating allegations of infringements of the rights of children.[138] Where action taken at this level is unsuccessful, the matter is referred to the Local Resistance Court at village level, and where this body has exhausted its options, a Probation and Social Welfare Officer undertakes protective services in association with the Family and Children Court.[139] In Ghana the Local Government Act no. 462 of 1993 gave effect to a policy of decentralisation. The Department of Social Welfare was decentralised to District Assembly level, where it is charged with the delivery of both statutory and non-statutory services, linking up with local Family Tribunals and Juvenile Courts.[140] The Department receives and acts on reports of child abuse and of children in need of care and protection.[141] In Brazil, there is a policy of 'municipalisation' of enforcement of the rights of children.[142] Partnership between local government and NGO's in such enforcement is provided for, on condition that they are registered with the Municipal Council of Child and Adolescent Rights.[143]

In the USA, as mentioned above, each state must operate a comprehensive CPS system in terms of specified conditions in order to qualify for funding in terms of CAPTA. While there are considerable variations among the jurisdictions in that country, formal child protective interventions appear to be largely the responsibility of specialised state or county social service departments. There is in some cases scope for NGO involvement - e.g. Wyoming provides for child protective services by licensed

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136 Section 31(9) of the Children Act, 1989.

137 See sections 53-65. However the local authority must itself make provision for the accommodation of children who are received into statutory care, and must pay the 'reasonable expenses' incurred in accommodating such children by voluntary service providers (sections 21(1) and (3).

138 Sections 12(2) and (3) of the Children Statute, 1996.

139 Section 13, section 20ff.

140 Ghana National Commission on Children: "Reforming the Law for Children in Ghana - Proposals for a Children's Code", 13.

141 Children's Act, 1998, section 17, section 19ff.

142 Statute of the Child and Adolescent, article 88(1).

143 Article 91.

child welfare agencies under contract to county departments.[144] In Canada, child protective responsibility rests with the provinces and territories, each of which has a central child and family services division.[145] However in some cases services are delegated to state-funded structures – e.g. in Ontario they are delivered by a large network of autonomous Children's Aid Societies, mandated and closely supervised by the Children's Service Branch of the Ministry of Community and Social Services. Responsibility for the financing of services is usually shared between the provincial or territorial and the federal government.[146]

° *Interdisciplinary coordination*

The *multi-disciplinary child protection protocol* is a widely used instrument for ensuring that the roles of service delivery personnel in each sector are properly defined, and that all structures and persons involved are committed to an agreed process of intervention. The intention is to prevent situations where children are dealt with in terms of conflicting approaches or fall through the service net. While protocols provide a framework for cooperation, coordinating structures are also required to ensure that the relevant sectors plan and develop policy together, and maintain properly functioning linkages. In Scotland, Area Review Committees develop local policy and coordinate the sectors. In England, local government operates Area Child Protection Committees to fulfil the same function. Actual interventions are carried out via Child Protection Conferences, in which the professionals concerned pool information and plan investigations and interventions in specific cases.[147] The government publication 'Working Together' provides an agreed framework for multi-disciplinary cooperation in the implementation of the Children Act of 1989, setting out procedures to be followed by the various professionals. Area Child Protection Committees have their own local procedures, based on the national framework, setting out the responsibilities and step-by step tasks of the various persons involved.[148]

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144 NCCANI State Statutes Elements: Central Registries/ Reporting Records no. 9 - Establishment and Purpose, as at December 1999, p. 17.

145 Each has a central child and family services division which is responsible for the relevant programmes. While legislation differs from one part of the country to the next, each statute recognises that 'children have ... the right to be protected from abuse and neglect, and that governments have the responsibility to protect children from harm' (FPWGCFSI 'Child Welfare in Canada', Minister of Supply and Services, Canada, 1994, 5ff).

146 Ibid, 66, 3.

147 Duquette 'Child protection legal process' (1992) 54 **University of Pittsburgh LR** 252-3.

148 See for example 'Child Protection Policies, Procedures and Guidelines', Rochdale Area Child Protection Committee.

Protocols and interdisciplinary teams are often provided for in locally developed policy documents rather than in law, but may be provided for by statute. Many States in the USA have legislative provision for multi-disciplinary teams, although they are apparently not always well used in practice.[149] In Canada, government departments in several provinces have developed protocols which guide regional practice.[150] These appear to vary in status from one province to another and to be in the nature of official policy documents or guidelines rather than being part of the legal framework.

° *Risk assessment*

Risk assessment frameworks seem to be also a matter of policy rather than directly enshrined in law, although legislation may be designed so as to require their use, as is the case in the USA under CAPTA (see below). They may also be designed so as to explicitly linked with protective legislation. For example, the Ministry of Community and Social Services (MCSS) in Ontario, Canada, recently updated its risk assessment model to reflect amendments to the Family Court Rules and forthcoming changes to child protection legislation.[151]

° *CPS management*

In the USA the federal funding system in terms of CAPTA[152] is used as a mechanism for ensuring a properly planned and coordinated approach. Section 5106a(a) provides for the federal government to make grants to every State, based on the population of children in each, to assist the State with comprehensively improving its CPS system in relation to the following:

(1) the intake, assessment, screening and investigation of reports of abuse and neglect;
(2) (A) creating and improving the use of multi-disciplinary teams and inter-agency protocols to enhance investigations; and

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149 Duquette 'Child protection legal process' (1992) 54 **University of Pittsburgh LR** 252-3.

150 E.g. Newfoundland, Nova Scotia, New Brunswick, Quebec and Ontario – see FPWGCFSI 'Child Welfare in Canada', Minister of Supply and Services, Canada, 1994, 17ff.

151 Ontario Child and Family Services Information Project: Bulletin – January 2000. In Ontario, the government child protection authority sets the relevant procedures and also provides for the relevant skills development. The MCSS provides specialised training for different categories of child protection workers and supervisors employed by the Children's Aid Societies. The Ministry has announced its intention of requiring that minimum competencies are demonstrated before newly hired workers will be allowed to engage in child protection work.

152 Child Abuse Prevention and Treatment and Adoption Reform Act.

(B) improving legal preparation and representation ... ;

(3) case management and delivery of services provided to children and their families;

(4) enhancing the general child protective system by improving risk and safety assessment tools and protocols, automation systems that support the program and track reports of child abuse and neglect from intake through final disposition and information referral systems;

(5) developing, strengthening, and facilitating training opportunities and requirements for individuals overseeing and providing services to children and their families through the child protection system;

(6) developing and facilitating training protocols for individuals mandated to report child abuse and neglect;

(7) developing, strengthening and supporting child abuse and neglect prevention, treatment and research programs in the public and private sectors;

(8) developing, implementing or operating -

(A) information and education programs or training programs designed to improve the welfare of disabled infants with life-threatening conditions ... ;

(B) programs to assist in obtaining or coordinating necessary services for families of disabled infants with life-threatening conditions, including (... social and health care, financial aid and adoption services);

(9) developing and enhancing the capacity of community-based programs to ... prevent and treat child abuse and neglect at the neighbourhood level.

The eligibility requirements for state funding under this statute are spelled out in detail. They involve initially, and at five-yearly intervals thereafter, submitting a 'State plan' concerning the areas of CPS which the State intends to address with the funding, which must be coordinated with a plan for 'child welfare services and family preservation and support services' as required for support under the Social Security Act.[153] To qualify for funding under Title 42, a State has to be enforcing a State law or operating a state-wide programme which incorporates elements regarded as essential for managing protective services.[154]

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153 Part B, Title 4, USC 620 et seq.

154 Section 5106a(b)(2) requires *inter alia* that there be: provisions or procedures for the reporting of child abuse and neglect; procedures for the prompt screening, safety assessment, and investigation of reports; procedures for immediate protective action; cooperation of the relevant state structures in investigation, assessment, prosecution and treatment processes; procedures for the appointment of a guardian *ad litem* for the child in any case involving judicial proceedings; the establishment of citizen review panels; and provision to facilitate the termination of parental rights in cases of child abandonment , and to ensure that reunification is not required

States seeking CAPTA funding are also required to supply a description of the services to be offered to individuals, families or communities by means of the funding in question, and the training which is to be provided to line and supervisory personnel with regard to report-taking, screening, assessment, decision-making, and referral for investigation of suspected instance of abuse or neglect.[155]

° *Structural provision*

The United States, through CAPTA, has also set in place a number of key federal structures to promote a coordinated response to child abuse and neglect throughout the country. Section 5101 enables the Secretary of Health and Social Services to establish the Office on Child Abuse and Neglect to coordinate child protection functions and activities. In terms of section 5102 the Secretary is empowered to appoint an inter-sectoral Advisory Board on Child Abuse and Neglect, to include representation from the relevant sectors responsible for protective interventions as well as relevant advocacy organisations, to make recommendations to the Secretary and to appropriate committees of Congress. Section 5104 provides for the establishment of the National Clearing House on Child Abuse and Neglect Information (NCCANI), to gather and disseminate information on the incidence of child abuse and neglect in the USA and on relevant programmes to address this problem. NCCANI is also mandated to promote the coordinated collection of data and research findings in this field.

10.2.10 Options mooted in the consultation processes, and responses received

10.2.10.1 Issue Paper 13

Issue Paper 13 posed a broad question as to how abused and neglected children should be dealt with in a comprehensive children's statute. The following suggestions were put forward in the provincial workshops on the Issue Paper:

•• The over-arching principle should be the best interests of the child.

•• The recommendations contained in the National Strategy on Child Abuse and Neglect

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in cases involving murder of or serious injury to a child by a parent.

155 Section 5106a(b)(2)(C). States which are granted funding must provide annual data with regard *inter alia* to the number of reported cases and the outcome of investigations, the types of intervention made and services delivered, deaths due to abuse or neglect, the number of CPS staff dealing with intake, assessment and investigation, their response time, and the number of family reunifications.

(NSCAN) coordinated by the Department of Welfare, and the child protection protocols arising from the strategy should be legislated for.

- There should be (mandatory) victim empowerment/therapeutic services for children and families.
- A clearer, more specific definition of abuse and neglect is required.
- Legislation should make counselling obligatory.
- There should be no delay in attending to abused children.
- The community must/should be more involved.

In relation to abandonment of children the following suggestions arose:

- Abandonment should be clearly defined.
- Reference should be had to child protection protocol procedures.
- There should be consultation in the drafting process with the National Committee on Child Abuse and Neglect.
- Provision must be made for family reintegration.
- Effective services must be provided.
- There should be appropriate punishment for abandonment of children.

10.2.10.2 **Research paper on legislating for child protection**

Using a research paper[156] and associated worksheet, the Commission conducted a focus group discussion in Pretoria on 29 April 1999, and also invited individuals and groups outside the workshop to offer their opinions on the kind of child protection system which would be appropriate for South Africa. One intention was to gain insight into the types of balance for which the Commission should strive, given the need to use the expanding body of international knowledge and experience of child protection for the benefit of South African children, while bearing in mind the wide range of children's needs to be met in this country, and the scarcity of available resources.

10.2.10.3 **Responses to points raised in the research paper**

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156 The research paper was entitled 'Legislating for child protection' and was prepared by Dr Jackie Loffell and Dr Carmel Matthias.

In relation to the weighting of different components of legislation aimed at protecting children, the research paper posed the following question:

> *Taking into account the fact that resources are finite, how do you believe an appropriate balance can be achieved between: a) addressing the underlying social problems which promote child abuse, and dealing effectively with the individual child who has experienced abuse? b) punitive and rehabilitative approaches with regard to offenders? c) formal protective measures and supportive/preventive services?*

As regards the balance between attention to underlying problems which promote abuse, and dealing effectively with individual children who have been abused, there was general agreement on the need to seek such a balance. Groups 1 and 2 in the Pretoria workshop emphasised the need for legislation to be backed up by resources. Group 1 felt that commitment to legislation should be reflected in appropriate budgetary allocations at each of the levels to be addressed. Mr D van Heerden of the Department of Welfare (Northern Cape), along with Group 2 in the Pretoria workshop, emphasised the need for legislation to provide for local government to address root causes of abuse by creating a 'child-friendly environment', and providing and facilitating resources for services to promote their well-being. It was suggested that financing of programmes should be provided for in the children's statute. Group 2 also referred to the need to promote by non-legislative measures the concept of the responsibility for all children being shared by the whole community.

There was consensus on the need for attention to the rehabilitation of offenders.[157] Suggestions included the following: that courts when passing sentence should include provision for rehabilitation; that restorative justice principles should apply, and the perpetrator should take financial responsibility for redressing the harm done to the child; that rehabilitative processes should also be promoted outside the justice system; that abuse within the family should be dealt with by a family court, as the abused child was often detrimentally affected by the adversarial criminal justice system, and that this court should make have the power to make any of a range of rehabilitation orders; and that child offenders in particular be kept out of the criminal justice system; and that there be legislated provision for state-funded rehabilitation for offenders, together with harsher sentences.

Several respondents pointed out the need to ensure that priority be given to the safety of the child when dealing with the offender. The UCARC commented that children were being endangered by

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157 Umtata Child Abuse Resource Centre (UCARC); Umtata consultative meeting; SANCCFW; Ms T Odayer, Ms D Ritter and the Grahamstown Child Welfare Society (GCWS); Groups 1 and 2 in the Pretoria workshop.

giving bail to unsuitable candidates, resulting in children losing trust in the system and cases being withdrawn. Participants at the Umtata consultative meeting believed that both bail and sentencing practices were too lenient. The SANCCFW pointed to the need for the law to prevent children from being exposed to serious offenders with a very poor prognosis for rehabilitation - failure to address the reality that such people will pose an ongoing danger can have serious consequences, including the death of a child.

The SANCCFW emphasised the need for the strengthening of the family in order to promote the wellbeing of the child, and pointed out that there were many cases in which protective measures as carried out by the children's court, accompanied by intensive work with the family as a whole, were an appropriate means of dealing with child abuse. With appropriate help, in the view of the SANCCFW, most families could learn to provide adequate care for their children. A lack of progress often had to do with a lack of resources - personal, material or psychological - rather than an inability to parent. Respondents called for a range of services involving various sectors, both for preventive purposes and for dealing with abuse and its effects.[158] The National Coalition on Gay and Lesbian Equality (NCGLE) noted that the White Paper on Social Welfare had shown a fundamental shift away from the traditional approach in South Africa of responding to the symptoms of child abuse, by highlighting the need for approaches which provide for financial support and programmes which enable and promote development so as to ensure that people can sustain themselves through times of crisis and vulnerability. On this basis the NCGLE suggested a multi-pronged approach to child abuse which would simultaneously deal with the abused child so as to minimise the effects of abuse; deal effectively with offenders, both in terms of effective sentencing and rehabilitation; and addresses the underlying social problems which promote or fail to prevent child abuse. The NCGLE highlighted the vulnerable position of gay and lesbian youth who, due to current myths and prejudices, were particularly liable to rejection, assault and violence, discrimination at school, and homelessness and street life with all their

158 These included safe houses, support programmes for abused children and volunteer training programmes (Ms T Odyar, Ms D Ritter and the GCWS); development programmes operated by state departments, NGO's and CBO's, and support groups for young mothers as part of health care provision (UCARC); continuous preventive education programmes and support/counselling programmes in relation to child abuse and children who have been subjected to abuse (Umtata consultative meeting); and targeting of vulnerable mothers and children in the hospital setting, both at the time of birth and subsequently, e.g. through the appointment of hospital social workers (SANCCFW); and via parenting programmes and support groups (Pretoria workshop Group 2). Ms F Cleaton-Jones cited research results indicating that most abusive parents are under 25 years of age, and that children of very young parents tend to be disadvantaged. She recommended school-based parenting education as being useful both in delaying the onset of parenting and of providing coping skills. The need for inclusion of parenting education in the school curriculum was likewise emphasised by the SANCCFW, who also supported the employment of school social workers as a preventive measure. Group 1 at the Pretoria workshop emphasised the need for inter-sectoral collaboration in preventive strategies.

associated dangers.[159]

Further questions raised in the research paper in relation to the scope of protective legislation were as follows:

> *Which of the following should be covered in legislation to address child abuse: physical abuse; sexual abuse; emotional abuse; neglect which occurs despite access to resources; neglect which occurs due to unavailability of or lack of access to resources; abandonment; commercial sexual exploitation of children; child labour generally; trafficking in children; failure to protect? (Respondents were also invited to suggest other forms of abuse which should be included.)*
>
> *Should a legal definition include abuse perpetrated by social structures ... as well as abuse by those in the child's immediate environment?*
>
> *Would it be preferable:*
> *(a) to use a single broad definition covering all forms of ill-treatment and neglect of children?*
> *(b) to define only those forms in which it is intended that legal interventions will be carried out - e.g. non-accidental injuries to children; sexual abuse of children?*
> *(c) to use one or more broad definitions with a view to providing enabling clauses in legislation, e.g. to allow for the financing of preventive or therapeutic programmes, while also using narrower definitions to pinpoint specific forms of abusive behaviour in which criminal sanctions and/or statutory protective interventions should take place?*
> *(d) Another approach? Please specify.*
> Respondents were invited to suggest definitions.

Those who took up this issue were virtually unanimous in the view that all the forms of abuse mentioned should be covered in legislation to address child abuse.[160] Group 2 in the Pretoria workshop suggested that intentionality was an issue in abuse; also that cultural influences should be taken into account. This group recommended that abandonment not be criminalised. The SANCCFW suggested that there be recognition, as in the case of neglect, that child labour, child prostitution and trafficking

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159 The following priority areas for preventive strategies were identified: training and education of people in positions of authority over children, including police officers, officials within other child protection agencies, and teachers; programmes which foster a non-discriminatory environment in schools; and empowering lesbian and gay youth through the provision of support for programmes focussing on sexuality education ... and specialised physical and mental health information and counselling services.

160 Participants in the consultative meeting in Umtata felt that neglect should be treated as abuse unless it were proven that it occurred due to unavailability of or lack of access to resources. This group also felt that cultural and traditional practices which interfered with the rights of children should be added to the list. Ms T Odyar, Ms D Ritter and the GCWS suggested that there should be a legal ban on children being used in a suggestive way in advertising, and that the violation of a child's right to be a child should be covered. Group 1 in the Pretoria workshop raised the issue of child pornography on the Internet, as well as abuses in childminding arrangements, and the use of children in crime and in armed conflict. The UCARC pointed out that there were differences in degree of abuse and that some abuse amounted to a serious crime.

in some cases arose from a lack of the resources to meet basic survival needs. Group 1 of the Pretoria workshop pointed out a need for context to be taken into account. There was a need to examine where neglect is coming from. Group 1 also felt that there might be a need for a refinement of the approach to child labour so as to prevent rural families from falling into increased poverty. There should be sensitivity to prevailing norms and circumstances; however this should not amount to a condoning of abuse. This group felt that 'minimum care protocols' should be drafted. Ms Fran Cleaton-Jones mentioned the need to take the developmental stage of the child into account so as to place evidence in context.

There was general consensus that abuse should be addressed by protective legislation regardless of the source from whence it came; hence abuse within schools and other child care facilities as well as abuse by the structures of society should be included in a definition of abuse.[161]

As regards defining abuse in the legislation, most respondents who engaged with this issue were in favour of using both a broad definition which could facilitate enabling measures, and a series of more precise definitions to serve as the basis for enforcement of the law in specific cases.[162]

With regard to the controversial issue of whether corporal punishment should be treated as a form of abuse, the following question was posed:

> *What position should the law adopt with regard to physical punishment of children by their parents or caregivers?*

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161 The UCARC and Project Go: Eastern Cape felt that structural abuse had a lesser effect on children than that which occurred e.g. within the family, but should ideally be included. Group 2 at the Pretoria Workshop listed schools, courts and local authorities as potential agents of structural abuse. The SANCCFW strongly supported the proposal that structural abuse be included as this would enable a range of services and perpetrators to be dealt with by child care legislation. The NCGLE pointed out the need for recognition that all forms of child abuse constituted a serious threat to the future of our country, irrespective of the sexual orientation of either the perpetrators or the children concerned. Abuse to children resulted either where they themselves were stigmatised due to their sexual orientation, or where their parents were deprived of custody of or access to them due to homophobia. The Coalition provided examples of severe systemic abuse which had resulted from prejudice in some judges and social workers towards lesbian mothers. Mention was made of prevailing myths to the effect that gay and lesbian persons were falsely regarded as being intrinsically mentally unbalanced, unable to provide a stable environment for children, or (in the case of men) prone to paedophilia. These myths have caused great injustice and suffering to adults and children who are directly or indirectly affected. The NCGLE's vision is for children to be raised in a climate which actively counteracts prejudice towards people on grounds of race, gender, nationality, sexual orientation etc.

162 Ms D van Heerden, Department of Welfare, Northern Cape; Ms T Odyar, Ms D Ritter and GCWS; UCARC; SANCCFW: Eastern Cape.

Opinion on this issue was divided. Ms S Leslie on behalf of the SANCCFW said that corporal punishment, among other abusive forms of punishment such as deprivation of food or threats to disown a child, should be prohibited by law. Abuse or neglect of a child could not be countenanced as forms of discipline. Physical punishment could be emotionally damaging and irreparable harm had been caused by ongoing physical punishment of children by teachers, parents and other caregivers. Physical punishment of adults is not permitted and children should have the same protection. The message the child receives is that violence is an acceptable means of solving problems between people. Positive forms of discipline in which children learn through praise and being treated with respect lay down a far better basis for the formation of positive values, according to Ms Leslie. Both she and the UCARC regarded corporal punishment as a means of promoting violence in society.[163]

Group 4 in the Pretoria workshop noted that the law currently allows for chastisement in a reasonable manner in certain circumstances and suggested that there be criteria to clarify issues of reasonableness, severity and the circumstances warranting punishment. They felt that chastisement by parents was acceptable subject to such limitations, but other caregivers should not be permitted to administer this form of punishment. They proposed that physical punishment be defined and that there be an associated action plan to promote education and understanding. Culture should not be used to sanction abusive forms of physical punishment. Group 3 at the same workshop noted that there was not consensus among them and were unsure as to the wisdom of legislating on this matter, given that views on whether corporal punishment is morally good or bad differ widely from one group to the next. They felt that children's rights should be entrenched and punishment should be addressed through education and counselling. Ms L Vara of the SANCCFW: Eastern Cape felt that a legal approach to corporal punishment must be in line with the definition of abuse used.

The Committee on the Rights of the Child has stated that '[i]n the framework of its mandate, the Committee has paid particular attention to the child's right to physical integrity. In the same spirit, it has stressed that corporal punishment of children is incompatible with the Convention and has often proposed revision of existing legislation, as well as the development of awareness and education campaigns to prevent ...the physical punishment of children'.[164] Both in the light of South Africa's

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163 In an individual submission dated 21 August 2001, Mr H M Selolo equated parental care without discipline as juvenile delinquency. He said that without some form of punishment, children grow up in misery because 'they fear no one'. He consequently argued strongly in favour of some form of corporal punishment being used on children.

164 Report of the 7th Session, November 1994.

obligation incurred under international law, and also in view of the decisions of the Constitutional Court concerning corporal punishment,[165] it seems that there would be a need to address the matter of parental corporal punishment in the new children's statute. Indeed, **a number of members of the Project Committee would have favoured an approach similar to countries such as Sweden, in which all forms of corporal punishment would be prohibited**.

In relation to the issue of legal backing and provisioning for multi-disciplinary child protection protocols, and associated norms and training, the following questions were asked:

> *Should there be a legal requirement that government at all levels ensures that protocols are in place to guide and set standards for the different sectors involved in child protection, and to bring about their coordination, or is this best achieved through policy development and/or other approaches?*
>
> *Who should be responsible for the resourcing required to make protocols work in practice, and what should the role of the law be in this regard?*
>
> *Do we need to render government officials and non-governmental child protection workers more accountable? If so, would protocols in combination with existing professional codes be sufficient or do we need to build in a potential for personal legal liability for those who fail to carry out their duties without good reason? Should government and non-government employers in the child protection services be made more accountable for structuring their services so that acceptable standards of work are possible? If so, how?*
>
> *Should issues such as training of child protection practitioners, conditions of service and caseload norms be dealt with in legislation? If so, How should these be approached?*

The few who addressed themselves to these issues showed support for the idea of child protection protocols being required by law.[166] Respondents emphasised the need for government to act in partnership with NGO's in this regard, and for local government to be actively involved. The SANCCFW suggested that the process of putting protocols in place be driven by national government, which should set minimum standards, and monitor implementation of preventive programmes as well as intervention. Provincial government should ensure that local needs and conditions are taken into account, while local government should monitor the process. There should be clear differentiation of

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165 See 3.4 above for a more detailed discussion of the reasoning in **Christian Education South Africa v Minister of Education** 2000 (4) SA 757 (CC) and the approach of the European Court of Human Rights in **A v United Kingdom** [1998] 2 FLR 959.

166 Ms T Odyar, Ms D Ritter and the GCWS; UCARC; SANCCFW: Eastern Cape; Group 2 of the Pretoria workshop.

state and NGO roles. Group 2 of the Pretoria consultative workshop also saw the state as being responsible for ensuring that protocols were implemented and monitored, and suggested that resourcing should come in part through local government via NPA processes. Ms T Odyar, Ms D Ritter and the GCWS suggested that the Department of Health should coordinate resourcing. The SANCCFW (Eastern Cape) regarded resourcing as a joint responsibility of state and non-state structures.

In relation to the accountability of officials and child protection workers, there was agreement by most of those who commented that such persons should be held accountable and face sanctions if guilty of negligent or inadequate practice.[167] Some respondents cautioned, however, that accountability had to be dealt with in perspective,[168] given the serious under-resourcing of agencies, and that the roles of all those involved had to be clarified. Urgent attention was required to factors including training, caseload norms and appropriate staff remuneration, to ensure that staff were properly equipped to do their work.[169] The SANCCFW (Eastern Cape) suggested that practitioners be held accountable via their professional bodies.

The NCCAN called, on the basis of the NSCAN and ongoing internal deliberations, for a legally mandated coordinating structure to pull together the currently fragmented child protection system and make it effective and dependable for children. This structure should include representation at senior level from all state departments with core child protection responsibilities, along with representation from national child protection organisations and persons selected for their specific expertise. The structure would be responsible for:

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167 Ms T Odyar, Ms D Ritter and the GCWS; UCARC, SANCCFW: Eastern Cape; Group 2 of the Pretoria workshop.

168 Group 2, Pretoria workshop; SANCCFW.

169 In response to the question of how personnel issues including training, conditions of service and caseload norms should be addressed, the SANCCFW: Eastern Cape suggested that a minimum standard and a code of ethics be set. Ms T Odyar, Ms D Ritter and the GCWS felt that training should be provided for by law; that universities should do more in this regard and that in-service training in the field must also be provided for and that the SA Council for Social Service Professions should give inputs. The SANCCFW regarded training as an essential responsibility of service providers. The UCARC likewise saw training as essential and felt that government should allocate funding for this purpose. Group 2 of the Pretoria consultative workshop saw a need for minimum standards, but commented that these would be difficult to legislate. Caseload norms could also not in their view be spelled out because of variations in the intensity of services required. They pointed out the importance of accreditation and the need for adequate basic conditions of service such as leave, support and debriefing to be built in for key service providers in the child protection field. The SANCCFW emphasised the need to address salaries and working conditions especially in the non-government sector.

- commissioning appropriate research for purposes of a national needs analysis and for preparing preliminary child protection budget estimates for each sector;
- setting up a national data base and coordinating the child abuse registration and reporting system;
- setting up and coordinating inter-sectoral task teams to deal with issues such as training and selection of child protection personnel; minimum standards, workload norms and guidelines for protocol development; conditions of service for child protection workers; planning, administration and staff deployment; and contracting and purchase-of-service agreements between government and NGO's for the delivery of child protection services;
- overseeing the selection of an appropriate institution to serve as a clearing house for research and information regarding all aspects of child abuse and neglect, including programmes to address these problems;
- providing guidelines for, assisting and monitoring provincial coordinating structures for child protection;
- negotiating with training institutions for curriculum development and the training of personnel in all the relevant sectors;
- developing a comprehensive plan for the financing of child protection services as a component of the NPA – to be undertaken in consultation with the corporate sector and foreign funders.[170]

The NSCAN sets out linkages between the proposed national structure and inter-sectoral structures at the provincial and local levels where responsibility for direct service delivery is located. The NCCAN sees both government and NGO's as acting in partnership at all these levels to address child abuse and neglect, with government carrying full responsibility for the financing of those protective services which are mandated by statute. The NCCAN regards local government, and the health and education sectors at all levels, as having key preventive responsibilities in the primary and secondary prevention of child abuse and neglect.

10.2.10.4 **Consultation with officials of the Department of Social Development**

170 See NCCAN **Draft National Strategy on Child Abuse and Neglect**, updated version (2000); also minutes 1999.

At a consultative meeting held on 26 June 2001 with officials of the Department of Social Development and a Commissioner of Child Welfare, Pretoria, concern was raised about the use, as a routine measure in the placement of children, of Form 4 authorisations issued in terms of section12 of the Child Care Act. This section enables a social worker, police officer or 'authorised officer' to remove a child without a warrant. It was designed for emergencies in which children are at immediate risk, and the delay in obtaining a warrant could be prejudicial to their safety and wellbeing. Abuse of section12 could create a danger of children being too readily removed from their homes, for example by inexperienced personnel. A further problem was the range of people using the forms - e.g. military police. Social workers in private practice are using the forms after being designated 'authorised officers' by some commissioners of child welfare. This is problematic in that private practitioners are being paid by one or other interested party.

It was, however, pointed out that section 12 was being used as a short cut partly because of the present overload on the courts and the relevant social service organisations. It was agreed that the proposed children's statute should take into account these realities while providing safeguards against abuses, and that social workers and police officers should be removed from the definition of an 'authorised officer'. Persons using section 12 in a non-emergency situation should be required to justify their action to the court.

It was also agreed that the term 'prescribed welfare organisation', which has been rendered more or less obsolete by the Nonprofit Organisations Act of 1997,[171] no longer adequately identifies which structures are mandated to carry out tasks set out in the Child Care Act. The Nonprofit Organisations Act is not of any help as it makes no distinction between child protection organisations and any other type of nonprofit structure. This in turn creates problems with the linked definition of a 'social worker'.[172] The meeting recommended that a 'prescribed welfare organisation' be defined as 'an organisation contracted by the Department of Social Development to perform statutory tasks under the Child Care Act'. Certain requirements for such organisations could then be set down in the Regulations.

10.2.10.5 **What the children said:**

171 See also 10.2.8.2 above.

172 Ibid.

Participants in the structured consultations with children which formed part of the present Project[173] showed concern in varying degrees with preventive, protective, punitive and rehabilitative approaches. Unfortunately the responses cannot be quantified due to problems in the data-capturing process.

Abuse and neglect, especially by parents, topped the list in responses to the question: 'What things do you need protecting from?' A consciousness of prevention was evident among the many groups who saw a need for adults to be made aware of the rights of children (p23), for the legal responsibilities of children to be defined, and for parents to be educated about these (p34). Education of children themselves regarding their rights, and about sexual abuse and ways to avoid this, was seen as important (p50). There was support for the idea that services be provided whereby families could discuss and resolve their problems (p26). A number of groups thought that the law should provide help to families with problems, e.g. by making social workers and psychologists available or providing treatment for alcoholism. Many saw a need for social workers to provide counselling and support for sexually abused children and their families (p46), and for specialised courts and police to deal with children who had been abused and/or needed out of home placement (pp 37, 46).

At the same time, there was a strong emphasis on punitive measures, with many of the groups concurring that the government must punish people who violated the rights of children. Among those who expressed this view, it was noted that 'increase in severity of sentences was a recurring theme' (p 25). One of the groups consulted called for the death sentence for some crimes against children, and another suggested corporal punishment of offenders. Where there was specific mention of sexual abuse of children, several groups called for severe measures including 'the death penalty, castration, public beatings and public humiliation' (p 49). While many groups thought that sexual offenders against children should always be locked up, there was also a widespread view that they should be treated to help them change their behaviour.

10.2.11 The Commission's evaluation and recommendations in setting broad principles for child protection legislation

173 See Report on Workshops to Give Effect to Art. 12 of the UN Convention on the Rights of the Child (Children's Participation), prepared by the Community Law Centre, UWC, 1999.

Given the scarcity of formal child protection resources in South Africa it appears unwise to legislate for a system which depends excessively on authoritarian interventions by the state or its delegates into the lives of children and families. Considerable problems are associated with such approaches even in First World countries with well-developed child protection services (CPS) infrastructure. In South Africa such a system would probably be unaffordable and, given that resources for its implementation would be thinly spread, it could generate high levels of secondary abuse. There is widespread consensus on the need for substantially greater provision for primary and secondary preventive measures than is currently the case.

At the same time, well designed and implemented protective services have important preventive potential in breaking the cycle of abuse and neglect. They also minimise secondary abuse. South Africa has very high levels of severe child abuse and neglect, and this has extremely damaging implications for the present and future wellbeing of the nation. In such a context, a strong and effective CPS system is essential for the realisation of the constitutional right of every child to protection. This cannot be achieved without concerted attention to all components of this system and a systematic approach to its design, resourcing, coordination and functioning. Legislation should be designed accordingly, without detracting from other essential forms of provision for children.

The Commission therefore proposes a system which includes the following features:

- **Properly resourced, coordinated and managed CPS measures, focussed primarily on children who are at serious risk of immediate harm.**
- **Careful balancing of these measures with measures designed to support family life, promote child wellbeing and prevent neglect and abuse in the broader population of children, as provided for in Chapter 9 above.**
- **An expanded range of protective options, designed to improve and expand on those currently available and make them more flexible. Innovations include provision for:**

  - **time-limited, voluntary, foster care placement agreements between parents / caregivers and structures providing foster care services;**
  - **hospitals to be authorised to retain children with injuries likely to have been caused by abuse for investigation, for a limited period of time, where early**

release could place them at risk;[174]

- **orders by the children's court to remove an alleged or confirmed perpetrator from the child's home, or to restrict or prohibit that person's access to the child;[175]**
- **the court to have the option of ordering that family group conferences be arranged and of endorsing and monitoring decisions made in such conferences, subject to appropriate programmes being in place, and to specified conditions being observed to ensure that family solutions include proper protection of the child;[176]**
- **orders by the children's court for children with special needs who are found to be 'in need of care' to be placed in facilities registered by the Departments of Health and Education, where such facilities are the best available resources for the meeting of their needs;**
- **measures specifically designed to address the protection needs of children 'in especially difficult circumstances' or 'in need of protection'. These would include e.g. requirements for making protective processes accessible to children with disabilities;**

- **Codes of Good Practice, for inclusion in the Regulations, in which the CPS responsibilities of personnel in the Departments of Safety and Security, Justice, Correctional Services, Education, Health and Social Development, and relevant NGO's are spelled out separately and jointly. These should be rights-based and linked to the Developmental Quality Assurance (DQA) process being pioneered by the Department of Social Development.**
- **An inter-sectoral coordinating mechanism, housed in the (national) Department of Social Development, for the overall planning, development and implementation of child protective services, and for ongoing needs-assessment in this area.**
- **Clarification as regards the structures and categories of social service personnel authorised to perform child protection functions in terms of the Act. This would be**

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174 See further 23.10.4 (hospital retention powers) below.

175 See 23.10.4 (removal powers) below.

176 See 23.10.6 (family group conferences) below.

achieved in part through the revision of the present definitions of a 'prescribed welfare organisation' and an 'authorised officer'. The aims would be (i) to ensure improved coordination, planning and quality control in these services; and (ii) to preserve the impartiality of processes whereby protective investigations are carried out and recommendations are made to the court or other authorities. It is envisaged that NGOs would be contracted on a planned basis by the Department of Social Services to assist with these functions, and that contracted NGOs would be required to meet criteria as set out in Regulations.

- **A requirement for each province to make an annual estimate of the number of children who will require state-funded child protective and associated services, from the social development, justice, education, health, policing, and correctional services sectors, and to budget for these accordingly**.
- **Provision for protection against other harmful or potentially harmful cultural practices within both the child protection and criminal justice systems, by (a) prohibiting harmful or potentially harmful cultural practices; (b) regulating (male) circumcision schools; (c) prohibiting female genital mutilation; (d) expanding the grounds for refugee status to include the threat of female genital mutilation; and (e) an educative and criminal law approach to virginity testing.[177] As far as the health aspects of virginity testing and male circumcision are concerned, the Commission recommends that the (provincial) Health Departments prepare the necessary legislative enactments.**
- **A prohibition on coercing or forcing children to be betrothed or to be married and providing a minimum age for marriage.[178]**

There was no clear mandate from the respondents and workshop participants to support an outright ban of corporal punishment. **The Commission accordingly recommends that the educative and awareness-raising suggestion of the Committee on the Rights of the Child be followed,[179] in order to influence public opinion on this matter**. Formal protective interventions and the criminal justice system would continue to be used in cases where injuries to, or physical assaults on, children

177 See 10.2.8.4 above and Chapter 21 below.

178 The Commission should also aim to narrow the gap between marriageable age (18 years recommended) and the age at which a child can lawfully consent to sexual intercourse (16 years recommended). See in this regard, the Commission's investigations into the Review of the Marriage Act 25 of 1961 (Project 109) and Sexual Offences (Project 107).

179 See 10.2.10.3 above.

are concerned. **However, the Commission is of the opinion that the common law defence that a parent may raise that physical punishment was justified on the grounds of the rights of parents to impose reasonable chastisement upon their children is overly broad, and that the common law in this regard should be revisited in order to protect children from serious breaches of physical integrity**.[180] Further, the Commission believes that amendments to the common law are required by section 28(1)(d) of the Constitution, in order to ensure that the State obligation to protect children from maltreatment and abuse is given effect in municipal legislation.

The Commission therefore proposes that upon any criminal charge of assault or related offences (such as assault with intent to do grievous bodily harm), it shall not be a defence that the accused was a parent, or person designated by a parent to guide the child's behaviour, who was exercising a right to impose reasonable chastisement upon his or her child.

10.3 Assessment and Treatment / Therapeutic Services

A proper understanding of the needs and situation of each child entering protective services and his or her family is clearly essential as a basis for appropriate planning and action. Practitioners emphasise the need for skilled interdisciplinary assessments which are undertaken on a planned and fully co-ordinated basis.[181] Assessment is needed at the point of referral, to decide whether protective intervention is necessary and, if so, in what form. Thereafter, if a child is to be placed in care or under official supervision, assessment should guide the choice of care arrangement and the plan for subsequent services, including any form of treatment[182] which may be required. The terms 'treatment', 'therapeutic services' or 'therapeutic support and special services'[183] are used interchangeably in the present Chapter. A question to be addressed by the Commission is whether legislation can help to promote an optimal approach to such services and to assessment.

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180 See the discussion of **A v United Kingdom** [1998] FLR 959 in Chapter 3 above.

181 NCCAN **National Strategy on Child Abuse and Neglect**, 1996, p. 34.

182 The term 'treatment' may be problematic in some quarters at present due to moves away from the 'medical model' by many in the social work and child and youth care fields. However the term continues to be used to cover many therapeutic activities designed to promote emotional and social health and development and to overcome past problems.

183 The IMC refers to 'therapeutic support' and 'special services' to refer to services which tend to be referred to by many practitioners as 'treatment'. The IMC view would be that this is not merely a semantic difference but one which arises from fundamental differences between intervention paradigms.

10.3.1 Types of assessment which may be required for effective protection

10.3.1.1 Assessment of the child, family members and the family unit

At initial referral, assessments of the child, other family members and the family unit are likely to revolve around the current state of the child and his or her position in the home. They will usually be combined with a process of risk analysis (see below) in being geared towards determining whether or not the child can safely remain at home or whether placement in alternative care should be considered, and, if so, in what form. Criminal investigations involving law enforcement processes may be in process simultaneously or in an overlapping period. Multi-disciplinary protective assessments, especially where there is a criminal justice component, have a high potential for secondary abuse, if not properly planned and managed by all concerned. Assessment will also often be required early in the intervention process and possibly thereafter to determine what services are needed by the child and family. Hence examinations by neurologists, psychiatrists, educationists, occupational therapists and others may come into the picture where there is access to such persons.

In the absence of the necessary resources for care and protection and for subsequent service delivery, comprehensive assessment processes may have little meaning. Writing from a British perspective, Scott states: 'Intervention in child welfare often has more to do with the resources that are available than ... the particular needs of the child. It is therefore not surprising that some social workers may see little point in undertaking an elaborate assessment if it does not determine the intervention'.[184] Hence if provision for assessment and treatment is to be built into the law, the resource context must be kept in mind.

10.3.1.2 Risk analysis

A crucial dimension of assessment in cases of alleged child abuse is risk analysis. A process of weighing up the risks of various forms of intervention, and also of refraining from intervening, has to be undertaken for every child referred for protective services.[185] Protective intervention and the

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184 Scott, D 'A qualitative study of social work assessment in cases of alleged child abuse' (1996) **British Journal of Social Work**, 73-87.

185 Cooper, DM and Ball, D **Social Work and Child Abuse** London: BASW 1987; see also NCCAN **National Strategy on Child Abuse and Neglect**, 1996, 25-6.

processes which follow are in themselves potentially hazardous for children, given the possibilities for secondary abuse.[186]

Where a report is considered sufficiently serious to warrant a social work investigation, it is necessary in the first place to establish whether any risk to the child can be dealt with by the use of enabling or empowering approaches.[187] Such approaches, calling for voluntary involvement of the family in secondary preventive strategies, will be the first choice unless they are inadequate to prevent harm to the child.

Numerous risk assessment frameworks have been developed by child protection agencies in different parts of the world including South Africa.[188] Without some basis on which to systematically approach decision-making, arbitrary action may occur which arises from the attitudes and anxieties of particular practitioners rather than the actual implications of the child's situation. At the same time, frameworks of this kind are not infallible, and research findings indicate that individuals have different "thresholds" at which they elect to undertake protective interventions.[189] In addition, risk to a child cannot be evaluated except in relation to his or her total environment, including local norms and support systems,

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186 See 10.2.5.3 above.

187 These may include counselling, drawing in support from the extended family or neighbourhood, education in child development and parenting skills, linking of the family with available resources or with a development programme, etc. Regulation 2(4)(b) to the Child Care Act as amended in 1996 requires that 'a summary of prevention and early intervention services rendered in respect of the child and his or her family ....' be supplied to the court in the social worker's report for every children's court enquiry.

188 Stein, T & Rzepnicki, T **Decision-making at Child Welfare Intake - a Handbook for Practitioners**, C.W.L.A., New York: Wald 1983, cited in White, R 'Standards of parenting and the law' in Adcock, M and White, R (eds) **Good-Enough Parenting** London: BAAF 1985, 33-4; De Panfilis, D and Scannepieco, M 'Assessing the safety of children at risk of maltreatment: decision-making models' (1994) 73(3) **Child Welfare** 239.

See also Child Welfare Society: Cape Town, 1988 'The Management of Child Abuse - An Intake and Field Social Workers' Guide to Abuse Management', (internal document). The NCCAN **National Strategy on Child Abuse and Neglect** 25 gives the following list of factors to be examined in the course of the risk assessment process: impact of the offender's behaviour on the child; severity of abuse or neglect; age and physical or mental abilities of the child; frequency/ recency of the alleged abuse or neglect; credibility of the reporter; location and access of the perpetrator to the child; parental willingness to protect the child and level of co-operation; parental ability to protect the child; the availability and willingness of others in the child's immediate context to protect the child; and the availability of resources to relieve parental stress, and to provide support and guidance to caregivers who may be predisposed to abuse. The assessment, the NCCAN goes on to say, must also 'take into account the possible consequences of all the available forms of intervention, which must be balanced against each other as well as against the above factors'; hence the trauma likely to be associated with drastic interventions such as removal must be taken into account. 'There is .... no justification for removing a child from one situation where he/she is considered to be at risk without having good reason to believe that the alternative arrangement is less hazardous and more likely to meet the child's needs'.

189 Dalgleish, L 'Assessing the situation and deciding to do something: risk, needs and consequences', paper presented at ISPCAN Congress, Durban, 2000.

and the available options for intervention. Hence models from elsewhere require modification for use in South Africa, and even from one area to another within the country. Nevertheless they provide some starting points. The research paper 'Legislating for Child Protection' cites several examples of basic frameworks for risk analysis.[190]

In assessing level of risk to a child, it is helpful to identify the predominant causative factors which appear to be generating the abuse. Typically, a combination of such factors is at work in any given case, comprising (a) characteristics of the caregivers (e.g. emotional disturbance, immaturity and/or ignorance about childrearing); (b) characteristics of the child (e.g. feeding problems, incessant crying, a disability or some other feature which the parents find highly stressful to deal with); and (c) socio-economic conditions which generate excessive stress (e.g. poverty, unemployment, overcrowding, lack of basic child care facilities or other essential resources). It has been suggested, e.g., that, if the majority of children living in a given area are at similar risk due primarily to socio-economic conditions, case-by-case investigation and removal of children would not normally be the appropriate form of intervention - rather, a broad developmental approach would be called for. On the other hand, 'if … the danger is primarily located in the personality and/or behaviour or in the lack of capacity of the parent(s) or other caregivers, perhaps in conjunction with features of the child which trigger an abusive reaction…, removal may be indicated if there is a likelihood of serious harm to the child and there is no way of building in adequate supports and protective factors', states the Johannesburg Child Welfare Society (JCWS).[191]

It is also often recommended that the concept of 'good-enough parenting'[192] rather than some idealised standard, be used when considering whether a child should be moved from his or her home, or be restored to that home after being in statutory care.[193] Socio-economic conditions will of course also play a role in determining to what level parents and caregivers are able to meet such criteria, and cultural factors may also have a bearing. Protective investigations should take account of these

190 Loffell, J. and Matthias, C., 1999, 38-40.

191 'Considerations in Child Protection Investigations', internal policy document, 1997.

192 Adcock, M and White, R (ed) **Good-Enough Parenting** London: British Agencies for Adoption and Fostering, 1985.

193 Bentovim and Bingley 'Parenting and parenting failure: Some guidelines for the assessment of the child, his parents and the family' in Adcock and White (eds) **Good-Enough Parenting** 45 state as follows: 'For a child's potential to unfold, parents need to provide an environment in which the child can grow adequately in an atmosphere of security, affection and acceptance, be protected from danger and be nurtured and controlled adequately. The child also needs to be able to play and have sufficient freedom to explore and to learn; parents are also expected to ensure children are educated and attention paid to their medical needs'.

aspects.

A further consideration in assessing the relative risks of various courses of action is the issue of available resources, including alternatives for placement. To justify the risks inherent in removing a child from his or her family we must be able to offer a care option which is more likely to meet his or her needs. 'Hence decisions about removal will differ between contexts in which there is a range of care options for the child and those in which such options are absent or severely limited', states the JCWS.[194] These considerations highlight the need to develop the necessary resources for placement of children and for any other form of action which may be deemed to be necessary - e.g. treatment for the child, intensive support for caregivers, family reunification services etc. - to enable practitioners to select the options which have the best chances of ensuring the wellbeing of children.

10.3.2 Ongoing services / treatment / therapeutic support

Child abuse tends to arise at least in part from emotional problems in the perpetrators, and to create emotional problems in the child victims. Other family members are also liable to be involved or affected in one way or another. Non-abusive parents who fail to protect their children are often themselves past victims of child abuse who have never overcome their trauma. Other children in the family who are not directly victimised will nevertheless have their socialisation and development affected. The problems involved may be severe and need specialised attention. Abused children or their abusers may have physiological or neurological problems, or physical or intellectual disabilities. These may be congenital, or may arise from illness or accident or from abuse. Abused children and their families often have a range of practical problems which may relate to poverty, unemployment, lack of housing, lack of parenting skills, substance abuse etc. If protective interventions are to succeed in the long term, CPS workers must assist the children and families they serve to overcome their problems, through direct services and/or by linking them to other practitioners within a team approach.

10.3.3 Existing system in South Africa and deficiencies

Section 14 of the Child Care Act, after being amended in 1996 to provide for psychological assessments, reads as follows:

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194 JCWS 'Considerations in Child Protection Investigations' 4.

> 14(1) Any children's court holding an inquiry in terms of section 13(3) may at any time during the enquiry order any medical officer or psychologist to examine the child concerned and to report to the court thereanent.
> (2) The commissioner presiding over a children's court holding such an inquiry shall during that inquiry request any social worker to furnish a report on the circumstances of the child concerned and his or her parents or guardian or the person having custody of the child.

There is a lack of clarity with regard to the legal right of practitioners to undertake assessments for protective purposes, except where this is ordered by the Children's Court once an enquiry has commenced. Medical assessments may be needed as a matter of urgency for purposes of gathering forensic evidence, especially if criminal charges are also being pursued. The case may be prejudiced if there is a delay while an inquiry is opened. Due to uncertainties about their legal position, medical practitioners vary in their willingness to examine children without the consent of a parent, who may also be the alleged offender. Similar problems may arise with regard to arranging social work evaluations. Without entry into the home a social worker may be unable to assess the safety of the child, and may lack evidence to request the opening of an inquiry. Section 12 gives 'any policeman, social worker or authorised officer' the right to 'remove a child from any place to a place of safety without a warrant' if the child is considered to be at immediate risk – however the right of any of the above persons to enter the home in the first place so as to assess the circumstances is not clear. There is no provision for the financing of assessments, or for assessment to be required for a parent or other family member.

Risk analysis frameworks as such are not built into either the Child Care Act or the Domestic Violence Act. In the case of the Child Care Act the initial evaluation process usually rests entirely with the social worker, who may or may not have any support or guidance in this process. The court decides on the final disposition of the child's situation. However, the sudden removal of a child form his or her family in without preparation, as is allowed for by section 12, is a highly traumatic intervention which can have lasting consequences for all concerned. It is arguable that there is a need at least for a rudimentary decision-making framework, to prevent overzealous intervention by inexperienced personnel.

In relation to treatment of the child or any other family member, section 15(a) of the Child Care Act enables the children's court to order that the child 'be returned to or remain in the custody of his parents or ... the parent designated by the court or of his guardian or the custody of the person in whose custody he was before the commencement of the proceedings, under the supervision of a social worker, on condition that the child or his parent or guardian or such person complies … with such of

the prescribed requirements as the court may determine'. Regulation 2 pertaining to the 1996 amendments requires that the social worker's report to the court shall include the proposed plan to reunite the child and the family, where applicable. The definition of 'family reunification services' as supplied in the amended Regulations reads as follows:

> A service whereby a social worker … where applicable in consultation with the child and youth care worker renders a service for the purpose of empowering and supporting parents, the family and children in alternative care, which aims at enabling those children to be reunited with their family and community of origin in the shortest possible period of time, in a manner consistent with the best interests of the child … .

The Child Care Act thus provides for a range of activities which could incorporate arrangements for specialised treatment, or delivery of services with a treatment orientation. However, there is no explicit provision for the court to require psychotherapy or any form of remediation for the child, or to compel a perpetrator or a family to participate in a therapeutic programme, or to determine how costs are to be covered.

A criminal court has discretion in the sentencing procedure to order a perpetrator to pay for treatment for a child victim, or to engage in treatment him or herself. Enrolment in a treatment programme may be a condition of suspension of sentence, or probation, or placement under correctional supervision. The terms of such arrangements are, however, not spelled out clearly, and there is no automatic provision for monitoring in cases of suspension of the sentence. There is also a lack of clarity regarding the consequences for defaulters.

° *IMC policy on assessment and therapeutic support*

The Inter-Ministerial Committee on Young People at Risk (IMC) has sought to give assessment a far more central role in child and youth care practice than has traditionally been the case, and to change the focus of assessment to fit the strengths-based ethos of the developmental approach. The IMC describes assessment as a process 'to determine the least restrictive environment and programme suitable to the child's development needs at any given moment, and/or during the next steps of development and/or in the long term'.[195] It is also recommended by the IMC that assessment not be undertaken as an isolated task, but be firmly located within a methodology which moves through a

195 IMC, 1998: Developmental Assessment of Children, Youth and Families – Draft Practice Guidelines for Trainers.

continuum from engagement, to behaviour management, to developmental care and then to assessment, followed by disengagement. A detailed set of principles is provided.[196]

The IMC uses a model of developmental assessment based on the 'Circle of Courage' which includes core concepts of belonging, mastery, independence and generosity. The model assumes that assessment will result in a care plan for each child, to be based on an assessment of the least restrictive, most empowering long-term option for the young person. The care plan is about the long-term arrangements for a child's future and encapsulates the principles of permanency planning and reunification with the family and community. The IMC also refers to 'individual development plans' (IDP's) which are required for all children in care. Within the framework of such plans, 'therapeutic support and/or special services' may be indicated for specific young people.[197] There is an emphasis on therapeutic interventions being voluntary and strengths-based, and on the avoidance of labelling. Therapeutic interventions (e.g. behaviour modification) may, in terms of the IMC approach, not be used

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196 In its Interim Policy Recommendations, the IMC set out a number of principles which should apply with regard to assessment:

- Assessment should be undertaken by a multi-disciplinary team, and should be holistic and appropriate to the child's culture, language and developmental stage.
- Assessment should be undertaken within a developmental approach which places emphasis on the strengths of the child (and family).
- Assessment should always be undertaken within the family home and/or community unless proved not to be in the best interests of the child.
- Assessment should be done with the child and family and not to them. Family conferencing (and/or community conferencing where appropriate) should be included in the process.
- The process should aim to increase insight and competency and should involve shared decision-making with all relevant role-players.
- Assessment should be based on minimum standards and guidelines for practice.
- Assessment should result in an appropriate referral to a programme of intervention which is regularly reviewed together with the child and family.
- Assessment processes and documentation should be of such a nature and standard that they can be used at the point of reception of any level and do not necessarily need to be repeated (only reviewed) within a 12-month period.
- The process and procedure of reception, assessment and referral should not be ad hoc, regardless of circumstances and time constraints. Whether located in a particular centre or not, this process should recognise the critical impact of any referral decision upon the child and family and should be consistent and thorough.
- Observation and assessment is a process and should continue throughout the young person's participation in the child and youth care system. However, there are particular stages during that period of participation that warrant a comprehensive assessment. For example, at the point of reception, at the point of placement, annually, and at the point of disengagement. A reception/referral interview or an overnight procedure should not be labelled as assessment, but considered to be the first step in a more holistic assessment process.
- The reception and referral process should be rooted within the community and should actively involve the "significant others" in the child's life. Where appropriate, consideration should be given to including the community leaders and volunteers within the team decision-making process.

197 IMC, May 1998: draft Minimum Standards, South African Child and Youth Care System, 32, 37-8.

as a means of behaviour management. A required outcome in terms of the IMC's draft Minimum Standards is that 'service providers confirm that young people are unconditionally receiving therapeutic support and/or special services as indicated in their IDP and/or as required on a daily basis, or in a particular crisis'.[198]

The IMC guidelines do not differentiate between assessments, development programmes, therapeutic support measures etc. which are implemented in different situations – e.g. where young people are in conflict with the law, are suspected to be in need of protection from abuse or neglect by their caregivers, or are destitute. While there is of course substantial overlap between such categories, it can be argued that, for purposes of protective investigations and follow-up services, some additional specific issues need to be examined and there may need to be a shift in emphasis. Where there is a possibility that a child is in immediate danger of physical or sexual abuse within his or her family, it can be argued that assessment cannot always be of the voluntary and participatory nature advocated by the IMC. Likewise, where therapeutic support and special services for the growing numbers of young perpetrators of child sexual abuse are concerned, provision only for services which are voluntary and from which the young person can withdraw at any time, is unlikely to offer sufficient protection to prospective child victims.

The assessment process and the provision of therapeutic support and special services as per the IMC principles have clear resourcing implications. Substantial costs are involved in conducting multi-disciplinary assessments of the child's developmental and therapeutic needs.[199] The same applies to the provision of special services or support 'on a daily basis', or even only in times of crisis. Without adequate resourcing, both the assessment process and the plans to which it gives rise are undermined from the start.[200] Resourcing concerns are of course not restricted to the IMC model – they would apply in any approach to assessment and service delivery.

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198 Ibid, 38.

199 NCCAN **National Strategy on Child Abuse and Neglect**, 1996, 38-9.

200 For example, Project Go is a major policy initiative through which the Department of Social Development has sought to ensure appropriate assessment of children entering the Child and Youth Care System, to prevent them from moving deeper into the system, and to enable them to move out of it more quickly. Project Go has, it is argued, not achieved the desired results because it has been an attempt to induce conformity with the required procedures and standards of service by setting up bureaucratic controls, without effectively addressing the underlying human resource problems and service options (Johannesburg Child Welfare Society, Letter to Chief Director, Gauteng Department of Welfare, 20 January 1998; SASPCAN 'Creating new options for the prevention and management of child abuse in a developing country', 1998 Conference proceedings, Johannesburg, 68, 72).

10.3.4 Comparative review of other systems

° *Assessment in other systems*

It seems to be standard practice for child protective legislation to provided at least for medical examination. There is variation as to other forms of assessment which may be provided for, and the ways in which consent by the child and the parents is managed. The Children (Scotland) Act provides for the granting of a 'child assessment order' to enable a local authority to establish whether a child is being ill-treated or neglected to a degree likely to cause significant harm.[201] In England the court may, simultaneously with the issuing of an interim care or supervision order, give directions regarding the 'medical or psychiatric examination or other assessment' of the child.[202] A child who is in a position to make an informed decision may refuse to submit to such a process. One of the options open to the court is to order that there be no examination or assessment.[203]

In the USA, federal funding for States under CAPTA is dependent on each State enforcing a law or operating a state-wide programme which includes 'procedures for the immediate screening and safety assessment and prompt investigation' of reports of child abuse. An explicit aim of the law is to 'create and improve the use of multi-disciplinary teams …to enhance investigations' and to 'improve risk and safety assessment tools and protocols'.[204] In Canada there are various provincial arrangements for coordinated assessment processes carried out by teams. The relevant processes may be mandated by statute, as is the case with e.g. the Youth Protection Act in Quebec.[205] In others they are set out in

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201 Section 55 of the Children (Scotland) Act, 1995.

202 Sections 38(6) and (7) of the Children Act 1989.

203 New Zealand's Children, Young Persons and their Families Act of 1989 provides that the court may order a medical examination of a child where there is a suspicion of ill-treatment or neglect. A Court may issue a warrant authorising a police officer or social worker to search for a child, in which such person is authorised to enter and search a residence and if necessary to remove or detain the child. Where such a warrant has been issued the social worker has the authority to request a medical examination of the child without the consent of a parent, if reasonable efforts have been made to obtain such consent. Examinations on the anus or genital organs may only be carried out where there is suspicion of abuse, and with the consent of the child (sections 49, 39, 53, 55). In Canada, Newfoundland and Prince Edward Island provide that a parent should be asked to consent to medical assessment, failing which this can be authorised by the responsible social worker FPWGFSI, 1994: 12,19). The Ugandan Children Statute provides that the court may order a medical examination "if there is any reason to believe that the child is in need of the examination, or for some reason requires a report concerning the child's physical or mental condition [Section 43(1)].

204 Title 42. Section 5106a(a)(2)(A); Section 5106a(a)(4).

205 Federal-Provincial Working Group on Child and Family Services Information: 'Child Welfare in Canada', Federal Family Violence Initiative, Minister of Supply and Services Canada, 1994, 53-4.

policies and working agreements.

° *Some specific considerations concerning assessment where a child may be in need of protection*

As mentioned earlier, in South Africa the IMC has emphasised that assessment should be strengths-based and should be carried out in partnership with the young person and his/her family. The draft Minimum Standards for the South African Child and Youth Care System include the following as an underlying principle: 'All services should prioritise the goal to have young people remain within the family and/or community context wherever possible'.[206]

This approach has been subject to some controversy in recent years, especially in North America, in situations requiring protective intervention. In British Columbia, Canada, the Gove Commission questioned a shift which had occurred from 'child-centred' to 'family-centred' practice, and identified as dangerous a resultant trend towards giving family unity priority over the child's safety and well-being. The Gove Commission also recommended that legislation to make family group conferences standard practice not be proclaimed into law for the present for children at risk of abuse or neglect, and that such conferences be avoided at least in the early phases of contact, as they could compromise the safety of the child. The Gove Commission further found that 'the Ministry's adoption of a strengths-based approach ... is dangerous in child protection situations because it focusses on the parent's potential rather than the child's protection'.[207] In Ontario, arguments have been raised against the emphasis on 'least restrictive' outcomes on the grounds that this has tended to result in children being left in danger and has sometimes led to their deaths. Legislation was changed in 1998 to ensure that the safety of children took precedence over a previous mandate to choose the 'least restrictive or disruptive course of action'.[208]

These concerns reflect part of the debate in North America between supporters of the 'protectionist' and 'family preservationist' positions, as discussed in 10.2.9.1 above, and a balanced approach must be sought for local purposes. The Canadian experience suggests that it may be necessary, in situations involving immediate danger to the child, for the structure and format of child and family

206 IMC Draft Minimum Standards, May 1998, 6.

207 Report of the Gove Enquiry into Child Protection in British Columbia: Executive Summary, vols 1 and 2, 1995.

208 **Toronto Star**, 29 October 1998:A32; Office of the Chief Coroner, Ontario, 1996 : 60.

assessment approaches to differ in some respects from those used in other scenarios in the child and youth care system.

° *Ongoing services / therapeutic support in other systems*

In the USA, in terms of CAPTA and the linked provisions of the Social Security Act, each state has to have a plan for child welfare services, family preservation and family support services.[209] 'Family preservation' as understood in this legislation includes services designed to restore children to their families and to support these placements thereafter. In Canada, any of a range of services designed to address specific needs of a child and his or her family may be offered at the request of the family, on the basis of a social worker's recommendation, or in terms of a court order.[210] In New Zealand, a court which has declared a child to be in need of care and protection may make a 'support order' requiring the Director-General of Social Welfare or another party to 'provide support' to the child for a specified period.[211] In England, provision is made for ongoing supportive services through 'supervision orders' issued by the court. The designated supervisor has a broad obligation to 'advise, assist and befriend the child'.[212] In exceptional circumstances, a court hearing a divorce or domestic dispute case can make a similar order where a child appears to be vulnerable, in the form of a 'family assistance order'. This requires a probation officer or local authority to 'advise, assist or befriend' a child, a person who is living with or is obliged to maintain contact with the child, or a parent or guardian of the child. Family assistance orders are subject to the consent of all concerned.

Ongoing services including therapeutic measures are usually structured within a permanency planning process, discussed further in that context in 10.3.3 above.

10.3.5 Options mooted in the research paper

Issue Paper 13 did not raise specific questions concerning assessment and treatment. Specific attention was paid to assessment in the research paper. Questions raised and responses received

209 42 USC 620 et seq., Part B of Title IV: Child and Family Services.

210 FPWGCFS op. cit., 5ff.

211 Section 91 of the Children, Young Persons and their Families Act 1989, as amended.

212 Section 35 of the Children Act 1989.

were as follows:

> *Should assessment orders be made a more prominent feature of our child care law? If so, which of the following (if any) should be catered for in legislation: medical, psychological, social and/or criminological assessments? Any other type?*
>
> *In relation to whom should such assessment orders be issued - the child? the caregiver/s? other family members? an alleged perpetrator?*
>
> *Who should have to give consent to the assessment, and to any resulting treatment? For example, should an incestuous father have the power to withhold consent to medical examination of his child?*
>
> *Who should be empowered to carry out assessments? Who should pay for an assessment?*
>
> *How can the impartiality of such assessments be safeguarded? For example, should it be possible for parents accused of abuse to pay private medical practitioners, psychologists, social workers etc. to carry out assessments and give evidence in court?*
>
> *When should a child or any other person involved in a child protection investigation have the right to refuse to be subject to an assessment?*
>
> *Do the principles of "strengths-based" assessment, the use of family group conferences and the selection of the "most empowering and least restrictive" option require any modification in the case of assessments and intervention in child protection cases? If so, how should these issues be approached?*
>
> *Do you have any other suggestions to raise as regards legal provision for assessments?*

There was general consensus as regards the desirability of extended provision for court-ordered assessments.[213] A group at the Pretoria workshop felt that district surgeons should be properly trained to assess children, since reports tended to be superficial; in addition many such doctors did not know how to establish rapport with children and this led to secondary trauma.

There was agreement that there should be provision for assessment of all parties, or at least all family members. Opinions varied as to the issue of consent, and whether this should be up to the

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213 The SANCCFW (Eastern Cape); Ms T Odyar, Ms D Ritter and the GCWS; the UCARC and the participants in the Umtata consultative meeting supported such provision. The SANCCFW gave qualified support, suggesting that the results of studies undertaken elsewhere in the world be summarised to provide guidelines which could be made available as an assessment tool. Assessment orders could be considered if it were possible for these to be implemented without delays being created. The SANCCFW (Eastern Cape), the UCARC and participants in the Umtata consultative meeting felt that medical, psychological, social and criminological assessments should be provided for. A group at the Pretoria consultative workshop felt that only medical assessments should be mandatory and others should be called for as deemed necessary, given the limited available resources.

parents (with recourse to the court should they refuse), the child and his or her guardian, or the professionals involved.[214] Most respondents felt that the parents or the perpetrator should pay for assessment where possible, with the state assisting where necessary.[215] It is not clear whether respondents believed payment by the parents should be direct to the various practitioners or via some other mechanism so as to protect the impartiality of investigations.

On the subject of whether modifications to the IMC approach, i.e. strengths-based assessment, the choice of the 'most empowering and least restrictive option', and the use of family group conferencing in child protection cases, only two responses were received.[216] Those concerned saw no need for modifications.

The following questions were posed with regard to risk assessment:

> *Are the provisions of s14(1) of the Child Care Act adequate as a basis for considering a child to be in need of protective intervention?*
>
> *Should a framework for risk assessment be built into a comprehensive children's statute or should this be a task for policy-making and planning?*
>
> *If the former, are the factors to be taken into account in risk assessments as mentioned above, appropriate to the South African context? If not, what adjustments are necessary?*
>
> *Is your organisation using, or do you have suggestions for, a framework which would be useful for child protection decisions, or would you like to suggest a different approach altogether? Please attach any contributions you may wish to make.*

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214 A group at the Pretoria workshop felt that, where resources were limited, assessment could be limited to the child and the perpetrator. As regards the issue of consent to assessment, Ms T Odyar, Ms D Ritter and the GCWS felt that the assessment team should be in a position to give the necessary consent. In similar vein, participants in the Umtata consultative workshop felt that the relevant professionals should give consent. The UCARC felt that the child and the guardian's consent should be obtained. The SANCCFW (Eastern Cape) said that consent should rest with the parents/caregivers but, should they refuse, the commissioner of child welfare should be able to consent. Any person refusing assessment would then be in contravention of a court order and liable to prosecution. The Umtata consultative group felt that there should be a right to refuse assessment by someone not dealing with the case, or where the assessment would jeopardise the investigation or was unlawful. They felt that there should where possible be one person managing the case.

215 Ms T Odyar, Ms D Ritter and the GCWS felt that legislation should provide for the appointment of a team, and that parents should pay if possible, failing which the Department of Social Development should carry the costs. The UCARC felt that the parents should pay for the assessment of the child and others concerned for their own assessments, unless the perpetrator agreed to pay, with the state helping where possible. The Umtata consultative meeting and the SANCCFW (Eastern Cape) felt that the parents should pay unless they could not afford to do so.

216 Ms L Vara of the SANCCFW (Eastern Cape); Ms T Odyar, Ms D Ritter and the GCWS.

Respondents felt that the present terms of section14(1) of the Child Care Act as amended in 1996 and 1991 were adequate.[217] Risk assessment was seen as an important aspect of protective intervention. There was support for the idea that a framework be built into the law, although one organisation saw this as a policy and planning issue.[218]

In relation to services needed for the effective implementation of court orders, the following question was posed:

> *Could a comprehensive children's statute make more adequate provision than is presently in place, to ensure that appropriate substitute care or other court-ordered services are in place for children and families who need them? If so, what types of provision could be included and how?*

The SANCCFW (Eastern Cape) felt that the present Act was adequate but that there was a need for trained and committed personnel to implement it. The SANCCFW favoured statutory provision for adequate care resources and court-ordered services and also advocated regular court reviews of each child's situation. The UCARC felt that more state Places of Safety could be built, while T Odyar, D Ritter and the GCWS recommended that legislation provide for safe-houses in the community.

10.3.6 Evaluation and recommendations regarding assessment and treatment / therapeutic services

The Commission has sought an approach to assessment, ongoing services and therapeutic support which is realistic in terms of the limitations on resources for these purposes in South Africa; provides adequately for a decision-making process which is based on sound information; ensures that services which are essential for positive outcomes will be carried out; and is sufficiently flexible to allow for different conditions and resourcing priorities in different parts of the country, while also

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217 SANCCFW; Ms T Odayar, Ms D Ritter and the GCWS; UCARC; SANNCFW (Eastern Cape). The SANCCFW emphasised the need for adequate resources for implementation.

218 The UCARC regarded risk assessment frameworks as being more a matter for policy-making and planning. The SANCCFW recommended that guidelines be provided in legislation based on the categories cited in the consultation paper. These guidelines should be mandatory and thus binding on the court - this would cut down on unnecessary bureaucracy and costs. Ms T Odyar, Ms D Ritter and the GCWS concurred that a risk assessment framework should be built into the proposed statute. Both they and the SANCCFW saw the considerations for risk assessment as spelled out in the research paper as being appropriate. The UCARC felt adjustments could be necessary to take into account conditions in areas with minimal resources.

being equitable.

The Commission recommends provision for:

- **greater clarity as to the right of CPS practitioners in various disciplines to undertake routine investigations in response to allegations of abuse and neglect, before a case comes to court;**
- **court orders for additional investigations and assessments where these are indicated, if necessary, at state cost;**
- **appropriate provision for consent to examination and assessment by the child concerned;**
- **a mechanism to ensure the impartiality of the assessment process, whether this is undertaken by a state facility or a professional in private practice;**
- **a Code of Good Practice to guide assessments of children referred for protective services, based on the IMC guidelines with the addition of specific considerations where protective investigations are involved;**
- **a broad risk assessment framework, adaptable to different local conditions, to guide decision-making;**
- **provision for Family Group Conferencing outcomes to be incorporated into court orders, where the necessary programmes exist and where outcomes comply with requirements to ensure the safety of the child;**
- **court orders which incorporate necessary and available services, which may be practical, supportive, educative and/or therapeutic.**

10.4 Permanency Planning and Associated Services and Mechanisms

10.4.1 Philosophy and introductory remarks[213]

The basis for permanency planning is the premise that every child, in order to enjoy healthy growth and development, needs secure and meaningful relationships with parents and other significant persons. This in turn requires continuity and stability in these relationships. The parental home is the natural and generally the best environment for a child to experience this. The first premise in a permanency planning approach is to avoid removal from the family where possible, through timely preventive services.

Should separation from the family be inevitable, permanency planning must start before such a step is taken. Failing this, a child could spend years in alternative care without a goal-directed plan for his or her future. He or she may become a victim of 'drift in care' and never experience any security.[214] This situation arises where a child remains in substitute care for an indeterminate period. Such children are unable to put down roots or develop a clear sense of who they are. Repeated separations, as occur when children are moved between a succession of placements, can severely affect their ability to trust others, to form normal relationships, and ultimately to become competent parents for their own children.

The dangers of a lack of permanency planning are particularly acute in the case of infants and very young children. While there are extensive debates about the precise effects of separation in early life, there is a general consensus that severe ill-effects can occur 'especially where separation is not followed by consistently good physical and emotional care and opportunities for one-to-one bonding'.[202] Without opportunities to form an attachment to one or at most a few consistent parent figures, a child's ability to form normal attachments in later childhood or in adulthood may be severely impaired.

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213 Certain permanency issues specific to foster and residential care are discussed in Chapters 17 and 19 below.

214 Department of Health Services and Welfare, Administration: House of Assembly, January 1990. Report of the Committee of Enquiry into the Foster Care of Children.

202 Johannesburg Child Welfare Society, Policy Document relating to Permanency Planning, 1995.

Permanency planning can be described as 'the systematic process of carrying out, within a brief time-limited period, a set of goal-directed activities designed to help children live in families that offer continuity of relationships with nurturing parents or caretakers and the opportunity to establish lifetime relationships'.[203] 'Permanency planning offers considerable promise for generating constructive programmes that are truly in the best interest of the child, and end the problem of many children's gradual drift into the limbo of temporary placements. However, the movement must be guided so that a rush toward placing children in inadequate but nevertheless permanent placements does not result. Permanency programmes must result in more continuous placements that help children feel psychologically secure' states Rooney.[204] Permanency planning holds out special challenges in a multicultural society such as South Africa, requiring the development of diversity competence in child welfare processes.[205]

10.4.2 **Components**

° *Service plans and contracts*

When developing a permanency plan, the child, the parent or guardian, the social workers and other significant role players should participate. Such a plan must include goal-directed time-frames, and be implementable. Often such a plan is incorporated in what is termed a 'service contract' which sets out the responsibilities of the parents, the social service agency or state department responsible for protective services, the substitute caregiver and, where age and capacity permit, the child. The reasons for the child's placement in substitute care must be clearly stated, and likewise the conditions which must be fulfilled in order for him or her to return home. The consequences if reunification is not achieved within a specified period should be spelled out – e.g. the possibilities of long-term substitute care, adoption etc.[206] An undertaking by the

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203 Maluccio, AN, Fein, E & Olmstead, KA **Permanency Planning for Children: Concepts and Methods** New York: Tavistock Publications 1986.

204 Rooney, RH **Permanency Planning: Boom for All Children?** New York: Social Work 1982 27, 157.

205 Anderson, GR, Shen, A, & Leashore, BR 'The challenge of permanency planning in a multicultural society' (1998) 33(132) **Adolescence** 957; Pinderhughes, E 'Developing diversity competence in child welfare and permanency planning' (1994) 5(1/2) **Journal of Multicultural Social Work** 19-38; Williams, CW 'Personal reflections on permanency planning and cultural competence' (1997) 5(1/2) **Journal of Multicultural Social Work** 9-18.

206 Johannesburg Child Welfare Society, Policy Document Relating to Permanency Planning, 1995.

caregivers to facilitate contact between the parents and the child should be part of the contract unless there are compelling reasons to the contrary – e.g. a real threat to the safety and wellbeing of the child or the caregivers from a violent or severely disturbed parent. As far as possible the plan should be agreed upon by all concerned. Exceptions to the latter requirement would be situations where, despite appropriate efforts by service providers, the parents are unwilling or unable to acknowledge serious problems which have led to the removal of the child, such as physical or sexual abuse or severe neglect, and refuse to engage with the necessary services. The plan may then have to be drawn up without their cooperation, but will nevertheless in most cases include contact between them and their child and continuing efforts to assist them, at least in the early stages of placement. The service plan should be documented and, where possible, signed by all parties.

If the return of the child to the custody of the parent(s) cannot be achieved within a specified period, then the child's right to alternative permanent placement takes precedence over the rights of the parents. A state of limbo must then be avoided through a permanent placement. 'A child's future and best interests cannot be held to ransom by indecisive parents'.[207] The social worker's obligation to provide reunification services will then terminate.

° *Services to the child, the family and the caregivers*

Where a child has to be removed from his or her parent to appropriate alternative care, every effort must be made to return him or her to the parent as soon as possible, unless there are highly exceptional reasons to the contrary. This is to be achieved through services designed to help overcome the difficulties which have led to placement. If this is not possible, contact with other significant persons in the child's life such as grandparents, other relatives and friends, should be maintained if this is in the best interests of the child. The child's personal history including his or her social and cultural background, must be respected.[208]

Services to the family of a child who is placed in out-of-home care should be delivered with a high

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207 Department of Welfare, 1998: Information Guide, p 23.

208 L Stuurman, 2000: Child Protection Comparative Research: Children in Need of Care or at Risk of Harm., SA Law Commission, 40.

level of intensity before, during, and after placement. If a partnership of trust and cooperation can be established between parents and social service workers by the time the child moves into care, which is usually a highly painful phase for all concerned, the prospects for successful reunification services are greatly increased. In Britain it has been estimated that about 90% of children in care at some stage return to live with their parents or in their home communities.[209] Thorburn cites research which indicates considerable success in achieving family reunification where adequate services, including financial and material help are delivered.[210] There are also research findings to the effect that children for whom family rehabilitation has been tried are able to settle more effectively, even if they are eventually placed in permanent substitute family care.[211]

The specific service needs of each child and family should as far as possible be defined in the course of a thorough assessment process, and should be spelled out in the service plan. For example, a parent may need specific help with developing parenting skills, achieving impulse control, or overcoming a drinking problem. A couple may require help in stress management or conflict resolution. A child is likely to need considerable help in dealing with past traumas and learning new life skills in order to settle either in his or her own family or in a permanent new home. Especially in cases of in-family child sexual abuse and of severe physical abuse, there will be a need for clarity as to the prognosis of the offender for rehabilitation, the types of services to be offered, and the consequences of non-compliance with treatment. This may involve work within the framework of an order issued by a criminal court.

Services to the child will in the nature of the situation involve support for and assistance to the caregivers, especially where foster care is involved. Intensive services may be required depending on the level of training and experience of the substitute parents, the willingness and ability of the biological parents to work cooperatively with them, and the specific problems of the child. The caregiver is expected to play a key role in facilitating contact between the child and his or her parents and other significant family members and promoting positive relationships between them, as well as playing an educative role by helping them e.g. to increase their parenting skills, understanding of child development and so forth. Caregivers may experience considerable inner

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209 Thorburn J **Child Placement: Principles and Practice** (second edition) Aldershot: Arena 1994, 73.

210 Ibid.

211 Ibid 75.

conflict in playing these roles, in which case the support of social service personnel will be particularly important. The nurturing of the parents' efforts to develop their relationship with their child is a key aspect of working for permanency – these efforts may either help achieve reunification or, conversely, help all concerned to realise that reunification is not possible.

° *Reviews*

Regular reviews are essential to ensure that the permanency plan is on track and to take corrective action if this is not the case. All the relevant role players should, where possible, be active in the review process. In many jurisdictions, the time-frame for review processes is set out in law or may be determined by the court ordering a particular course of action for the child. The age of the child may be a factor in setting review dates; e.g. a shorter deadline may be set in cases involving infants and very young children.

° *Transitional phase and aftercare*

The transition from a statutory placement to being reunited with the parent or guardian or a significant other person, should be dealt with in a supportive and sensitive manner and all parties concerned should be heard. Preparation for the transition is vital to ensure that such a transition will be as smooth as possible, and to promote the child's chances for a successful reunification as well as his or her reintegration into the community. A transitional care plan should be drawn up to support the re-entry of the child or young person into the biological family, or a new permanent family, or independent living. Aftercare services are then advisable to assist all concerned to successfully deal with the ongoing reintegration process.

10.4.3 **Possible outcomes**

° *Family reunification*

The first placement option to be explored is the possibility of family reunification.[212] Only if this is ruled out can another permanent plan be considered. Within the ambit of family reunification

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212 See Information Guide, Department of Welfare, 1998.

various possibilities exist including long-term ‘kinship care’, i.e. care by relatives.

° *Long-term foster care or kinship care with full or partial termination of parental responsibility*

Where it appears that the child’s best interests will be best served by remaining in the care of a substitute family, whether or not they are related to him or her, there may be a need to give some form of official security to this placement and create a sense of permanence both for the child and the caregivers. This may be achieved by transferring full, or at least an added measure of, parental responsibility from the biological parents to the substitute caregivers. Various legal possibilities for achieving this outcome will be discussed in the Chapter on Foster Care.

° *Adoption*

Adoption tends to be the placement of choice where parents voluntarily request this option for their child, or are deceased or untraceable over a protracted period, or where the prognosis for the return of the child (within a period consistent with the meeting of his or her developmental needs) seems negligible. Many countries have legislative provision for termination of parental rights for purposes of adoption as a means of achieving permanency for a child who would otherwise remain indefinitely in foster or residential care.

The CRC upholds the principle that the State shall respect the responsibilities, rights and duties of parents and extended family members. The child is entitled to know and be cared for by his or her parents and has the right to preservation of his or her family relationships without unlawful interference. Circumstances nevertheless arise in which the termination of parental responsibilities is required in order to enable a child to achieve permanence, usually in a substitute family. Complex legal and philosophical problems arise in deciding the circumstances under which parental responsibility should be terminated.

° *Permanent residential care*

Although most current service models emphasise the short-term nature of residential care, in

practice it has been found that certain young people remain in long-term residential care.[213] In addition, at least one care model, contrary to the prevailing orthodoxy, is based on the concept of permanent residential care – namely the SOS Children's Village system which operates in a number of countries. Permanent residential care, like permanent foster care, must involve preparation for independent living and emancipation.

° *Preparation for emancipation, release into and support in independent living arrangements*

A significant number of children, due to inadequate service delivery, or despite intensive efforts at family reunification and/or the recruitment of substitute families, remain in care until they are able to function independently in the community. Where it becomes apparent that this will be the likely outcome for a young person, the caregivers and the responsible professionals must ensure that he or she is equipped with the necessary skills to function independently. Young people in alternative care are particularly vulnerable where they have attained the age of eighteen years and their biological parents are untraceable, deceased or unable to support them; or they have foster parents who have died or are unwilling to continue to assist them.

Where a young person is set to enter an independent living arrangement without any support from his or her erstwhile caregivers or family, there is likely to be a substantial need for support over a transitional period. This process could be assisted by the appointment of a significant other person in this child's life, to assist and guide him or her towards independent living up to the age of 21 years or less, depending on his or her level of maturity.

10.4.4 Existing South African system

Provision for permanency planning was not initially spelled out in the Child Care Act 74 of 1983 but has always been implicit. Where a child is placed either in his or her own home under supervision, or in any form of substitute care, in terms of section 15 of the Act, the relevant order is valid for a maximum of two years. Thereafter it will lapse, thereby effectively restoring the child to the normal

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213 See Thorburn, J **Child Placement: Principles and Practice** 127-132. Such a child may e.g. have had bad experiences in foster care and not want to join another family, or have been so badly abused that he/she cannot adapt to placement in another family, or have significant ties with the biological family who nevertheless remain unable to meet his or her needs. A child in the latter category has often entered care in adolescence and the family may e.g. now include a step-parent, creating re-entry problems.

custody of the parent(s), unless the Minister of Social Development extends its validity for a further period not exceeding two years, or parental responsibilities are terminated through adoption. Initially, the fact that an order for substitute care of a child had been extended in terms of s16 constituted grounds to dispense with the parent's consent to adoption.[214]

Amendments to the Regulations which came into effect in April 1998 introduced far more explicit provision for permanency planning than had existed in the past. Regulations 2(4)(b) and (f) require that details of efforts at early intervention and prevention of the need for placement, as well as a plan for family reunification where applicable, be included in the social worker's report supplied to the court in terms of section 14. Regulation 13(1) requires that the child's caregiver should have access to a range of services. Regulation 15 provides for reports aimed either at the discharge or transfer of a child or the extension of the existing order to be based on a developmental assessment of the child and to 'reflect the existing and future developmental programme for the child and family as well as services provided to the child and family to meet developmental goals …'.[215] These changes to the Regulations reflect the IMC's commitment to developmental assessment, planning and services with an emphasis on achieving permanency.

In terms of section 19(b) of the Act, consent by a parent to the adoption of a child may be dispensed with by the court, after a proper hearing, in order to promote and secure a permanent placement in the interests of a child where there is a poor prognosis for his or her return to parental care. This applies to the parent or guardian:

- who as a result of mental illness is incompetent to give any consent; or
- who has deserted the child and whose whereabouts are unknown; or
- who has physically, emotionally or sexually assaulted, ill-treated or abused the child or allowed him or her to be so assaulted, ill-treated or abused; or
- who has caused or conduced to the seduction, abduction or sexual exploitation of the child or the commission by the child of immoral acts; or
- who is withholding his or her consent unreasonably; or
- who, in the case of a child born out of wedlock, has failed to acknowledge himself as the

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214 Previously section 19(b)(v), repealed in 1996.

215 Regulations 15(2), (4).

father of the child or who has, without good cause, failed to discharge his or her parental duties with regard to the child; or

° whose child, in the case of a child born out of wedlock, was conceived as a result of an incestuous relationship between himself and the mother of the child; or

° who, in the case of a child born out of wedlock-

(aa) was convicted of the crime of rape or assault of the mother of the child; or

(bb) was, after an enquiry by the children's court following an allegation by the mother of the child, found, on the balance of probabilities, to have raped or assaulted the mother of the child … ; or

(cc) who, in the case of a child born out of wedlock, has failed to respond, within 14 days, to a notice served upon him as contemplated in section 19A.

10.4.5 **Deficiencies in the existing system**

In practice, many children in South Africa remain in substitute care arrangements for many years. For some, their entire childhood is spent in foster care, residential care or various combinations thereof. Such children may thereafter be discharged from care without any support systems being in place, and without being ready to function independently. The following appear to be significant issues to be addressed in this regard:

° Permanency planning and the associated mechanisms are often not adequately understood by social workers and child care workers. The necessary training and supervision are often not in place.

° Resources within the child protection system are insufficient for permanency planning and the associated services, which are intensive and time-consuming. Such resources as are available tend to be concentrated at the level of initial referral and protective intervention, which are highly crisis-driven, leaving very limited provision for ongoing services.[216]

° The lack of provision for subsidised adoption for children who have special needs, or whose caregivers cannot support them without financial aid, results in many children remaining permanently in foster care. This does not offer the same sense of security as adoption and has a higher risk of breakdown.

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216 NCCAN **National Strategy on Child Abuse and Neglect**, 1996, 35.

- There is a lack of legal guidelines to assist the court in determining the circumstances under which parental responsibilities should be terminated.
- There is no distinction, for purposes of termination of rights, between mild and severe forms of abuse, and no provision for termination with respect to one child in a family when another has been grossly abused or even killed by a parent.[217]
- There is no clear definition of and no guidelines associated with, abandonment. Commissioners as a result set their own procedures for the management of such cases. These are at times incompatible with the developmental needs of the children – e.g. some commissioners refuse to free abandoned infants for adoption until a lengthy (and in practice usually fictional) 'police search' has been carried out for the parents. By the time this is over, the child's development has been compromised and the chances of adoption may be reduced. This, in conjunction with a lack of a permanency orientation among social workers, may result in infants being institutionalised and 'drifting in care' for years.
- In combination with the lack of guidelines for the court, a lack of appropriate training for justice personnel has the effect that many commissioners of child welfare do not understand key aspects of child development, including children's need for permanency. It has been the experience of many social workers that some commissioners are extremely unwilling to use the existing provisions for termination of parental rights, even where the most compelling reasons exist.
- There is no provision for termination of parental responsibilities other than for purposes of adoption by a specific person or couple. This is a problem where a parent is habitually violent or very disturbed and disruptive. Children of such parents whose needs would best be met in a family environment may grow up in institutional care, because prospective foster or adoptive families, along with the children concerned, would be endangered or subjected to intolerable stress if placement were attempted.
- Financial and legal provision for children in foster or residential care ceases at age eighteen or soon afterwards. The needs of children who 'graduate' from care without having adequate support systems are not catered for, and they are at risk of becoming destitute, involving themselves in crime, etc.

10.4.6 Comparative review of other systems

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217 Hence a parent may be in jail for murder of one child, but be able to refuse consent to the adoption of another.

The principle of a planned approach to placement, intended to settle a child in a permanent environment as soon as possible, is widely reflected in modern child protection legislation. The aim, first and foremost, of promoting reunification of the child with the biological family, unless compelling reasons exist against this approach, is clearly embodied in the laws of many countries. Circumstances in which reunification services are not required are sometimes spelled out. Where efforts at reunification are unsuccessful, there is usually provision for parental rights and obligations to be terminated. In some jurisdictions, termination is linked specifically with adoption, while in others it can be used as a means of freeing a child for adoption without prospective adopters as yet having being identified. Laws in some countries recognise the significance of the developmental stages of children for purposes of attachment to substitute parent figures, and make differentiated provision for termination of parental rights based on the age of the child. Legislation may or may not make specific provision for continued relationships with parents and/or other significant persons after termination.

Several countries have detailed legal requirements concerning the development and documenting of plans for children who come to the attention of the courts, especially where separation from the family is involved. For example, in New Zealand, before a court issues an order that a child be placed in alternative care, it must be in possession of a plan for the child, prepared by designated persons in accordance with specific requirements.[218] This plan must:

(a) Specify the objectives sought to be achieved for that child or young person, and the period within which those objectives should be achieved;
(b) Contain details of the services and assistance to be provided for that child or young person, and the period within which those objectives should be achieved;
(c) Specify the persons or organisations who will provide such services and assistance;
(d) State the responsibilities of the child or young person, and of any parent or guardian or other person having the care of the child or young person;
(e) Contain such matters relating to the education, employment, recreation, and welfare of the child or young person as are relevant.[219]

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218 Section 128 of the Children, Young Persons and their Families Act 1989.

219 Section 130.

The plan which has been put in place for the child as described above must be reviewed after no more than six months in the case of a child who is under seven years at the time of the issuing of the court order, and no more than twelve months thereafter in any other case.[220] Kentucky also provides for a detailed placement plan.[221]

In the USA, all States provide for the termination of the legal parent-child relationship. There appears to be pressure on child protection authorities to apply for termination of parental rights if 'reasonable efforts' at family reunification have not succeeded within a specified period.[222] The Adoption and Safe Families Act (ASFA) was passed in 1997. Among its purposes was to clarify the requirement in the Adoption Assistance and Child Welfare Act (CWA) of 1990[223] that 'reasonable efforts' be made to preserve the family before a child was removed from his her home; and that, where a child was removed from the home, 'reasonable efforts' be made to reunify the family before termination of parental rights could be ordered by a court. The failure of State statutes to clarify this requirement had created the possibility of children being left in dangerous households, because agencies could not prove that they had been sufficiently diligent in their efforts to preserve the family. Later down the line, children were being trapped in temporary care situations because overburdened agencies could not prove to the court that they had tried hard enough to restore them to their families. On the other hand, some courts were simply rubber-

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220 Ibid, section 134. In New Zealand, permanency planning is wherever possible undertaken within the context of the Family Group Conferencing approach as described earlier in this chapter.

221 In terms of sections 20-7-764 of the Child Protection Reform Act 1996, the plan must: include the participation of the parents, guardian *ad litem,* and the child if possible; include the specific reasons for the removal and the specific changes that must be made before the child is returned home; include a statement regarding the time frames for the parents to accomplish those objectives and a measurement of those objectives; have objectives which relate to the reasons for the removal; include the parents' financial responsibility if any; address issues relating to visits by the parents, allowing for as much contact as is possible between the child, parents, siblings and other relatives with a close involvement, and as is consistent with the child's best interests; provide for placement as close to the child's home as possible; give preference for kinship placement; include provision for supportive and social services to all concerned, including the minimum frequency of contacts with the child (who must be seen at least monthly); and include a statement regarding the parent's participation or nonparticipation in developing the plan.

222 NCCANI **Grounds for Termination of Parental Rights. Statutes at a Glance Series**, 1999. A common pattern is for grounds to be defined which serve as the basis for termination of the rights of the parents, and for these to come into effect when 'reasonable efforts' to prevent placement of the child in care, or to reunify the family after such placement, are unsuccessful. Grounds for termination frequently include severe or chronic abuse or neglect; abuse or neglect of other children in the household; abandonment; long-term mental illness or retardation in the parent(s); long-term parental alcohol- or drug-induced incapacity; failure to support or maintain contact with the child; conviction of the parent(s) for a violent crime against the child or another family member; or a conviction where the sentence is so long as to negatively affect a child who has been placed in care.

223 94 Stat. 500; 42 U.S.C.

stamping agencies' unsubstantiated claims to have made the required efforts.[224]

ASFA removes the 'reasonable efforts' requirement where parents have subjected the child to defined 'aggravated circumstances', or committed or planned a crime of violence against the child or another child of the parents, or there has been involuntary termination of the rights of a parent with respect to a sibling of the child concerned. ASFA lays down as a condition for receipt of federal funding that state agencies must seek termination of parental rights if:

> A child has been in foster care for 15 of the most recent 22 months;
> A court has determined:
>
> •• a child to be an abandoned infant;
> •• that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired or solicited to commit such a murder or ... voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent.[225]

'Reasonable efforts' at family preservation prior to placement, and at family reunification after placement, are made subject, in terms of ASFA, to the consideration that 'the child's health and safety shall be the paramount concern'.[226] Some States specify shorter time limits than the 15 out of 22 months as set out by ASFA, especially for very young children.[227]

Meanwhile, criticisms against the provisions of the CWA have not been confined to its potential to keep children in care for long periods. There have also been criticisms that it has too readily allowed for termination of parental rights. An intention of the Act was to reduce the financial incentives for states to place children in foster care and to keep them there, by requiring them to 'provide preventive and reunification services geared to keeping families together before and after

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224 Herring, DJ 'Inclusion of the reasonable efforts requirement in termination of parental rights statutes: punishing the child for the failures of the state child welfare system' (1992) 54(129) **University of Pittsburgh LR** 139-209.

225 NCCANI **Grounds for Termination of Parental Rights. Statutes at a Glance Series**, 1999.

226 Section 101(a)(A).

227 NCCANI **Grounds for Termination of Parental Rights. Statutes at a Glance Series**, 1999.

state intrusion'.[228] But Guggenheim, for example, suggests that 'in an increasing number of cases, states are destroying the legal relationship between parents and children for no good purpose and that, as a result, a record number of children have become legal orphans'.[229] The writer suggests that part of the problem has been an over-reliance on theory emphasising the importance of a consistent 'psychological parent' figure to the exclusion of other considerations, e.g. the quality of substitute care received, and the need of children to know their biological parents.[230]

Canadian law has an emphasis on permanency planning similar to that in the USA. The aim appears, in general, to be to return the child home after the period set down in a voluntary placement agreements, which are generally of six months' or one year's duration, with limited options for renewal under specified conditions. If such an agreement is not adequate to protect the child, or if the services under such an agreement do not succeed in resolving the problems in question, a temporary protection order or supervision order may be issued by the court. Where such measures are also not adequate or fail to produce the required results, there is provision for the court to order permanent wardship of the child. Parental custody and guardianship are then terminated, and the provincial authority or a designated agency takes on these functions until the child is adopted, or has become independent, or the order is terminated by the court.[231]

Nova Scotia sets out age-based time limits for achieving permanency, in that an 'order for care and custody', in combination with any other official orders, may not exceed twelve months in the case of a child who was under six at the time of the initial order, or eighteen months where the child was under twelve.[232] One of the options available to the court from the outset is to place the child in the permanent care and custody of the protective service agency.[233] The court may make an order for parental access, a condition being that 'permanent placement in a family setting has not been

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228 Guggenheim, M 'The effects of recent trends to accelerate the termination of parental rights of children in foster care - an empirical analysis in two states' (1995) 29(1) **Family Law Quarterly** 121-140. In similar vein Tamilia, P 'A response to elimination of the reasonable efforts required prior to termination of parental rights status' (1992) 54(129) **University of Pittsburgh LR** 217-8 advises against termination of parental rights where there is no prospective adoptive parent available, due to the danger of a child being left in 'legal and psychological limbo'.

229 Guggenheim (1995) 29(1) **Family Law Quarterly** 121-2.

230 Guggenheim (1995) 29(1) **Family Law Quarterly** 124.

231 FPWGCFS, 1994: op. cit., 5ff; 17ff; 27ff; 53ff.

232 Section 45(1) of the Children and Family Services Act, 1990.

233 Section 42(1)(f).

planned or is not possible and the person's access will not impair the child's future opportunities for such placements'.[234] There are safeguards to ensure that this is not the option of first choice.[235]

In Ghana, section 26 of the Children's Act 1998 provides that 'a child under a care order whose parent, guardian or relative does not show any interest in the welfare of the child within a period stipulated by a Family Tribunal may be put up for adoption'. In Uganda, section 48(2) of the Children's Statute enables the court to dispense with the consent of parents who are 'incapable of giving it'.

In both England and Scotland conditions are set out in terms of which a parent's consent to adoption can be dispensed with in order to provide permanent alternative family care for a child.[236] Both countries also have provision for a 'freeing order' to be granted to an adoption agency, with the consent of the biological parents. This transfers parental rights not to adopters but to the agency, which can then place the child without fear of disruption if parents change their minds after a child has become settled in a family for whom the issuing of an adoption order is still pending. A criticism is that this may leave the child without any parent apart from the local authority; however it is a provision which facilitates permanency for a significant number of children.[237]

10.4.7 Questions raised and options mooted in Issue Paper 13 and the research paper

The following questions with a bearing on permanency planning were raised in Issue Paper 13:

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234 Section 47(1)(a).

235 Section 42(2) provides that removal of the child can only be ordered if the court is satisfied that services to strengthen the family and other 'less intrusive' alternatives have failed, have been refused by the parent, or will be inadequate to protect the child. Nova Scotia also places a legal requirement on the Minister of Community Services, and agencies set up in terms of the child protection statute, to provide a range of family support services (section 13).

236 In England these include 'unreasonable' withholding of consent, persistent failure to discharge parental duties, severe or persistent ill-treatment of the child, and neglect or abandonment of the child [Section 16(2) of the Adoption Act, 1976].

237 Section 18 of the Adoption Act, 1976; Edwards, L and Griffiths, A **Family Law** Edinburgh: W Green / Sweet and Maxwell 1997, 184-5.

Should subsidised adoption ... become an option in South Africa?

Should the existing concept of foster care be redefined?

Should section 19(b) of the Act be amended to identify situations in which refusal of parental consent (to adoption) may be regarded as "unreasonable", or should the ground be changed to allow for dispensing with parental consent where this is "in the best interests of the child"?

How should (a new children's statute) deal with abandoned children?

There was overwhelming support for provision for subsidised adoption, with a few dissenting or qualified views based on concerns that such a measure would be unaffordable or could lead to abuse.[238] There was also agreement with the idea of broadening the concept of foster care to allow for a permanent form thereof.[239]

Both Issue Paper 13 and the research paper used at the focus group discussion were workshopped before the emergence of the recent lobbies for a universal basic income grant and a universal grant for children. Hence the idea that a non-means-tested grant might be accessible to every child, supplemented by an additional allocation in the case of e.g. a disability or chronic illness, did not enter the discussions at the time. Such a system would of course facilitate adoption by foster parents in the absence of an adoption subsidy.[240]

There was support both for the idea of identification of situations in which refusal of parental consent to adoption should be regarded as unreasonable and for using the 'best interests' criterion

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238 In support were a majority of provincial workshop participants, as well as Health and Human Rights, SANCCFW, Phoenix Child Welfare Society, NICC, Johannesburg Institute of Social Services, Cape Law Society, Durban Child and Family Welfare Society, Disabled People South Africa, and Mr DS Rothman: Commissioner of Child Welfare. Dissenting were the Natal Society of Advocates, which felt that such a system was not practical at this time, and the ATKV, which felt that such an approach would be unaffordable and could lead to abusive situations. The Department of Developmental Social Welfare, Northern Cape, suggested that the cost-effectiveness of subsidised adoption be investigated. Some provincial workshop participants cautioned against the potential for use of children as a source of income. The DPSA said that people with disabilities should not be excluded from adoption, and Professor C Davel of Pretoria favoured foster parents having first option to adopt.

239 Durban Child Welfare Society, provincial workshop participants.

240 See the submission of the Alliance for Children's Entitlement to Social Security (ACESS) to the Committee of Enquiry into a Comprehensive Social Welfare System, April 2001.

in deciding on the termination of parental rights.[241] The view was expressed that commissioners were excessively hesitant to apply section 19(b)(vi), while others differed on this issue.[242] It was also recommended that a set of criteria be developed in terms of which refusal to consent would be considered as contrary to the best interests of the child.

In relation to child abandonment, family reunification was seen by participants in provincial workshop groups as being important where possible. It was also felt that there was a need for abandonment to be properly defined, and for consent to adoption to be waived after a given period of time where abandonment had occurred. Durban Child Welfare Society favoured immediate adoption for this group. Ms P Brink felt that abandoned children tended to languish in hospitals for long periods, with their legal status being unregulated.[243]

The following questions were raised in the research paper:

> *Is it possible and desirable for permanency planning to be ensured through legislation, and, if so, how could this be achieved?*
>
> *Should time frames be set for achieving permanency, based on the age of the child?*
>
> *What do we need to do to help families and communities successfully resume care of children who have been placed in residential or foster care?*
>
> *What additional resourcing is needed to make effective permanency planning possible?*

All who responded to these questions were in favour of legal provision to ensure permanency

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241 J Smith and D Rothman supported the former approach, with the SANCCFW, National Council of Women of SA, Cape Law Society supported by the Durban Committee, Durban Child and Family Welfare Society, and Professor C Davel favouring the latter.

242 Mr Rothman believed social workers' allegations that commissioners were reluctant to use this provision were based on ignorance of the way that courts have to deal with evidence; also that it was in the first place the court assistant who should use this ground, and that the test for reasonableness is when it is weighed against the best interests of the child. The Natal Society of Advocates had the view that the court should have wide discretion to decide what constitutes unreasonableness.

243 This respondent felt that lack of clarity as to who must take responsibility for such children led to their needs not being met. She felt that bureaucratic obstructions, discrimination and insensitivity were blocking black persons who wished to adopt.

planning.[244] Respondents were also in favour of time frames being set.[245] One group of respondents felt that time frames should be based on the age of the child and the circumstances and position of the parents, while another group felt that legislation should prevent children under seven being placed in institutions except as a last resort.[246] Subsidised adoption was again stressed as a means for achieving permanency,[247] as were various forms of family support and community involvement.[248]

With regard to helping families and communities resume care of their children, and resourcing needed for this purpose, the SANCCFW felt that in the early stages of placement parents could usually be motivated to work for the return of their children, and that a lack of sufficient social workers, staff turnover and lack of resources generally led to children remaining in care too long. Where several children were together in a residential care facility for a long period, the possibility of adoption by the caregivers could be investigated if appropriate. Long-term cluster home care was seen as another possibility.

10.4.8 Evaluation and recommendations

The Commission has opted for an approach to permanency planning which includes the following elements:

° **A requirement that in every case where there is application to a court for removal of**

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244 SANCCFW; Ms D van Heerden, Department of Welfare, Northern Cape; Ms T Odyar, Ms D Ritter and the GCWS; UCARC; Group 2 of the Pretoria consultative meeting; SANCCFW (Eastern Cape). The UCARC made the proviso that adjustments to plans should be made as necessary. Group 2 stated that the efficacy of reconstruction services should be assessed and they should be terminated if they were not succeeding; also that the court should review each case after two years to assess progress.

245 The SANCCFW felt that these would promote cooperation by the parents and that the setting of return dates by the court would assist. Ms Van Heerden favoured a twelve-month period for the achievement of permanency.

246 Ms T Odyar, Ms D Ritter and the GCWS; Group 2 at the Pretoria consultative meeting.

247 SANCCFW; Ms D van Heerden of the Northern Cape Department of Welfare and Group 2 at the Pretoria consultative meeting.

248 Ms T Odyar, Ms D Ritter and the GCWS saw a need for parental guidance programmes, aftercare programmes and emergency funds. The UCARC saw community awareness of the needs of children in foster and residential care as being essential. They also stressed the importance of dedication to the achievement of permanency goals. Ms S Leslie of the SANCCFW, Ms D van Heerden of the Northern Cape Department of Welfare and Group 2 at the Pretoria meeting recommended provision for subsidised adoption. Group 2 also suggested a home help system to develop parenting skills, as well as a neighbourhood-based monitoring system.

a child from the home, details are given of what possibilities for family preservation have been considered or attempted and why these are being excluded - with the proviso that the child's safety and wellbeing will take first priority.

- **A requirement that in every case where a child is placed in substitute care, the court will be supplied with a documented plan aimed at achieving stability for the child, with priority given to family reunification unless there are compelling reasons to the contrary. Reunification may involve permanent placement within the extended family circle. The plan must include time frames for reunification which are appropriate to the developmental stage of the child, as well as regular reviews.**

- **Waiving of the requirement for efforts towards reunification with any parent or caregiver who has subjected the child to assaults which have been life-threatening or liable to cause lasting bodily harm, or subjected a sibling of the child to such assaults, or caused the death of a sibling.**

- **Provision for very young children who have, on balance of probabilities, been intentionally abandoned, to be released for adoption with the minimum possible delay.**

- **Provision, in cases of apparent abandonment, for clear procedures to enable a finding to be made within the shortest possible time as to whether or not a child has been abandoned.**

- **Provision for children to be freed for adoption without the consent of the parents, where this can be considered to be in their best interests on the basis of a clearly specified set of principles. More specifically, it is recommended that the department or organisation managing the child's case be empowered to make an application to the children's court for the termination of all or certain parental rights and responsibilities over a child who at the time of placement**

  - **was aged seven years or more, and has been in foster or residential care for**

at least two years;

- **was aged three to six years, and has been in foster or residential care for at least a year; or**
- **was aged less than three years, and has been in foster or residential care for at least six months.**

It is further recommended that the children's court should be in a position to terminate all or some parental rights and responsibilities only if -

- **there are clear indications that the termination of parental rights and responsibilities would be in the best interests of the child;**
- **reasonable efforts have been made to reunify the child with his or her family and these have not succeeded, or the parents have refused to involve themselves in such efforts or have been untraceable, and there is a poor prognosis for the child's return to parental care within a time frame suited to his or her developmental needs; and**
- **there is a high probability that adoption or another form of permanent family care can be arranged.**[249]

When making an order for the termination of parental responsibilities and rights in a situation where adoption is not envisaged, the court may make an order assigning increased or full parental responsibilities and rights to the current caregiver.

- **Limited and circumscribed provision for termination of parental responsibility in cases where adopters have not yet been recruited, where family reunification is clearly not an option but where an end to parental involvement is necessary to facilitate the recruitment of, or the child's placement in, a permanent substitute family. When making an order for the termination of parental rights and responsibilities for purposes of facilitating adoption, the court may request the department or organisation which has made the application for such order to**

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249 On the suspension and termination of parental rights and responsibilities in general, see 8.7.4 above and 23.10.5 below.

re-appear before the court, within a period prescribed by the court, with a report on whether the child has been adopted or not. At such hearing, if the court finds that the adoption of the child is not likely, it may revoke the termination order and restore parental rights and responsibilities, provided that this is in the best interests of the child.

- **Provision for permanent forms of foster or kinship care.**

- **Provision for successful long-term foster placements to be converted to subsidised adoption arrangements where appropriate.**

- **Continued support for children and caregivers after reunification or transfer to a new permanent placement, until successful reintegration has been achieved.**

- **Continued support, over a bridging period, to children who turn eighteen while in care.**

10.5 Reporting and Registration of Reported Cases

10.5.1 Common features of reporting and registration systems

Legal provision for the reporting of cases of child abuse, whether mandatory or voluntary, is a feature of the child protection systems of many countries, although the approaches vary considerably. Typical features are (a) a legal compulsion to report abuse and possibly also suspicions of abuse, or (b) a process to facilitate voluntary reporting, or (c) a combination of the two. For example, there may be a legal requirement binding on every person who knows of or suspects abuse to report this to a specified authority. Alternatively, all reporting may be voluntary, or some categories of people such as health care professionals, nurses, social workers and teachers may be compelled to report cases of abuse which come to their attention, while members of the general public may be provided with channels to do so voluntarily. There is often legal protection, at least for those mandated to report, from criminal or civil action arising from any report made in good faith. Immunity may be absolute, as long as there is reasonable cause to report, or

qualified - e.g. with a specification that the report be made 'in good faith', whether or not the suspicion of abuse turns out to be correct. In the case of qualified immunity, there could be the possibility of a lawsuit against the reporter, based on an allegation that malice was involved, or significant facts were ignored.[250] Immunity may extend beyond reporting to participation in legal proceedings, the conducting of medical examinations and associated procedures such as taking photographs and x-rays, and placing the child in protective custody.[251]

Legislation to require and/or encourage reporting of child abuse is often linked to provision for a register of reported cases. This is usually intended to serve as a protective mechanism for children deemed to be 'at risk'. A specific authority may e.g. be given the responsibility to ensure that all children whose names appear on the register are being properly attended to. Provision may also be made for a register of offenders, usually to enable bodies which assign people to positions in which they will have close contact with children, to screen out those with a history of perpetrating child abuse. An important benefit of both child and offender registers lies in their being a source of data on trends and patterns in child abuse, which can serve to guide policy development, planning and budgeting for the relevant sectors.

When reporting systems were first introduced in the USA and the UK several decades ago, the emphasis was on ensuring protection of abused children and support to families under severe stress. There has since come to be an increased weighting towards investigative processes and mobilisation of the criminal justice system – a shift in focus which has given rise to concern in some quarters.

In all aspects of a reporting and/or registration system, questions of the ethics surrounding confidential relationships arise. In addition, decisions have to be made relating to the levels of certainty which are required before the duty to report arises or a case is registered – e.g. 'reasonable suspicion' vs. clear knowledge that abuse has taken place. In the matter of offender registers, for example, there is a strong school of thought to the effect that only a criminal conviction would justify inclusion on such a register. Dissenters point out that very few paedophiles are in fact

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250 Allen, J and Hollowell, E 'Nurses and child abuse/neglect reporting: duties, responsibilities, and issues' (1990) 40(2) **The Journal of Practical Nursing** 56-9; also George, J and Quattrone, M 'Law and the emergency nurse' (1988) 14(1) **Journal of Emergency Nursing**34-5.

251 Ibid.

convicted, and hold that there is a need for known but unconvicted perpetrators of abuse to be prevented from moving from one children's service to the next as their activities are uncovered.

Reporting and registration systems have their origins in First World countries with highly developed human service systems. In developing countries such as South Africa, which lack this kind of infrastructure, there is a need to clearly identify the aims which reporting can reasonably be expected to achieve, and the resourcing which would be needed in order to achieve such purposes.

10.5.2 Existing situation in South Africa

South Africa has followed the pattern set by the USA since the 1960's in making the reporting of child abuse compulsory, with failure to do so being a criminal offence for those to whom the obligation applies. It has also over the years followed the American approach of steadily increasing the range of mandated reporters. In terms of section 42(1) of the Child Care Act of 1983 as amended, reporting of suspected ill-treatment of children is now mandatory for dentists, medical practitioners, nurses, social workers, teachers, and persons employed by or managing children's homes, places of care and shelters. The obligation to report applies when any such person 'examines, attends or deals with any child in circumstances giving rise to the suspicion that the child has been ill-treated, or suffers from any injury … the cause of which probably might have been deliberate, or suffers from a nutritional deficiency disease'.

Persons mandated to report in terms of the Child Care Act must send notifications of cases of suspected abuse to the Director-General of the Department of Social Development on Form 25, as supplied in the Regulations as amended in 1988. The Director-General is then required to request a police officer, social worker or authorised officer to take appropriate steps, and to call for an investigation into the circumstances of the case and a report on these circumstances and on action taken, within 30 days. The Director-General may in certain cases instruct that the alleged perpetrator be removed from direct contact with children (presumably where such a person is employed in a registered or government-operated children's facility), and that the matter be referred to the SAPS for possible prosecution.[252]

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252 Regulations 39A (2) and (3).

Section 4 of the Prevention of Family Violence Act of 1993 also creates a legal obligation to report actual or suspected abuse. This applies to anyone who 'examines, treats, attends to, advises, instructs or cares for any child in circumstances which ought to give rise to the reasonable suspicion that such child has been ill-treated, or suffers from injury the probable cause of which was deliberate'. The Act requires that a report be made to a police official, a commissioner of child welfare or a social worker employed by a registered welfare organisation.[253]

The concept of a register based on mandated reporting of child abuse was introduced in South Africa law in April 1998, in new Regulations under the Child Care Act. The purpose of this register is the protection of children, and it will capture information obtained from three sources: criminal court convictions, children's court findings, and notifications received in terms of section 42(1) of the Act. Some uncertainty arises from the wording of Regulations 39B(2)(e) and (f). In terms of the former, identifying details of a perpetrator are to be included after conviction by a criminal court. But in terms of the latter, 'details of the relationship between the child and the perpetrator' must be revealed even where an alleged perpetrator has not been convicted. Such details may serve to identify the person and thus circumvent the protection provided to unconvicted persons by Regulation 39B(2)(e). It may be necessary for the Constitutional Court to decide whether an alleged perpetrator's right of privacy as per section 14 of the Constitution is contravened by Regulation 39B, and also whether this right should be secondary to the right of children to protection.

10.5.3 **Deficiencies in the existing system**

The lack of coordination between the reporting provisions of the Child Care Act and the Prevention of Family Violence Act has been a source of considerable confusion. Until recently there was no clear system for reporting cases in terms of either Act, and there has been widespread failure to observe their requirements. Although the 1998 amendments to the Child Care Act brought some clarity into the situation, many uncertainties remain. Definitions to guide reporting are lacking, and there is no clarity as to the timing and the level of certainty involved – i.e. whether notification should occur immediately an allegation is received, or only after there has been some assessment

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253 Section 6A of the Aged Persons Act 81 of 1967 also provides for the mandatory notification of abuse of aged persons by certain professionals.

of whether abuse has indeed occurred or there is at least some basis for suspicion of abuse. This problem exists in part because there is also no differentiation between criteria for reporting and for registration. Further, there is no clear process for deregistration. Neither is there clarity as to whether only current abuse falls under the reporting requirement, or whether past incidences which come to light later (possibly after many years) are also covered. There is, in addition, confusion among practitioners as to whether the reporting requirement in relation to 'nutritional deficiency disease' applies only where this results from deliberate failure by a caregiver to feed a child, as part of a pattern of abuse, or whether it also applies in situations of sheer poverty.

Despite the new Regulations, the reporting and registration system in terms of the Child Care Act is not yet fully functional in much of the country, although the Department of Social Development is engaged in a concerted process of promoting implementation. Cases of child abuse are of course being referred and dealt with - social workers, police and others have continued to respond to reports according to the directives of their employing bodies. The SAPS Child Protection Units and specialised officers have an internal reporting system which has been providing the only hard national data concerning the incidence of child abuse. The national and provincial Departments of Social Development now have databases in place which should, in the near future, begin providing statistics as regards cases of abuse which come to the attention of the formal welfare sector.

The Child Care Act provides no guidance as to when instances of ill-treatment will or will not be referred into the criminal justice system rather than being dealt with purely via child protection and family support interventions. This is likely to be a major consideration for people faced with a decision as to whether to report abuse. At present the Director-General has discretion to make a decision in this regard, but no guidelines are set down for this purpose. There is also no clarity as to whether, and if so in what form, there should be any linkage between the police data base on crimes against children and the Child Protection Register. Disagreements with regard to the sharing of information arise from time to time between police and social workers, based on the differing ethical and legal frameworks within each group operates.

Although section 42(6) of the Child Care Act provides immunity from legal proceedings for mandated reporters acting in good faith, the Act does not cover non-mandated persons who report abuse. According to the Department of Social Development's legal division no proceedings can

be brought against someone who truthfully and in good faith reports a concern regarding possible abuse; however the lack of specific protection could be considered to be a gap in the law. The argument for improved protection for informants has been strengthened by recent legal developments concerning access to information. Social workers are obliged to keep information concerning clients confidential.[254] However, this could be overridden by a court, as communications with a social worker are not regarded as privileged in South African law. The Promotion of Access to Information Act 3 of 2000 creates mechanisms whereby a person who is named in a notification of a case of alleged or confirmed abuse of a child might demand to know the identity of the informant. Given the climate of intimidation and reprisals which not infrequently surrounds such matters, the question arises as to whether some form of legal protection should be attached to reporting provisions.

The NCCAN has pointed out that reporting in isolation from the necessary resourcing and management serves no useful purpose. It may merely serve to increase the vulnerability of the child, given that disclosure creates a crisis which, if not properly managed, can compound his or her trauma.[255] The NCCAN suggests that reporting has in this country has tended to be treated as a magical solution. Concern in this regard has also been voiced as follows:

> As public and official alarm about abuse has mounted, the reporting requirement has been extended to additional categories of people, as if this on its own could be expected to solve the problem ... expansions to reporting legislation have not been accompanied by any increase in resources to deal with reported cases … Neither has there been any apparent awareness … that the child protective service system to which notifications are supposed to be directed has all along been extremely ill-equipped to handle them.[256]

10.5.4 **An international perspective**

° *Mandatory vs voluntary approaches*

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254 This is laid down in the Rules relating to the acts or omissions which constitute unprofessional or improper conduct, as laid down under section 27(1)(c) of the Social Work Act of 1978.

255 National Committee on Child Abuse and Neglect, 1996: "National Strategy on Child Abuse and Neglect", Department of Welfare and Population Development, p. 40.

256 Loffell, JM 'Dilemmas and critical choices for child protective legislation in a developing country', paper presented at ISPCAN Congress, Durban, 2000.

As mentioned earlier, two basic approaches are to be found in relation to the reporting of child abuse – those which facilitate voluntary reporting, and those which make reporting mandatory under threat of criminal sanctions. Various combinations of the two are often used, with reporting being mandatory for specific categories of people and voluntary for the broader population.

New Zealand provides an interesting example in having reached a decision after intensive deliberation, paying heed to the impacts of mandatory reporting laws elsewhere in the world. That country in 1994 decided not to go the route of mandatory reporting, but rather to emphasise public education and voluntary reporting protocols.[257] Provision was made for any person to voluntarily report suspicions of child abuse, and for the protection of such persons against civil, criminal or disciplinary reprisals except where the information was provided 'in bad faith'.[258]

Likewise, section 53 of Kenya's draft Children Bill of 1994 provides that a person having cause to suspect that a child is 'in need of protection or discipline' **may** report his or her concerns to an 'authorised officer'. In the UK, the Children Act of 1989 does not refer to reporting, although there are apparently firm guidelines in place, developed jointly by the different disciplines and authorities involved, in terms of which specified persons are regarded as having a 'duty to report' suspicions of abuse. These include the police and certain social workers.[259]

In the USA, in contrast, all states have laws compelling a range of professionals, and in many cases any person having grounds to believe that a child is being abused, to report this information. The persons typically required to report are physical and mental health care professionals, coroners, social workers, law enforcement officers and child care providers. Some states include school personnel, pharmacists, firefighters, paramedics and commercial film and photographic processors.

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257 Department of Social Welfare, 1996: "Strategic Directions", Post-election briefing paper, Wellington, 132. Section 7 of the Children, Young Persons and their Families Act of 1989 was amended in 1994 to include requirements that the Director-General of Social Welfare 'raise public awareness of child abuse and how to prevent it and information about when and how to report it'; 'work with all the relevant government and non-government agencies to develop individual but interconnected protocols on reporting child abuse'; and 'monitor the effectiveness of these protocols'. See also 10.2.9.3 above.

258 Section 15 of the Children, Young Persons and their Families Act of 1989.

259 Local guidelines and professional codes encourage other professionals such as teachers and health visitors to report. In its report the National Commission of Inquiry into Child Abuse recommends that such groups be 'strongly urged' to report abuse but stops short of recommending legislation to make reporting mandatory for them [see National Commission of Inquiry into Child Abuse (NCIPCA), 1997: "Childhood Matters", Summary of the report of the Commission, NSPCC, London, 2].

About nineteen states extend the requirement to the whole population.[260] Almost all jurisdictions in Canada other than Yukon have chosen the mandatory reporting approach.[261] In most Australian States and Territories, specified professional groups are required by law to report any suspected abuse or neglect to the relevant authority.[262]

Section 12 of the Children's Statute of Uganda (1996) contains a particularly broad notification provision - i.e. that any member of the community has a 'duty' to notify the local government council if he or she has evidence that any child's rights are being infringed. Section 17 of the Ghanaian Children's Act requires 'any person with information' regarding child abuse or a child in need of care and protection to report this matter to the Social Welfare and Community Development Department. Section 28 of the Namibian Draft Child Care and Protection Act (1996) contains a mandatory reporting provision very like that in South Africa's Prevention of Family Violence Act.

° *Action following reporting*

Where child protection legislation includes provision for a reporting system, this is generally linked with procedures for investigation and action, as already described in the case of the Child Care Act in this country. In contrast to the South African situation, however, there seems in most countries to be a clear assignment of responsibility for responding to reports of abuse. This task is normally vested in a public welfare authority, or occasionally the police. Often both of these work in

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260 NCCANI 1999: Issue paper - "Current trends in child maltreatment reporting laws", Child Abuse and Neglect State Statutes Series, US Department of Health and Human Services, 3-4.

261 FPWGCFS, op. cit., 5ff. In Nova Scotia, Canada, section 23(1) of the Children and Family Services Act of 1990 states: 'Every person who has information, whether or not it is confidential or privileged, indicating that a child is in need of protective services shall forthwith report that information to an agency'. There is protection from civil action against the reporter except in cases of false and malicious reporting. In Alaska, all 'practitioners of the healing arts' (a term which includes a wide range of conventional and alternative health care practitioners along with social workers and psychologists), teachers, child care workers and administrators, employees of crisis intervention and counselling programmes and certain law enforcement officers, are required to report instances in which they have 'reasonable cause to suspect' that a child has been harmed through abuse and neglect, to the Department of Health and Social Services (Alaska Statutes 47.17.020). Other persons are entitled but not compelled to report such instances. Law enforcement agencies are also required to notify the Department of instances of harm to a child. In Ontario, all citizens are required to report known abuse, and a requirement to report any suspicion of abuse or neglect was due to be extended from professionals such as teachers and doctors, to all citizens in the course of 1998 (Globe and Mail, Toronto, June 13 1998: A3).

262 See ACT Community Law Reform Committee Report no. 7, **Mandatory Reporting of Child Abuse**, ACT Community Law Reform, Canberra, 1993, 18ff. In the Australian Capital Territory, one of the few jurisdictions without a legal compulsion for specified professionals to report, the Community Law Reform Committee after extensive investigation recommended a phased approach which would emphasise voluntary reporting through targeted education, and bring in mandatory reporting if this approach failed (83).

partnership with each other and with e.g. the judicial, health, and/or education authorities, with one or other carrying the overall case management function.[263]

Different approaches are evident in the extent to which abuse notifications do or do not automatically lead to the involvement of the police and criminal courts. In an analysis emanating from the American Humane Association it has been observed that, in the USA, 21 states use a 'therapeutic' model. Within this approach, law enforcement agencies are only called in for specific purposes and to a limited extent. Another 24 states use a "hybrid" model, combining therapeutic and law enforcement approaches to child abuse, with the social service authority taking the dominant role. Certain problems, e.g. severe physical abuse or sexual abuse, are automatic 'triggers' for the involvement of law enforcement agencies. In contrast, in a relatively few jurisdictions which use the 'justice' model, law enforcement bodies are substantially in control of the intake and investigatory process, calling in the social services in defined situations. It is suggested that the therapeutic model is more effectively directed towards the social and economic rights of the child as outlined in the CRC, while the justice model is geared to his or her political rights. Each has built-in advantages and disadvantages, while the hybrid model seeks to address the range of rights in an integrated manner.[264]

° *Registration of abused children*

In England children are listed in the child protection register under four main categories representing the primary forms of abuse, i.e. neglect, physical injury, sexual abuse and emotional abuse. The Child Protection Committee in each local area has a duty to maintain a record of the names of children within that area who are considered to be at risk of significant harm. In the USA, 42 States and the District of Columbia have central registries created by statute. These are

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263 In New Zealand, the police officer or social worker who receives a report must undertake or arrange an investigation in consultation with a Care and Protection Resource Panel. In Australia, notifications are generally investigated by a Family Services Department. Investigations may be conducted in conjunction with the police where the alleged incident constitutes a crime. In England, the local authority is responsible for investigating and taking any necessary action in relation to reported child abuse, or of arranging for these functions to be carried out. In most states in the USA, a state or county social service authority has the primary responsibility. In Uganda, the local government Secretary for Children's Affairs may summon the person alleged to be responsible for the infringement of a child's rights and, if the matter is not resolved in this way, refer the matter to the Village Resistance Committee Court for adjudication.

264 Bollenbacher, V 'The effect of the State child protection model on securing children's rights: debunking myth models and constructing legal rights', presentation at ISPCAN Congress, Durban, 2000.

typically used 'to aid social services in the investigation, treatment, and prevention of child abuse cases , and to maintain statistical information for staffing and funding purposes'.[265] The relevant State laws have a variety of emphases. Some provide specifically for cooperation with other States and with centralised structures, some for the use of the material as a resource in the planning, management and evaluation of services, and some for the tracking of the investigative and protective process, and/or the monitoring of pending cases.[266] As of September 1993, seven Australian States/Territories had central registers containing information pertaining to notified cases of child abuse, and five of these held additional information concerning perpetrators.[267] The registers were seen as 'potentially valuable sources of information for workers involved in intervention, policy makers acting on empirical information and Governments considering the need for increasing or reducing financial resources in this area'.[268]

° *Registration of offenders*

In South Carolina, USA, persons convicted of, or pleading guilty to or not contesting, charges of violent or indecent offences against others, or of physical or sexual abuse of a child in a criminal court are entered on a 'Central Registry of Child Abuse and Neglect'.[269] In addition, a family court can add a name to the register if a child is found to have been abused or neglected. An agency can petition the family court to order the entry on the register, in which case the perpetrator may request a hearing prior to a final decision being reached. The register can be used to screen potential employees and volunteers.

In England and Wales, the Protection of Children Act of 1999 provides for the Secretary of State to keep a list of individuals who are considered after some form of due process to be 'unsuitable to work with children'.[270] This is part of a process aimed at integrating data bases previously held

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265 NCCANI - Child Abuse and Neglect States Statutes Elements: Central Registries/Reporting Records, No. 9: Establishment and Purpose, 1.

266 Ibid, 5ff.

267 ACT Community Law Reform Committee, Report no. 7, **Mandatory Reporting of Child Abuse**, 19-20.

268 Ibid, 20.

269 Section 20-7-650 of the Child Protection Reform Act of 1996, as amended.

270 See also Part VII of the UK Care Standards Act 2000, 19.4.4 below, and Chapter 42 of the Commission's **Discussion Paper on Sexual Offences: Process and Procedure**, 2001.

by the police, education and health authorities. The Act makes four principal changes to the law with the object of both creating the framework of a coherent cross-sector system for identifying people unsuitable to work with children and achieving a 'one stop shop' to compel or allow employers to access a single point for checking the names of people they propose to employ in a post involving the care of children. This involves permitting checks against criminal records and two lists of similar kind of people considered unsuitable for work with children maintained respectively by the Department of Health and the Department for Education and Employment to be made via the Criminal Records Bureau.

First, the Act places the existing 'Consultancy Index List' (a list wholly confined to people considered unsuitable to work with children) of the UK Department of Health on a statutory basis, provides for the referral of names, creates a right of appeal to a new tribunal against inclusion on the list, and - with the leave of the tribunal, and to protect individuals from remaining provisionally listed for unreasonably long periods - allows individuals listed provisionally for at least nine months to request the tribunal rather than the Secretary of State to determine the question of permanent inclusion.

Secondly, the Act amends section 218 of the Education Reform Act 1988, which provides, essentially, for prohibiting or restricting the employment of teachers. Under those powers, the UK Department for Education and Employment maintains for analogous but wider purposes a list ('List 99') similar to the Department of Health list. To enable the 'one stop shop' to operate, access to List 99 is permitted. To this end, the Act provides a power permitting inclusion on List 99 on grounds that individuals are not considered fit and proper persons to work as teachers or in work involving regular contact with children. This enables a distinction to be drawn between people who, on the one hand, are included on List 99 because they are unsuitable to work with children and, on the other hand, teachers who are included on the list for other reasons e.g. for fraud and dishonesty. In this way people will be identified who should not be allowed to work with children in both education and childcare settings. The Act also provides for a right of appeal to a tribunal against inclusion on List 99.

Thirdly, the Act amends Part V of the Police Act 1997 to enable the Criminal Records Bureau established under that Act to disclose information about people who are included on either list along with their criminal records. In this way the Act provides a 'one stop shop' system of checking

applicants for child care positions against similar criteria through the gateway of the Criminal Records Bureau.

Fourthly, to complete the circle, the Act requires child care organisations proposing to employ someone in a child care position to ensure that individuals are checked through the Bureau against the Department of Health list and the relevant category of 'List 99' and not employ anyone identified on either list.

A child care organisation, or any other organisation, can refer a person deemed 'unsuitable' to the Secretary for inclusion on the list. Such referral may be on the basis of the dismissal of such a person due to misconduct - whether or not this has occurred in the course of the employment - which has 'harmed a child or placed a child at risk of harm'. Referral may also occur if the individual has retired or resigned in circumstances in which his or her dismissal would otherwise have been considered for such reasons, or if the person has instead been transferred to a non-child care position.[271] A person can also be listed if information not in the organisation's possession at the time of the employment, but which would have led to the person's dismissal or to consideration of dismissal, has subsequently come to light.[272] The provisions include in their ambit any employment agency or agency for the supply of nurses which has refused to continue to do business with the person concerned on the grounds of his or her having harmed a child or placed a child at risk of harm. Any child care organisation proposing to offer a person employment in a child care position is required to ascertain whether that person is listed, and is prohibited from offering employment to a listed person.[273]

The Interdepartmental Working Group on Preventing Unsuitable People from Working with Children and Abuse of Trust, which produced the report which preceded the Act, made detailed

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271 Section 2(2).

272 Section 2(3).

273 Section 7(1). The Secretary, on receiving information concerning such a person, if it seems that it may be appropriate to do so, must provisionally include him or her on the list. That person must then be approached for his/her comments on the information supplied by the organisation, and invite the organisation to submit relevant comments. The Secretary must then consider the information at hand and either confirm the person's inclusion on the list or remove him/her from it. Inclusion on the list will occur if the Secretary is of the opinion '(a) that the organisation reasonably considered the individual to be guilty of misconduct (whether or not in the course of his employment) which harmed a child or placed a child at risk of harm; and (b) that the individual is unsuitable to work with children'. [section 2(7)].

recommendations for a careful balancing of the right of children to protection and the rights of people who stand to be placed on the register. The group recommended access to the information on a differentiated basis, so as to avoid a situation in which people could be barred from all forms of employment, or information could be abused. Thus e.g. families employing nannies could be advised to obtain police certificates showing an absence of criminal convictions. Small informal organisations using volunteers would similarly be offered advice on good practice. Organisations specifically responsible for 'regularly caring for, training, supervising or being in sole charge of persons aged under 18' would qualify for more detailed police information as well as information from other lists. There was also a proposal that it be made a criminal offence for a listed person to seek employment in a position which involves working with children.[274]

Also informative are the criteria in terms of which a person is found not to be suitable to work with children or not a 'fit and proper person'. Section 11(1) of the Victoria Children's Services Act 1996, for instance, lists the following grounds:

(a) the person has within the 10 years preceding the application been found guilty of an indictable offence against the person or an offence involving dishonesty, fraud or trafficking in drugs of dependence where the maximum penalty exceeds 3 months imprisonment;
(b) the person has been found guilty of an offence against this Act or any previous corresponding Act;
(c) the person is not of sound financial reputation and stable financial background;
(d) the person is not of good repute having regard to character, honesty and integrity.

The Act specifically provides that the above grounds do not limit the circumstances in which a person may be considered not to be a fit and proper person to operate a children's service.[275]

° *Immunity from legal action and anonymity of reports*

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274 Annex H: Report of the Interdepartmental Working Group on Preventing Unsuitable People from Working with Children and Abuse of Trust, 1999. The Working Group points out that the information in question would also have relevance to bodies serving 'vulnerable adults'.

275 Section 11(3) of the Children's Services Act, 1996 (Victoria).

In the USA, all states as a requirement under CAPTA provide immunity from civil or criminal liability for individuals making reports of abuse or neglect in good faith.[276] Some jurisdictions distinguish between mandated and voluntary reporters – e.g. Massachusetts gives absolute immunity for mandated reporters, while voluntary reporters are only protected subject to the report having been made 'in good faith', and Vermont only protects mandatory reporters.[277] In Australia, Victoria, South Australia and Northern Territory provide immunity from civil liability for persons who report abuse, while New South Wales also gives immunity against criminal action.[278] In England the identity of a person who reports suspected abuse is protected, regardless of whether the informer is a health care professional or someone else.[279]

10.5.5 Debates on the merits of mandatory reporting

The Community Law Reform Committee of the Australian Capital Territory provides an overview of the arguments in favour of mandatory reporting which can be summarised as follows:

- Children are unable to defend themselves against abuse, and bringing abused children to the attention of the authorities is essential if further abuse is to be prevented and the causative factors addressed.
- Reporting provides data indicating the incidence and location of abuse, making it possible to identify trends and target areas and to allocate resources accordingly.
- The loss of choice in the matter makes the position of the medical or other helping professional easier – there is less likelihood of a loss of trust where the person who reports clearly has no option.
- Compulsory reporting brings in the expertise of other disciplines, thus individual practitioners are relieved of the sole responsibility for the complex problem posed by child abuse.
- Legal compulsion to report abuse represents public commitment to the protection of abused

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276 NCCANI - Child Abuse and Neglect State Statutes Elements, 1999: Issue Paper: "Current trends in child maltreatment reporting laws", US Dept. of Health and Human Services, 17.

277 Ibid, 17.

278 ACT Community Law Reform Committee, Report no. 7 **Mandatory Reporting of Child Abuse**, 25 ff.

279 As per the Access to Personal Files Act 1987, and the Access to Personal Files (Social Services) Regulations 1989.

children and promotes community involvement in achieving this end.[280]

On the other hand, many problems have arisen in relation to reporting and registration. These include the following: lack of adequate resources to deal properly with reported cases, distortions in the allocation of child protection resources, the potential for negative consequences for children and families, tensions between reporting requirements and professional ethics, and unsubstantiated reports.

Some writers point out that systems for the compulsory reporting of child abuse were inspired by doctors and developed on the basis of the public health approach of reporting infectious diseases.[281] These systems are thus based on the medical model in terms of which child abuse is seen as a 'disease' to be identified, diagnosed, 'treated' and 'cured', rather than being rooted in the structures of society.

Problems have grown with the substantial widening of the scope of reporting and registration laws since they were first introduced. In the USA the range of people required to report abuse increased, starting with doctors and moving across a range of service-providers and eventually, in many states, applying to all people.[282] At the same time, definitions of abuse broadened and the number of categories of abuse for which reporting was required mounted. Legislation which originally had a limited focus on children suffering physical injuries consistent with the 'battered child syndrome', as described by Henry Kempe and his colleagues from the 1960's onward,[283] soon expanded to cover sexual and emotional abuse as well as the various forms of neglect. Early concerns were raised about the possible potential for harm inherent in wide-ranging reporting laws. Sussman and Cohen,[284] for example, expressed concern that the system which was being created could 'invade and harm the lives of parents and children as easily as help them'.[285]

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280 ACT Community Law Reform Committee **Report No. 7: Mandatory Reporting of Child Abuse**, 55-6.

281 Lachman, P 'Reported Child Abuse in Cape Town', MD thesis, University of Cape Town, 1997.

282 E D Hutchison 'Mandatory reporting laws: Child protective case finding gone awry?' (January 1993) 38(1) **Social Work** 56 - 63.

283 Kempe RS and Kempe CH **Child Abuse** London: Fontana 1978.

284 A Sussman and S Cohen (eds) **Reporting Child Abuse and Neglect: Guidelines for Legislation** Cambridge MA: Ballinger as quoted by E D Hutchinson 'Mandatory reporting laws: Child protective case finding gone awry?' (January 1993) 38(1) **Social Work** 56 at 57.

285 Ibid, 57.

The reporting system, Hutchison points out, was founded on a number of assumptions, some of them questionable. For example, it is assumed that the legal compulsion to report will result in early identification of symptoms of abuse and the prevention of more serious incidents and deaths. This belief, however, is in turn founded on the assumptions that: '(1) professionals have the technology to engage in both early detection and secondary prevention, and (2) that the state will allocate the increased resources required by increased reporting'.[286] These assumptions have been found to be questionable even in the USA with its sophisticated infrastructure. Funding for services has lagged behind the numbers of reported cases and this has led to 'failure in the delivery of services to reported children'.[287]

A shift also seems to have taken place in the consequences of reporting, which was originally designed as a means of ensuring that a child at risk and his or her family received the necessary support and services.[288] Lachman refers to international experience and particularly recent British research, in terms of which the medical model has increasingly been combined with a coercive and adversarial approach emphasising the prosecution of offenders. This has led to a disproportionate allocation of resources to investigative processes, reducing the resources available for preventive and supportive services which he believes to be more likely to succeed in reducing the likelihood of child abuse. In the South African context he advocates against falling into what he calls the 'investigative trap'.[289]

Mandatory reporting laws cut across the confidentiality ethics of a number of professions, including medicine, nursing, psychology and social work. Serious concerns have been expressed about the potential negative consequences of allowing no room for the use of professional discretion in this regard. Particular difficulties have arisen in the USA relating to abuse which has occurred long ago

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286 Ibid, 57.

287 Lachman, MD thesis, 44.

288 'The central purpose of the child abuse/neglect statute is to protect children by identifying those who need the attention of child welfare professionals, not to aid in the criminal prosecution of the offenders' state Allen and Hollowell in the North American context (op. cit, 58). They go on to say that once the primary aim has been achieved, 'the medical privilege need not be abrogated further'. See also McKittrick, C 'Child abuse: recognition and reporting by health professionals' (1981) 16(1) **Nursing Clinics of North America** 111.

289 Lachman, MD thesis, 45. In similar idiom, paediatrician Margaret Lynch, addressing the recent 13th ISPCAN Congress in Durban, named mandatory reporting along with 'overinvestment in investigation' in a list of what she called 'elephant traps' in attempting to confront child abuse ('"Children's rights and child protection – working to meet new challenges", Kempe Memorial Lecture).

and is divulged in therapy, either by the victim or the perpetrator. Weinstock and Weinstock, e.g., speak of the reporting laws as 'an unprecedented threat to confidentiality' with serious attendant dangers. They suggest that these laws could lead to a steady erosion of patient-therapist privilege with all manner of issues possibly becoming open to notification requirements to satisfy the needs of law enforcers as time goes on. Patients who are wanting help in dealing with a history of abuse are less likely to reveal sensitive information if they believe that the therapist may turn informer. Sometimes, the writers comment, the therapist him or herself may be well placed to help the individual or family deal with the abuse, but is prevented from proceeding accordingly because of the compulsion to report.[290]

The consequences of reporting appear to be far from equitable. Numerous studies have been undertaken into compliance and noncompliance of mandated reporters with their legal obligation to report. Crenshaw et al cite findings from a number of sources to the effect that large numbers of mental health professionals opt not to obey the reporting laws, or use their own discretion in this regard. Reasons include lack of certainty as to whether abuse has occurred; lack of trust in child protection services, which are perceived to be overloaded and unable to respond adequately; and a belief that the practitioner can work effectively to prevent abuse without outside interference.[291] There have been recommendations from a number of sources in the USA for a more flexible approach to reporting requirements which would allow therapists to reach a decision in this regard which they believe to be consistent with the safety of the children in question and in the best interests of their clients.

Apart from the above concerns, a number of extraneous issues seem to affect the likelihood that a person charged with the duty to report will in fact do so. In the USA, racial minority families and lower income families have been found to be more likely to be reported for child abuse than

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290 Weinstock, R and Wrinstock, D 'Child abuse reporting trends: an unprecedented threat to confidentiality' 33(2) **Journal of Forensic Science** 418-31. These writers cite cases where the breaching of confidentiality by therapists to comply with the law has had devastating effects on their clients. The cases include situations in which there was no reason to believe that any child was in danger. They also make the point that, while the reporting laws are intended to protect children, the child protection system itself is capable of creating trauma for them which may exceed that which they experienced in the course of the initial abuse.

291 Crenshaw, W, Bartell, P and Lichtenburg, J 'Proposed revisions to mandatory reporting laws: an exploratory survey of child protection service agencies' (1994) 73(1) **Child Welfare** 15-27.

others.[292] Various studies have pointed to effects of age and gender,[293] practice setting[294] and a variety of personal factors[295] on the likelihood that practitioners will comply with reporting requirements.

Unsubstantiated reports pose particular dilemmas. In the USA this problem has been described as being of 'crisis proportions'.[296] The rate of false reporting appears to be particularly high in the case of anonymous reports.[297] In England, also, there is concern that names of children are too easily entered on the register, often on insubstantial evidence, and there has been a call for a criterion for proof of allegations to be introduced as a requirement for a child's name to be listed.[298] While non-substantiation of reports will generally not amount to proof that abuse has not occurred, the trauma to children and families which can result from fallacious or over-zealous reporting is enormous and can include stigmatisation, job losses and major disruption to relationships.[299]

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292 Hampton and Newberger, 1985, in Warner, J and Hansen, D 'The identification and reporting of physical abuse by physicians: a review and implications for research' (1994) 18 **Child Abuse and Neglect** 11-25.

293 Warner and Hansen (1994) 18 **Child Abuse and Neglect** 11 - 25.

294 There have been findings to the effect that doctors practising privately in small towns are less ready to report abuse than urban practitioners (Badger, LW 'Reporting of child abuse: influence of characteristics of physician, practice and community' (1989) 82 **Southern Medical Journal** 281-6). There is also evidence that abuse is more easily reported by doctors in the public health services than those in private practice (Morris, J, Johnson, M & Clasen, M 'To report or not to report - physicians' attitudes towards discipline and child abuse' (1985) 139 **American Journal of Disease of Children** 194-7). Significant differences have been found between mental health workers and child protection service workers in terms of grounds on which they would consider it necessary to report a suspicion of abuse (Deisz, R, Doueck, H, George, N and Levine, M, '*Reasonable cause*: a qualitative study of mandated reporting' (1996) 20(4) **Child Abuse and Neglect** 275-87).

295 See Morris, Johnson and Clasen, (1985) 139 **American Journal of Disease of Children** 194 -7; Pollak, J and Levy, S 'Countertransference and failure to report child abuse and neglect' (1998) 13 **Child Abuse and Neglect**, 515-22. According to the latter writers, a range of personal issues such as poor self-esteem, unresolved inner conflicts and a strong need for certainty may determine whether or not a case is reported. The life history of the reporter will influence the decision, as will 'gender, experience and the nature of professional training'.

296 Deisz et al (1996) 20(4) **Child Abuse and Neglect** 276. See also Pollak and Levy (1998) 13 **Child Abuse and Neglect** 515-22, who commented in 1988 that a steady rise in reporting rates in the USA over the previous decade had occurred together with a drop in the rate of substantiation of reports. A 1992 report designates 66.4% of reports from social service sources and 71.4% from mental health sources in New York State as being unfounded, while according to the National Centre on Child Abuse and Neglect in the USA in 1994, 54% of all reports were 'either unfounded or unsubstantiated' (Deisz et al (1996) 20(4) **Child Abuse and Neglect** 276.).

297 Adams, W, Barone, N, and Tooman, P 'The dilemma of anonymous reporting in child protective services' (1982) 61(1) **Child Welfare** 3-13.

298 Bedingfield, D 'The Child in Need: Children, the State and the Law', 1998.

299 Tiffany Jenkins of Families for Freedom in England refers to some potential dangers of protective investigation for family and community relationships as follows: 'The process of inspection blatantly infers to the child that they should not trust their parents – that a stranger from the social service department is ... the best protector of their interests … the school, colleagues, neighbours and other family members are consulted. Once accused, many spend years trying to regain the trust of these people. At a time when parental confidence is already low and

The costs of investigating unfounded reports have also to be taken into account, along with the resources taken up by the investigative component of the system as a whole in relation to the rest of the child protection system.[300] The following statement comes from Britain: 'The management of child protection is most developed around the reporting and investigation of alleged child abuse. It is least developed around preventive work with children at home'.[301]

In Australia, an enquiry by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission into children and the legal process has reported both strong support for and serious concerns regarding mandatory reporting. Critics point out that abusers are less likely to seek help if professional persons are required to report them, and that children themselves may be more reluctant to seek help if they know the perpetrator and fear that he will be prosecuted. Mandatory reporting may also deny children and families the opportunity of finding other ways to deal with the abuse.[302] The report states as a central concern that mandatory reporting is often instituted without adequate resources for its proper operation, and that it may siphon off resources needed for prevention and treatment. Child protection services in Victoria, e.g., found themselves less able to effectively protect children after the introduction of the system than before. The ACT Community Law Reform Committee sees its recommendations against the immediate introduction of mandatory reporting as 'inextricably linked to the resource issue', and states that 'it would be grossly irresponsible to introduce a system of mandatory reporting without at the same time ensuring that the whole child welfare system can cope with the new measures'.[303]

In the South African context, the following concerns have been voiced: mandatory reporting and registration have been imported more or less directly from countries where the basic survival needs of most of the population are met, and where highly developed service infrastructure in place. Superimposing child protection approaches in situations which differ vastly from those where they

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people are more mistrustful of one another, the consequences of false accusations and investigations can be to wreck homes and lives'. (1998: "How 'child protection' can destroy families", www.informin.co.uk/LM/LM113/Taboos.htm).

300 Lynch, cited above, states that in 1993 in the USA, three million reported cases were investigated and one million were confirmed, all at a cost of $4 billion.

301 NISW, op. cit.

302 ALRC 84, 1997:435, 82, 84.

303 ALRC 84, 82. The Australian Law Reform Committee recommended a phased approach based initially on voluntary reporting encouraged by targeted education.

have originated and lack the necessary back-up resources creates particular risks of secondary abuse.[304] Distortions arise from trying to address child abuse in isolation from its surrounding problems, and the vulnerability of children is heightened if abuse is exposed without being met with prompt and skilled intervention and the necessary follow-up services.

The question also arises in the local context as to whether it is helpful to criminalise e.g. mothers who fail to report partners who are family breadwinners, when they lack any alternative means of survival for their children and themselves and no state support is available to them.[305] In addition, account must be taken of the problem of intimidation of and violent reprisals against persons who report or intervene in abuse, given the low rate of successful prosecution of perpetrators, and the fact that protection cannot be guaranteed with current police resources. Further, many examples can be cited of cases where no meaningful form of protective assistance has been forthcoming from the welfare system either. Is it fair to criminalise those who fail to report without first putting in place the mechanisms needed to ensure the safety both of the child and the person who refers the case?

Hutchison points out that there were warnings as early as 1975 in the American context against proceeding with the expansion of reporting requirements 'before programmes to ensure adequate food, shelter, clothing and medical care for poor children and their families were in place'.[306] But the process continued, in a climate of entrenched reluctance to provide organised assistance to families. 'It is attractive to legislate against child abuse ... . So, expansion of the scope of the reporting laws went forward and created a national myth that children would be protected', says Hutchison.[307]

In relation to the registration of perpetrators, significant potential dangers have been noted. Freeman-Longo, referring to provisions which have been introduced in certain districts in the USA to allow for publication of the addresses of released sex offenders, and the harm to innocent people

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304 Loffell, JM 'Intervention in child abuse in the South African context – dilemmas and potentially abusive aspects', (1992) 5(1) **The Social Work Practitioner-Researcher**, 3-8.

305 This is an effect of section 4 of the Prevention of Family Violence Act – section 42 of the Child Care Act covers only designated professionals.

306 Hutchinson (January 1993) 38(1) **Social Work** 56 at 57, citing Sussman and Cohen (eds) **Reporting Child Abuse and Neglect: Guidelines for Legislation**, 61.

307 Ibid.

which has been the unintended consequence, speaks of 'feel-good legislation' - i.e. laws which create false reassurance while generating new forms of damage.[308] The recent 'name and shame' campaign by a British publication which made the names and whereabouts of released offenders known has produced further evidence of the hazards of such approaches. These include vicious vigilante action - at times involving cases of mistaken identity, stigmatisation of the victim - whose confidentiality is violated if the offender is a family member; and released offenders being driven underground so that monitoring and follow-up services become impossible. For such legislation to serve its purpose, it must incorporate adequate safeguards against such effects.

The National Committee on Child Abuse and Neglect (NCCAN) states as follows: 'Reporting is only useful to the extent that it:

- gives rise to appropriate and skilfully managed services which are immediate and ongoing; and/or
- provides data for planning and policy development'.[309]

The NCCAN nevertheless states that there is considerable consensus on the need for 'a co-ordinated data base linked with a single, effectively maintained Child Protection Register ... (to be) operated by the state using dedicated resources and person power'.[310] The appointment of an inter-disciplinary task group which would inter alia examine the ethical and technical issues involved, including those relating to the registration of perpetrators, is recommended as a component of the proposed National Strategy on Child Abuse and Neglect (NSCAN).

10.5.6 Options mooted in Issue Paper 13 and the research paper and responses received

Issue Paper 13 raised the following questions:

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308 'Invited commentary - Feel Good Legislation - prevention or calamity?' (1996) 20(2) **Child Abuse and Neglect**, 112.

309 NCCAN **National Strategy on Child Abuse and Neglect**, 1996, p. 41.

310 Ibid.

What, if any are the difficulties with the present provisions for reporting of child abuse? What kind of system should be in place to deal with reports of child abuse? What particular issues should be taken into account in future legislation in this regard?

Participants in the provincial workshops emphasised the need for clear definitions of abuse. The SANCCFW recommended inclusion of child labour, child trafficking and child prostitution as reportable forms of abuse; also that distinctions be made in the law between abuse which is suspected, alleged or confirmed. Durban Child Welfare Society (DCWS) likewise called for clarification of the level of evidence required for reporting.

Several respondents referred to a need for proper procedures, resources and services to be in place in order to ensure that reporting served a positive purpose. The National Council of Women of South Africa referred to the need for properly run and inspected places of safety for children reported. The DCWS called for a system ensuring proper planning and action to protect the child and address the family's problems, as well as a mechanism to detect prior offences by the perpetrator. Disabled People South Africa stressed the importance of what happens after reporting and the need for a system which would inspire confidence. The unpredictability of the present situation as regards police and court action, the granting of bail etc. was cause for concern.

The Cape Law Society felt that abuse should be reported to a court rather than a government official and that provision should be made for the courts to deal with after-hour emergencies. The ATKV referred to a need for the channels for reporting to be accessible and to be made well known. The Natal Society of Advocates also favoured improved public education about child abuse, with a view to the reporting of all abuse, with a central register being in place to serve as a basis for protection of children.

Mr D Rothman favoured extension of the reporting requirement to all persons, while the Durban Committee felt that it should apply to people in regular contact with children such as teachers, therapists and doctors. The Committee favoured a system allowing reporting to any of a range of bodies serving children. The Johannesburg Institute of Social Services supported the recommendations of the NCCAN. These include investigation of the experience of mandatory reporting elsewhere; the establishment of a committee of experts from the various disciplines involved to examine ethical issues; research to establish what data would be stored in the register

and the needs of users; a secure system for accessing information; education for mandated reporters; and immunity from legal action for all *bona fide* reporters.[311]

The research paper raised the following questions relating to reporting and registration:

Should a comprehensive children's statute include provision for:

- *mandatory reporting of child abuse for selected professionals?*
- *mandatory reporting by anyone who encounters child abuse?*
- *discretionary reporting accompanied by campaigns to promote reporting, and provision for protection against legal action for bona fide reporters?*
- *allowance for the exercise of discretion, subject to conditions, for professionals involved in confidential relationships?*
- *legal backing for professionals engaged in tasks in response to reports - e.g. medical examinations, social work investigations etc.?*
- *indemnity against legal action and protection of the identity of any person who in good faith reports actual or suspected child abuse?*
- *other options? (specify).*

If you favour mandatory reporting, what should be its purpose(s)? Please number in order of priority, with no. 1 as most important:

- *Identifying children at risk in order to ensure the necessary protection and support.*
- *Identifying children at risk in order to monitor their wellbeing.*
- *Identifying and rehabilitating offenders.*
- *Identifying and punishing offenders.*
- *Gathering data for purposes of planning and service-provision.*
- *Any other purposes (please specify).*

If you favour mandatory reporting:

- *What measures should be undertaken to ensure that the necessary resources are in place to deal effectively with reported cases?*
- *What standard should apply before reporting is required (e.g. reasonable cause for suspicion, full confirmation, etc.)?*
- *How can the problem of unsubstantiated reports be kept to a minimum?*
- *Should nutritional deficiency disease which is not associated with a pattern of abuse by caregivers continue to be included in a mandatory reporting provision?*

Do you believe that a comprehensive children's statute should include provision for a child protection register? If so,

- *For what purposes and how should the register be used?*
- *In what circumstances should a child's name be entered on the register?*

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311 NCCAN **National Strategy on Child Abuse and Neglect**, 1996, pp. 41-42.

- *Who should have access to this register and under what conditions?*
- *Should perpetrators be entered on the register? If so, under what conditions?*
- *What system, if any, should be used for removing names from the register?*
- *What ethical issues are involved and how can these best be addressed?*
- *What structure should operate and finance the register?*

No respondents expressed support for the continued fragmentation of provisions for mandatory reporting between the Child Care Act and the Prevention of Family Violence Act.[312] There were few responses to the more detailed questions posed in the research paper, and these were somewhat contradictory.

Mandatory reporting for selected professionals was supported by the SANCCFW, as well as Ms T Odyar, Ms D Ritter and the GCWS. The latter three respondents supported mandatory reporting for anyone who encounters child abuse, while the SANCCFW believed that such reporting should be encouraged but not necessarily legislated. All of the above, however, also supported the idea of provision for discretionary reporting supported by educational campaigns, as well as indemnity against legal action and protection of the identity of *bona fide* reporters. All also supported some space for the exercise of discretion, subject to conditions, for professionals involved in confidential relationships, with some adding that this must be only insofar as it did not jeopardise the case. The same respondents supported the introduction of legal backing for professionals engaging in investigative tasks in response to reports, such as medical examinations and social work processes.[313] They saw the protection of children at risk, and the monitoring of their wellbeing as the most and second-most important reasons for mandatory reporting. They were divided on the prioritisation of the remainder of the issues although all were considered relevant.

As regards ensuring that the necessary resources are in place to deal with reported cases, the SANCCFW recommended firstly addressing the fragmentation and duplication of services and resources, and setting in place a clear legal and policy framework to deal with all aspects of child

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312 The SANCCFW, the National Interim Consultative Committee, Disabled People South Africa, the National Council of Women of South Africa, the Johannesburg Institute of Social Services, and Commissioner of Child Welfare Mr DS Rothman all supported the incorporation of reporting provisions in the children's statute only.

313 The SANCCFW proposed that research involving all the relevant disciplines be undertaken into the pro's and con's of mandatory reporting in South Africa given our scarce resources, e.g. by means of a pilot study comparing results in two areas, one where reporting and registration are and another where they are not properly under way. Information could be sought from Kenya, Uganda and Namibia, given that in the former there is proposed provision for discretionary reporting whereas the latter two countries have gone the mandatory route. Research from First World countries should also be examined.

protection. Service providers in all relevant disciplines must be must be equipped with the proper training and the tools necessary for delivery, and staff complements must be adequate and workloads manageable. With the essential resources in place, a definite time period should be set within which reports should be acted upon, and monitoring should then be carried out for all children alleged to be at risk. Ms T Odayar and Ms D Ritter suggested continuous evaluation of service delivery, using provincial and regional protocols.

10.5.7 Evaluation and recommendations

With hindsight, the wisdom of having proceeding with a system of mandated reporting in the South Africa context is perhaps open to question. However, **the Commission acknowledges that the reporting system and the national child protection register as currently provided for have protective potential for children as well as being a prospective source of data for planning, policymaking and resourcing purposes, and that it might be ill-advised to reverse the mandatory provisions which are presently in place in the Child Care Act, 1983.**[314] **The Commission however recommends that the reporting provision in the Prevention of Family Violence Act be repealed, and that this issue be addressed only in the new children's statute. It is also recommended that compulsion to report be confined to the categories of persons set out in section 42 of the Child Care Act at this time, and that the emphasis for the general population be on voluntary reporting based on public education and awareness-raising. It is further recommended that the mandated reporting provision and the registration process be confined to cases involving actual or suspected physical injury, sexual abuse, severe neglect which appears to be intentional, abandonment, and child labour**.

Registration should take place only after investigation has confirmed reasonable grounds for suspicion of ill-treatment. Clear definitions of each category are to be provided. It is recommended that nutritional deficiency disease which is caused by poverty rather than

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314 The National Child Protection Register is currently kept by the Director-General: Social Development for 'the sole purpose of protecting children' and provides for the following entries: All notifications in terms of section 42(1) of the Child Care Act, 1983; all convictions as contemplated in regulation 39A(2)(c); and all determinations of the children's court as contemplated in regulation 39A(4)(b). See further 6.4.3 above where the Commission recommends that the Register be expanded to include the recording the findings of all children's court cases.

deliberate neglect should be removed from the reporting provision, child malnutrition being a mass problem in South Africa which can more effectively be addressed through other mechanisms. It is further recommended that accounts of abuse which have occurred in the distant past not be subjected to the reporting requirement unless there is reason to believe that a child is currently at risk. Further, a mechanism should be included whereby a report can be registered for statistical purposes only, if the Director General is satisfied that the person reporting the case is in a position to undertake the action necessary to protect the child. The law should provide immunity for any person, whether or not mandated to report, from legal action after making a *bona fide* report, and the anonymity of informants should be specifically protected. This protection should encompass both persons who submit formal notifications in terms of the Act, and persons referring cases for investigation and intervention. Malicious reporting should carry a severe penalty.

The approach taken in the United Kingdom of maintaining a consolidated register of persons found by a court or through some other form of due process to have abused children, or to be likely to pose a risk of abuse, is considered advisable for South Africa, as a means of keeping serial offenders out of children's services.[315] Such a register should be available to assist with the screening of prospective staff members, volunteers or substitute caregivers for children within schools, designated child care services and major youth organisations, and for no other purpose whatever. Strict controls on access to this information and strong sanctions for any breach of the limitations should be put in place. Obviously it will be necessary to build in processes to ensure that, in cases involving dismissal, internal transfer or retirement of a person on the basis of prima facie evidence of abuse, principles of administrative justice have been upheld. It is further recommended that severe criminal penalties should apply to malicious reporting

The Commission recommends that any prospective foster or adoptive parent, prospective volunteer or applicant for employment or voluntary service in a designated child care employment setting or category of work should be required to produce a certificate

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315 See also 19.5.4 below. See also the Commission's **Discussion Paper on Sexual Offences: Process and Procedure**, par. 42.11.

confirming that his or her name does not appear on such a list or register.[316] This is regarded as the least invasive way of applying this protective measure.

10.6 Conclusion

The formal child protective intervention system as proposed by the Commission is one in which there is a recognition that a children's needs are normally best met in well-functioning families and supportive communities. Policies should be designed and resources allocated with this in mind. The Commission seeks to avoid an over-interventionist approach, in which reporting, official investigations and other authoritarian approaches dominate the system at the expense of preventive, supportive and rehabilitative components. At the same time, provision is made for a well-planned and coordinated protective system, geared to children who have experienced or are at risk of severe forms of abuse. This system is intended to deal effectively with children throughout their involvement with it, on the basis of thorough assessment, planning and appropriate service delivery, until the child is permanently settled in a safe environment. The need for resources to be allocated to all components of the system on a systematic basis, so that each can function as intended, is recognised. The Commission also recognises the need for ongoing coordination of the various sectors and disciplines involved, and proposes a structure for this purpose. Provision for mandatory reporting and registration of child abuse is maintained, but within a more clearly defined framework than has been the case in the past. Further expansion of the system is avoided, protection of voluntary reporters is built in, and provision is made for the registration of offenders, solely for purposes of preventing their entry into positions of responsibility for, or close contact with children.

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316 Contra section 7(1) of the UK Protection of Children Act 1999 where the duty is placed on the prospective employer.

CHAPTER 11

THE PROTECTION OF THE HEALTH RIGHTS OF CHILDREN

11.1 Introduction

This Chapter examines how children's health rights can be promoted and protected through legislation and policy. As such it covers aspects such as accessing the health rights of children, the right of children to basic health care services, consent to medical treatment and or surgical intervention, HIV testing, issues relating to confidentiality of medical information, access to contraceptives, and access to termination of pregnancy.

A sample of the sort of problems that may arise in this context is given by Ngwena:[1]

> Contraceptive and abortion treatment may bring the child and the parent into conflict. A well-meaning parent may vehemently object to a daughter receiving contraceptive or abortion treatment without parental knowledge and approval. A parent may, on the other hand, wish to impose on the daughter contraceptive or abortion treatment regardless of the daughter's views on the matter. With or without the support of the parent the child may be inclined to reject treatment, including life-saving treatment.

11.2 Accessing Children's Health Rights

11.2.1 Introduction

Children's health care rights are currently scattered throughout a number of different pieces of legislation, making it difficult to determine what health rights children are entitled. This is compounded by the lack of a charter of children's rights to health and policy guidelines from the Department of Health on the nature and level of care that children and youth with HIV or AIDS are entitled to within the public health system. As a result, children do not always receive appropriate treatment in hospitals and clinics.

The Bill of Rights in Chapter 2 of the 1996 Constitution contains a number of references to health

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1 Charles Ngwena 'Health care decision-making and the competent minor: The limits of self-determination' (1996) **Acta Juridica** 132 at 133.

care rights.[2] Section 27(1) of the Constitution provides every person with rights of access to health care services, whilst section 28(1)(c) of the Constitution provides that amongst others, every child has the right to basic nutrition, shelter, basic health care services and social services.[3]

The most important health provisions in the Child Care Act are those relating to consent to medical treatment and surgical intervention in certain circumstances.[4] Although the Act makes reference to the medical treatment of children, it does not provide for the right of children to a certain standard medical care.[5]

The primary purpose of the Health Act 63 of 1977 is to provide for the promotion of health and the co-ordination of health services.[6] In section 10 of the Act, the state's responsibility to its citizens with regard to health care is stated as being:

> To promote the health of the inhabitants of the Republic so that every person shall be enabled to attain and maintain a state of complete physical, mental and social well-being.

This very broad definition which applies to both children and adults does not create a right of access to health care services or treatment.[7] Instead it places an obligation on the state to promote the health of individuals.

The existing Health Act, 1977 is in the process of being redrafted and the last draft Bill is dated 28 February 2001. This Bill will be published for comment later in the year. Although the Bill does not have a separate section dealing with the rights of children, it does provide a link to the Child Care

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2 See, for example, sections 12, 24, 27, 28 and 35.

3 See in this regard, the Constitutional Court decision **Soobramoney v Minister of Health, KwaZulu-Natal** 1998 (1) SA 765 (CC). See further Craig Scott and Philip Alston 'Adjudicating constitutional priorities in a transnational context: A comment on Soobramoney's legacy and Grootboom's promise' (2000) 16 **SAJHR** 206; Ferdinand van Oosten 'Financial resources and the patient's right to health care: Myth and reality' (1999) 32 **De Jure** 1; Frank Michelman 'The Constitution, social rights and reason: A tribute to Etienne Mureinik' (1998) 14 **SAJHR** 499; Geraldine van Bueren 'Alleviating poverty through the Constitutional Court' (1999) 15 **SAJHR** 52.

4 Section 39 of the Act.

5 For a discussion of these provisions, see sections chapter 6 at 6.3.4 and 6.4.7 above. See also 11.4 below.

6 Bryan K (Draft) 'Review of the legislation affecting child health in South Africa' October 1998, compiled for the Community Law Centre, University of the Western Cape and the Child Health Policy Institute, University of Cape Town.

7 Research paper on children living with HIV/AIDS.

Act in its reference to a 'user'. The Bill defines a 'user' as being -

> the person receiving treatment or using a health service; and where the person concerned is below the age contemplated in section 39 (4) of the Child Care Act, 1983, or is incapable of taking decisions, in certain circumstances may mean -
>
> (a) the person's next of kin;
> (b) a person authorised by law or court order to act on that person's behalf; or
> (c) an executor of that person's deceased estate.

11.2.2 **Comparative systems in other countries**

In 1989, Columbia adopted a Code of Children and Minor's Health Rights.[8] The Philippines have also codified children's health rights.[9] The Ukraine has introduced a special provision which allows parents (or persons acting on their behalf) of children under the age of 14 who are infected with HIV, the right to remain in hospital with such children and to receive a temporary disability benefit if they cannot work during this period.[10] A number of countries such as Norway, Italy (Lombardy and Abruzzo) and France have also introduced special measures to protect the rights of children within hospitals. Some of these measures include:[11]

- measures to avoid or reduce periods of hospitalisation;
- steps to ensure the appropriate design and equipping of children's wards, e.g. ensuring that play rooms exist;
- authorisation for children to be visited outside of ordinary visiting hours; and
- assurance that sufficient information will be provided to parents and children regarding their illness and treatment.

Chapter VII of the new India Children's Code Bill, 2000 is headed 'Provisions regarding health and nutrition', although the bulk of the provisions clearly are preventative and early intervention

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8 Columbian Code for Minors, see sections 2 - 17 quoted in Harrison S **A Review of International Maternal and Child Health Legislation** (2nd edition) 1.

9 Ibid.

10 Ibid at 71.

11 Ibid at 71 - 72.

measures. Section 51(1) of the Bill, for instance, places an obligation on the State Government to provide adequate health services and facilities to children, 'both before and after their birth and through the period of growth', to ensure their full physical, mental and social development. The section further provides that the scope of such services must be progressively increased so that within a targeted period all children in the country are provided with and enjoy optimum conditions in health care for their balanced growth.

In order to increase the rate of child survival in India, especially the girl-child, the draft Bill[12] places special emphasis and importance on the following areas, namely: -

(a) the prevention of child marriages;
(b) the age of the mother in relation to child birth, the spacing of pregnancies, the services to be provided and care to be received during pregnancy and child birth;
(c) care of the new born;
(d) time-bound immunization programme and properly spaced scheme till the child attains five years of age;
(e) adequate nutrition and health care;
(f) safe water supply and basic sanitation.

Section 52 of the India Bill states that the State Government must formulate suitable schemes to provide sufficient care to women during pregnancies which may 'include early registration of pregnant women for anti-natal care, universal coverage, tetenus injection supplemented with iron and frolic acid, timely identification and treatment of maternal complications, promotion of clean deliveries by trained personnel, which may include imparting of training to the local mid-wives or dais in modern methods of handling deliveries and recognising them as such increasing the institutional delivery rates, management of obstetric emergencies, birth spacing, timing and limitation, improvement of maternal care facilities, and media efforts to promote the awareness of safe motherhood in the community'. This provision is built on the recognition that maternal death affects the rate of child survival and is detrimental to the health and development of the child.

Also informative is section 55 of the draft Indian Children's Code Bill, 2000. It reads as follows:

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12 Section 51(2) of the draft Bill.

Preventative measures against diseases and malnutrition

(1) The State Government shall take adequate measures to combat disease and malnutrition affecting children residing in the State.

(2) The main causes for infant mortality in India have been found to be low birth weight, diarrhoea and acute respiratory infections which causes morbidity in children, absence of complementary feeding during six months to eighteen months wherein the infant is most vulnerable to infection, iodine deficiency, affliction of cretinism, mental retardation and motor handicaps, blindness, seasonal food shortages and the last but not the least, continuing gender disparity in intra-familial distribution of food, and steps shall be taken to minimize the recurrence of the above conditions so as to promote the general health of children.

(3) To combat the general prevalence of malnutrition, both the Central and State Governments shall initiate programmes providing for a package of services, comprising supplementary nutrition, immunization, and health and referral services for the children below two years of age, health check-up, immunization and supplementary nutrition for pregnant and lactating women.

(4) The programmes referred to in sub-section (3) shall take the form of assistance being rendered to the non-governmental or other organizations in the local area and the Government shall have a clear obligation to ensure access to proper nutrition and an efficient and adequate public distribution system.

(5) The measures that may be taken to prevent malnutrition may include -

(a) the child's right to colostrum in the first few days of its birth, exclusive breast feeding for four to six months and an adequate supplementation thereof;

(b) nutrition and well-being shall be achieved through delivery of services, capacity building and empowerment, and ensuring the three necessary conditions of food, health and care;

(c) community groups working on local malnutrition problems should approach the local Pnachayats and State Governments for help in the form of money, endorsements, contacts, transportation, or moral support and encouragement and the State should help such community groups;

(d) to conduct all the above activities, the State Government shall adopt a holistic approach towards preventing malnutrition.

11.2.3 Comments received

The research paper on Children Living with HIV/AIDS[13] poses various questions relating to children's health rights. Comments received on these questions as well as on Issue Paper 13 are incorporated into this Chapter. In the research paper on children living with HIV/AIDS respondents were asked to comment on the following (preliminary) recommendations:

(a) It is recommended that in the light of the legislation in both Columbia and the Philippines where the health rights of children have been codified, a charter of children's health rights be drafted for broad consultation and discussion. This document could then be used as the basis for preliminary discussion regarding the placement of such rights, ie whether they are more suitably placed in the Child Care Act or the National Health Bill.

(b) In order to protect the rights of children infected with or affected by HIV/AIDS it is recommended that such a charter includes the following:

- the right to non discrimination on the basis of HIV status;
- equal access to health care services regardless of HIV status;
- access to terminations of pregnancy;
- the provision of HIV/AIDS prevention information/health promotion information;
- confidential access to contraceptives regardless of age;
- informed consent obtained before HIV testing and testing only undertaken when it is in the child's best interests;
- a child's right to confidentiality regarding their HIV status maintained;
- the right to be treated with dignity regardless of health status;
- to be provided with treatment of an acceptable standard;
  protection against female circumcision and other harmful traditional practices;
- an accessible complaint procedure; and
- the right to use alternative health care systems if so desired.

(c) Following the legislation in Norway, Italy and France it is recommended that the Department of Health, in conjunction with other role players, develop and adopt a national policy which protects the rights of children who have to be hospitalised.

(d) The Department of Health should develop and adopt clinical guidelines on the appropriate treatment and care which children and youth with HIV/AIDS can expect to receive through the public health system.

Childline Family Centre agreed with the recommendations made, but suggested that greater emphasis should be placed on the child's rights to have his or her mental and psychological health needs attended to. The respondent contended that this is important for children who have suffered the loss of parents and who may be assuming responsibility to care for the terminally ill, or for

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13 See Chapter 1, footnote 8.

younger siblings. It is further submitted that the health policy for children should include provision of practical support for children who are nursing terminally ill parents.

The focus group participants agreed with the recommendations made. In respect of the right to be protected against female circumcision and other harmful traditional practices, the group suggested that the right to be protected against unhygienic male circumcision should also be included. The group, however, believed that the life skill component of circumcision schools was very positive and should therefore not be totally scrapped. Thus, the group suggested that female circumcision should be outlawed, whilst provision should be made for greater protection of boys against unhygienic circumcision. The group agreed with the recommendation that the charter should include the right to alternative health care systems if so desired and suggested that this should be a ground for removing a child from hospital.

11.2.4 Evaluation and recommendation

The Commission recommends that the following health rights for children be included in the National Health Bill:

- **the right not to be unfairly discriminated against on the basis of HIV/AIDS status;**
- **equal access to health care services;**
- **right to mental and psychological health care;**
- **the provision of HIV/AIDS prevention information/health promotion information;**
- **confidential access to contraceptives regardless of age;**
- **informed consent as a prerequisite for HIV testing, and testing only when it is in the child's best interests;**
- **a child's right to confidentiality regarding his/her health status;**
- **the right to be treated with dignity regardless of health status;**
- **treatment of an acceptable standard;**
- **protection against female genital mutilation;**[14]
- **right of boys not to be subjected to unhygienic circumcision;**[15]

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14 See also 10.2.11 above.

15 See also 10.2.11 above.

- **protection against other harmful cultural practices;**[16]
- **an accessible complaints procedure;**
- **the right to use alternative health care systems if so desired**.

The Commission further adopts recommendations (c) and (d) in 11.2.3 above.

11.3 Children's right to basic health care services

11.3.1 Introduction

In order to promote and fulfill the right to basic health care services as set out in section 28(1)(c) of the Constitution, the national Department of Health is providing free health care services to children under the age of six years old. At provincial level, the Departments of Health have introduced various measures to promote and fulfill the right of children to basic health care services. For example, the Gauteng Department of Health is serving children in rural areas and informal settlements through mobile and container clinics. Homeless children are referred to places of safety where primary health care services are rendered. Community rehabilitation services are provided to address the needs of children with disabilities and a policy to address the backlog on assistive devices had been implemented. Home-based care is offered to children living with HIV/AIDS.[17]

11.3.2 South African Law and Policy

Section 27(1)(a) of the Constitution states that all persons have the right to have access to health care services, subject, however, to the state's available resources. In addition to this, section 28(1)(c) of the Constitution states that every child has a right to basic health care services. This right is not subject to the availability of state resources.

Children's right to shelter as set out in section 28(1)(c) of the Constitution has recently been tested

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16 See 10.2.11 above, and 21.5 below.

17 South African Human Rights Commission **2nd Economic and Social Rights Report 1998 - 1999** September 2000.

in **Government of the RSA and Others v Grootboom and Others**.[18] Although the court's focus was on the right to shelter, some conclusions about the scope of the right to basic health care services may be inferred from the reasoning of the court. The court held that section 28(1)(c) did not create a direct and enforceable claim upon the state by children. Rather it was argued that section 28(1)(c) must be understood in the context of the primary duty of parents towards their children.[19] Thus, the right to 'basic nutrition, shelter, basic health care services and social services' must be read with the right of the child to 'family care or parental care, or to appropriate alternative care when removed from the family environment'.[20] Consequently, the constitutional duty as regards children's rights in section 28(1)(c) entails a primary obligation which rests upon parents to ensure basic nutrition, shelter and basic health care services for children. Only in default, when children lack parents or families does the state assume a primary obligation for the fulfilment of these rights.[21] However, as the rights in section 28(1)(c) are not expressly limited by the 'progressive realisation' and 'limited resources' principles, the government has an obligation to immediately make these rights a reality and cannot argue a lack of resources as a defence in a court of law.[22]

The state's responsibility to ensure that the basic health care needs of children with additional health care needs are met, is unclear. It can be argued that the provision of anti-retroviral drugs to HIV positive children is essential to preserve or improve their health and can therefore be considered as a basic health care need. Likewise, the provision of assistive devices and rehabilitation services to children with disabilities are essential to improve their level of functioning within society.

However, according to the **Grootboom** case, the state has a primary responsibility to provide basic health care services only to children who lack a family environment. The health care needs of children of families living in dire poverty health care could thus be marginalised.

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18 2001 (1) SA 46 (CC).

19 Julia Sloth-Nielsen 'What's left for the rights? The child's right to social services, the right to social security and primary prevention: considering socio-economic rights in the provisioning for South Africa's proposed Children's Statute' Children's Rights Project, Community Law Centre, University of the Western Cape (unpublished).

20 See also par 76 of the **Grootboom** case.

21 Sloth-Nielsen 'What's left for the rights?' Children's Rights Project, Community Law Centre, University of the Western Cape (unpublished).

22 **South African Health Review** 2000 at 6.

Although the White Paper for the Transformation of the Health System does not directly define 'basic health care services', a definition may be deduced from the goals identified in the paper. Regarding maternal and child health services, the White Paper provides that all health facilities, as far as possible, must render these services on a one-stop basis, making services as close as possible to one another. Included in maternal and child health services, are those services which relate to reproductive and sexual health. Implementation strategies include diagnosis, treatment and counselling services for HIV/AIDS and other sexually transmitted diseases at all health centres.[23]

The White Paper on the Integrated National Disability Strategy, 1997 notes that legislation fails to protect the rights of people with disabilities and through legislation, barriers are created to prevent people with disabilities from accessing equal opportunities. Poor children who are disabled are particularly excluded as they have poor access to appropriate health care services. The White Paper also proposes free access to assistive devices and rehabilitation services for children under the age of six who have disabilities. The White Paper, bolstered by the Constitution, seems to indicate the state's intention to create legislation which would address the different basic health needs of disabled children.[24]

11.3.3 **Comments received**

Commenting on Issue Paper 13,[25] the Department of Paediatrics and Child Health at the University of Cape Town submitted that there is a need for a more precise definition of 'basic health care services' to which all children are constitutionally entitled. The Department contended that the scope of the definition of 'basic health care services' should be extended beyond essential primary health care to include a range of health care services for children with special needs. The Department believes that the definition of 'basic health care services' must also include effective highly specialised health care services.

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23 Bryan K 'A review of legislation affecting child health in South Africa', November 1998, compiled for the Community Law Centre, University of the Western Cape and Child Health Policy Institute, University of Cape Town.

24 Ibid.

25 S A Law Commission **Collation of comments on Issue Paper 13: Review of the Child Care Act.**

The Child Health Unit of the same Department recommended that legislation that affects child health must include a definition of 'basic health care services' and an explanation of the extent to which children with special needs may be provided with additional services to meet their basic needs.

11.3.4 Evaluation and recommendations

The Commission recommends that -

- **Children's right to basic health care services be confirmed in both the new children's statute and the National Health Bill.**
- **The National Health Bill must set out the core minimum requirements for the state in providing for the health of all children, including the state's responsibility in providing for the basic health care needs of children with additional health care needs**.

11.4 Consent to medial treatment or surgical intervention

11.4.1 Introduction

In respecting the autonomy and dignity of a person, sound information should be provided to a patient which will allow him or her to make informed decisions in full knowledge of the risks of any proposed medical treatment or surgical intervention. As far as it relates to consent to testing for HIV, the following problems are being experienced:

- Children are frequently subjected to HIV testing without informed consent. There is a view that the results of these tests are often used to discriminate against HIV positive children resulting in them being denied appropriate treatment and given sub-standard care.[26] There is also a contrary view that HIV testing is essential for proper permanency planning, care and case management with regard to abandoned babies.
- Urgent or emergency testing is frequently done on children as a way of avoiding obtaining

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26 Information supplied by Mark Heywood at the AIDS Law Project on 12 January 1999.

consent and undertaking counselling with the parent or guardian. This is so despite the fact that very few clinical situations arise where a patient's HIV status is required so urgently that ordinary consent procedures need to be bypassed.[27]

- In a society characterised by high degrees of mobility and in which 20% of children do not live with their biological parents[28] contact between health care workers and guardians may be extremely difficult. In the health sector this has relevance beyond the HIV/AIDS setting and in the event of medical emergencies, telephonic consent or consent from the medical superintendent is usually obtained. In non urgent situations, as with HIV testing, consent is either dispensed with or management of the child delayed - usually to the detriment of the child.
- Emergency care is dependent on the medical superintendent's consent which is usually only sought for surgical procedures. All other medical care is undertaken at the discretion of the attending medical practitioner. The result is often a conflict between the interests of the health services and those of the child.

11.4.2 South African Law and Policy

The Constitution provides that everyone has the right to bodily integrity which includes the right to security in and control over their body.[29] The Mental Health Act 18 of 1973 stipulates that where a person of any age is unable, because of mental illness, to consent to medical treatment or to an operation, a parent or other authorised person must do so instead.[30] The Child Care Act 74 of 1983 sets out the age at which a child is competent to consent to medical treatment. In terms of this Act, a child over the age of 14 years is competent to consent, without the assistance of his or her parent or guardian, to any form of medical treatment.[31] This means that children over the age of 14, but younger than 18 years cannot consent to an operation without the assistance of their parent or guardian.

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27 Information supplied by Dr McKerrow on 1 December 1998.

28 McKerrow NH and Verbeek AE **Models of Care for Children in Distress** Pietermaritzburg, 1995; and Simkins C 'Household Composition and Structure in South Africa' in Burman S and Reynolds P (eds) **Growing Up in a Divided Society: The Context of Childhood in South Africa Johannesburg** Raven Press, 1986.

29 Section 12(2) of the Constitution.

30 Section 60A of the Act.

31 Section 39(4)(b) of the Act. Medical treatment also includes an HIV test.

In a situation where a child needs treatment or needs to undergo an operation and his or her parent or guardian refuses to give consent, or cannot be found, or is mentally ill, or is deceased then the medical practitioner must approach the Minister for Social Development for the necessary consent.[32] In instances where medical treatment is necessary and so urgent that it ought not to be referred to the person legally competent to consent to such medical treatment or operation, the superintendent or medical practitioner acting on his behalf may give the necessary consent.[33]

Also, if the head of an institution[34] or a person[35] in whose custody a child is, has reasonable grounds for believing that the performance of any operation upon or the provision of medical treatment to the child is necessary to preserve his or her life or to safe him or her from serious and lasting physical injury or disability and that the need for the operation and medical treatment is so urgent that it ought not to be deferred for the purpose of consulting the parents or guardian of the child, or the Minister, the head or the person concerned may authorise its performance upon or provision to the child.[36]

However, medical practitioners note the following problems and uncertainties with the consent procedures in the Child Care Act:

- the procedure set out in section 39(1) which requires a medical practitioner to apply to the Minister of Social Development for consent is impractical and widely disregarded in practice;
- consent is not defined in the Act;
- despite the provisions in the Act unauthorised testing continues, particularly on abandoned babies;
- the Act's distinction between 'medical treatment' and an 'operation' is not clear and neither concept is defined within the Act; and
- most practitioners, particularly those working in hospitals report problems with obtaining

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32 Section 39(1) of the Child Care Act.

33 Section 39(2) of the Child Care Act.

34 An institution in which a child has been placed in terms of the Child Care Act, 1983 or under section 290 of the Criminal Procedure Act, 1977.

35 A person in whose custody a child has been placed in terms of the Child Care Act, 1983 or under section 290 of the Criminal Procedure Act, 1977.

36 Section 53(4) of the Child Care Act, 1983.

consent for non-emergency procedures from parents or guardians as they may live a long distance from the hospital, or cannot be contacted by telephone.

The National Health Bill provides that subject to any other law, no person or health establishment may provide a user[37] with treatment of any nature unless the user has been adequately informed and has consented to the treatment; a law or court order has authorised the treatment; the treatment is necessary for the protection of public health; or any delay in treating the user might result in their death or irreversible damage to their health and the user has not expressly refused the treatment.[38]

In light of the above, it follows that to perform an operation on a child or to submit him or her to any medical treatment without consent will amount to an invasion of his or her bodily integrity. The position in the Child Care Act does not detract from the rule that the High Court as the upper guardian of all minors may be approached at any time to give consent to medical treatment on behalf of a minor.[39]

With regard to decisions affecting one's health, the National Health Bill provides that 'every user has a right to participate in any decision affecting his or her personal health and treatment, unless it is not reasonable practicable for the user to participate'.[40] However, the definition of a 'user' does not give to a child of 14 years and younger the right to participate in a decision regarding his or her medical treatment nor does it give a child over the age of 14 the right to participate in a decision regarding surgical intervention on him or her.

11.4.3 Comparative review of systems in other countries

In America, the doctrine of informed consent requires that people about to undergo medical treatment be provided with all material information needed to make an informed decision. The determining factor as to what risks are material is that of the 'prudent patient', rather than the

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37 See 11.2.1above for the definition of 'user'.

38 Clause 9 of the Bill.

39 Strauss **Doctor, Patient and the Law** (3rd edition) 6.

40 Clause 7 of the Bill.

doctor's assessment of what should be disclosed.[41] The doctrine of informed consent is also well established in Canada.[42]

In Zimbabwean law, all persons under the age of 18 years are minors.[43] Consent to medical treatment on a minor must in the first instance be provided by their parent or guardian.[44] If their consent cannot be obtained or is refused, the Children's Protection and Adoption Act provides in section 76 as follows:

> (1) Where the consent of a parent or guardian is necessary for the performance of any dental, medical, surgical or other treatment upon a minor and the consent of the parent or guardian is refused or cannot be obtained within a period which is reasonable in the circumstances, application maybe made to a magistrate of the province where the minor is or is resident for authority to perform the treatment.
>
> (2) A magistrate to whom an application in terms of subsection (1) is made may -
>
> (a) after due inquiry and after affording the parent or guardian concerned a reasonable opportunity of stating his reasons for refusing to give the necessary consent or without affording such person opportunity if his whereabouts are unknown or if in the circumstances it is not reasonably practicable to afford him such opportunity; and
> (b) if satisfied that any dental, medical, surgical or other treatment is necessary or desirable in the interest of the health of the minor;
>
> by order in writing authorise the performance at a hospital or other suitable place upon the minor concerned of such dental, medical, surgical or other medical treatment as may be specified in the order.

In the United States, Florida, an exception is made to the ordinary consent provisions for minors. This allows a medical practitioner to treat a minor's sexually transmitted disease without parental consent. Furthermore they may not inform the parent of this treatment either directly or indirectly (by for example sending a detailed bill for the treatment).[45] In California, the Family Code[46] contains a general rule that a parent or guardian must consent to 'medical care' on behalf of a minor. It then

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41 **Canterbury v Spence** (1972) 464 F (2nd) 772.

42 **Reibl v Hughes** (1980) 114 DLR (3RD) 1.

43 Feltoe G and Nyapadi T J **Law and Medicine in Zimbabwe** 42.

44 Ibid.

45 Harrison S **A Review of International Maternal and Child Health Legislation** (2nd edition) 38.

46 Family Code, Division II, Part 4, chapters 1 - 3.

sets out a number of exceptions to this rule.[47] Examples include:

- a caregiver, who is not the parent or guardian may in certain circumstances consent on behalf of the minor;[48]
- a parent, guardian or 'caregiver who is a relative' may assign their consent to medical care powers to another person who is caring for the child, provided they do so in writing;[49]
- a minor, from the age of 12 may consent on their own to mental health treatment, provided certain conditions are met;[50]
- a minor of any age may consent to medical care related to pregnancy prevention;[51] and
- a minor of 12 years or older who has come into contact with a 'communicable disease' or is suffering from a 'sexually transmitted disease' may consent to treatment on their own.[52]

11.4.4 Comments received

The research paper asked respondents to comment on the following recommendations:

(a) It is proposed that the legislation confirms the current position in the Child Care Act that children over the age of 14 may consent to medical treatment on their own, whilst until they are 18 they will require parental assistance before they consent to an operation.

(b) It is proposed that following the Californian approach, the legislation should include a number of exceptions to this general rule. These should include but not be limited to:

- a child of any age should be entitled to obtain information on and access to contraceptives; and
- a child over the age of 12 should be able to obtain treatment for sexually transmitted diseases.

(c) Furthermore, following the Californian Family Code, a parent or guardian should be entitled to transfer their parental powers regarding consent (to medical treatment and operations) to a third party, provided the person to whom such power is transferred is the child's caregiver and they have done this in the form of a statement before a Commissioner of Oaths. It is further recommended that the Project Committee debate further the possibility

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47 Section 6920.

48 Section 6550.

49 Section 6910.

50 Section 6924.

51 Section 6925(a).

52 Section 6926(a) and (b).

of creating a simple procedure for appointing a guardian for abandoned children, orphans and those living on the streets so that should they need medical care this can be provided.

(d) It is recommended that the following be considered in the redrafting of the consent provision:

- a simplification of the procedures for obtaining consent;
- a process for ensuring that consent to treat a minor in non-emergency situations can easily be obtained from an appropriate and responsible caregiver, who is not necessarily the parent or guardian; and
- creating a statutory definition of informed consent, medical treatment and operations;

(e) It is also recommended that the Project Committee debate the appropriate placement of such provisions (ie should they be within the Child Care Act or health legislation?)

(f) It is recommended that section 60 of the Child Care Act be amended to empower the Minister of Welfare to develop and publish codes of good practice on any matter relating to the welfare of children. In terms of this amendment we would propose that a code of good practice on HIV testing be developed and published, based on the SALC's draft National HIV Testing and Informed Consent Policy[53] and the following principles:

- all HIV testing should be undertaken only with the informed consent of the parent, guardian or child themselves, and if it is in the best interests of the child.

This shall mean that no child may be tested for HIV if :

(i) such information is to be used to discriminate against them; and
(ii) the information is required due to the irrational fears of staff or other persons dealing with the child (instead universal precautions should be used in every appropriate situation.);

- pre and post test counselling accompany every HIV test; and
- confidentiality of the results is maintained and disclosures only made with the consent of the parent, guardian or child themselves.

(g) Finally, it is recommended that the Department of Health be urged to implement the SALC recommended draft National Testing and Informed Consent Policy.

The focus group participants, in respect of recommendation (a), proposed that children from the age of 10 to 14 should be consulted in matters relating to their health and that children under the age of 10 should be consulted as appropriate to their capacity. In respect of recommendation (e), concern was expressed that the Department of Health has not yet implemented the recommendation that all HIV testing be carried out with pre-test counselling. It was suggested that Departments of Health and Welfare should have an integrated testing policy for children and that

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53 The Law Commission's **First Interim Report on Aspects of the Law relating to AIDS** February 1997.

this policy should be implemented at provincial level. Further, that all pre-test counselling should be culturally appropriate. In respect of recommendation (f), the group was divided. Some members of the group submitted that the best interest of children not infected by HIV/AIDS should also be considered. Thus, HIV testing should be allowed if it is in the best interest of another child. Whilst other members of the group felt that no mandatory testing should be allowed to avoid stigmatizing HIV infected children.

Comments received on Issue Paper 13 suggested that the terms 'medical treatment', 'informed consent' and 'operation' should be defined and a simple procedure for obtaining consent to provide treatment to children in a non-emergency situation should be provided for. Further, that a simplified procedure should be created for obtaining consent for an operation as the present procedure in section 39(1) is cumbersome and not used. Boys Town submitted that section 39 of the Child Care Act does not make provision for the principal or director of a children's home to give consent to operations. The respondent stated that this is desirable as often the persons entrusted with this task are hesitant to take responsibility for such consent.

11.4.5 Evaluation and recommendation

It seems that children are being subjected to non-emergency procedures despite the fact that the current law implies that children cannot be submitted to any medical treatment or surgical intervention without consent. It is also apparent that the treatment of children in non-emergency situations is often delayed - usually to the detriment of the child. This is so mainly because the person legally responsible for giving consent is not available or difficult to trace. The procedure in terms of which the Minister of Social Development can give consent to medical treatment or an operation in non emergency situations is also criticised for being impractical. **For these reasons the Commission recommends as follows:**

- **That the age at which children may consent to medical treatment be lowered to 12 years, whilst until they are 18 they cannot consent to an operation without the assistance of their parent(s) or guardian(s).**
- **Following the Californian approach, the new children's statute should include the following exceptions to this general rule:**
  - **a child of any age should be entitled to obtain information on and access to**

contraceptives; and

- **any child should be able to obtain treatment for sexually transmitted diseases regardless of age.**

- **A caregiver who is not a parent or guardian of a child may consent to medical treatment for or an operation on that child if that child has been abandoned or his or her parents are deceased.**
- **A parent or guardian of a child may give written consent to a person caring for a child to give consent to medical treatment for or an operation on that child.**
- **The National Health Bill should be amended to provide that children from the age of 12 should be consulted in matters relating to their health and children under the age of 12 should be consulted as appropriate to their capacity.**
- **Following the Zimbabwean approach, section 39 (1) of the a Child Care Act which requires a medical practitioner to approach the Minister for consent for medical treatment to or an operation upon a child in instances where a parent or guardian refuses consent, or cannot be found, or is by reason of mental illness unable to give consent, or is deceased should be amended to provide that the children's court, instead of the Minister, can be approached to obtain the necessary consent for medical treatment or an operation.[54]**
- **The new children's statute should explicitly provide that no child may be submitted to any medical treatment or surgical intervention without the child's informed consent, or that of his or her parent or guardian.[55]**
- **Medical treatment or surgical intervention should not unnecessary be delayed in instances where consent in terms of section 39 (1) is needed.**
- **Confusion exists between 'medical treatment' and an 'operation'. These terms are defined neither by the Child Care Act nor by the Heath Act. The latter Acts also do not define 'informed consent'. The Commission therefore invites comments on how the said terms should be defined**.

11.5 HIV testing in relation to placement of children in need of care

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54 See further 23.10.4 below.

55 Informed consent shall include consent, on behalf of a child, by the superintendent of a residential care facility or department or organisation arranging placement of the child in terms of the Child Care Act.

11.5.1 Introduction

Children in need of care and protection are often tested for HIV before being placed in adoptive and foster care, or residential care facilities. In many cases this testing is carried out without the necessary informed consent, and may also be used to discriminate against children.[56] There are a number of arguments proposed both for and against HIV testing before placement, many of which were detailed by the South African Law Commission's Project Committee on HIV and AIDS:[57]

Arguments against HIV testing include the following:

- HIV testing is frequently carried out without the requisite consent, since the parent or guardian of the child is not available to consent to the HIV test.
- Furthermore, disclosure of a child's HIV status without the necessary consent is also a breach of the child's right to confidentiality.
- The results of an HIV test may be used to discriminate against a child, in that the child may not be adopted, fostered, or accepted into a residential care facility on the basis of his or her HIV status.
- The positive HIV status of a baby can only be established with certainty by means of an HIV antibody test, at an average of 15-18 months.[58]
- It has been argued that all children available for adoption, fostering and admission to residential care should be regarded as potentially HIV infected.

Arguments in favour of HIV testing include the following:

- It may be argued that HIV testing is in the best interests of the child, in that knowing the HIV status of a child allows the caregiver to plan for and manage the child's health care and welfare appropriately.
- Adoption is a permanent and final placement, and according to welfare organisations it is

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56 Cameron, E 'Children with HIV or AIDS: Guidelines to pull out and keep' March, 1993 **AIDS Bulletin**.

57 S A Law Commission **Aspects of the Law Relating to AIDS : Working Paper 58** published for General Information and Comment, September 1995.

58 The HIV status of a baby can be confirmed through the Polymerase Chain Reaction (PCR) test at 3 months. This is, however, costly and the health authorities do not routinely offer it.

the policy to inform prospective parents as fully as possible about the child to enable them to make a final decision concerning adoption.

- It is argued that a child who is HIV positive or has AIDS may require expensive health care, and caregivers should be given the opportunity to determine whether they are in a position to care for the child.
- An adoption order may be rescinded on the basis of fraud, misrepresentation and *iustus error*.[59] If a child is later discovered to be HIV positive, this may be a ground for rescinding the adoption.
- Prospective caretakers have the right to decide whether they feel able to care for a baby with a life-threatening condition.
- Adoption agencies have traditionally arranged for screening for all major health problems, and AIDS should not be treated differently.
- Failure to test for HIV would discourage people from adopting, reducing the pool of prospective adoptive parents.
- Organisations are engaged in recruitment of families who are willing and able to care specifically for children who are HIV positive or have AIDS.
- Testing for HIV assists in ensuring that children are placed as quickly as possible in the most appropriate available form of care.

11.5.2 South African Law and Policy

Currently, there is no legislation addressing the issue of HIV testing before the placement of a child in need of care. The Commission's First Interim Report on Aspects of the Law Relating to Aids, 1997 considered the issues of a national policy on HIV testing and informed consent.[60] The Report recommended that the Minister of Health should adopt a national policy on testing for HIV. The Report further proposed a policy on HIV testing. The proposed policy stipulated the circumstances under which HIV testing can be done with or without informed consent. In terms of the proposed

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59 Section 21(1)(b) of the Child Care Act 74 of 1983.

60 See also the Law Commission's **Third Interim Report on Aspects of the Law Relating to Aids** in which a national policy on HIV/AIDS in schools was considered. The Report in particular states that compulsory testing of learners as a prerequisite for admission to any school, or any unfair discriminatory treatment (for instance the refusal of continued school attendance on the basis of the HIV status of the learner), is not justified. However, it is recognised that special measures in respect of learners with HIV may be necessary. These must be fair and justifiable in the lights of medical facts, school conditions and the best interest of learners with and without HIV.

policy, informed consent includes pre-test counselling. The proposed policy further provided that information regarding the results of an HIV test must remain fully confidential, and may be disclosed in the absence of an overriding legal or ethical duty only with the individual's fully informed consent. A National Policy on testing for HIV was consequently adopted by the Department of Health.[61] This Policy does not differ substantially from the policy proposed by the Commission. The National Policy on HIV testing states explicitly that testing for HIV infection at all health care facilities must be carried out with informed consent,[62] which includes pre and *post-test* counselling. In terms of the Policy, informed consent means 'that the individual has been provided with information, they have understood it and based on this they agree to undergo the HIV test. It implies that the individual understands what the test is, why it is necessary and the benefits, risks, alternatives and possible social implications of the outcome'. The Policy further states that informed consent implies the giving of express agreement to HIV testing in a situation devoid of coercion. Referring to the Child Care Act,1983, the Policy stipulates that a parent or guardian of a child 14 years and younger may give consent to HIV testing of the child.[63]

11.5.3 Comparative review of systems in other countries

11.5.3.1 United Kingdom

In England, the routine HIV testing of children intended for adoption is sometimes proposed, but is presently discouraged by the British Agencies for Adoption and Fostering (except in cases where there is a clear risk of infection), potential adoptive parents being rather informed that it is not

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61 Latest draft received from the National Department of Health on 2 July 2001 (not yet published).

62 However, HIV testing may be conducted without informed consent in the following circumstances:

- On an existing blood or tissue sample as part of unlinked and anonymous testing for epidemiological purposes, provided that such testing is carried out in accordance with national legal and ethical guidelines regarding such testing.
- Where an existing blood sample of a source patient is available, and an emergency situation necessitates testing the source patient's blood (e.g. when a health care worker has been accidentally exposed to the source patient's blood in the course of medical procedures), HIV testing may be undertaken without informed consent, but only after the source patient has declined to give his/her informed consent or is unable to do so, and he/she has been informed that the result may be disclosed to the heath care worker concerned, but will otherwise remain confidential.
- Where statutory provision or other legal authorisation exists for testing without informed consent.

63 HIV testing is not regarded as medical treatment or an operation for purposes of the new child care statute.

possible to guarantee that a child is not infected.[64]

11.5.3.2 United States of America

In the United States, the Centres for Disease Control has recommended in guidelines that adoption organisations should make HIV testing a compulsory part of the health evaluation of children intended for foster-care and adoption. However, the guidelines have in general not yet been accepted by welfare organisations - most organisations prefer a selective case-by-case approach to HIV testing.

11.5.4 Comments received

The research paper asked whether respondents agreed with the following recommendations:

a) A code of good practice should be developed with regard to HIV testing to prohibit mandatory HIV testing, to ensure that all testing only takes place voluntarily and with informed consent, and ensure that HIV testing may only take place where this is in the best interests of the child.
b) The testing provisions should also take note of the South African Law Commission's *First Interim Report on Aspects of the Law Relating to AIDS.*
c) The issue of whether requesting prospective adoptive and foster children to undergo HIV testing is in the best interest of the child should be canvassed and debated, and a uniform national policy decision be taken accordingly. The policy decision should be accompanied by clear operational guidelines to ensure that children are placed as quickly as possible, and that placement options are available.

Childline Family Centre stated that the levels of sexual activity between children in care and the level of sexual exploitation of children by other children in institutional care are extremely high. Further, HIV positive children should be aware of their HIV status in order to facilitate the development of responsible management of their own sexual behaviour and to make appropriate decisions. The respondent suggested the implementation of universal management procedures with regard to all children in care to minimise the risk to other children as well as universal educational programmes with regard to sexual activity.

The Cape Law Society submitted that legislation should provide for the mandatory testing of a child

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64 Viinikka S 'Children, Young People and HIV Infection' in Haigh, R and Harris, D (eds) **AIDS : A Guide to the Law** London: Routledge, 1996 at 10.

in residential care where the possibility exists that he or she may be infected. This would ensure that the child receives the appropriate care and treatment. It is submitted that possible objections based on religious belief may be raised. Lastly, it is essential that a policy be adopted protecting such results as confidential.

The focus group participants said that it is in the best interest of a child to undergo an HIV test before adoption as this will avoid the risk of the child being returned if discovered at a later stage that he or she is HIV positive. The group, however, cautioned against requesting foster parents to undergo an HIV test as this may reduce the number of potential foster parents. It is also suggested that the 'code of good practice' and 'best interests of the child' should be defined.

Question 8 of Issue Paper 13 asked: How should HIV testing, including testing of children in residential care, be approached in legislation? The majority of respondents felt that HIV testing should be allowed if it is in the best interest of the child. For instance, the Natal Society of Advocates contended that HIV should not be distinguished from any other testing for life threatening disease. Thus, a person in whose de facto care a child is should be able to consent to the testing of the child if there is a reasonable belief that the child may suffer from a life threatening disease. The SA National Council for Child and Family Welfare argued that it is important that children in need of alternative care, including residential care, be tested as confidential knowledge has to be provided to the caregivers. The respondent submitted that this will assist the caregiver to plan appropriate care for a child whose parents have died as a result of HIV/AIDS. Also, the need for the child to know his or her HIV status cannot be overlooked. Some respondents are, however, against the HIV testing of children. For instance, the Health/Human Rights argued that legislation should provide that no child entering residential care should be discriminated against. A list of prohibited grounds of discrimination, which includes HIV/AIDS, should thus be developed. This will protect children from being tested for HIV and from being refused access to a children's home because of their HIV status. The respondent proposed that the code of good practice could set out the following in more detail: (a) when is it in the best interest of the child to be tested, (b) how to obtain informed consent from the child or the parent/guardian, (c) ensuring that confidentiality of the results is guaranteed, (d) the provision of pre- and post-test counselling, and (e) ensuring that the test is undertaken for diagnostic or therapeutic reasons.

11.5.5 **Evaluation and recommendation**

Although the majority of respondents are in favour of mandatory HIV testing in certain circumstances, the Commission needs to take cognisance of the fact that HIV testing may often not be in the best interest of the child as it can be used to discriminate against the child. **The Commission thus recommends that no child may be tested for HIV without the informed consent of the child or his or her caregiver[65] and HIV testing may only take place where this is in the best interests of the child**. The best interest of the child shall include testing for HIV where there is reasonable belief that the child may be infected and testing is done to ensure that the child receives appropriate care and treatment. The testing should also take note of the National Policy on testing for HIV.[66] **The Commission further recommends that pre[67] and post-test[68] counselling for the child, where applicable**,[69] should take place as the results of an HIV test will undoubtedly have profound implications for the entire family.[70]

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65 Informed consent shall include consent, on behalf of a child by the head of a residential care facility or department or organisation arranging placement of the child.

66 See 11.5.2 above.

67 The National Policy on testing for HIV stipulates that pre-test counselling should include discussions on:

- What an HIV test is and the purpose of the test.
- The meaning of both a positive and negative result, including the practical implications such as medical treatment and care, sexual relations, psycho-social implications etc.
- Assessment of personal risk of HIV infection.
- Safer sex and strategies to reduce risk.
- Coping with a positive test result, including whom to tell and identifying needs and support services
- An opportunity for decision making about taking the HIV test.

68 The National Policy on testing for HIV stipulates that post-test counselling involves one or more sessions and should include discussions on:

- Feedback and understanding of the results.
- If the result is negative:
  - strategies for risk reduction;
  - possibility of infection in the 'window period'.
- If the result is positive:
  - immediate emotional reaction and concerns;
  - personal, family and social implications;
  - Difficulties a patient may foresee and possible coping strategies;
  - Who the client want to share the results with, including responsibilities to sexual partners;
  - immediate needs and social support identification;
  - follow up supportive counselling; and
  - follow up medical care.

69 Pre- and post-test counselling will not be necessary if the child concerned is not of sufficient maturity to understand the implications of an HIV test.

70 Counselling may include counselling for the family. Care should, however, be taken that the child's right to confidentiality is not infringed when counselling is provided to a family member other than the child.

The Commission further recommends as follows:

- **The age at which a child may consent to an HIV test should be lower to children 12 years of age and older.**
- **A child under 12 years of age who is of sufficient maturity to understand the benefits, risks and possible social implications of an HIV test may consent to such a test.** However, parental consent to undergo medical treatment for HIV/AIDS will be needed as treatment could have serious financial implications for the parents of such child.
- **Where a child under 12 years of age is not of sufficient maturity to understand the benefits, risks and possible social implications of an HIV test, the person exercising parental authority over that child may consent to the HIV testing of that child.**
- **Where parental consent to an HIV test is unreasonably withheld, the court should be approached for the necessary consent.**
- **Where a child under 12 years of age who is not of sufficient maturity to understand the benefits, risks and possible social implications of an HIV test, is in residential care or awaiting statutory placement, the head of the residential care facility or organisation arranging placement may consent to the HIV testing of that child.**
- **The head of a hospital may only give consent to the HIV testing of a child under 12 years of age who is not of sufficient maturity to understand the benefits, risks and social implications of an HIV test if no parent or person exercising parental authority over the child is available or where no organisation is arranging placement for the child or where the child is not in the care of a residential care facility.**

The Commission takes cognisance of the fact that many parents will not accept a child for adoption until his or her HIV negative status is confirmed. The cost and emotional damage resulting from keeping a healthy child in residential care or a hospital until he or she tests negative at eighteen months is vastly higher than using the Polymerase Chain Reaction (PCR) test.[71] **The Commission therefore recommends that consideration be given to making the PCR test available at state expense for babies requiring placement in terms of this Act for purposes of permanency planning and appropriate selection of placement**.

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71 The PCR test can detect the HIV virus in the blood immediately.

11.6 Confidentiality of information relating to the HIV/AIDS status of children

11.6.1 Introduction

The right to confidentiality is frequently breached in the health care and institutional setting. A child's right to confidentiality is of particular importance with regard to his or her HIV status due to the high levels of stigma and discrimination against children infected with HIV/AIDS.

11.6.2 South African Law and Policy

The S A Interim Medical and Dental Council describes the ethical rule regarding confidentiality as follows: 'No practitioner may divulge information regarding the ailments of a patient except with the express consent of the patient or, in the case of a minor, with the express consent of his guardian or, in the case of a deceased patient, with the consent of his next of kin or the executor of his estate'.[72] A patient's right to confidentiality may be limited in certain circumstances and each situation would have to be considered with regard to its individual circumstances.[73] The Medical Association of South Africa (MASA) has identified the following criteria for limiting a patient's right to confidentiality: a grave risk, to a clearly defined third party.[74] Our courts also recognise the right to confidentiality or privacy as a common law personality right. However, the common law right to confidentiality for children is not confirmed in legislation. Therefore, confusion exists in practice with regard to how this rule should be applied. This has led to an ad hoc approach to confidentiality based on individual interpretations of the 'right to know' and 'best interest of the child' principles.

The National Policy on testing for HIV stipulates that information regarding the result of an HIV test must remain fully confidential and may only be disclosed, in the absence of an overriding legal and ethical duty, with the individual's fully informed consent. The Policy further provides that pre-test counselling should be a confidential dialogue with a suitably qualified person.

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72 Rule 16 of the South African Interim Medical and Dental Council's Rules of Practice.

73 In **Jansen van Vuuren and Another NNO v Kruger** 1993 (4) SA 842 (A) the court held that the conflicting interests would have to be balanced : 'However the right of a patient and the duty of a doctor are not absolute but relative. One is, as always weighing up the conflicting interests ... a doctor may be justified in disclosing his knowledge where his obligation to society would be of greater weight than his obligation to the individual'.

74 MASA HIV/AIDS Ethical Guidelines.

The National Health Bill provides that 'every user is entitled to confidentiality of all information concerning the user, including information relating to his or her health status, treatment, or stay in a public or private health establishment'. However, this Bill does not require a person who can lawfully give consent, in terms of section 39(4) of the Child Care Act, to treatment of or surgical intervention on a child to consult with that child before information regarding his or her health status is disclosed.

11.6.3 Comparative review of systems in other countries

In England, children with HIV are guaranteed rights to confidentiality.[75] The 'need to know' principle is used as a standard when deciding whether or not to make a disclosure.[76] In **W v Egdell**[77] the following principles regarding the disclosure of confidential medical information were established:

(a) disclosures should be limited to those regarded as vitally in need of the information,
(b) the risk, if the information is not disclosed must be real; and
(c) this real threat of harm must be physical.[78]

Italian law provides specific protection against disclosure of the result of an HIV test. Section 4 of Law No. 135/90 states that the result of an HIV test may only be disclosed to the person concerned.[79]

11.6.4 Comments received

The research paper asked respondents to comment on the following recommendations:

(a) It is recommended that the departments of Health and Welfare develop operational guidelines on confidentiality for their respective sectors based on the following criteria:

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75 **AIDS : A Guide to the Law** at 8.

76 Ibid at 10.

77 [1990] Ch 359 (CA).

78 Davies M **Medical Law** 1996 Blackstone Press Ltd 34 - 36.

79 'Comparative study on Discrimination against Persons with HIV or AIDS' Swiss Institute of Comparative Law, Lausanne, Switzerland, 1993 at 31.

- disclosure of HIV related information in a medical context should always be made with regard to the best interests of the child principle;
- attempts should be made to obtain consent from the child's parent or guardian before a disclosure is made;
- confidentiality should not be breached unless a real risk exists to a third party; and
- in the light of the levels of discrimination and stigma that exist, medical practitioners should consider the possible consequences of a disclosure before providing this information to third parties.

(b) A child's right to confidentiality in a medical context be confirmed in legislation by being placed within a charter of health rights.

The S A National Council for Child Welfare, with regard to recommendation (a), submitted that the principles of *best interest of the child* and *a real risk exists to a third party* need to be clearly defined. Childline Family Centre, KZN, suggested that the recommendations should be extended to include consultation with and consent of the child before disclosure of his or her HIV status is made. The respondent acknowledged, however, that such a consultation process will depend on the age of the child. The focus group participants agreed with the recommendations made. However, the group recommended the following changes: (i) In respect of recommendation (a), that not just medical practitioners but all other child care professionals should consider the possible consequences of disclosing a child's HIV status before providing information to third parties; (ii) in respect of recommendation (b), that the words 'in a medical context' be deleted.

11.6.5 Evaluation and recommendation

The Commission recommends that -

- **A child of at least 12 years of age should have the right not to have information regarding the outcome of his or her HIV test disclosed.**

- **A child under 12 years of age who is of sufficient maturity to understand the benefits, risks and possible social implications of an HIV test should have the right not to have information regarding the outcome of his or her HIV test disclosed.**

- **The HIV status of a child under 12 years of age who is not of sufficient maturity to understand the benefits, risks and possible social implications of an HIV test may only be disclosed by other parties on a need-to-know basis when it is in the best interests of that child or when the child's HIV/AIDS status would pose a real risk to third parties.** The Commission did not debate the meaning of a 'real risk' and invites comment in this regard. The disclosure of a child's HIV/AIDS status should not affect the child's right to education and the right to play and should not be capable of being lawfully raised as an impediment to the general overall care of the child.

- **All child care practitioners, including medical practitioners, should have a legal duty to consider the possible consequences of disclosure of information regarding a child's health status before providing this information to third parties.**

- **Before disclosing a child's HIV status, note must be taken of the National Policy on testing for HIV**.

11.7 Access to contraceptives

11.7.1 Introduction

In order for young persons to make informed choices regarding the age of initiating sexual activity, and protecting themselves against unwanted pregnancies and sexually transmitted diseases, they need access to appropriate family planning services. This raises a number of issues relating to the age at which they may utilise such services and the family and parental involvement in this process.

11.7.2 South African Law and Policy

A child is entitled to consent to medical treatment on their own if over the age of 14. This has led the Department of Health to adopt a policy of providing contraceptives to children over the age of 14 without informing parents or requiring parental consent. With children 14 years and younger, contraceptives will only be provided once the health care worker has considered the individual circumstances of the child. However, many children 14 years and younger are sexually active, and making provision of contraceptives subject to the discretion of a health care worker tends to make

such services inaccessible.

11.7.3 Comparative review of systems in other countries

The Reproductive Health Services Policy in Ghana provides that services must be provided to adolescents and that this includes all couples engaging in sexual activity, regardless of age.[80]

The Tanzanian family planning guidelines state that all males and females of reproductive age, including adolescents, are entitled to family planning information, education and services. They are also entitled to counselling and those who are sexually active may request counselling on access and methods of family planning which will suit their individual circumstances.[81]

In California, a minor may consent to medical care related to the prevention or treatment of pregnancy without the assistance of their parent or guardian.[82] In other words, a minor of any age is entitled to have access to contraceptives.

11.7.4 Comments received

The research paper asked respondents to comment on the following recommendation:

> It is recommended that the consent provisions in the Child Care Act should provide an exception to the consent rules with regard to access to contraceptives. It is proposed that this should follow the Ghanian and Californian examples and provide that access to contraceptives should be provided to all sexually active couples regardless of age.

The respondents welcomed this recommendation. Some, however, felt that cognisance should be taken of the spiritual and moral aspects of the family as the welfare of the child also includes certain spiritual and moral issues. The HIV/AIDS Project Committee submitted that more debate may be needed to support the recommendation regarding supply of contraceptives regardless of age.

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80 'Women of the World: Laws and Policies affecting their reproductive lives' Anglophone Africa Centre for Reproductive Law and Policy 1997 at 85 - 86.

81 Ibid at p. 126.

82 Section 6925(a) of the Californian Family Code.

11.7.5 Evaluation and recommendation

Following the Ghanaian and Californian approach, the Commission recommends that confidential access to contraceptives should be provided to all sexually-active persons, regardless of age. The Commission further recommends that access to contraceptives and advice about contraceptives should be at state expense where necessary and should not be linked to medical treatment.

11.8 Access to termination of pregnancy services

11.8.1 Introduction

In South Africa the 'law against abortion' has been radically altered by the Choice on Termination of Pregnancy Act 92 of 1996. Under this Act the focus of the law has shifted away from 'abortion', with its connotation of criminality, to a woman's right of choice with respect to reproduction, including the right to choose to terminate a pregnancy in the early part of the gestation period. Prior to this development in our law, South African common law permitted lawful abortion only in the case of necessity, the only clear instance of which was to save the mother's life. Some measure of reform was introduced by way of the Abortion and Sterilisation Act 2 of 1975.[83]

11.8.2 South African Law and Policy

Under the Choice on Termination of Pregnancy Act 92 of 1996 the grounds for lawful termination of pregnancy are dependent on the gestation period. The most significant change introduced by this Act is that a pregnancy may be terminated at the request of a pregnant woman during the first 12 weeks of the pregnancy.[84] No other grounds for lawful termination are required during this period. The consent of the pregnant woman is sufficient to secure a termination, even if she is a minor.[85] Where the pregnant woman is a minor, the medical professional concerned is only under

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83 This Act was repealed by the Choice on Termination of Pregnancy Act 92 of 1996 in so far as it relates to abortion.

84 Section 2(1)(a). This effectively introduces abortion on demand during the first 12 weeks of pregnancy.

85 Section 5. Informed consent is required.

an obligation to advise her to consult with her parents, guardian, family or friends before the pregnancy is terminated. The termination may not be denied should she choose not to consult with such persons.[86] Terminations during the first 12 weeks may be carried out by a registered midwife who has completed a prescribed training course.

From the 13th week to the end of the 20th week of pregnancy a termination may be carried out on grounds broadly approximating those set under the Abortion and Sterilization Act of 1975: (a) the continued pregnancy poses a risk of injury to the woman's physical or mental health; (b) there is a substantial risk that the foetus would suffer from a severe physical or mental abnormality; (c) the pregnancy is the result of rape or incest; or (d) the continued pregnancy would significantly affect the social or economic circumstances of the woman.[87] A medical practitioner must, after consulting with the pregnant woman, be of the opinion that one of the grounds exists before carrying out a termination during this period.

After the 20th week of the gestation period the grounds for termination are limited to: (a) endangerment of the woman's life; severe malformation of the foetus, or (c) risk of injury to the foetus. Here the medical practitioner concerned must consult with another medical practitioner or with a registered midwife before forming an opinion that one of the grounds for termination exists. In all cases of termination, at whatever stage of the gestation period, the informed consent of the pregnant woman is required.[88]

The Choice on Termination of Pregnancy Act 92 of 1996 has come under constitutional attack in **Christian Lawyers Association of SA v Minister of Health**.[89] The plaintiffs in this case argued that the whole of the Act be struck down as unconstitutional on the basis of the argument that the right to life[90] applies to an unborn child. The matter was decided on exception, the defendants arguing that the plaintiff's case disclosed no cause of action. In its judgment the Transvaal High

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86 Sections 5(4) and (5) make special provision for terminations in respect of women who are severely mentally disabled or in a state of continuous unconsciousness.

87 Sections 2(1)(b)(i) - (iv) respectively. The fourth ground, viz the effect of the pregnancy on the social and economic circumstances of the woman, is entirely new. See also J Birenbaum 'Contextualising choice: Abortion, equality and the right to make decisions concerning reproduction' (1996) 12 **SAJHR** 485.

88 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 45.

89 1998 (4) SA 1113 (T).

90 Section 11 of the Constitution.

Court held that the validity of the plaintiff's cause of action depended on the legal (as opposed to religious or philosophical) question whether the term 'everyone' in section 11 of the Constitution applied to an unborn child. In finding that it did not so apply, the court was persuaded by the fact that, despite the possible uncertainty existing at common law, the Constitution made no express provision affording legal personality or protection to the foetus. The court recognised that if it were to accept that section 11 of the Constitution safeguarded the right to life of a foetus, this would mean that the foetus would enjoy the same protection as the mother. This would have far-reaching consequences which, in the absence of a clear expression of intention in this regard, could not have been contemplated by the drafters. The court accordingly held that ' ... under the Constitution the foetus is not a legal *persona*'.

Apparently, the Christian Lawyers Association has instituted action in the High Court of Pretoria against the Minister of Health, the Premier and MEC for Health of Gauteng to challenge section 5 of the Choice of Termination of Pregnancy Act 92 of 1996. The Association, inter alia, argues that the provisions of the Act which allow termination of pregnancy without parental consent are infringing the child's right to parental care in terms of 28 of the Constitution.

11.8.3 Evaluation and recommendation

The Commission has recommended that the new children's statute should not apply to unborn children.[91] From our perspective, and given the focus of this discussion paper, **the Commission accepts that a woman, even a girl child, has a right of choice with respect to reproduction, including the right to choose to terminate a pregnancy**. However, we do acknowledge the absurdity of the situation where a (girl) child of any age can have an abortion without parental consent in terms of the Choice on Termination of Pregnancy Act 92 of 1996, but needs parental consent to undergo any other operation in terms of section 39 of the Child Care Act, 1983.

11.9 The right to refuse medical treatment

11.9.1 Introduction

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91 See the definition of 'child' in 4.2 above.

The advances made in medical science and in the application of medical technology have resulted in patients living longer. For many patients this signifies a welcome prolongation of meaningful life, but for others the result is a poor quality of life which inevitably raises the question whether treatment is a benefit or burden.[92] The need has therefore arisen to consider the protection of a child's right to refuse medical treatment. This section draws a distinction between two scenarios namely, (a) where a child or he or her parents refuse treatment due to the child's health condition being such as to preclude an acceptable quality of life, and (b) where treatment for the child is refused based on religious beliefs.

11.9.2 South African Law and Policy

Patients have a common law right to refuse medical treatment.[93] Strauss[94] puts it as follows:

> Our law allows a person to refuse medical treatment or a particular form of treatment, even if that may result in the patient's health deteriorating.

Whilst the common law position for adults is clear and unambiguous, the Child Care Act has changed the position for children. The Act provides that if a parent or guardian refuses his or her consent to an operation or treatment, and the medical practitioner believes the treatment or operation is necessary, then he or she may report the matter to the Minister of Social Development who may authorise the treatment or operation if satisfied that it is necessary.[95]

There are several problems with section 39(1) relating to the right of a parent or guardian to refuse medical treatment on behalf of their minor child. In essence the problems are that the current Act does not take into account the following:

- that the views of parents or guardians of children infected with HIV should be involved in decisions regarding the type of care their children receive; and

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92 South African Law Commission **Report on Euthanasia and the Artificial Preservation of Life** November 1998 at 2.

93 Strauss **Doctor, Patient and Law** at 31.

94 Ibid.

95 Section 39(1) of the Act.

- children or young adults who are at the age where they may lawfully consent to medical treatment should be entitled to participate in decision-making regarding their health.

The South African Law Commission in its Report on Euthanasia and Artificial Preservation of Life, 1998, stated that although a child over the age of 14 may consent to medical treatment without the assistance of his or her guardian, that the right to refuse medical treatment *without assistance* should be limited to persons above 18 years as a safety measure since refusal of treatment could be to the detriment of the patient. The Commission is of the view that there is a rational distinction to be made between giving consent and withholding consent and that it is right for the law to be reluctant to allow a child to veto treatment designed for his or her benefit, particularly if a refusal will lead to the child's death or permanent damage. The Commission therefore recommended that every child above the age of 14 until the age of 18, of sound mind and *assisted by his or her parents or guardians*, is competent to refuse any life-sustaining medical treatment or the continuation of such treatment with regard to any specific illness from which he or she may be suffering.

11.9.3 Comparative review of systems in other countries

In a recent English case the Appeal Court held that the best interests of every child include an expectation that difficult decisions affecting the length and quality of their life will be taken by their parents.[96] Furthermore, in England the Children's Act, 1989, provides that a child with sufficient understanding of the procedure or treatment may refuse life-extending treatment.[97] This position has, however, been eroded by court decisions which have held that a court has the inherent jurisdiction in such matters and may override such decisions by children.[98]

In Zimbabwe, as stated in 11.4.3 above, if consent is refused by the parent or guardian, the medical practitioner may apply to the local magistrate for consent to undertake the procedure.[99]

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96 **The Weekly Telegraph** 30 October 1996.

97 Sections 38(6), 43(8), and 44(7) quoted in **AIDS : a Guide to the Law** at 5.

98 See **Re W** (1992) 4 All ER 627 and **South Glamorgan Country Council v W and B** (1993) 1 FLR 574 quoted in **AIDS : a Guide to the Law** at 5 - 6.

99 Section 76(1) of the Children's Protection and Adoption Act.

11.9.4 Comments received

The research paper asked respondents to comment on the following recommendation:

> It is recommended that the consent legislation should follow the Zimbabwean approach where a court application must be made to a local magistrate if a parent or guardian's decision is to be overridden. It is therefore proposed that the consent provisions within the Child Care Act be amended to provide that should a parent or guardian refuse to give their consent for medical treatment or an operation and a medical practitioner believes such treatment is necessary then an application must be made to the Commissioner of the Children's Court for a decision regarding consent. At such a hearing the following parties should be provided with an opportunity to state why they believe the proposed procedure should or should not take place: the parents or guardians, the child affected and the medical practitioner. A decision should then be taken on the basis of the 'best interests of the child' principle and the clinical information provided.

The majority of respondents agreed with the recommendation made. Referring to the issue of religious belief which may prevent treatment, the NICC argued that limitations need to be set to customary rights as the Child Care Amendment Act does give rights to consent for medical treatment for the child.

On the other hand, the Jehovah Witnesses of South Africa submitted that Jehovah Witnesses' children should not have to undergo blood transfusion and that they should receive a medically accepted alternative choice, namely non-blood medical and surgical management. Also, if the treatment is not urgent, notice must be given to the parent should the consent of the Minister be required in terms of section 39(1). Notice should also be given in those circumstances contemplated in section 39(2) in that the superintendent must give notice to the parents if their whereabouts are known. The respondent submitted that consideration should be given to the concept of mature minor. Thus, if a minor is competent enough to make decisions about his or her health, the court must accept the views of that minor regardless of his or her age. The respondent suggested that the following be taken into account in the event the court feels compelled to issue a court order to permit the use of blood: (a) should the order limit when and how blood might be used? For example, doctors have been required to use or consider the use of non-blood medical alternatives first and to record in the child's clinical notes why blood was deemed necessary, (b) should the order require that senior doctors more experienced in non-blood management make the clinical decision if and when blood is to be given?, (c) should the order be restricted specifically to

the use of blood only? Since it is only blood that the parents are refusing, there is no need to take all medical decision-making authority away from them, and (d) should a time limit be put on the order showing a specific expiration date or time for traditional re-examination?

11.9.5 Evaluation and recommendation

The Commission recommends as follows:

- **The Commission reaffirms the view it took in the Report on Euthanasia and Artificial Preservation of Life and recommends that every child above the age of 12 years, of sound mind and assisted by his or her parents or guardian, is competent to refuse any life-sustaining medical treatment or the continuation of such treatment with regard to any specific illness from which he or she may be suffering.**

- **That the Children's Court may be approached if a child above the age of 12 years and of sound mind disagrees with his or her parent or guardian that medical treatment on him or her should be refused or discontinued or where a medical practitioner believes that such treatment is necessary.**

- **That no child may be deprived of medical treatment by reason only of religious or other beliefs unless the person who refuses to give consent can show that there is a medically accepted alternative choice**.[100]

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100 See 11.2.5 above where it is proposed that a child should have the right to use alternative health care systems if so desired. See also 23.10.4 below.

CHAPTER 12

THE PROTECTION OF CHILDREN AS CONSUMERS

12.1 Introduction

Children are significant consumers[1] of goods and services.[2] Markets in toys, fast food, entertainment and clothes are directed explicitly at children.[3] Older children often have direct spending power from pocket money and their own earnings. In addition, children have an indirect effect on the marketplace through the influence they have on the way their parents and other adults spend money.

Some older children are relatively sophisticated consumers. However, many children, especially those of primary school age, may make uninformed purchases or be particularly susceptible to aggressive selling techniques.

This Chapter considers the appropriateness and effectiveness of the legal process in protecting children as consumers. Obviously any discussion in this regard has to take into account the provisions of the Age of Majority Act 57 of 1972 and the reader is referred to Chapter 4 above. The key legal processes that affect children as consumers are those relating to trade practices and consumer protection, financial services, advertising and the media.

12.2 Comments and submissions received

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[1]Consumers are generally defined as those who purchase goods and services for personal or household use. Individuals using government services are also regarded as consumers.

[2]From about seven or eight years of age, about 80% of middle-class South African children get between R50 and R100 in pocket money a month. They spend this on luxury items such as stickers and tattoos, sweets, chips and cooldrinks. Shirley Fairall 'Who's the boss?', **Fair Lady** 25 April 2001, p. 73.

[3]Shirley Fairall 'Who's the boss?', **Fair Lady** 25 April 2001, p. 71: 'Marketers understand the universal law that happy children make happy parents. Fast food marketers understand a more refined version of this law: children who are happy *and* eating make the happiest parents. Of course, happy parents stay longer and spend more money'.

The protection of children as consumers was not a specific focus of Issue Paper 13. The following question, however, was posed:

> Question 29: Should the current legislative provisions governing matters such as the ownership of firearms, the sale of solvents, liquor and tobacco to children, and related matters be revisited in order to better protect children?

The question was a loaded one and perhaps the reference to ownership of firearms biassed the responses. In any event, the majority of the respondents answered the question in the affirmative.[4] The NICC stated that there is most definitely a need for such revisitation. It said allowing children aged 16 years to own a firearm is unacceptable. This was also the view of Mrs J Smith. The National Council of Women of South Africa, acknowledging its unfamiliarity with the respective legal provisions, considered that these measures should be as stringent as possible. Both the Durban Committee and the Cape Law Society supported any measures which might protect children, stating that the appropriate authority should be consulted in this respect.

The Natal Society of Advocates answered the question in the negative. It was their view that children younger than the prescribed age limits who wished to indulge in these activities (smoking, drinking, sniffing, etc) do so anyway notwithstanding the age limit imposed.

What the children said:

In the child participation process, children indicated that upon attaining majority status, persons (and therefor adults) should have the right to carry licensed firearms, to vote, to enter into contracts, to use alcohol, to have sex, and to drive a car.[5]

12.3 Protecting and Informing Child Consumers

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[4]Professor C J Davel, Mr D S Rothman, Disabled People South Africa, the SA National Council for Child and Family Welfare and the Johannesburg Institute of Social Services.

[5]See also the discussion in Chapter 4 above.

The major barrier to children exercising their consumer rights is that they generally do not know they have those rights. Even if they do know they have rights, children may not understand how to enforce them or may not feel confident about pursuing a remedy. Children, and perhaps consumers in general, find it very difficult to seek redress for poor treatment by service providers. It is therefore essential that complaints mechanisms are complemented by regulatory requirements and educational initiatives that effectively safeguard child consumers' well-being.

Accordingly it is recommended that national child consumer education strategies should be developed for implementation in all primary and secondary schools by the Department of Education in consultation with the Department of Trade and Industry.

12.4 Enforcing children's contracts

Commerce often involves consumers in contractual arrangements. At common law, generally[6] a minor cannot incur contractual liability if he or she is not assisted by his or her guardian when the contract is made.[7] The minor can, however, enter into a contract without such assistance if such contract will improve the minor's position without imposing any duties on him or her.[8] A minor can enforce a contract against the other party but the contract cannot be enforced against the minor. This is one of the consequences of children's historical classification as persons under a legal disability.

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[6]There are statutory exceptions to this general rule: See Van Heerden et al **Boberg's Law of Persons and the Family** (second edition) 781 - 786.

[7]Voet 26.8.2, 3, 4; Van Leeuwen **Censura Forensis** 1.1.17.10; 1.4.3.2; Rooms-Hollands-Regt 1.16.8; 4.2.3; Van der Linden 1.4.1; Grotius 1.8.5; 3.1.26; 3.6.9; 3.48.10; Van der Keesel **Theses Selectae** 128. The courts have also confirmed this principle many times - see eg **Dhanabakium v Subramanian** 1943 AD 160; **Edelstein v Edelstein** 1952 (3) SA 1 (A).

[8]Van Heerden et al **Boberg's Law of Persons and the Family** (second edition) p. 798 calls it a "limping" transaction: for the minor an unassisted contract creates only a natural obligation; for the other party it creates a legal one. See also Cronjé **Barnard, Cronje & Olivier's The South African Law of Persons and Family Law** (third edition), p. 80.

There are statutory exceptions to the rule that a minor cannot incur contractual liability where he or she has not been assisted by his or guardian.[9] These exceptions are:

° Minors who have attained the age of 18 years may, without the consent of their guardians, insure their own lives, pay any premium due under the policy, and undertake and maintain the policy for a stipulated period, ceding their earnings as security.[10]

° Minors over the age of 16 years may be depositors with a bank, and may without the assistance of their guardians execute all necessary documents, give all necessary acquittances and cede, pledge, borrow against and generally deal with the deposit as they think fit.[11]

° Minors over the age of 16 years may be members of or depositors with a mutual bank, and may without the assistance of their guardians execute all necessary documents, give all necessary acquittances and cede, pledge, borrow against and generally deal with the share or deposit as they see fit.[12]

° Deposits in the Post Office Savings Bank made by or for the benefit of a minor, and any National Savings Certificate issued in favour of a minor, may be repaid to the minor when he or she has attained the age of seven years (or such other age above seven years as may be determined by regulation in respect of any particular kind of deposit or account) in every respect as if the minor were of full age.[13]

° Minors may be members of a friendly society if its rules so provide, and minors who have attained the age of 16 years may 'execute all necessary documents and give all necessary

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[9]Van Heerden et al **Boberg's Law of Persons and the Family** (second edition), p. 781 et seq; Cronjé **Barnard, Cronje & Olivier's The South African Law of Persons and Family Law** (third edition), p. 82.

[10]Section 37(1) of the Insurance Act 27 of 1943.

[11]Section 87(1) of the Banks Act 94 of 1990.

[12]Section 88(1) of the Mutual Banks Act 124 of 1993.

[13]Section 54(a) of the Post Office Act 44 of 1958.

acquittances', though they may not manage the affairs or be a principal officer of the society.[14]

° Minors may be members of a registered medical scheme if its rules so provide, and minors who have attained the age of 16 years may 'execute all necessary documents and give all necessary acquittances' without assistance, but they may not manage the affairs or be the principal officer of the scheme.[15]

° Minors over the age of 18 years may, without the consent of their guardians, consent to the performance of any 'operation' upon themselves. Minors over the age of 14 years are competent to consent, without the assistance of their guardians, to the performance of any 'medical treatment' upon themselves or their children.[16]

Some 16 and 17 year old children are in full time employment and living independently. These young people in particular should have greater contractual capacity, including the ability to enter credit contracts.

In New South Wales, the Minors (Property and Contracts) Act 1970 (NSW) reverses the general principle that a contract is not binding on a minor. It provides that where a minor participates in a civil act (including a contract) for his or her own benefit that act is presumptively binding on the child provided he or she has the necessary understanding to participate in it. The Australian Law Reform Commission[17] has subsequently recommended that legislation based on this model should be

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[14]Section 16 of the Friendly Societies Act 25 of 1956. A member under the age of 16 years is required to act 'by his parent or guardian'.

[15]Section 20A(1) of the Medical Schemes Act 72 of 1967.

[16]Section 39(4) of the Child Care Act 74 of 1983. See also Van Heerden et al **Boberg's Law of Persons and the Family** (second edition) 784, footnote 76 for a discussion of the questions as to who is liable for the fees arising from the operation or medical treatment and whether s 39(4) of the Child Care Act empower unassisted minors to incur contractual liability for fees arising from the operation or medical treatment to which they have consented.

[17]**Report No 84: Seen and Heard: Priority for Children in the Legal Process**, September 1997, p. 222. (Hereinafter **Report No 84**).

adopted nationally for young people aged 16 and 17.

12.5 Trade practices and consumer protection

In South Africa trade practices and consumer affairs are regulated by the Consumer Affairs (Unfair Business Practices) Act 71 of 1988.[18] This Act provides for the prohibition or control of certain business practices. The Act does not differentiate between adult and child consumers,[19] and provides for the establishment of Consumer Affairs Committee[20] which is tasked with the function to make known information on current policy in relation to business practices in general and unfair business practices in particular, to serve as general guidelines for the persons affected thereby, to receive and dispose of representations, and to conduct investigations into any unfair business practices which allegedly exists or may come into existence.[21] The Committee reports the result of any investigation to the Minister of Trade and Industry who may then, provided the Minster is of the opinion that a unfair business practice exists or may come into existence and provided the Minister is not satisfied that the unfair business practice is justified in the public interest, declare the said unfair business practice to be unlawful and take the steps necessary to ensure the discontinuance or prevention of the unfair business practice.[22]

The Businesses Act 71 of 1991 provides for the licensing and carrying on of businesses, and shop hours. In terms of Item 2 of Schedule 1 to the Act, the following businesses require licences to

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[18]Although the Consumer Affairs (Unfair Business Practices) Act, 1988 repeals the Trade Practices Act 76 of 1976, certain sections of this latter Act dealing with the prohibition of certain false and misleading advertisements, statements, communications, descriptions and indications (section 9) and giving false or misleading indications in respect of prices of goods or the rendering of services (section 13) remain in force.

[19]See the definitions of 'consumer' and 'business practice' in section 1. In terms of the latter definition, 'business practice' inter alia includes 'any agreement, accord, arrangement, understanding or undertaking, **whether legally enforceable or not**, between two or more persons'.

[20]Section 2 of the Consumer Affairs (Unfair Business Practices) Act, 1988.

[21]Ibid, section 4.

[22]Ibid, section 12(1)(b). See also sections 12(1)(c) and (d) of the Consumer Affairs (Unfair Business Practices) Act, 1988.

operate:

> The carrying on of business by -
> (a) - (c)
> d. keeping three or more mechanical, electronic or electrical contrivances, instruments, apparatus or devices which are designed or used for the purpose of the playing of any game or for the purpose of recreation or amusement, and the operation of which involves the payment of any valuable consideration, either by the insertion of a coin, token coin or disc or in an appliance attached thereto or in any other manner;
> e. keeping three or more snooker or billiard tables;
> f. keeping or conducting a night club or discothèque;
> g. keeping or conducting a cinema or theatre;

Children frequent some of these places.

Australia has federal and State and Territory consumer protection regimes. Parts IV and V of the Trade Practices Act 1974 (Cth) (Trade Practices Act) provides protections for consumers who conduct transactions with corporations or the Commonwealth.[23] All Australian States and Territories have mirrored many of the consumer protection provisions in the Trade Practices Act in their fair trading legislation.[24]

A person who suffers loss or damage as a result of a breach of the consumer protection provisions of the Trade Practices Act may recover damages for that loss.[25] In certain circumstances where a breach of the legislation is established, the Australian Competition and Consumer Commission (ACCC) may negotiate with a corporation on behalf of a consumer to resolve a dispute. If the ACCC declines to pursue a complaint on behalf of a child consumer, he or she has the option of pursuing a private action under the Trade Practices Act by way of a guardian *ad litem* in the Federal

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[23]The federal consumer protection law is of limited scope because of constitutional restrictions on the legislative power of the Commonwealth. See Australian Law Reform Commission **Report No 84**, p 223.

[24]Fair Trading Act 1987 (NSW); Fair Trading Act 1989 (Qld); Fair Trading Act 1987 (SA); Fair Trading Act 1990 (Tas); Fair Trading Act 1985 (Vic); Fair Trading Act 1987 (WA); Consumer Affairs and Fair Trading Act 1990 (NT); Fair Trading Act 1992 (ACT).

[25]There are also other remedies available under the Trade Practices Act, such as injunctions and orders to disclose information or publish advertisements.

Court. However, there is a significant lack of awareness of consumer rights in Australia as was noted by the Australian Law Reform Commission in its 1994 inquiry into compliance with the Trade Practices Act.[26]

12.6 The sale of dangerous goods to children and safety standards

Statistics from the Poison Information Centre[27] from 1992 - 1997 indicate that the majority of out- and in-patients at hospitals are treated for medicines poisoning (49% of all admissions) followed by paraffin poisoning (25 %). The Medical Research Council estimates that paraffin poisoning affects 15000 children a year.[28] Most of these 'accidental' injuries to children could have been prevented. Following a workshop during National Child Protection Injury Prevention Week in August 1999, the Office on the Rights of the Child within the NPA has formulated a child accident prevention plan and facilitated the establishment of a coordinating body as part of the NPA.[29]

The Child Care Act, 1983 does not contain provisions specifically designed to ensure that certain goods meet particular standards and that dangerous goods are not sold to children. However, provisions prohibiting the sale of dangerous goods to children are found in various other enactments. In terms of section 3(1) of the Arms and Ammunition Act 75 of 1969, for instance, a person under the age of 16 years may not apply for a licence to possess a firearm.[30] In terms of

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[26]Australian Law Reform Commission **Report No 68 Compliance with the Trade Practices Act 1974** (1994). See also Australian Law Reform Commission **Report No 84**, p 223 - 224.

[27]Department of Paediatrics and Child Health, Institute for Child Health, UCT and the Red Cross War Memorial Children's Hospital.

[28]S Giese, V Mathambo, T Guthrie and P Proudlock **Child Health Policy Institute Working Document: Child Health in South Africa**, UCT, 1999.

[29]**Children in 2001 - A Report on the State of the Nation's Children**, National Programme of Action for Children in South Africa, the Presidency, p. 79.

[30]See also section 37 of the Arms and Ammunition Act 75 of 1969 which provides that 'no person shall permit or enable a juvenile under the age of sixteen years to be in possession of an arm or ammunition'. Whenever such juvenile is in possession of any arm or ammunition, it may be seized.

section 4 of the Tobacco Products Control Act 83 of 1993 no person shall sell or supply any tobacco product to any person under the age of 16 years, 'whether for his personal use or not'. Section 5 of the Tobacco Products Control Act 83 of 1993 also provides that the sale of tobacco products from vending machines shall be restricted to places in which such machines are inaccessible to persons under the age of sixteen years. Section 45(1)(a) of the Liquor Act 27 of 1989 prohibits the sale or supply of liquor on licenced premises to any person under the age of 18 years. Indeed, a person under the age of 18 years is not even allowed to be in any restricted part of such premises.[31] Access by children to places of gambling is regulated by provincial legislation.

Although some toy manufactures do place warnings[32] on their products as is prescribed by the SABS or some (European) safety standards, the obligation to ensure the safe use of that product remains with the parent. Some feel this obligation is misplaced and that manufacturers of toys and other goods for children should assume responsibility for ensuring that their products (and their packaging) are safe for children to use.

In order to comply with the vision of a single comprehensive children's statute, it is recommended that a complete audit of national and provincial legislation and municipal bye-laws be undertaken by the Department of Trade and Industry of the various prohibitions on the sale of dangerous goods to children, that such provisions then be incorporated in the new children's statute. The provisions incorporated can then be repealed in the various other statutes.

In Australia, the Trade Practices Act requires that minimum conditions and warranties are met in transactions.[33] A person who is injured or whose property is damaged by a defective product has a right to claim compensation against the manufacturer of the product. Legislation in each Australian State and Territory prescribes product information and safety standards that complement

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[31]Section 45(1)(b) of the Liquor Act 27 of 1989.

[32]Such as 'Contains small parts. Not fit for children under 3 years of age!'.

[33]These conditions include that goods and services be of merchantable quality and fit for their purpose.

the product liability provisions in the Trade Practices Act.[34]

Subject to their inability to litigate directly, children in Australia have access to the same remedies under the Trade Practices Act for defective goods as adult consumers. Safety standards that are effective in protecting child consumers from harm are equally as important as this statutory remedy for loss. The Consumer Affairs Division of the Department of Industry, Science and Tourism oversees the enforcement of safety standards declared under the Trade Practices Act. Mandatory safety standards can only be introduced when a product has been shown to be dangerous. Currently, there are mandatory safety standards for toys for children aged under 3 years,[35] flotation toys and swimming aids[36] and children's nightclothes.[37] This regime has been criticized for being reactive rather than pro-active.

The European Union product safety model is cited as appropriate to adopt because it requires manufacturers to ensure that all children's toys meet essential safety requirements before being placed on the market. The European Union system is one of presumed compliance. It involves manufacturers certifying that their product complies with the law by placing a 'Communauté Européene' (CE) label on the toy. The European Union Directive establishes safety standards for all toys designed for use by children under 14 years of age.[38] It stipulates general principles and particular risks as criteria against which a toy's safety is measured. For example, toys and their

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[34]Eg Fair trading Act 1987 (NSW), Part 4; Fair Trading Act 1989 (Qld), Part 4; Sale of hazardous Goods Act 1977 (Tas); Goods (Trade Descriptions) Act 1971 (Tas), Consumer Affairs Act 1972 (Vic), Part IV; Consumer Affairs and Fair Trading Act 1990 (NT), Part IV; Consumer Affairs Act 1973 (ACT), Part IIIA; Manufacturers' Warranties Act 1974 (SA).

[35]This standard has been in place since 1989: Federal Bureau of Consumer Affairs **Safety Standard for Children's Toys** AGPS Canberra 1994. See also the **Toys and Children's Products Safety Ordinance** 1993 (Hong Kong).

[36]This standard has been in place since 1986: Federal Bureau of Consumer Affairs **Safety Standard for Children's Floatation Toys and Swimming Aids** AGPS Canberra 1992.

[37]A standard has been in place since 1978: Federal Bureau of Consumer Affairs **Safety Standards for Children's Nightclothes** AGPS Canberra 1994.

[38]Council Directive 88/378/EEC (OJ 1988 L187/1), articles 1, 3.

parts and the packaging in which they are contained for retail sale must not present a risk of strangulation or suffocation.

The European Union model has been in force since 1990 and is reportedly working well.[39] **It is therefore recommended that the European Union product safety model should be evaluated by the Department of Trade and Industry to determine whether it would provide more effective protection for children from injury caused by defective or dangerous products than the current South African system**.

12.7 The sale of solvents and other harmful substances to children

Substance abuse, in particular of alcohol and illicit drugs, is recognised as one of the greatest health and social problems in South Africa today.[40] A South African National Drug Master Plan, approved by Cabinet in 1998, was developed as a response to drug abuse and its related harmful consequences. Youth are a priority focus of the plan. Objectives of the plan include provision of counselling, treatment and rehabilitation services for young people who are at risk of misuse or drug dependency. National policy is also being drafted for the Health Promoting Schools Initiative aimed at preventing and reducing consumption of tobacco products and other drugs by youth.[41]

12.7.1 Comparative review of systems in other countries

In Ireland, the Child Care Act of 1991 makes it a criminal offence to sell solvents to a person under 18 years of age where there is reasonable cause to suspect that the person will inhale the product. Although it is not an offence to possess solvents, these products can be seized if inhaled by a person under 18.[42]

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[39]X Lewis 'The protection of consumers in European Community Law' (1992) 12 **Yearbook of European Law** 139.

[40]**Children in 2001 - A Report on the State of the Nation's Children**, p. 83.

[41]Ibid.

[42]The information can be accessed at http://www.mwhb.ie/drug9.htm .

Article 2 of the Decree of the Legislative Assembly of the Republic of El Salvador states that the following are considered to be solvents or inhalants: 'all substances or chemical products which independently of their degree of purity, have effect on the central nervous system and other organic systems of the human body, capable of producing transformations be they of the nature to increase or diminish its functions or modifying the states of conscience and that the undue use of the same cause dependency or physical and psychic subjection'. Article 3 lists the substances and products to which this law is applicable. Article 11 of the Decree makes it obligatory to detail the active substances of the content and the degree of toxicity on the packing, tubes, and pots in which the listed substances and products are commercialized. It is also obligatory that the packing carries the following label mentioning: 'It is a criminal offense to sell and provide this product to minors under 18 years of age'. In terms of article 12, it is prohibited to sell, procure or facilitate the acquisition by minors under 18 years of the listed substances and products and any contravention is considered as induction or help to the use of drugs.

12.7.2 **Comments received**

Question 8 of the research paper on street children[43] asked:

> Should a comprehensive children's statute prohibit the sale or supply of solvents to minors? What other alternative measures can be taken to prevent the sale of solvents to minors? Would a prohibition be effective? Should it be contained in a comprehensive children's statute, or in other legislation (eg legislation administered by trade and industry)?

The majority of respondents were in favour of a prohibition on the sale and supply of solvents to minors. It was suggested that public awareness and education campaigns should be used to persuade shop owners not to sell solvents. Further, it was said that solvents should be stored behind counters and not be freely accessible.

The focus group participants suggested that a realistic age limit should be set for the buying of solvents. However, difficulties were foreseen with enforcement, e.g. intimidation and bribery of officials. Strategies suggested for reducing solvent abuse were education programmes, positive

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[43]The research paper was prepared for the Commission by Mr Miles Ritchie. The workshop was held in Pretoria on 8 April 1999.

role models, recreational facilities, and positive use of peer pressure.

The Growing up in Cities research[44] explained that substance abuse by street children is not purely done for 'kicks' as is the case with many school children. The research shows that if a child's access to a particular harmful substance is closed by legislation, the child will simply seek something else more readily obtainable. The respondent recommended that the issue of substance abuse should be addressed with regard to children as a whole and not just street children. The respondent rightfully said that even though street children abuse substances openly, the immensely wide and more secret use of substances by all children should not be ignored.

SANCA, Pietermaritzburg submitted that since children as young as eight years are addicted to substances, comprehensive legislation is required which regulates every facet of their treatment such as schooling, parental responsibility, health, and state responsibility. SANCA, Pietermaritzburg said children abusing substances need legislative intervention to -

- formalise placements at places of safety;
- amend admission criteria at schools of industry and reform schools for children addicted to drugs - they need admission first and then treatment can follow; and
- establish a specialised court for children to finalise all matters relating to children.

12.7.3 **Evaluation and recommendations**

Introducing legislation to prevent the sale of certain harmful solvents (such as glue) to children is easy to propose and enact, but difficult, if not impossible, to enforce.[45] Some children, for instance, may legally own and drive motor vehicles at certain ages. To prohibit the sale of petrol, a potential dangerous inhalant, to such children seems illogical. To ban the manufacture and supply of all products containing scheduled substances[46] to children also seems impracticable. As these

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[44]Conducted under the auspices of Street-Wise South Africa.

[45]See also Copeland P 'Recommendation: Ban on solvents to minors' Legal Resource Centre.

[46]'Scheduled substances' as per Part II of Schedule 1 of the Drugs and Drug Trafficking Act 140 of 1992 include acetone, an ingredient of most nail polish removers.

examples illustrate, the problem relates to the endless forms harmful substances can assume, the fact that numerous household goods such as paraffin do have the potential to be abused, and the ease with which most of these substances can be obtained. The problem is therefore not the sale of harmful substances, but their potential abuse, inter alia, by children. Given the practical difficulties in defining harmful substances, **the Commission therefore does not recommend the enactment of a provision in the new children's statute prohibiting the sale of harmful substances to children**.

It must be pointed out, however, that it is already a very serious criminal offence to manufacture and supply certain scheduled substances,[47] to use and possess any dependence-producing, dangerous dependence-producing or undesirable dependence-producing substances,[48] or to deal in such substances,[49] in terms of the Drugs and Drug Trafficking Act 140 of 1992. Listed as 'undesirable dependence-producing substances' are cannabis (dagga) and methaqualone (which includes Mandrax). Children found in possession of or dealing with these substance are liable on conviction to a payment of a fine or a period of imprisonment ranging from not more than five years to not more than 25 years.[50] **The Commission has no hesitation in condemning the sale of cannabis (dagga), Mandrax and other dependence-producing, dangerous dependence-producing or undesirable dependence-producing substances, as defined in the Drugs and Drug Trafficking Act 140 of 1992, to children and adults alike, and to support the existing legislation in this regard. The Commission is further of the view that children who themselves deal in drugs should not expect any mercy from the criminal justice system**.

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[47]Section 3 of the Drugs and Drug Trafficking Act 140 of 1992.

[48]Section 4 of the Drugs and Drug Trafficking Act 140 of 1992. The substances are listed in the Schedules to the Act.

[49]Section 5 of the Drugs and Drug Trafficking Act 140 of 1992. 'Deal in' is given a very wide definition in this Act. The definition is strengthened by presumptions. If, for instance, it is proved that an accused was found in possession in or on any school grounds or within a distance of 100 metres from the confines of such school grounds of any dangerous dependence-producing substance, it shall be presumed, until the contrary is proved, that the accused dealt in such substance.

[50]Section 17 of the Drugs and Drug Trafficking Act 140 of 1992.

However, it is realised that children are often dependent on drugs. In order to maintain their drug habits, such children often resort to prostitution, crime or dealing in drugs. In this regard, reference must be made to the Prevention and Treatment of Drug Dependency Act 20 of 1992. This Act provides for a procedure for bringing persons dependent on drugs before a magistrate.[51] The magistrate can then commit a person dependent on drugs to a treatment centre after holding an enquiry.[52] Such person shall then be detained in the treatment centre until being released on licence or discharged or transferred or returned to any other institution in terms of any provision of the Act.[53] The Act also provides for the transfer and retransfer of persons to and from children's homes, schools of industries or reform schools to treatment centres.[54] **The Commission regards the provisions of the Prevention and Treatment of Drug Dependency Act 20 of 1992, read with sections 255 and 296 of the Criminal Procedure Act 51 of 1977, as adequate in dealing with children dependent on drugs and who do require treatment. The Commission therefore does not recommend the inclusion of such provisions in the new children's statute**.

Legislation alone, however, is not enough to prevent the abuse of harmful substances, drugs and alcohol by children. Awareness campaigns which enlighten children, parents and the public about the danger of substances abuse should be initiated. Education on the dangers of the abuse of harmful substances, drugs and alcohol should be part of the school curriculum. **The Commission therefore supports the Health Promoting Schools Initiative and the National Drug Prevention Strategy**.

12.8 Safety at places of entertainment

In some of the newer legislation, provisions are found which protect the safety of children at places of entertainment. One such example is section 271 of the Ireland Children Bill, 1999.[55] It reads as

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[51]Section 21 of the Prevention and Treatment of Drug Dependency Act 20 of 1992. See also sections 255 and 296 of the Criminal Procedure Act 51 of 1977.

[52]Section 22 of the Prevention and Treatment of Drug Dependency Act 20 of 1992.

[53]Section 26 of the Prevention and Treatment of Drug Dependency Act 20 of 1992.

[54]Section 30 and 31 of the Prevention and Treatment of Drug Dependency Act 20 of 1992.

[55]See also section 19 of the Lesotho Children's Protection Act 6 of 1980.

follows:

(1) Where -

(a) an entertainment for children or any entertainment at which the majority of the persons attending are children is provided,
(b) the number of children who attend the entertainment exceeds one hunderd, and
(c) access to any part of the building in which children are accommodated is by stairs, escalators, lift or other mechanical means,

it shall be the duty of the person who provides the entertainment -

(i) to station and keep stationed wherever necessary a sufficient number of adult attendants, properly instructed as to their duties, so as to prevent more children or other persons being admitted to any such part of the building than that part can properly accommodate,
(ii) to control the movement of the children and other persons admitted to any such part while entering and leaving, and
(iii) to take all other reasonable precautions for the safety of the children.

(2) Where the occupier of a building permits, for hire or reward, the building to be used for the purpose of an entertainment, he or she shall take all reasonable steps to ensure that the provisions of this section are complied with.

(3) If any person on whom any obligation is imposed by this section fails to fulfil it, he or she shall be liable, on summary conviction, in the case of a first offence, to a fine not exceeding £500 or imprisonment for a term not exceeding 6 months or both and, in the case of a second or subsequent offence, to a fine not exceeding £1,500 or imprisonment for a term not exceeding 12 months or both.

(4) A member of the Garda Síochána may enter any building in which he or she has reason to believe that such an entertainment as aforesaid is being, or is about to be, provided with a view to seeing whether the provisions of this section are complied with.

(5) This section shall not apply to any entertainment given in a private residence.

The provision in the Tasmania Children, Young Persons and their Families Act 1997 is aimed at something different. Section 93 of this Act reads as follows:

Public entertainment by children

93. (1) In this section –

"entertainment" includes any performance, exhibition, display, match or contest;

"public entertainment" means –

(a) any entertainment to which persons are admitted on payment; and

(b) any entertainment which is open to the public, whether admission to the entertainment is or is not procured by the payment of money or on any other condition; and

(c) any entertainment or other activity, the whole or any part of which is, or is intended to be, seen or heard by the general public (whether in this State or elsewhere and whether at the time the entertainment or activity takes place or at some later time) on broadcast receivers or television receivers or by the projection of a film or video;

"restricted public entertainment", in relation to a child, means a public entertainment which, or which is of a class which, the Minister has declared to be restricted public entertainment in respect of children the same age as the child.

(2) The Minister may, by order, declare any public entertainment or class of public entertainment to be restricted public entertainment in respect of children who have not attained the age, not exceeding 14 years, specified in that order in relation to that public entertainment or class of public entertainment.

(3) Without limiting subsection (1), a class of public entertainment may be determined by reference to –

(a) the nature of the entertainment; and

(b) the purpose of the entertainment; and

(c) the persons who carry on the entertainment; and

(d) the place in which, and the days or times at or during which, the entertainment is carried on.

(4) A person must not procure, induce, permit, counsel or assist a child to take part in a public entertainment which, in relation to that child, is a restricted public entertainment, except where the Secretary has given written permission for the child to take part in the public entertainment.

Penalty: Fine not exceeding 15 penalty units or imprisonment for a term not exceeding 3 months.

(5) This section does not apply in relation to a public entertainment –

(a) the net proceeds of which are devoted to the benefit of a school or to a charitable purpose; or

(b) that takes place on any premises wholly or mainly used for the purpose of conducting religious services.

(6) An order under this section is a statutory rule within the meaning of the Rules Publication Act 1953.

Section 114 of the draft Namibia Children's Act is similar to the Ireland provision, with one addition.

Sections 114(3) and (4) of the draft Act provide, in addition to the possibility of a fine and or imprisonment as punishment for violation of the section, that a court may cancel any license issued under any law for the operation of the premises for performances, entertainment, or events of a convicted person who has also been convicted within the last five years of an offence under this section. Such cancellation of a licence shall also disqualify the person in question from obtaining any licence for a place of entertainment for five years from the date of that person's latest conviction.

The Commission recommends that a provision similar to the Namibian provision be included in the new children's statute.

12.9 Media regulation[56]

Children are avid consumers of media and information services, including television, radio, magazines and the Internet. In Australia, for instance, children aged between 5 and 12 years watch an average of 17 hours 27 minutes of television each week.[57]

Article 17 of the CRC requires States Parties to recognise '... the important function performed by the mass media...' and encourage the dissemination of information that is of social and cultural benefit to children. It also requires States Parties to protect children from harmful material.

12.9.1 Television broadcasts

The stated object of the Broadcasting Act 4 of 1999 is to establish a broadcasting policy in South Africa and for that purpose to 'cater for a broad range of services and specifically for the programming needs in respect of children, women, the youth and the disabled'.[58] Broadcasting is regulated by a system of licenses and programming is made subject to licence conditions

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[56]See also the draft Position Paper on the Media Developmental & Diversity Agency (MDDA), November 2000 at www.gov.za/documents/mdda on the question of media ownership in South Africa.

[57]Australian Law Reform Commission **Report No 84**, p. 230.

[58]Section 2(e) of the Broadcasting Act 4 of 1999.

determined by Independent Communications Authority of South Africa (ICASA).[59]

Section 2 of the Independent Broadcasting Authority Act 153 of 1993 (the predecessor of the Independent Communications Authority of South Africa Act 13 of 2000) enjoins the Independent Broadcasting Authority (IBA) to ensure that broadcasting licensees adhere to a Code of Conduct acceptable to the Authority. In terms of section 56(1) of the 1993 Act, 'all broadcasting licensees shall adhere to the Code of Conduct for Broadcasting Services as set out in Schedule 1'. The provisions of that sub-section do not, however, apply to any broadcasting licensee 'if he or she is a member of a body which has proved to the satisfaction of the Authority that its members subscribe and adhere to a Code of Conduct enforced by that body by means of its own disciplinary mechanism, and provided that such Code of Conduct and disciplinary mechanisms are acceptable to the Authority'.

The existing Code of Conduct for Broadcasting Services does not provide any specific guidance on children.[60] However, the Code of the Broadcasting Complaints Commission of South Africa does provide that the electronic media must 'exercise due care and responsibility in the presentation of programmes where a large number of children are likely to be part of the audience'.[61] Likewise, a proposed new code of conduct prepared by J Browde SC and F Kathree also provides guidance to broadcasters in this regard.[62] Paragraph 18 of this proposed new code of conduct reads as follows:

> CHILDREN

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[59]ICASA was established by the Independent Communications Authority of South Africa Act 13 of 2000 to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society as is required by section 192 of the Constitution, 1996.

[60]For the text see http://iba.org.za/actsched.htm .

[61]Section 7.1.3 of the Code of the BCCSA.

[62]For the full text see http://iba.org.za/policypg.htm "Proposed New Code of Conduct".

18. Broadcasters are reminded that children[63] ... embraces a wide range of maturity and sophistication, and in interpreting this Code it is legitimate for licensees to distinguish, if appropriate those approaching adulthood from a much younger, pre-teenage audience.
18.1 Broadcasters shall not broadcast material unsuitable for children at times when large numbers of children may be expected to be part of the audience.
18.2 Broadcasters shall exercise particular caution, as provided below, in the depiction of violence in children's programming.
18.3 In children's programming portrayed by real-life characters, violence shall, whether physical, verbal or emotional, only be portrayed when it is essential to the development of a character and plot.
18.4 Animated programming for children, while accepted as a stylised form of story-telling which can contain non-realistic violence, shall not have violence as its central theme, and shall not invite dangerous imitation.
18.5 Programming for children shall with due care deal with themes which could threaten their sense of security, when portraying, for example, domestic conflict, death, crime or the use of drugs.
18.6 Programming for children shall with due care deal with themes which could invite children to imitate acts which they see on screen or hear about, such as the use of plastic bags as toys, use of matches, the use of dangerous household products as playthings, or other dangerous physical acts.
18.7 Programming for children shall not contain realistic scenes of violence which create the impression that violence is the preferred or only method to resolve conflict between individuals.
18.8 Programming for children shall not contain realistic scenes of violence which minimise or gloss over the effect of violent acts. Any realistic depictions of violence shall portray, in human terms, the consequences of that violence to its victims and its perpetrators.
18.9 Programming for children shall not contain frightening or otherwise excessive special effects not required by the story line.

Apart from the Code of Conduct for Broadcasters set by the Broadcasting Complaints Commission of South Africa, the South African Broadcasting Corporation (the SABC) adheres to the Code of Advertising Practice of the Advertising Standards Authority of SA. However, none of these applies specifically to children, although they both cover the general principle that children should be taken into consideration whenever a large number may reasonably be expected to be in the audience. The implication is that the SABC is not expected to cater specifically for children during adult viewing time - ie after the watershed of 21:00 during the week and 21:30 at weekends (which is an SABC rule, not an externally imposed one) - although some may be watching, of course. News bulletins are regarded as adult programmes too, even at 19:00, and the SABC is only expected to

[63]Children are defined as persons under 16 years of age.

issue warnings of potentially disturbing visuals.

The SABC's mandate in terms of the Broadcasting Act 4 of 1999, and the obligations of its licensing conditions set by ICASA, do not impose any quota of children's programming. This is determined solely by the broadcaster. The provisions of the Films and Publications Act 65 of 1996 regarding the classification of films are, of course, adhered to.

There is no provision in any external code regarding warning symbols and age advisories, only that the broadcaster should warn viewers about content that is potentially damaging or disturbing to children. The systems of symbols, and the guidelines for those and for age advisories, have been introduced and are determined at the broadcaster's discretion. However, in an effort to arrive at some kind of standard - so that viewers can make informed choices - over the past year the SABC has had several workshops with the other broadcasters (M-Net and e-tv), which were attended by the BCCSA and representatives of the Films and Publications Board. These were initiated by the broadcasters, and have achieved a large measure of uniformity, except that M-Net is in a slightly different position owing to its decoder facility of parental blocking and an alternative language channel.[64]

Even in the most commercial mature broadcasting market in the world - that of the United States of America - regulation of broadcasting has been increased in recent years. Obligations to screen a certain minimum quota of children’s television programmes, and obligations to classify television programmes for their levels of violence, nudity and language, have been imposed on the private sector.

In general, the content of programs shown on Australian commercial television is co-regulated by the Australian Broadcasting Authority (ABA) and the broadcasters through industry codes of practice. However, regulation is stricter in regard to children's television. Each year, commercial television stations in Australia must broadcast a certain number of hours of program material specifically for children. This program material is classified by the ABA prior to broadcast under criteria set out in the children's television standards (CTS) established under the Broadcasting Services Act 1992 (Cth). The CTS apply only to these quota programs and are designed to ensure

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[64]As per Mrs Dorothy van Tonder, Manager: Audience Liaison, Corporate Affairs, SABC.

the availability of quality material that adds to children's experience and understanding.[65]

One of the objects of the Australian Broadcasting Services Act 1992 (Cth) is to ensure that providers of broadcasting services place a high priority on the protection of children from exposure to program material that may be harmful to them. The Act does not define the term 'harm', but it is generally interpreted to mean an adverse psychological impact on children. For example, the CTS provide that no quota program may present images or events in a way that is unduly frightening or unduly distressing to children or present images that depict unsafe uses of a product or unsafe situations that may encourage children to engage in activities dangerous to them. The ABA is reviewing results of research on the television viewing behaviour of preschool aged children.[66]

In addition to complying with the CTS, the Australian Broadcasting Services Act 1992 (Cth) requires the various sectors of the Australian electronic broadcasting industry, including commercial television stations, to develop a code of practice. In 1993 the ABA registered the Federation of Australian Commercial Television Stations code of practice that includes sections regulating the handling of complaints and the classification of programs.[67] The code of practice also requires all advertisements directed to children to 'exercise special care and judgement' and comply with the relevant CTS.

The national broadcasters, the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS), have particular responsibilities under their respective enabling statutes. Both the ABC and SBS must develop codes of practice relating to programming matters and complaints handling and notify them to the ABA.[68] The main focus is on protecting children

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[65]Children are defined in the CTS as those under 14 years of age. Programmes classified “P” (pre-school children) can be shown between 7 am and 4.30 pm Monday to Friday. Programmes classified “C” (children) can be shown between 7 am and 8 am and between 4 pm and 8:30 pm Monday to Friday and 7 am to 8:30 pm on weekends and school holidays. Other suitable programmes such as those rated “G” (general) may also be shown at these times.

[66]Australian Law Reform Commission **Report No 84**, p. 231.

[67]Classified material must be broadcast in suitable time zones.

[68]Section 10(1)(j) of the Special Broadcasting Service Act 1991 (Cth).

from inappropriate material. For example, section 3.1 of the ABC code of practice states

> [w]hile the real world should not be concealed from children, special care will be taken to ensure programs children are likely to watch unsupervised will not cause alarm or distress.[69]

In Australia Pay TV is less regulated than commercial free-to-air television. All Pay TV operators have channels for child viewers but there is no legislative requirement for this and no regulation of when certain programs are shown. The Pay TV sector has submitted a code of practice for registration by the ABA.

There is growing community concern, both in South Africa and internationally, about the effect of violence portrayed on television, video and computer on viewers' behaviour, particularly the effect on the behaviour and development of children.[70] In response to this concern, legislation in the USA and Canada requires that a v-chip (a technological blocking device) be installed in all new television sets over a certain size.[71] The chip enables consumers to block the reception of programs in nominated ratings categories.[72]

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[69]Section 2.6 of the general SBS program code states that 'SBS recognises its responsibility to carry its multicultural message to young people and includes appropriate programming in schedules as and when funds permit': SBS Codes of Practice: Programming Policies SBS Sydney 1996, 19.

[70]See eg M Brown 'The portrayal of violence in the media: Impacts and implications for policy' (1996) (55) **Trends and Issues in Crime and Criminal Justice**; Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies **Report on the Portrayal of Violence in the Electronic Media** Senate Printing Unit Canberra 1997; W Josephson **Television Violence: A Review of the Effects on Children of Different Ages** Canadian Heritage Ottawa 1995.

[71]Section 551(c) of the Telecommunications Act 1996 (US); (1996) 2 **International Research Forum on Television and Children** 4.

[72]In Australia, a federal Ministerial Committee looking at the portrayal of violence in various forms of the electronic media recommended that v-chips be included in all new televisions sold in Australia. All the recommendations of the committee have been endorsed by federal Cabinet. Legislation to this effect has yet to be introduced: Australian Law Reform Commission **Report No**

It is recommended that the Department of Trade and Industry, in consultation with the Department of Communications and ICASA, investigate the possibility of introducing legislation to compel manufacturers to install technological blocking devices in all new television sets.

12.9.2 Radio broadcasts

The provisions of the Broadcasting Act 4 of 1999 also apply to radio. Like commercial television stations, commercial radio broadcasters are required to comply with a code of practice. In this regard, the Code of the Broadcasting Complaints Commission of South Africa provides that the electronic media must 'exercise due care and responsibility in the presentation of programmes where a large number of children are likely to be part of the audience'.[73]

The code developed by the Federation of Australian Radio Broadcasters, registered by the ABA in May 1993, does not include any provisions directed specifically at child listeners although it does prohibit the broadcasting of unsuitable programs such as those that incite violence or that present as desirable the misuse of drugs.

12.9.3 On-line services

The Internet is becoming a popular source of information and entertainment for children. Increasing numbers of schools are coming on-line and material on the Internet targeted at children is burgeoning. As with television, there is increasing community concern that young people are being exposed to pornographic and other inappropriate material[74] such as aggressive marketing on the Internet. Placing or possessing material on the Internet that infringes existing legislation regulating, for example, racial vilification or defamation may be a criminal offence.[75] These laws are difficult to

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84, p. 232.

[73]Section 7.1.3 of the Code of the BCCSA.

[74]Such as how to make a bomb and where to buy the ingredients.

[75]See, for instance, sections 7, 10 and 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. See also section 29 of the Films and Publications Act 65 of 1996.

enforce as the originators of Internet material can rarely be identified.

The Films and Publications Act 65 of 1996[76] provides for the classification of certain films and publications through a mechanism known as the Film and Publication Board. Section 27 of the Films and Publications Act 65 of 1996 creates the offences of knowingly creating, producing, importing or being in possession of a publication or film which contains a visual presentation of child pornography.[77] The definition of 'film'[78] is broad enough to encompass visual presentations and images relayed on the Internet. However, given its specific focus and the nature of the classification system, it is clear that the Films and Publications Act 65 of 1996 does not, and cannot, specifically regulate Internet material, including advertisements, accessible to children.[79]
Some commercially developed filtering programs that allow parents to restrict children's access to on-line services are available. The dilemma some parents face in this regard is that their children are far more computer literate than they themselves. This places the parents in an uncomfortable catch 22 situation: you need a child to install the computer programmes to prevent that child from accessing certain sites!

The Australian Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies suggested in 1997 that on-line service providers should

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[76]As amended by the Films and Publications Amendment Act 34 of 1999.

[77]'Child pornography' is defined in the Act to include 'any image, real or simulated, however created, depicting a person who is or who is shown as being under the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participation in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children'.

[78]See the definition of 'film' in section 1 of the Act.

[79]It is doubtful whether the Films and Publications Act 65 of 1996 can even effectively deal with child pornography. See in this regard the report of a national workshop on 'Combatting child pornography through effective law enforcement' held in Cape Town on 12 -14 May 2000, a paper prepared by Working Group 1 of the International Association of Prosecutors on 'Combatting use of the Internet to exploit children', 23 March 1999, etc. The Commission is also looking at combatting child pornography as part of its investigation into sexual offences (Project 107).

establish procedures to ensure that prospective account holders are over the age of 18.[80] Shortly afterwards the Wood Royal Commission made a number of recommendations designed to prevent material exploitative of children from being placed on the Internet and to protect young Internet users from other harmful material that may be available on-line.[81] The Royal Commission recommended that support be given to the development of labelling technology that can be combined with appropriate software to limit the material that can be accessed by minors.[82] It considered this necessary, in light of the sheer scale of the Internet and the inability to regulate effectively what is available on it.

In Australia, the 1996 investigation into the content of on-line services by the ABA recommended a self-regulatory framework for the Internet. The main features of this framework would be the development of codes of practice for service providers and the development of voluntary content labelling schemes to enable parents and providers to identify, material potentially harmful to children.[83] The review considered that the regulatory framework for on-line services should recognise that the majority of parents will accept responsibility for managing their children's use of on-line services in the home.

12.9.4 **Printed material**

As stated previously, the Films and Publications Act 65 of 1996, as amended, provides for the classification of certain publications.[84] Upon submission of a complaint or an application, a classification committee appointed in terms of the Act examines and considers the content of the

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[80]**Report on the Regulation of On-Line Services**, Part 3, recommendation 6 Canberra: Senate Printing Unit 1997.

[81]**Final Report Vol. V: The Paedophile Inquiry** Sydney: NSW Government Printer 1997, chapter 16.

[82]Recommendation 100.

[83]Australian Law Reform Commission **Report No 84**, p. 234.

[84]'Publication' is given a very broad meaning in the Act and includes '(i) any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet'.

publication and classifies the publication as XX, X18, R18 or F18.[85] The distribution or advertisement for distribution of publications so classified (or in conflict with conditions which may have been imposed) is a criminal offence.[86] For the publication of a publication classified as R18, for instance, the following conditions may be imposed:[87]

(1) that the publication shall only be distributed to persons older than 18 years of age, or older than a specified younger age and that the notice shall bear a distinct notice of such restriction;
(2) that the publication shall only be distributed in a sealed and, if necessary, opaque wrapper which must also, if applicable, bear the notice referred to in (1) above.

The Films and Publications Act 65 of 1996, as amended, has been criticised for not protecting children effectively, especially as regards to the use of the Internet.[88] Although the classification scheme provided for by the Act does provide some form of protection to children, the administration of the scheme is re-active as it is activated by the submission of a complaint or an application. By then it is usually too late to do anything about it.

The Commission will be considering all aspects relating to child pornography in its investigation into sexual offences. For present purposes, and as an interim measure, **the Commission urges the Department of Home Affairs, as the Department responsible for the administration of the Films and Publications Act 65 of 1996, to affect the amendments to the Act agreed upon at the national workshop held in Cape Town on 12 to 14 May 2000**. The Commission is convinced that these amendments will address some of the concerns relating to the effective law enforcement against child pornography in South Africa. **In addition the Commission recommends that when films or video material unsuitable for viewing by children or children of a certain age group are advertised, such advertisements (trailers) themselves must be age appropriate**.

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[85]Section 17(1) of the Films and Publications Act 65 of 1996. The classification is done with reference to the Schedules to the Act.

[86]Section 25 of the Films and Publications Act 65 of 1996.

[87]Schedule 4 to the Films and Publications Act 65 of 1996.

[88]See the proceedings of a national workshop on the "Combatting child pornography through effective law enforcement" held in Cape Town, 12 - 14 May 2000.

12.9.5 Complaints and review mechanisms

Children tend not to make complaints about media services on their own behalf.[89]

In Australia, the Broadcasting Services Act 1992 (Cth) lays down a general procedure for making complaints related to radio and television codes of practice that requires consumers to approach the service provider first. If the consumer is not satisfied with the provider's response or does not receive one within 60 days, he or she can refer the matter to the ABA for investigation.[90] Complaints about possible breaches of program standards, including CTS, can be made directly to the ABA. Any person aggrieved by a decision of the Classification Board about a publication can apply for review of that decision by the Classification Review Board.[91] The application must be in writing and accompanied by the prescribed fee.[92]

In its report,[93] the Australian Law Reform Commission points out that it cannot be assumed that the methods which work for adults in terms of formal complaints are also accessible to children. This requires imagination and sensitivity to the developmental stages of childhood in relation to various approaches which might enable children to participate in the processes of critical evaluation of the media. The Australian Law Reform Commission then recommends that information about media complaints mechanisms should be included in the national child consumer education strategies proposed at recommendation and that media service providers, the ABA and the Classification Board should ensure that their complaints procedures are appropriately modified for child

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[89]In 2000 the Broadcasting Complaints Commission of South Africa received 50 complaints which were perceived to have been harmful to children. All these complaints were lodge by adults. Three complaints by children (friends) were received regarding blasphemy on television: Registrar, Broadcasting Complaints Commission of South Africa (letter dated 26 April 2001).

[90]Sections 148 and 149 of the Broadcasting Services Act, 1992 (Cth).

[91]Section 42(1)(d) of the Classification (Publications, Films and Computer Games) Act 1995 (Cth).

[92]Section 43(1) of the Classification (Publications, Films and Computer Games) Act 1995 (Cth).

[93]**Report No 84**, p. 235.

consumers.[94]

One of the principal objects of the Broadcasting Services Act 1992 (Cth) is to protect children from potentially harmful program material. As pointed out by the Australian Law Reform Commission,[95] for regulatory systems to be effective, regulators must be able to identify accurately and specifically the harm they seek to avoid. This can be difficult in the media industry because its products are open to diverse interpretations. Child consumers cover a wide range of ages and developmental stages. What is distressing to one child consumer may be amusing or informative to another. Neither the Convention on the Rights of the Child nor the federal legislation regulating the media offer guidance on the meaning of harm in this context. The Australian Law Reform Commission therefore recommends that international and Australian research on the effects of the media on children at different ages and stages of development should be comprehensively reviewed to determine more clearly what is harmful to the variety of child consumers. A summary of the results should be distributed to legislators, regulators, media providers and schools.[96] The Australian Law Reform Commission further recommends that national child consumer education strategies proposed should strongly encourage all States and Territories that have not already done so to include compulsory units on critical evaluation of the media, including advertising, in primary and secondary school syllabuses.[97]

12.10 Advertising

Children have high levels of consumption and considerable influence on family spending.[98] Advertising and marketing targets them directly from an increasingly young age. There is considerable community concern about the effects of advertising on children.

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[94]**Report No 84**, recommendations 61 and 62.

[95]**Report No 84**, p. 235 - 236.

[96]**Report No 84**, recommendation 63.

[97]**Report No 84**, recommendation 64.

[98]See Shirley Fairall 'Who's the boss?', **Fair Lady** 25 April 2001, p. 70 - 73.

The Advertising Standards Authority of South Africa (ASA) has formulated specific standards in respect of children and safety for the advertising industry. In terms of this standard, advertisements addressed to or likely to influence children should not contain any statement or visual presentation which might result in harming them, mentally, morally, physically or emotionally (the general principle).[99] The aim of the general principle is that children should not be brought under the impression that it is acceptable and safe to be in certain surroundings, and that the depiction of a particular activity or circumstances in such a way would not have the likely effect that children would attempt to emulate it with the concomitant risk of physical, moral or mental harm or that the impression is created that it is acceptable to act in a certain manner.

The ASA standard gives as unacceptable examples where the above principle may apply the following :

An advertisement -

- which encourages children to enter strange places or to converse with strangers in an effort to collect coupons, wrappers, labels or the like;
- where children appear to be unattended in street scenes unless they are obviously old enough to be responsible for their own safety, and where they are shown to be playing in the road unless it is clearly shown to be in a play area or other safe area, in street / traffic scene where they are seen to disobey traffic rules;
- where children are seen leaning dangerously out of windows or over bridges, or climbing dangerous cliffs;
- where small children are shown climbing up to take things from a table above their heads or where medicines, disinfectants, antiseptics or caustic substances are shown within reach of children without close parental supervision, or where unsupervised children are shown using those products in any way;
- where children are being shown using matches or any gas, paraffin, petrol, mechanical or mains powered appliances in such a way which could lead to their suffering injury.

Another principle formulated by ASA provides that advertisements should not exploit the natural credulity of children or their lack of experience and should not strain their sense of loyalty.[100] Instances where this principle may apply are, inter alia, the following:

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[99]Section 14.2.1.1 of the Advertising Standard.

[100]Section 14.3.1 of the Advertising Standard.

° for a commercial product or service which contains any appeal to children which suggests in any way that unless the children themselves buy or encourage other people to buy the product or service, they will be failing in some duty or lacking in loyalty toward some person or organisation, whether that person or organisation is the one making the appeal or not;

° which leads children to believe that if they do not own the product advertised they will be inferior in some way to other children or that they are liable to be held in contempt or ridicule for not owning it;

° offering a free gift, where the gift is not 'free' in the literal sense, i.e. where it is available without a consideration; if a condition applies, i.e. 'Free with ...'. This fact should be stated as well as any other conditions that will apply if the free gift is not deliverable immediately; if the main conditions, e.g. the purchase of something, is met. The gift should be portrayed in such a manner that its size can be determined by showing it in relation to some common object.

Given these standards, and provided the advertising industry continues to adhere to them, the Commission sees no need to divert from what is basically a self-regulatory scheme. Therefore we do not recommend any legislative intervention in this regard.

Some research has been done on the effects of advertising on children. In Australia, the Federal Bureau of Consumer Affairs has reported that children below the age of five years are unable to discriminate consistently between programs and advertisements, especially when they are similar in style.[101] Further, children below seven or eight years are said to possess little or no ability to recognise the persuasive intent of television advertising.[102] However, there is continuing debate about the level of regulation needed to protect children at different ages and stages of development from inappropriate marketing techniques.

In Australia no advertisements may be broadcast during nominated pre-schoolers' viewing

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[101]Australian Law Reform Commission **Report No 84**, p. 237.

[102]See also S Frith & B Biggins (eds) **Children and Advertising: A Fair Game?** Sydney: New College Institute for Values Research, University of NSW, 1994.

periods.[103] At other times, broadcasters are required to ensure that commercials and sponsorship announcements are clearly distinguishable from programs to child viewers.[104] In addition, stations may not broadcast advertisements designed to put undue pressure on children to ask their parents or other people to purchase an advertised product or service.[105] Advertisements may not state or imply that a product makes children who own it superior to their peers or that a person who buys an advertised product for a child is more generous than a person who does not.[106]

Concern about the potentially harmful effects of advertising on children is not restricted to the Australian community. Tight controls on advertising during television programs directed at children have been introduced in a number of overseas jurisdictions. In Quebec advertisements directed at children and adults can only be broadcast when the 2 to 11 year old age group represents less than 15% of the audience. Advertisement directed exclusively at children may only be broadcast during programs where the audience is less than 5% children. This ensures that children have adult supervision during peak times of advertising to children.

Sweden, Norway, Greece, Germany, Belgium, France and Austria ban advertising during children's TV programs.[107] Danish regulation of advertising directed at children is relatively similar to that in Australia and provides, for example, that advertisements must not contain a direct appeal to children to persuade others to buy the product being promoted and must not give the children the impression that they will have physical or psychological advantages if they buy the product.[108] In addition, children under the age of 14 cannot give recommendations or testimonies about any product or service.[109]

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[103]CTS 13(2): ABA **Australian Children's Television** Sydney ABA 1997, 29.

[104]CTS 15: ABA **Australian Children's Television** Sydney ABA 1997, 29.

[105]CTS 18(1): ABA **Australian Children's Television** Sydney ABA 1997, 29.

[106]CTS 18(2): ABA **Australian Children's Television** Sydney ABA 1997, 29. The Federation of Australian Commercial Television Stations' Code of Practice also sets out guidelines for advertising during children's programmes.

[107]Australian Law Reform Commission **Report No 84**, p. 239.

[108]Sections 16 and 18 of the Radio and Television Act 1992 (Denmark).

[109]Section 23(2) of the Radio and Television Act 1992 (Denmark).

Research on the effects of advertising on children at different ages and stages of development should be reviewed to enable the preparation of guidelines for all advertisers to protect children at different ages and stages of development from harm. The review should look at international material in the area such as the Scandinavian reports that lead to the banning of advertising during children's television programs.[110] It should consider what effect exposure to advertising has on young people who are introduced to it at a later age. The advertising guidelines should include information on what constitutes misleading practices in relation to young media consumers. The following questions should also be considered during the course of the research review.

- To what extent do 'misleading practices' and all child directed advertising impact on the buying habits of child consumers?
- What degree of regulation is required?
- How successful are current overseas attempts at regulation?
- Do 'safe' forms of advertising exist which can be used to promote children's products?

The Commission therefore recommends, as did the Australian Law Reform Commission,[111] that research on the effects of advertising on children at different ages and stages of development should be undertaken to enable the preparation of best practice guidelines for all advertisers to protect children at different ages and stages of development from harm. The Departments of Communications, Home Affairs, Trade and Industry, the Independent Communications Authority of South Africa and the Advertising Standards Authority of South Africa (ASA) should conduct this review in consultation with the relevant stakeholders and community groups, provide the results to the ASA and assist ASA to develop and refine appropriate best practice standards for distribution to advertisers.

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[110]Other documents of interest would be the guidelines on child friendly advertising produced by the Consumentenbond in the Netherlands as well as its report on the success of unconventional methods of advertising children's toys, food and entertainment.

[111]Recommendation 66, **Report No 84**.

CHAPTER 13

CHILDREN IN NEED OF SPECIAL PROTECTION

13.1 Introduction

The term ‘children in need of special protection’ (CINSP) appears to be replacing the term ‘children in especially difficult circumstances’ (CEDC), which featured in national and international child rights documents in the 1990's. In this Discussion Paper, use is nevertheless made of the latter term from time to time for clarity and continuity.

The World Summit Declaration on the Survival, Protection and Development of Children, which together with the CRC provided the child rights agenda for the 1990's, had the following clause among the global goals which participating nations committed themselves to achieve by the year 2000: ‘Provide improved protection of children in difficult circumstances and tackle the root causes leading to such situations’. The same categories of children will no doubt come into focus in the global agenda to be set for the current decade at the United Nations Special Session on Children, originally scheduled to be held in September 2001, but since postponed.

The following are commonly recognised categories of children in need of special protection:

- children living in severe poverty;
- children infected and affected by HIV/AIDS, including orphaned children;
- children with disabilities and chronic illnesses;
- children experiencing abuse, neglect and abandonment;
- child labourers;
- children living or working on the streets;
- commercial sexual exploited children;
- children in conflict with the law;
- children exposed to armed conflict or violence;[1]
- child refugees and undocumented immigrant children.

Not all of the above categories will be dealt with in the present Chapter. The issues of physical, sexual and emotional abuse, neglect and abandonment of children have been covered in

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1 On the issue of child soldiers, see Christine Jesseman ‘The protection and participation rights of the child soldier: An African and global perspective’ (2001) **African Human Rights Law Journal** 140.

Chapter 10 above. The issues of child refugees and undocumented immigrant children are dealt with in detail in the context of the international issues facing children in Chapter 22 below. This Chapter focusses only on the care and protection of commercial sexual exploited children, as the Commission's investigation into sexual offences is dealing with the criminal aspects of all forms of child sexual abuse including commercial sexual exploitation. The issue of young people in conflict with the law have been comprehensively dealt with in the Commission's investigation into juvenile justice. It is, however, worth pointing out that the draft Child Justice Bill[2] makes specific mention of an increased linkage between the child justice system and the child care system.[3]

This provision in the draft Child Justice Bill makes a much more clearly defined linkage between the criminal justice system and the child care system than exists in the current law, and officials working in the system will be alerted to the need to consider the children's court option when homeless children and other children living in poverty commit crimes and are brought to the criminal justice system.

The children who are at issue in the present Chapter are those whose lives are lived daily in circumstances which place their survival, development and protection at risk. The White Paper on Social Welfare, 1997 defines children in especially difficult circumstances as 'those children who are denied their most basic human rights and whose growth and development are consequently impaired'. The Child Care Act, 1983, as amended, defines children in especially difficult circumstances as 'children in circumstances which deny them their basic human needs, such as children living on the streets and children exposed to armed conflict or violence'. Some children are in special predicaments because of individual factors such as disability or chronic illness, while others are caught up in historical and social contexts which have led to multiple infringements of their rights. Combinations of such factors are also common.

Many if not most children in need of special protection could be considered to be 'in need of care' in terms of section 14(4) of the Child Care Act, 1983 and would qualify in theory for

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2 S A Law Commission's **Report on Juvenile Justice**, Project 106, 2000.

3 See clause 70 of the draft Child Justice Bill. This section, particularly subsection 2, was clearly drafted with the special protection for children in mind. The thinking behind this clause is that where a child commits a crime which is directly related to seeking basic needs such as food and warmth, such offences should not be treated as crimes but should be seen as a symptom of the child's poverty or homelessness and the child should then be dealt with as a child in need of care. If a child commits other kinds of crimes, it is still possible, in terms of subsection (1), for the court to stop the proceedings and refer the matter to the children's court.

protection via the conventional children's court processes. It will certainly be necessary at times to follow this route, and for the formal protective system to be better adapted to the needs of these children than is the case at present.[4] However, such children are typically caught up in mass-based socio-economic situations which case-by-case interventions on their own cannot satisfactorily address. They are also, in the very nature of their situations, marginalised from the mainstream of society and its formal protective mechanisms. Formal protective interventions may also not be practically possible on the required scale. Broader structural interventions are needed which will address the underlying causes of these children's problems and counteract their marginalisation, bringing them within the reach of needed services and enabling them to access their constitutional entitlements.

The Commission does not suggest that children in need of special protection be dealt with as a distinct group apart from other children. Often the issue is mainly one of enabling them to access services and benefits which are intended for all children. However, there is a need to examine each category of such children in order to ensure that their special circumstances are addressed in legislation. The intention is both to address the ways in which they may be marginalised from general forms of provision, and to provide for the specific services which may be needed in order to overcome their problems, as these children often have needs beyond those of children in ordinary situations. For example, specific measures are required to meet the needs of children with disabilities, those with chronic illnesses and those who have been subjected to various forms of trauma or deprivation. Ways of ensuring that such special provisioning can be facilitated by law will be explored in this Chapter.

13.1.1 Overarching problems and strategies

After examination of the plight of children in all the categories mentioned above, the Commission is of the opinion that certain broad-based interventions are required to address some problems common to the vast majority of those affected. These are, firstly, poverty and secondly, barriers to the accessing of basic services. Any action which would effectively impact on these would, in the view of the Commission, have the effect that children would in the first place be less likely to be put at risk of disease and disability, or be driven into life on the streets, prostitution or other forms of child labour. Secondly, such interventions would greatly mitigate the destructive effects of these

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4 Recommendations have been made in Chapters 10 and 23 towards this purpose.

problematic situations. Thirdly, children would be enabled to move out of destructive circumstances and become fully integrated with their communities. In the absence of such interventions, these problems are inclined to be cyclical and self-perpetuating.

Absolute poverty is the main reason why children enter circumstances which place their entire development at risk. As they then become increasingly marginalised from mainstream society, it becomes more and more difficult for them to access basic services. Education and health care are of particular relevance here. The results of this lack of access are far-reaching: lack of health care can render a child chronically unable to survive, develop and function to his or her potential. Lack of education locks children into poverty and denies them the means to move beyond their problematic circumstances, and ultimately to offer their own children a better life.

Research shows, e.g., that orphanhood, particularly that caused by the loss of a mother, often entails a deterioration in the health of the child.[5] Parallels no doubt exist for many other categories of children. Those on the streets usually miss out on their schooling, as do child workers and those caring for family members who are ill with AIDS.

13.1.2 Current law and practice

As will be discussed in Chapter 25, existing social security provision is for the most part limited to children under seven years. Children over the age of six years are not automatically able to access free medical services in the public health sector. The Regulations[6] to the South African Schools Act 84 of 1996 do not make explicit provision for persons other than a parent (if he or she lacks the necessary finances) or a foster parent or children's home to be exempted from payment of school fees. In addition, schools are under financial pressure and there are many reports about children who cannot pay fees and children who do not have uniforms being denied access, albeit this is in contravention of the regulations. This apparently happens partly through

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5 Barrett K "The Rights of Children: Raising the Orphan Generation" Paper presented at the Southern African Conference on Raising the Orphan Generation, Pietermaritzburg, 9 - 12 June 1998.

6 Exemption of Parents from the Payment of School Fees Regulations, 1998. GN No.1293 of 1998 in Government Gazette No. 19347, 12 October 1998. The relevant provisions of the Regulations read as follows: The Regulations to the South African School Act 84 of 1986 provide as follows for exemption from payment of school fees:

- Parents whose combined annual gross income is less than ten times the annual school fees per learner qualify for full exemption.
- Parents whose combined annual gross income is less than thirty times, but more than ten times the annual school fees per learner qualify for partial exemption.
- A person who has the responsibility of a parent for a learner placed in a foster home, foster care or place of safety is exempted from payment of school fees.

devices such as ensuring that the school is filled to capacity with fee-payers, or through pressures exerted on the learners themselves within the school setting, who may be shamed by staff or barred from extramural activities.

13.1.3 Approaches in other systems

Assistance is provided with primary heath care and education for impoverished children in various African countries. In Zimbabwe, primary education is compulsory, and tuition is free in rural areas. Uganda and Malawi also offer free primary education, and Malawi provides grants for books and clothing.[7] Primary health care in a number of countries is free or available at low cost to certain sectors of the population. For instance, in Zambia this applies to children.[8] Zimbabwe offers free primary health care in rural health centres, free health care for children below 5 years of age and free health care based on a means test.[9]

13.1.4 Recommendations

The Commission recommends the following overarching measures to address the problems of children in need of special protection, and to prevent them from falling into or remaining in such circumstances:

- **A universal grant to provide protection against absolute poverty, accessible to every child, along with additional grants to address special needs and circumstances. More detailed recommendations in this regard are supplied in Chapter 25.**
- **Provision for the court to be empowered to order that a grant be paid for a specified period in respect of a child found to be in need of care, if this is deemed necessary to enable the child to return to or remain within in his or her family home, or to be extricated from prostitution or other forms of exploitative labour. It is the Commission's view that children should not be removed from or forced to live away from the family home merely for reasons of poverty.**

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7 UNICEF **Children in Need of Special Protection Measures The Growing Needs of Children who have Lost Caregivers due to HIV/AIDS**, Draft Strategy Paper, March 1998.

8 **Orphans and HIV/AIDS in Zambia** Draft Report of an Assessment of UNICEF Programming in Zambia for Children and Children Affected by HIV/AIDS, July 1998.

9 Hunter S **Draft Report on Community Based Orphan Assistance in Zimbabwe: Developing and Expanding National Models by Building Partnerships with NGOs, CBOs and the Private Sector, September 1998**.

- **Genuinely free access for all impoverished children to primary and basic health care services in the public sector. Hence, no public health care facility should be entitled to exclude a destitute child from treatment. Tax concessions should be offered to private clinics which provide emergency services to destitute children.**
- **Genuinely free education for all impoverished children of school-going age. Hence, the Regulations to the S A Schools Act 1996 should be amended to include all categories of caregivers and also children from child-headed households for purposes of exemption from school fees. In addition, provinces should be required to budget for the number of children who in any given year will require education without being able to pay fees, and specific financing should be allocated to schools which accommodate such learners. No public school should be entitled to turn away a child on the grounds of not having a uniform.**

In the remainder of this Chapter, recommendations are made to address specific needs of children in particular categories. These are in addition to the overarching strategies recommended above.

13.2 children living in extreme poverty

13.2.1 Introduction

Although severely impoverished children are addressed in this section as a category of children in need of special protection, it should be borne in mind that, as mentioned above, most children in all the categories discussed in this Chapter experience this problem.

Poverty is a multi-faceted phenomenon with destructive impacts on all aspects of the lives of children. It creates barriers to the realisation of the entire range of their rights. Cassiem et al, for example, refer to poverty in terms of 'capability deprivation' rather than only being a matter of insufficient income. They identify the following four categories of poverty:

- insufficient income and income-earning opportunities;
- lack of human development opportunities (such as education, basic nutrition and health, ability to enjoy leisure and develop one's talents).
- feeling of physical and economic insecurity, or vulnerability;
- lack of ability to participate in family and community life and an inability to influence

one's own destiny - powerlessness and social exclusion.[10]

In this section, not all of these issues will be addressed in depth. The focus will be on the basic survival issues reflected in indicators such as infant mortality and morbidity, and child malnutrition. Additional information regarding child poverty is included in Chapter 25, dealing with grants and social security for children.

In South Africa, six out of every 10 children live in poverty.[11] Children account for 25% of South Africans living in poverty.[12] While the manifestations of poverty in South Africa are similar to those found in many other developing countries, the determinants of this poverty differ in a number of significant ways. The structural nature of poverty in South Africa and the extreme socio-economic dualism were, to a considerable extent, shaped by the segregationist policies of apartheid. The bantustan system, in particular, consigned the majority of Africans to overcrowded, poorly endowed and poorly serviced ethnic reserves. Under this system, moreover, the costs of social reproduction were deflected away from the more affluent centres of production in 'white' South Africa to the impoverished homelands. Thus, it is not surprising that the poorest segments of South African society are still to be found in these areas, and that within them the incidence of child mortality and malnutrition are the highest.

The fact that poverty has been aggravated by rigorously enforced state policies, strongly indicates that the reversal of such distortions will necessitate concerted interventions by the new Government through the RDP. The redress of structural underdevelopment cannot take place through the influence of market forces alone.

Apartheid has also resulted in an extraordinary level of structural violence in South Africa, with serious effects on the psychological development of its children. There are large numbers of children with special needs, including children with disabilities.

Reflecting both a lack of concern with such issues and the inefficiencies of the ethnically based administration of apartheid, data on mortality, morbidity, malnutrition and other key indicators are woefully inadequate and present an incomplete and partial picture of the current status of

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10 Cassiem S; Perry H; Sadan M and Streak J **Are Poor Children Being Put First ? Child Poverty and the Budget 2000** Idasa, Cape Town 2000, viii, 2-3.

11 **A Report on the State of the Nation's Children** National Programme of Action for Children in South Africa, The Presidency 2001 at 33.

12 Deborah Ewing "The Impact of HIV/AIDS on Child Poverty" Paper prepared for The Health Economics and HIV/AIDS Research Division (HEARD), May 2001.

children in South Africa, especially of poor, rural African children.

13.2.2 **Mortality**

Perhaps the most profound manifestation of the extent and impact of poverty in South Africa is to be found in the rates of infant and child mortality. More than any other indicators, these signal a society's capacity or incapacity to nurture and maintain its future generation. As such, these indicators represent a fundamental measure of a society's well being.

13.2.2.1 **Perinatal mortality**

The perinatal mortality rate (PNMR) is defined as the death of a foetus or a baby which occurs from 28 weeks of gestation to the first 4 weeks after birth. High rates of PNMR are generally taken as an indication of the quality and availability of antenatal care, as well as the health, nutritional and social conditions of child-bearing women.

A quarter of all 38 047 child deaths in 1995 were in the perinatal period.[13] A study was recently conducted to estimate a national PNMR in South Africa. The study concluded that the PNMR in South Africa is probably in the order of 40/1000 births.[14] Existing survey data indicate that most perinatal mortality is associated with pre-term labour, unexplained stillbirth, abrutio placentae and infections. Perinatal mortality rates point to the inadequacy of antenatal care, as a significant number of deaths in the age category are preventable. Antenatal care is important to ensure that a pregnancy is supervised and that complications are detected and dealt with promptly. The availability of antenatal facilities differs widely according to race, socio-economic standing and locality.

Due to limited services, and inadequate transport and cost, large numbers of women in rural areas give birth at home. Further evidence suggests that some women only attend antenatal clinics once in their late pregnancy. This implies that there is no follow up and no benefit from this visit.

Selected studies indicate that the percentage of home births range from 31 per cent in the

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13 **A Report on the state of the Nation's Children: South Africa** (2001) 76.
14 Pattinson RC 'Saving Babies: A Perinatal Care Survey of South Africa' **Science in Africa** 2000.

former KaNgwane to 66 per cent in parts of the former Transkei.[15] The risks to mother and child are increased with home deliveries especially when there are complications. It has been estimated that traditional birth attendants assist 12.8 per cent of all women who give birth. Due to the high incidence of home delivery in the rural areas, this is likely to be an underestimation. A study conducted in the rural areas of the former KwaZulu found that 60 per cent of all women who delivered at home were assisted by traditional birth attendants.

13.2.2.2 **Infant mortality**

The infant mortality rate (IMR) refers to the number of children who die before they reach the age of one year, expressed as a rate per 1000 live births. The IMR is widely used as a measure of the survival chances of children within society. It is a sensitive indicator of the overall health of the community and a good proxy for environmental and socio-economic conditions in a particular population.

Estimations based on the 1998 Demographic and Health Survey are that 45 per 1000 infants, or one in 22 children born in South Africa will die in the first year of life. The provinces with IMR higher than 45 per 1000 are the poverty stricken provinces of the Eastern Cape (61) and KwaZulu-Natal (52). In the richer provinces of Western Cape and Gauteng, the IMR figures were 8 per 1000 and 32 per 1000 respectively. However, provincial averages IMRs do mask intraprovincial variations. Foe example, Shung King, et al, (in SAHR 2000) found that the metropolitan region of the Western Cape had an IMR of 22.5 and 22.9 in 1998 and 1999 respectively.[16]

13.2.3 **Morbidity**

Available data on the extent and nature of morbidity and mortality are limited and partial. The absence of a comprehensive national health information system, coupled with inadequate reporting of notifiable diseases (particularly within the formerly independent homelands), poses problems for an analysis of the health status of different groups according to region, age gender etc. It is possible, nevertheless, to draw some common inferences on the basis of occasional surveys.

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15 UNICEF / National Children's Rights Committee **Children and Women in South Africa: A Situational Analysis** Johannesburg: UNICEF 1993, p. 30.

16 **A Report on the state of the Nation's Children: South Africa** (2001) 73.

Poverty, poor primary health care and unhealthy living conditions are major factors causing illness and death. Many parasitic and infectious diseases, which are aggravated by poverty, are preventable through immunisation, increased access to primary health care, improvements in living conditions and improvements in income levels.

The Department of Health currently maintains a register of notifiable diseases. Of these, infectious diseases were the most prevalent among African and Coloured children.

Tuberculosis (TB) is one of the most common notifiable diseases in South Africa. The lack of firm diagnostic criteria for notification, however, suggests that there is a significant degree of under reporting. Tuberculosis rates are highest in rural areas and particularly amongst children in poor living conditions. Geographically, the incidence of TB is highest in the rural areas of the Western Cape.

Measles is a leading cause of child mortality and morbidity in South Africa, although, once again, it is likely that there is significant under reporting. Unvaccinated children between nine and twelve months are the most vulnerable. Both measles and tuberculosis are eminently preventable through systematic vaccination programmes.

Other leading notifiable causes of child mortality and morbidity in South Africa are malaria (especially in the northern and eastern parts of the country), viral hepatitis, typhoid fever (which is strongly associated with contaminated drinking water, poor sanitation, and overcrowding), meningococcal disease, and cholera (which tends to be episodic).

A weakness in the existing health information system relates to a preoccupation with notifiable diseases at the expense of recording information on non-notifiable diseases. Diarrhoeal diseases, for example, are not generally notifiable, and yet dehydration from diarrhoea in responsible for thousands of deaths among black children each year.

Acute respiratory infections, likewise, are a major cause of childhood mortality. Significantly, the incidence of this and diarrhoeal diseases correlates very strongly with poverty and poor living conditions. Diarrhoeal diseases, respiratory infections and allergies outnumber all diseases in both ambulatory facilities and hospital admissions.

South Africa is experiencing one of the most rapidly progress HIV/AIDS epidemics in the

world,[17] with more people infected than in any other country, with the exception of India. In 1999, at least 1:8 adults were estimated to be HIV infected, representing about 4 million people.[18] The highest rates are among young adults, with an alarming increase observed among teenage girls. In south Africa, it is projected that AIDS will account for a 100% increase in child mortality - from an anticipated 48.5 per 100 000 births without AIDS to almost 100 per 100 000 births in the year 2010. In 1999, at Greys Hospital in KwaZulu-Natal, 81% of all deaths in the paediatric ward were proven AIDS related deaths - the figure is 90% for children under 3 years.[19]

Existing data indicate that the virus is spreading rapidly among 15 to 30 year olds, with nearly 50 per cent of reported cases falling within this age group. Although the total number of reported AIDS cases reveal marginally more male than female cases, in the 15 to 24 year age group the number of female cases is more than double that of males. As in many other developing countries, the dominant mode of transmission is via heterosexual sexual intercourse, followed by mother to child transmission.

There are considerable regional variances in the incidence of the disease with the highest recorded number of cases in KwaZulu/Natal. The regional breakdown of HIV positive cases among the sexually active population is highlighted in table 3.3 of the publication **Children, Poverty and Disparity Reduction**.

International research indicates that both men and women with sexually transmitted diseases (STDs) are most likely to contract HIV/AIDS. Figures indicating the extent and the consequences of sexually transmitted diseases do not exist nationally. However, studies of women attending family planning and antenatal clinics have shown prevalence rates ranging from 3 per cent for syphilis, 4 per cent to 12 per cent for gonorrhoea and 5 per cent to 16 per cent for chlamydia.[20] Although major urban centres have STD clinics where treatment is free, in all other health facilities payment is required for treatment of STDs.

A disturbing feature of the rapid increase in HIV infection, and one that is linked to the high incidence of infection among women, is the growing number of children infected with the virus. Children who are born with the AIDS virus seldom live beyond 5 years. Apart from an actual

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17 **National Report on Follow-Up to the World Summit for Children** submitted by the National Programme of Action for children Steering Committee through the Office on the Rights of the Child in the Presidency on behalf of the Republic of South Africa, December 2000.

18 **Children living with HIV/AIDS in South Africa - A Rapid Appraisal** (2000) 16.

19 **Children living with HIV/AIDS in South Africa - A Rapid Appraisal** (2000) 16.

20 Department of Health **Maternal, child and women's health**, p. 23.

loss of infant and child life, the pandemic is certain to give rise to a generation of AIDS orphans as it has done in a number of other African countries. The pressure which this state of affairs will place on the resources of society and on the well being of the children themselves (in terms of impoverishment, limited education and psychological deprivation) is likely to be considerable.

International experience has shown that there are no easy solutions for the control of HIV/AIDS since so many adolescent and women's health issues are rooted in social, economic and political factors. As there is no cure for HIV/AIDS at present, it has been accepted internationally that prevention is the only way to slow and contain the spread of the virus. Many countries are thus starting to focus HIV/AIDS interventions on children and adolescents, who are both a vulnerable group and the group with the greatest potential to slow or avoid transmission of the virus.

The HIV/AIDS Directorate within the Department of Health has produced a 2 year plan based on the National Aids Plan established by the National Aids Convention of South Africa (NACOSA). The Directorate's draft plan outlines five key strategies for the next two years, and of these, three are related to the provision of clinical HIV/ AIDS care.

Some strategies for countering HIV/AIDS include the development of school based life skills programmes and the use of the media to popularise key prevention concepts. Support could also be given for the identification of potential problematic issues (for example, children affected by AIDS). Advocacy for, or mobilisation of support to establish an independent National AIDS programme to co-ordinate efforts to counter the effects of HIV/AIDS is also essential as the epidemic takes greater hold.

13.2.4 **Malnutrition**

In South Africa, malnutrition is one of the biggest contributors to childhood morbidity and mortality.[21] The recent national food consumption survey found that in children aged 1 to 9 years, 1 in 5 children are stunted and 1 in 10 children are underweight.[22] In terms of nutrition, the latest national Vitamin Information Centre study results published in the South African Medical Journal, April 2001 shows that: “At the provincial level, households in the Eastern Cape had the highest percentage of hunger (83 percent) followed by the Northern Cape (63 percent)

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21 Child Health Policy Institute “Children in South Africa - their right to health” September 1999.
22 **National food consumption survey in children aged 1 - 9 years: South Africa** April 2000.

and North West (61 percent). The impact of HIV/AIDS on childhood malnutrition can be observed at many levels. HIV infection in children compromises their nutritional status and with poor nutritional status, disease progression is hastened. In 1989 it was estimated that the prevalence of chronic protein energy malnutrition (PEM) was 30 per cent among black children of 14 years of age and younger. The PSLSD survey collected anthropometric data about young children in late 1993. Fourteen per cent of African children age 7 - 60 months were underweight (two standard deviations or more below the median standard weight for age).

Corresponding prevalence among other groups were 11 per cent of Coloured children, 7 per cent of Indian children and 4 per cent of white children. An estimated 28 per cent of African children were stunted (under two standard deviations from the median standard height for age); a condition which reflects chronic under-nutrition, especially in the weaning period, from age 6 to 18 months, when growth falters. In order to meet the nutritional goals set by the WSC, South Africa will need to reduce severe as well as moderate malnutrition among under 5 children by half of 1990 levels.

Reflecting national patterns, and the strong correlation between poverty and malnourishment, there are significant regional variations in the incidence of malnutrition. While PEM is highest in the rural areas of the former homelands and in the peri-urban informal settlements, 1987 figures show a fluctuation from a low of 5.5 per cent among Africans in the Western Cape, to a high of 34 per cent in the former Transkei. Although the incidence of PEM has remained constant in the rural areas, the rates appear to be declining in the urban areas.

Under-nutrition in South Africa is the result of PEM as well as micronutrient deficiencies. PEM is associated with cerebral atrophy, which may be detrimental to intellectual and psychomotor development. In 1990 it was estimated that some 2.3 million South Africans were nutritionally compromised and that the majority of these were black (87 per cent) children under 12 years of age. Although comprehensive national data are lacking, it is generally accepted that those households living in rural, peri-urban and informal settlements are the most vulnerable. The fragmented survey data available suggest that approximately 16 per cent of children under 5 years of age are under weight for their age and between 20 per cent and 30 per cent are stunted (low height for age) which is an indication of chronic under-nutrition. These indicators are higher than the norms set by the WSC, which specify a reduction in the rate of low birth weight (2.5 kg or less) to less than 10 per cent by the year 2000.

13.2.4.1 Child feeding

The pattern of weight gain in young South African children is such that growth faltering often sets in during the weaning period, thereafter children tend to gain weight such that few are wasted, though a significant percentage are stunted. This is itself a strong indication that child feeding during weaning is problematic. Young children are not fed often enough to satisfy their energy requirements and the food they do receive is not energy-dense. Their older brothers and sisters with larger stomachs can eat enough with only one or two main meals a day to satisfy their energy requirements.

A further implication of this pattern of weight gain is that a shortage of food in the household is often not the cause of malnutrition. The additional food which is required by young children is an extremely small proportion of the total consumed by their older brothers and sisters and adults in their family.

The more important causes of growth faltering during the weaning period is the early introduction of breast milk substitutes and the lack of support for breast feeding women. In addition, the time constraints on childcare givers preclude their having enough time and attention for feeding young children frequently. The lack of energy-dense weaning foods, especially in rural communities, as well as the lack of information and income also prevents many households from making adequate arrangements for the frequent feeding of their infants.

13.2.4.2 Micronutrient deficiencies

A further implication of this pattern of weight gain is that a shortage of food in the household is often not the cause of malnutrition. The additional food which is required by young children is an extremely small proportion of the total consumed by their older brothers and sisters and adults in their family.

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For many rural people maize forms part of the staple diet. Without supplements, however, maize is deficient in amino acid tryptophan, while its high leucine content interferes with the absorption of valine and isoleucine. The highly refined maize meal which is currently in demand, furthermore, suffers from losses of up to 14 per cent of protein and 60 per cent of fat content as well as other minerals. It is clear that micronutrient deficiencies are eminently avoidable at relatively low cost. The WSC set as a target the virtual elimination of iodine and vitamin A deficiency disorders by the year 2000. In 1995, regulations were promulgated requiring the iodisation of all food grade salt. The Iodine Deficiency Survey (2000) showed substantial improvements in iodine status and elimination of IDD following the mandatory iodisation of salt, with close to 90 percent of primary schools surveyed showing an adequate iodine intake.[23]

13.2.4.3 **Malnutrition and infection**

There is a direct and cyclical link between malnutrition and infection. Inadequate dietary intake can cause weight loss or growth failure in children, which in turn leads to low nutritional reserves. With virtually all nutrient deficiencies there is a lowering of immunity; with deficiencies in protein energy and vitamin A, in particular, there may be progressive damage to mucosa, which lowers resistance to invasion and colonisation by pathogens.

Lowered immunity and mucosal damage are major contributors to the lowering of a body's defences. In such circumstances, the potential for contracting diseases is not only increased, but the severity and duration of diseases are also likely to increase. The disease process itself exacerbates the loss of nutrients, both by the host's metabolic response, and by the loss from the intestine. Many diseases are also associated with a loss of appetite and other disabilities which contribute to a further lowering of dietary intake. The proportion of deaths due to PEM in children under 5 years of age is not known. However, among poor children PEM is known to contribute considerably to mortality associated with diarrhoeal diseases, respiratory infections and measles.

13.2.4.4 **Programmes to improve child malnutrition**

In a 1994 report on the status of nutrition in South Africa, the National Nutrition Committee found

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23 **A Report on the state of the Nation's Children: South Africa** (2001) 70.

that a number of primary factors were contributing to the development of under-nutrition. These were as follows:

(a) **The availability and quality of health services**

Access to primary health facilities was found to be a major factor in the prevention of malnutrition. A shortage of clinics and staff, inappropriate training, a lack of emphasis on growth monitoring and promotion, variable immunisation coverage and the low prevalence of breast feeding all contribute to the high prevalence of malnutrition among infants and children. These factors are compounded by unclean water and an insanitary environment.

(b) **Caring capacity**

Women assume the primary responsibility for the care of children, and especially very young children. As a consequence of an array of political, economic and social forces, the structure and composition of black (and African in particular) families has been severely distorted.

The migrant labour system, rapid urbanisation, the separation or break-up of families and the consequent changes in the gender division of labour have placed growing pressures on women either to assume full responsibility for domestic production or to enter the wage market. In both sets of circumstances, women have added responsibility without a commensurate increase in decision making power or in control over domestic resources. Working mothers also frequently do not have sufficient time at their disposal to give their full attention to the care and feeding of children. Division of responsibilities based on gender also mean that fathers spend little time caring for and feeding their children.

This situation is aggravated by overcrowding, violence and the fact that working mothers (particularly 'living-in' domestic workers) are frequently unable (or are not permitted) to have their children with them.

(c) **The availability of food**

At present there is no integrated nutrition surveillance system operating in South Africa. It is thus

extremely difficult to generate a comprehensive overview of trends in this area and the nature and extent of different types of malnutrition and their causes. Similarly, there is no system in place to monitor and evaluate the impact of nutrition programmes underway.

A number of public programmes focussing on nutrition and hunger are currently under way. The Protein Energy Malnutrition Scheme is a food supplementation programme largely operating through local authority clinics and health centres. Although the scheme is especially problematic for infants who should be exclusively breastfed, it is aimed at vulnerable groups who are undernourished or at risk. The target groups are: all children under 6 years of age who suffer from or are at risk of developing PEM; all underweight pregnant and lactating women; and the elderly and chronically ill who are underweight or who are at risk of becoming underweight. Although in previous years the budget for the PEM scheme was under-utilised, in the 1994/5 budget R37 million was allocated to this scheme. Thus far, the programme has suffered from a shortage of appropriate staff at clinic and health centre levels, the fragmentation of service provision and the stocking of inappropriate food supplements.

The National Nutrition and Social Development Programme (NNSDP) was introduced in the Department of Health in 1991, initially to act as a safety net for those likely to be affected by the introduction of value added tax (VAT) on basic food stuffs.

A Primary School Nutrition Programme has recently been introduced with the aim of alleviating hunger among needy primary school pupils. It also aims to improve the nutritional status of those pupils suffering nutritional deficiencies by means of appropriate micronutrient supplementation.

The Department of Health has stressed the importance of primary health care, with the emphasis on Growth Monitoring, Oral Rehydration Therapy, Breast feeding, Immunisation, Family Planning, Feeding and Female Education (GOBIFFF strategy). However, the results of this approach and that of the PEM scheme have been disappointing. This has been due to a lack of staff and infrastructure and to limited participation by communities. The need for community mobilisation and participation has thus emerged as a key component of the integrated nutrition strategy which was recommended by the National Nutrition Committee.

13.2.5 **Evaluation and recommendations**

The Commission recommends the inclusion of a provision on preventative measures against diseases and malnutrition (along the lines of section 55 of the draft Indian Children's Code Bill, 2000)[24] in the new children's statute. Such provision will place an obligation on Government to initiate programmes providing for a package of services comprising nutrition, immunization, and health and referral services for children below a certain age, and regular health check-up, immunisation and supplementary nutrition for pregnant and lactating women. The programmes may take the form of assistance being rendered to non-governmental and other organisations to enable them to provide such services.

13.3 Children infected with and affected by HIV/AIDS

13.3.1 Introduction

The United Nations Programme on HIV/AIDS estimates that South Africa currently has more HIV-infected people than any other country in the world, except India.[25] HIV/AIDS places enormous stress on infected individuals and on their families, who are confronted with the demands of caring for the seriously ill and with the trauma of death as well as the loss of breadwinners. Children and the elderly may be left to run households, with severe implications for those concerned. Many children are themselves contracting HIV, with the mother-to-child route being the second most common mode of transfer of the disease. Infected babies generally survive for shorter periods than adults. Many die within two years of birth, and most will die before they turn five. However, a significant number can survive even into their teenage years before developing AIDS.[26] South Africa has a very high incidence of child rape and other forms of child sexual abuse,[27] and children of all ages are exposed to the possibility of contracting HIV in this manner. The current myth to the effect that sex with a child will cleanse an adult of HIV infection is a tragic aggravating factor.[28]

All children in a society which is experiencing the HIV epidemic will be affected by its consequences. The term "children living with HIV/AIDS" was adopted by the National HIV/AIDS Care and Support Task Team (NACTT) to encompass all children, namely:[29]

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24 See chapter 11 at 11.2.2 above.
25 **HIV/AIDS in South Africa: the impacts and the priorities** Report written by Kinghorn A and Steinberg M of HIV Management Services 1998.
26 Ibid.
27 National Committee on Child Abuse and Neglect (NCCAN) 2000, op cit., 2.
28 McKerrow N, "Childhood sexual abuse and HIV/AIDS", paper presented at SASPCAN conference, Pietermaritzburg, 1997.
29 **Children living with HIV/AIDS in South Africa - A Rapid Appraisal** (2000).

- those from 'uninfected' households who are affected due to the societal impact of the epidemic (reduced access to services and reduced quality of services);
- abandoned children;
- those from infected households who are affected in a range of ways both before and after the death of their parents;
- those who are vulnerable to HIV infection; and
- those who are infected.

This section in general deals with the impact of HIV/AIDS on the ability of children to grow up within an environment which can meet their basic physical, emotional, social and education needs and fulfil their right to family or family-like care. Specific issues dealt with in this section will be: access to social security; care and support options, especially as these relate to orphans and those who stand to be orphaned; the prevention of unfair discrimination; access to education; and access to heath care. As the health rights of all children, including those relating to HIV/AIDS have been discussed in Chapter 11 above, this issue will receive only brief mention here.

13.3.2 Categories of AIDS-affected children in need of special protection

Abandoned infants are one category of children who appear to be requiring care and support due to HIV/AIDS. Although this cannot be confirmed it is suspected that an HIV-positive diagnosis is in some cases a precipitating factor for abandonment of infants. It may be at the time of delivery that the mother first learns of her HIV status.

Children in infected households form a rapidly growing category of those affected. In such households one or more members, particularly caregivers, have become infected with the virus, and may:

- be experiencing discrimination due to HIV status (e.g. a breadwinner may be dismissed or be refused employment once this becomes known);
- be carrying increased financial, physical and emotional burdens due to unemployment, the care of sick individuals, and funeral expenses;
- be wholly or partially incapacitated due to AIDS;
- have died.

Children orphaned by AIDS are a group creating growing concern in sub-Saharan Africa, including South Africa. Traditionally, an orphan is defined as a child that has lost both his or her parents. This definition does not take cognisance of the fact that mothers are usually the primary or only caregivers, or (in the case of AIDS) that the surviving parent is likely also to be infected and perhaps incapacitated, or that the child may for other reasons not be taken care of by the surviving parent. UNICEF defines "AIDS orphans"[30] as children who before the age of 15 have lost either their mother or both parents to AIDS. However, the Commission prefers not to use the term "AIDS orphans" due to its stigmatising connotations. An "orphaned child" is defined for purposes of this Discussion Paper as a child under the age of eighteen who has no surviving parent caring for him or her after at least one of them has died.

The AIDS pandemic has been producing orphans in massive numbers on the African continent. For example, by 1989 nearly 13% of children under 15 in the Rakai district of Uganda had been orphaned.[31] It is estimated that by 2005 in South Africa there will be nearly a million children under the age of 15 who will have lost their mothers to AIDS.[32]

The plight of children orphaned by AIDS may begin long before the death of their parents. In households where a parent is dying, children are often pushed into roles that would be extremely stressful even for most adults. Many have to nurse their parents as they become helpless and incontinent and ultimately die. Older children frequently drop out of school due to heavy domestic responsibilities including care of their younger siblings as well as sick adults. After, and often before, becoming orphaned they will lack the resources for school fees, books or uniforms. These children are often stigmatised and marginalised by the community due to misplaced fears of contamination. They may be rejected by relatives for such reasons or due to economic considerations. Even if they are taken in by these people, there is still the risk of abuse, neglect and exploitation. They may be caught up in child labour, delinquency, homelessness, street-life and prostitution, among other problems.[33] Children in these situations face multiple risks including malnutrition, illness and every hazard arising from lack of the means of survival, as well as those resulting from the absence of parental care and of normal socialisation. Apart from needs such as food, shelter and clothing, orphans require psycho-

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30 UNICEF **Childen Orphaned by AIDS – front-line responses from eastern and southern Africa** (1999) 5.

31 Dunn et al "Enumeration and Needs Assessment of Orphans in Uganda" 1991 Kampala, Social Work Department/ Save the Children Fund.

32 **HIV/AIDS in South Africa: the impacts and the priorities** (1998).

33 Kalemba E "The Development of an Orphans Policy and Programming in Malawi" Paper presented at the Southern African Conference on Raising the Orphan Generation, Pietermaritzburg, 9 - 12 June 1998.

social support to help them to cope with the trauma associated with the sickness and death of their parents and with remaining alone to face the challenges of life.[34] These children are also vulnerable to early pregnancy. Without far-reaching interventions, the generation of children born to them is likely to be caught up in the next stage of a cycle of severe neglect, exploitation and loss of human potential.

Children who are HIV-positive or have AIDS, apart from being faced with debilitating illness and early death, are vulnerable to discrimination and exclusion from basic services.

13.3.3 South African law and practice

While the fundamental rights of children infected or affected by HIV/AIDS are protected in the Constitution, current legislation and administrative systems fail to ensure that they can realise these rights.

13.3.3.1 Promotion of Equality and Prevention of Unfair Discrimination Act, 2000

Section 1(xxii)(a) of this Act prohibits discrimination on grounds such as race, gender, social origin, religion and language. It adds that other grounds which undermine human dignity, promote systemic disadvantage and interfere with the realisation of rights and freedoms in a comparable manner will also constitute prohibited grounds. The Act recognises the reality of discrimination on the grounds of HIV status and stipulates that recommendations for the inclusion of HIV/AIDS as a prohibited ground of discrimination must be made to the Minister of Justice.[35] Although almost no research into the extent and impact of discrimination has been conducted in South Africa, it has been noted that, in the welfare setting, children living with HIV/AIDS have been denied access to pre-school care facilities;[36] and to residential care facilities.[37]

13.3.3.2 Child Care Act 74 of 1983

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34 Ibid.
35 Section 34(1).
36 Telephonic Discussion with Bridgette Engelbrecht of Durban AIDS Training and Information Centre, 16 November 1998.
37 For instance, a **Draft SOS AIDS Policy** sent to the offices of Lawyers for Human Rights in October 1997 stated (at paragraph 1.2) that "if a child is determined as HIV positive and alternative care facilities exist, the child should not be admitted". Lawyers for Human Rights recommended that the policy should not discriminate against HIV positive children even where alternative care facilities were available, and that the overriding consideration should be the best interests of the child.

In terms of the Child Care Act the children's court has the power to order that a neglected, abandoned, destitute or orphaned child be adopted, placed in the custody of a suitable foster parent, placed in a children's home or sent to a school of industries.[38] This Act also provides for state financial support of a child admitted to a children's home, and enables a local authority to provide financial support to any association of persons working in its area for the protection, care or control of children.[39] These options are proving to be insufficient to deal with the realities of the situations of most children who are destitute or without adequate care due to AIDS.

13.3.4 **Policy documents**

13.3.4.1 **White Paper for Social Welfare, 1997**

The White Paper recognises the needs of children whose parents are dying of AIDS and those who have already lost one or both parents. The White Paper also states that there is a need to enhance the capacity of the following existing forms of care to meet the needs of children whose parents have AIDS and of children who have been orphaned:

- the extended family;
- family homes (through support to women in the community who live with and care for orphaned children);
- foster care and/or adoption; and
- institutional care.[40]

The White Paper emphasises that care by the extended family is the most preferred option. However, it gives recognition to the fact that while many families appear to be willing to care for and nurture orphans, some are not able to do so owing to financial strain, poor living conditions or the absence of close relatives to provide the necessary care and support.

13.3.4.2 **Policy on managing HIV/AIDS within schools**

The Department of Education's National Policy on HIV/AIDS for Learners and Educators in

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38 Sections 18 and 15 of the Act.
39 Section 56(1) and (2) of the Act.
40 GN 1108 of 1997 in Government Gazette 18166 of 8 August 1997, chapter 8 section 4.

Public Schools, and Students and Educators in Further Education and Training Institutions[41] prescribes how HIV/AIDS must be managed in public schools. This includes inter alia the following:

- No learner, student or educator with HIV/AIDS may be unfairly discriminated against directly or indirectly. Educators should be alert to unfair accusations against any person suspected to have HIV/AIDS.
- Learners, students, educators and other staff with HIV/AIDS should be treated in a just, humane and life-affirming way.
- No learner or student may be denied admission to or continued attendance at a school or an institution on account of his or her HIV status or perceived HIV/AIDS status.
- Testing of learners or students for HIV for admission to or attendance at school is prohibited.
- The needs of learners or students with HIV should as far as is reasonably practicable be accommodated in the school or institution.
- No learner or student or educator is compelled to disclose his or her HIV status to the school or institution or employer.
- Any person to whom any information about the medical condition of a learner, student or educator with HIV/AIDS has been divulged, must keep this information confidential.
- The MEC should make provision for all schools and institutions to implement universal precautions to eliminate the risk of transmission of blood-borne pathogens, including HIV, in the school or institution environment.
- While the risk of transmission of HIV in contact play and sport is insignificant, all schools should take measures to eliminate this risk. This includes the use of universal precautions, and prohibiting any learner from participating in contact sport with an open wound, sore, break in the skin or open skin lesion.
- A continuing life-skills and HIV/AIDS education programme must be implemented at all schools and institutions for all learners, students, educators and other staff. Measures must also be implemented at hostels.

The above policy has eliminated much of the uncertainty with regard to the management of HIV/AIDS in public schools. However, it does not apply to independent schools, although copies

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41 GN 1926 of 1999 in Government Gazette 20372 of 10 August 1999. This Policy is based on the South African Law Commission's recommended Policy on HIV/AIDS in schools as contained in the Law Commission's Third Interim Report on Aspects of the Law Relating to AIDS, April 1998.

of the policy must be made available to those registered with the provincial departments of education.

13.3.5 Comparative systems in other countries

13.3.5.1 Identifying children in need of care and protection

Uganda, through its Children's Statute of 1996, has created a post of Secretary of Children's Affairs in each local authority to safeguard and promote the welfare of all children.[42] A statutory duty is further placed on the community to report abuses of children's rights to the local authority. Malawi, on the other hand, has developed a National Orphan Policy in 1992,[43] which created a structure to promote the identification of children in need at local level by giving legal jurisdiction to the District Social Welfare Officer over any NGO providing services to children. The District Social Welfare Officer is also tasked with supervising institutional care, foster placements and adoption, placements of abandoned children, tracing of relatives, and children who have problems with the law. Further, Village Orphan Committees are tasked with identifying and registering orphans within their area.[44] Similarly to Malawi, Zimbabwe has produced a Draft Orphan Care Policy to identify children in need of care and protection. This would give responsibility to Area and Village Child Welfare Committees for identifying and registering orphans and other vulnerable children and for assessment of their needs. These Committees would also undertake planning and decision-making in order to identify local services to assist and support children in need of care and support, where possible.[45]

13.3.5.2 Discrimination

A number of UN member States include HIV/AIDS in their laws prohibiting discrimination on the basis of health or disability. The Americans with Disabilities Act defines disabilities to cover many serious health conditions including HIV/AIDS.[46] HIV/AIDS is considered a disability or

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42 Section 11(1) of the Children's Statute of 1996.
43 Policy Guidelines for the Care of Orphans in Malawi and Co-ordination of Assistance for Orphans, 1992.
44 Kalemba E 1998.
45 Hunter S 1998.
46 The information can be accessed at http://hivinsite.ucsf.edu/social/un/3098.0033.html .

handicap under human rights legislation in every jurisdiction in Canada.[47] In the Canadian case **Biggs and Cole v Hudson** (1998) the human rights tribunal ruled that people who are HIV-positive, who are diagnosed as having or are perceived to have AIDS, who belong to groups widely regarded as especially vulnerable to HIV infection but who are not HIV-positive or whose HIV status is unknown, or who associate with people who belong to such groups or who are HIV-positive, may be protected under the term "physical disability".

13.3.5.3 Support for orphans

Most models of care responding to the needs of large numbers of orphaned children throughout the continent represent variations on traditional practices. The models can be grouped into a number of options:

- Independent living by orphans;
- Independent living with external supervision and support;
- Foster care including traditional family care, cluster care of multiple children, collective care of individuals or multiple children;
- Adoption;
- Institutional care including places of safety, shelters, short-term infant homes and traditional children's homes.

The options which diverge from the models of care which are clearly provided for in legislation in South Africa are discussed below:

- **Independent living by orphans**

This is an option of child care which, although uncommon and accounting for fewer than 5% of orphans, is found throughout the continent including South Africa. In this instance, orphaned children live alone without an adult in the house and without adult supervision, care or support from outside the household. The oldest child becomes the head of the household, accepting responsibility for his/her younger siblings.

The advantages of this model of care lie in keeping siblings together and leaving children in their

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47 The information can be accessed at http://www.aidslaw.ca/Maincontent/issues/discrimination/discussionpapers/DISCres.html .

own home. The disadvantages arise from inadequate nurturing and the extreme poverty usually associated with a child-headed household. The oldest child not only loses the love and nurturing of a parent by assuming adult responsibilities, but also loses his/her childhood. This means leaving school and going out to work. The oldest child experiences numerous social, financial, emotional and physical problems including exploitation, abuse, stress and depression. The level of care provided to the younger household members is invariably inadequate and associated with social, emotional and health-related sequelae.[48] These children are also very vulnerable to becoming victims of prostitution.

- **Independent living with external supervision and support**

This option usually occurs as a response by the community to the presence of children living independently in their neighbourhood. In this model, although the children have no adults living with them, they are monitored and they do receive some degree of supervision and support. In addition, if they encounter crises they have access to help. The intensity of the supervision is usually determined by the ages of the children - the younger they are the more frequent the visits to the house - whilst the nature of the support is determined by the socio-economic status of their community.

The advantages and disadvantages of this model are similar to those experienced by independently living children, although with some degree of adult supervision and support the problems are reduced.

An example of this is Kwasha Mukwenu[49] (help your friend), an interdenominational community-based NGO run entirely by volunteers who each contribute at least 4 hours a day to the project. The group's main programme is the identification, care and support of orphaned children. Each member is responsible for identifying children in need in their neighbourhood, and for acting as a caretaker parent to 3-5 families of orphans. On identifying orphans the initial response is to attempt to place the children within their extended family. If this is not possible, children are placed in institutions or left in their homes under the supervision of a member of Kwasha Mukwenu. Each caretaker parent will visit her orphan families on a daily basis and ensure that they have adequate shelter, food, clothing and health care, and are attending school and have

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48 Personal communication Pietermaritzburg Child and Family Welfare Society.

49 Kamanga P, "A Case Study of Kwasha Mukwenu: A CINDI Programme in Urban Lusaka, Zambia" in **Community Based AIDS Prevention and Care in Africa: Building on Local Initiatives. Case Studies from Five African Countries** The Population Council, 1997, 29-33.

access to adult attention.

- **Foster care**

Traditional models of foster care entail the placement of one or more children in a family setting under the care of a foster parent or parents. This placement may follow a formal legal process with ongoing supervision of the child by a social worker and the payment of a grant to the foster parent(s), or it may be an informal arrangement with no monitoring or financial aid. The vast majority of informal foster placements occur as private arrangements within families following the abandonment or orphaning of one or more children.[50]

The major advantage of formal and informal foster care lies in the placement of the child within a family environment. Problems experienced are those which may potentially arise for any child in surrogate care, and include exploitation and abuse. This applies both to formal and informal, as well as intra- and extra-familial placements. In theory, the provision for monitoring by a social worker of formal placements should facilitate early intervention to protect the child should these problems occur. The reality is that large case loads, transport problems and poor motivation result in only some placements being monitored. There may therefore in practice be little difference between formal and informal placements as regards ensuring the ongoing well-being of the children concerned – however, the availability of financial assistance in court-ordered arrangements allows at least for basic material provision for the child.

At present, despite active recruitment drives, traditional foster care provides a finite capacity for the placement of orphaned children. To address this issue two variations of foster care have recently been proposed:[51]

Cluster Foster Care involves a cluster of houses within a community which are identified as homes for orphaned children. Single women or couples are recruited to care for the children following suitable training. Up to six children are placed in each house. The volunteers are either employed by a local NGO or act independently as foster parents and apply for state funding in the form of a foster care grant. Community workers link these volunteers to whatever resources are required and available within the community. Finally community support

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50 Models of Care for Children in Distress and Responses to Orphaned Children: A Review of the Current Situation in the Copperbelt and Southern Provinces of Zambia.

51 Laudon M **Report on the Pietermaritzburg Summit on Children in Distress** July 1996 Pietermaritzburg, South Africa, 1996.

structures such as creches and day-care centres are required to free parents to undertake additional income-generating activities.

Collective Foster Care: This is a variation of traditional foster care where, instead of a placement with an individual woman or couple, children are placed into the collective care of a social, religious or work-related body whose members undertake to collectively act as surrogate carers for the children. Individual members of the group may elect to accept responsibility for specific needs of the children.

The Zimbabwe Commercial Farmers Union[52] has developed a programme for the fostering of orphans on commercial farms and in surrounding areas. A child who becomes orphaned is placed with a surrogate family living on the farm. This family is responsible for providing care and meeting the day-to-day needs of orphans, whilst the farmer subsidises the stay of the children and facilitates the creation of day-care facilities on his farm. In return for the expenses incurred by the farmer some remuneration is expected from the government in the form of access to labour or tax relief.

Nsambya Hospital[53] in Kampala has developed three possibilities within a closed religious community.

- *Total care within orphan houses.* Here a house is run by the church specifically to care for orphans. A maximum of seven children live in one house with a full-time housemother who is responsible for their total care.
- *Family support.* Orphans are placed with extended family members who accept responsibility for the day-to-day care of the children. All expenses incurred by the family towards the care of these children are borne by the church.
- *Limited family support.* Children are placed with members of the extended family who provide for their total care except for schooling. This expense is borne by the church.

- **Institutional care**

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52 SAfAIDS and the Commercial Farmers Union **Orphans on Farms: Who Cares? An Exploratory Study into Foster Care for Orphaned Children on Commercial Farms in Zimbabwe** Harare, Zimbabwe, 1996.

53 Fincham R and Smart R A **Report of a UNICEF sponsored Study Tour of AIDS programmes in Zambia, Uganda and Tanzania** Pietermaritzburg, South Africa, 1993.

Institutional care is fairly widespread throughout Tanzania[54] which in 1991 had 34 registered children's homes. All but one of these are run by NGOs who are subsidised by the state and supervised by the Ministry of Labour, Culture and Social Welfare. The majority of these facilities provided temporary homes for children aged 0 - 3 years whereafter they are returned to their extended families, fostered, adopted or transferred to the single state orphanage which caters for older children. Children in orphanages have access to complete support including shelter, food, clothing, schooling, health care and recreation.

•• **Swaziland**[55]

An extensive study into the education system has made a number of recommendations related to orphans:

•• that a needs assessment of orphans and caregivers be conducted, carefully defining what an orphan is in the Swaziland context, and defining orphans in need;
•• that exemptions be offered to homesteads/institutions with orphans to enable children to attend school, waiving school uniform requirements when affordability is a problem, expanding school-based feeding programmes for school children, and introducing flexible school hours where possible to keep children in school who might otherwise have to drop out due to labour requirement elsewhere;
•• increasing day care facilities, particularly at schools, to allow children who would otherwise have to take care of their younger siblings to attend classes;
•• the creation of an educational insurance scheme permitting parents to invest in policies catering for their children's school fees in the event of their death; and
•• the use of national funds as an investment in the education of children.

Malawi[56]

Malawi's national orphan care guidelines stipulate that -

•• The first approach must be community-based programmes. Formal foster care will be expanded as the second preferred form of care. Institutional care should be the last

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54 PAAG, **Report on an AMREF sponsored Study tour to Tanzania and Uganda and the Ixth INCASA** Pietermaritzburg, 1996.
55 **Children living with HIV/AIDS in South Africa: A Rapid Appraisal** (2000) 48. See also King J R **Report to the Ministry of Education** (1999).
56 **Children living with HIV/AIDS in South Africa: A Rapid Appraisal** (2000) 47.

resort, though temporary care may be necessary for children awaiting placement.

- Hospitals should record next of kin so that relatives can be traced if children are abandoned. The registration of births and deaths should be improved to assist in the monitoring of orphans.
- The Government will protect the property rights of children and these rights will be widely publicized.
- Self-help groups should be developed to help affected families. NGOs are encouraged to set up programmes of community-based care.
- The needs of all children should be considered on an equal basis, regardless of cause of death of the parent(s).

13.3.6 Comments received

The comments covered in this section were received in the course of a focus group discussion held in Durban on 26 March 1999, making use of a Research Paper on Children Living with HIV/AIDS[57] and a worksheet, coupled with written comments submitted to the Commission thereafter. Certain comments were also submitted in response to Issue Paper 13.

13.3.6.1 Identifying children in need of care and protection

In the worksheet respondents were asked to comment on the problems and uncertainties relating to the identification of children in need of care and protection. It was suggested that traditional leaders in rural areas be empowered to make decisions about guardianship and suitable caregivers for orphans. Respondents were also asked to comment on the following preliminary recommendations:

- The concept of an 'authorised officer' as provided for in section 1 of the Child Care Act should be redefined to ensure that persons and structures beyond those employed by the state may be authorised to identify a child in need of care and protection, so as to include community structures and community leaders such as priests, teachers, community health workers and others.
- Section 60 of the Act should enable the creation of regulations to provide for Child Care Committees, and to determine their structure, composition and function.

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57 See also chapter 1, footnote 8.

•• Further research and debate into the structure, composition and functioning of community-based models of identifying children in need of care and protection, and the links between community-based structures and other structures[58] should be encouraged. At present, some projects within the country have begun to pilot innovative structures and processes in order to decentralise the process of identifying children in need. For instance, the Thandanani Project uses traditional community structures to set up Child Care Committees within communities.

•• Further research should be conducted into the area of 'registration' of orphans.

Childline Family Centre favoured the establishment of Child Care Committees and suggested that these be trained at district and local levels, and be integrated into the activities connected with the protocol for the management of child abuse and neglect. This respondent further submitted that child care committees should have greater access to the Family Court system, and proposed that the placement of orphans with families be monitored to ensure the integration of the child into the family system and to prevent the exploitation of the child. With regard to the registration of orphaned children, the respondent submitted that this could have a long-term negative impact and that the act of registration tended to create an expectation of assistance. It was thus recommended that registration be linked to the provision of some sort of service and/or support.

The focus group participants feared that community-based committees/structures might be vulnerable to corruption. A clearly set out system of accountability was regarded as vital. The urgent need for police and volunteer training in child care within communities was stressed. It was also recommended that registration of births and deaths should be automatic at the point of event. Further, all children in need within the community should be registered.

13.3.6.2 **Discrimination**

In the worksheet respondents were asked to comment on the following recommendations:

•• A clause prohibiting unfair discrimination on the basis of, *inter alia*, HIV/AIDS should be

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58 Department of Welfare **Draft Discussion Document on Foster Care Guidelines**, August 1997, paragraph 7.1.1(a) and paragraph 7.4 recommends the formation of a Foster Care Body with the legal mandate and responsibility to protect children, and to guide the process of foster care. The function of this body could possibly be expanded to assist children with other forms of placement.

inserted into the Child Care Act as has been done with the Employment Equity Act.[59] Discrimination on the basis of HIV/AIDS status should be considered to be unfair, unless it can be shown to be fair and in the best interests of the child.

•• The South African Law Commission's Project Committee on HIV/AIDS recently conducted extensive research into HIV/AIDS and discrimination in the educational setting,[60] and the recommended policy has been adopted virtually in its entirety by the Department of Education, as a draft national policy on HIV/AIDS.[61] Many respondents to Discussion Paper 73, on which the Third Interim Report was based, drew attention to the need for application of the same policy, or a similar policy, to other child care institutions such as pre-schools and day-care facilities and residential institutions,[62] with arguments being advanced both in favour of and against broader application of the policy. It is therefore recommended that the Department of Welfare develop a draft national HIV/AIDS policy, based on the principles of the aforementioned policy, to be developed and adapted for the pre-school, day-care and residential care settings. This draft policy could be used as a basis for further discussion and debate.

•• Adoption of the HIV/AIDS policy, once finalised, should be made a ground for registration of a pre-school, creche and residential care facility.

The South African National Council for Child and Family Welfare (SANCCFW) welcomed the development of a draft national HIV/AIDS policy to serve as a basis for further discussion and debate. The respondent cautioned, however, that cognisance should be taken of the fact that admission of a child to a creche, day-care facility or children's home has different implications for these institutions. The respondent opined that, in the first two instances, some of the difficulties surrounding admission could be eliminated via guidelines on admission, universal precautions etc. However, an HIV-positive child whose status moves to AIDS carries long-term and costly implications for a children's home. Further, that this can cause residential care facilities to be cautious in their admission criteria and to refuse admission to an HIV-positive child. Thus, that a global non-discriminatory clause might be seen as lacking in due consideration for the realities faced by the organisation.

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59 Act 55 of 1998, Chapter II, section 6(1) prohibits unfair discrimination "on one or more grounds including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth".

60 **Third Interim Report on Aspects of the Law Relating to AIDS** April 1998.

61 GN No. 3006, Government Gazette No. 19603, 11 December 1998.

62 **Third Interim Report on Aspects of the Law Relating to AIDS** April 1998 at 159 - 171.

13.3.6.3 **Models of care**

In the worksheet respondents were asked whether they agreed with the problems and uncertainties raised in respect of the available models of care. The SANCCFW submitted that the placement options currently available to children are not only limited, it is questionable whether they are accessible. Further, research by the respondent has indicated that it is the legal aspects relating to the models which confuse prospective parents rather than non-acceptance of the care models themselves. Ways thus need to be found to make these models more accessible and less time-consuming, whilst at the same time maintaining some minimum standards. The respondent also suggested that legislation must cater for extended family placements, coupled with some form of support or linkage to a special programme where necessary, as it cannot be assumed that children will be absorbed into the extended family if their parents die of HIV/AIDS. The respondent is also in favour of subsidised adoption as this would contribute to the speedier placement of young children.

Suggestions by focus group participants included the following: (a) there should be redistribution of resources at government level, (b) family group conferencing should be established in law as a first step, (c) family members should be located through the use of tracing agents, and (d) the value of child headed households should not be negated.

The worksheet invited comment on the following preliminary recommendations:

- Section 15 of the Child Care Act should include a broad reference to alternative placement options for children in need of care and protection, so that regulations may be promulgated in the future to provide for alternative models of care.
- Section 60 of the Child Care Act should include a provision empowering the Minister to develop regulations as to alternative models of care for children. It is suggested that a set of minimum standards and guidelines for such care be developed, in order to ensure that informal models of care nevertheless offer legislative protection to children in need of care. Some suggested minimum standards may include:
  - that the best interests of the child are paramount;
  - that adult supervision be a prerequisite for children below a determined age;
  – that all models of care should ensure that a child is appointed with a guardian, or failing that, custodian;
  - that community monitoring and support mechanisms are developed.
- The Child Care Act should review the legal requirements and processes for obtaining custody and guardianship of children in order to allow for more informal models of foster care, and to give legislative force to alternative models of care.
- Further research, evaluation and debate into models of care in South Africa are recommended. In particular the following issues which have legislative implications need to be determined:

- whether, and in what form,[63] child-headed households should be recognised by law as a placement option for children in need of care. Legal aspects which need to be considered include the age at which a child may head a household. This needs to be linked with the legal age for labour, as well as the legal age for accessing social welfare grants such as the Child Support Grant. Additionally, consideration needs to be given to the guardianship and custodianship of children in child-headed households, in order that they may be appointed with a legal guardian or custodian where possible.
- which alternative forms of foster care should be adopted.

• A policy decision should be taken on models of care to be adopted in the South African situation as soon as possible, in order that the legislative framework may respond accordingly.

In respect of the recommendation with regard to monitoring, the SANCCFW stated that the issue should be further developed. Further, government remains responsible for the protection of children living with HIV/AIDS and the monitoring of this responsibility should be prescribed for in regulations. The monitoring function then becomes the state's contribution to the care of children affected by HIV/AIDS. The respondent suggested that if the community undertakes monitoring, then the parameters within which they may operate, as well as the participants' responsibilities, should be clearly spelt out. The respondent emphasised that, in addition to the need for a policy decision to be taken on models of care, there is a need to establish criteria to regulate the system of support whether in grant or other form.

Childline Family Centre agreed with the recommendations made. The respondent also highlighted the following problems relating to child-headed households: That it is in the best interests of siblings who have collectively suffered the loss of parental care, to continue to have the support and relationship of the sibling group wherever possible. The respondent submitted that more thought should be given to how child-headed households can materially and psychologically be supported and given access to resources to facilitate their survival in both the physical and psychological sense, without compromising the development and particularly the education of the older caretaker sibling(s), and without exposing the caretaker siblings to exploitative labour and/or sexual practices. It is suggested that the training of district committees might be helpful in the latter regard. The respondent pointed out that the age at which, and conditions under which, caretaker siblings can assume the responsibility of sibling care, needs to be debated. Further, that it is essential for school policy to accommodate the educational needs of child-headed households and to provide for some flexibility within the school

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63 A UNICEF consultation on Children Affected by HIV/AIDS, held in Kampala, Uganda in October 1998, recommended that child-headed households should always be accompanied by some form of adult supervision, whether individual or community.

curriculum and school hours, and to consider the provision of after-school care to relieve the burden of child caretaking on older siblings.

Question 6 of Issue Paper 13 read as follows: 'What are appropriate forms of alternative community and cluster care options that will affect children who might be affected by HIV/AIDS?'

The Johannesburg Institute of Social Services proposed that children's villages be considered as an alternative to community and cluster care options. The Department of Health contended that families are an option, though there is a need for such families to be assisted. Mr DS Rothman argued that specialist homes and places of safety are needed to accommodate the increasing numbers of such children and should be subsidised by the State. The Durban Child and Family Welfare Society, however, felt that there should be no differentiation and that all options on the continuum of care could be appropriate.

13.3.6.4 Education

In the worksheet respondents were asked to comment on the following recommendations and also to make specific suggestions as to how these issues might be tackled by legislation:

- That the Draft National Policy on HIV/AIDS, for Learners and Educators in Public Schools, and Students and Educators in Further Education and Training Institutions be supported by the Project Committee for the Review of the Child Care Act, if they concur with its contents.
- That the Minister of Education require the adoption of the HIV/AIDS policy as a condition for registration of independent schools in terms of section 46(2) of the Schools Act.

No comments were received.

13.3.7 Evaluation and recommendations

The Commission takes the position that children who are ill with AIDS should as far as possible be enabled to remain in the care of their own families, including the extended family network, and failing this with caregivers in the community. Social assistance for sick children is a key form of provision to promote family-based care. It is noted that South Africa, unlike certain other countries, does not recognise chronic illness, including AIDS, as a form of disability. **It is recommended that family caregivers of children who are chronically and/or terminally ill, including those with AIDS, be eligible for specific social assistance to help them to meet**

the special needs of such children.[64]

It is apparent that children who are HIV-positive are subject to discrimination in a variety of contexts. **The Commission therefore recommends:**

- **That the new children's statute provide that no person may discriminate, directly or indirectly, against a child on the basis of his or her HIV status, unless this can be shown to be fair;**
- **That the Department of Social Development, in similar vein to the National Policy on HIV/AIDS for Learners and Educators in Public Schools, and Students and Educators in further Education and Training Institutions, develop a national HIV/AIDS policy for places of care and residential care facilities, and that the adoption of such policy, once finalised, be a prerequisite for the registration of such facilities;**
- **That the South African Schools Act 84 of 1996 be amended to include the provisions of the National Policy on HIV/AIDS for Learners referred to above, as far as these relate to children;**
- **That the Minister of Education require the adoption of the National Policy on HIV/AIDS for Learners referred to above, as a ground for registration of independent schools in terms of section 46(2) of the Schools Act.**

The Commission takes cognisance of the fact that the admission of HIV-positive children to child care facilities can, once these children become ill, have enormous financial implications for such facilities, which are in the main run by non-profit organisations. We also recognise that the fact that care facilities do not receive a subsidy from government to cater for the additional needs of HIV-positive children is a further constraint against admitting such children. **The Commission therefore recommends that provision be made for special programme funding to be offered to care facilities that care for chronically ill children, including those with AIDS. A care facility which is a receiver of such funding should progressively adjust its environment to ensure that children with AIDS are protected from opportunistic infections.**

The options of formal placement for children in need of care and protection due to HIV/AIDS as

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64 See also 13.1.4 and chapter 25 at 25.4 below.

set out in section 15(1) of the Child Care Act, 1983 are inadequate to cater for the massive numbers of children who will be involved, for the following reasons:

- the placement options are limited and restrictive;
- the special needs of infants who are spending protracted periods in hospital or institutions are not addressed;[65]
- formal children's court processes as currently provided for are likely to prove too cumbersome to cope with the hundreds of thousands, even millions of children who will require substitute care due to the AIDS pandemic;
- the placement options do not reflect the reality in South Africa, in terms of which many children are simply absorbed into the extended family system, or the community;
- many communities have limited access to social workers, and are unaware of the placement options available for children in need of care and protection; and
- options such as formal foster care and, in particular, adoption are at this time not culturally acceptable to all South Africans.[66]

There are already various pilot projects for the care of children within communities. Although it has been suggested that legislative reform in respect of alternative models of care should be delayed in order to give the pilot projects a change to prove successful, the Commission is of the view that there is an urgent need for the enactment of legislation to formalise alternative models of care.

The Commission accordingly recommends:

- **That the new children's statute empower the Minister of Social Development to make regulations to allow for in-home support of families affected by AIDS.** This will discourage children from abandoning their education to care for dying parents and

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65 Infants require more intensive supervision and care than children, and families who are willing to care for children are often reluctant to care for infants. An additional need is for HIV-positive, abandoned or orphaned infants who spend considerable periods in hospitals awaiting clarification of their HIV status, since most adoption and fostering services presently require knowledge of a child's HIV status. As this process may take up to 15 months a more suitable environment is required for these children - Dr N McKerrow, Paediatrician, Grays Hospital. At the same time institutional care is seen by many practitioners as being particularly unsuitable for, and potentially damaging to the development of infants (see 10.4.1 above). It is clear that special attention needs to be paid to this group, who are at a highly sensitive stage of their development.

66 Parry, S "Community Care of Orphans in Zimbabwe : The Farm Orphan Support Trust", paper presented at CINDI Conference **Raising the Orphan Generation**, Pietermaritzburg, June 1998, http://www.togan.co.za/cindi/papers/paper5.htm, (at p.3) states that formal adoption is not readily accepted because of the cultural beliefs, which mitigate against taking unrelated children into the family.

from taking on other adult responsibilities.

- **That, as an alternative to the current placement options, legal recognition be given to the placement of orphaned children within the extended family, through an expedited court process, and that where the extended family has taken on the long-term care of a child, they should have access to a simple procedure whereby the necessary parental responsibilities can be conferred on them. The child must be present at and heard in such proceedings unless this is not realistically possible.**

It is a reality that some children may be absorbed into HIV- positive households. This may subject the child to repeated grief and uncertainty. **The Commission therefore recommends that children absorbed into HIV/AIDS-affected families should be included in relevant support programmes.**

As the HIV/AIDS pandemic spreads, child-headed households will be come a familiar phenomenon. Despite their serious drawbacks, these arrangements have the advantage of enabling siblings to remain together and provide mutual support, while also providing for continuity of relationships with and support from their local community. **For this reason, the Commission recommends:**

- **that legal recognition be given to child-headed households as a placement option for orphaned children in need of care, provided that any court making such an order is satisfied that suitable adult support will be available. Support structures, e.g. regular visits by community workers should be put in place to ensure the survival of child-headed households.**
- **that support rendered to child-headed households be designed to ensure that the child at the head of the household is not forced to abandon his or her education by taking up adult responsibilities.**
- **that the Departments of Health, Education and Social Development, with the assistance of the Treasury, be tasked to budget specifically for programmes to support child-headed households.**

The issue of at what age and under what conditions a child may head a household was not debated, and the Commission invites comments in this regard.

A child at the head of a household will need some form of recognised parental responsibility over the younger siblings in order to perform certain tasks, e.g. giving consent to a medical operation. However, such a child may be too young and immature to be entrusted with total responsibility for his or her siblings. **For this reason, the Commission recommends that -**

- **legal recognition be given to schemes in terms of which one or more appropriately selected and mandated adults are appointed as 'household mentors' over a cluster of child-headed households by the Department of Social Development, a recognised NGO or the court.**
- **the proposed 'household mentor' may not make decisions in respect of the siblings without giving due weight to their opinions as appropriate to their capacity and to the opinion of the child at the head of the household.**
- **the proposed 'household mentor' be able to access grants and other social benefits on behalf of the child-headed household.**
- **the proposed 'household mentor' be accountable to the Department of Social Development or a recognised NGO or the court.**

The Commission notes that alternative forms of what is currently termed 'foster care' may be appropriate for children who require substitute care as a result of AIDS. Recommendations in this regard will be discussed in Chapter 16. **It is the attitude of the Commission that institutional care of children, including orphans, should normally be a measure of last resort, and that all possible measures should be undertaken to promote and facilitate family care.**

Children living in families where one or both parents are infected with HIV/AIDS are affected in various ways. For one, they are forced to abandon their education to care for ill parents or to work in order to supplement family income. **The Commission therefore recommends that schools be required to identify children who are absentees due to AIDS and to refer such children to the Department of Social Development or link them to community support structures.**

13.4 Children with Disabilities

13.4.1 Introduction

There is no statutory definition for the term disability, it however still remains a concept linked to exclusion, inequality and dependency. Children with disabilities are often excluded from mainstream society due to lack of access or impaired access to essential resources and services. There is also a close link between disability and poverty. Disability worsens poverty due to the additional costs attached to disability. More than 80% of black children with disabilities live in extreme poverty and have very poor access to appropriate services.[67] Due to the lack of services, children with disabilities grow to be disempowered adults with little to contribute to society. In this section effort is made to identify the rights of South African children with disabilities and also to determine to what extent these rights are currently being fulfilled. Recommendations are then made for legislative reform to adequately provide in the needs of disabled children.

13.4.2 International and regional instruments recognising the rights of children with disabilities

Various international instruments recognise the rights of children with disabilities. The CRC recognises the right of children with disabilities to develop together with non-disabled children by stipulating that State Parties must respect and ensure the rights set forth in the CRC to each child without discrimination of any kind, including discrimination on the basis of disability.[68] The CRC places an obligation on governments to ensure, to the maximum extent possible, the development of the child.[69] This not only includes the child's physical, social and intellectual development, but also the development of the child's capacities and abilities. The CRC further recognises that children with disabilities have the right to enjoy a full and decent life. In recognising the child with a disability's right to special care, the CRC stipulates that assistance to the child with a disability and those responsible for the care of the child should be provided free of charge whenever possible, taking into account the financial resources of the parent or others caring for the child.[70]

The UN Standard Rules for the Equalisation of Opportunities for Persons with Disabilities aim to commit States to take action for the equalisation of opportunities for persons with disabilities and provide for, among others that[71] -

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67 **White paper on an Integrated Disability Strategy** 1997.
68 Article 2 of the Convention.
69 Article 6 of the Convention.
70 Article 23 of the Convention.
71 **Equalisation of opportunities for children with disabilities** Report of the International Seminar hosted by the Disabled Children's Action Group and held from 5 - 8 April 1998, Johannesburg.

- governments recognise the principle of equal primary and secondary educational opportunities for children and youth with disabilities in integrated settings (where appropriate);
- special attention be given to very young children with disabilities;
- provision be made for social security protection to caregivers;
- children with disabilities are enabled to live with their families and that families are fully informed about taking precautions against sexual and other forms of abuse; and
- children with disabilities are provided with the same level of medical care within the same system as other members of society.

The World Programme of Action Concerning Disabled Persons[72] sets international guidelines to promote the adoption of effective measures for the prevention of disability, rehabilitation and the realisation of equal opportunities for persons with disabilities.

As regards regional child rights instruments, the African Children Charter gives to every child who is mentally and physically disabled the right to special measures of protection in keeping with his/her physical and moral needs and under conditions which ensure his/her dignity, and promote his/her self-reliance and active participation in the community. State Parties to the African Children Charter are also obliged, subject to available resources, to ensure that the child with a disability has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration and individual development. State Parties have also an obligation to progressively achieve for people with disabilities easy movement and access to public buildings and other places to which they may legitimately want to have access.[73]

13.4.3 **Policy**

The Education White Paper 6 on Special Needs Education[74] is based on the principle of inclusive education for all learners including those with disabilities. The White Paper outlines, inter alia, the following as key strategies for establishing an inclusive education and training system.

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72 Adopted by the United Nations General Assembly on 3 December 1982.
73 Article 13 of the Charter.
74 July 2001.

(a) The qualitative improvement of special schools for children with disabilities. Special schools will provide a high-quality service for learners with severe and multiple disabilities. Special schools will be converted to resource centres and integrated into district support teams. District support teams are to provide professional support in curriculum, assessment and instruction to full-service and other neighbourhood schools to recognise and address severe learning difficulties and to accommodate a range of learning needs.

(b) Within mainstream schooling, the designation of approxamately 500 out of 20 000 primary schools to full-service schools. At least one primary school per district will be designated as a full-service school. Learners who experience mild to moderate disabilities will be accommodated in full-service schools. Full service schools will be equipped and supported to provide for the full range of learning needs of all learners and to address barriers to learning. The support that will be rendered to full-service schools will include physical and material resources such as hearing aids and wheelchairs, as well as professional development of the staff to accommodate the full range of learning needs. Lessons learnt from this process will be used to guide the extension of the full-service school model to other primary schools and high schools.

(c) The overhauling of the process of identifying, assessing and enrolling learners in special schools, and its replacement by one that acknowledges the central role played by educators, lectures and parents.

13.4.4 The rights of South African children with disabilities

Although South Africa has no specific legislation that applies to children with disabilities, there are laws providing for the protection of children with disabilities. The Constitution, 1996, prohibits any form of discrimination on the ground of disability.[75] A child with a disability has thus the same rights as non-disabled children. Children with disabilities also have the right to health care services, social security[76] and basic education.[77] In addition to all the rights that children have under the Constitution, section 28 sets out specific rights that only apply to children. In terms of this section, children have the right to basic health care services and social services. Children with disabilities are also entitled to these rights.

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75 Section 9 (3) of the Constitution.
76 Section 27(1) of the Constitution.
77 Section 29 of the Constitution.

The South African Schools Act, 1996, provides that every person has the right to basic education.[78] Thus a child with a disability, notwithstanding the decree of his or her disability, has a right to receive basic education. A school also has no right to refuse admission on the basis of a child's disability. The Act further makes it compulsory for all learners from the age of seven to the age of 15 to receive basic education[79] and recognises the right of deaf learners to learn through the medium of Sign Language at public schools.[80] The Act prohibits unfair admission policies and stipulates that where reasonably practical children with disabilities should be admitted in mainstream schools.[81]

The Child Care Act, 1983 provides for the protection of children from abuse. All the rights in this Act also apply to children with disabilities.

The National Building Regulations of 1986 make provision for barrier free access to the built environment. Accessibility of buildings to the disabled is therefore a legal requirement. The design of buildings, e.g. must be 'wheelchair friendly'.

Apart from legislation protecting the rights of persons with disabilities, the government has also developed other national instruments giving recognition to the rights of persons with disabilities. The White Paper on an Integrated National Disability Strategy, 1997 acknowledges that persons with disabilities not only form an integral part of our society, but can also contribute to the growth of society. The promotion and protection of the rights of persons with disabilities are therefore important. The White Paper further forms the basis for a paradigm shift from the outmoded medical model to the new social model of disability. The social model requires substantial changes to the physical environment, e.g. that an alternative to stairs should be made available to persons making use of wheelchairs. Also, the Disability Rights Charter of South Africa aims to promote equal opportunities for all disabled people. The Charter is not a legally binding document, but is important for raising awareness around specific issues of disability.[82]

13.4.5 Deficiencies in the current system

Although several laws make provision for the protection of children with disabilities, these laws

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78 Section 29 (1) of the Act.
79 Section 3 (1) of the Act.
80 Section 6 (4) of the Act.
81 See also **Children and the Law** published by Lawyers for Human Rights (1998) 77.
82 **Children and the Law** 74.

still contain various loopholes hampering the effective protection of these children.

Although the Child Care Act, 1983 provides for the placement of children in need of care, it does not make any specific provision for children with disabilities who are found to be in need of care in terms of section 14(4) of the Act. There is thus a lack of recognition in the Act that children with disabilities who are found to be in need of care may need to be placed in other forms of alternative care that can provide for their special needs. There are, however, institutions for children with disabilities, some private and some government run homes.[83] However, there is no provision for committal of children found to be in need of care to these facilities by the children's court. Thus, children in need of care cannot be placed by the children's court in care facilities registered by the Departments of Health and Education other than facilities established in terms of the Child Care Act. The limited number of available homes for children with disabilities leads to overcrowdedness and a shortage of assistive devices.[84] A further barrier is that residential care facilities often refuse to admit children with disabilities who are found to be in need of care. Existing residential care facilities are also not accessible to children with disabilities. They are structurally inaccessible and do not offer rehabilitation services that will equip the disabled child to live a productive existence. Also, children's homes have never to date been subsidised for the additional cost involved in caring for children with special needs.

There is also a lack of ECD services for children with disabilities and, like residential care facilities, existing ECD facilities are inaccessible to children with disabilities. Where ECD services for children with disabilities do exist, they are often attached to special schools outside of communities and provinces, requiring that a child as young as three years has to attend boarding facilities.[85] Also, the majority of children with disabilities within ECD centres, are presently accommodated in informal community-based day care centres run by parents of disabled children.[86] The issue of ECD for children is addressed in chapter 15.

The South African Schools Act, 1996 is premised on the principle of inclusive education. Schools must therefore recognise and respond to the diverse needs of learners. There should also be a continuum of support to match the special needs encountered in every school. However, children with disabilities are not often seen in so-called mainstream schools. Albeit schools may not refuse admission on the basis of a child's disability, children with mental and

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83 **Children and the Law** 83.
84 Ibid.
85 Comment received on the workshop on Early Childhood Development held on 30 March 2000.
86 **White Paper on an Integrated Disability Strategy** 1997.

physical disabilities continue to be discriminated against. Even if schools admit children with disabilities, they are often not accessible to children with physical disabilities, e.g. a child in a wheelchair will find it difficult to move to the next class if that can only be done through using stairs. This is despite the fact that the Act provides that the physical facilities at public schools should be accessible to disabled persons.[87] The inaccessibility of schools also has the effect that those children who do not attend special schools for the disabled do not attend school at all. This is clearly a violation of the child's right to basic education.

There is a lack of assistive devices for children with disabilities. For example, some children do not go to school due to the absence of a wheelchair. It is not certain whether the disabled child's right to basic health care includes treatment or equipment which is specific to their needs.[88] It still needs to be determined whether assistive devices such as wheelchairs are considered as an essential component of basic health care.

A disabled child is only entitled to the care dependency grant if he or she receives 24-hour home care.[89] Thus, in cases where the grant enables a parent to send a child with a severe disability to a special school, which may be the child's only opportunity for education and will also allow the parent to go to work, the grant is taken away. This could have the effect that the parent is no longer able to pay the school fees and the child has to go back home where he most probably will not have access to education. The cost of transport to special schools is also often prohibitive.

Being in a rural area often makes life more difficult for the disabled child. Far from rehabilitation centres, transport facilities and specialised health workers such a physiotherapist and occupational therapists, children in rural areas have few means to enable them to lead more productive lives.[90] Part of the problem is that therapists are not exposed to rural areas in their training and, like other health workers, have few incentives to work in rural areas.[91]

Children with disabilities are inherently vulnerable to abuse. Their impaired mobility and ability to communicate what is happening to them make them targets for perpetrators of sexual abuse. The excessive stress which parents and other caregivers may experience and the poor working

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87 Section 12 (5) of the Act.
88 **Children and the Law** at p. 81.
89 See also chapter 25 below.
90 Clarke E 'A guide to living with disability in the rural areas' **Disability Update** Issue no. 41, April 1999.
91 Simon-Meyer J 'Being disabled in a rural area' **Disability Update** Issue no. 41, April 1999.

conditions of personnel in many care facilities increase the risk of abusive and neglectful behaviour. Where abuse and neglect do occur, children with disabilities are less likely then other children to access protection. Mentally disabled children are often not taken seriously and are regarded as unreliable witnesses by criminal justice officials. Even if problems are referred to protective agencies, the police, courts and welfare system are not equipped to manage them properly.

The following categories of barriers which lead to the exclusion and/or marginalisation of children with disabilities and their parents from projects aimed at children and/or parents have been identified-[92]

Attitudinal barriers:

- total ignorance;
- being aware, but believing that disability is a curse or contagious and that affected persons should be banished from society;
- transferring your beliefs about what the disabled child can or cannot do onto the parent;
- focussing only on the child's disabilities and not on his or her abilities;
- patronising attitudes where planners and the community want to care for children with disabilities, but within segregated facilities;
- accepting that children with disabilities have rights, but insisting that plans have to be finalised before attention can be given to the specific needs of children with disabilities.

Physical barriers:

- barriers in the built environment, e.g. steps, narrow doorways, inaccessible toilets etc.;
- poor access roads to schools, clinics etc.;
- poor town planning where schools and clinics are far outside the village/town, or where they are built on the highest point of the town/village;
- inaccessible public transport;
- fixed furniture, e.g. laboratory benches.

Communication barriers:

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92 **Equalisation of opportunities for children with disabilities** (1998).

- lack of Sign Language interpreters;
- lack of training facilities where parents and families can learn Sign Language; and
- lack of alternative and augmentative communication strategies to enable non speaking children to communicate.

13.4.6 Comparative systems in other countries

13.4.6.1 Viet Nam

In an effort to better address the needs of children with disabilities, the government of Viet Nam passed an Ordinance on Disabled Persons on July 30, 1998, which entitles disabled persons to health care and functional rehabilitation. Seriously disabled persons without sufficient income are specifically entitled to free medical examinations, treatment and social allowances. The Ordinance also calls for the integrated education of disabled children and specialised schools for severely disabled children. Article 8 of Decree 55 on the Implementation of the Ordinance on Disabled Persons states that disabled children under fifteen years of age whose families are poor must be provided with artificial limbs and/or orthopaedic aids free of charge.[93]

13.4.6.2 United States of America

In America, the Vocational Rehabilitation Act (VRA) of 1973, the Americans with Disabilities Act (ADA) of 1990, and the Individuals with Disabilities in Education Act (IDEA) of 1990 protect children with disabilities from discrimination. IDEA protects children with severe disabilities only. In order for a State to receive federal funding under IDEA, it must provide "free appropriate public education"[94] to all children with disabilities. The duty imposed on school districts requires that they must identify children with disabilities and that they provide needed educational opportunities, including supplementary services such as occupational and physical therapy if necessary, to ensure that the child benefits from his or her individual education plan (IEP). The IEP describes the specific instructional program that will be put in place to meet the unique educational needs of the child for whom it is developed. The child's IEP must be reviewed at least once a year and changed if necessary. IDEA further mandates the involvement of a child's parent in the development of the IEP and the appointment of a surrogate for those children who

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93 The information can be accessed at http://www.unicef.org.vn/disable.htm .

94 Free appropriate public education is one that addresses the child's special education needs through the provision of special education classes and related services such as transportation, counseling and physical therapy provided at public expense.

do not have a parent to act on their behalf. No later than a child's 16th birthday and as early as his or her 14th birthday, the IEP must describe the services needed by the young person to make the transition to independence. Where appropriate, the IEP should identify the role and responsibilities of those state agencies that will assist the youth in making the transition to independence before he or she leaves the school. IDEA stresses, but does not mandate mainstreaming of children with disabilities. Thus, segregated placements should occur only when the nature or severity of a child's disability prevents the child from participating in regular classes, even with the use of supplementary aids and services. Other than IDEA, VRA and ADA provides protection to a greater number of people. Protection from discrimination for those not demonstrably disabled is provided by VRA and ADA.[95]

13.4.6.3 **Australia**

In Australia, the Disability Services Act, 1986 provided a framework for developing a range of support services designed to increase individual independence and integration by all people with disabilities, including children, in community life. The following are some of the laws or programs that were designed pursuant to the Act:

a) The Federal Disability Discrimination Act, 1992, prohibits discrimination on the ground of disability in the areas of work, education, access to premises, accommodation, land, clubs and incorporated associations, sport, administration of federal laws and programs. The Act also prohibits harassment of a person with a disability. People, including children, who believe that they have been discriminated against on the ground of disability can make an inquiry or lodge a complaint with the Disability Discrimination Commissioner. The Act also makes provision for the formulation by the Attorney-General of disability standards in respect of the employment, education, accommodation and the provision of public transport for a person with a disability and the administration of Federal Laws and programs.

b) The Commonwealth Rehabilitation Service provides vocational rehabilitation programs to people with disabilities. Services are provided to people between the age of 14 and 65. Vocational rehabilitation programs are also used to assist children with disabilities in the transition from school to work and the wider community.[96] The legislative authority for the provision of rehabilitation services by the Commonwealth is contained in Part III of the Disability

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95 Stein T J **Child Welfare and the Law** 109 - 135.
96 The information can be accessed at http://www.workright.org.au/sevsg/crs.htm .

Services Act, 1986.

c) The Commonwealth Disability Strategy is a planning framework for Commonwealth agencies to ensure access to all Commonwealth programs, services and functions for people with disabilities. The aim of the strategy is to remove all barriers for people with disabilities. Children are considered to be an additional disadvantaged group. This means that Federal Departments and agencies will be expected to provide specific information about the progress of activities to address the needs of children with disabilities.[97]

13.4.6.4 **Canada**

In Canada, the Community of Persons with Disabilities presented to the federal, provincial and territorial governments a National Strategy for Persons with Disabilities. The strategy is a comprehensive plan to advance the equality rights of persons with disabilities via a systematic plan of barrier review and removal. Responding to the needs of people, including children, the Federal, Provincial and Territorial Ministers produced “In Unison: A Canadian Approach to Disability Issues”. This document was intended to promote the integration of persons with disabilities in Canada. In 1999, the Government of Canada produced a Federal Disability Strategy. These documents contain strong statements of support for the principles of equality. They acknowledge Canada’s fundamental commitment to the equality rights of persons with disabilities as stated in section 15 of the Charter of Rights and Freedoms and in international covenants signed by Canada. The documents also provide a basis on which the disability community can work with governments to address issues and concerns.[98] Several States have legislation and programs for children with disabilities. One such State is Ontario. The Advocacy Act, Consent to Treatment Act, and Substitute Decisions Act deal with children with disabilities. The Advocacy Act provides aid to vulnerable children 16 years of age and older, who due to moderate or severe disabilities, illness or infirmities, find it impossible to say what they want. The rights and wishes of these children should in terms of this Act be respected. The Consent to Treatment Act provides protection to individuals of any age in determining their own health care treatment. The Substitute Decisions Act protects those 16 years of age and older deemed mentally incapable in matters related to their own personal care. The Act also provides safeguards against undue state intervention and defines the process whereby if incapacity is established, substitute decision makers can be appointed.

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97 The information can be accessed at http://www.dss.gov.au/disability/ood/cds.htm .
98 The information can be accessed at www.pcs.mb.ca/~ccd/nation~4.html .

13.4.7 **Evaluation and recommendations**

Parents often send their disabled children to special homes as they do not know how to care for their children. The lack of available resources within communities is also a reason for sending children with disabilities to special homes. The Commission is therefore of the view that children with disabilities should be enabled to live with their families. **In order to achieve this, the Commission recommends that -**

(a) Parents should be empowered to care for their children at home. This could be achieved by the establishment of rehabilitation and health care services within communities, accessible schools for children with disabilities, the provision of assistive devices free of charge or at an affordable cost, and support programmes for parents of children with disabilities which will inform the parent about -

- **i the rights of his/her child with a disability;**
- **ii existing facilities and services for his or her child in the community and how to make use of them;**
- **iii laws and policies that protect children with disabilities;**
- **iv channels to seek justice for his or her child when the child's rights have been infringed; and**
- **v how the parent can contribute to his or her child's development.**

Support programmes for parents must also, if necessary, include the teaching of Sign Language.

(b) An integrated approach be followed in the delivery of rehabilitation services and the role and responsibilities of each Department towards the rehabilitation of children with disabilities should be clearly outlined.

(c) Rehabilitation centres should offer the following services:

- **i vocational training;**
- **ii psychological and other types of counselling;**
- **iii medical care and treatment;**
- **vi recreational services; and**
- **v training in communication and daily living skills.**

The above services should be provided in both urban and rural areas.

It is apparent that children with disabilities are forced into institutions for the disabled as existing residential care facilities are not 'disabled friendly'. The limited number of institutions for children with disabilities also has the effect that the existing institutions for such children are overcrowded. Placing children with disabilities in institutions for the disabled, is not in accordance with the principle of inclusiveness of the White Paper on an Integrated Disability Strategy. However, residential care facilities registered in terms of the Child Care Act are run by NGOs. Most of these NGOs are under-resourced and are battling to manage with their existing services. These facilities are also full of children who have emotional and behaviour problems, some of whom can severely victimise a child with a disability. Placing a child with a disability in such a facility without the proper support structure such as staff who can skilfully manage the situation can have a negative impact on the development of a child with a disability. Absorbing children with disabilities into residential care facilities can also have enormous resourcing implications for such facilities. Also, residential care facilities receive no special subsidies for the additional cost involve in caring for children with special needs. **The Commission therefore recommends that -**

(a) Special subsidies be offered to residential care facilities that care for children with special needs for the purpose of making them fully accessible to children with disabilities.

(b) A residential care facility which is a receiver of the proposed subsidy should progressively adjust its programmes and environment in such a manner that will allow, to the maximum extent possible, the development of children with disabilities. This includes the provision of appropriate rehabilitation services and assistive devices.

(c) Staff of residential care facilities who work with children should receive in-house training in order to provide a comprehensive and inclusive service delivery to all children, including children with disabilities.

The care options for children with disabilities in terms of the Child Care Act, 1983 are limited as the children's court has no power to place children found to be in need of care in facilities that provide special care to children with disabilities as the latter facilities are not established under the Child Care Act. **The Commission therefore recommends that the children's court should be empowered to make orders for the placement of children with special needs,**

who are found to be in need of care, in care facilities registered by the Department of Health and Education where such facilities are the best available resources for the meeting of their needs.

The inability of ordinary schools to deal with diversity in the classroom and their physical inaccessibility force children with disabilities into special schools. The South African Schools Act,1996 already recognises the need to include children with disabilities into mainstream schools. Children with disabilities are, however, still excluded from mainstream schooling solely on the basis of their disability. The Education White Paper 6 recognises the need for inclusive education for all learners.[99] The Education White Paper seems to indicate the state's intention to create legislation to provide an inclusive environment which will address the different learning needs of children. **In order to ensure basic education to children with disabilities in an inclusive environment, the Commission recommends that provisions along the directions set out in the Education White Paper be included in the South African Schools Act.**

The Commission further recommends as follows:

(a) The definition of a "care-dependent child" be amended to remove the reference to permanent (24-hour) care.

(b) Where the circumstances of the child with a disability and that of his or her family oblige that the disabled child be placed in a special home, the care dependency grant should not be taken away if this enables the child's parent or guardian to pay for the hostel fees.

(c) The Children's Code should recognise sign language as deaf children's first and natural language and as the primary medium of their communication.

(d) Sign language services be made available to children with hearing disabilities at Domestic, Children and Sexual Offences Investigation (DCS) Units and during police and court processes and that, as far as possible, sign language interpreters be used who understands the dialect used by the deaf child.

(e) Sign language interpreters for the children's court must receive training in legal interpreting and special skills in interpreting for children. In other words, sign language interpreters must understand the dialect of the child since the signs used by the deaf child originate in a different reference framework than the one

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99 See 13.4.3 above.

being in use by a deaf adult.[100]

(f) The Department of Justice, in conjunction with the Department of Welfare, should design appropriate questioning techniques during court and police processes for children with intellectual disabilities.

The Commission is also of the opinion that social assistance to children with disabilities should be determined by a needs test, which considers the extra needs and cost incurred by the child due to his or her disability.[101]

As public transport is inaccessible to children with disabilities, **the Commission recommends:**

(a) That the Department of Transport should budget for the transportation of children with disabilities (for whom public transport is inaccessible) to school. This should include the provision of accessible vehicles, and coupons for those children who cannot afford to pay for transport.

13.5 Child Labour[102]

13.5.1 Nature and extent of the problem

Child labour has been defined as "work by children under 18 which is exploitative, hazardous or otherwise inappropriate for their age, or detrimental to their schooling, or social, physical, mental, spiritual or moral development".[103] Child labour is a widespread phenomenon especially in developing countries. Assefa Bequele of the ILO suggests that it is the primary form of child abuse in the world today.[104] The ILO's Bureau of Statistics estimates that, worldwide, at least 120 million children aged between 5 and 14 years work full-time at economic activities, and about another 250 million are working part-time. Sixty-one per cent of these children are in Asia, followed by Africa with 32% and Latin America with 7%. Africa has the highest incidence

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100 This is in accordance with the submissions to the Law Commission made by DEAFSA on 12 August 1998.

101 See also 13.1 above.

102 Commercial sexual exploitation of children, including prostitution, is internationally recognised as being a form of child labour, indeed it is designated in ILO Convention 182 as one of the 'worst forms' thereof. Due to the many specific issues surrounding commercial sexual exploitation of children this is dealt with separately in section 13.10 below and is only mentioned in passing in the present section.

103 Definition used in the South African Child Labour Action Programme, 1998, as adopted by the Programme of Action Workshop of Stakeholders and endorsed by the Child Labour Intersectoral Group (obtainable from the Department of Labour).

104 Bequele A "The effective elimination of child labor: challenges and opportunities" 2000, Paper presented at ISPCAN Congress, Durban.

of child labour, with about 40% of its children between 5 and 14 years being workers. Child labour is to be found in many industrialised countries, although it is mainly apparent in the developing world.[105]` ILO research indicates that, except in Latin America, a relatively small percentage of children caught up in labour are employed as wage earners. In a number of countries a large majority are involved in family enterprises.[106]

Child labour is for the most part poverty-driven, being part of a vicious cycle with the following features:

> a) children prematurely enter the work force; b) their education is limited or non-existent, and their physical, emotional and social development is impeded or in some cases severely damaged; c) they emerge as adults only able to command the lowest wages, and - where the labour in childhood has taken a heavy physical toll - with a shortened working life. They are then d) more likely to be dependent on an income from their own children. Because they can be more easily underpaid and generally exploited, it often happens that children are employed in preference to adults. Hence adult unemployment and the resultant poverty increase, setting the scene for an increase in child labour.[107]

Children who are themselves marginalised or are from marginalised families or communities are at increased risk of being caught up in child labour, due to the difficulties they encounter in meeting their basic needs and accessing essential services. Hence, e.g., children living on the streets, displaced or refugee children, and those who have been orphaned or whose caregivers are incapacitated by AIDS, are particularly vulnerable.

Bequele points out that there have been enormous strides internationally in developing awareness of child labour, which is now at the top of the global child rights agenda. Products in which child labor has been used are being subjected to international trade bans and the international legal framework for the combatting of child labour has been greatly strengthened. But, believes Bequele, optimism which had developed by 1997 to the effect that the battle against this practice was being won and could be won in all countries within fifteen years, now needs to be tempered with realism. War, famine and HIV/AIDS are changing the context and this needs to be reflected in policy changes. In his view mass poverty, drought and famine have

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105 ILO "Child Labour: Targeting the Intolerable" 1998, Report VI(1), International Conference, 86th Session, Geneva.

106 ILO Press: 'Child Labour Today: Facts and Figures', ILO/CLK/1, Geneva, 10 June 1996.

107 Loffell, J "Child labour: economic exploitation as a form of child abuse" (1993) 43 **Critical Health** 38.

to be addressed rather than relying on formal interventions.[108]

In South Africa it has long been recognised that abusive child labour is practised in a number of sectors including commercial agriculture, street trading, entertainment and modelling, the taxi industry, brickyards, domestic service and prostitution.[109] The first national survey into child labour as it manifests itself in this country was carried out in 1999 by Statistics South Africa, commissioned by the Department of Labour, with funding from the ILO's International Programme for the Elimination of Child Labour OPEC). The following are some important findings of the study:[110]

- In 1999, more than one in every three children in SA was involved in child labour, using a definition based on at least three hours per week per child being spent in economic activities, at least seven hours per week in domestic chores, or at least five hours per week in school labour (i.e. cleaning or improvement of school premises).
- About 1.2 million children spent at least 8 hours per week fetching wood and water. Of these, 67 000 spent between 34 and 43 hours on these tasks. The figure for some was 59 hours or more.
- Nearly 1.3 million children spent at least 5 hours per week on school labour. For 12 000 of them, 34-38 hours per week were spent in these activities.
- 551 000 children spent at least 8 hours per week in economic activities.[111] For 95 000 of them, 36 or more hours were spent in such work. For 23 000, time at work exceeded 50 hours per week.
- More than 2.1 million child workers had been exposed to one or other hazard in the course of their work -, e.g. injuries; proximity to dangerous substances, heavy machinery or dangerous animals; hot, unlit or dusty conditions; heavy physical work, tiring work or work for long hours.

The main industry in which children working for "pay, profit or family gain" were engaged was agriculture (59%). This was followed by trade (33%). However, the most common economic activity for children was fetching wood and water.[112] Unpaid domestic work and help on the

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108 Bequele, A., op cit.

109 Bosch, D. and Gordon, A. 'Eliminating child labour in commercial agriculture', paper prepared for the ILO; Schurink, W, Molope, C and Tshabalala, S 'Exploring some dimensions of child labour in South Africa', University of Pretoria, 1997; Loffell, J, 'Child Labour in South Africa: some features, policy considerations and possible strategies', paper presented at Child Labour Programme of Action Workshop, Johannesburg, 1998.

110 Extracted from "Child Labour in South Africa", pamphlet circulated by the Network Against Child Labour and the Child Labour Intersectoral Group, March 2001.

111 This category was defined as including work for pay, profit or family gain; fetching wood and water; and unpaid domestic work ib the child's home, where that home was not shared by a parent, grandparent or spouse of the child.

112 It has been pointed out that hours may be somewhat inflated because young people socialise through the fetching of wood and water.

family farm were the next most frequent forms of economic activity. Lengthy hours spent on domestic chores and in cleaning and improvements to school premises were common forms of "non-economic" work expected of children.[113] What emerges from the survey is that the illegal employment of children is a significant issue in South Africa, but that most work by children is in the pursuit of their own and their families' survival in situations of poverty, in settings other than employment. Relieving the burden of these children will clearly require interventions above and beyond those which are directed to the employment context.

13.5.2 Approaches to the problem

It is widely recognised that it is overwhelmingly children in poverty who tend to be exploited for their labour, and that the eradication of child labour will in the long run depend largely on the eradication of poverty. Until that aim can be achieved, there are various schools of thought as to how child labour should be addressed, and heated debates occur both in South Africa and internationally in this regard. Approaches tend to favour immediate and total abolition at one end of the spectrum, and the regulation of some forms of child labour, together with the building in of protective measures for children at the other. Various interim positions also exist.

A strong abolitionist stance would tend to go hand in hand with advocacy of firm implementation of minimum age legislation with no exceptions. Bequele points out that this approach arises from a variety of motives - while some have primarily to do with the protection of children, others are geared, e.g. to protecting jobs and markets in countries where child labour is outlawed, and which face competition from countries which can keep prices low because of exploitative labour conditions, including the use of children.

Approaches which favour regulation may also be in support of, e.g. provision for flexible school hours which allow working children to continue with their education, the establishment of unions for child workers, and programmes which provide skills training for children and help in producing and marketing their goods.[114]

The ILO has identified the following elements which are necessary to put in place a comprehensive national strategy against child labour:[115]

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113 Statistics South Africa 2000: Survey of Activities of Young People - Summary Report and Tables.

114 Johannesburg Child Welfare Society, 1990: Report on the International Child Labour Workshop, Free University of Amsterdam, 12. See also Montezuma, L 1990: "Creative and protective programmes on education and work", paper presented at the same seminar.

115 ILO Press ‘Child Labour: Action required at the national level’ ILO/CLK/2, Geneva, 10 June 1996.

- Designing a national plan of action.
- Research.
- Raising awareness.
- Creating a broad social alliance.
- Establishing the required institutional capacity.

Within this framework, the ILO further identifies three specific areas of action, namely: improving legislation and enforcement measures, improving schooling for the poor, and using economic incentives.[116]

While it is widely acknowledged that legislation on its own will have little impact on child labour, there is also substantial agreement that strong and well-enforced legislation is an indispensable component in strategies to end this form of exploitation.

Improving schooling for the poor is often identified as the single most effective way to prevent children from entering abusive forms of work; hence the education sector has a critical role to play in the elimination of child labour.

Positive incentives for families are a way of addressing the reality that children often work because their families cannot do without their earnings. Thus in some parts of the world programmes have been set up which include cash or in-kind incentives to enable families to move children out of the workplace and into school. A simple example of this kind is an Indian programme which provides each child at school with a packet of rice to take home to the family at the end of the school day. The use of negative incentives has been more controversial. This involves, e.g. consumer boycotts of and legal barriers against the sale of goods which children have been involved in producing. While these measures have raised public awareness of child labour there is some evidence that the children who are shifted out of jobs in these processes tend to be driven underground into more hazardous employment. The ILO thus suggests that there is a need "to move children from the workplace in a phased and planned manner, instead of throwing them overnight, and unaided, into a far worse situation'.[117]

In South Africa there are very few programmes aimed specifically at removing children from labour or protecting them within the labour context, and activity has been substantially concentrated at the level of awareness-raising, policy and legislation. The overall approach has

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116 Ibid.

117 Ibid, citing the ILO research report "Child Labour: What is to be done?" - document for discussion at the informal tripartite meeting at ministerial level, Geneva, June 1996.

tended to be abolitionist, with CLIG stakeholders (see section 4.5 below) agreeing on a prohibition of employment of children of less than 15 years[118] although some have called for this to be raised to 18. There is also agreement on the need for regulation of work for young persons aged 15-17. There is a view that, while a regulatory approach may be necessary as an interim measure in countries where the employment of children is deeply embedded in the culture and economy, the problem is sufficiently contained in South Africa to render such an approach unnecessary.[119] There is some support for an exception being made for the employment of children in modelling, advertising and entertainment subject to strict regulation.

13.5.3 International framework

13.5.3.1 United Nations Convention on the Rights of the Child (CRC)

Article 32 of the CRC reads as follows:

1. States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's health or physical, mental, spiritual, moral or social development.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

    - provide for a minimum age or minimum ages for admission to employment;
    - provide for appropriate regulation of the hours and conditions of employment;
    - provide for penalties or other sanctions to ensure the effective enforcement of the present article.

Other provisions of relevance are article 28 on the right to education, article 31 on the right to rest and leisure, and article 34 on protection against sexual exploitation.

13.5.3.2 African Charter on the Rights and Welfare of the Child

Article 15 of the African Charter has wording which is virtually identical to that of article 32 of the CRC. It adds a requirement that legislative and administrative measures should cover both the formal and informal sectors of employment, and that information on the hazards of child labour should be disseminated to all sectors of the community [15(2)1]. Articles 11 and 12 affirm the

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118 SA Child Labour Action Programme, clause 32.

119 Loffell 1998: op. cit, 4. The SA Agricultural Union lobbied in the late 1980's and early 1990's for provision for the employment of children over twelve for light duties on farms to be permitted subject to regulations. This was strongly opposed by NGO's and trade unions. However the SAAU subsequently became part of CLIG and associated itself with the consensus reflected in the Child Labour Action Programme - see section A.5 below.

child's right to education and to leisure, recreation and cultural activities respectively.

13.5.3.3 ILO Conventions and cooperative arrangements with South Africa

13.5.3.3.1 Convention 138: Minimum Age Convention (1973)

Convention 138 requires ratifying states to set a minimum age for employment and to pursue a national policy aimed at the abolition of child labour. The age in question should be no less than that for completion of compulsory schooling and in any case not less than 15; however this can initially be set at 14 in developing countries under certain circumstances. "Light work", which is not clearly defined, carries a minimum age of 13, or 12 in the case of countries which use 14 as the general minimum age. The Convention requires that such work should not interfere with schooling or any other aspect of the child's healthy development. In the case of hazardous work - i.e. "work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons" - the minimum age is 18. If adequate training and protections are in place, this can be reduced to 16. The Convention provides for limited categories of work to be excluded from its ambit. South Africa ratified this Convention in 2000. The Convention is supplemented by ILO Recommendation 146 of 1973, which sets out a broad framework and essential policy measures for the prevention and elimination of child labour.[120]

13.5.3.3.2 Convention 182: Worst Forms of Child Labour Convention (1999)

Convention 182 requires members to take urgent, immediate and effective steps to prohibit and eliminate the worst forms of child labour. These include (a) all forms of slavery and similar practices, including sale and trafficking of children, debt bondage and forced or compulsory labour including conscription into armed conflict; (b) the use of children for prostitution and pornography; (c) the involvement of children in illegal activities especially the drug trade, and (d) "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of the child".[121] Member states are required to draw up and implement programmes of action to give effect to this Convention. They are required to take steps to prevent children from being taken up into these forms of labour, identify and reach out to those at particular risk, provide the necessary assistance for the removal of children from these situations and for their rehabilitation and reintegration into society, and take into account the

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120 ILO 1998: "Child Labour - Targeting the Intolerable", International Labour Conference - 86` session, report V1(1), Geneva, 24-26.

121 Article 3.

particular situation of girls.[122] South Africa ratified Convention 182 in 2000.

13.5.3.3.3 Convention 29: Forced Labour Convention (1930)

Convention 29 aims to end all practices which involve work which is carried out "under the menace of any penalty and for which the said person has not offered himself voluntarily".[123] South Africa has been a party to this Convention since 1997.

13.5.3.3.4 Memorandum of understanding

In 1998 the Minister of Labour in South Africa signed a Memorandum of Understanding with the ILO, making South Africa an international partner in the process of eliminating child labour. This set the scene for assistance from the ILO in carrying out the national survey of child labour in South Africa in 1999, and will in due course also be the basis for the operation of programmes backed by IPEC.

Other relevant international instruments are mentioned in section 13.7 in relation to commercial sexual exploitation of children.

13.5.4 Existing legal and policy situation in South Africa

13.5.4.1 Constitutional provisions

Section 28(1) of the Constitution provides as follows:

> Every child has the right -
> ...
> (e) to be protected from exploitative labour practices;
> (f) not to be required or permitted to perform work or provide services that -
> (i) are inappropriate for a person of that child's age; or
> (ii) place at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.

Also of relevance is section 32 which guarantees every person's right to education, and section

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122 Article 7(2).
123 ILO 1998: op. cit.,27.

12 which prohibits servitude and forced labour.

13.5.4.2 **The Child Care Act 74 of 1983**

Section 52A of the Act provides as follows:

> (1) Subject to the provisions of this Act or any other law, no person may employ or give work to any child under the age of 15 years.
>
> (2) The Minister may, on the conditions determined by him
>
> (a) by notice in the Gazette exclude any employment or work from the provisions of subsection (1); and
>
> (b) grant any particular person, or persons generally, exemption from the provisions of subsection (1).

Subsection (3) provides for conditions to be set for the granting of any exemption, and subsection (4) allows for the amendment or withdrawal by the Minister of Welfare of any certificate or notice of exemption at any time. Maximum penalties for the contravention of section 52A are those generally applicable to offences under this Act, i.e. a fine not exceeding R4 000 or imprisonment for up to one year, or both.[124]

Section 52A was brought into the Child Care Act via the Child Care Amendment Act of 1991, and was initially seen as a potential turning point in relation to child labour in South Africa. The employment of children under 15 had been prohibited under the Basic Conditions of Employment Act 74 of 1984, but thirteen employment sectors, including agriculture and domestic service, had been excluded from this Act. When, through the efforts of the trade union movement, moves were under way to bring all sectors within its ambit, a recommendation was made by the then National Manpower Commission that child labour be addressed through the Child Care Act as the statute primarily directed towards the wellbeing of children. The wisdom of this approach was subsequently questioned given that the Department of Welfare lacked the resources to address child labour.[125] In addition the trade unions, which had a stake in preventing child labour and were well organised around labour law and its implementation, were not active in the welfare arena. There was also criticism to the effect that s52A gave too much scope for exemptions, especially general exemptions which would not automatically lend

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124 Section 58.
125 Bosch D and Gordon A: op. cit., 20.

themselves to monitoring or control.[126] Amendments were called for to provide only for individual exemptions, subject to strict conditions.[127] Events in due course overtook s52A, and this section was excluded from regulations which were gazetted for other newer sections of the Act, as there was agreement after 1994 that child labour should after all be dealt with via the Basic Conditions of Employment Act.

13.5.4.3 **The Basic Conditions of Employment Act 75 of 1997**

Section 43 of the Basic Conditions of Employment Act (BCEA) reads:

> (1) No person may employ a child -
> (a) who is under 15 years of age; or
> (b) who is under the minimum school-leaving age in terms of any law, if this is 15 or older.
>
> (3) No person may employ a child in employment -
> (a) that is inappropriate for a person of that age;
> (b) that places at risk a child's well-being, education, physical or mental health, or spiritual, moral or social development.

Section 44 enables the Minister to regulate the employment of children over fifteen years, by prohibiting or placing conditions on the employment of youths in this category. Section 55 enables the Minister to make sectoral determinations which may in various ways modify the conditions of employment applicable to a particular sector or area. According to section 55(6)(b), such determinations can only be made to allow for the employment of children in advertising, sports, artistic or cultural activities. The controversial Basic Conditions of Amendment Bill[128] would repeal the limitation on sectoral determinations applicable to children, this being among numerous aspects of the Bill which are meeting with opposition from the trade union movement and other role players.

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126 In particular there were concerns about the possibility that the commercial agricultural sector might succeed in its lobby to be permitted to employ children, subject to conditions which many believed would be unenforceable in practice. The sector has since accepted the minimum age of 15years.

127 Otis, 1, Thomas, A. and Loffell, 1, 1992: "Introducing Child Labour to the Child Care Agenda in South Africa", paper presented at the International Conference of the Rights of the Child, Cape Town; Network Against Child Labour, November 1991: Section 52A of the Child Care Act: Recommendations and issues for consideration in the drafting of Regulations; and October 1992: Proposals for enforcement of legislation concerning child labour, documents submitted to the Working Group: Child Labour, Department of National Health and Population Development.

128 Government Gazette, 27 July 2000.

13.6.4.4 Other relevant legislation

The South African Schools Act 84 of 1996 provides that a child must attend school until age 15 or completion of grade 9, whichever comes first. Various statutes including the Domestic Violence Act 116 of 1996, the Sexual Offences Act 23 of 1957 and the Film and Publications Act 65 of 1996 prohibit aspects of the commercial sexual exploitation of children.

13.5.4.5 Strategic and policy initiatives

The Department of Labour took the initiative in 1998 to convene a wide range of stakeholders in developing a Child Labour Action Programme (CLAP) for South Africa. Other government departments, NGO's, trade union federations and employer organisations joined in this partnership, and together formed the Child Labour Intersectoral Group (CLIG). The CLAP is to be amended on the basis of the results of the SAYP (see section 13.6.1 above), and the Department of Labour will in the near future be engaging in consultations relating to a Green Paper and a White Paper. The current CLAP includes in its ambit all forms of exploitative, hazardous or inappropriate work by children, while giving priority to immediate removal of children from the most abusive forms of child labour. It emphasises the inter-sectoral nature of the task at hand, and identifies the following key areas for action:

- Employment law, including provisions on the prohibition of child labour and increasing the capacity to enforce the law, which is the responsibility of the Department of Labour.
- Appropriate educational policy and implementation, administered by the national and provincial. Departments of Education, including attention to poor levels of achievement at school and school drop-outs since education, particularly primary education, are the principal means of preventing and eliminating child labor.
- Adequate provision of social security, administered by the national and provincial Departments of Welfare and supported by NGO's.
- Programmes for the creation of employment opportunities for adults and for alleviation of poverty.
- Social mobilisation and educational programmes for the public, employers, parents and children.[129]

The National Committee on Child Abuse and Neglect (NCCAN), convened by the Department

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129 Clause 9, South African Child Labour Action Programme, as amended 6 May 1998. Obtainable from the Department of Labour.

of Social Development has, as mentioned in chapter 10, developed a National Strategy on Child Abuse and Neglect (NSCAN). The NCCAN recognises child labour as a form of child abuse, and has called for provision to be made for inter-sectoral intervention into cases of child labour in all provincial, regional and district child protection protocols. These are working agreements which have been developed to guide practitioners from welfare, health, the police, the courts and correctional services in cooperative action when intervening in cases of child abuse. The role of the labour inspector as part of the multi-disciplinary child protection team in cases of exploitation of children is recognised by the NCCAN.

Both CLIG and the NCCAN have provincial structures which are responsible for promoting coordination in case-by-case interventions in situations of exploitation of children. Both have recognised a need for improved synchronisation of their efforts on the ground and are exploring ways in which this can be achieved.

13.5.5 Deficiencies in the existing situation

Both section 52A of the Child Care Act and section 43 of the BCEA are ignored on a wide scale. The results of the SAYP cited above are a clear indication of widespread infringement of the law, especially in agriculture and in trading. Charges in terms of the BCEA have been brought in very few cases, and with little or no success to date, and the procedure for obtaining exemption for the employment of one of more children in terms of S52A of the Child Care Act is seldom used.[130]

Various sets of guidelines have been put together to govern the employment of children in entertainment and modelling, and the Ministry of Labour is in the process of finalising a sectoral determination to protect children employed in this sector. Nevertheless substantial numbers of children are known to be already employed as models and performers, and abuses are reputed to be widespread.[131] There is an impression that the exploitation of children through prostitution is increasing.[132]

Part of the problem appears to be lack of enforcement. This is a shortcoming shared with many other countries. The ILO observes that enforcement problems are particularly evident "in the informal sector, away from main cities and in agriculture, in small businesses .... in street

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130 Personal communications, Dept of Social Development and Dept of Labour.
131 Personal communication, Performing Arts Workers Equity.
132 Barnes September R et al **Child Victims of Prostitution in the Western Cape**, Institute for Child and Family Development, UWC 2000; Molo Songololo **The Trafficking of Children for Purposes of Commercial Sexual Exploitation** Cape Town 2000.

trading, in domestic service and in home-based work".[133] The ILO identifies gaps or excessive complexity in legislation, inadequate penalties, ignorance of the law and of the hazards of child labour, and problems related to inspectorates as causative factors. Inspectorates tend to have capacity problems; they may lack legal access to sites of child labour; or they may be affected by low motivation, poor pay and/or corruption.[134] The Department of Labour has a very limited inspectorate which must carry the main burden of enforcement of the BCEA, and the criminal justice system is unaccustomed to processing cases of this kind. Child workers and their families are often in a very vulnerable position and may be threatened with eviction from their homes and other forms of abuse if they press charges.[135]

The Child Care Act lacks specific provisions designed to protect children who are in illegal employment, except in the case of prostitution.[136] Neither does it provide for any means to enable such children to survive without being prematurely employed. Nor does it address the plight of those who are not in employment but are nevertheless engaged in toil which is inappropriate for their age and stage of development, as indicated in the results of the SAYP.

Child protection workers in the welfare sector and their colleagues in the health, education and criminal justice systems have to date tended to cooperate around cases of physical and sexual abuse and abandonment, while lacking experience and an established pattern of intervention in child labour. Thus the protective system has in general tended not to engage directly with child labour. Both the Child Labour Intersectoral Group convened by the Department of Labour, and the National Committee on Child Abuse and Neglect which is based in the Department of Social Development (see section 4.5. above), have made efforts to promote mutual cooperation and joint action. The Department of Labour has begun inter-sectoral training of labour inspectors together with social workers, educators and criminal justice personnel within the framework of the multi-sectoral SA Child Labour Action Plan (CLAP) (1998). Thus far these efforts have born little fruit in practice.

There is also a lack of interlinkage between the school system and the authorities responsible for the enforcement of legislation against child labour. Universal education is widely regarded as crucial to the prevention of child labour and schools are ideally placed to monitor attendance and reach out to defaulting children and their families.

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133 ILO 1998: op. cit., 87.
134 Ibid, 87ff.
135 Farm workers are particularly vulnerable in this regard. See e.g. Otis et al., 1992: op. cit., 4. Domestic workers would be in a similar situation.
136 In terms of section 14(4)(aB)(iii), a child living in circumstances likely to conduce to his or her sexual exploitation can be found to be ‘in need of care’.

A major difficulty is the lack of alternatives for the survival of families who are dependent on child labour. The lack of social security provision for children older than six years is a major issue here, given that the vast majority of child workers are above this limit. The SAYP showed that child workers are in general working to meet their own and their families' needs, with only 16% working for pocket money.[137]

13.5.6 Comparative systems in other countries

Virtually all countries have laws specifying a minimum age for employment and setting out conditions under which children may work if this is permitted.[138] By 1998, 45 countries had set the minimum age at 15, 37 at 14 and 23 at 16. However, in 30 countries it is legally acceptable for children under 14 to work, the basic minimum age in 6 countries being 12. [139] Some 135 countries provide for exclusions from general rules by the competent authority. Many others exempt particular sectors or industries, with agriculture, domestic service and family enterprises being common examples.[140] Convention 138 provides for a lower minimum age for “light work". European countries tend to set the minimum at 13-14 for such activities, while in the Americas and Africa the age of 12 is the more common legal minimum. Lebanon has a minimum age of 8 for light work.

Convention 138 requires parties to exclude children from hazardous occupations. Common examples of work from which children are excluded by ILO member countries are mining, quarries and underground work (101 countries); aspects of maritime work (57 countries), and various forms of work involving heavy or dangerous machinery. Considerable numbers of states have legislation to exclude children from the production or sale of alcohol and from work considered dangerous to morals[141]'.The exposure of children to a number of substances and agents is also prohibited in many countries - these include in particular explosives; fumes, dust and gas; radioactive and pathogenic substances and hazardous rays; and a number of dangerous chemicals.[142]

There has been a tendency for legislation governing child labour to develop as part of labour legislation, separately from that which is geared specifically for the protection of children from other forms of abuse and neglect. Exceptions are the use of children for prostitution or begging,

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137 Network Against Child Labour “The SAYP Results: Hard Data for Tough Action”, Johannesburg 2001.
138 ILO 1998: op. cit., 33.
139 Ibid, 34.4
140 Ibid, 34.
141 Ibid, 52, 54.
142 Ibid, 48-55.

which often appear in mainstream protective legislation. General references to "ill-treatment" or the likelihood of the child suffering harm of deprivation may or may not be interpreted in practice as including child labour. A disadvantage of this approach is that the enforcement of labour regulations does not ipso facto involve action to address the social context of the child in illegal employment and his or her family. Neither does it offer any remedies for the situation of such a child once the employer has been dealt with and the illegal practice ended. Meanwhile, as mentioned above in the South African context, protective legislation may tend in practice be inoperative in the labour context.

There is a recent tendency for child labour to be addressed along with other child rights issues in comprehensive children's statutes. Some examples follow.

13.5.6.1 **Brazil**

The Statute of the Child and Adolescent (1990) of Brazil is based on the full range of the rights of children and seeks to address all of these in a holistic manner; hence it addresses labour, protective, educational and other related issues pertinent to the prevention and elimination of child labour. Title 1, Chapter 5, dealing with the right to vocational training and protection at work, includes the following provisions:

- Children aged less than fifteen may not work, except as apprentices.
- Work by older adolescents is subject to regulation.
- Education is compulsory.
- Apprenticed children over fourteen years have labour and social security rights.
- Various forms of hazardous work are prohibited for adolescents (work between 22h00 and 5h00, dangerous or heavy work, work which is prejudicial to healthy development; work which interferes with schooling).
- Social programmes based on "educational work" are allowed for - this is labour activity in which the pedagogical demands related to the personal and social development of the person being educated prevail over the productive aspect.[143]
- The adolescent is entitled to vocational training and protection at work.

Title 1, Chapter 4 deals with the right to education, culture, sports practice and leisure. This chapter provides inter alia for supplementary programmes for the provision of "didactic school material, transportation, nourishment and health assistance". It also places a duty on the public

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143 Art. 68, para. 1.

authority (presumably at the local level) to "conduct a census of the student population at the basic education level, ... and, together with parents and guardians, ensure their attendance at school".[144] Directors of institutions of basic education must report cases of abuse, absenteeism and high levels of repetition to the Council of Guardianship.[145] Municipalities are obliged to "encourage and facilitate the directing of resources and spaces to cultural, sports and leisure programmes oriented to childhood and youth".[146] In a situation in which any of the child's rights are threatened or violated, protection measures can be invoked. Preference must be given to those intended to strengthen family and community ties. These may include, e.g. temporary guidance, support and monitoring; compulsory school attendance; inclusion in a programme of child, adolescent or family assistance, inclusion in a drug rehabilitation programme, placement in a shelter or placement in a foster home.[147]

13.5.6.2 **Uganda**

S9 of the Children's Statute of 1996 prohibits the employment or engagement of a child "in any activity that may be harmful to his or her health, education, (or) mental, physical or moral development". As with the infringement of any other right of the child, contraventions of this provision can be referred to the local authority for investigation and follow up by the Secretary for Children's Affairs and, if necessary, by the Local Resistance Committee court.[148]

13.5.6.3 **Ghana**

Ghana's Children's Act of 1998 prohibits "exploitative child labour", i.e. labour which "deprives the child of its health, education or development".[149] The Act sets the minimum age for employment at 15 years, or 13 in the case of light work. The latter is "work which is not likely to be harmful to the health or development of the child and does not affect the child's attendance at school or the capacity of the child to benefit from school work.[150] The minimum age for hazardous work is 18 years - this category includes going to sea, mining and quarrying, carrying heavy loads, manufacturing which involves the use of production of chemicals, work in proximity to machines, and work in venues where there may be exposure to immoral behaviour - e.g. bars, hotels and places of entertainment.[151] The engagement of children in work

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144 Art 54 (VII).
145 Art. 56.
146 Art. 59.
147 Title 11, Chapter 11.
148 Sections 12 and 13.
149 Section 87.
150 Sections 89, 90.
151 Section 91.

between 20h00 and 6h00 is prohibited.[152] In industrial undertakings, a register must be kept of children employed and of their dates of birth or apparent ages.[153]

The Ghanaian statute incorporates an interesting approach to the involvement of the welfare and labour sectors in enforcement. In the formal sector, enforcement is the responsibility of district labour officers, while in the informal sector it resides with Social Services Sub-Committee or the Social Welfare and Community Development Department of the relevant District Assembly. Where the offender is a family member of the child, a social enquiry report must be requested from a probation officer or social welfare officer, and this must be considered by the police before action is taken.[154]

The Act further provides that from the age of fifteen or on completion of basic education, a child may be apprenticed to a craftsman, who then has responsibility for that child's training in the relevant trade, safety and health, nutrition unless otherwise agreed, and moral training, and for the general promotion of his or her best interests.[155]

13.5.6.4 **India**

The Children's Code Bill of 2000 provides specifically for the withdrawal of children from labour and for their reintegration thereafter. S57 designates the minimum age for employment "in any establishment" as 14 years, and prohibits the employment of a child of any age in "a mine, plantation or any establishment in which a hazardous process is carried on". However, provision is made for an owner or occupier of any establishment to be granted a licence to employ children if the relevant licensing authority is satisfied about matters including the conditions of service and proposed amenities for the children. Inspectors appointed under the Child Labour (Prohibition and Regulation) Act of 1986, and NGO's are given the right to inspect employment sites and to report to the relevant authority on the conditions of the children working there. The Bill provides that employers who have had to discontinue the employment of children due to these provisions must provide their families with compensation for the loss of their earnings or damages if applicable, and must provide the children with facilities for education.[156] In addition the state must provide "adequate measures in the education system to admit such children who are withdrawn from employment". If they are unable to fit into regular schools the employer must arrange non-formal education for such children so as to enable them in due course to integrate

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152 Section 88.
153 Section 93.
154 Sections 95, 96.
155 Sections 98, 99.
156 Sections 57(5), 58(1) and (2).

into the formal system.[157] The Bill provides that the central and state governments must conduct educational activities to promote awareness of the evils of child labour, especially among parents of children of schoolgoing age. NGO's and other bodies are commissioned to visit factories and schools to monitor school attendance and the provision of essential facilities.[158]

13.5.6.5 **Kenya**

The 1998 draft of The Children Bill in Kenya recognises the right of the child to protection from economic exploitation and any work which is likely to be hazardous or to interfere with the child's education or be harmful to his or her development. Provision is made for regulation of employment of children above the age of 16.[159] These provisions include "any situation in which a child provides labour in exchange for payment". This covers payment of someone else on the child's behalf, payment of another person to whom the child has been deemed to be acting as an assistant, the use of a child's labour for gain by any individual or institution whether or not the child benefits therefrom; and any situation where the child's labour is contracted by an agent.[160] The Kenyan Bill (not yet enacted as at January 2001) provides that a child 'Who is engaged in any work likely to harm his health, education, mental or moral development" is a child in need of care and protection.[161] This may be the basis for the pressing of charges against an offender and/or the issuing of a care or supervision order.

13.5.7 **Question raised in Issue Paper 13 and responses**

Respondents were asked in Issue Paper 13 to reply to the following question: ‘If detailed child labour provisions remain in dedicated labour legislation, what protective mechanisms should the proposed children's statute contain with regard to children's labour?’

Please refer to chapter two, section 2.5.4 above for a summary of responses received from individuals and organisations, most of whom were in favour of child labour being addressed in the new statute. Some, however, believed that the matter should be left to or cross-referenced with labour legislation. Of respondents who completed a questionnaire on the scope of the proposed statute, 87% said that it should deal fully with child labour, 12% said it should do so

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157 Section 58(2).
158 Sections 58(3) and (4).
159 Sections 9(1) and (4).
160 Section 9(5). This clause is of interest in South Africa, as employers here have over the years held themselves out to be exempt from minimum age legislation on the grounds that the children concerned are "self-employed", "earning pocket money", not in direct receipt of money paid etc.
161 Section 113(3)(o).

partially and 1% said it should not do so at all.

The following measures were recommended by respondents who believed that the statute should deal with child labour:

- measures to address poverty;
- provision of social security for children over six years;
- powers for the child and family court to order that state financial or material assistance be awarded to the parents of caregivers of a child who comes before the court, to enable them to support that child in preference to the child's being placed in alternative care;
- spelling out of the responsibilities of the Departments of Justice, Welfare, Police and Health in taking preventative, rehabilitative and protective measures;
- A rehabilitative as opposed to a punitive approach to children caught up in labour and their families;
- education of farmers and monitoring of the agricultural sector to prevent the employment of children;
- rules as to the nature of work in which children can engage and the applicable working hours;
- greater clarity as to penalties for employers.

Question 11 of the worksheet to the Research Paper on Children Living in the Streets asked: *Having regard to the fact that street children engage themselves in various kinds of employment in order to survive or to supplement family income, should any prohibition on child work be drafted in a new children's code? If so, how should such a provision be formulated? What should the law provide with regard to children who work on the street to supplement the family income? Should the present provisions of the Basic Conditions of Employment Act (which sets the age below which children may not work at 15 years) and the constitutional ban on hazardous and dangerous work be changed or expanded in the proposed new statute to accommodate the realities facing street children?*

Respondents felt that the Basic Conditions of Employment Act and constitutional provisions cover the issue of child labour sufficiently. The problem is how to enforce such legislation in the face of the reality of poverty. It is argued that the new children's statute should draw a distinction between entrepreneurship and child labour.

13.5.8 **Recommendations**

The Commission recommends as follows:

- **That, along the lines used in the Kenyan Bill as described in 13.5.6.5 above, 'employment' be clearly defined so as to overcome present loopholes in labour legislation as it applies to children, and to avoid blocking survival strategies initiated by children themselves (such as those living on the streets).**
- **That the provisions of the BCEA in relation to the minimum age for employment, the prohibition of involvement of children in work which is likely to be harmful to their development, and sectoral determinations which may be made concerning the employment of children in the fields of advertising, sports, artistic or cultural activities, be supported in the comprehensive children's statute.**
- **That there be collaboration between the Departments of Labour, Social Development and Education in the drawing up and implementation of Regulations with regard to child labour.**
- **That, similar to the Brazilian approach mentioned in 13.5.6.1 above, social programmes allowing for educational work by young persons be provided. Thus, work which is carried out within the framework of a programme registered in terms of the Nonprofit Organisations Act and that is designed to promote personal development and vocational training, ought not to be deemed to constitute illegal child labour.**
- **That involvement of a child in illegal employment or any form of inappropriate or hazardous work be grounds for the opening of proceedings in the child and family court.**
- **That the Departments of Labour, Social Development, Education, Safety and Security and Justice be required to submit to the Treasury a joint annual estimate of the number of children in each province who are expected to be involved in illegal employment generally, and in the designated "worst forms" of child labour specifically, together with an estimate of the costs of the interventions which will be required for enforcement of the law and rehabilitation of these children in the year in question.**
- **That the Departments of Labour and Social Development be empowered to make funds available to NGO's to operate programmes for the specific purpose of intervening in child labour and promoting the rehabilitation of children who have been extricated from situations of child labour - such allocations to be coordinated and monitored through an appropriate interdepartmental process.**

- **That in accordance with the principle of early intervention,[162] all schools be required to identify those children in their area who are not attending school regularly and who are suspected to possibly be working, to take appropriate action, where necessary in cooperation with the Departments of Labour and/or Social Development, to ensure their attendance.**
- **That the Department of Education be required to identify schools where excessive use is being made of children as a source of labour for the purpose of cleaning and maintenance tasks, and to ensure that sufficient adults are employed to carry out these tasks.**
- **That the Departments of Mineral and Energy Affairs, Water Affairs and Forestry, and Land Affairs be required to identify areas which must be given priority for service delivery, in order to free children from excessive involvement in fetching wood and water.**
- **That penalties for the illegal employment of children and the use of any form of exploitative child labour be significantly increased, and provision be made for the payment of the costs of rehabilitation of child workers by offenders.**
- **That, in compliance with ILO Convention 182, all forms of child slavery and forced or compulsory labour including debt bondage be specifically designated as criminal offences.**
- **That money or goods acquired through the use of illegal child labour be subject to confiscation by the Assets Forfeiture Unit.**

13.6 Children living and working on the streets

13.6.1 Introduction

The phenomenon of street children[163] the world over has a common aetiology; the children themselves share a common street lifestyle. In their homes, poverty, unemployment, marital instability and alcohol abuse are endemic. In South Africa, rapid urbanisation and an education system, which has failed to redress the imbalances of Apartheid education, intensify the situation. In addition, street children are also vulnerable to exploitation by criminal elements.

For every four street children seen on the streets during the day, three are daytime strollers, that

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162 See Chapter 9 above.

163 In its use of the term 'street children', the Commission has no intention to stigmatise this particular vulnerable group of children.

is they are supplementing household income and go home at night. The fourth child lives on the streets - that is, he will sleep on the streets at night.

Every community produces either government machinery or NGO's to try to control, care for or punish these children.[164] However, it has been shown over the years that street children do not benefit from traditional facilities and so alternative ways of addressing the problem have to be sought. Interventions should be humane, accountable and multi-faceted as the child moves through a continuum of care. Furthermore, in South Africa, as in other developing countries, the models of childcare should be indigenous in nature.[165]

Street children are the responsibility of all South Africans, but particularly the responsibility of the institutions, which represent society, such as the national, provincial and local government, NGO's, and CBO's. The first priority lies in preventing youth from coming into the city, through improving the social environment circumstances of communities. Achieving the necessary conditions for the human rights of street children to be realised has distinct implications for governance and suggests budgetary changes and a commitment to redress equity and support.

13.6.2 **Law and Practice**

13.6.2.1 **The Child Care Act 74 of 1983**

Section 30 of the Child Care Act 74 of 1983 makes provision for accommodation for children in need of care in the form of children's homes and places of care. In the past it had been difficult for street children shelters to access funding as only those shelters which provided a full residential service qualified for children's home subsidies. Thus, street children shelters at intake level were marginalised in terms of legally qualifying for subsidies and had to rely on provincial policies to access funding.

The above situation was addressed in the Child Care Amendment Act (No. 96 of 1996) which amended section 30 of the principal Act to read: *'by the substitution for sub-sections (3) and (4) of the following subsection:*

> *(3) Application for the registration of a children's home [or] a place of care <u>or a shelter</u> shall be made to the Director-General in prescribed manner ... etc'.*

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164 **Proposed integrated policy framework for services to street children in the Western Cape** (Draft), (1997) 9.

165 Ibid.

In addition the following definition of the term '*shelter*' was inserted: *'shelter' means any building or premises maintained or used for the reception, protection and temporary care of more than six children in 'especially difficult circumstances'.*

13.6.2.2 Regulations[166] arising from the Amendment of the Child Care Act (No. 96 of 1996)

Although the insertion of the word *'shelter'* into the Child Care Act is a clear step to make provision for street children in need of care, the fact remains that regulations governing the registration of shelters are the same regulations that govern the registration of children's homes and places of care.[167] This has led to a situation where street children projects have altered the nature of the shelter to offer more permanent accommodation and by so doing qualify for maximum subsidy from the Department of Social Development. This approach to street children intervention is problematic as it emphasises one type of service provision and it is not in line with the new paradigm of the child and youth care system which emphasises an holistic approach to care. Moreover, the situation places some street children projects in a vulnerable position as they may, after inspection, lose their maximum children's home subsidy and be reregistered as a shelter.

Another shortfall in the regulations governing the care of street children is that besides residential care programmes, other care services to street children are not provided for in legislation. Drop-in centres, for example, which play a pivotal role in early intervention, are not regulated. Other programmes in the prevention and re-integration stages remain unregulated. This situation perpetuates the slow transformation of the child and youth care system.

13.6.2.3 The South African Schools Act and its implications for 'at risk' learners in mainstream schools

The South African Schools Act of 1996, refers to 'at risk' learners as 'learners with special education needs'.[168] An explanation of this term is not provided in the definitions section at the beginning of the Act. It can be assumed that when the Act mentions 'schools for learners with special education needs',[169] it is implying that only learners presently catered for in special

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166 Government Gazette No. 18770 of 1998.
167 Regulation 28 Government Gazette No. 18770 of 1998.
168 Section 12(4) of the Act.
169 Section 3(2) of the Act.

schools are included in the definition. A comprehensive definition would cover all learners with special needs both in the school system and outside. The question arises as to whether or not to include street children who fall outside of the school system as a separate category, or rather to subsume them under a broader category of 'out of school learners'.

Although the Act ensures that the provision of support services is mandatory, an issue arises in Section 12 (4) of the Act which states:

> *'the Member of the Executive Council must, where reasonably practicable, provide education for learners with special education needs at ordinary schools and provide relevant education support services for such learners.'*

The proviso 'where reasonably practicable' undermines the mandatory power of the Act.[170] The emphasis seems to be more on safeguarding the system than on protecting the rights of the learner.

The Act makes provision for a special needs portfolio at governing body level. Section 25(3) reads:

> *'The governing body of an ordinary public school which provides education to learners with special needs must, where practical possible, co-opt a person or persons with expertise regarding the special education needs of such learners'.*

Once again, the words 'where practically possible' is not mandatory enough. A further weakness in the Schools Act is that no provision is made for the needs of 'overage learners' in schools. The following scenario captures the present plight of these learners:

> Sdima is fifteen years old. He is on the brink of adulthood. Sdima feels it is necessary to return to school to learn to read and write. He dropped out of school when he was seven and only passed Grade 1. He enrols at a school and is placed in the Grade 2 class. Imagine the trauma for Sdima who day by day has to line up with younger learners; who is made to sit cramped up in a desk designed for a six year old and who is forced to learn from materials and methods which for his needs are inappropriate.

The Primary Open Learning Pathway (POLP) approach may assist the wording for the provisioning of overage learners in the Schools Act. This NGO advocates that older learners in the primary school (i.e. up to the age of fifteen years) be accommodated in 'open learning

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170 National Commission on Special Needs in Education and Training (NCSNET) **Education for All** (1997) 33.

classes'. In these classes the learners are exposed to relevant materials and teaching practices and 'fast tracked' to a context where they learn with their age cohorts. POLP goes on to recommend that learners in a primary school (grade one to grade seven) older than fifteen years of age be accommodated in high schools and exposed to Adult Basic Education and Training (ABET) classes during the school day.

13.6.2.4 The South African Schools Act and its implications for non-formal education outside of the school system

One of the strong criticisms of the Schools Act is that although provision is made for learners with special education needs in the school system, no provision is made for those outside of the system. Section 2(1) of the Act states that the Act applies to '*school education in the Republic of South Africa*'. The word '*school*' is defined as a '*public school or an independent school which enrols learners in one or more grades between grade zero and grade twelve*'. This means that non-formal schools which attempt to form a bridge between 'out of school' learners and mainstream schools are not provided for in the Act unless they register as independent schools. This status does not suit non-formal schools as the Act's interpretation of independent schools emphasises financial autonomy and only in some cases provides for limited state funding.

13.6.2.5 The Gauteng Street Children Shelters Act 16 of 1998

Gauteng seems to be the first province to have legislated on the issue of street children. The Gauteng Street Children Shelters Act provides for the establishment of a board of management as the governing body of a shelter.[171] The Act further sets out standards with which the physical facilities of a shelter must comply.[172] A shelter operator must provide each street child in its care with the following:

(a) a development programme and a treatment plan;
(b) a family reunification or other appropriate placement programmes;
(c) access to educational services;
(d) access to health services;
(e) access to social welfare services; and
(f) any other prescribed programme or service

A shelter operator is further obliged to provide an outreach programme for street children not

171 Section 12 of the Act.
172 Section 20 of the Act.

within the shelter operator's care, but who are in geographical proximity of the shelter.

With regard to the registration of shelters, the Act stipulate that a shelter operator may not operate a shelter, unless the shelter has been registered in accordance with the Child Care Act 74 of 1983 or in accordance with section 32 of the Gauteng Street Children Shelter Act. This section states that the Head of the Department (Social Development) must consider any application for registration of a shelter.[173] Should the Head of the Department decides to grant the application, he or she may impose any reasonable conditions on a shelter in respect of its registration.[174] The Act further makes provision for the cancellation of registration under certain circumstances.[175] Also, the Act stipulates that the Head of the Department may appoint any suitably qualified or experienced person as an inspector for the purposes of monitoring compliance with the Act.[176] The Head of the Department is also obliged to evaluate the operation of a shelter annually and must compile an annual evaluation report for each shelter.[177] This report may include recommendations for changes in any matter or aspect relating to the shelter.

13.6.3 Comparative systems in other countries

13.6.3.1 Defining street children

A comparative study of legislation in other countries[178] could not find a comparable definition of 'children in need of special protection'. However, children in need of special protection seem to be included under the definition 'child in need of care'. With regard to street children, the United States seem to be the only country that has enacted legislative provisions to deal with the problem of street children. The Runaway and Homeless Youth Act (42 U.S.C 5701) gives recognition to the fact that children who run away from home and who live on the streets are at risk of developing serious health and other problems. The Act, however, does not define a runaway and homeless youth.

13.6.3.2 Prevention mechanisms and strategies

One of the least explored levels of street children intervention is that of prevention. Services

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173 Section 32(1) of the Act.
174 Section 33 of the Act.
175 Section 34 of the Act.
176 Section 25 - 27 of the Act.
177 Section 30 of the Act.
178 Australia, New Zealand, United Kingdom, Botswana, Kenya, Ghana, Uganda, Namibia, Zimbabwe.

to street children tend to focus on protection and rehabilitation rather than the early identification of potential street children and families 'at risk'.

Various countries have some form of early intervention programmes to ensure maximum development (physical, emotional, etc.) in the first few years in the life of children. Effective intervention/prevention can ensure that children get the love and support they need at home and do not need to seek refuge on the streets. In Canada, Ontario,[179] the 'Better Beginnings, Better Futures' Prevention Model helps parents (living in socio-economically disadvantaged communities) to better care for their children. This project is further aimed at preventing problems (social, emotional, behavioural, physical, cognitive) from happening in children. The following programmes are also offered to families: high quality child care, family visits, prenatal education, fathers' groups and community focussed programmes. Partnership has also developed with various professionals: social service, health, and educational organizations to ensure that families are able to access the resources they need in their own community. This project is funded by the Ontario ministries of Community and Social Services, Health and Education as well as by the federal Department of Indian and Northern Affairs and the Office of the Secretary of State.

In Australia, the Good Beginnings Volunteer Home Visiting Program is a programme using volunteer parents to 'connect with' new parents (in disadvantaged communities) to offer emotional and practical support and to help new parents to build the self-confidence they need to give their children a physically and emotionally healthy start in life. In each area, an experienced professional coordinator is responsible for selecting, training, supporting and supervising volunteer community parents. Community parents are carefully screened before any training begins. This programme is funded by the Commonwealth Government.[180]

13.6.3.3 **Non formal education outside the school system**

In Nacala, Mozambique, the ADPP School for Street Children forms part of a project that gives educational possibilities to potential street children, who do not go to normal schools because of their age and other problems. The aim of the project is, inter alia, to help children in difficult situations to find a way to get a better future and to reintegrate children without families into the community. The project consists of the following five programmes: (a) the ADPP School for Street Children - primary school, first phase, which is divided into academic lessons, culture,

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179 Flanagan S "The 'Better Beginnings, Better Futures' Prevention Model" (1998) 16:9 **Child and Youth Care** 112.

180 The information can be accessed at http://www.aifs.org.au/external/nch/nlaut99.html .

sports, practical lessons and arts and caters for 1st to 5th grades; (b) the Junior Vocational School - primary school, second phase, which is divided into academic lessons, vocational skills in Construction, Commerce and Agriculture, and caters for grades 6 and 7; (c) the Secondary level which offers a similar curriculum to that of general education in Mozambique, and gives possibilities to the graduates to continue their studies up to grade 10, in the evenings; (d) the programme of Reintegration and Adoption which finds substitute families for those children who have lost contact with their parents; and (e) the Integration Programme which helps graduates to reintegrate into the community.[181]

In Uganda, an organisation named Friends of Children Association (FOCA) assists street children to attend non-formal schools where they are taught basic literacy and numeracy as well as simple book-keeping and management.[182]

The Rich's Academy, located in Atlanta, is an alternative high school that caters for the needs of out-of-school children and those at risk of dropping out of school. Students are placed at random into 'family groups' of 20 - 30 members that meet daily for group counselling and referrals in the 'extended day' program which runs until 6pm. Parents are encouraged to participate and the staff visit each student's home at least once to share the program objectives.[183]

In the United States, the Stuart B McKinney Homeless Assistance Amendment Act of 1990 makes provision for the education of homeless children and youth. It goes beyond mere access to schools, and calls for policies and practices aimed at attendance and success for homeless children. The Act authorises state educational agencies to make grants to local educational agencies for direct services to homeless children and youth. These support services include tutoring, remedial education services, expedited evaluation for special education programmes, counselling, social work, psychological services, early childhood programmes and referrals to medical, dental, mental other health services.[184] Discretion also would exist to fund activities for the specific educational needs of runaway youth and of homeless children affected by domestic violence, and to provide other emergency assistance to permit the homeless children to attend school.[185]

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181 The information can be accessed at http://www.humana.org/projekterne/school_for_street_children_nacala.htm .

182 Cockburn A "Work with street children: lessons from Africa" **Child and Youth Care** vol.16:8 August 1998 14.

183 The information can be accessed at http://www.nwrel.org/scpd/c017.html .

184 "Children without homes" (1990 - 1991) 45 **University of Miami Law Review** 363 -364.

185 Ibid at p 364.

13.6.3.4 Consent to surgical intervention and other treatment

The Children's Protection and Adoption Act (Part VIII 76 'Consent to surgical or other treatment') of Zimbabwe makes provision for magistrates to give consent 'for medical, dental, surgical or other treatment upon a minor in the case where the consent of the parent or guardian is refused or cannot be obtained within a period which is reasonable in the circumstances. The magistrate may by order in writing authorise the performance at a hospital or other suitable place upon the minor concerned of such dental, medical, surgical or other treatment as may be specified in the order'.

Section 76(3) of the Zimbabwean Act further states that 'where the authority for the performance of any treatment has been given in terms of subsection (2), the person legally liable to maintain the minor concerned shall be liable for payment'.

13.6.3.5 Begging

The Children's Protection and Adoption Act of Zimbabwe has the following provision in place which may assist in the development of legislation in this regard:

> Section 10: Begging and public entertainment
>
> (1) Any parent or guardian of a child or young person who allows that child or young person or any person who causes any child or young person:-
>
> (a) to beg; or
> (b) to accompany him or any other person while he begs; or
> (c) to induce or endeavour to induce the giving of alms; or
> (d) to perform or be exhibited in any way for public entertainment in a manner likely to be detrimental to the child's or young person's health, morals, mind or body;
>
> shall be guilty of an offence'.

13.6.3.6 Supporting and reunifying street children with their families

In Uganda, an organisation named Friends of Children Association (FOCA) has created

resettlement programmes whereby children are reunited with their families.[186] Although the government of Guatemala has made efforts to improve its human rights situation, not much attention has been given to street children.[187] For this reason, a number of private organisations such as Casa Alianza (hereafter "Casa") have been created to address the issue of street children. To help children with their transition from the streets into a more stable home setting Casa has designed the following four-step programme:

> A - Street educators go out on the streets to provide attention and medical care to street children. However, no food, clothing or money are given to street children as they must accept the consequences for their decision to live on the street. Street educators try to gain the trust of the children and try to convince them to leave the street and enter the crisis centres created by Casa.
>
> B - Crisis centres for both girls and boys offer shelter, food, clothing and counselling for children who have just left the streets. Recreational activities are also provided to the children.
>
> C - Children who stay continuously in the crisis centre for three months are ready to move on to the transition homes. The transition homes are smaller and more stable than the crisis centres.
>
> D - The final step in the process is the group homes. The children stay in the group homes until they turn eighteen, and all of them study and work.

Finally, Casa's Family Reintegration Program strives to reintegrate street children into their families. Counselling with the child and family before and after reintegration is offered to ensure that the child does not return to the street.

13.6.4 **Comments received**

The comments covered in this section were received in the course of a focus group discussion held in Pretoria on 8 April 1999, making use of a Research Paper on Children Living on the Street and a worksheet, coupled with written comments submitted to the Commission thereafter. Certain comments were also submitted in response to Issue Paper 13.

13.6.4.1 **Defining street children**

Question 1 of the worksheet on children living on the streets (hereafter 'the worksheet') asked:

> *Street children were recognised as a distinct category of children in especially difficult*

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186 Cockburn A **Child and Youth Care** (1998)113.
187 "Street children in Guatemala City" (1995) 27:1 **Columbia Human Rights Law Review** 195.

circumstances in the 1996 amendments to the present Child Care Act. Yet, the new definition is relevant only insofar as it links to provisions relating to the establishment and inspection of shelters. Should there be a definition of street children in a new children's statute? If so, how should it be formulated, and to what specific aspects or areas of a new statute should this definition apply? Should provisions concerning the right to basic needs fulfilment be incorporated, and if so, how? Give wording where possible.

The Homestead (Projects for Street Children), Western Cape endorsed the following definition of a street child proposed by the Western Cape Street Children's Forum: 'A person under the age of 18, unless otherwise stated, who for a variety of reasons leaves his/her family and community to survive on the street of the city and is inadequately cared for and protected by responsible adults'.

The Department of Welfare, Eastern Cape proposed the following definition of street child: 'A child without responsible adult supervision within a given living structure'.

The majority of the focus group participants supported the inclusion of a definition on street children in the new children's statute. It was further suggested that since there are different subcategories of street children, the definition should be broad, e.g., also to include runaway children.

13.6.4.2 **Prevention mechanisms and strategies**

Question 2 of the worksheet asked: *Which preventative measures can be taken to ensure that an 'at risk child' does not seek refuge on the street? How best can legislation promote these preventative or early invention measures? Give specific examples of the kinds of legislative provisions or measures that could illustrate the policy of early intervention.*

The Homestead (Projects for Street Children), Western Cape suggested the following preventative measures:

- Identifying children at risk of dropping out of school (this is usually the first step in becoming a street child).
- Skills training for mothers in order to provide some income for at risk families.
- After school clubs providing constructive activities for children who would otherwise linger in the streets.
- Centres where children and their families can receive advice, counselling, and be

referred to legal and/or material resources.

The Department of Welfare, Gauteng submitted that well-planned poverty alleviation programmes to address priorities are needed. Also, funding for preventative work should be provided.

The Department of Welfare, Eastern Cape recommended that programmes on parenting skills and child development should be provided to families. Awareness campaigns in this area are vital. Life skills programmes should be compulsory in schools. The respondent gave the following examples of legislative measures:

- Creation of job opportunities for parents who are unemployed.
- Life skills training to form part of the formal and informal school setting.
- Social work services in schools.
- Social education as part of school curricula.

The focus group participants suggested the following preventative measures:

- Education for parents, families, children.
- Empowerment of families.
- Addressing “pulling” (money) and “pushing” (alcohol abuse, violence) factors.
- Explore ways of alternative care.
- Early identification of children and families at risk.
- Grants in cases of poverty.
- Parents and prospective foster parents need to be trained in parenting skills.
- Funding programmes need to be redirected to established needs.
- More control over local authorities.
- Punitive measures against nursing staff who don’t take cases seriously.
- After school care.
- Support for informal educational programmes.
- Career guidance and job preparation.
- Help to rural schools, eg career guidance and resources.
- Ideally each school should have a psychologist or social worker.
- Schools must have inter-disciplinary teams (social workers, nurses, SAPS, teachers, etc).
- More equitable distribution of resources.
- Local governments should be obliged to provide aftercare centres.

- Professionals should be required to do community work.
- Attending school should be enforced more rigorously.
- Schools must become genuinely inclusive.
- Screening for abuse and neglect.

Growing up in cities (SA research under the auspices of Street-Wise SA) submitted that children should be enabled to have a voice in the assessment of their living environments and to recommend improvements. Enabling children to make critical assessments and then to work with the community towards bettering their environment brings a level of community solidarity and support quite unparalleled in formal intervention programmes where the emphasis is on deficiency rather than self-efficacy. The respondent felt that there is a need to get away from deficiency models and concentrate more on resiliency. Communal self-efficacy will go a long way towards lessening the need for children to flee for the streets.

Assisting members of the community in discussing and prioritising their problems and wishes for development, also taking into account the needs of children and youth by having young representatives on such committees, enable them to direct their own upliftment. Then there is no need for an exhaustive list of areas that should be addressed.

13.6.4.3 **Non-formal education outside the school system**

Question 7 of the worksheet asked:

> *Should a comprehensive children's statute provide for street children's rights to education or is this part of education legislation? Should the children's statute go further by providing that non-formal educational structures be established as part of rehabilitation for street children? If non-formal educational structures are to be established, what should the legal provisions for this be? Who (or which department) would bear responsibility for these education provisions? What should the process of accreditation or registration be? How would such structures be funded?*

The Homestead (Projects for Street Children), Western Cape is of the view that non-formal education comprising remedial assessment, confidence building, and adult education style curricula and syllabi would be most suitable. The respondent argued that the Education Department must take responsibility for the education of all children covered by the SA Schools Act, even when this requires a reorientating foundation phase for older children. Adult Basic Education and Training (ABET) accreditation would be appropriate for 13 years and older if the children give clear indications that they cannot reintegrate, or are irrevocably opposed to, reintegration into mainstream.

The Department of Welfare, Gauteng submitted that the Department of Education should be responsible for developing the criteria for accreditation, registration and funding for non formal structures. Department of Welfare, Eastern Cape recommended that the Departments of Education and Labour should be responsible for training programmes and that non formal structures should be registered and accredited according to education standards. Further, the government should fund the structures.

The focus group participants submitted that children's legislation and education legislation can supplement each other. Further, there is a shift in education legislation to accommodate all children. Free education is, however, a myth and schools do exclude some children. The focus group is of the view that "formal" and "informal" education cannot both be accommodated in the same formal education system. Thus, the focus should be on preventative measures.

Growing up in cities (SA research under the auspices of Street-Wise SA) proposed that the focus should move from "education for street children" to "bridging education" where there is a clearly acknowledged remedial approach - and also the recognition that isolation from other children in the community is not an ideal. Children are overly labelled in our society and they feel the pain of the stigmatisation than negative labelling carries. When children are able and wish to continue formal education it should be possible for them to move naturally out of the remedial environment regardless of where they are living.

SA National Council for Child and Family Welfare (comments on Issue Paper 13) stated that the best way to protect the rights of street children is to provide legislation with financial backing for appropriate educational programmes for the children.

13.6.4.4 **Access to health care services**

Question 9 of the worksheet asked:

> *Street children, more particularly those who are not staying in shelters, seem to be hesitant to seek medical attention when ill, usually because of their lack of trust in adults. What can be done in a comprehensive children's statute to make medical care services more 'street child friendly' and to ensure adequate health care to street children? How can specific legal provisions be drafted in this regard? Who should be liable for the payment of medical treatment of street children in the absence of any legally liable caregiver?*

The Homestead (Projects for Street Children), Western Cape is of the view that access to medical care does not appear to be a big problem. In the case where street children require

medical attention due to injury or disease, state hospitals accept the children and treat them accordingly.[188] Children who need medical attention will go to a drop-in centre where they will receive first aid or be transported to hospital. Street workers also routinely take children to hospital as do members of the public. Most programmes also have access to volunteer doctors. It is, however, difficult to monitor whether children living on the street experience the same access to health services as those who are living in residential care or frequenting a drop-in centre. On the other hand the focus group participants submitted that street children are reluctant to seek medical attention and they seldom do it voluntarily but are brought by the SAPS. Also, staff at clinics are negative towards street children. They lack ID documents and birth certificates. It is suggested that shelters should offer medical services. An inter-sectoral approach is needed in terms of which the non-formal health sector is supported (subsidies). Further, mobile clinics staffed by community primary health care providers are a suggested option and referrals to hospitals can be done by mobile units. Primary health care services are free across the board. Tax incentives should be offered to private clinics that provide emergency services for street children.

The Department of Welfare, Eastern Cape suggested that free health care services should be provided for in a children's statute. Further, a registration requirement for drop-in centres should be a health staff complement. Also, the government should be liable for the payment of medical treatment of street children in the absence of any legally liable caregiver.

13.6.4.5 **Begging**

Question 5 of the worksheet asked: *Should a comprehensive children's statute, similar to the position in Zimbabwe, prohibit any parent, guardian or other person to cause or allow a child or young person to beg or to accompany him or her while begging? What about older street children that cause younger children to beg or accompany them while begging? What would be an appropriate sanction? Should criminal sanctions be contemplated?*

The Homestead (Projects for Street Children), Western Cape is concerned that making begging an offence would lead to large-scale arrests of street people of all ages.

Department of Welfare, Eastern Cape suggested that a children's statute should reflect the position in Zimbabwe and community service should be imposed as an appropriate sanction.

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188 This seems to be the case in Cape Town. Whether hospitals in other parts of the country do the same are questionable.

The focus group participants submitted that begging by children is inherently damaging. Further, as legislation cannot stand on its own, the focus should be on prevention and diversion programmes for children to develop entrepreneurial skills. There should be zero police tolerance and the parent/older child must be warned. Schools must be more active and look beyond their gates.

13.6.4.6 **Commercial sexual exploitation of street children**

Question 10 of the worksheet asked:

> *If a comprehensive children's statute provides for harsh punishment for anyone who sexually exploits children, should special provisions apply to those who engage or involve street children in sexual exploitation? What about older street children who exploit younger children? Should the legislation also make provision for, inter alia, counselling and support services for child victims of commercial and other forms of sexual exploitation?*

The Homestead (Projects for Street Children), Western Cape is of the view that street children are more vulnerable to older youths on the streets, intimidation and assault. Thus, harsher sentences without bail should be provided for and counselling and support services are crucial for victims.

The Departments of Welfare in both Gauteng and the Eastern Cape stated that special provisions should apply to those who engage or involve street children in sexual exploitation. The Department of Welfare, Eastern Cape submitted that provision should be made for counselling and support services for sexually exploited child victims.

The focus group participants also felt that harsher punishment should be provided for all perpetrators who sexually exploit and abuse children. Further, no special provisions should apply to abusers of street children and counselling and support services should be provided for.

13.6.4.7 **Deficiencies**

Question 3 of the worksheet asked:

> *What are the current gaps regarding shelters for street children? How can this be addressed by a comprehensive children's statute? If a comprehensive children's statute provides for alternative care options, what other options can be created for older street children who will not necessarily adapt to foster or children's home placement? If shelters are the preferred option for children living on the street, should this be a*

statutory placement issue? Or should referrals not be by means of what is now termed the statutory system, and is this legally viable? What should the relationship between shelters and children's homes be?

The Homestead (Projects for Street Children), Western Cape submitted that shelters are only one of a number of services offered to street children and is a very limited form of intervention. Thus, shelters need to be viewed in conjunction with other services which should include non-formal education, outreach, family mediation, drop-in centres, skill training programmes, etc. The following phased intervention model is suggested:

Outreach• drop in centre• family mediation and return home **or** intake centre• non-formal education• second phase children's home• return to formal school

The Department of Welfare, Gauteng stated that there is no coordination between the various government departments in respect of the running of shelters. Further, children should be treated in the least restrictive environment with the focus on returning them to the family as soon as possible.

The Department of Welfare, Eastern Cape identified the following gaps regarding shelters:

- Educational needs of children in shelters are neglected.
- The present structure allows for gangs to be formed.
- The staff-child ratio is insufficient.
- Discipline is lacking.
- Programmes offered in shelters are fragmented and there is no uniformity.
- Open door policies negate personal responsibility and accountability for the child's life.

The following remedial measures are suggested:

- A professional staff compliment to provide programmes should be a prerequisite for registering shelters.
- Shelters should be graded according to the following levels: level 1 - drop in centre; level 2 - statutory placement; level 3 - children's home as a last resort after all efforts of reunification have been exhausted.
- Legislation should make provision to accommodate a child in all instances up to the age of 18 years.

The following options for older children are proposed:

- Children above the age of 15 years should be accommodated in something similar to a “kibbutz” - a distinct shelter with work creation programmes.
- Foster families should be trained to care for children who are unable to adapt to conventional foster care or children’s homes. An aftercare centre should be created as a bridge between a shelter or home to prepare the child for independence.

The Department of Welfare, Eastern Cape argued that placement should not be statutory but voluntary with a time frame, after which statutory intervention should take place as a last resort. As part of reunification, the family should be introduced to shelter life and the child be reintroduced to the family gradually. The respondent added that there should be no relation between shelters and children’s homes although the child could be transferred from a shelter to a children’s home if problems are experienced with reunification.

The focus group participants suggested that alternatives to shelters could be group homes and halfway houses. Further, shelters should be registered but should not form part of a statutory placement issue. Shelters are voluntary whereas children’s homes require court intervention. Also, alternative arrangements must be made if shelters are closed.

The following comments were received on Issue Paper 13:

The National Council of Women of SA submitted that austerity type shelters should be available for street children and be subsidised. Recognising the difficulty of finding staff for these shelters, it is recommended that a psychologist with a roving commission to visit such shelters be appointed.

Mr DS Rothman submitted that street children should be sheltered within cities or towns in a manner that takes into account -

- repatriation to their own families, who are often advantaged by having their children looked after by others;
- the prevention of further influx of children attracted by such facilities and freedoms offered;
- the prevention of crimes and abuse of dependence producing substances; and
- the provision of educational and entertainment facilities to eliminate boredom etc.

He also suggested that subsidised boarding school types of facilities should be provided, instead of children's homes or schools of industries of the usual kind.

13.6.4.8 Supporting and reunifying street children with their families

Question 4 of the consultation paper asked:

> *What can be done by means of a new children's law to ensure that street children are successfully reintegrated into their families and communities? Should reunification be a statutory or non-statutory matter? Should a comprehensive children's statute make provision for the monitoring of the child's progress after he or she has been reunited with his or her family? Give specific details of proposed legislative models that could be followed to ensure that the legislation promotes reintegration.*

The Homestead (Projects for Street Children), Western Cape submitted that it is a very difficult process to return children to the very situation which caused them to run away in the first place. There is a universal assumption that both child and family want to be reunited. In most instances this is not the case. It is questioned how reunification could be a statutory matter. Who would be held liable if the child leaves the home again, as almost invariably happens? Would it be the usually indifferent parent?

The Department of Welfare, Eastern Cape proposed that reunification should be a statutory matter. Provision should be made for monitoring the child's progress after reunification. The respondent proposed the following measures to ensure reintegration:

- Developmental assessment - care plan and individual development plan.
- Introducing the child to the home environment outside the institution and introducing the family to the institution.
- Compulsory training in parenting skills.
- Utilize families that are functioning properly to assist with the preparation of dysfunctional families.
- Local authorities should take responsibility for welfare in the community.
- Employment opportunities should be created in rural areas.

The focus group participants felt that a clearly defined process must be followed for reintegration in families. Further, reunification should be a non-statutory matter, since the child enters the shelter voluntarily. It is suggested that monitoring of the child's progress after reunification should be done by the Departments of Welfare, Education and Health. Also, the Office of the

Public Protector should monitor shelters. Independent developmental and business plans are required.

The Cape Law Society (comment on Issue Paper 13) submitted that legislation should provide for the keeping of registers. The respondent referred to the problems experienced in Cape Town where many street children come from the Eastern Cape or elsewhere and no effective orders can be obtained in relation to them as they give false names and addresses and their parents cannot be traced. Hence the proposal of a computerised registry. (The Durban Committee on the other hand consider the views expressed by the Cape Law Society with regard to the implementation of a register as unrealistic.)

13.6.5 Evaluation and recommendations

The Commission is of the view that children living or working on the streets are a specific category of children in need of special protection. **The Commission thus recommends that the following definition of a street child be included in the new children's statute: 'A person under the age of 18 who, for reasons which may include abuse, community upheaval and/or poverty, leaves his or her family or community permanently to survive on the streets, or alternatively begs or works on the street but returns home at night, and who experiences inadequate care and protection from adults'.**

The Commission realises that the early identification of children at risk is crucial for effective prevention. **The Commission therefore recommends as follows:**

- **Each school should be responsible for identifying children at risk of dropping out of school as well as children at risk of abuse, and should take appropriate action, where necessary in cooperation with the Department of Social Development.**

- **Local Government should be accorded the following functions:**

  - **Each local government must estimate the number of street children in its area of jurisdiction.**
  - **Each local government must then furnish these figures to the Department of Education.**
  - **The Department of Education must then design appropriate programmes for the schooling of those children living or working on the streets.**

- **The Department of Education should budget for the financing of such programmes.**
- **Each local government may develop and support programmes and/or make available resources to NGOs to assist with the integration of children living on the street.**
- **Each local government may identify services available and assist children living or working on the streets in its area of jurisdiction.**

While it is recognised that shelters have a limited role to play in the lives of street children, it is accepted that drop-in centres can help in the identification of street children.

The Commission would like to emphasis that the payment of a non means-tested universal grant will serve as a measure to prevent children from turning to the streets for reasons of poverty.[189]

The Commission takes cognisance of the fact that street children often find it difficult to reintegrate into mainstream schooling due to their distinct circumstances. Further, that an alternative form of education is needed to deal holistically with the needs of the child. **The Commission thus recommends as follows:**

(a) That the Schools Act be amended to make provision for the creation of non formal educational structures to cater for the needs of street children and other out-of-school learners.

(b) That the Department of Education should budget for the establishment of such structures and should develop criteria for their accreditation or registration.

Street children often find it difficult to gain access to health care services due to the fact that they do not have adult caregivers to assist them and who can give permission for medical treatment, and because of prejudice on the part of some health care workers. In order to make health care services more accessible to street children, **the Commission recommends that**

(a) **If a medical practitioner or nurse at a hospital considers it necessary for a street child to undergo an operation or to be submitted to any treatment that requires prior consent of such child's parent or guardian, whether such operation or**

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189 See also 13.4 above and 25.4 below.

treatment is *urgent or not*, and the parent or guardian cannot be found, the superintendent of that hospital or person acting on his behalf may give the necessary consent.[190]

(b) **The Provincial Departments of Health should budget for appropriate basic health care programmes for all children, including street children.**

(c) **As not all street children are accommodated in shelters or frequent a drop-in centre where they will have access to health care services or from where they can be transported to hospital if needed, it is recommended that appropriate basic health care programmes should include the use of mobile clinics (vehicle/staff), where necessary, in order to provide medical care to children on the street, especially to those far from a drop-in centre. Mobile clinics should also be made available to all other children for whom basic health care services are inaccessible due to distance.**

Regarding street children in particular there are three kinds of children who beg:

(a) Children who live on the streets. These children may use the money for food but are more likely to use the money received to feed dangerous drug and solvent addictions, or, less destructively, for video games or movies.

(b) Children who come into the cities each day to beg, often to supplement their families' income. They usually have a place to sleep and a home to return to. These children are known as daytime strollers and no provision is made for their welfare in law.

(c) Small children, who are managed by older youth or sometimes their parents who beg at traffic lights. 'These are the saddest, most exploited, abused and neglected of all the children seen on the streets. Coerced and afraid they have little choice'.[191]

Begging is a time consuming activity and thus children tend to drop out of the mainstream school to engage in it. Apart from the physical danger and lack of schooling, begging has a disturbing side effect: the practice destroys dignity, creates an unhealthy self image and can easily be internalised as a 'natural' way of life.[192]

The Commission therefore recommends that a child who is caused or allowed to beg should be listed as a child in need of care in terms of section 14(4) of the current Child

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190 See also 11.4 above.
191 Cockburn A **Child and Youth Care** 1998.
192 Abass-Johnstone, Z "The Right of a Child to Secure a Family Life" Community Law Centre, UWC, 1994 72.

Care Act, 1983. Poverty often forces parents or guardians to cause their children to beg. Although the Commission does not condone the acts of parents or guardians who cause or allow their children to beg, it is of the view that it would not be appropriate to make it a criminal offence for any parent or guardian who cause or allow a child to beg. However, the Commission invites comments as to whether it should be a criminal offence for a non-family member who causes or allows a child to beg.

Street children, particularly, but not exclusively female street children are exploited in the sex industry through child prostitution, child pornography and trafficking.[193] Many are drawn into the formal system of prostitution very soon after arriving in the city. Children who have been sexually exploited are dealt with as children in need of care in terms of the Child Care Act, 1983. Although in theory the Child Care Act can be used to protect children caught up in commercial sexual exploitation, in practice the Act does not adequately protect these children. There is also a lack of rehabilitative programmes to assist street children involved in commercial sex work. **The Commission therefore recommends as follows:**

(a) **Each local government must provide an annual estimate of the number of children, including street children involved in commercial sex work in its area of jurisdiction.**

(b) **Each local government must then furnish these figures to the Department of Social Development.**

(c) **Each provincial Department of Social Development must then budget for the development and implementation of rehabilitative programmes to address the specific needs of these children.**[194]

Although the insertion of the word 'shelter' into the Child Care Act makes some provision for the appropriate care of street children, it is narrowly focussed and does not accommodate other street children interventions. **The Commission therefore recommends that regulations governing outreach programmes, drop-in centres, shelters and halfway homes be drafted.** The regulations could be formulated as follows:

Application for registration as an outreach programme, a drop-in centre, shelter and halfway home for children living on the street

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193 See also 13.7 below.
194 See also 13.7.7 at paragraph 4 below.

(1) Application for registration as an outreach programme, a drop-in centre, shelter and halfway home for children living on the street in terms of section 30 of the Act should be made on a form determined by the Director-General.

(2) The application shall be accompanied by:-

(a) the constitution of the association of persons that is to manage the outreach programme, drop-in centre, shelter or halfway home for children living on the street;

(b) a certificate issued by the local authority within whose area the outreach programme, drop-in centre, shelter or halfway home for children living on the street is situated or is to be erected to the effect that plans for the said building or buildings, if still to be erected, have been approved by the local authority or, alternatively, that the said building or buildings, if already erected, complies or comply with all structural and health requirements of the local authority;

(c) a certificate issued by the Director-General confirming that a needs assessment which supports the need for this resource in the community undertaken by the applicant in collaboration with the Director-General; and

(d) in the case of shelters and halfway homes for children living on the street a certificate referred to in paragraph (c) shall also contain a confirmation that the shelter or halfway house is able to comply with residential care minimum standards.

(3) The constitution referred to in subregulation (2)(a) shall contain at least the following particulars and stipulations:

(a) the name of the outreach programme, drop-in centre, shelter or halfway home for children living on the street and a description of the category or categories of children in to be cared for;

(b) the composition, powers and duties of the management and of the executive committee or management committee, as the case may be;

(c) the powers, obligation and undertaking of the management to delegate all authority with regard to the care, behaviour management and development of children to the head of the outreach programme, drop-in centre, shelter or halfway home for children living on the street.

(d) the procedures in respect of amending the constitution; and

(e) the commitment of the management to ensure the establishment and maintenance of minimum standards as in specific regulations set out for the outreach programme, drop-in centre, shelter or halfway house for children living on the street.

(4) Registration of the outreach programme, drop-in centre, shelter or halfway home for children living on the street shall be reviewed every 24 months on the basis of a quality assurance assessment undertaken by appropriately trained officials appointed by the Director-General.

Additional requirements with which a drop-in centre shall comply

(1) Subject to the provisions of the Act and these regulations no drop-in centre for children living on the street shall be registered in terms of section 30 of the Act or remain registered after 24 months unless the Director-General is satisfied that proper arrangements have been made to ensure that:-

(a) the drop-in centre is run on the basis of self referral (or voluntary referral);

(b) access is not refused to any child based on his/her race, religion, sexual orientation, sex or cultural heritage;

(c) the drop-in centre meets the child's basic needs by providing food, clothing, developmental opportunities, primary health care and safety;

(d) the drop-in centre is an accessible structure with adequate physical space, running water and an accessible ablution;

(e) the drop-in centre sees itself holistically as part of the continuum of services which ensures opportunities for the development, care, education and treatment of children living on the street;

(f) records of children who attend activities at the drop-in centre are kept by the staff;

(g) the drop-in centre provides programmes only for children under the age of 18 years;

(h) the drop-in centre provides each child with a developmentally appropriate plan of care, education and treatment (where necessary) and where the child has been able to participate in this plan as a partner and make changes to it;

(i) family based services/intervention are part the programme in the drop-in centre and the emphasis is on re-unification with the family and the preservation of family life.'

Additional requirements with which a shelter shall comply

(1) Subject to the provisions of the Act and these regulations no shelter for children living on the street shall be registered in terms of section 30 of the Act or remain registered after 24 months unless the Director-General is satisfied that proper arrangements have been made to ensure that:-

(a) children who are of school-going age attend school or are enrolled in an appropriate alternative education programme;
(b) the shelter is a permanent structure with enough physical space for accommodation and recreation, adequate running water, ablution facilities, bathing or showering facilities and kitchen;
(c) in the case where shelters accommodate boys and girls, separate sleeping as well as bathing/showering and ablution facilities are provided for;
(d) older and younger children are separated during times when there is no direct supervision (e.g. in the night when they sleep);
(e) the environment and/or milieu in the shelter empowers staff to perform their tasks effectively;
(f) children are provided with every opportunity to develop maturity and responsibility within the context of caring relationships;
(g) the shelter provides 3 balance meals a day and toiletries to promote personal hygiene;
(h) the shelter is run on a 24-hour basis by adults who are appropriately screened and trained in child and youth care;
(i) no child over the age of 16 years is admitted to the shelter and no child over the age of 18 years of age is allowed to stay in the shelter unless he or she is in the process of completing his/her secondary education;
(j) a documented record of children residing in the shelter is kept by the staff and management of the shelter;
(k) children who reside in the shelter have a developmentally appropriate plan and programme of care, education and treatment (where necessary) and participate in this plan and make changes to it;

(l) children who reside in the shelter have personal privacy, adequate free time and their own possessions;

(m) each child residing in the shelter has contact with his/her family and friends unless such contact is deemed to inappropriate by a team of child and youth care experts.'

Additional requirements with which a outreach programme shall comply

(1) Subject to the provisions of the Act and these regulations no outreach programme for children living on the street shall be registered in terms of section 30 of the Act or remain registered after 24 months unless the Director-General is satisfied that proper arrangements have been made to ensure that:-

(a) the outreach programme diverts children back to their communities and/or families or to appropriate statutory or non statutory interventions;

(b) self-referral forms an intrinsic part of the programme;

(c) contact time with the child's community and family is established in the shortest time possible;

(d) an individual programme for the child based on his/her needs, developmental stage and personal circumstances is an intrinsic part of the outreach programme;

(e) links the children's needs to existing resources such as day hospitals, dental clinics, health clinics and, where appropriate, shelters;

(f) documented records are kept of all children with whom contact is made;

(g) the outreach programme is conducted by adults who are appropriately trained in child and youth care work and who are appropriately screened to render an effective outreach service;

(h) appropriate community involvement in the outreach programme is promoted.'

Additional requirements with which a halfway home shall comply

(1) Subject to the provisions of the Act and these regulations no halfway home for children living on the street shall be registered in terms of section 30 of the Act or remain registered after 24 months unless the Director-General is satisfied that proper arrangements have been made to ensure that:-

(a) the halfway house is situated in a community where the child/youth is likely to find more permanent accommodation;
(b) the halfway home is a permanent structure with enough physical space for accommodation and recreation, adequate running water, ablution facilities, bathing or showering facilities and kitchen;
(c) an adult, or adults, who is/are adequately trained in child and youth care work resides in the home on a 24 hour basis;
(d) the home emphasises confidence building, allowing the child/youth to learn responsibility and independent living;
(e) the general maintenance and running of the home, such as paying accounts are the responsibility of the residents;
(f) a vocational skills programme encompassing vocational guidance and skills training is, where possible, run with available community resources.'

With regard reunification of street children with their families, **the Commission recommends that** -

(a) **Counselling be done with both the child and the family before reintegration in order to prepare them for the moment of reintegration.**
(b) **A social service inquiry be conducted to determine why the child left home and to address the issues that have caused the child to leave the family home; and**
(c) **Counselling be done with both the child and the family after reintegration to ensure that the child does not leave the family home and community again.**

13.7 Commercial Sexual Exploitation of Children

13.7.1 Introduction

This section focuses on the care and protection of children who have been, are being or are in danger of being sexually exploited for commercial reasons, as a category of children in need of special protection. The need to focus on this category of children is mandated, inter alia, by

the Stockholm Agenda for Action,[195] to which South Africa has committed itself.

Traditionally, commercial sexual exploitation of children is divided into three categories, namely child prostitution, child pornography and the trafficking of children for sexual exploitation. There is no rigid distinction between these categories as children can also be trafficked[196] for more than one of the stated purposes.

Commercial sexual exploitation of children is defined as the 'procurement of a child to perform a sexual act for a financial or other reward payable to the child, the parents or guardian of a child, the procurer or any other person'.[197] The Commission has critically analysed the current provision on commercial sexual exploitation in both its investigation into Sexual Offences[198] and in Chapter 6 above and has decided to incorporate the provisions criminalising commercial sexual exploitation in the new sexual offences legislation and not the new children's statute.[199]

13.7.2 Trafficking in children for purposes of commercial sexual exploitation

This section focusses only on trafficking[200] in children for purposes of commercial sexual exploitation. As we have seen,[201] trafficking in children is not limited to the commercial sexual exploitation of those children and legal provisions need to cover trafficking for other purposes such as, for example, labour or organ removal. To this end, we have recommended the inclusion of specific child anti-trafficking provisions in the new children's statute.[202] For an overview of how the current South African legal system deals with the problem of trafficking in children, the reader is referred to 22.5.3 below.

Although South Africa has no anti-trafficking legislation, several legal remedies in the Child Care Act, 1983 can be used to protect children who have been or are being trafficked for purposes of commercial sexual exploitation. The Child Care Act, 1983, as amended, stipulates that a child is a child in need of care if the child (a) has been abandoned or is without visible means

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195 The Stockholm Agenda for Action was unanimously adopted by the World Congress Against the Commercial Sexual Exploitation of Children on 28 August 1996. The Agenda for Action covers areas such as coordination and cooperation, prevention, protection, recovery and reintegration, and child participation. See further Rose Barnes-September et al **Child Victims of Prostitution in the Western Cape** Bellville: Institute for Child and Family Development, UWC 2000, p. 131 - 134.

196 The trafficking of children (in general terms) was dealt with in section 3.5 above.

197 The definition was introduced by the Child Care Amendment Act 13 of 1999.

198 See also S A Law Commission **Discussion Paper 85: Sexual Offences: The Substantive Law**, August 1999, par. 3.7.11.

199 Section 22.5.4 below.

200 For a definition of trafficking, see chapter 22 at 22.5.1 below.

201 See chapter 22 at 22.5.1below.

202 See section 22.5.4 below.

of support, (b) lives in circumstances likely to cause or conduce to his or her seduction, abduction or sexual exploitation, (c) lives in or is exposed to circumstances which may seriously harm the physical, mental or social well-being of the child, (d) is in a state of physical or mental neglect, and (e) has been physically, emotionally or sexually abused or ill-treated by his or her parents or guardian or the person in whose custody the child is.[203] A trafficked child can thus be declared a child in need of care and placed in suitable alternative care in terms of this Act. The Act makes it a criminal offence for any parent or guardian of a child or any person having the custody of a child to ill-treat that child or allow that child to be ill-treated.[204] Ill-treatment per definition will certainly include trafficking of children for commercial sexual exploitation. The Act further declares the participation or involvement by **any** person in the commercial sexual exploitation of a child an offence.[205] It is also unlawful in terms of the Child Care Act, 1983 to abduct or harbour an abducted child.[206]

13.7.3 Comparative systems in other countries

13.7.3.1 United States of America

The US **International Trafficking of Women and Children Victim Protection Bill** of 1999, recognises that trafficking in women and children is a fast-growing international business and that trafficked women and children are often subjected to rape and other forms of sexual abuse by their traffickers and often held as virtual prisoners by their exploiters. This Bill seeks to improve protection for victims of trafficking by:

- providing trafficked victims in the USA with humanitarian assistance;
- allowing trafficked victims to remain in the USA for up to three months, or as long as necessary to seek asylum and/or pursue civil or criminal action against those who have abused their human rights;
- increasing funding for services for trafficked victims in countries around the world and creating programs and activities to assist these women and girls internationally;
- revoking the eligibility of foreign governments to receive police assistance[207] if they fail

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203 Section 14(4)(AB) of the Child Care Act, 1983.
204 Section 50(1) of the Child Care Act, 1983.
205 Section 50A of the Child Care Act, 1983.
206 Section 51 of the Child Care Act, 1983.
207 Police assistance means (i) assistance of any kind, whether in the form of grant, loan, training, or otherwise, provided to or for foreign law enforcement officials, foreign customs officials, or foreign immigration officials; (ii) government-to-government sales of any item to or for foreign law enforcement officials, foreign customs officials or foreign immigration officials; and (iii) any license for the export of an item sold under contract to or for the officials described in (i).

to take effective action to investigate and prosecute officials who are involved in trafficking;

- banning common forms of involuntary servitude and debt bondage in the USA;
- establishing an inter-agency task force to monitor and combat trafficking which will report on the status of international trafficking to Congress once a year.

Although laudable in what it aims to achieve, the Bill has not become law in the USA.[208]

13.7.3.2 **Italy**

Italy, a destination country for trafficked persons, in 1998 adopted Legislative Decree no. 286 which gives victims who decide to shun prostitution and leave the streets the opportunity to be rehabilitated, to engage in alternative trade and employment and to settle down to 'decent' living in Italy. To qualify for such protection, prostitutes must renounce their trade and provide information that could lead to the arrest and prosecution of their sponsors or pimps. A number of NGOs in Italy are involved in the rehabilitation of prostitutes. The Embassy of Nigeria in Italy also supports the Italian rehabilitation programme by issuing the victims of trafficking with the necessary documents like passports. This is on request by NGOs and after verification that the prostitutes are no longer in the trade and actually undergoing rehabilitation.[209]

13.7.3.3 **Thailand and China**

With regard to Thailand and the Yunnan Province of China, police agencies have agreed to cooperate in a repatriation program of Yunnanese girls trafficked into prostitution in Thailand. Thai authorities and NGOs are to inform the Chinese Embassy or Chinese Consulate in Thailand in case they come across trafficked victims from the Yunnan Province. The Chinese authority will provide support in repatriating the victims and finally reintegrate the victims into their homes, villages, schools etc.[210]

13.7.3.4 **Cambodia**

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208 This Bill was introduced in the 106th session of Congress, but was not passed in that session. It has since not been reintroduced in the current congress.

209 Most Nigerian children, particularly girls are trafficked to Italy. Some are deceived in that they are promised work in Italy, but on their arrival are informed that they will be required to work in the sex industry. Others know that they will be working in the sex industry.

210 Report on Combatting the Trafficking in Children and their Exploitation in Prostitution and Other Intolerable Forms of Child Labour in Mekong Basin Countries, June 1998.

In Cambodia, many people, and particularly women and children, are vulnerable to exploitation in the form of sexual abuse, abduction, sale, and trafficking due to poverty. The problem is exaggerated by poor law enforcement and the involvement of police officials in trafficking in persons. Many young girls in rural areas are taken by agents to the city or other countries to work in jobs described to be honest and well paid. In actual fact, nearly all of these girls forcibly end up in the sex industry.

Cambodia has, however, taken measures to stop the kidnapping and trafficking of women and children into prostitution. In January 1996, its National Assembly adopted a law on the Suppression of the Kidnapping or Sales of Human Persons. This law, inter alia, imposes a 15 to 20 year prison sentence on those who lure and kidnap persons under the age of 15 for trafficking or sale into prostitution. Many programs in Cambodia by government and NGOs which promote the welfare of women and children, include the prevention of their kidnapping and trafficking.[211]

13.7.3.5 **Japan**

Article 8 of the Japanese Law for Punishing Acts related to Child Prostitution and Child Pornography, and for Protection of Children, 1999 makes it a criminal offence for any person to buy or sell a child for the purpose of making the child be a party to sexual intercourse (e.g. for child prostitution) or for the purpose of producing child pornography. The Article further provides that a Japanese national who, for purposes of child prostitution or child pornography, transports a child who has been abducted, kidnapped, sold or bought in a foreign country, out of that country, shall be guilty of an offence.

13.7.3.6 **African countries**

Trafficking in children is a widespread practice in West Africa. Trafficking routes within West Africa include Benin, Cote d'Ivoire, Gabon, Ghana, Mali, Nigeria, Togo, Cameroon, Burkina Faso, Guinea and Niger. While some of these countries are sending countries (suppliers of trafficked children), others are receivers, and others are transit countries. Some countries are both sending and receiving. Although internal child trafficking exists within the borders of West African countries, little is known about it.[212] Eighty percent of trafficked persons from sub-

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211 Ibid.

212 "Child trafficking in West and Central Africa": Paper presented by Dr R Salah, UNICEF Regional Director for West and Central Africa, at the First Pan African Conference on Human Trafficking in Abuja, Nigeria on 19 - 23 February 2001.

Saharan Africa and Nigeria in particular, are young girls, including minors of between 12 to 16 years.[213] Nigerian girls who are enslaved for sex exploitation in Europe number at least 50 000.[214] Studies undertaken by UNICEF in 1998 and 2000 show that poverty, cultural values and traditional belief systems combine to weaken the protection of children's rights and push children towards traffickers.

13.7.4 Evaluation and recommendations

The provision of effective and efficient services linked to the availability of resources to children in need of special protection should remain the primary preventative strategy. However, it should be evident that the new children's statute on its own cannot address the numerous and varied root causes underlying the trafficking of children for commercial exploitation.[215] Indeed, only a prolonged, massive, integrated programme of economic and social upliftment can hope to make a difference. In the long term, however, such a programme will be our only salvation.

Where a child is trafficked to South Africa from another country, the Commission has recommended in this Discussion Paper that **such a child should be afforded refugee status**,[216] entitling the child to the protection measures such a classification will bring. In particular we wish to point out that such a child would enjoy full legal protection, in accordance with the rights set out in the Bill of Rights to the Constitution and the Refugees Act 130 of 1998, in South Africa. Where such a refugee child is found under circumstances which clearly indicate that the child in question is in need of care as contemplated in the Child Care Act, 1983, he or she must be brought before the children's court. The children's court enquiry can then trigger the full possible range of protection measures available under the Child Care Act, 1983.

In this Discussion Paper,[217] the Commission has also recommended the inclusion, in the new children's statute, of **a general provision criminalising the trafficking of children**. Trafficking for commercial sexual exploitation would be but one of the possible forms such an indictment can take.

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213 Paper presented by the Embassies of Nigeria, Rome, Italy at the First Pan African Conference on Human Trafficking, Abuja, Nigeria.

214 "Report on Nigerian Prostitution in Europe": Paper presented at the First Pan African Conference on Human Trafficking, Abuja, Nigeria.

215 The Molo Songololo report **The Trafficking of Children for Purposes of Sexual Exploitation - South Africa** Cape Town: Molo Songololo 2000 cites the following reasons: Poverty and school drop-outs; lack of effective safety and protection services for children; the sexual abuse of children; high levels of domestic violence; lack of effective welfare support; increased urbanisation; and parental involvement.

216 See section 22.5.4 below.

217 See section 22.5.4 below.

The Commission believes that severe criminal sanctions linked to trafficking and the other forms of commercial sexual exploitation, the strengthening of the sexual offences legislation, the application of extra-territorial legislation, etc. will serve as a significant deterrent and therefore preventative measure. However, the criminal law has its limitations,[218] notably when it comes to enforcement.[219] In this regard the Commission would like to repeat that it is necessary, in addition to ensuring economic upliftment, to raise awareness, to have educational campaigns, etc. NGO's, CBO's and other structures in civil society have an important role to play in this regard.

Research shows that South African children are increasingly being trafficked by their own parents into slavery or prostitution in order to generate an income or to pay off a debt.[220] The authorities and the Children's Court will have little difficulty in proclaiming such a trafficked child a child in need of care; to summarily remove that child, and to place that child in alternative care. In these circumstances,[221] it seems rather pointless to expect social workers to perform family reunification services in order to have the child returned to the very person(s) who trafficked him or her in the first place. This is not to say that other welfare services should not be rendered to such family. Indeed, given the extremes to which the parent(s) have gone in trafficking their own child, it should certainly cause red lights to flash. This should be particularly true where other siblings remain with the parents. For this reason, **the Commission recommends that if a court finds that a child has been trafficked for purposes of commercial sexual exploitation by his or her parents or any other person legally responsible for the child, all parental rights of that person be suspended pending an enquiry,[222] that the court holding such an enquiry may terminate all parental rights,[223] and that the child immediately be placed in alternative care**.

13.7.5 Child Prostitution

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218 Joan van Niekerk 'Children and survival sex in Kwa-Zulu Natal', in Rose Barnes-September, Anne Mayne and Ingrid Brown-Adam (eds) **The National Consultative Conference against the Sexual Exploitation of Children, 16 - 18 March 1999** Cape Town: Institute for Child and Family Development, UWC 1999, p. 28: '[C]hanges to law on their own will do little to address the root causes of child sex work. The law is only as effective as those who administer and apply it'.

219 It is recognised, for instance, that it would be easier to prosecute a person for trafficking a foreign child to South Africa, than to prosecute a South African who traffics children from informal settlements in the north of Johannesburg to the northern suburbs of Johannesburg (the in-country trafficking). Foreign children have to go through some port of entry, are more visible and therefore easier to spot.

220 Molo Songololo **The Trafficking of Children for Purposes of Sexual Exploitation - South Africa**, p. 34; Rose Barnes-September, Anne Mayne and Ingrid Brown-Adam (eds) **The National Consultative Conference against the Sexual Exploitation of Children, 16 - 18 March 1999**, section III.

221 As would be the case when babies are abandoned.

222 The parent(s) may be under some form of duress or child may wish to return home to his or her parents.

223 See Chapter 8 on the termination of parental rights and responsibilities below.

13.7.5.1 Introduction

Child prostitution[224] is regarded as one of the manifestations of commercial sexual exploitation of children, and can be defined as the sexual exploitation of a child for remuneration in cash or in kind to the child, usually, but not always facilitated by an intermediary (pimp, parent, family member, etc.).[225]

In its **Discussion Paper on Sexual Offences: The Substantive Law**, the Commission recommended that a complete ban should be placed on child prostitution and that anyone involved in the sexual exploitation of a child, whether as a pimp or customer, should face severe criminal sanction.[226] The Commission stated that the child prostitute should be regarded as a victim in need of care and protection and should not be prosecuted.[227] The Commission further stated that the force of the criminal law should be harnessed to prosecute the customer, pimp, procurer, and parents and guardians who wilfully cause children to participate in child prostitution.[228] Therefore this section will focus on the care and protection of children engaged in prostitution;[229] the criminal law aspects are being dealt with by the Project Committee on Sexual Offences.

13.7.5.2 Child prostitution within the borders of South Africa

It is believed that child prostitution is on the increase in all major South African cities. At least 4000 children are estimated to be among the 10 000 prostitutes jostling for clients in the streets of Johannesburg.[230] The House Group, an organisation working in Hillbrow, estimates that 40% of sex workers in Johannesburg are under 18.[231] Child prostitution is becoming a growing problem in Cape Town and the mother city is fast becoming a child sex tourist destination where

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224 The trend is to move away from the term 'prostitution' to 'commercial sex work'. While the phrase 'commercial sex work' might be less derogatory and more applicable to use in the adult context, the Commission wishes to point out that prostitution should never be a viable career option for children.

225 S A Law Commission **Discussion Paper 85: Sexual Offences: The Substantive Law**, par. 3.7.3.1.

226 Par. 3.7.10.2. This included recommendations for the removal of trade licences, confiscation of property, fines, etc. where children are being accommodated on premises for the purpose of prostitution.

227 The rationale is based on the laws of supply and demand: Reduce the demand by making it extremely unattractive for the customer and the facilitators to sexually exploit children thereby reducing the supply of child prostitutes onto the market.

228 Ibid.

229 The Project Committee on Sexual Offences is looking specifically at **adult** prostitution (adult commercial sex work) and is in the process of finalising a discussion paper in this regard.

230 **The Star**, 24 May 2000 by Claudia Mpeta.

231 The information can be accessed at http://www.thenextstep.co.za/child_prostitution.htm .

tourists can pay as little as R50 for sex with a child.[232] An estimated 25% of people working as prostitutes in the Western Cape are children under 18.[233] Messina, situated in the Northern Province, has disturbing reports of child prostitution.

Ms Joan van Niekerk of Childline, Durban says it is essential to note that the use of the child sex worker - especially the street child - is usually not by a child sex tourist. Many paedophiles may use street children sexually despite the high risk of sexually transmitted disease because the likelihood of being reported is negligible. 'The street child has little value, the police are unresponsive to complaints of abuse by the street child and the child and user remain relatively anonymous to each other'. She says some paedophiles believe that they are actually doing the child a favour - "if it was not for me the child would not survive - not have food or the glue to sniff that makes life bearable". Ms Van Niekerk says poverty, lack of family support, and the decimation brought about by HIV/AIDS to families and communities are contributing enormously to the phenomenon of child sex work in Durban.

There are many reasons why children become involved in prostitution,[234] but again the main reason seems to be poverty.[235] Apparently, some poor families allow the prostitution of their children as they have no other stable source of income.[236] For child headed households prostitution may be the only means of supporting oneself and one's siblings.

Often the entry of children into sex work is survival driven - the prohibitions on child labour of other forms and the absence of child support grants / maintenance for children over 7 years makes some children more vulnerable to entering the sex work 'market'. However, the large sums of money that can be earned - large in comparison to any other possibility open to the

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232 **Sunday Times** news, 21 March 1999; This appears to be linked to the increase in tourism to South Africa.

233 **Cape Times** news, 21 June 1999.

234 As to how children become involved, see Robinson L N "The Globalization of Female Child Prostitution: A Call for Reintegration and Recovery Measures Via Article 39 of the United Nations Convention on the Rights of the Child"; Barnes-September et al **Child Victims of Prostitution in the Western Cape**, p. 9 et seq.

235 Rose Barnes-September, Anne Mayne and Ingrid Brown-Adam (eds) **The National Consultative Conference against the Sexual Exploitation of Children, 16 - 18 March 1999**, p. 9 : 'In developing countries, macro social and economic factors are important determinants in the increase in the prostitution of children. It seems that the prostitution of children dramatically increases in countries undergoing structural adjustments related to social, political and economic struggles and upheavals. As a result, children become economic and sexual commodities. Because of the disparity between rich and poor, parents become victims of coercion and manipulation and sell their children to brothel owners. In addition, children are more likely to be orphaned or left to care for themselves while parents look for migratory work. In South Africa, thousands of children's lives are endangered, placed at risk and negatively impacted upon because of conditions that leave them vulnerable to recruitment into the sex industry. Children involved in prostitution are more vulnerable to gang violence, drug and alcohol abuse, isolation, and to being condemned and ostracised by families, peers and many sectors of society'.

236 The information van be accessed at http://www.zoutnet.co.za/archive/2000/February/25th/newsfeb25.asp?StoNum=22 .

child - does create a desire to remain involved in the work. This, and the high levels of drug and alcohol use among child sex workers, often introduced to the child by the user or pimp because drug use and dependence makes the child more controllable and manipulable, and drug and alcohol use often continued by the young person because it makes what they are involved in more bearable, must also be addressed.

Is it also worth mentioning that child sex workers are also preferred to adult workers in communities where HIV/AIDS anxieties are high and the child sex worker is (mistakenly) seen as safer than an adult sex worker. Children also are less likely to be able to insist on condom use. These two factors contribute to an enhanced demand for child sex workers.

13.7.5.3 **Child prostitution and the South African legal system**

An overview of the legislation addressing the issue of child prostitution is given by the Commission in its **Discussion Paper on Sexual Offences: The Substantive Law**.[237] The **draft Sexual Offences Bill** (2001) converges the various offences that target different role-players involved in child prostitution into one universal offence namely 'involvement in child prostitution'. The potential role-players in this offence have also been extended to those who can be considered to be trafficking in children as a trafficker is merely one of several participants in child prostitution. The Bill makes having knowledge of the commission of indecent acts or acts of sexual penetration with a child an offence. Any person who has such knowledge and who fails to report it within a reasonable time will be guilty of the offence of 'failure to report knowledge of child prostitution.' Any person who intentionally receives any reward, favour or compensation from the commission of indecent acts or acts of sexual penetration with a child by any person is guilty of the offence of 'benefiting from child prostitution'. Also, any person who intentionally lives on rewards, favours or compensation for the commission of indecent acts or acts of sexual penetration with child by any person is guilty of the offence of 'living from the earnings of child prostitution'. The Bill also criminalises the organising or facilitation of child sex tours within or to South Africa in any way.

13.7.5.4 **Comparative systems in other countries**

13.7.5.4.1 **Thailand**

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237 Discussion Paper 85, par. 3.7.3 et seq. A discussion paper contains the Commission's **preliminary** views and recommendations.

Thousands of girls are drawn into the Thai sex industry every year to supplement family income. The selling of young girls by their parents to procurers has also been prevalent in Thailand, especially in the North.[238] In order to address the increasing problem of child prostitution, the government of Thailand has strengthened child prostitution laws by enacting the Prostitution and Suppression Act B.E. 2539 (1996). This Act makes it a serious crime to engage a prostitute if she is under 18 years of age. Parents who collude with sex traffickers could face a jail sentence of four to 20 years and guardianship of their children can be revoked. As far as the Act relates to the protection of children involved in prostitution, it provides that all prostitutes not over 18 years of age must receive protection and vocational development for a period not exceeding two years. Also, the private sector, a foundation, institution or association with the objective of prevention and rectification of prostitution problems can file an application with the authority to establish a primary shelter or a protection and vocational development premises.

13.7.5.4.2 **Britain**

In Britain, the Department of Health has issued guidelines on how to deal with children involved in prostitution. The aim of the guidelines is to safeguard and to promote the welfare of children involved in prostitution and to encourage the investigation and prosecution of those who coerce children into prostitution. These guidelines also enable the relevant agencies to treat the child as a victim of abuse. In terms of these guidelines, a child who is at risk of or involved in prostitution must be considered for immediate referral to the multi-agency group who will meet as soon as possible to consider the situation. This multi-agency group consists of individuals from the Police, Social Services, Health, Education, Youth Service, Probation Service, the Crown Prosecution Service, local voluntary child care agencies and national organisations.

Each role-player has its own responsibility, e.g. the police will play a leading role in the investigation of the crime. The functions of the multi-agency group are: (a) to provide a local resource and source of expertise for those who have concerns that a child may be at risk of being drawn into prostitution; and (b) to provide an initial forum for considering an individual case (or group of cases) when children are found to be involved in prostitution. When considering a case, the multi-agency group need to consider the following: (a) the needs of the child and what arrangements may be necessary for his or her immediate safety; (b) how to coordinate the arrangements for the child's safety with any criminal investigations, and (c) how the arrangements for continuing protection and diversion will be taken forward. If the child is

238 The information can be accessed at http://www.sexwork.com/ .

found to be a child in need, he or she must be dealt with under section 17[239] of the Children's Act, 1989 and a child and family assessment should be undertaken. After the assessment, a decision is taken on what help is required to meet the child's needs and a plan should be developed based on the findings of the child and family assessment. Lastly, arrangements then need to be put in place for the implementation and review of the plan.[240]

13.7.5.4.3 **Japan**

In Japan, the Law for Punishing Acts related to Child Prostitution and Child Pornography, and for Protecting Children makes it a criminal offence for any person to commit child prostitution.[241] Child prostitution is defined in Article 2 of the Act as the act of performing sexual intercourse, an act similar to sexual intercourse, or an act for the purpose of satisfying one's sexual curiosity, etc with a child or of making a child perform such a sexual act in return for giving, or promising to give, a remuneration either to the child, an intermediary, or the protector of the child. The Act also makes it a criminal offence for a person to act as an intermediary in child prostitution[242] or to solicit another person to commit child prostitution.[243]

13.7.5.5 **Evaluation and recommendations**

The Commission is considering the aspects relating to the criminalising of child prostitution in its investigation into sexual offences. For present purposes, it suffices to say that our principal approach to child prostitution is that **the child prostitute is not a criminal, but a child in need of care and protection**. Given the focus of the envisaged new sexual offences legislation and the Government's commitment to eradicate child prostitution, it is expected that stricter enforcement and more criminal investigations will bring to light more children involved in or affected by child prostitution. The Commission recommends that where a criminal investigation reveals that a particular child has been involved in prostitution, such child be treated as a child in need of care and be brought before the children's court. Where necessary, the child must be removed to a place of safety, but this should not be the general rule. For instance, it might be more appropriate to arrest and remove a father who pimps his child, than to remove the child.

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239 This section deals with the provision of services for children in need, their families and others.
240 The information can be accessed at http://www.homeoffice.gov.uk/cpd/sou/child991.htm .
241 Article 4. The punishment is imprisonment with labour for not more than three years or a fine of not more than one million yen.
242 Article 5(1).
243 Article 6(1).

After an assessment of the child and his or her family, the children's court should make an appropriate order. This order can include the allocation of some form of grant, the placement of the child in alternative care, the removal of the perpetrator from the family, rehabilitation services for the child, etc. While the Commission would support initiatives which allows (former) child prostitutes the opportunity to advance their education and or to acquire marketable skills through **voluntary** rehabilitation efforts,[244] it does not support the idea (along the Thailand model) of forcing child prostitutes to receive vocational developmental training for certain periods of time.

The Commission is aware that some children are being sexually exploited, sometimes with the knowledge and active participation of parents or care-givers, because that is their only source of income. It is sad that some children (and adults) are compelled by circumstances to engage in what has become known as 'survival sex' in order to keep themselves or other siblings or family members alive. Again the Commission stresses the need to address the socio-economic circumstances of children in a holistic, integrative fashion.[245]

There is another group of children who are mainly runaways, often from abusive home environments, where they might have been sexually abused, who get onto the city streets and are systematically drawn into prostitution and drug and alcohol addiction. Ideally, preventative measures should address the home situation of these children before they run away. However, once these children are trapped in the sex industry, special rehabilitation and skill-building programmes are needed in order to get them to break free - the existing places of safety, children's homes, foster care system, etc., simply cannot meet their needs.

Lastly, the point must be made that adult prostitutes (or commercial sex workers) are not *per se* unfit parents. The fact that a child's parent or care-giver is a prostitute does not imply that that child is in need of care. Indeed, such parent or care-giver may well be prostituting himself or herself in order to maintain his or her child.

13.7.6 Child pornography

13.7.6.1 Introduction

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244 This is also recommended by Rose Barnes-September et al **Child Victims of Prostitution in the Western Cape**, p. 135. See also R E Booth, Y Zhang and C F Kwiatkowski "The challenge of changing drug and sex risk behaviour of runaway and homeless adolescents" (1999) 23 **Child Abuse and Neglect** 1295.

245 This is also recommended by Rose Barnes-September et al **Child Victims of Prostitution in the Western Cape**, p. 136.

Child pornography depicts the participation of children in sexual activities with adults or other children. This type of activity is universally condemned as inappropriate to the psychological and physical well-being of children and, as such, it has been suggested,[246] does not deserve to be protected by the constitutional guarantee of freedom of expression. Often the children used in the production of the pornography are subjected to extreme, severe and violent forms of abuse. There is also evidence that such practices fuel the development of paedophilic tendencies and hence the possible increase in incidences of sexual abuse of children.

By all accounts the problem of child pornography is growing in South Africa. Child pornography on the Internet in particular is a matter of great concern and there is pressure from various sectors that Internet service providers should be obliged to monitor the use of their services for the dissemination of child pornography. The issue of child pornography is receiving specific attention in the Commission's investigation into Sexual Offences.[247]

13.7.6.2 Child pornography and the South African legal system

The Films and Publications Act, 65 of 1996,[248] as amended by Act 34 of 1999, defines child pornography to include 'any image, real or simulated, however created, depicting a person who is or who is shown as being under the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children'. The Act makes it an offence for any person who 'knowingly creates, produces, imports or is in possession of a publication which contains a visual presentation of child pornography; or creates, distributes, produces, imports or is in possession of a film which contains a scene or scenes of child pornography'.[249] The production and possession of child pornography is thus completely prohibited.

13.7.6.3 Comparative law

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246 **Case v Minister of Safety and Security; Curtis v Minister of Safety and Security** 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) para [105] and [107] per Madala J.

247 Although the Commission did express the opinion in **Discussion Paper 85: Sexual Offences: The Substantive Law** that child pornography should be addressed comprehensively in specific legislation such as the Films and Publications Act 1996 and not the new sexual offences legislation, the Project Committee has decided, in the light of comments received, to prepare a specific discussion paper on child pornography.

248 Steps are being taken to combat child pornography through effective law enforcement. See the report of the National Workshop on Combatting Child Pornography through Effective Law Enforcement, Cape Town, 12 - 14 May 2000, hosted by the Films and Publications Board, the papers presented at a special training session on Investigative and Prosecution Techniques for On-line Child Exploitation Investigations convened by the Director of Public Prosecutions, Pretoria, 6 -7 September 1999.

249 Section 27 (a) and (b) of the Act.

While there is an abundance of provisions on the prohibition of the possession or distribution of child pornography, only one example related to the protection of children who have suffered as a result of child pornography (and child prostitution) could be found. According to Article 14(1) of the Japanese Law for Punishing Acts related to Child Prostitution and Child Pornography, and for Protecting Children, 1999, in light of the fact that acts such as child prostitution and the distribution of child pornography would seriously affect the mental and or physical growth of children,[250] the State and local public entities must endeavour to educate and enlighten the public to deepen their understanding of the rights of children. To this end, the state and local public entities must endeavour to promote research and studies that can help prevent such acts as child prostitution and the distribution of child pornography.

The unofficial translation[251] of Article 15 of this Act reads as follows:

> **Protection of Children who have suffered Mental or Physical Damage**
>
> 1. With regard to children who have suffered mental and or physical damage as a result of having been a party to child prostitution or having been depicted in child pornography, the relevant administrative agencies shall, in co-operation with one another, taking into account the mental and physical conditions of the children as well as the environment in which they have been placed, properly take necessary measures for their protection so that they can recover physically and mentally from the damage they have suffered and grow with dignity. Such measures include consultation, instruction, temporary guardianship and placement in an institution.
> 2. The relevant administrative agencies shall, in the case of taking the measures mentioned in the preceding paragraph, provide the protector of the child with consultation, instruction or other steps if such steps are deemed necessary for the protection of the child mentioned in the said paragraph.

Article 16 of the Act states that in order to be able to properly provide protection based on professional knowledge with regard to children who have suffered mental and or physical damage as a result of having been a party to child prostitution or having been depicted in child pornography, the state and local public entities must endeavour to promote research and studies on the protection of such children, reinforce systems of cooperation and liaison among relevant agencies in case of the urgent need of protection of such children, arrange systems of cooperation and liaison with private organisations which undertake the protection of such

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250 For a South African perspective on the links between pornography and child sexual abuse, see Doreen Meissner "Will control of, and education on, pornography reduce sexual abuse and exploitation of children?" in Barnes-September, Mayne and Brown-Adam (eds) **The National Consultative Conference against the Sexual Exploitation of Children**, p. 50. See also Anne Mayne "The links between adult and child pornography" in Barnes-September, Mayne and Brown-Adams (eds) op cit, p. 52.

251 Draft received from the Embassy of Japan, Pretoria, via the Department of Foreign Affairs, in November 1999.

children, and arrange other necessary systems.

13.7.6.4 Evaluation and recommendation

It is very difficult to trace and find the actual children used in the production of child pornography.[252] This, and the easy access to the Internet and concomitant technological advances, effectively limit the possibility to provide care and protection to the specific children originally used. Indeed, the children might not even have known that images taken of them would be used in pornographic material.[253] Where it is possible to trace an individual child used in the production of pornographic material, and such child is found to be in need of care, then such child should immediately be brought before the children's court.[254]

Children must also be protected from viewing pornographic material.[255] In this regard, it appears that the monitoring mechanism in the Films and Publications Act 1996 is better geared to regulate access to films and publications than access to the Internet. Clearly, parents and care-givers have a responsibility to limit the access of their children to pornographic sites and this can easily be done by installing the appropriate software filters. In addition, **the Commission recommends that an obligation be placed on Internet service providers not to allow child pornography on their servers**. Such a provision could place an obligation on Internet service providers to monitor their sites and can be framed in such a way as to make it an offence for an Internet service provider to knowingly provide access to child pornography.[256]

13.7.7 Conclusion

The causes of sexual exploitation of children in South Africa are diverse. Dire poverty, the HIV/AIDS pandemic, the high level of domestic violence,[257] and sex tourism are some of the factors. No single cause can be attributed to the spread of the incidences of commercial exploitation and it would rather appear that a combination of factors are at work. However, it

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252 The child might be a Russian national, the photo taken in Germany, the developments done in Britain, the magazine published in the USA, and sold in South Africa.

253 It is technical possible to superimpose the face of a child on an adult engaged in explicit sexual acts.

254 Ms Joan van Niekerk of Childline, Durban, however, is of the opinion that children's court proceedings are not necessary in all cases where children have been used in pornography.

255 See Chapter 12 on the Protection of Children as Consumers above.

256 See Julia Scheeres 'ISP guilty in child porn case' at www.wired.com/news/ebiz/0,1272,41878,00.html . Obviously the provision will have to provide for some form of notification of the fact that the server is hosting child pornography.

257 In some areas in the Western Cape, up to 10 cases of domestic violence are reported each day - **The Argus** newspaper, 26 April 2000. See also Rachel Khatlane's paper on 'Domestic violence: How it contributes to sexual exploitation of children' in Barnes-September, Mayne and Brown-Adam (eds) **The National Consultative Conference against the Sexual Exploitation of Children**, p. 62.

is clear that poverty and poor socio-economic conditions play major roles, at least for some forms of commercial sexual exploitation.[258] What makes it very difficult to address the root causes of commercial sexual exploitation, is the fact that while the victims (the children) generally come from poorer, more indigent families, the perpetrators come from all walks of life. Perpetrators often have very little in common with other perpetrators (other than the need to sexually exploit children) and some are quite sophisticated and well educated.[259]

For purposes of this section, however, the focus is on the care and protection of children that have been, or are being sexually exploited for commercial purposes. Obviously in such a scenario, a multi-disciplinary inter-departmental approach will yield the best results. In this context the Commission would like to stress the need for proper co-ordination of poverty relief measures, not only within the Department of Social Development, but also with other forms of social assistance such as old age pensions, the child support grant, unemployment insurance, etc. The poverty relief and social assistance measures should also be integrated with the Government's housing programme, the supply of basic services, labour, education, health - basically every department's activities.

Currently, a child who has suffered mental, emotional and/or physical damage as a result of having been the subject of commercial sexual exploitation can be dealt with as a child in need of care in terms of the Child Care Act, 1983. Although in theory the Child Care Act can be used to protect children caught up in commercial sexual exploitation, in practice the Act does not adequately protect these children. Also, the placement options offered by the Child Care Act do not meet the needs of these children. There is also a lack of rehabilitative programmes to assist affected children, especially those involved in prostitution.

The Commission does not want to lose sight of the fact that some children are forced by poverty and dire economic circumstances into prostitution and pornography. To this end, the Commission recommends that a non means-tested universal grant be paid to all children.[260] This will serve as a measure to prevent children from turning to prostitution and or pornography for reasons of poverty. With regard to rehabilitative programmes, **the Commission recommends that the provincial Departments of Social Development should determine the extent of the problem (the number of children involve in commercial sex work) and should budget for rehabilitative programmes**.

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258 Mainly trafficking and prostitution.
259 The users of child pornography on the Internet, for instance, must have access to a computer.
260 See also 13.1.4 above and 25.4 below.

A children's court should also have the discretion to order that a child attend a rehabilitation programme. Rehabilitation programmes should also include activities for skills development which will enable young children to find employment after successful completion of the rehabilitation programme. Children who voluntary want to leave prostitution should also have access to such rehabilitation programmes.

With regard to education within schools or the community (to be included in policy), **the Commission recommends that children should be sensitized and educated to consciously detect and identify risk factors or situations making them vulnerable to commercial sexual exploitation**. Children should be encouraged to seek help and assistance if they are victims of sexual exploitation and organisations who render services to victims of sexual abuse should be publicised. Further, the public should be educated on the adverse and long-lasting consequences of any form of sexual abuse and exploitation of children.

CHAPTER 14

THE PROTECTION OF CHILDREN CAUGHT UP IN THE DIVORCE / SEPARATION OF THEIR PARENTS

14.1 Introduction

This Chapter focusses on the care and protection of children who are, or who have been, caught up in the conflict surrounding the divorce or separation of their parents, as a category of children in need of special protection.[1] As these children do have parents who sometimes do go to extreme measures to maintain a relationship with a child, this is one area where we feel a little effort can go a long way to diffuse tension in the family home and improve the well-being of the children involved.

Divorce or separation is invariably traumatic for all concerned, but especially for the children of such a marriage or relationship.[2] The high divorce rate[3] and breakup of other relationships[4] mean that more and more children - and younger children - are experiencing rearrangements in their households. Their parents' remarriages[5] or other new relationships following divorce and separation compound the complexity of these children's lives. A great number of divorced or separated men and women remarry or enter new relationships, so that children from first marriages / other relationships have to develop relationships with step-parents and other children from such (previous and subsequent) marriages / relationships.

Although the divorce rate is increasing,[6] it would appear that most divorces are concluded

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1 The **White Paper for Social Welfare** (p. 41, para 38 and 39) identifies children of divorced and divorcing parents as a vulnerable group that require special attention.

2 Sandra Burman, Lauren Derman and Lizaan Swanepoel >Only for the wealthy? Assessing the future for children of divorce= (2000) 16 **SAJHR** 535.

3 According to the Central Statistical Service, 31 000 divorces were granted in South African courts in 1995. In the same period, the Office of the Family Advocate undertook 25 000 investigations (i.e. divorces where children were involved). The figures do not include Black divorces. See further 8.2.1 below.

4 In the absence of formal recognition of such relationships, actual figures of the number of persons and children involved are difficult to find.

5 Most South Africans consider divorce to be a right. Adults are free to marry whom they wish, and if one of the partners finds the relationship unsatisfactory, unhealthy, or unsafe, he or she is free to end the relationship through divorce. The Divorce Act 70 of 1979 removed most of the blame from divorce proceedings, and since 1979 South Africa has had, in effect, no-fault divorce.

6 While the divorce rate in South Africa has been historically high, fewer people are now getting married at an early age. This is linked to the increase in other living arrangements.

without extensive conflict over parenting arrangements.[7] In such >low-conflict= divorces, it is claimed that parents are able to dissolve their marriages and make good plans for the children without having to resort to litigation. Since mental health research shows that children are harmed by exposure to continuing conflict between parents, it might seem to follow that low-conflict divorces would not be permanently damaging to children. However, there seems to be general agreement that >high-conflict= divorces are very damaging to the children and the adults involved.[8]

In terms of section 6(1) of the Divorce Act 70 of 1979 a decree of divorce may not be granted until the court is satisfied that the provisions made or contemplated for the welfare of any minor or dependent child of the marriage are satisfied or at least the best possible in the circumstances, and if the Family Advocate has made an enquiry in terms of the Mediation in Certain Divorce Matters Act 24 of 1987, the court has considered the report and recommendations of the Family Advocate.

In order to enable the court to assess the arrangements regarding the children, it may cause any investigation which it may deem necessary to be carried out, may order any person to appear before it and may order the parties or any one of them to pay the costs of the investigation and appearance.[9] The court may further appoint a legal practitioner to represent a child in divorce proceedings and may order the parties or any one of them to pay the costs of this representation.[10]

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7 Referring to a 1990 Canadian Department of Justice study, Professor James Richardson >Divorce and remarriage= in **Families: Changing Trends in Canada** Toronto: MCGraw-Hill 1996, p. 233 reports that in Canada, well over 90% of divorces are now granted without a formal court hearing. >As only non-contested divorces can be processed in this way, it is evident that, contrary to popular and media images of divorce, most divorces do not involve bitter and protracted battles over custody and property. Indeed, the evidence from the evaluations is that less than 5% of divorces are contested to the extent that matters must be settled in court. The central issues in these are more often spousal and child support, and division of property, than child custody=.

8 See, for instance, Martin Richards >Children and parents and divorce= in Eekelaar and Šar…evi*ƒ* (eds) **Parenthood in Modern Society** 307; Wanda Stojanowska >The protection of the child against the negative effects of parental conflict= in Eekelaar and Šar…evi*ƒ* (eds) **Parenthood in Modern Society** 317; Marygold S Melle >Toward a restructuring of custody decision-making at divorce: An alternative approach to the best interests of the child= in Eekelaar and Šar…evi*ƒ* (eds) **Parenthood in Modern Society** 325.

9 Section 6(2) of the Divorce Act 70 of 1979. If this is considered necessary in order to enable the court to determine what is in the best interests of the child in a particular case, the court may use expert evidence, such as that of psychologists or psychiatrists, or the evidence of other persons such as school teachers, family members, other care givers, etc. who are familiar with the circumstances and cognizant of the needs of the parents and children. See **Stock v Stock** 1981 (3) SA 1280 (A) at 1296E-J, concerning the role of experts in such proceedings.

10 Section 6(4) of the Divorce Act 70 of 1979.

In the absence of a formal (legal) termination process for other living arrangements (other than marriage, that is), it is not surprising that only high conflict separation cases come before our courts.[11] However, it is submitted that the separation of parents or partners who no longer wish to live together is just as traumatic for the children involved.

14.2 The impact of divorce / separation on children

When South Africa joined other countries and moved toward less constraining divorce law in the 1970s, the prevalent assumption held by mental health professionals was that it was better for children to grow up in a divorced family than to grow up in a family where at least one of the parents was unhappy with the relationship. While acknowledging that divorce is a difficult and painful experience for all family members, the prevailing belief was that divorce did not cause long-term harm to children. Clinical literature from that era focussed on the need for preventive counselling for children and it was assumed that if children were given the opportunity to talk about their feelings, long-term emotional complications could be avoided.

The assumption that children would be better off in a divorced family than in a stressed or difficult intact family resulted in a significant shift in professional thinking about divorce. Until the 1970s, divorce often carried a social stigma, but since then it has become more acceptable in South African society. Many articles in the professional literature commented on the relative harmlessness of divorce. Although divorce was recognized as stressful, it was not thought to present any serious emotional dangers for those who experienced it. Happy parents, even if they lived apart, were thought to be able to provide the best environment for their children.

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11 See, for instance, **Fraser v Children=s Court, Pretoria North and others** 1997 (2) SA 218 (T); **Fraser v Children=s Court, Pretoria North and others** 1997 (2) BCLR 153 (CC), 1997 (2) SA 261 (CC).

In 1989 Judith Wallerstein and Sandra Blakeslee published **Second Chances: Men, Women and Children a Decade after Divorce**.[12] This groundbreaking study followed 161 children from 60 American families for 10 years after a divorce. The study provoked a great deal of reaction from mental health professionals, because the findings challenged the idea that most children are unharmed by divorce. Contrary to the authors' own expectations, most of the children in their study showed severe difficulties in school and in personal and social relationships. There was a noticeable increase in drug and alcohol use and a higher rate of delinquency. The children of divorce showed high rates of depression, aggression and social withdrawal. The study also challenged the idea that helping children express their feelings in therapy at the time of divorce would have long-term preventive benefits. Many were experiencing serious difficulties in their adult relationships. Finally, Wallerstein's research showed that ways had not yet been found to prepare children adequately for the stress of divorce. Therapy and counselling may be helpful at the time, but they do not seem to have long-term preventive effects.

The professional reaction to this work was highly sceptical. Critics argued that Wallerstein's sample was too small and questioned her research methodology. However, almost ten years later, at the 1998 Annual Conference of the Association of Family and Conciliation Courts in Washington, D.C., a panel of sociologists and psychologists argued that Wallerstein's findings were correct, because larger research studies in the United States and Great Britain had subsequently supported them.

Lamb, Sternberg and Thompson[13] wrote about the negative impact of divorce on children in 1997:

> Most children of divorce experience dramatic declines in their economic circumstances, abandonment (or the fear of abandonment) by one or both parents, the diminished capacity of both parents to attend meaningfully and constructively to their children's needs (because they are preoccupied with their own psychological, social and economic distress as well as stresses related to the legal divorce), and diminished contact with many familiar or potential sources of psycho-social support (friends, neighbours, teachers, schoolmates, etc.) as well as familiar living settings. As a consequence, the experience of divorce is a psychosocial stressor and significant life transition for most children, with long-term repercussions for many. Some children from divorced homes show long-term behaviour problems, depression, poor school performance, acting out,

12 Boston: Houghton Mifflin Co 1989.

13 Michael E Lamb, Kathleen J Sternberg and Ross A Thompson >The effects of divorce and custody arrangements on children=s behaviour, development and adjustment= (1997) 35.4 **Family and Reconciliation Courts Review**, p. 395 - 396.

> low self-esteem, and (in adolescence and young adulthood) difficulties with intimate heterosexual relationships.

Amato and Keith[14] analysed 37 divorce studies, involving 81,000 individuals, that investigated the long-term consequences of parental divorce for adult well-being. This analysis showed a significant pattern of problematic after-effects for adults and children. The authors concluded:

> The data show that parental divorce has broad negative consequences for quality of life in adulthood. These include depression, low life satisfaction, low marital quality and divorce, low educational attainment, income, and occupational prestige, and physical health problems. These results lead to a pessimistic conclusion: the argument that parental divorce presents few problems for children's long-term development is simply inconsistent with the literature on this topic.

Recent studies on children's attachment patterns also indicate that divorce can cause serious emotional difficulties for younger children (0 to 48 months). Ainsworth and her associates[15] identified four distinctive patterns of childhood attachment to parents, ranging from >secure attachment= to >disorganized and disoriented= attachment. Dr Pamela Ludolph and Dr Michelle Viro[16] reported in 1998 that even the normal upset and disorganization caused by a so-called friendly divorce caused young children to slip from secure feelings of attachment to insecure attachment behaviour. In high-conflict cases, secure children were observed to slip to disorganized and disoriented states of attachment with their parents.

It can therefore convincingly be concluded that the impact of divorce / separation on children is significant and potentially harmful.

14.3 Child-parent relationship must survive divorce / separation

A great deal of the professional literature about children and divorce concludes that it is in the child's best interests to have continuing contact with both parents after divorce / separation.[17] The exception to this general rule arises when the child experiences violence by one parent

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14 Paul R Amato and Bruce Keith >Parental divorce and adult well-being: A meta-analysis= (1991) 53 **Journal of Marriage and the Family**, p. 53.

15 M Ainsworth, M Blehar, E Walters and S Wall **Patterns of Attachment** Hillsdale NJ: Erlbaum 1978.

16 >Attachment theory and research: Implications for professionals assisting families of high conflict divorce=, paper given at the 35th Annual Conference of the Association of Family and Conciliation Courts, Washington, DC, May 1998.

17 See also J M Kruger >Emigration by a custodian parent after divorce= (2001) 64.3 **THRHR** 452.

toward the child or the other parent. In these cases, most experts believe that the abusive parent's parenting time should be restricted or supervised and in extreme cases be terminated.

14.4 Problems parents face in divorce / after separation

° Gender bias and the >maternal preference= or >tender years= rule

In their experience with the justice system many fathers feel that there is gender bias in the courts against men.[18] There is also a great body of opinion suggesting that divorce affects women unfairly.[19] Until fairly recently, South African courts have tended to apply a so-called >maternal preference= or >tender years= principle (namely the principle that the custody of young children - and of girls of any age - should normally be given to the mother in preference to the father,[20] unless the mother=s character or past conduct renders her >unfit=,[21] in the court=s view, to have such custody, or unless the father=s circumstances enable him to make better provision for the needs and well-being of the child). On the other hand, where adolescent boys are concerned, the courts have shown greater readiness to award custody to the father, other factors being equally in favour of both parents.[22]

Van Heerden et al[23] argue that this >maternal preference= or >tender years= principle could be

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18 See also the submissions by CHILDS (Children in Legal Disputes) dated 4 May 2001 and 27 June 2001.

19 See e.g. Elsje Bonthuys >Labours of love: Child custody and the division of matrimonial property at divorce= (2001) 64 **THRHR** 192 at 193: >My aim is it . . . show how the interaction between legal and societal expectations structures a situation where women pay heavily for the privilege of custody, while men gain financially=.

20 See, e.g. **Tabb v Tabb** 1909 TS 1033 at 1034; **Dunsterville v Dunsterville** 1946 NDP 594 at 597; **Napolitano v Commissioner of Child Welfare, Johannesburg** 1965 (1) SA 742 (A) at 746C-D; **Schwartz v Schwartz** 1984 (4) SA 467 (A) at 480F-G; **Fortune v Fortune** 1995 (3) SA 348 (A). Cf Rhona Rosen >Is there any real basis for the preference accorded to mothers as custodial parents?= (1978) 95 **SALJ** 246 and Ellison Kahn >A note on AIs there any real basis for the preference accorded to mothers as custodial parents?= (1978) 95 **SALJ** 249. On the shifts and developments in judicial decision-making in this regard in the USA, see Mary Ann Mason and Ann Quirk >Are mothers losing custody? Read my lips: Trend in judicial decision-making in custody disputes - 1920, 1960, 1990 and 1995' (1997) 31 **Family LQ** 215.

21 Thus in **Mohaud v Mohaud** 1964 (4) SA 348 (T) Vieyra J awarded custody of three young children (two of whom were girls) to the father rather than the mother (who had committed adultery on several occasions) in the light of his finding that the mother was >a person so immature in character, so emotionally unstable, so lacking in discretion, so confused in her moral ideas that despite the youthfulness of the children it would not be in their interests to entrust their custody to her if there exists a better choice= (at 353B). See also **Ngake v Mahahle** 1984 (2) SA 216 (O); **Fletcher v Fletcher** 1948 (1) SA 130 (A).

22 See **Tromp v Tromp** 1956 (4) SA 738 (N) at 746; **Manning v Manning** 1975 (4) SA 659 (T) at 662E-F; **Stock v Stock** 1981 (3) SA 1280 (A); and **McCall v McCall** 1994 (3) SA 201 (C).

23 **Boberg=s Law of Persons and the Family** (2nd edition), p. 537.

seen as violating the equality clause[24] in the Constitution, 1996 by discriminating between parents on the grounds of gender (although, it is submitted, this would in many instances be justified by courts on the basis of the best interests of the child).[25] As emphasised by Lever AJ in the case of **Madiehe (born Ratlhogo) v Madiehe**,[26] >the test ... is simply the best interests of the child. It follows that if the father can provide what is in the best interests of the child, he is the proper person to be awarded the custody of the child. Similarly if the mother is better equipped to provide what the child needs, then she has the better claim=.

The common-law doctrine was thoroughly rejected by the Supreme Court of Canada in 1976.[27] Since then, it has occasionally been discussed by judges and replaced by analysis based on consideration of the >best interests of the child=. Although the tender years doctrine is not part of current Canadian family law or case law, many persons expressed the view that judges still operate on the presumption that mothers are better parents.[28]

° **Lack of legal standing**

Our law treats married persons differently from unmarried persons.[29] This creates severe difficulties for those persons who married according to religious rites and those involved in other domestic relationships as, according to South African law, any children born of such relationships are regarded as extra-marital. In this regard it has been said that an extra-marital child has a mother but no father[30] or, stated differently, that an extra-marital child is in law

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24 Section 9. It may also be argued that, by uncritically favouring mothers over fathers as the custodians of minor children after divorce or separation, courts may well be infringing a child=s right to >family care or parental care= as enshrined in section 28(1)(b) of the Constitution, 1996. See **V v V** 1998 (4) SA 169 (C) at 177B; cf also Brigitte Clark & Belinda van Heerden >Joint custody: Perspectives and permutations= (1995) 112 **SALJ** 315 at 317-8.

25 See **Van der Linde v Van der Linde** 1996 (3) SA 509 (O). See also **V v V** 1998 (4) SA 169 (C) at 176F-G and 177B; **Van Pletzen v Van Pletzen** 1998 (4) SA 95 (O) at 101D.

26 [1997] 2 All SA 153 (B) at 157f-g.

27 **Talsky v Talsky** [1976] 2 SCR 292.

28 **For the Sake of the Children**, report of the Special Joint Committee on Child Custody and Access, December 1998, p. 9 - 10.

29 Even married persons are treated differently. Persons married according to customary law only recently received legal recognition of their marriages with the adoption of the Recognition of Customary Marriages Act 120 of 1998. Marriages conducted according the Muslim and Hindu rites, and same-sex partnerships (gay / lesbian marriages) are not recognised in South Africa. The South African Law Commission is considering some of these issues: see Project 59: Islamic marriages and related matters and Project 118 : Domestic Partnerships.

30 Van der Vyver and Joubert **Persone- en Familiereg** (3rd edition) 218; Van Heerden et al **Boberg=s Law of Persons and the Family** (2nd edition) 405. See also **F v L** 1987 (4) SA 525 (W) at 526.

related to its mother and her relations, but not to the natural father and his relations.[31] While this kind of generalisation is misleading,[32] it cannot be denied that the unmarried father (or a partner in a same-sex relationship) has a more difficult task in showing the court that he (or she) has a legitimate interest in matters affecting the children in such situations. Since the adoption of the Natural Fathers of Children born out of Wedlock Act 86 of 1997 the biological father stands a better chance of getting access to or custody or guardianship of such children.

° **Unethical Practices by Family Law Lawyers and Flaws in the Legal System**

It is not unusual to find that the custodial parent is using the child as a weapon in the matrimonial warfare and is sabotaging the access visits of the non-custodial parent. This is particularly prone to happen in high-conflict divorce cases where a parent might even go so far as to abduct the children to a foreign country.[33]

More worrisome, however, is the allegation that some lawyers make a practice of escalating the acrimony between divorcing / separating parents. These practices include encouraging their clients to make false claims of abuse and encouraging women to invoke violence as a way to ensure an advantage in parenting and property disputes. For instance, some unethical lawyers are encouraging their clients to apply for protection orders in terms of the Domestic Violence Act 116 of 1998 in order to frustrate the attempts by the non-custodial parent to see his or her children.[34] False allegations[35] also continue to enter divorce proceedings by way of lawyers who place allegations of criminal behaviour in affidavit material, without substantiation from child welfare or police authorities, and without consequence to the accusing parent or lawyer involved.[36] We trust such lawyers are pretty few and far between, but they certainly are there.

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31 Spiro **Law of Parent and Child** (4th edition) 450 and 457; Barnard, Cronjé, Olivier **Law of Persons and Family Law** 163.

32 As Van Heerden et al **Boberg=s Law of Persons and the Family** (2nd edition) 405 show, the father is liable, jointly with the mother, to maintain his extra-marital child.

33 See 20.3 below on parental child abduction and the Hague Convention on the Civil Aspects of International Child Abduction.

34 See also Elsje Bonthuys >Spoiling the child: Domestic violence and the interests of children= (1999) 15 **SAJHR** 308 who argues that women=s primary responsibility for childcare renders them uniquely vulnerable to domestic violence by constraining their ability to leave abusive relationships and by limiting their capacity to negotiate divorce settlements to their own and their children=s advantage.

35 **For the Sake of the Children**, report of the Special Joint Committee on Child Custody and Access, December 1998, p. 11: >Perjury is common, but how can we put the custodial parent in jail for lying?=.

36 See, in this regard, the comments in **Van Vuuren v Van Vuuren** 1993 (1) SA 163 (T) at 167C-D.

In this regard the Commission supports the submission made by Mr Stuart McDonald that lawyers must fully inform their clients of all possible alternatives and the consequences of all legal steps taken in a divorce.

14.5 Improving Outcomes for Children

° Hearing Children's Voices

Since adults are the ones making the decision to divorce, they have some sense of justification for their decision and a sense of confidence that things will work out eventually. Often they also have a support network of family and friends to help them emotionally and practically during the difficult period of adjustment. Finally, adults have direct access to lawyers to help them argue in favour of the arrangement they believe is best for the children. But children are often surprised by their parents' decision to divorce. Some children knew things were tense before their parents separated but they did not expect them to divorce. Children feel they have no say in the decision (to get divorced), and they are left unsure about what to expect in the future.[37] Although in reality an extended support system may be in place, this is cold comfort for the children faced with the disintegration of their immediate support system.

As we have seen,[38] section 6(4) of the Divorce Act 70 of 1979 empowers a court to appoint a legal practitioner to represent a child at divorce proceedings and to order the parties or one of them to pay the costs of such representation. **The Commission would like to see this provision being used more often. The Commission also recommends that section 6 of the Divorce Act 70 of 1979 be amended to give a court the authority to appoint an interested third party, such as a member of the child's (extended) family, to support a child experiencing difficulties during parental separation or divorce in a manner determined by the court. Such support can involve a person being allocated temporary parental rights and responsibilities in respect of the child concerned**.

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37 **For the Sake of the Children**, report of the Special Joint Committee on Child Custody and Access, December 1998, p. 12: >Separation and divorce is a traumatic event for children, regardless of age. When they're told of the decision they have fears, worries and questions. What do they worry about? They wonder, Where will I live? Who will I live with? Do I have to leave? What about my friends? Will we still go on holidays? Will I get to see Dad, Grandma? What about the dog? What about the cat? How much time will I spend with people? Can I still have lessons, hockey, skating... These questions speak volumes on children's interests=.

38 See 14.1 above.

The need for legal representation does not end with the divorce. Changed circumstances may require changes in the original custody and access arrangements. Without someone to help give the children an opportunity to speak about their needs and voice their concerns, these sometimes dangerous situations are allowed to continue, and children are put at risk.

The Mediation in Certain Divorce Matters Act 24 of 1987 is another attempt by the South African legislature to safeguard the interests of minor and dependent children involved in divorce proceedings and in certain applications arising from such proceedings.[39] This Act provides for the appointment of one or more Family Advocates[40] and also for the appointment of Family Counsellors[41] to assist the Family Advocate. If requested to do so by any party to divorce proceedings or by the High Court, the Family Advocate must institute an enquiry and furnish the court with a report and recommendations on any matter concerning the welfare of the children concerned.[42] The Family Advocate may also initiate such enquiries mero motu.

While it is one of the key functions of the Family Advocate to canvass and ascertain the genuine wishes of the child and to communicate these to the court,[43] the Mediation in Certain Divorce

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39 Which includes any application for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child made in terms of the Divorce Act 70 of 1979.

40 For a critique of the office of the Family Advocate, see Sandra Burman, Lauren Derman and Lizaan Swanepoel >Only for the wealthy? Assessing the future for children of divorce= (2000) 16 **SAJHR** 535 at 544 et seq.

41 Although the Act does not specify what qualifications or experience a person must possess in order to be appointed as a Family Counsellor, in practice most are social workers with several years of experience.

42 Section 4(1) of the Mediation in Certain Divorce Matters Act 24 of 1987. See also L Neil van Schalkwyk >**Ex parte Critchfield** 1993 3 SA 132 (W); **Denston v Denston** saakno 287/00 (OK) - Aspekte van die funksie van die gesinsadvokaat in egskeidingsaangeleenthede= (2001) 34 **De Jure** 203.

43 Schäfer **The Law of Access to Children** Durban: Butterworths 1993, p. 53.

Matters Act 24 of 1987 does not require the Family Advocate or the Family Counsellor to hear the views of the child. Indeed, the prescribed questionnaire (Form A) is parent-orientated, rather than child-orientated, and includes no questions concerning the wishes of the child or his or her views in regard to the proposed arrangements.[44] **The Commission believes a simple amendment to the regulations[45] to provide for the canvassing and recording of the child=s views, where appropriate and if the child so wishes, would go a long way to solving this problem**. However, special care must be taken to ensure that children are not forced to choose between their parents.

However, it is necessary to understand the distinction between hearing children's views and putting children in the position of having to choose between parents. Many professionals warn that most children want to remain loyal to both parents after divorce; having to choose one parent over the other would create incredible inner conflict for a child. In fact, many a time a child's sudden wish to break off contact with a parent could indicate a major problem, necessitating therapeutic rather than legal intervention. It is therefore necessary to find solutions that would give children the opportunity to be consulted and heard on decisions that affect them without being pulled into an emotionally dangerous situation.

° **Reducing Conflict**

44 Palmer in Keightley (ed) **Children=s Rights** 98 at 112 - 113.

45 GN R2385 in Government Gazette 12781 of 3 October 1991, as amended.

Apparently the majority of divorces are resolved without a great deal of conflict between the parents. These so-called >friendly divorces= are presumed difficult for children, but not necessarily permanently damaging.[46] Unfortunately, a significant number of divorcing parents become locked in bitter and sometimes violent disputes over custody and access arrangements. These situations are truly dangerous for children, and the Commission has attempted to find ways to reduce conflict between divorcing and separating parents,[47] to the benefit of the children. In this regard, **the court should start with the assumption that, in the absence of issues regarding the child's physical, mental or emotional safety, the continued involvement of both parents in the child's life is the desired goal: this involvement ideally will be of the same quality post-separation as pre-separation**.[48] While not excluding the possibility of joint custody (as we now know it), the Commission is not equating the need of the child for the continued involvement of *both* his or her parents in his or her upbringing with the call for joint custody as the presumptive starting point in divorce.[49]

The use of the words >custody=, >sole custody=, >guardianship=, >sole guardianship= and >access= in the Divorce Act 70 of 1979 promotes a potentially damaging sense of winners and losers and more neutral language[50] would help reduce conflict and let both parents focus on their responsibilities rather that their rights. This can be an important means of reducing parental conflict by defusing the winner-take-all custody-contest.

A number of jurisdictions can serve as models for new conflict-reducing language. For example, custody and access regimes could be replaced with concepts and terms like >parental responsibility= (Australia), >joint parental responsibility= (United Kingdom), >shared parental responsibility= (Florida), or >residential placement= and >parenting functions= (the state of Washington). Custody itself is often replaced by the concept of >residence= combined with

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46 Note, however, the comments above re the damaging effect of divorce / separation on children.

47 Possibilities range from parenting education programs - to make parents aware of their own conduct during and after separation, its impact on their children, and means by which they might change it or at least shield their children from its effects - to non-litigation models for custody and access decision making, such as mediation.

48 See 14.3 above.

49 See also June Sinclair >From parents= rights to children=s rights= in Davel (ed) **Children=s Rights in a Transitional Society** 62 at 63.

50 On the issue of language, virtually every jurisdiction that has modernized its law in this area in the last decade or so has recognized that terms like >custody= and >access= are not appropriate. Unless you're familiar with the legal terminology, they're not terms that naturally flow to a parent. They have unfortunate connotations. They're not concepts that capture what parents are actually doing or should be doing, and they are concepts that tend to alienate one parent or indeed both parents: **For the Sake of the Children**, report of the Special Joint Committee on Child Custody and Access, December 1999, p. 20.

decision-making authority. What is currently referred to as access may be referred to as >contact=, >visitation= or >parenting time= in other jurisdictions. The new terminology is often attached to new substantive legal regimes, some of which presume that joint custody or shared parenting - or alternatively some form of shared decision making without equal time sharing - will be the norm.

The Commission is of the view that a shift to new, less loaded terminology is critical to reducing conflict in divorce.[51] Coupled with our intention to reduce conflict, the Commission feels strongly that the legal regime under the Divorce Act 70 of 1979 must discourage the estrangement of parents and children, and that to do so the Act must ensure that parent-child relationships survive marital breakdown. Therefore, in addition to proposing new language to replace that of custody and access, the Commission concludes that parental decision-making roles should, in most cases, continue beyond divorce.[52]

The Commission concludes that the current Divorce Act terms >custody= and >access= should be replaced by the expressions >care= and >contact= respectively.[53] By this, the Commission is not recommending a presumption that equal time-sharing, or what is currently referred to as joint physical custody, is in the best interests of all children. The Commission recognizes that the details of time and residence arrangements for children will vary with the family involved. In view of the diversity of families facing divorce in South Africa today, it would be presumptuous and detrimental to many to establish a >one size fits all= formula for parenting

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51 See also 8.4.5.2 above.

52 The Alberta Law Reform Institute **Child Guardianship, Custody and Access** (Report for Discussion No 18.4), October 1998, p. 68 -69 cautions, however, against changes in terminology in isolation - >to be meaningful, they must reflect new concepts or processes=.

53 See 8.4.5.2 above.

arrangements after separation and divorce.

Several other recommendations flow naturally from this proposed change of language. The Divorce Act 70 of 1979 and the Mediation in Certain Divorce Matters Act 24 of 1987 should be amended to define >care= and >contact= as per our formulations in the new children=s statute. Also, with the removal of the concepts of custody and access, the outdated and discredited >tender years doctrine= or >maternal preference rule= is clearly no longer useful, and to ensure that it has no further influence, the Commission recommends its rejection.

Under the new regime and terminology formulated by the Commission, in almost all cases both parents will continue, after separation and divorce, to exercise their pre-separation decision-making roles with respect to their children. To ensure that neither parent is excluded unfairly from fulfilling that obligation, the Commission is also recommending change in the way authorities such as schools and doctors provide information to parents. In the event of separation or divorce, unless a court orders otherwise, important information about the child's development and well-being should be provided directly to both parents.

While the South African courts have favoured the use of contempt of court proceedings, when a custodian parent has refused to abide by a court order allowing the non-custodial parent access to his or her child,[54] it is also possible to utilise section 1 of the General Law Further Amendment Act 93 of 1962 against the recalcitrant parent.[55] It reads as follows:

> **Failure to comply with order of court relating to access to children or to notify change of address of parent having sole custody of child**
>
> (1) Any parent having the sole custody of his minor child in terms of an order of court, who contrary to such order and without reasonable cause refuses the child's other parent access to such child or prevents such other parent from having such access, shall be guilty of an offence and liable on conviction to a fine not exceeding two hundred rand[56] or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine.
>
> (2) Any parent having the sole custody of his minor child in terms of an order

54 See, for instance, **Germani v Herf** 1975 (4) SA 887 (A); **Oppel v Oppel** 1973 (3) SA 675 (T).

55 Gerhard van Rooyen >Non-custodian parents= rights to children : Some comments on the application of the General Law Further Amendment Act 93 of 1962 in the criminal protection of non-custodian parents= rights to their children= (2000) **De Rebus** 23 points out that the provision is not well known and therefore not utilised to its full potential.

56 The effect of the Adjustment of Fines Act 101 of 1991 is that this fine is now R20 000 or one year=s imprisonment.

of court whereby the other parent is entitled to access to such child shall upon any change in his residential address forthwith in writing notify such other parent of such change.

(3) Any person who fails to comply with the provisions of subsection (2) shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand.[57]

(4) Notwithstanding anything to the contrary contained in any other law, a magistrate's court shall have jurisdiction to impose any penalty prescribed by this section.

It is important to note that the **sole**[58] custody of the child must have been awarded to a parent in terms of an order of court. Once this is established, such a parent commits a criminal offence if he or she refuses the child=s other parent access to the child without reasonable cause. Reasonable cause would depend on the circumstances of each case. However, it must be remembered that the interests of the child and not those of the parent are the most important factor in this regard. The fact that the parents do not see eye to eye or that it is inconvenient for the custodian parent to allow such access will not suffice.

One of the main advantages (for the non-custodian parent) of utilising the above provision is the fact that he or she does not have to institute contempt proceedings in the High Court in order to enforce his or her access rights. Another advantage is that the criminal law option is much cheaper for the non-custodian parent and should also be much faster.

Accordingly the Commission recommends:

° **that where allegations of child abuse surface in divorce cases, whether in the affidavits, in evidence, or as a result of the investigations conducted by the Family Advocate, or otherwise, the Court hearing the divorce matter may, of its own accord or upon application, order that the divorce matter stand down and order a children=s court enquiry. This should reduce conflict in divorce proceedings by removing the incentive for making false allegations and should provide those**

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57 The Adjustment of Fines Act 101 of 1991 is not applicable in this instance because the absence of an alternative maximum period of imprisonment.

58 >Sole custody= implies that the other parent is unfit to have custody. See in this regard **S v Amas** 1995 (2) SACR 735 (N) where the court held that the sanction applies only to a parent with sole custody, while the court in **Botes v Daly** 1976 (2) SA 215 (N) held that it is also applicable to a parent who merely obtained single custody. As sole custody is seldom granted, section 1 of the General Law Further Amendment Act 93 of 1962 can be invoked in very few cases (as per Professor Jacqueline Heaton, letter dated 26 March 2001). See also the submission by Mr Stuart McDonald who recommends that the section be amended by deleting the word >sole=.

children who are at risk of abuse with the protective framework of the new children=s statute;

- **that the court, in making an order in respect of the child, attempt to ensure the continued involvement of both parents of the child in that child=s life;**
- **that the terms >custody= and >access= be replaced with the terms >care= and >contact= respectively;**
- **that the Divorce Act 70 of 1979, the Matrimonial Affairs Act 37 of 1953, and the Mediation in Certain Divorce Matters Act 24 of 1987 be amended to add definitions of >care= and >contact= that reflect the meanings ascribed to those terms by the Commission;**
- **that the common law >tender years doctrine= or >maternal preference rule= be rejected as a guide to decision-making about parenting; and**
- **that both parents of a child receive information and records in respect of the child's development and social activities, such as school records, medical records and other relevant information. The obligation to provide such information should lie with the parent who has care (>custody=) of the child, unless ordered otherwise by a court**;
- **that the word >sole= be deleted in the wording of section 1 of the General Law Further Amendment Act 93 of 1962. This will have the effect of making it a criminal offence for the parent having care of the child to unreasonably refuse the other parent access to their child. It is further recommended that section 1 of the General Law Further Amendment Act 93 of 1962, as then amended, be repealed after having been incorporated in the new children=s statute.**

- **Parenting Education**

It has been suggested that parenting education immediately following separation would also help reduce conflict between divorcing spouses.[59] The argument is that mandatory education programs for divorcing parents would help make them aware of how divorce affects children and the damage that can be caused to children by ongoing conflict. It will also help parents cope

59 **For the Sake of the Children**, report of the Special Joint Committee on Child Custody and Access, December 1999, p. 22.

with the issues they will have to face as individuals (e.g. finances, subsequent relationships, depression, loneliness, etc) that, if not addressed, will affect the children.

Parenting education and divorce courses are increasingly available in South Africa, and offer the hope of mitigating the negative effects of divorce on children. Early research on the effectiveness of these programs is beginning to provide some grounds for optimism.[60]

Parenting education programs give participants general information about the separation or divorce process, the legal and financial impact of divorce, and other issues they will face as parents, and how the transition will affect their children. Some go further to train parents in the types of parenting techniques most likely to prevent children from being exposed to parental conflict. In most jurisdictions where parenting education programs are mandatory, special programs are offered to victims of domestic violence.

In Alberta, Canada, a parenting education program entitled Parenting After Separation has become mandatory - parents must attend a course before they can proceed with an application for divorce. In Florida, children also must attend a divorce education program before their parents can proceed with an application to the courts.[61]

In terms of section 6(3) of the Divorce Act 70 of 1979,[62] the court granting a decree of divorce may already make >any order which it may deem fit=. **The Commission therefore foresees no difficulty in recommending that any parent seeking a divorce participate in an education program to help him or her become aware of the post-separation reaction of parents and children, children's developmental needs at different ages, the benefits of co-operative parenting after divorce, parental rights and responsibilities, and the availability and benefits of mediation and other forms of dispute resolution, provided such programs are available**. The Family Advocate is in an ideal position to coordinate such educational programmes. Parents should not be required to attend sessions together. The Commission wishes to emphasise that its recommendation in this regard is not aimed at putting hurdles in the way of those who wish to divorce, but to equip parents to be sensitive to the

60 Jack Arbuthnot, Cindy Poole and Donald Gordon >Use of educational materials to modify stressful behaviours in post-divorce parenting= (1996) 25 **Journal of Divorce and Remarriage** 117; Jack Arbuthnot and Donald Gordon >Does mandatory divorce education for parents work?= (1996) 34 **Family and Conciliation Courts Review** 60.

61 M Gary Neuman **Helping your Kids cope with Divorce the Sandcastles TM Way** New York: Random House 1998.

62 See also section 5(1) of the Matrimonial Affairs Act 37 of 1953.

needs of their children during and post the divorce.

° **Joint custody**

In appropriate circumstances, an award of >joint custody= of their child to parents who are divorcing or who have separated would serve the best interests of the child concerned.[63] Joint custody can assume many forms and it is therefore difficult to define precisely.[64] A distinction frequently made is that between joint **physical** custody and joint **legal** custody. The former usually involves an arrangement by which actual physical care of the child in question is shared between the parents, with the child spending substantial amounts of time living with each parent.[65] Joint legal custody usually entails the daily care and control of the child being vested in one parent, with the other parent having periodical contact with the child. Both parents, however, share responsibility for major decision-making concerning the child, each having an equal voice in the child=s education, upbringing, religious training, medical care and general welfare and the right to be consulted over all major decisions in respect of the child. Particularly in cases where, prior to the court order being sought, the parents have worked out the details of a joint custody arrangement between themselves and have successfully implemented this arrangement for some time, a court order incorporating this arrangement would appear to meet the child=s need for continuity and stability.[66]

CHILDS[67] asked that the Commission consider recommending a presumption in favour of

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63 See generally in this regard, Erwin Spiro >Joint custody= (1981) 44 **THRHR** 163; D J Joubert >Gesamentlike bewaring= (1986) 19 **De Jure** 353; Ivan Schäfer >Joint custody= (1987) 104 **SALJ** 149, >Joint custody: Is it a factual impossibility= (1994) 57 **THRHR** 671; M Schoeman >Gesamentlike bewaring van kinders= (1989) 52 **THRHR** 462; Brigitte Clark and Belinda van Heerden >Joint custody: Perspectives and permutations= (1995) 112 **SALJ** 315.

64 Van Heerden et al **Boberg=s Law of Persons and the Family** (2nd edition) 551.

65 Joint physical custody most frequently involves the child or children in question moving between the separate homes of the parents on a regular basis, e.g. spending consecutive weeks or months with each parent in turn or spending certain days of the week with one parent and the rest of the week with the other. See further. Arthur Baker & Peter Townsend >Post-divorce parenting - rethinking shared residence= (1996) 8 **Child and Family LQ** 217; Caroline Bridge >Shared residence in England and New Zealand - A comparative analysis= (1996) 8 **Child and Family LQ**; Vivienne Goldberg >Family mediation is alive and well in the United States of America: A survey of recent trends and developments= 1996 **TSAR** 358 at 362 - 3.

66 This would appear to have been an important factor in the court=s decision to award joint custody to the parties in the cases of **Kastan v Kastan** 1985 (3) SA 235 (C), **Venton v Venton** 1993 (1) SA 763 (D) and **Corris v Corris** 1997 (2) SA 930 (W). See also the leading decision of the English Court of Appeal in **A v A (Minors)(Shared residence order)** [1994] 1 FLR 669, discussed by Helen Conway >Shared residence orders= [1995] 25 **Family Law** 435.

67 Children in Legal Disputes, submissions dated 4 May 2001 and 27 June 2001.

shared parenting or joint custody.[68] They argued that such a presumption is the only way to ensure that both parents negotiated or participated in mediation in good faith and with the children's best interests as the main focus. Without a presumption of joint custody, the respondent argued, mothers often would not participate in mediation, and the perceived gender bias in the courts would perpetuate the predominance of mothers as the custodial parents. Although the Commission has not recommended establishing a legal presumption in favour of either parent or any particular parenting arrangement, the Commission does see the value of joint custody (or care) and even substantially equal time sharing **where appropriate**. For parents with the emotional and financial resources necessary to make a joint physical custody arrangement work, it is the Commission's view that such arrangements can encourage the real involvement of both parents in their children's lives.

On the other hand, there are various arguments against joint custody awards, irrespective of the form such awards may take. Thus, a key argument against joint physical custody is the perceived danger of instability in the child=s life, caused by frequent moves and inconsistency in living arrangements.[69] The risk of a lack of effective communication and of ongoing hostility and conflict between the parents in a post-divorce or post-separation situation is another frequently cited reason against joint custody in any form.[70] However, this notion that it is in the best interests of the child that there is one parent who has the >final say= as regards the child=s upbringing and that this parent=s authority should not be undermined by the necessity to consult with or by the >interference= of the other parent, harks back to the patriarchal legal past of South Africa and assumes that there will always be disagreement requiring resolution by one authoritarian parent.[71]

> Against the background of the judicial ambivalence as regards joint custody awards, this means in effect that most minor children of unsuccessful marriages will continue to be placed in the custody of one parent, subject to the access >rights= of the other parent,

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68 See also June Sinclair >From parents= rights to children=s rights= in Davel (ed) **Children=s Rights in a Transitional Society** 62 at 63.

69 A van Westing >Faktore vir die verlening van >n bevel van gesamentlike toesig en beheer na >n egskeiding= (1995) **TSAR** 605 at 614 - 615 cautions that an award of joint custody will in all probability not be feasible in a situation where one or both of the parents have remarried - in her view, it is clearly not in the best interests of the child to be exposed on a sporadic basis to the different methods of upbringing and discipline prevailing in the >new= family units, with resultant confusion to the child. See also **Willers v Serfontein** 1985 (2) SA 591 (T); **Grobler v Grobler** 1978 (3) SA 578 (T); **Krasin v Ogle** [1997] 1 All SA 557 (W); **Schmidt v Schmidt** 1996 (2) SA 211 (W); **Chodree v Vally** 1996 (2) SA 28 (W).

70 In fact, in the reported South African cases in which joint custody orders have been refused, it is this argument which appears to have weighed most heavily with the court. See Van Heerden et al **Boberg=s Law of Persons and the Family** (2nd edition) 556 and authority cited.

71 As per Foxcroft J in **V v V** 1998 (4) SA 169 (C) at 179D.

with both parents retaining residuary guardianship (or guardianship in the narrow sense) over such children.[72]

Internationally, joint custody arrangements involving substantially equal time sharing, when agreed to by the parents through the assistance of a counsellor or mediator, are often spelled out in detail in parenting plans. More elaborate than the traditional separation agreement or court order upon which many couples rely, these agreements specify where the child is to reside throughout the year, how decision-making responsibilities are to be shared by the parents, and the mechanism parents will use to deal with any disputes that arise between them.

With the passage of its Parenting Act in 1987, Washington was the first of several states in the USA to adopt a parenting plan system. The Parenting Act did away with the terms >custody= and >visitation=, substituting the concept of >residential placement=. Legislators intended the change of language to shift the focus away from the sometimes acrimonious battle between parents and onto the more important matter of ensuring the best possible parenting arrangements for children.

The basic mechanism for spelling out post-separation parenting arrangements is the parenting plan. All parents separating in Washington must complete detailed temporary and permanent parenting plans. A plan has three parts: a residential schedule; decision-making allocation; and a dispute resolution mechanism. Thinking through the children's post-separation arrangements is intended to help parents develop an understanding of children's complex needs and the importance of co-operating with the other parent in decision making. The long parenting plan forms that have to be filled out make sure that parents consider an extensive list of practical matters to meet the children's needs. The residential schedule must indicate at which parent's home the child will live on given days of the year.

Although it is hoped that the parties will arrive at the terms of the parenting plan by agreement, in the event that they cannot agree, the statute sets out criteria courts can use to impose a parenting plan. The residential provisions must encourage each parent to maintain a loving, stable and nurturing relationship with the child, consistent with the child's developmental level and the family's socio-economic circumstances. However, a parent's residential time with a child must be limited if the parent has engaged in any of the following behaviours: wilful

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72 Van Heerden et al **Boberg=s Law of Persons and the Family** (2nd edition) 561.

abandonment of the child; physical, sexual or emotional abuse of a child; domestic violence or sexual assault; or conviction for one of several other specified sexual offences.

The Washington law does not refer to joint custody or shared parenting, nor does it create any presumption about the desirability of such an arrangement. Shared parenting under a parenting plan is possible and can even be imposed by a court if to do so would be in a child's best interests.

Any matter can be sent for mediation of the contested issues before or at the same time as the matter is to be heard, unless one of the parties cannot contribute to the cost or would be placed at risk emotionally or physically. There is provision in the legislation for the court to appoint an attorney to represent the interests of a child in proceedings dealing with any aspect of a parenting plan in a marriage dissolution or legal separation matter between the child's parents. The court will order one or both parents to pay the legal expenses of the child's attorney.

The Commission believes the law should encourage parents to enter into consensual arrangements for shared parenting in the form of parenting plans.[73] The use of parenting plans is discussed in Chapter 8 below.

In some cases, of course, parents will be unable to agree on a parenting plan either on their own or in mediation. In that event (a situation which we hope would be exception rather than the rule) and subject to the discretion of the court acting in the best interests of the child to order otherwise, the Commission think it preferable to give one parent sole custody and clear decision-making authority over the child with access to the other parent, as appropriate in the circumstances. This approach is more likely to bring stability to the child=s life than continued disagreement between parents under a court order for shared parenting. Reality dictates that where parents are unable to come to an agreement on a parenting plan, then the prospects of joint custody working are equally slim.

Accordingly the Commission recommends:

° **that section 6 of the Divorce Act 70 of 1979, section 5 of the Matrimonial Affairs Act 37 of 1953, the Mediation in Certain Divorce Matters Act 24 of 1987 be amended to require that parties applying to a court for a parenting order must file**

73 See also JMT Labuschagne >Case discussion: *SF v MD* 751 A2s 9 (Md App 2000) (2001) 34 **De Jure** 210.

a proposed parenting plan with the court;

- **that divorcing parents be encouraged to develop, on their own or with the help of a trained mediator or through some form of alternative dispute resolution, a parenting plan setting out details about each parent's responsibilities for residence, care, contact, decision making and financial security for the children, together with the dispute resolution process to be used by the parties. Parenting plans must also require the sharing between parents of health, educational and other information related to the child's development and social activities. All parenting orders should be in the form of parenting plans;**

- **that the relationships of grandparents, siblings and other extended family members with children be recognized as significant and that provisions for maintaining and fostering such relationships, where they are in the best interests of those children, be included in parenting plans.**

CHAPTER 15

EARLY CHILDHOOD DEVELOPMENT

15.1 Introduction

In this Chapter, the question of legislative support for early childhood development (ECD) services is considered. The Department of Education's **White Paper 5** defines ECD[1] as an 'umbrella term that applies to the processes by which children from birth to at least 9 years grow and thrive, physically, mentally, emotionally, spiritually, morally and socially'.[2] As can be seen from this definition, ECD is a very broad concept.

Of the South African population 15, 7% (or approximately 6, 4 million) children are aged 0 - 6 years. This is a period of great vulnerability as these are critical years for the development of innate potential. It is also the period in which primary prevention and early intervention measures can be most effective. Exposing children to appropriate early stimulation, nutrition, health and care through a range of services has many benefits, including a reduction of the need for later costly medical, remedial and welfare services.[3] As pointed out in **Children in 2001: A Report on the State of the Nation's Children**,[4] ECD:

- •• can assist a child's transition to schooling and improve efficiency in the education system by reducing costly repetition rates;
- •• is the ideal phase for the inculcation of values such as anti-racism, anti-sexism and human rights;
- •• is the critical phase for identification and prevention of being at-risk both from learning difficulties and social, behavioural and health problems;
- •• is the key time for the development of literacy;
- •• is a strategy for reducing poverty and inequality.

There are economic and gender equality arguments that can be made for ECD and child-care

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1 The concept of ECD replaces the term 'Educare', which was previously used to refer to programmess for children in the 0 to 6 years age group.

2 Directorate Early Childhood Development **Education White Paper 5**, par. 1.3.2. See also Department of Education **White Paper 1: Education and Training** (1995) p. 33, para 73 and the Department of Education **Interim Policy for Early Childhood Development** (1996) at p. 1.

3 **Children in 2001: A Report on the State of the Nation's Children**, p. 36.

4 Ibid. See also the **Education White Paper 5: Early Childhood Development** (May 2001, Department of Education) at p. 6.

provision in the form of partial care services. Education is an important factor in determining both employment and income and is closely associated with poverty. Appropriate ECD and partial care services will free parents, particularly women, to enter the labour market. This will have the effect of assisting families and communities to break out of poverty. The provision of ECD and partial care services (whether home or centre-based) is also a potential form of employment in a society in which unemployment rates are high.

The Commission had the benefit of obtaining the views held by a representative sample of persons with expertise in ECD at a focus group discussion held in Pretoria on 30 March 2000. However, no specific research paper on ECD was prepared. The Commission draws extensively on the outcome of the focus group discussion on ECD in this Chapter.

15.2 Basic problems and existing law

ECD provisioning has been and remains very underfunded. As a result of this access to quality services is limited.[5] There is no accurate information on ECD provision. Public provision for young children is very limited. In 1998 there were just under 150 000 children in Grade 0 or Grade R classes in the formal schooling system.[6] Some provincial education departments provide subsidies to community preschools. Most existing ECD facilities are run by welfare organisations, NGO's, community-based organisations and private providers. Due to a lack of resources, the quality of much of the services is less than optimal as many of the facilities lack equipment, educators are untrained and conditions are sometimes unhygienic. A recent study found that parental fees, averaging R20, 73 per month, were the primary source of income for ECD community-based sites and many educators reported that they only take a salary if there is money left over after paying all other expenses.[7]

The lack of ECD services has fuelled a practice of allowing underage enrolments at primary schools. This practice has become widespread because access to ECD facilities is limited and where such facilities are available many parents cannot afford the fees. An advantage for

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5 **Children in 2001: A Report on the State of the Nation's Children**, p. 38: 'Resource-strapped departments in some provinces are directing resources away from, rather than towards, preschool provision. There has been a reduction in the number of resource and training NGOs in this sector from 91 to 80 in 1998, and a further 14 had down-scaled their services, in the light of dwindling donor support'.

6 Department of Education **Annual Report 1998**, Pretoria.

7 Khulisa Management Services **ECD Pilot Project Baseline Study**, submitted to the Department of Education, 1998.

under-age children attending primary school is that they also have access to the Primary School Nutrition Programme. Grade 1 classes are not designed to meet the needs of younger children and 70% of all 5-year-olds who enrol repeat the year, making it the most inefficient year in the education system.[8]

The main problems facing ECD identified at the focus group discussion held in Pretoria on 30 March 2000 were the same as those previously recognised in the South African literature.[9] Clearly, a major problem with ECD services in South Africa at present is a lack of accessibility for many South African children.[10] Insufficient availability of such services is particularly a problem for many children who are disabled, affected by poverty and those living in rural areas.

Other related major problems are the lack of funding for ECD services, the fragmentation of ECD services, and an absence of clear lines of governmental responsibility for the provision of ECD services.[11] This is partly because ECD has been seen as an overlapping responsibility of the Departments of Health, Education and Social Development.[12] As a result children often 'fall through the cracks'. Disabled children in particular find it very difficult to access ECD services.[13]

As far as legal provisions are concerned, there is a lack of uniformity because of a variety of bye-laws in different areas. There is thus not merely confusion about which government departments are responsible, there is also inadequate legislative guidance with regard to the ECD responsibilities of provincial and local government authorities.

As Tabata has noted, our present national legislation in regard to child care facilities for pre-school children is seriously inadequate.[14] This is partly due to the fact that previous

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8 **Children in 2001: A Report on the State of the Nation's Children**, p. 38.

9 See for example, Mary Newman 'Early Childhood Development in South Africa: Key Issues' (Submission the Law Commission: Project 110 Review of the Child Care Act, 6 March 1998) and Linda Biersteker **Report to the Department of Education on an Interdepartmental Workshop to Audit ECD Policies and Develop Mechanisms for Essential Linkages and Networking Required to Implement Delivery of ECD Policies** (October 1998).

10 Groups 1 - 4 at the focus group discussion; the Centre for Early Childhood Development; Early Learning Resource Unit; Department of Welfare, Pretoria; Inner City Pre-school Forum, Johannesburg.

11 Sunshine Centre Association; SA Vroue Federasie; SA Federated Council on Physical Disability.

12 According to the Department of Education's definition of ECD, children up to age 9 are covered. Compulsory schooling starts at age 7.

13 SA Federated Council on Physical Disability; DICAG, Northern Province; DICAG, Eastern Cape; DICAG, Free State.

14 Sindile Tabata **Childcare (Pre-School) Provision in South Africa** (Research Report 10: National Association of Democratic Lawyers, Cape Town, 2000) p. 7.

governments in South Africa 'have taken the view that early childhood development is the responsibility of parents and families and not that of the State'.[15]

It may be added that, generally, our legal coverage of ECD services is inadequate. There are no references in the Child Care Act 74 of 1983 or the Regulations to the Act to ECD services.

In one of the three pieces of legislation where ECD is mentioned, Schedule 4 of the Division of Revenue Act 1 of 2001 provides for an Early Childhood Development Grant of R21 million, the purpose of which is to develop the capacity of provincial education departments to implement a compulsory reception year for six-year-old children.[16]

15.3 Policy documents[17]

The Departments of Education and Social Development have produced some important documents dealing with the provision of ECD services. In its 1995 **White Paper on Education and Training**, the Department of Education emphasised the Government's commitment to a holistic approach to ECD with a focus on the wider environment, including family and community support systems. The establishment of a formal, interdepartmental committee was proposed in the 1995 **White Paper**. The Department of Education's document entitled, **Interim Policy for Early Childhood Development**, which was released in September 1996, like the 1995 **White Paper**, promoted the holistic development of the child, with an emphasis on interdepartmental collaboration.

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15 **Interim Policy for Early Childhood Development**, Department of Education, 1996, p. 2.

16 See also section 4(m) of the South African Qualifications Authority Act 58 of 1995 (dealing with the constitution of the Qualifications Authority); section 10(e) of the Broadcasting Act 4 of 1999 (prescribing the public service component of the services to be offered by the SABC).

17 The following policies / documents on ECD were identified at the focus group discussion as being relevant:

Green Paper on ECD by the Department of Education; ECD audit by the Coordinating Committee for Early Childhood Development; Department of Social Development's draft policy guidelines on day care; Department of Welfare's draft minimum standards; Department of Education's interdepartmental audit on ECD policies; Education for all (section on ECD) by the National Commission on Special Education and Training; S A Qualification Framework by the Department of Labour; the National Plan of Action; Rights of children in care - NACCW; African Charter on the Rights of the Child; Welfare Financing Policy; Early Intervention for Deaf Children, DEAFSA discussion paper, 1998; 'Teach us too', DICAG guidelines to early intervention, 1996.

See also the Early Learning Resource Unit's report to the Department of Education on an interdepartmental workshop to audit ECD policies and develop mechanisms for essential linkages and networking required to implement delivery of ECD policies.

In the Department of Social Development's 1997 **White Paper for Welfare**, it was recommended that a national ECD strategy should be devised as part of an inter-sectoral approach 'with other government departments, civil society and the private sector'. This recommendation was supported in the Department of Social Development's 1998 **Draft Policy Document on the Transformation of the Early Childhood Development System**.[18] The Department of Social Development, in consultation with the Departments of Education and Health, is busy developing an Integrated Policy on the Transformation of Early Childhood Development.

Recently, the Department of Social Development has prepared **draft Guidelines for Day Care**.[19] Chapter III of the draft **Guidelines** provides for minimum standards for ECD services. The function of the minimum standards is to enable service providers to recognise developmental tasks in service delivery, to ensure that services are monitored effectively and in a manner which promotes and guides change and development; to give specific direction to human resource development and service delivery; and to enhance collaboration between stakeholders from different sectors, in providing effective ECD services to children.

The Department of Education's **White Paper 5: Early Childhood Development (2001)**[20] has recommended wide ranging and inter-sectoral responses in order to '…increase access to ECD services, correct existing imbalances in ECD provision, improve the quality of ECD services and plan and deliver ECD services in a co-ordinated way'. The proposed policy priority of **White Paper 5**, however, is limited to the implementation of the pre-school Reception Year (grade R) for six-year-olds, based in public primary schools with a small community-based component. Porteus argues that the proposal outlined in **White Paper 5** undermines '…the best of what is available, and replaces it with a mediocre (at best) or damaging (at worst) alternative'. The proposed policy is criticised by Porteus on a number of levels, *inter alia,* the provision of reception year services for six-year-olds in isolation without a more integrated service model; the minimal attention which is given to pre-reception year programmes (for children under the age of 6); the marginalisation of the community-based ECD sector; the lack of consideration of

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18 Suzette Grobbelaar **Draft Policy Document on the Transformation of the Early Childhood Development System** (Department of Welfare, Pretoria, February 1998) at p. 26.

19 April 2001. The 2001 draft **Guidelines for Day Care** updates the Department's February 1993 **Guidelines for Day Care**.

20 Hereafter '**White Paper 5**'.

alternative models of ECD provision and the undermining of community multi-age centres.[21]

As is pointed out in **White Paper 5** cited above, one of the most significant problems that has detrimentally affected the provision of ECD services is '[a]n incomplete, fragmented legislative and policy framework for ECD that results in unco-ordinated service delivery'.[22] Being already aware of this basic problem at an earlier stage, the Commission held a focus group discussion on 'Legislation Concerning Early Childhood Development' in Pretoria on 30 March 2000. A primary aim of the workshop was to discover whether improved legislative support for ECD services could be developed. Delegates at the workshop were mainly persons with experience in ECD policy formulation or implementation of ECD and partial care services. Suggestions and other responses by delegates at this workshop have influenced the recommendations in this Chapter.

The Department of Social Development launched a Flagship Programme entitled 'Developmental Programmes for Unemployed Women with Children under Five Years' in 1998. Objectives of the Programme include building women's capacity for economic independence and empowerment, as well as providing developmentally appropriate education for children aged 0 - 5 years. The Flagship Programme has provided access to ECD opportunities.[23]

15.4 Submissions received

After identifying the major problems surrounding ECD in South Africa, respondents at the focus group discussion on ECD were asked to propose solutions to such problems. In this regard, the following solutions were proposed:

- a comprehensive ECD policy should be developed;
- legislative provisions on ECD services should be included in the new children's statute;
- adequate funding needs to be made available for ECD;
- the new children's statute must empower local government to provide community-based ECD services;

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21 Kimberley Porteus et al 'Early Childhood Development' (April – June 2001) Vol 8 No 2 **Quarterly Review of Education and Training in South Africa**, p. 13 - 16.

22 Directorate Early Childhood Development **Education White Paper 5: Early Childhood Development** (Department of Education, May 2001) at p. 3.

23 **Children in 2001: A Report on the State of the Nation's Children**, p. 42.

- The ECD functions of all government departments need to be coordinated and integrated;
- uniform training standards should be developed;
- legislation should be all-inclusive and equity should prevail for able as well as disabled children;
- the community needs to be educated on the Department of Social Development's Financing Policy, children's rights and child development; and
- ECD services must be equally subsidised.

Following on the previous question, respondents at the focus group discussion were asked to identify the aspects of ECD that could and should be regulated by the new children's statute. In this regard the following aspects were identified:

- the funding mechanisms for ECD;
- the roles and functions of the different spheres of government, including the roles and functions of the various national and provincial departments in ECD;
- a comprehensive and integrated system of registering and monitoring of ECD services;
- the framework for new multi-service approaches to ECD service delivery; and
- the framework for supporting and developing families and communities to meet the basic needs of young children and protecting children's rights.

The South African Federal Council on Disability submitted that the regulation of ECD for all children is vital in order to ensure that all children, especially children with disabilities, have an equal opportunity to access ECD services. There is therefore a need to:

- Regulate service delivery to avoid fragmented and uncoordinated services by establishing minimum norms and standards and providing a clear legislative framework for inter-sectoral collaboration.
- Regulate the registration of practitioners and child-minders to ensure that they are adequately trained to provide a comprehensive and inclusive service delivery to all children. This should also include placing a duty on the State to fund the training of practitioners and child-minders.
- Regulate access to services. Services should be equitable and accessible to all children, including disabled children, and in particular children with disabilities living in rural and impoverished communities - as a means to provide a learning environment

supportive of both teacher and learner.

- Regulate service delivery content in order to ensure that programmes provided within the service delivery are family-centred as opposed to child-centred.
- Regulate rehabilitation services as part of service delivery in ECD.

The Council on Disability submitted that the regulation of ECD will also require that current initiatives such as informal respite care placement, day-and-night care informal services and emergency 'foster care' informal placement services be researched and expanded in order to provide for appropriate service provisioning to all children in need.

The worksheet used at the focus group discussion acknowledged that ECD starts at home as parents / care-givers are the primary educators of their children. The question was then posed as to how legislation can support parents so that they better fulfil this important role and the idea of parenting programmes, was mooted.

The idea that parents should play an active role in the development of their children received overwhelming support at the workshop. So did the concept of parenting programmes as part of ECD service provision.[24] The SA Federal Council on Disability went further and argued for the establishment and subsidisation of parental support networks. The Council said the new children's statute should provide for appropriate community outreach rehabilitation programmes that will enable the parent to assist the child at home during the vulnerable early stages of development, and to assist the ECD service provider in preparing the child for formal education.

The Sunshine Centre Association opined that ECD needs to be both family and community based. Thus, parental skills need to be built on and further developed, rather than everything being 'dumped' in the hands of professionals. Also, training in parental skills is needed. The respondent stated that skills necessary to manage disability are essential and suggested that home intervention and child-to-child education programmes should be included in Curriculum 2000. Further, relevant departments should take responsibility for community education, advocacy and capacity building. The respondent recommended that parental education should become a component for the funding of programmes. It was submitted that the training of

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[24] The involvement of parents, care-givers, and indeed the family in ECD programmes was stressed by several respondents. See, for instance, Groups 2, 3, 4; the SA Federal Council on Disability; the Centre for Early Childhood Development; Early Learning Resource Unit; Department of Welfare, Pretoria; Sunshine Centre Association; SAVF; Inner City Pre-school, Johannesburg; DICAG, Eastern Cape; DICAG, Northern Province; DICAG, Free State.

parents could be done on an incentive basis and certificates could be made out in the child's name after the parents have completed certain courses. These certificates could be used by schools in making curriculum decisions on the admission of the child to school. The respondent stated that parents and communities need to be made aware of the vital nature of ECD as it is the foundation of all future learning and development. The respondent emphasised the importance of training and partnership projects to facilitate awareness as well as to empower individuals with the necessary and appropriate skills. It was submitted that an inter-sectoral approach, together with local government, is essential.

Respondents at the focus group discussion were divided in their approach as to where legislative provisions on ECD ideally belong. Some argued that the Department of Education should take sole responsibility for ECD (and therefore argued for the inclusion of ECD provisions in education legislation);[25] others argued for the inclusion of ECD provisions in the new children's statute;[26] some argued for inclusion in a specific ECD Act;[27] while others argued for the inclusion of ECD provisions in education, health, and welfare legislation, as well as in the new children's statute.[28]

Respondents were also divided on what level of government legislative intervention was needed. Group 1 suggested that legislative intervention should take place at local level. Group 2 suggested that legislative intervention must be made at national level to avoid fragmentation and a lack of interest.[29] The majority of respondents, however, argued in favour of legislative intervention at all levels of government.[30]

The South African Federal Council on Disability submitted that ECD must be seen in the context of family and community, and ultimately in the context of the development of a nation. Further, this development within an eco-system framework calls for national intervention with operating frameworks for provincial and local implementation. Thus, national legislation must be issued

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25 Group 1.

26 Groups 3 and 4; Centre for Early Childhood Development; Department of Welfare, Pretoria; DICAG, Northern Province.

27 SA Federal Council for Disability; Early Learning Resource Unit.

28 Inner City Pre-school Forum, Johannesburg; SAVF; DICAG, Free State.

29 This view was shared by the Inner City Pre-school Forum, Johannesburg.

30 Groups 3 and 4; the Centre for Early Childhood Development; the Early Learning Resource Unit; the Department of Welfare, Pretoria; the Sunshine Centre Association; SAVF; DICAG, Eastern Cape; DICAG, Northern Cape; DICAG, Free State.

and must contain uniform provincial minimum standards that take into consideration the current infrastructure of communities at provincial level in order to strengthen ECD services where required.

At a workshop[31] held in August 1997, local councils in the Durban Metropolitan Area identified the following components relating to ECD in which local government has a role to play:[32]

- Provisioning: programmes for out-of-school children; age-appropriate recreational and educational resources; premises and facilities (multi-purpose); access to MCWH[33] facilities; safe, secure environment.
- Physical infrastructure: water, sanitation, electricity, communication, housing, community facilities.
- Funding: access to funds, affordability, equitable distribution of funds.
- Monitoring: health services and welfare departments.
- Coordination: inter-sectoral collaboration, safe and secure community.
- Public education and training
- Policy and planning: setting standards, equitable development of services, effective planning.
- Affordability: review policy on support of community initiatives with a focus on playgrounds.

The New Beginnings ECD Project members commented on this document and made the following proposals:[34]

(a) A subsidy system which targets children at risk should be operated. The subsidy system could be operated on a sliding system which takes into account the severity of poverty and other circumstances. The second form of subsidy could be in the form of capital costs, i.e. percentage of rates reduction, provision of land where feasible, encouragement of employers to initiate ECD programmes with a tax concession being used as a motivation.

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31 From this workshop a discussion document on the role of local government in ECD was developed by Sherin Ahmed, Community Social Work Section, North/South Central Health Department, Durban, April 1998.

32 Report on ECD to the Department of Education by the Early Learning Resource Unit.

33 Maternal, Child and Women's Health.

34 See also Tabata **Childcare (Pre-school) Provision in South Africa** (Nadel Research Report No. 10), 2000, p. 27 et seq.

(b) Local government should take the initiative and encourage greater financial investment in ECD by providing a supporting legislative environment that provides tax concessions to individuals and companies that support ECD.

(c) Special attention should be given to creating a structure which provides for a percentage of local tax to be set aside for ECD. This must be lobbied with councillors before the budget debates.

(d) Since ECD is a multi-disciplinary field, local government needs to establish a formal inter-departmental committee on ECD to take the process forward. The committee should act in consultation with a broader community consultative forum which should be set up as a matter of priority.

(e) With regard to programmes, the following suggestions are made:

- there is a strong view that ECD should be located within the context of civil society and community development;
- local government needs to sustain local efforts, should it have the necessary resources, then it should target children at risk in consultation with communities and other stakeholders;
- the community, social workers, and health workers should support the development of appropriate and culturally relevant ECD programmes in communities where no ECD facilities exist;
- awareness around ECD should take place within council, targeting personnel from all departments;
- health and education programmes need to integrate the importance of children and the significance of ECD, and should prepare to address the issues of the enormous problems of Aids orphans; and
- should ECD training be required at different levels, local government should out-source these services to credible ECD regional and training organisations which have the necessary expertise and skills.

15.5 Defining ECD

It was pointed out in the 1998 Department of Social Development's Draft Policy Document that:[35]

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[35] Suzette Grobbelaar **Draft Policy Document on the Transformation of the Early Childhood Development System** (Department of Welfare, Pretoria, February 1998) at p. 3.

> No single model or program is capable of meeting the varied ECD needs of children and their families. A range of options would be eligible for subsidisation. These options include day care services, both home, community and centre-based, after care for school-going children, child and family education programs, as well as health and nutrition programs.

Newman comments that the most popular and common option in South Africa has been the centre-based child care facility. She criticises this approach as being inappropriate because of the high costs involved, the accommodation of infants and toddlers in programmes designed for older children, very high child-to-adult ratios, unhygienic and overcrowded physical facilities, poor nutrition and the lack of opportunities to explore both the environment and different materials. Newman therefore concludes that what needs to be promoted in South Africa are lower cost and less formal models of community-based child-care. These could include part-day and family education services. Day care could then be limited to those children who need a full-time service.[36] Legislation and funding policies should, therefore, promote a wide range of options.

The prevailing view is that ECD covers the first nine years of a child's life. This causes problems in legal formulation and a confusion of roles amongst the State Departments involved. The Department for Social Development, for instance, regards ECD services for children in the age group birth to five years as their mandate, while the Department of Education is currently concentrating its ECD efforts on the compulsory reception year for six-year-old children. Neither of these Departments seem to focus on the after-school ECD needs of the 7 - 9 year old age group.

For legislative purposes, it is necessary to target the situations where ECD services need regulation. For the birth-to-five years and the reception-year situations this is fairly easy, but a problem arises with the provision of ECD services to 7 - 9 year-old children. One possible option in this regard is to define ECD services in the new children's statute as only covering the first six years of a child's life. After this period, ECD services would be received as part of the child's school education. After-school care, sport and holiday camps, for instance, could then be regulated by separate provisions on partial care. Another option would be to retain the current age cut-off of nine years and provide that the Departments of Education and Social

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[36] Mary Newman 'Early Childhood Development in South Africa: Key Issues' (Submission to the Law Commission: Project 110 Review of the Child Care Act on 6 March 1998) pp. 3 and 23.

Development are jointly responsible for the provision of ECD services to children in the 7 - 9 year-old age group. Where such ECD services are then offered to more than six children apart from their parents after-hours at a school, the school premises would qualify as a place of care and be subject to regulation in terms of the current Child Care Act, 1983. This could cause confusion and duplication of efforts as the school also falls under the relevant education legislation. Another option would be to link ECD services to school premises: Where ECD services are provided on school premises, whether as part of formal education or not, such services should be the responsibility of the Department of Education.

As a starting point, **the Commission considers it necessary to include definitions of ECD and of ECD services in the new children's statute. These definitions should not be premises-based, in order to allow for facilitation of ECD where a building is not available**. **The Commission further recommends that ECD be defined to limit it to children in the age group 0 - 9 years. The Commission further recommends that the (provincial) Departments of Education be responsible for the provision of ECD services on school premises, and that the (provincial) Departments of Social Development take responsibility for the ECD at all other non-school premises. For the sake of simplicity, the (provincial) Departments of Education should also assume responsibility for the registration of ECD services where such services, for instance, are provided for the benefit of the children of the teachers at that school or institution only. The fact that the ECD services are to be rendered at school premises is therefore the deciding factor.**

The definition of ECD services proposed by the Commission also requires the rendering of ECD services to at least six children apart from their parents or primary care-givers. According to this definition, the provisions of the new children's statute would not apply where ECD services are provided to be provide to less than six children. This position was taken to prevent an over-regulation of the ECD sector.

The Commission therefore recommends the following definitions and provisions to give effect to these recommendations:

> '**Early childhood development**' means the process of emotional, mental, physical and social growth and development of children aged between birth and 9 years.
>
> '**Early childhood development services**' are formal or informal services that are

offered on a regular basis to six or more children aged between birth and 9 years to promote their early childhood development by a person, persons or organization where the provider of the service is not the parent or the primary caregiver of the children.

Responsibility for providing ECD services

(1) The Department of Social Development may provide or contract for the provision of ECD services to children on non-school premises.

(2) The Department of Education may provide or contract for the provision of ECD services to children on school premises.

(3) When providing or contracting for ECD services referred to in (1) and (2) above, the relevant Department must take reasonable steps to ensure that such services are accessible to children who are most in need of such ECD services.

15.6 ECD services provided at places of care (partial care facilities)[37]

Under current law, once ECD services are offered at a building or premises to more than six children apart from their parents, they fall under the definition of a 'place of care' and the provisions of sections 30 and 31 of the Child Care Act, 1983 apply. These sections provide for the registration, classification and inspection of places of care. These provisions do not, however, provide for the registration, classification or inspection of the ECD services offered at these buildings or premises.[38]

However, the Commission recognises that not all ECD services are rendered in buildings or premises (in other words, not in a 'place of care' as defined in the Child Care Act, 1983). Indeed, some places of care facilitate ECD services to children and their families as part of their community outreach programmes. Further, while not registered as places of care, some facilities do care for children apart from their parents and sometimes offer ECD services. For present purposes the question is whether these ECD services should be subject to some form

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37 As we will see in Chapter 16 below, the Commission has recommended that where more than six children are cared for apart from their parents, whether for profit or otherwise, in any building or premises maintained or used for such purpose, such facility must be registered as a partial care facility.

38 See also the definition of 'day-care centre' in section 124 of the Ghanian Children's Act, 1998 which equates day-care centres with early childhood development 'establishments'.

of registration and monitoring process.[39]

In terms of the Commission's position, the provision of partial care and life-skills training form part of ECD services, and these services can be offered at a place of care (partial care facility). However, the lines are blurred and there is a continuum ranging from physical care to a holistic approach to the development of the child which incorporates a fully developed programme. It should therefore be clear that ECD services, as well as health services, for instance, can be offered to the same children (and their families) at a place of care (partial care facility).

ECD services can and should be offered at a range of facilities (from a children's home, in a community centre, inside a private home or in the shade under a tree). Since the contents of such services also have infinite variations, the Commission sees little point in specifying in primary legislation (the new children's statute) what the minimum content of such ECD services should be. In this regard, **the Commission recommends that minimum standards for ECD services, as proposed by the Department of Social Development in its draft Guidelines for Day Care,[40] be included in the regulations which are to accompany the new children's statute. Where service providers who do offer ECD services rely on or wish to obtain state support, then such services must be registered and subject to the necessary quality controls prescribed by that government department**.[41]

The tension between registration of ECD services and the licensing of premises where ECD services are rendered, was highlighted at the focus group discussion held in Pretoria on 30 March 2000.[42] This tension relates to the difficulty of assessing quality of service beyond the narrow conception of building standards and safety requirements. In this regard most of the respondents favoured some form of registration or accreditation of ECD services in accordance with set (minimum) standards.[43] It must be pointed out, however, that most respondents were also in favour of minimum building and safety standards where ECD services are premises

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39 The question as to whether such facilities should be registered or licenced as partial care facilities is dealt with in Chapter 16, below.

40 Chapter III of the draft Guidelines, April 2001.

41 See also section 65 of the Kenya revised draft Children Bill, 1998, which provides that any charitable children's institution which intends to implement a child welfare programme must notify the Area Advisory Council and must provide full information on the mode of operation and the specifics of the programme.

42 See 16.5.2 below.

43 Group 3, the SA Federal Council on Disability; the Centre for Early Childhood Development; the Early Resource Unit; the Department of Welfare, Pretoria; SAVF; DICAG, Eastern Cape; DICAG, Northern Province.

based.[44]

The Commission recommends that the adequacy and appropriateness of State-funded or subsidised *ECD services* should be assessed by the Department of Social Development. Where such ECD *services* are not registered, State-funded or subsidised, then Government has no right to prescribe to or interfere with the contents of such an ECD programme. In this regard, the Commission is of the view that facilitation, by means of subsidies, providing facilities or expert advice for those involved, and other inducements, is a more appropriate way to deal with ECD services.

The Commission further recommends that a registration system be adopted in terms of which service providers who provide ECD programmes on school premises must register with the (provincial) Department of Education. All other ECD services not provided on school premises must be registered with the (provincial) Department of Social Development. The (provincial) Departments of Social Development should be entitled to delegate the responsibility to register ECD services which are not rendered on school premises, along with the relevant funding, to local authorities which have the necessary infrastructure and capacity. Where such facilities do not measure up to the standards set by the local authority, such facility could be closed down by the local authority. Registered centres and ECD programmes should then be subject to a unified process of inspection (and DQA or equivalent) by the Department of Social Development or Education, as the case may be.

15.7 Lines and levels of Government responsibility

The Commission has recommended the allocation of specific responsibilities to the Departments of Social Development and Education in the provision of ECD services.[45] In this regard the Commission is of the opinion that the view that ECD is the responsibility of parents and families and not the State is no longer tenable.[46] For one thing, it is a self-defeating argument as Government ends up spending much more on education

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44 Groups 1 and 4; the SA Federal Council on Disability; the Centre for Early Childhood Development; Early Learning Resource Unit; the Department of Welfare, Pretoria; SAVF; DICAG, Eastern Cape; DICAG, Free State.

45 See 15.4 above.

46 See 15.2 above.

later than would have been required had it invested more resources in ECD in the child's formative years. Obviously, this financial argument hardly weighs up against the human potential which a properly implemented ECD programme could have unlocked.

As has been shown in the introduction to this Chapter, access to ECD services has a positive impact on children and families. There should, therefore, be a planned approach to the provision of these services in order to ensure access for all children, but particularly for children living in poverty and children in need of special protection. The provision of ECD services cannot be left primarily to private initiative, but should be seen as a government responsibility.

The Commission therefore recommends that the Departments of Education and Social Development, in consultation with their provincial counterparts, be given joint responsibility for developing and implementing a plan to ensure that all children have access to ECD services.[47] These Ministers should then be responsible for conferring with the Minister of Finance so as to ensure that there is proper budgetary allocation for these services at the national and provincial levels. Otherwise, the provision of ECD services will continue to be regarded as either a welfare or educational responsibility, with nobody taking real ownership. In addition, it is recommended that Treasury should budget for ECD services specifically, as an essential service along with health, education, policing, etc. Treasury can then allocate these funds to the annual budgets of these Departments to provide ECD services.[48] In this regard, the Commission wishes to point out that it is of the view that the provision of ECD services to children is essentially a public service similar to the provision of education and health care services and therefore a State responsibility.

The Department of Social Development's **Draft Policy Document on the Transformation of the Early Childhood Development System** appears to envisage that the Department of Social Development should play a major role in the provision of ECD services.[49] However, it is also recognised in this document that the 'Ministries of Health, Education, Environment, Justice,

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47 Private services to more privileged children should be part of the plan but the State need not pay for these, in the same way as the Departments of Education and Health have to plan and budget for primary and secondary schooling and health care for the whole population, and the private schools and health care practitioners are seen as picking up a proportion of the load, for which those using them will pay.

48 See in this regard Schedule 4 of the Division of Revenue Act 1 of 2001.

49 See generally, Suzette Grobbelaar **Draft Policy Document on the Transformation of the Early Childhood Development System** (Department of Welfare, Pretoria, February 1998).

Finance, Housing, Transport, Public Works, and Trade and Industry' could provide members to serve on the 'Intersectoral ECD Committees' which are presented as an appropriate mechanism for providing the necessary inter-sectoral collaboration.[50]

At the focus group discussion on ECD held on 30 March 2000, it was considered by many delegates that there should be one government authority vested with ultimate responsibility for the provision of ECD services. One of the groups at the focus group discussion favoured the Department of Education for this role and was supported by the South African Federal Council on Disability.[51] Other suggestions made at the focus group discussion were that the office of the President or the Deputy President should take on ultimate responsibility for the provision of ECD services. It is important to note that, although there were different views in regard to who should bear ultimate responsibility for ECD services, there was unanimity that support from many different sectors would be needed.

With regard to the responsibilities of different levels of government, the Department of Social Development's **Draft Policy Document** recommends as follows:

> The central State will be responsible for policy development: planning and coordination, setting standards, norms, quality guidelines and information systems. Provinces will implement policy, develop delivery systems and manage resources. Local authorities will ensure that community centres and facilities are made available for ECD programmes.

As can be seen from this quotation, when it comes to designation of responsibilities, some aspects will have to be left to governmental policy and discretion. However, as regards what can be legislated for in the new children's statute, **the Commission recommends that local authorities should be responsible for environmental and health inspections relevant to registration applications where ECD services are to be premises-based. Local authorities should have the power, where they see the need and have the capabilities, to provide premises or other facilities and to implement or subsidise ECD services**. As part of their encouragement / facilitation duties, local authorities could have a discretion to offer rates and or other rebates and possibly even premises to private applicants for the purpose of providing ECD services. **In this regard, the Commission recommends that registered non-**

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50 Ibid.

51 The South African Federal Council on Disability stated that the Department of Education should serve 'as the lead agency, with the Departments of Health, Welfare and the Office on the Status of Disabled People as part of the coordinating support'.

profit ECD service providers be rates-exempt on the basis that they are providing an essential public service.

The Commission further recommends that the Departments of Social Development and Education should be accorded the power to fund, set up, inspect, monitor and close down ECD services. More specifically, the Department of Education should concern itself with registering, facilitating, monitoring and (where necessary) closing down ECD services that are provided on school premises.[52] The Department of Social Development should particularly concern itself with registering, facilitating, monitoring and closing down of ECD services not offered on school premises.

15.8 Conclusion and recommendations

The Commission is of the opinion that the new children's statute should include some empowering provisions on ECD. **Provision should also be made for the registration of ECD services with either the Department of Social Development or the Department of Education.** To give effect to this view and in order to present a coherent picture, the Commission recommends that the following substantive provisions on ECD be included in the new children's statute:

Assistance to providers of partial care or ECD services

1. The (provincial) Departments of Social Development and of Education, or any local authority may support, financially or otherwise, any registered ECD service. Such support, or the continuation of such support, may be made subject to conditions.

2. The (provincial) Departments of Social Development and of Education, and local authorities must jointly develop and implement plans to ensure that all children and their families in their jurisdiction can progressively access ECD services.

3. The (national) Departments of Social Development and of Finance, in consultation with the (provincial) Departments of Social Development, must jointly

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52 These need not necessarily be confined to the 'Reception Year' services that has been referred to earlier. In its **Education White Paper 5**, the Department of Education states that it 'will over the medium-term spearhead the development and implementation of pre-Reception Year services for 4-year-old children from poor rural and HIV/AIDS infected and affected families and those with special learning needs'.

develop and implement plans, with budgets and allocations, to ensure that all children and their families can progressively access ECD services.

4. Subject to section 5, a local authority may support, financially or otherwise, any registered ECD service by:

(a) making buildings or premises available at no cost to a person or persons who or organisation which proposes to administer such service;
(b) providing water or electrical power at reduced rates or at no charge to buildings or premises used for the administration of such service.

5. A local authority shall not levy rates on land which is used by a registered non-profit organisation to administer ECD services.

Implementation of ECD services

6. A local authority may implement and administer ECD services or have such services implemented and administered on its behalf.

7. The local authority in whose jurisdiction a building or premises used for providing ECD services is located must assess the adequacy of the health and safety aspects of such building or premises before the ECD service can be registered.

Registration of ECD services

8. (1) ECD services not delivered on school premises by non-State service providers who receive a State ECD grant or subsidy must be registered with the Department of Social Development in the prescribed manner.

(2) ECD services delivered on school premises by non-State ECD service providers who receive a State ECD grant or subsidy must be registered with the Department of Education in the prescribed manner.

(3) The relevant Department referred to in (1) and (2) above may refuse an application for registration if there are reasons to do so.

(4) Where it appears to the relevant Department that a person has contravened subsections (1) or (2), the Department may serve a notice ('an enforcement notice') on him or her.

(5) An enforcement notice shall have effect for a period of 1 year beginning with the date on which it is served.

(6) If a person in respect of whom an enforcement notice has effect contravenes subsections (1) or (2) without reasonable excuse, he or she shall be guilty of an offence.

Minimum standards for ECD services

9. The (provincial) Departments of Social Development and of Education may prescribe, by regulation, the minimum standards to which all registered ECD services must comply.

Monitoring, inspection and closure of ECD services

10. The (provincial) Departments of Social Development and of Education may inspect, monitor, suspend and close any ECD services, whether registered or in receipt of a State grant or subsidy or not, on the conditions prescribed by regulation.

CHAPTER 16

PARTIAL CARE

16.1 Introduction

This Chapter deals with the temporary care of children by persons other than their parents or ordinary care-givers. The essential feature of this care is that it is of relatively short duration and that the children are still cared for and live with their parents / primary care-givers. Parents or primary care-givers continue to be involved with the children and exercise primary responsibility for them, but they ask or pay somebody else to look after their children for part of the day or week.[1] Hence, the form of care discussed here must be contrasted with full-time care provided for children in residential care facilities or foster homes.

Much of the temporary care which is the subject of this Chapter can accurately be described as 'day-care', but on occasions parents or guardians place children in the care of others overnight. Hence the general term 'partial care' is used throughout this Chapter.[2]

Although there are differing views about the desirability of facilitating the provision of partial care, it is undeniable that the demand for partial care services in South Africa is substantial. This demand is unlikely to decline in the foreseeable future. One factor in the widespread use of partial care facilities is undoubtedly the number of women in the workforce. Another is the relatively high proportion of single parent households.[3] However, it would be wrong to view partial care as being provided solely to meet the needs of working mothers or single parents as traditional alternative sources of child care, such as friends and relatives, are less readily available than in the past. Appropriate care arrangements for children are therefore a matter of public importance.

Partial care services cater for a wide variety of needs. Examples of the situations of children accommodated by the various service providers and individuals include:

- Children whose parents work full or part time;
- Children who need after-school care;

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1 Some (wealthier) parents employ au-paires or nannies on a full-time basis to care for their children.

2 ECD services, like other services, can also be provided at partial care facilities. See further 15.6 above.

3 See 8.2.1 above for an exposition on the contemporary South African family.

- Children of parents who are seeking work or attend lectures, classes or any form of training;
- Children who need care in an emergency, such as the illness or hospitalisation of a parent;
- Children whose parents need assistance for a short time (for example, to go to the gymnasium, to keep an appointment, to go shopping);
- Children in play groups and play schools. These groups are intended to bring together pre-school children in a stimulating environment and to give the children an opportunity to interact with others of their own age;
- Children attending (sport) training camps and other organised recreational activities such as holiday camps, school tours, and church outings.

Partial care might be regular and continuous, or occasional and of limited duration. Thus a child might be placed in a private home or centre five days a week if both parents are working, or the placement might be short and for a single, specific purpose, for example, to permit the mother to do Christmas shopping. A distinction can be made between occasional care, part-time care and full-day care, where occasional care is defined as short-term care; full-day care as non-residential care for a full day; and part-time care as care for a certain number of mornings (or afternoons) each week. In looking at the way in which these types of care are provided, it is possible to distinguish between centre-based services and home-based services. Most such services are provided by private individuals and organisations for profit,[4] although a large number of non-profit organisations are also involved.

As we have seen in the previous Chapter,[5] the provision of appropriate partial care services tends to free parents, particularly women, to enter the labour market. This has the effect of assisting families and communities to break out of poverty. The provision of partial care services (whether home or centre-based) is also a potential form of employment in a society in which unemployment rates are high.

16.2 Basic problems

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4 Most profit-making provision is in the form of day care for pre-school children. However, there are various other forms. Some casino's, for example, provide adjunct child care facilities free of charge to allow patrons (the parents) the opportunity to gamble.

5 See 15.1 above.

The Commission's analysis of the law relating to partial care in South Africa and the way the system operates revealed a number of problems requiring solution:

•• *Lack of clarity in the law*. The relevant provisions of the Child Care Act, 1983 dealing with 'places of care' lack clarity and precision. It is not clear which forms of partial care should be registered as 'places of care' and which should not. As a result, those whose task it is to implement the registration provisions make arbitrary distinctions between facilities which require registration and those which do not, despite the language of section 30(2) of the Child Care Act, 1983. In this regard, the distinction between centre-based and home-based partial care services is particularly problematic.

•• *An outmoded law*. Not only is the law unclear, but it is also ill-adapted to the varied range of partial care services which have developed in South Africa. Such services meet a variety of needs, from occasional to full-day care, from the care of infants to the care of older children after school and during school holidays. Sometimes a number of different services are combined at one multi-purpose centre. This is not provided for under the existing legislation.

•• *Need for tighter control*. In submissions to the Commission and elsewhere a number of persons have expressed their anxiety about the quality of care provided in some partial care facilities.[6]

•• *Excessive and unrealistic bureaucratic demands*.

16.3 Current law and practice

Section 1 of the Child Care Act 74 of 1983 defines a 'place of care' as follows:

> '**Place of care**' means any building or premises maintained or used, whether for profit or otherwise, for the reception, protection and *temporary or partial care*[7] of more than six children apart from their parents, but does not include any boarding school, school hostel or any establishment which is maintained or used mainly for the tuition or training of children and which is controlled by or which has been registered or approved by the

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6 See also the submissions on ECD at 15.4 above.

7 Our emphasis.

State, including a provincial administration.

'Temporary or partial care' commonly occurs in environments such as day care or after-school centres where ECD services might also be provided. 'Temporary or partial care' itself is not defined in the Child Care Act, 1983.

It should be noted that the definition separates out registered private or state **educational** institutions for treatment elsewhere (in education legislation). It is submitted that, insofar as this definition excludes school activities, a correct approach has been taken. These should indeed be reserved for education legislation. In terms of the Commission's present approach, the latter should fall outside the new children's statute.[8] However, the above-quoted definition of places of care in the Child Care Act is unclear about pre-school care centres. The new children's statute must not create confusing duplication by trying to regulate 'Reception Year' programmes **as partial care, but rather as ECD services** as the Commission has recommended.[9] However, the definition of partial care will need to be broad enough to include other forms of care such as day nurseries and kindergartens.

Another important aspect of the above-quoted definition of 'places of care' in section 1 of the Child Care Act is that it is premises-oriented. It is the use of a 'building or premises' which is essential to trigger the relevant protective provisions. It is appropriate to regulate aspects of the premises in which many forms of partial care operate, including most day care facilities. However, partial care services are potentially infinite in variety, and premises may be in short supply in impoverished communities.

16.4 Partial care provided at 'places of care'

Once partial care services are offered at a building or premises to more than six children apart from their parents, such services come under the ambit of the definition of a 'place of care' and the provisions of sections 30 and 31 of the Child Care Act, 1983 apply. These sections provide for the registration, classification and inspection of places of care.

Section 30(2) of the Child Care Act, 1983 provides that no child may be received in a place of care (other than a place of care maintained and controlled by the State) unless that place of

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8 See 2.6 above.

9 See 15.5 above.

care has been registered. Application for the registration of a place of care must be made to the Director-General: Social Development in the prescribed manner.[10] At the time of registration, the Director-General may classify or amend the classification of a facility, and any such classification may differ according to the sex or age, or the physical, mental or spiritual needs of the children in that facility.[11] A certificate of registration may at any time be cancelled by the Minister of Social Development.[12] Any person who contravenes or fails to comply with the registration requirements is guilty of a criminal offence.[13]

Section 31 of the Child Care Act, 1983 provides for the inspection of places of care. In terms of subsection (1), a social worker, a nurse, a commissioner of child welfare, or any authorised person may enter any children's home, place of care, shelter or place of safety in order to inspect that place and observe and interview any child therein, or cause such child to be medically examined. After conducting such an inspection, a report must be submitted to the Director-General: Social Development.[14]

The Commission recommends that where more than six children are cared for on a partial basis[15] apart from their parents, whether for profit or otherwise, in any building or premises maintained or used for such purpose, that such facility must be licensed as a *partial care facility*. We believe the terminology 'partial care facility' more accurately reflects the type of facility involved and accordingly recommend a change in terminology from 'place of care' to 'partial care facility'. The existing registration and inspection requirements contained in sections 30(2) and 31 of the Child Care Act, 1983, with the necessary changes, can, for the moment, therefore be retained.

Regulation 30A of the Child Care Act further provides for some additional requirements with

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10 Section 30(3) of the Child Care Act, 1983, read with Regulation 30. Regulation 30(2) provides that an application for registration must be accompanied by (a) the constitution of the association of persons who is to manage the place of care; (b) a certificate issued by the local authority to the effect that the building(s) complies with all the structural and health requirements of the local authority; and (c) a certificate issued by the Director-General: Social Development confirming that a needs assessment supports the need for the resource in the community. Registration is to be reviewed every 24 months on the basis of a quality assurance assessment undertaken by departmental officials.

11 Section 30(4) of the Child Care Act, 1983.

12 Section 32(1)(a) of the Child Care Act, 1983.

13 Section 30(6) of the Child Care Act, 1983.

14 Section 31(4) of the Child Care Act, 1983.

15 All forms of statutory care are supposed to be temporary, but they are either full-time or partial.

which a place of care shall comply. The Regulations, in part, read as follows:

> (1) Subject to the provisions of the Act and these regulations no place of care shall be registered or shall remain registered after 24 months unless the Director-General is satisfied that the following behaviour management practices are expressly forbidden:
>
> (a) Group punishment for individual behaviour;
> (b) threats of removal, or removal from the programme;
> (c) humiliation or ridicule;
> (d) physical punishment;
> (e) deprivation of basic rights and needs such as food and clothing;
> (f) deprivation of access to parents and family;
> (g) denial, outside of the child's specific development plan, of visits, telephone calls or correspondence with family and significant others;
>
> (h) - (o) ....
>
> (2) All children in a place of care shall, where appropriate, have the right -
>
> (a) to know their rights and responsibilities;
> (b) to a plan and programme of care and development, which includes a plan for reunification, security and life-long relationships;
> (c) to participate in formulating their plan of care and development, to be informed about their plan, and to make changes to it;
> (d) to expect that their plan and programme is based on an appropriate and competent assessment of their developmental needs and strengths and, where possible, is in the context of their family and community environments;
> (e) to a regular review of their placement and care or development programme;
> (f) - (u) ....

Most respondents at the ECD focus group discussion held in Pretoria on 30 March 2000 agreed with the assertion that the above provisions seem to have been designed with children's homes, rather than ECD or other forms of day care, in mind.[16]

It is indeed questionable whether some of the behavioural management practices expressly forbidden in terms of Regulation 30A(1) or the rights of children listed in Regulation 30A(2) do have any relevance for children making use of partial care services in a place of care. It hardly makes sense, for instance, to accord a child in a partial care facility the 'right to a plan ... for reunification ... and life-long relationships' with a (temporary) care-giver or service provider.[17] Such a right is even less relevant for a toddler in a play group which meets once a week. **The Commission accordingly recommends that the present regulations pertaining to the**

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16 Groups 3 and 4; SA Federal Council on Disability; the Centre for Early Childhood Development; the Early Learning Resource Unit; the Department of Welfare, Pretoria; DICAG, Free State.

17 Regulation 30A(2)(b).

requirements with which a partial care facility (the old 'place of care') shall comply be revised to ensure that they are worded in a manner appropriate for children making use of such services. In this regard, the Commission would recommend that the revised Regulations at least accord children in partial care the following minimum rights:

- Partial care must promote the physical, emotional and intellectual development of children while in partial care;
- Children in partial care should have access to a safe area in which to play, taking into account the number of children catered for;
- Children in partial care should have the right to shelter and to protection from the elements where necessary; with adequate ventilation in any part of a facility used by children;
- Children in partial care should have the right to safe drinking water and age-appropriate nutrition at intervals which are appropriate to their age and development;
- Children in partial care should have access to hygienic and safe toilet facilities;
- Children in partial care may not be subjected to corporal punishment.[18]

Some, if not most, of the additional requirements listed in Regulation 30A with which a place of care must comply are more appropriate to 24-hour or week-long care situations.[19] It is to cater for these situations that provisions such as Regulation 30A are needed. **The Commission accordingly recommends that in the redrafting of the present regulations care be taken to ensure that the different types of partial care situations are covered adequately, individually as well as collectively**.

16.4.1 Minimum building standards for partial care facilities (places of care)

There was a general measure of agreement at the ECD focus group discussion that there should be a clear set of simple and achievable standards that should apply across the board. However, the Commission is well aware of the fact that many local authorities apply first-world building regulations with which impoverished communities cannot comply - e.g. requirements for child-sized toilets (even if the children concerned have no toilets of any kind in their own

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18 See the provision on the issue and term of license below.

19 Such situations are akin to residential care arrangements and the question arises as to whether such forms of care should not be subject to registration as 'child and youth care centres'. It is nevertheless a reality that e.g. migrant workers are using weekly boarding arrangements due to the practicalities of their employment situations and some degree of leeway should therefore be allowed for such circumstances.

homes), ideal amounts of floor space per child, etc. The Commission has also taken cognisance of the fact that many local authorities presently have too much on their plates to be of great help in getting partial care facilities up and running. In this regard, the Commission has recommended that the draft Guidelines for Day Care be incorporated in the regulations to the new children's statute. As such the Guidelines should serve as the basic issues for compliance. In this context, it has been suggested that what is required in the new children's statute is an empowering provision to allow for nationally-applicable minimum building standards for partial care facilities. It was further said that such minimum standards should be flexible to cater for local requirements.

The Commission does not recommend that the new children's statute should provide for the formulation, in the regulations, of minimum building requirements for partial care facilities. In this regard, the Commission holds the view that the present requirement in the Regulations[20] for a certificate issued by the local authority to the effect that the premises comply with all structural and health requirements of the local authority is flexible enough to cater for local and regional differences. While one local authority might therefore require two flushing toilets per six children, another might prescribe access to safe drinking water as a requirement.

However, the Commission recommends that the health and safety appropriateness of any *building or premises*, whether this is a private dwelling, a church building, or a community centre, being used or to be used as a partial care facility, should be assessed by the local authority in terms of appropriate bye-laws.[21] The adequacy and appropriateness of the proposed partial care *service or programme* should be assessed by the Department of Social Development and the latter Department should, after receiving a health and safety clearance certificate from the relevant local authority, finalise the licensing of the partial care facility. Such an evaluation would ensure that children in partial care are accommodated in satisfactory, locally appropriate, facilities, that those in charge of such facilities are suitable, and that the programmes provided to the children are appropriate to their needs.

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20 Regulation 30A(2)(b).

21 Many local authorities use antiquated standards (formerly applicable to 'White areas') which are unachievable for community-based organisations. Where such standards are not appropriate, the local authority must revise its standards.

16.4.2 **Registration of partial care facilities (places of care)**

In practice, the requirements for successfully registering a place of care (for example, in the form of a day care or after-school facility) are administratively onerous and vary considerably in different parts of the country according to the different local authority bye-laws. Mr K Naidoo, an Environmental Health Officer (North/South Central Local Council, Durban Metropolitan Region), summarized and criticized the registration requirements as follows:

> The various departments in the Local Authority, including Health, Fire, Town Planning and Building Inspectorate, carry out inspections of the facility/premises to see if the requirements are met. The Environmental Health Officer co-ordinates the reports of all the departments and provides the Department of Welfare with the clearance certificate and the necessary recommendations. This process leads to the duplication and fragmentation of the services.

Mr Naidoo considered that the application process is a burdensome one because applicants have to satisfy several different authorities. He therefore recommended that local authorities should take over sole responsibility for the registration and monitoring of all child care facilities.

With regard to registration requirements, there was intense debate at the March 2000 ECD focus group discussion.[22] The debate was about whether extensive registration requirements should be set by law in order to protect children properly, or whether less extensive requirements should be set in order to encourage the setting up of much greater numbers of partial care facilities or ECD programs. The Law Review Project (not linked to the Commission) was of the view that the current registration requirements (in the Child Care Act for more than six children) have the unintended and undesirable consequence that numerous places of care conduct their activities illegally and entirely unmonitored. They were thus not in favour of a registration requirement as it criminalises child-minding in deprived communities, and prevents health officials, community nurses, social workers and welfare officials from helping and advising those child-minders who are most in need of assistance. The solution put forward by the Law Review Project was:

> that there should be legislation to empower the authorities to prevent a place of care that is a danger to the health or safety of the children from being used as a place of care. The legislation should provide that, if there is reason to believe that a danger exists in a place of care that threatens the health or safety of children, the authorities can give notice prohibiting the continued use of that place as a place of care. Failure to comply

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22 See Chapter 15 above.

with the prohibiting notice should be an offence.[23]

However, the Law Review Project's proposal that registration requirements be completely scrapped did not receive much support at the March 2000 ECD focus group discussion. The majority view at the focus group discussion was that there should continue to be legally-designated minimum safety and health registration requirements.

The Commission has recommended that the existing *registration* system be replaced with a *licensing* system[24] and that regular inspection and monitoring of partial care facilities be carried out.[25]

16.4.3 The number of children criterion

An important limitation in the current wording of the definition of a 'place of care' in the Child Care Act, 1983 is one based on the number of children receiving services. This definition uses the guideline of services for more than six children before certain facilities will need to be registered as 'places of care'.[26] Some delegates at the March 2000 ECD focus group discussion were of the view that this is an unnecessary limitation and that the Act should apply even where only a single child is involved in the activity concerned.[27] But as far as services for children are concerned, it has been suggested that it is not feasible or appropriate to try to control all such activities by means of legal provisions.[28] Limited resources in South Africa for legislative policing of such services and the danger of stifling good initiatives through disproportionate bureaucratic barriers need to be kept in mind.

It is therefore recommended by the Commission that partial care facility *licensing* provisions should apply only where groups of more than six children are involved. This is in line with the current definition of 'place of care' in the Child Care Act, 1983 and the

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23 Law Review Project 'Proposal for a New Approach to the Regulation of Child Minding' (July 1994) p. 6.

24 See 16.5 immediately below.

25 See 15.8 above.

26 See, for example, the definition of 'place of care' in section 1 of the Child Care Act, 1983.

27 Group 2; S A Federal Council on Disability; the Early Learning Resource Unit; Department of Welfare, Pretoria; SAVF; DICAG, Eastern Cape; DICAG, Free State; Law Review Project. Contra Inner City Pre-school Forum, Johannesburg; Centre for Early Childhood Development.

28 The SA Federal Council on Disability maintains that in most instances the number of children in a facility is not the issue, but rather the needed support, the space to accommodate children and the developmental quality assurance services required especially by disabled children.

proposed definition of 'ECD services'.[29] The consequence of this limitation to six or more children is that most 'au-pair' and nanny situations, as well as occasional baby-sitting, will not fall within the licensing provisions. Other protective provisions, such as provisions covering closure of facilities, should apply even where there are six or fewer children.

The Commission did consider including a provision to the effect that in calculating the number of children for whom partial care may be provided without a licence, regard should be had to the number of children (below a certain age) of the person providing the partial care. This would disadvantage care givers with big families who may provide care to other children precisely because they themselves are home-bound or unemployed. For this reason, and to secure access to partial care services, the Commission decided not to include such a limitation in the new children's statute.

16.5 Reconsidering the merits of a registration process and introducing a system of licencing

16.5.1 Introduction

Before further consideration is given to possible changes in the law governing partial care in South Africa, a decision must be made on the fundamental question of whether registration procedures should be retained as a method of regulation in this field.[30] Registration and inspection procedures are no more than one of the law's methods of attempting to regulate conduct, some of the other methods being certification, accreditation and licensing. As an alternative to these, however, reliance could be placed on the criminal law or on the use of civil law remedies or injunctions. Further, it could be argued that the law should not concern itself with partial care at all and that high standards are best pursued through public education and awareness campaigns. Alternatives to reliance on a registration system must therefore be examined.

16.5.2 Alternatives to registration

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29 See 15.5 above.

30 The worksheet used at the focus group discussion on ECD on 30 March 2000 posed the question (4.3) as to whether registration of places of care in terms of the present Child Care Act, 1983, serves any useful purpose. Respondents were divided on this issue.

* *Civil and administrative law remedies*. Reliance on the civil process would clearly be unsatisfactory. If it were left to a dissatisfied parent to initiate proceedings in delict or contract it would only be gross and obvious deficiencies (such as negligence producing actual harm to the child) which would result in action being taken. The initiation of such proceedings would be a slow, costly and cumbersome means of attempting to bring pressure to bear on those who provide child care. Proceedings of this kind would occur only 'after the event'. The dissatisfied parent would have to wait until those responsible were in breach of their duty or had broken the terms of the contract before taking action. Finally, the initiative would have to come from the parent. If the child had been placed in unsatisfactory conditions and the parent decided to take no action, the child would not be likely to receive the protection he or she needed. The conditions in which child care is provided are not always open to public scrutiny, and those who are likely to suffer most if it is inadequate are not able to take action to protect themselves. In short, reliance on the civil process would not be likely to assure children of the protection they require. Similar comments could be made about resort to an interdict to control the standard of care. Before seeking an interdict, a dissatisfied parent would have to wait until there had been a failure on the part of those responsible for the child's care, the procedure would be costly, and the onus would be entirely on the parent.

* *Reliance on the criminal law*. An alternative to employing registration procedures would be to establish certain standards for all who care for other people's children, and to prosecute those who fail to meet these standards. **The Commission is not in favour of this approach.** The control of child care services is not an area in which resort to the criminal law should be encouraged. The criminal law is a blunt instrument, the use of which should be reserved for seriously harmful conduct. Its procedures are stigmatising and require a high standard of proof before intervention is permitted. Further, the use of criminal sanctions is not an appropriate way in which to seek to regulate child care. When unsatisfactory care is provided it is not generally because of wrong-doing of a criminal kind, but because of a failure to reach acceptable standards. Such a failure is more susceptible to control by a system of registration or licensing than by the criminal law. A major consideration is that much of the child care with which this Chapter is concerned is provided on a commercial basis. Those operating on such a basis are more likely to be effectively controlled by the fear of losing a registration certificate or licence than by the threat of a prosecution which is unlikely to succeed. Most importantly, the criminal law, like the civil law, is invoked 'after the event.' Procedures which require fault or failure before they can be invoked are not the most effective means of protecting children or of ensuring high standards of care.

* *Reliance on public education*. Although education programs have an important role in making parents aware of the need to ensure that their children receive high quality care in partial care facilities, it would be unsatisfactory to place total reliance on educational campaigns. The law has a role to play in protecting children whose parents do not respond to such campaigns.

The view that some form of administrative control of partial care services should be retained does not lead inevitably to the conclusion that registration procedures provide the most appropriate method of regulation. As has been noted, registration is simply one of a number of administrative mechanisms. Others are licensing, certification and accreditation.

It is important to attempt to distinguish between the various forms of administrative control[31] and for present purposes the following distinctions are made:[32]

'*Accreditation*' is a weak form of control. It usually indicates that a group or organisation has conferred recognition on a member. It may indicate no more than membership of a particular group or organisation. Accreditation denotes that the person has been approved to undertake a particular activity. It does not, however, operate to exclude from the field those who have not been accredited.

'*Certification*' denotes a procedure by which a person or organisation is accorded a form of official recognition. It is usually an independent agency which certifies that a person is approved to perform a certain task. Like accreditation, it does not exclude unregulated persons from the occupation. Thus a person may be certified as a member of a particular trade or profession, and advertising may encourage members of the public to employ only persons who are so certified. However, such a system does not prevent other persons from offering exactly the same service, provided they do not hold themselves out as being certified. Thus certification merely gives members of the public a means of distinguishing between, on the one hand, those who have official approval and may be subject to standards and discipline and, on the other, those who have no such approval and are not so subject. Members of the public are not assured of protection, but they are provided with a means of distinguishing between those who have and those who lack the official seal of approval.

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31 The meaning of the various terms discussed below is not clearly established and the distinctions made in this Chapter are far from being universally accepted. The terminology in this area is used in a confusing manner.

32 See also Australian Law Reform Commission **Report No. 18: Child Welfare**, par. 419.

'*Registration*' is seen as an arrangement under which individuals are required to list their names in some official register if they engage in certain kinds of activities. There is no provision for denying the right to engage in the activity to anyone who is willing to list his or her name. Before a person is permitted to register it may be necessary for him to meet certain formal requirements. For example, a particular academic qualification may be made a pre-requisite of registration. Registration is an exclusionary system. It operates to inhibit entry upon the regulated occupation by those who are not registered.

'*Licensing*' also formally inhibits entry upon the regulated occupation. It is a system which requires official approval if a person is to undertake a particular occupation. A licensing authority sets standards and is required to evaluate an applicant's suitability before granting a licence. It is made an offence for a person to carry out a particular occupation without first obtaining a licence. Also, the licence may be withdrawn if the required standards are not maintained. The essential feature of a system of licensing is that it involves, at the point of entry, satisfying the licensing authority that certain standards have been met. Those who do not meet these standards are denied a licence and the result is to exclude them from the field.

In the Commission's view it is desirable to introduce a system of *licensing* as a method of regulating partial care in South Africa. Licensing offers a mechanism by which:

- standards may be set before a person or agency is authorized to provide child care;
- adherence to required standards can be regularly monitored; and
- those who fail to meet these standards can be compelled to do so or be excluded from the provision of partial care.

Thus licensing offers the best hope of controlling the quality of partial care services. A further dimension which needs to be developed is that of capacity-building and guidance; also that of promoting standards as a basis to qualify for state financing and to promote private sector contributions. There is a massive shortage of services and these need to be developed - hence the need to encourage people to seek registration / licensing and also to view those who fall short (unless they are positively abusive) in terms of their potential as caregivers and not just their potential for abuse or exploitation of children for profit. The licensing process should be used for this purpose as well as for standard-setting and monitoring.

As has been explained, licensing provides the strictest form of administrative control. A

corollary of the Commission's conclusion is the view that alternative forms of administrative control would be neither appropriate nor effective methods of regulating the majority of partial care services in South Africa.

The basic purpose of the licensing system should be to ensure, to the extent that the law can do so, that children in partial care are accommodated in satisfactory facilities, that persons in charge of these facilities are suitable, and that the programs provided for the children are appropriate to their needs. The essential aim must be to protect children against inadequate care. It should not be overlooked that partial care services are often provided to suit the convenience of parents. If partial care were unregulated, parents could use the services best suited to their needs. Licensing is necessary to safeguard children.

It is, nevertheless, important to recognise the limitations of licensing procedures. The law can do no more than enforce standards on such matters as the physical conditions in which children are housed, qualifications of staff, and ratios of staff to children. It cannot control intangible matters such as the quality of care, affection and attention which children receive. Significant limitations also arise from the nature of a licensing system. As a control mechanism it is relatively complex and cumbersome to administer. A properly administered licensing system requires careful scrutiny of the qualifications of those seeking a licence and of the condition of the premises in which children are to be accommodated. If this scrutiny is not provided the granting of a licence will degenerate into a rubber-stamping of applications and the system will not provide the protection which it purports to offer. Further, once a licence has been granted, adherence to the prescribed conditions should be regularly policed. It is neither practicable nor desirable to apply such intrusive procedures to the whole range of partial care arrangements. Many of these arrangements are casual and informal, and involve neighbours, relatives and friends in caring for each other's children. Much partial care takes place on a small scale and is provided in private homes. If the creation of an unacceptably intrusive system is to be avoided it is clear that there are many informal, casual arrangements to which licensing provisions cannot and should not apply. A balance must be struck between, on the one hand, the need to safeguard children against poor and unscrupulous care, and, on the other, the necessity of avoiding excessive, heavy-handed, bureaucratic intrusion into citizens' lives.

The Commission believes that the new licensing provisions should reflect an awareness of the practical problems of enforcement. However desirable it is to assure every child of the highest possible standards of care, it is simply not practicable to design a

licensing system which will effectively regulate all forms of partial care. Choices must be made as to the types of care which it is feasible to regulate and as to the types of care which must remain beyond the control of the law. Recommendations for the basis on which these choices should be made are set out below.

A system of licensing, or its equivalent, is in operation in several jurisdictions. In most Australian jurisdictions the licensing provisions are applicable only if a fee is charged.[33] Tasmania,[34] like Queensland,[35] does not limit its licensing provisions to services in respect of which a monetary payment is made. In Ontario, Canada, licensing provisions also apply.[36]

There are also significant variations on the numbers and ages of children whose care requires a licence. In Queensland, a care provider must not provide care at any one time for more than the number of children determined by the licensee or seven children, whichever is the less.[37] In Tasmania and Western Australia the relevant provisions apply regardless of the number of children accommodated. In New South Wales a licence is required if one or more children (disregarding any children who are related to the person providing the service) are cared for.[38] Greater consistency exists with regard to the age of children in respect of whom licensing requirements apply. In Queensland, however, section 24(3) of the Child Care (Family Day Care) Regulation 1991 specifies that there must not be more than 2 children under 1 year or 4 children who have not started school with a care provider.

The Ontario Day Nurseries Act[39] limits licensing provisions to a 'day nursery' and 'private-home day care agency'. A day nursery is defined as premises that receive more than 5 children who are not of common parentage, primarily for the purpose of providing temporary care, or guidance, or both temporary care and guidance, for a continuous period not exceeding 24-hours, where the children are (a) under 18 years of age in the case of a day nursery for children with a developmental handicap; and (b) under 10 years of age in all other cases, but does not

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33 Australian Law Reform Commission **Report No. 18: Child Welfare**, par. 424.

34 Part VI of the Child Care Act, 1960 (Tasmania).

35 Child Care Act, 1991 (Qld); Child Care (Family Day Care) Regulation, 1991 (Qld).

36 Section 11(1) of the Day Nurseries Act, R.S.O 1990, c. D-2.

37 Section 24(1) of the Child Care (Family Day Care) Regulation 1991 (Qld).

38 Section 31, read with the definition of ‘child care service’ in section 3, of the Children (Care and Protection) Act 1987 (NSW).

39 R.S.O. 1990, c. D-2, section 11.

include (c) part of a public, private or separate school. 'Private-home day care agency' is defined as a person who provides private-home day care[40] at more than one location. The crucial distinction between a day nursery and private-home day care is one of number: the former accommodates **more** than five children, while the latter is limited to the care of five or fewer than five children. The Act does not require the licensing of the person who actually minds the child in a private home. Instead, it requires the private-home day care agency which placed the child to be licensed. This is seemingly made possible because, according to the definition of private-home day care agency, it is the agency which provides the private-home day care.

In the United Kingdom, elaborate provision is now made for child minding and day care in Part XA of the Children Act, 1989,[41] which provides for a system of registration for child minding[42] and day care.[43] In England the registration authority is the Chief Inspector of Schools and in Wales it is the National Assembly for Wales.[44] Section 79B applies slightly different registration requirements to child minding and day care:

> (3) A person is qualified for registration for child minding if-
>
> (a) he, and every other person looking after children on any premises on which he is or is likely to be child minding, is suitable to look after children under the age of eight;
> (b) every person living or employed on the premises in question is suitable to be in regular contact with children under the age of eight;
> (c) the premises in question are suitable to be used for looking after children under the age of eight, having regard to their condition and the condition and appropriateness of any equipment on the premises and to any other factor connected with the situation, construction or size of the premises; and
> (d) he is complying with regulations under section 79C and with any conditions imposed by the registration authority.

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40 'Private-home day care' in turn is defined as the temporary care for reward or compensation of 5 children or fewer who are under 10 years of age where such care is provided in a private residence, other than the home of a parent or guardian of any such child, for a continuous period not exceeding 24 hours.

41 The amendments were affected by section 79 of the Care Standards Act, 2000.

42 'Act as a child minder' is defined as looking after one or more children under the age of eight on domestic premises for reward. Excluded from the definition is a person who is the parent or relative of a child, a person who has parental responsibility for a child, or foster parents. Also excluded is a person who acts as a child minder, or provides day care, for less than two hours in any day. In determining whether a person is required to register as a child minder, any day on which he or she does not act as a child minder at any time between 2 am and 6 pm is to be disregarded (section 79A).

43 'Day care' is defined as care provided at any time for children under the age of eight on premises other than domestic premises (section 79A(6)). See the discussion above.

44 Section 79B(1) and (2) of the Children Act, 1989.

(4) A person is qualified for registration for providing day care on particular premises if-

(a) every person looking after children on the premises is suitable to look after children under the age of eight;
(b) every person living or working on the premises is suitable to be in regular contact with children under the age of eight;
(c) the premises are suitable to be used for looking after children under the age of eight, having regard to their condition and the condition and appropriateness of any equipment on the premises and to any other factor connected with the situation, construction or size of the premises; and
(d) he is complying with regulations under section 79C and with any conditions imposed by the registration authority.

Where it appears to the registration authority that a person has not registered, the authority may serve an enforcement notice on him or her.[45] Failure to comply with such a notice within one year beginning with the date on which it is served constitutes a criminal offence. Provision is also made for the inspection of child minding and day care.[46]

The Ghanaian Children's Act, 1998 provides for a permit system in operating day-care centres.[47] Permits are to be obtained on application to the Department of Social Welfare, subject to the payment of fees as prescribed in bye-laws. The Department must inspect the proposed day-care centre and if it meets the required standard it must approve the application and grant a permit upon payment of the fee for the permit. Any day-care centre in operation without a permit shall be closed on 14 days notice to the owner or operator by the Department.[48] The Act further provides for the inspection of the premises, books, accounts and other records of a day-care centre at least once in every six months.[49] If the inspection reveals that the day-care centre is not being managed efficiently in the best interests of the children, the Department must suspend the permit and the owner or operator ordered to make good any default within a stipulated time. Failure to make good such defaults will result in cancellation of the permit.

16.5.3 **A basis for licensing partial care**

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45 Section 79D(2) of the Children Act, 1989.

46 Sections 79N - 79U of the Children Act, 1989.

47 Section 115 of the Ghanian Children's Act, 1998.

48 Section 115(4). Any person who operates a day-care centre without a permit or continues to operate in contravention of the Act, commits an offence (section 120).

49 Section 116.

The view that partial care services should be subject to licensing procedures requires distinctions to be made between the forms of care which can and should be regulated and those which it is unrealistic and undesirable to seek to control. Before these distinctions are made it is necessary to identify the various bases on which child care services can be classified.

(a) Child care for reward

A distinction which immediately suggests itself is that between services which are voluntarily provided and those for which a fee is charged Such an approach reflects the assumption that the law should intervene only when the care is provided on a commercial basis. Further, legislation drafted in this way is clear and easy to administer.

(b) Setting a number

As has been noted, in several jurisdictions the relevant provisions permit a certain number of children to be cared for without a licence being required. Government regulation of child care occurs only when this number is exceeded. Although the numbers set vary from jurisdiction to jurisdiction, the exemption of small scale child care services appeals to common sense. The argument is that a law which sought to control every child minder, no matter how small the number of children cared for, would be unacceptably intrusive and unafforable.

(c) Premises used

A distinction can be drawn between care provided in a centre and that provided in a private home. Such a distinction would reflect the view that the two types of care are different in kind. This distinction is embodied in the Ontario Day Nurseries Act (R.S.O. 1990).

(d) Age of children cared for

A distinction can be made between partial care services catering for pre-school children and those catering for children attending school. The care needs for these two groups of children are different, and further distinctions based on age (say 3 months to a year; 1 year to 2 years; 3 - 5 years, etc) within this broad category might be necessary. The age grouping of the

children to be cared for can therefore serve as a very useful basis on which to classify partial care services.

(e) **Types of care**

Finally, distinctions might be made on the basis of the duration of the care provided. It is, for instance, possible to distinguish between, on the one hand, full and part-time care, and, on the other, occasional care. The argument for making such a distinction is that the law should generally not concern itself with brief, temporary placements but should confine itself to regulating more sustained forms of child care.

16.5.4 Evaluation and recommendations

In formulating provisions to regulate partial care the aim should be to devise a system which provides children with protection against unsatisfactory care, but which does not result in the enactment of laws which are either unacceptably intrusive or unenforceable. It is clear that, **when partial care is provided for reward, it should be regulated by licensing provisions**.

Reference has already been made to the danger that pursuit of profit can place children at risk. The law has a legitimate role to play in regulating commercial operations in this sensitive area. Further, the regulation of child care facilities operated on a commercial basis is well established internationally. **The crucial question, however, is whether partial care services which are provided for reward should be the only form of care which requires a licence. In the Commission's view they should not**. If the purpose is to protect children there is no logical reason for limiting this protection to those who are cared for in facilities operated on a commercial basis.

Although no accurate figures are available, voluntary, non-profit organisations play a substantial part in the provision of partial care in South Africa. These organisations sometimes arrange for the care of large numbers of children. Further, it has been suggested that the role of private individuals and voluntary community agencies in the provision of partial care is likely to increase in future. The care which private individuals and voluntary organisations offer is often paid for by the parents, but this is not always the case. A group might, for example, operate on a co-operative basis and the parents might 'pay' by putting in an agreed number of hours caring for children. Also, sometimes voluntary groups waive the payment of fees. If these organisations

were exempted from licensing requirements the protection which it is the purpose of a licensing system to provide would be denied to a large number of children.

There is also the concern, to which reference has already been made, about those centres which have been categorised as 'adjunct centres'. The available evidence suggests that these should be regulated. Adjunct centres do not always make a charge for the services which they provide. If the licensing provisions contained in the new children's statute were applicable only to services in respect of which a charge is made, some adjunct centres would continue to be unregulated. A distinction between commercial and non-commercial services therefore does not provide a foundation on which to build a satisfactory regulatory system, nor do distinctions based on the type of care or on the premises on which it is provided.

The main purpose of a licensing system is to protect children in child care facilities. It should also seek to encourage persons to seek licensing and assist those who fall short in terms of their potential as caregivers. The Commission believes this can be achieved by creative use of what we term 'an enforcement notice'. It is proposed that such notice be served on a person who has failed to obtain a licence or failed to operate within the terms and conditions of the licence.

It is illogical to extend the licencing protection to children in certain types of premises and not in others, or to endeavour to protect those in full-day care but not those in occasional care. With regard to occasional care, it must not be overlooked that a child in this form of care can be more difficult to manage than one who has settled into a routine of full-day care. Occasional care should not be dismissed as an unimportant aspect of the child care system. Also, if a licensing system were based on the type of care provided, difficulties would be encountered in multi-purpose centres which combine different forms of care. It would clearly be impracticable to license one type of care in a multi-purpose centre but not another. The arguments advanced against a licensing system which concerns itself only with commercial services are equally applicable to one which seeks to regulate the provision of care in centres, but not in private homes. Child-minding in private homes in South Africa is widespread. If child care services in private homes were excluded from the licensing provisions, the result would be a system which did not apply to a substantial number of children in care.

The Commission accordingly recommends the inclusion of the following provisions in the new children's statute:

Licensing of partial care facilities

(1) No person shall operate or continue to operate a partial care facility unless he or she has obtained a licence in the prescribed format from the relevant (provincial) Department of Social Development.

(2) A licence shall stipulate the terms and conditions in terms of which a partial care facility may operate or continue to operate.

(3) Where it appears to the Department that a person has contravened subsection (1), the Department may serve a notice ('an enforcement notice') on him or her.

(4) An enforcement notice shall have effect for a period of 1 year beginning with the date on which it is served.

(5) If a person in respect of whom an enforcement notice has effect contravenes subsections (1) or (2) without reasonable excuse, he or she shall be guilty of an offence.

Licences

(1) A licence may be issued in relation to a prescribed type of partial care.

(2) Different types of partial care may be prescribed by regulation.

(3) A person must not provide partial care of a prescribed type in or on any facility

(a) otherwise than under the authority of a licence; or

(b) otherwise than in accordance with the terms and conditions of the licence.

(4) A person who is not authorised under a licence must not hold himself or herself out as providing partial care of a prescribed type.

Application for licences or renewals

An application for a licence, or the renewal of a licence -

(a) must be made to the (provincial) Department of Social Development in the prescribed manner;
(b) must be accompanied by the prescribed fee, if any;
(c) must be accompanied by such relevant information and documents as the Department reasonably requires; and
(d) in the case of an application for renewal, must be made at least 90 days before the current licence is due to expire.

Inspection before issue of licence

Any authorised person may inspect a facility at which partial care is proposed to be provided under a licence for which an application or an application for renewal has been made.

Issue and term of licence

(1) The (provincial) Department of Social Development may issue or renew a licence to an applicant who is not disqualified from holding a licence unless the Department is of the opinion that, in the best interests or safety of the children, the application should not be granted.

(2) In deciding whether to issue or renew the licence, the Department must consider-

(a) whether-
(i) the facilities provided or proposed to be provided are adequate for the provision of partial care, due regard being had to the relevant local authority's building clearance certificate and the factors listed in subsection (3);
(ii) the applicant is a fit and proper person or body to provide partial care services;
(iii) each person proposed to be engaged to provide partial care is a fit and proper person to be providing the services;
(iv) the applicant can provide the services in respect of which the licence is being sought; and

(b) any relevant information given by or in relation to the applicant under this Act.

(3) In considering the adequacy of any partial care facility, the Department and the local authority involved must take into consideration the following factors:

(a) The availability of a safe area in which children may play, taking into account the number of children catered for;
(b) The availability of safe drinking water for the children;
(c) The availability of hygienic and safe toilet facilities at the facility;
(d) Adequate means for disposing of the refuse originating at the facility;
(e) The availability of a hygienic area for the preparation of food to be consumed by the children at the facility;
(f) Adequate ventilation in any part of the facility used by the children.

(4) A licence continues in force for such term specified in the licence, but may be cancelled, through just administrative action, at any time by the (provincial) Department concerned.

Disqualification from holding licence

A person is not qualified to hold a licence if he or she has, at any time,

(1) been convicted of a sexual offence relating to a child;
(2) been found to be unfit to work with children as is provided for in the Act.

Applicant's duty to disclose charges, convictions, etc.

An applicant for a licence must disclose by written notice with the application and, in the case of a later event, immediately after the event to the (provincial) Department particulars of -

(1) any offence of which the applicant has been convicted;
(2) any charge laid (whether before or after the making of the application) against the applicant where, if convicted, the applicant would be disqualified from

holding a licence;

(3) any refusal of an application by the applicant for a licence; and

(4) any suspension or revocation of such a licence.

It would also be necessary to include extensive provisions on review and appeal procedures in the new children's statute. These aspects are covered in Chapter 23 below.

In line with the Commission's recommendation regarding assistance to providers of ECD services, it is further recommended that the (provincial) Department of Social Development may support, financially and otherwise, any licenced partial care facility.[50] This support does not necessarily have to extend to the same level as that which should be provided by the State for ECD services. The recommended legal formulation reads as follows:

Assistance to providers of partial care services

1. The (provincial) Departments of Social Development, or any local authority may support, financially or otherwise, any licenced partial care facility. Such support, or the continuation of such support, may be made subject to conditions.

16.6 Defining 'partial care'

In section 79A(6) of the UK Children Act, 1989 'day care' is defined as 'care provided at any time for children under the age of eight on premises other than domestic premises'.[51] Ghana's Children's Act, 1998, defines 'day-care centre' as any early childhood development establishment where children below compulsory school-going age are received and looked after for the day or a substantial part of the day with or without a fee.[52] The Victoria Children's Services Act, 1996, defines 'children's service' as a service providing care or education for 5 or more children under the age of 6 years in the absence of their parents or guardians for a fee or reward, or while the parents or guardians of the children use services or facilities provided

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50 See 15.8 above.

51 See also the definition of 'act as a child minder' as provided for in section 79A(2) of the Children Act, 1989, as amended by the Care Standards Act, 2000. 'Domestic premises' are defined to mean any premises which are wholly or mainly used as a private dwelling (section 71(12)). See further the definition of 'day care' in relation to local government in section 18(4) of the UK Children Act, 1989. According to this definition day care, for the purposes of that section, means 'any form of care or supervised activity provided for children during the day (whether or not it is provided on a regular basis)'.

52 Section 124 of the Ghana Children's Act, 1998.

by the proprietor of the service.[53] In Tasmania, section 3 of the Children, Young Persons and Their Families Act 1997 defines 'child care' as the provision of care or accommodation to a child by a person other than the child's parent or a member of the child's extended family.[54] The Queensland Child Care Act, 1991, defines 'child care' as the provision of care of the prescribed type, on a regular basis, of a child, but does not include the provision of care of a child in the child's home or preschool education within the meaning of their Education (General Provisions) Act, 1989.[55] The 2001 Child Care (British Columbia) Act[56] defines 'child care' as the care and supervision of a child in a child care setting or other facility, other than by the child's parent or while the child is attending an educational programme provided under school's legislation.

For the purpose of the new children's statute in South Africa, a definition is required which is not confined only to day-time care. The definition needs to target a range of situations where children are temporarily placed by parents or primary caregivers with persons designated by them, for limited periods of time. At one end of the partial care spectrum are such situations as baby-sitting or weekly meetings of toddler playgroups which may last for only a few hours at a time. However, at the other end of the spectrum are overnight centres and holiday camps where the child is away from his or her parent or caregiver for longer periods. It should also be noted that children of any age may require partial care. There is thus, in this sense, a distinction between ECD services and partial care – although younger children in partial care should be receiving appropriate ECD services.

School attendance should not be included as receiving 'partial care' in the proposed new children's statute because education legislation applies. The school exclusion provision currently included in the definition of 'places of care' in section 1 of the Child Care Act, 1983, therefore needs to be reworded before it can be used. As stated before, the concept of 'partial care' as provided for in the new children's statute should not include ECD services.[57]

Exercise of contact (access) responsibilities by a non-custodian parent, although in a broad sense a kind of partial or temporary care, should also not be covered by the new legal definition

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53 Section 3. 'Care' is not defined in the Act.

54 'Extended family' is also defined in the Act.

55 See also the Queensland Child Care (Family Day Care) Regulation 1991.

56 [SBC 2001] Chapter 4.

57 See 15.6 above. However, where ECD services are not rendered at a partial care facility (place of care), even a self-styled ECD centre, then the provisions relating to partial care facilities should still apply.

of 'partial care'. Contact (access) of this kind is maintained because parental rights and responsibilities are exercised.[58] Also where contact (access) has been arranged in accordance with a court order, this is not a 'private arrangement' and should therefore be covered instead under the relevant parental responsibilities provisions of the new children's statute.

Obviously, children in the 'formal' child care system (i.e. those children placed in substitute family care by means of a court order) should not fall under the definition of 'partial care'.[59]

In defining 'partial care', the Commission recommends the inclusion of the following elements:[60]

- **the care is provided on a business or community service basis;[61]**
- **the care is provided for more than six children apart from their parents / primary care-givers;**
- **forms of statutory care (foster care, adoption, residential care), and care provided in schools and in hospitals,[62] in the course of treatment, should not be included;**
- **ECD services should not be included.**

The Commission believes the definition of 'partial care' should be linked to that of 'partial care facility', which is a rework of the definition of 'place of care' in the Child Care Act, 1983, and accordingly recommends the following definitions:

> '**Partial care facility**' means any place, building or premises, including a private residence, maintained or used partly or exclusively, whether for profit or otherwise, for the reception, protection and temporary or partial care of more than six children apart from their parents or primary care-givers, but does not include
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> (a) any boarding school, school hostel or any establishment which is maintained or used mainly for the tuition or training of children and which is controlled by or

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58 See 8.4.5.1 above.

59 See Chapters 17, 18, and 19 immediately below.

60 Ibid.

61 In other words, whether for profit or otherwise.

62 Hospitals may run day care centres for use of their members of staff, for instance, and these services should be included under the definition of 'partial care'.

which has been registered or approved by the State, including a provincial administration;

(b) any hospital or medical facility which is maintained or used mainly for the medical treatment of children;

(c) the statutory placement of a child in substitute family care;[63]

(d) ECD services as defined in this Act.

'**Partial care**' means the services offered at a partial care facility.

16.7 Partial care not provided at partial care facilities (places of care)

The Commission recognises that not all partial care services are rendered in buildings or premises (in other words, not in a 'place of care' as defined in the Child Care Act, 1983)[64] and that not all ECD or partial care situations involve the care of more than six children apart from their parents. While not registered as places of care, some facilities do care for children apart from their parents and sometimes offer ECD services. The question is whether these facilities should be subject to some form of licensing process.

The Commission is reluctant to classify all places where ECD and partial care services are rendered, regardless of where such services are rendered and the number of children involved, as places of care. Such an approach would be unmanageable as, for example, the typical baby-sitting situation where a neighbour looks after the baby while the parents go to the movies, would also require registration, inspection, and monitoring. However, it is realised that some partial care arrangements involving less than six children can be very harmful to children. For such situations, **the Commission regards the solution proposed by the Law Review Project as feasible and accordingly recommends that the Department of Social Development should be empowered to prevent an ECD service or partial care facility from continuing to operate, even though such service is not registered or such facility not licenced.** In this regard, the Commission regards the UK example[65] where provision is made for an enforcement notice as commendable. **It is accordingly recommended that where an**

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63 This includes foster care, adoption and residential care.

64 A partial care service provider may, for instance, take the children in his or her care to the zoo for a day outing. While still caring for such children it certainly cannot be said that the service is rendered, on that particular day, in a place of care.

65 See 16.5.2 above.

unregistered ECD service or an unlicensed partial care facility is de facto in effect or operational, the Director-General: Social Welfare be empowered to issue an enforcement notice to such unregistered or unlicensed operator. Such notice would then either instruct the operator to register or obtain a license or to cease operation forthwith.

16.8 Monitoring[66] and inspection

Monitoring provisions should be included in the new children's statute and must allow for a power to monitor both the environment and quality of care provided at partial care facilities and the implementation of ECD programs - by means of inspections or other methods - regardless of the number of children involved. The Commission has therefore recommended that ECD services and partial care facilities be subjected to regular monitoring and inspection.[67]

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66 See also Chapter 24 (monitoring) below.

67 See 15.8 above.

CHAPTER 17

FOSTER CARE

17.1 Introduction

Within the formal child care system in South Africa, foster care is normally considered to be the preferred form of substitute care for children who cannot remain with their biological families and who are not available for adoption. This reflects the belief that the family is normally the environment most suited to the healthy growth and development of the child. Many thousands of South African children have benefitted from court-ordered foster care. It is, however, doubtful whether this form of care as provided for in the Child Care Act of 1983 can adequately deal with the country=s changing needs. At present, there are approximately 50 000 children in court-ordered foster care in South Africa, and social workers are having difficulty in finding sufficient foster families.[1] It is estimated that four out of five families will need to take in a child unrelated to them in order to cope with the sheer numbers of AIDS orphans.[2] This is a most improbable scenario and one which would not be suitable for all the children concerned. The need thus arises to examine alternative forms of family care.

17.2 Conceptualising foster care

17.2.1 Problems of definition

Fostering is probably the most widely practised form of substitute care for children world-wide. There are many different kinds of fostering, and definitions of >foster care= vary internationally. A review of foster care in twenty-two countries found considerable diversity in the way fostering is both defined and practised. Kinship foster care, which is the most common form of fostering in Africa, is not defined as >foster care= in all countries. In Ireland, for instance, only children placed with non-relatives are said to be >fostered=. In some countries foster care is defined as applying

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1 **South Africa=s children made vulnerable or orphaned by AIDS** Report on a workshop held in Cape Town on 28 September 2000.

2 Ibid.

only to children placed through official channels, whereas in others it includes children living in informal arrangements. In some countries foster care is seen strictly as a temporary arrangement, whereas in others the norm is for long-term and quasi-adoptive placements.[3] Given these diversities, Colton and Williams suggest the following inclusive definition of foster care:

> Foster care is care provided in the carers= home, on a temporary or permanent basis, through the mediation of a recognised authority, by specific carers, who may be relatives or not, to a child who may or may not be officially resident with the foster carers.

17.2.2 Current Law and Practice

Foster care is defined neither in the Child Care Act, 1983, nor in the regulations to the Act. The terms >foster child= and >foster parent= are, however, defined.[4] A children=s court which is satisfied that a child is a child in need of care may order that he or she be placed in the custody of a suitable foster parent designated by the court under the supervision of a social worker.[5] Thus, a child can only be placed in foster care, as legally defined, by means of a children=s court order. The Child Care Act makes no distinction between foster care by non-relatives and care by relatives, or >kinship care=.

Court-ordered foster care as it currently exists in South Africa reflects two broad scenarios. In the first, children who have come to the attention of the courts due to abuse, neglect or abandonment are placed with people unknown to them who have come forward or been recruited from the community, usually by child and family welfare NGOs, specifically to carry out the task of caring for

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3 M Colton and M Williams >The nature of foster care: international trends= (1997) in **Adoption and Fostering** 21(1) 44 - 49.

4 >Foster child= is defined in the Act as >any child who has been placed in the custody of any foster parent in terms of Chapter 3 or 6 of this Act or section 290 of the Criminal Procedure Act, 1977'. In terms of the Act, >foster parent= means >any person, except a parent or guardian, in whose custody a child has been placed ...=.

5 Section 15(1)(b) of the Child Care Act, 74 of 1983.

children in need. These people will have gone through an assessment process and may have participated in a structured orientation or training programme of some kind. Such placements are, or should be, associated with a permanency plan including services to the biological family where possible, and with efforts either to return the child to their care where feasible, or to settle the child in an alternative permanent arrangement in due course.

In the second scenario, members of an extended family have taken in a child who is destitute after the death of or abandonment by one or both biological parents, or due to some form of incapacity on their part. When these caregivers come before the courts it is frequently to access financial assistance, as many such people are poor. Often they are the grandparents of the children and are themselves pensioners. The children concerned may remain with the relatives indefinitely, often throughout childhood. At present such arrangements make up a substantial proportion of the caseloads of many child and family care social workers.

In probably the majority of cases, children in substitute family care in South Africa do not go through a children=s court enquiry, but are simply absorbed into the extended family system. These arrangements are agreed between individuals without recourse to formal rules and regulations.[6] This raises the issues of whether legal recognition should be given to informal kinship care, and how the extended family system could be strengthened to absorb the vast number of children who stand to be left parentless due to AIDS and other factors. Where children are cared for by relatives without an order of court, these caregivers are not officially appointed custodians or foster parents, and are therefore unable to access the foster care grant. The caregivers also do not have any form of guardianship over the child, and may have difficulty carrying out certain responsibilities as a result.

However, the use of the foster care system as an >income maintenance= measure to assist families who care for the children of relatives has become a well-established child welfare practice. Social workers have used the foster care grant to obtain state support for relatives caring for children in the absence of other forms of state assistance. This has made kinship care a viable option for many families who would otherwise have been unable to maintain the children concerned. At the same time it has placed a burden on the formal foster care system in terms of legal requirements for

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6 M C Harber **Social policy implications for the care and welfare of children affected by HIV/AIDS in KwaZulu-Natal** (1998) Master thesis, University of Natal, Durban.

ongoing social work services and regular reporting obligations. There is also concern that, following the demise of the state maintenance grant and the limiting of the child support grant to children aged less than seven years, an incentive may have been created for children to be placed in formal foster care with relatives. This may, for an impoverished family with no access to state financial aid, be a more viable option than having the children remain in their own homes.

There is reluctance by some commissioners of child welfare to make orders placing children in the long-term foster care of relatives. This seems to be due to a reluctance for the court process to be used primarily as a means to access financial help, in cases where children are already in the long-term care of relatives. Objections have been raised to the effect that this is not the purpose of foster care, which is intended to be temporary measure and to be accompanied by services aimed at placing the child in permanent care. In addition, it is believed that children should not be before the court for purely financial reasons.[7]

There is also apparently reluctance by some officials of provincial Departments of Social Development to process requests for children to be placed in the long-term care of relatives. This could be due to the objections of the local commissioners; it could also reflect a concern about creating unmanageable pressure on overstretched social work caseloads and on provincial social security budgets. Apparently there is a tendency to try to channel applicants to the Child Support Grant rather than towards the court process; however this is of course of no help where the children concerned are over six years of age. The amount involved is also much smaller.

There seem to be regional differences in approach to this issue. At present 42% of all foster care grants are being paid in two provinces, namely the Eastern Cape and the Western Cape. In the Northern Province and the North West Province, fewer than 2000 foster care grants are being paid, despite the fact that the Northern Province is one of the most populous provinces as regards children. This has long been the case B for instance prior to 1994 there were provinces in which Black children were never brought before the children=s court for placement with relatives - qualifying caregivers were instead given the tiny >Granny Grant= (so-called) B which was the child=s portion of the old Maintenance Grant. In other parts of the country, especially where child welfare NGO=s were active, children in the care of relatives who could not afford to support them

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7 See D van Greuning >Foster care placements: Section 15(1)(b) of the Child Care Act 74 of 1983: The legal problem= (1998) Vol. 1 No. 3 **The Judicial Officer** 105. See further D S Rothman >Foster care placements: Section 15(1)(b) of the Child Care Act 74 of 1983 (as amended)= (1999) Vol. 2 No. 3 **The Judicial Officer** 98.

unaided were routinely brought before the children=s court, found in need of care and given access to the foster care grant. At present it would seem that certain courts may be declining to follow this process, with certain Social Development offices following suit, while in other areas foster care placements of this kind continue to be ratified.

A small research pilot was undertaken during November to December 1998 in the Kimberley area to analyse the phenomenon of kinship care.[8] The researcher concluded that a clear distinction needed to be made between foster care as a developmental and therapeutic intervention, and foster care which arises out of children living with families other than their biological parents. It was further recommended that any policy-making process in this regard would need to be based on creative possibilities for financial assistance which would ensure that such children are not exposed to risks because of poverty and economic need in caregiving families, while also not creating an attitude of increasing dependency on the state. Although the research was undertaken in the Kimberley area, the assumption can be made that other provinces are experiencing similar challenges in foster care practice.

Informal kinship care is seen as an appropriate response to the crisis facing orphaned and vulnerable children because it avoids the complicated and time-consuming legal processes associated with statutory foster care, and it has the potential of providing a good quality of care.[9] There is, however, in community care approaches an assumption that communities have families, or capable women, who are willing and able to provide care, and this cannot be taken for granted.[10] The extended family will not have the capacity to take in orphans in every case, and this capacity is in any case not unlimited, especially where no external support is available.

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8 Abstract from a draft document on Minimum Standards on Foster Care.

9 **South Africa=s children made vulnerable or orphaned by AIDS** Report on a workshop held in Cape Town on 28 September 2000.

10 M Harber **Who will care for the children? Social policy implications for the care and welfare of children affected by HIV/AIDS in KwaZulu-Natal** (1998) at 24 Research Report no.17. Durban: University of Durban, School of Development Studies.

17.2.3 Comparative systems in other countries

17.2.3.1 United States of America

Changes in statutory and administrative law, driven by the increasing demand for placement resources, clearly established relatives as the first placement preference when children were taken into state custody. In 1988, the Illinois Children and Family Services Act was amended to require that relatives >be selected as the preferred caregivers= when placement of children outside the parental home is considered by the child welfare system. The Act requires that children be placed with close relatives after an immediate preliminary approval process.[11]

Wisconsin=s Act 105 of 1997 provides for the creation of a long-term kinship care programme in terms of which monthly payments are paid to a relative of a child who is caring for the child on a long-term basis. The Act stipulates that only a relative who has been appointed as a child=s guardian may receive long-term kinship care payments. The Act further requires:

- an investigation of the home of the relative who will provide long-term kinship care;
- a criminal background investigation and individualised consideration of the conviction record of any long-term care kinship care relative, or an adult resident in the long-term kinship care relative=s home, or an employee or prospective employee of the long-term kinship care relative who has or would have regular contact with the child, to determine if any of these people has any arrests or convictions that could adversely affect the child or the kinship care relative=s ability to care for the child;
- a written agreement between a long-term kinship care relative and a county Department of Human Services or county Department of Social Services;
- an annual review of each case under the long-term kinship care program.

On a reading of the Act, children are placed in kinship care, without court intervention, by making an application to the relevant Department.

17.2.3.2 England and Wales

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11 R L Hegar and M Scannapieco **Kinship Foster Care: Policy, Practice and Research** (1999) 30 - 31 Oxford University Press.

Section 23(2) of the Children Act, 1989 prioritises care by relatives. Guidelines and regulations accompanying the Children Act emphasise the advantages for children of being placed within their wider family:[12]

> Possibilities for a child to be cared for within the extended family should have been investigated and considered as an alternative to the provision of accommodation by the responsible authority. However, even when it has become necessary for the responsible authority to arrange provision of accommodation, placement with a relative will often provide the best opportunities for promoting and maintaining family links in a familiar setting.

17.2.3.3 **Ireland**

A specific provision enabling relative care was included in the Irish Child Care Act of 1991. This was followed by the Placement of Children with Relatives Regulations, which now govern policy and practice in the area. Evidence of growth in the number of relative care placements suggests that they are set to become an increasingly important aspect of Irish child care services. Child care agencies are also required to compile separate registers for foster and relative care placements.[13]

17.2.3.4 **Ghana**

The Ghanaian Children=s Act, 1998 distinguishes between placement >with an approved fit person= and >at the home of a parent, guardian or relative=[14] on the basis of a care order of the Family Tribunal. A parent, family member or any person who has been caring for a child may apply to the Family Tribunal for custody of the child.[15]

17.2.3.5 **Uganda**

The Ugandan Children=s Statute, 1996, provides that, where the natural parents of a child have

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12 R Greeff **Fostering Kinship: An international perspective on kinship foster care** (1999) 87; D Berridge **Foster Care: A Research Review** (1997) 17.

13 R Greeff (1999) 113 - 114.

14 Section 20(3)(b) and (c), Act 560.

15 Section 43

died, parental responsibility may be passed on >to relatives of either parent, or, by way of a care order, to the warden of an approved home, or to a foster parent=.[16]

17.2.3.6 **Kenya**

After the death of the parents of a child, if there is no testamentary guardian and no court-appointed guardian, custodian or >fit person=, then in terms of the 1998 draft of the Children Bill >a relative of the child= is recognised as having parental responsibility for that child.[17]

17.2.4 **Comments received by the Commission**

The worksheet associated with the research paper on Foster Care[18] (hereafter >the Worksheet=), posed the following questions:

> Do you think it is necessary to define 'foster care' in the new child care legislation? Should kinship care and/or care within a child-headed household be defined separately? If so, how?
>
> How should the law deal with children cared for by relatives or close acquaintances?
>
> What legal protection should be provided for children in informal or kinship care?

All the respondents were of the view that 'foster care' should be defined in the new child care legislation. However, a substantial number of respondents felt that as kinship care and care within a child-headed household had different requirements - with child-headed households, for example, needing to be provided with some form of adult supervision - they should be defined separately

16 Section 7 of the Statute.

17 Section 24(1)(b)(v).

18 The worksheet, together with the research paper on foster care written by Mrs Petro Brink, was used as a basis for focus group discussions at a workshop which was held at the President Protea Hotel, Bantry Bay, Cape Town on 27 and 28 June 2000, and for subsequent inputs by organisations.

from care by non-relatives. CMR, Eastern Transvaal, suggested the following definition for 'kinship care': >A child taken care of by a relative(s) with mutual consent of the extended family=.

The Foster Care Association of South Africa, on the other hand, stated that the concept >foster care= should include all types of community-based care of children away from their biological parents. The Department of Social Development, Free State, likewise submitted that kinship care and care by child-headed households should not be defined separately from care by non-relatives. The respondent said that all forms of foster care were in substance the same and that it was only the prevailing circumstances that determined who would care for the children.

South Peninsula Legal Aid Clinic argued that 'foster care' should include 'kinship care'. However, care within a child-headed household should be defined separately.

The Department of Social Development, Free State, and the Catholic Women=s League suggested that relatives caring for children be vested with guardianship without going through the present statutory process. The Child Health Policy Institute was similarly of the view that kinship care should be a non-statutory arrangement. NG Welsyn, Vanderbijlpark, submitted that children placed with relatives should not be subjected to statutory supervision. This view was endorsed by the Catholic Women=s League.

The South Peninsula Legal Aid Clinic proposed that there should be no age limit to the child support grant. In their view, this would enable families to care for their relatives= children. The Foster Care Association of South Africa was of the view that a standardised grant would encourage more people to care for children.

The majority of respondents submitted that children in kinship care should receive the same legal protection as all other children.

The Deaf Federation of South Africa (DEAFSA) recommended the establishment of community committees and/or child and youth committees. The respondent also suggested that children be educated on their rights and that complaints mechanisms be put in place.

The Child Health Policy Institute submitted that children should be educated on their rights and

what procedures to follow when their rights are violated. Also, that community committees should be established.

17.2.5 Evaluation and recommendation

The Commission recommends that provision be made for various forms of substitute family care, which should include short-term and long-term care by relatives and non-relatives. The Commission proposes to distinguish between >foster care= and >care by relatives=, and to provide for the necessary support of both options. A further distinction is proposed between:

- court-ordered care by relatives which arises as a result of child and family court proceedings in cases of abuse and severe neglect and is associated with professional services; and
- care by relatives which is undertaken by informal arrangement on an indefinite basis.

Recognising the placement in >care by relatives=, as a category separate from >foster care=, would entail a legislative amendment to section 15(1) of the Child Care Act, 1983, as no such placement option currently exists. Should such legislative intervention be deemed necessary, **the Commission recommends that section 15(1)(b) of the Child Care Act be amended by the insertion of the following words after the words >suitable foster parent= in that section: >which may include a suitable person related to the child=**. Such amendment would place it beyond doubt that children may be place with relatives when found by the children=s court to be in need of care.

More specifically, the Commission proposes that:

- **Legal recognition be given to care by relatives as a placement option for children who come before the court via the formal child protection system, in cases of abuse or neglect. Care by relatives should be a preferred option, unless there are indications to the contrary. Further, depending on the circumstances of each case, the court should have the discretion to specify whether a placement with relatives should be of a permanent nature, whether reunification services should be rendered to the parties concerned and whether supervision or monitoring by a state**

department or organisation is required. On the other hand, (non-relative) foster care placements will usually, where appropriate, require permanency planning and the rendering of supervision and reunification services.

- **Relatives caring for children who have been abandoned or orphaned or are for some other reason in need of their assistance, but who are not in need of formal protective services, should have access to a simple procedure whereby the necessary parental responsibilities can be conferred on them. These should include consent to medical treatment for, or an operation on a child, and capacity to apply for state financial assistance on his or her behalf. Comment is invited as to whether such an arrangement should involve an initial once-off investigation, an order by the child and family court, or whether this could be an administrative process.**

- **A parent or guardian of a child may give written consent to a person caring for that child to give consent to medical treatment for or an operation on the child.**

- **Any person, including the child him/herself, who is of the view that a particular placement in informal care with relatives is not in the best interests of a child should be able to approach the Child and Family Court.**

- **The necessary provision must be made for appropriate financial and other forms of state support for foster care by non-relatives, formal court-ordered care by relatives, and informal care by relatives. These may be subject to separate regulation for the different categories.**

17.3 Alternative models of foster care

This section explores a range of models of foster care which are alternatives to the existing forms of statutory foster care and informal kinship care. These models are already being used in South Africa in the form of pilot projects, and have been initiated in response to changing social circumstances and in recognition of the inadequacy of conventional foster care. While areas of

overlap exist, two overarching models are presented for purposes of the present discussion.

17.3.1 Cluster foster care, or community foster care

17.3.1.1 Introduction

McKerrow[19] describes cluster foster care as follows: >Volunteer women and couples are recruited and trained in the basics of child care. Up to six children are placed with each volunteer who receives foster care grants and material support. Community workers link these volunteers to other resources such as day care centres which relieve foster parents of child care duties in order to undertake income-generating activities.=

17.3.1.2 Current Practice

Despite much rhetoric in recent years, examples of successful and sustainable community care projects are hard to find. Harber[20] describes the experience of a non-governmental organisation that attempted to develop community-based programmes. This organisation was constantly faced with the impoverished status of the communities and expectations of material assistance. While many studies have highlighted the willingness of communities to care for children outside their family units, they have also indicated that it cannot be done without financial assistance from the state.[21]

Pietermaritzburg Child and Family Welfare Society has developed a cluster foster care scheme for children with HIV/AIDS. In terms of this scheme, potential cluster foster care (CFC) parents are recruited, screened and trained in home-based care, universal precautions and the management of AIDS-afflicted children. They are provided with a >start-up pack= of, *inter alia,* milk formula, clothing, toiletries and, in some instances, material support until the foster care grant is received.

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19 N H McKerrow **Implementation strategies for the development of models of care for orphaned children** (1996) (unpublished).

20 M C Harber (1998) Masters thesis, University of Natal, Durban.

21 N H McKerrow and A E Verbreek **Models of care for children in distress** (1995).

CFC parents are also visited monthly to offer support and to ensure that children are well cared for.[22]

17.3.1.3 **Comparative review of systems in other countries**

The legislative Assembly of Oregon, USA has passed an Act[23] relating to community-based foster care demonstration projects. In terms of the Act, the State Office for Services to Children and Families, in consultation with local commissions on children and families, may agree to establish pilot programmes. The Act states that the purposes of community-based foster care demonstration projects are as follows:

- to promote strategies that keep abused and neglected children in their familiar surroundings and neighbourhood schools;
- recruit community volunteers to serve as foster parents for abused and neglected children who live in the community;
- to identify barriers to recruiting community foster parents and recommend strategies to address these; and
- to create a community-based system of support for foster children and community foster parents.

17.3.1.4 **Comments received**

The following questions were posed on the worksheet: *How would you define community foster care? Is it necessary to include such a definition of >community foster care= in the new child care legislation? How do you think such care might work, and how should it be resourced and monitored?*

The majority of respondents were in favour of providing for community foster care in the new child

22 Mark Loudon, CINDI Coordinator, **An overview of the Children in Distress (CINDI) Programme.** The paper can be accessed at http://www.togan.co.za/cindi/papers/paper3.htm.

23 House Bill 2491, passed by the House on 6 March 2001 and passed by the Senate on 30 April 2001.

care legislation. Understandings of this concept varied.

Cape Town Child Welfare Society proposed the following definition: >Community foster care is a family home in the community where a foster parent takes in more than one child, or a group of foster parents - about 2 to 3 - live together and care for a group of foster children in the same home.= The respondent further submitted that community foster care is appropriate, especially for HIV/AIDS-infected children.

CMR, Northern Transvaal, suggested that provision should be made for community foster care homes which accommodate one to four foster children. Further, these homes should be subjected to minimum standards and monitoring. Ondersteuningsraad, Vereeniging, recommended the placement of a maximum of six children in a foster home within the community.

At a meeting with officials from the Department of Social Development held on 30 July 2001, it was recommended that fostering of children by an individual foster parent should continue to be limited to six children.[24] Further, that where more than six children are to be placed, at least one other person must be given legal responsibility for the children, in a clustering-type arrangement. It was also recommended that legal recognition be given to privately-funded cluster foster care schemes. These should, however, be subjected to registration and regular monitoring.

17.3.1.5 **Evaluation and recommendations**

The Commission recommends as follows:

- **That >cluster foster care= be understood to imply a grouping of caregivers who are linked together to provide mutual support in the care of a number of children, and who receive some form of external support and monitoring.**

- **That the new child care legislation give legal recognition to both state-funded and**

24 Although there are some differences in interpretation, this is commonly understood to be the present legal limit, as implied by the definition of a >children=s home= in section 1 of the Child Care Act which requires registration by any residence or home >maintained for the reception, protection, care and bringing up of more than six children apart from their parents=.

privately-funded cluster foster care schemes subject to regulation in terms of the Act.

- **That the court have the option of committing a child to the care of a specific cluster foster care scheme rather that to that of a particular individual or couple within that scheme.**
- **That the Minister be enabled to allocate grants to children in cluster foster care schemes and also to subsidise these schemes as entities.**

- **That in any specific case where it is believed to be appropriate for more than six children to be placed in the foster care of a single caregiver, the court be required to assign one or more additional caregivers, whether or not resident in the same household, to exercise shared responsibility for the children in question.**

17.3.2 Specialist or professional foster care

17.3.2.1 Introduction

Colton and Williams[25] identify two diverging trends in fostering internationally:

> The first trend ... is towards placing children with relatives who often receive very little in the way of financial or other support. The opposite trend is towards the professionalisation of fostering.

There have in other parts of the world been two main reasons for the second trend, i.e. the >professionalisation= of fostering. First, there has been a growing recognition in many countries that caring for children who would have previously been institutionalised, such as children with disabilities or life threatening diseases, or severe emotional or behavioural problems requiring intensive therapeutic management, is a demanding task. Foster carers are thus increasingly required to undergo special training and to develop special skills. Secondly, there has been a growing recognition that fostering is reliant on the availability of women=s labour. The changing

25 M Colton and M Williams (1997) 21(1) **Adoption and Fostering** 44-49.

position of women, particularly in more affluent societies, means that ways have had to be found to entice women into fostering.

Practitioners are divided in their opinions about the appropriateness and, in the South African context, the affordability of a separate category of >professional= foster care service.[26] This section examines whether there is a need for professional foster care in this country, and, if so, how it can be provided within limited welfare resources.

17.3.2.2 **Current Practice**

Foster care was traditionally regarded as a placement option only for healthy and generally non-problematic children.[27] However, specialist or treatment fostering was introduced in the early 1970s to divert adolescents who were in trouble with the law away from residential institutions. Since then, specialist fostering programmes for children with special needs have proliferated in Europe and North America. These schemes typically pay foster carers a fee, or an enhanced allowance, in addition to the ordinary fostering allowance and any other entitlements. Such payments are usually made in recognition of the extra costs incurred in caring for a child with special needs, and of the costs involved to carers who have to leave work or reduce their hours to foster a child.[28] Training and support over and above those provided in regular foster care are also provided. The primary purpose of specialist fostering is to provide both >care= and >treatment=.

In recent years, the care of children with special needs has been given more attention in South Africa. HIV-positive children are one category who have come into focus. Child care agencies find it difficult to place these children in foster care or adoption. For example, Nazareth House reported that they have yet to find a foster care or adoptive placement for one of their HIV-positive children.[29] In addition, advocacy groups such as the Child Health Policy Institute have highlighted the needs of

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26 Personal communication with Mrs Elmarie Swanepoel from the Department of Social Development.

27 J Triseliotis, C Sellick, and R Short **Foster Care: Theory and Practice** (1995).

28 D Berridge (1997). A Pithouse and O Parry >Fostering in Wales= in **Adoption and Fostering** 21(2). H Argent and A Kerrane **Taking extra care. Respite, Shared and Permanent Care for Children with Disabilities** (1997) London, British Agencies for Adoption and Fostering. H Loening-Voysey and T Wilson **Approaches to caring for children orphaned by AIDS and other vulnerable children** (2001) Report prepared for UNICEF by the Institute for Urban Primary Health Care. M C Harber (1998) Masters thesis, University of Natal, Durban.

29 H Loening-Voysey and T Wilson (2001).

all children with chronic diseases.[30]

Models of specialist foster care that have been experimented with in South Africa include cluster foster care programmes for HIV-positive children[31] and a professional foster care pilot project implemented by the Inter-Ministerial Committee on Young People at Risk, for children in conflict with the law.[32] While these projects have differed in purpose, they have certain shared features, including the use of community-based carers who are trained to care for a child or children with a specific type of need. Both projects have also required a reconceptualisation of the nature of supportive and monitoring services offered to foster parents, and the involvement of practitioners from several sectors such as community health workers and child and youth care workers as well as social workers.

Despite its advantages, the notion of >professional foster care= has been criticised here and abroad for creating an elite class of caregivers, at the expense of children in the care of >ordinary= foster parents and these foster parents themselves. It has been pointed out that conventional foster parents are typically expected to do extremely difficult and demanding work which also requires intensive training and support, and that the creation of a separate >professional= category leads to those in the mainstream being relegated to a type of second class status and fobbed off with fewer resources. The urgent needs of the foster care system as a whole, according to this argument, then continue to be overlooked. It is often observed that children coming into care today tend on average to display higher levels of emotional and behavioural disturbance than was the case some decades ago, and that foster parents in general require increased levels of training and support.

17.3.2.3 **Comments received**

Question 29 of the Worksheet read as follows: *Should the concept of professional foster care be included in the new child care legislation? If so, in what form? How should such programmes be financed and monitored? Who should run the programmes?*

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30 Child Health Unit **Report on a workshop on chronic diseases in childhood** (1999) MCH news, (13) 6.

31 M C Harber (1998) Masters thesis, University of Natal, Durban 166 -177.

32 Pilot Project Report on **Professional Foster Care** (1998) Inter-Ministerial Committee on Young People at Risk.

The majority of respondents submitted that the concept of 'professional foster care' should be included in the new child care legislation.

Communicare suggested that professional foster care should be provided for exceptionally disturbed and traumatised children. Also, multi-disciplinary teams should run professional foster care programmes. The respondent, however, questioned whether South Africa can afford the introduction of professional foster care.

The Child Health Policy Institute recommended that professional foster care should be of a short-term and intensive nature and should focus on reintegration. Further, professional foster care should be provided for children with special health/medical, emotional/psychological and physical needs.

The Foster Care Association of South Africa was of the view that all forms of foster care should be considered as professional. Foster care can then be divided into different types, e.g. therapeutic care. The respondent suggested that all foster care practitioners (social workers, foster parents and other caregivers) should be trained to render foster care services. Further, additional training can be provided depending on the type of foster care concerned. Also, foster parents trained to care for >hard to place= children or children with special needs should get an additional allowance.

The Department of Health and Social Services, Western Cape, was also of the view that all forms of foster care should be considered as professional. Further, proper screening and training are essential for all foster parents.

However, a substantial number of respondents felt that the concept >professional foster care= should not be included in the new child care legislation. The Department of Social Development, Free State, submitted that all foster parents should be empowered to care for children and that no additional incentives should be paid to any foster parent. Cape Town Child Welfare Society stated that professional foster care is expensive and that we do not have the resources needed for this type of care.

Question 30 on the Worksheet read as follows: *How can the new child care legislation promote foster placements for special needs and hard to place children?*

Suggestions by respondents included the following:

- an extra allowance in addition to the foster care grant to foster parents caring for special needs and >hard to place= children;
- an increase in the foster care grant;
- special selection and training of foster parents;
- ongoing support for foster parents;
- greater access to needed resources for foster parents; and
- provision for relief foster parents.

Cape Town Child Welfare Society recommended that the cost of additional services such as medical treatment, equipment, transport etc. should be carried by the state.

The Department of Social Development, Free State, submitted that attention should be given to >foster care houses= and that parents should receive a subsidy to provide such services. Further, the foster care grant should be limited to children with special needs.

The Child Health Policy Institute proposed that the care dependency grant should be extended to children with moderate disabilities and chronic diseases including HIV/AIDS.

17.3.2.4 **Evaluation and recommendations**

It would seem that the majority of children currently placed in foster care are children with behavioural problems.[33] Thus, many foster parents not only provide care, but also treatment. It is therefore difficult to determine to which categories of children professional foster care should be provided. Also, as stated above, the notion of >professional foster care= creates the impression that >ordinary= foster parents do not provide professional care to children. **For these reason, the Commission recommends as follows:**

- **That all forms of foster care be seen as having a professional dimension and that**

33 Personal communication with Mrs Elmarie Swanepoel from the Department of Social Development.

financing of this service take into account the need for training and support of caregivers.

- **That, in addition to the current foster care grant, an additional allowance be paid to foster parents caring for children with special needs which have specific cost implications, including disabilities and chronic illnesses.[34]**
- **That >special needs= be clearly defined.**
- **That the Minister be immediately enabled to make regulations for the provision of financial assistance to children with special needs, including HIV/AIDS.[35]**

17.4 Selection criteria for prospective foster parents

17.4.1 Broad concerns and current practice

Adequate training and preparation of foster carers are important elements in meeting children=s needs. It is therefore important to consider whether all foster parents should be selected based on a particular set of criteria and whether they should be required to undergo specific training. Currently, organisations delivering foster care services implement training programmes according to their own policies, practices and resources B if indeed they provide structured training at all. Selection is also not governed by any standardised approach.

17.4.2 Comments received

Question 12 of the Worksheet reads as follows: *Should the new child care legislation prescribe certain criteria for prospective foster parents? If so, what should these be?*

The majority of respondents submitted that the new child care legislation should prescribe certain criteria for the selection of prospective foster parents. Criteria suggested by various respondents included e.g. the following:

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34 This will promote the expeditious placement of >hard to place= children.

35 The Alliance for Children=s Entitlement to Social Security has recommended to the Committee of Inquiry into a Comprehensive Social Security System and to the national Department of Social Development that the care dependency grant be extended to children with moderate disabilities and chronic illnesses, including HIV/AIDS.

- emotional stability;
- a regular income;
- participation in the reunification process;
- being in a similar financial position to that of the biological parents;
- being trained;
- being of a certain age.

The Sinodale Kommissie vir die Diens van Barmhartigheid of the Nederduitse Gereformeerde Kerk suggested that financial and social status should not be criteria for the selection of foster parents. Ondersteuningsraad Vereeniging was, however, of the view that criteria should not be prescribed for foster parents as each situation is different.

Communicare stated that criteria for foster parents should not be prescribed by legislation, but should rather be based on broad guidelines.

17.4.3 Evaluation and recommendation

It appears that there are widespread variations in thinking and practice in the field at present. In addition, resources available to child welfare organisations in different areas differ substantially. Further, the training needs of extended family caregivers and those offering indefinite care will differ from those who are unrelated to the children in their care and are expected to participate in reunification services aimed at restoring foster children to their biological families. Standardised recruitment and training procedures are therefore unlikely to be viable at this stage. However, to ensure that all children in foster care receive at least a basic standard of care, **the Commission does not recommend that the new children=s statute should prescribe certain (eligibility) criteria for prospective foster parents, but is of the opinion that the Department of Social Development should embark on a consultative process of developing broad minimum criteria for the selection and training of substitute family caregivers in various categories. These criteria should then be form the basis of a comprehensive Departmental policy.**

17.5 Social and cultural issues when placing children in foster care

17.5.1 Introduction

Internationally the issue of transracial placement of children, in either foster care or adoption, has been controversial. According to one school of thought, Black children can be seriously disadvantaged through placement in white families and this is to be avoided at all costs, even if the implication is that such children must remain in institutional care. This view has been promoted in particular by the National Association of Black Social Workers in the USA, although its position has apparently been modified somewhat in recent years. The Association has stated as follows: >Black children should be placed only with Black families whether in foster care or for adoption. Black children belong physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future. Human beings are products of their environment and develop their sense of values, attitudes and self concept within their family structures. Black children in white homes are cut off from the healthy development of themselves as Black people=.[36] This view has some support in South Africa. An alternative school of thought is that, while placement within the child=s own cultural and religious context has substantial advantages and should be used when possible, no child should be denied the opportunity to grow up in a family environment purely because of the non-availablity of a suitable family of similar background. This section examines the issue of placement of children across ethnic, cultural and religious boundaries.

17.5.2 **Current Law and Practice**

Section 40 of the Child Care Act requires that in the making of decisions regarding placement of a child in foster care, >regard shall be had to the religious and cultural background of the child concerned and of his parents as against that of the person in or to whose custody the child is to be placed or transferred=. Thus, a family with the same religious and cultural background to that of the child should, where available, be the placement option of choice. This is the case not only for South African children, but also for foreign children, including refugee and undocumented immigrant children.[37] The CRC also stipulates that when placing a child in care, due regard must be paid to the desirability of continuity in a child=s upbringing and to the child=s ethnic, religious, cultural and

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36 National Association of Black Social Workers, USA: Position Paper (April 1972) as quoted in Mosikatsana >Case Comment: **Sawan v Tearoe**= (1994) 11 **CFLQ** at 98.

37 **Protecting the most vulnerable: guidelines and recommendations for protecting refugee children** NCRA Report (2000).

linguistic background.[38]

The matching up approach promoted by section 40 has been the subject of heated debate.[39] One view is that this approach is an unfortunate perpetuation of apartheid thinking, another is that it is a correct approach to transcultural and transracial placements.

While most practitioners agree that, where possible, the racial and cultural matching of children and prospective adoptive or foster parents is desirable, many express concern about the damaging effects of institutionalisation especially in the case of infants and very young children. They emphasise the urgency of the need to settle such a child into a permanent family environment in which he or she can form close bonds and develop normally, and they hold that if considerations of culture and ethnicity become the overriding factor, irreparable damage may be done to children who could have the benefit of care in a family environment, albeit by persons who are different in cultural or religious background or physical appearance.

The wording >regard shall be had= is rather vague, and it may be that there should be more specific information in the Act on when the court should treat a difference in cultural, religious, racial, or linguistic backgrounds as a sufficiently significant factor to justify refusing a placement.

At Durban Children=s Society, many abandoned HIV-positive babies end up in cross-cultural crisis-care placements because recruitment drives for crisis care parents are most successful amongst white middle-class parents.[40] Crisis care parents did not see a need to talk Zulu to the babies; the children were being socialised into their culture.[41]

17.5.3 Comparative review of systems in other countries

38 Article 20(3).

39 See D J Joubert >Interracial Adoptions: Can we learn from the Americans?= (1993) 110 **SALJ** 726; N Zaal >Avoiding the Best Interests of the Child. Race-Matching and the Child Care Act 74 of 1983' (1994) 10 **SAJHR** 372; T Motsikatsana >Transracial Adoptions: Are We Learning the Right Lessons from the Americans and Canadians? - A Reply to Professors Joubert and Zaal= (1995) 112 **SALJ** 606; idem >Examining Class and Racial Bias in the Adoption Process and the Viability of Transracial Adoptions as a Policy Preference: A Further Reply to Professors Joubert, Pakati and Zaal= (1997) 13 **SAJHR** 602.

40 H Loening-Voysey and T Wilson (2001).

41 Ibid.

17.5.3.1 **United States of America**

In the state of New York, authorised agencies may view race as a factor in their decision to either place a child in or remove a child from a foster home. Such a consideration is authorised by section 421.18 (b) of the State Department of Social Services= Regulations which states that >an authorised agency shall make an effort to place each child in a home as similar to and compatible with his or her ethnic, racial, religious and cultural background as possible=.[42]

In the case of **Rockefeller v Nickerson**[43] white foster parents initiated an Article 78 proceeding for an order to compel the Welfare Commissioner of Nassau County to accept their application for the adoption of a Black child. Judge Bernard Meyer held that the application of the foster parents was not rejected because of any unwritten policy of the Department of Welfare not to accept white foster parents for a black child. Apparently, the foster parents application was rejected on other grounds. Judge Meyer found that there was no departmental policy against interracial adoption and quoted from the leading case on the subject, **In re Adoption of a Minor**,[44] as follows: >There may be reasons why a difference in race or religion may have relevance in adoption proceedings. But that factor alone cannot be decisive in determining the child=s welfare=.

Carrieri[45] states that the existing policy, as it is with religion, is to place a child with foster parents of the same race and culture where practicable. However, policy must give way to reality and the best interest of the child. Where special circumstances exist, foster children should be placed in an interracial setting. Carrieri is of the view that it would be in the best interest of a mentally ill child to be adopted by parents of a different colour or culture rather than to remain in an institutional setting for the remainder of his or her life.

17.5.3.2 **England**

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42 J R Carrieri >Bi-racial foster care and adoptions= in **The Foster Child** (1989) published by the Practising Law Institute.

43 36 Misc. 2d 869, 233 N.Y.S 2d 314 (Sup. Ct., Nassau Co. 1962).

44 99 U.S. App. D.C. 228 F. 2d 446, 448.

45 J R Carrieri **The Foster Child** (1989).

The Department of Health Guidance states as follows:[46]

> It may be taken as a guiding principle of good practice that, other things being equal and in the great majority of cases, placement with a family of similar ethnic origin and religion is most likely to meet a child=s needs as fully as possible and to safeguard his or her welfare more effectively.

17.5.4 **Comments received**

The following questions were posed in the Worksheet:

> In what situations would foster care with a South African family be the placement of choice for a non-South African child? Are there guidelines that should be observed when considering placement of, e.g. a refugee child or an undocumented immigrant child? Could these guidelines be built into the law or disseminated as policy?

How relevant to foster care placements in South Africa is the requirement that regard must be had to the cultural and religious background of the child concerned? Should there be any specific requirements for agencies who arrange placements across religious and cultural boundaries or for caregivers who accept children from a cultural or religious background different from their own?

Is section 40 of the Child Care Act, 1983 being applied in practice when children are placed in foster care? If so, how? If not, why not?

Some of the respondents submitted that all efforts should be made to first trace the families of non-South African children. The respondents also agreed on a need for guidelines to assist in considering placement of foreign children. The Sinodale Kommissie vir Diens van Barmhartigheid of the Nederduitse Gereformeerde Kerk suggested that non-South African children should be placed with South African relatives, where possible. The Department of Health and Social Services, Western Cape proposed that issues to be considered when making care arrangements for a

46 D Berridge (1997) 21.

foreign child should include the possibility of tracing the child=s family, as well as the existing conditions, e.g. with regard to war, in the country of origin.

The majority of respondents agreed that regard must be had to the cultural and religious background of the child as against that of the person in whose custody the child is to be placed. Some felt that a distinction should be made between short-term and long-term placements.

CMR Eastern Transvaal stated that it was paternalistic and a continuation of colonialism to reason that Black children should be placed with white foster parents for the sake of the economic benefits of such placements. The respondent suggested that agencies should be required to provide proof of what they have done to ensure the placement of a child within his or her own culture or religion. This suggestion was endorsed by CMR Northern Transvaal.

The Catholic Women=s League submitted that the shortage of suitable placements is a reality and agencies are often forced to place children with available families who are not from the same background as that of the child. Thus, the law should not be too prescriptive. The Foster Care Association of South Africa was in favour of placing a child with a family of the same cultural and religious background, but submitted that a family placement, no matter how different, was better than institutional care, and that all placements must be based on the best interests of the child.

A few respondents, however, felt that culture and religion should not be criteria when placing a child in foster care. For example, Cape Town Child Welfare Society proposed that section 40 of the Child Care Act should be repealed as it militates against an integrated society.

The majority of respondents submitted that section 40 was not being rigidly applied in practice due to the shortage of foster parents. CMR Eastern Transvaal, on the other hand, mentioned that it had procedures in place to ensure that section 40 was applied in practice. These included screening requirements from the parents= own religious and cultural group. Further, every social worker was required to make a presentation to a multi-professional team about a proposed foster care placement and to obtain written consent from the parents for placement with a person from a different religion or culture. CMR Northern Transvaal likewise stated that it applied section 40 as far as possible in practice.

17.5.5 Evaluation and recommendations

Children placed with foster parents with a different background from their own may be, albeit not intentionally or directly, denied the right to enjoy their culture, practise their religion or use their language.[47] It is also unrealistic to expect from foster parents that they keep the child in touch with his or her culture, if the foster parents do not know what that culture entails. Culture itself is also an evasive concept and changes over time. It also seems that, although many child agencies prefer to place a child in the care of a family with the same cultural and religious background as that of the child, this is not always possible. Taking all this into account, **the Commission recommends as follows:**

- **When arranging care for a child, including a foreign child (refugee and undocumented immigrant children included), social workers should make full enquiries about the cultural, religious and linguistic background of the child, and the availability of foster parents with a similar background to that of the child.**
- **A social worker arranging care for a refugee or undocumented immigrant child should approach the United Nations High Commissioner for Refugees or relevant service agencies working in the refugee communities to identify appropriate families who can provide foster care to the child.[48]**
- **The social worker=s report must include steps taken to secure placement of the child within a family with a cultural, religious and linguistic background similar to that of the child;**
- **A child may only be placed with a family from a different background to that of the child, if no family with a similar background to that of the child is available, willing and suitable to foster the child.**
- **However, a pre-existing relationship between a child and a prospective foster parent with a different background to that of the child could serve as a ground for placing**

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47 As is prescribed by section 31(1) of the Constitution, 1996.

48 This recommendation is supported by the National Consortium on Refugee Affairs.

the child in the care of such parent.

17.6 Parental rights and responsibilities for foster parents

17.6.1 Introduction

Foster parents are charged with all the responsibilities of the daily care of the child, but are without decision-making capacity in a range of situations. The issue thus arises as to whether foster parents, particularly long-term foster parents, should be vested with greater rights and responsibilities in respect of their foster children.

17.6.2 Current Law and Practice

The Child Care Act provides that the parent or guardian of a child who has been placed in foster care by a court order, shall be divested of his or her rights of control over and custody of that child. Further, these rights, including the right to punish and to exercise discipline, shall be vested in the person in whose custody the child is placed.[49] The Act further stipulates that the rights transferred to a foster parent do not include the power to deal with any property of the child, or the power to consent to the marriage of the child, or to the performance of an operation upon the child or the provision of medical treatment.[50] Foster parents are also not eligible to sign documents required for the child to participate in school trips, holiday camps and the like. The present limitations on parental rights and responsibilities of foster parents can create considerable difficulties for them in carrying out their tasks. Their rights and responsibilities remain limited, even in situations where the biological parent or guardian has disappeared or is deceased. Where a child=s parent or guardian has died, the High Court remains the upper guardian of the child, unless or until another guardian is appointed, usually through adoption. The need for a form of foster care in which guardianship could be transferred to foster parents was also highlighted by the De Bruyn Commission in its Report into the Foster Care of Children.[51]

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49 Section 53 (1).

50 Section 53 (3).

51 Department of Health Services and Welfare, 1990.

17.6.3 Comparative review of systems in other countries

In Uganda, the Children=s Statute of 1996 gives more rights and responsibilities to a foster parent than the South African law. The Statute defines parental responsibilities as >all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to a child.= The Statute stipulates that where the natural parents of a child are deceased, parental responsibility may be passed on to the relatives of either parent, or by way of a care order, to a foster parent.[52] The Statute further states that a foster parent with whom a child is placed has parental responsibility for the child in his or her care.[53] Thus, foster parents are entitled to share parental responsibility with the biological parents of the child.

In Zambia, the Affiliation and Maintenance of Children Act of 1995 defines a custodian as a person appointed under the Act or any other law to be the guardian of the child.[54] The Act stipulates that if the court is satisfied that certain circumstances exist which result in the mother or father of the child not being appropriate custodians for the child, it may appoint any other person as custodian of the child.[55]

In the District of Columbia, the Foster Children=s Guardianship Act of 2000[56] aims to encourage stability in the lives of certain children who have been adjudicated to be neglected and have been removed from the custody of their parents. Further, the Act aims to increase the opportunities for the prompt permanent placement of children, especially with relatives, without ongoing government supervision.[57] In terms of this Act, a person may be appointed as a permanent guardian over a child if the child has been living with him or her for at least six months.[58] The court may issue a guardianship order only if the court finds that:[59]

- the permanent guardianship is in the child=s best interests;

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52 Section 7(2) of the Statute.

53 Section 32(1) of the Statute.

54 Section 1 of the Act.

55 Section 15(3) of the Act.

56 Approved by the Mayor, District of Columbia, on 16 January 2001.

57 Section 16-2381 of the Act.

58 Section 16-2383 (a) of the Act.

59 Section 16-2383 (c) of the Act.

- adoption, termination of parental rights, or return to the parent is not appropriate for the child; and
- the proposed permanent guardian is suitable and able to provide a safe and permanent home for the child.

The permanent guardian has the following rights and responsibilities concerning the child:[60]

- to protect, nurture, discipline and educate the child;
- to provide food, clothing, shelter, education as required by law, and routine health care for the child;
- to consent to health care without liability by reason of the consent for injury to the child resulting from the negligence or acts of third persons unless a parent would have been liable in the circumstances;
- to authorise a release of health care and educational information;
- to authorise a release of information when consent of a parent is required by law, regulation or policy;
- to consent to social and school activities of the child;
- to consent to military enlistment;
- to obtain representation for the child in legal actions; and
- to determine the nature and extent of the child=s contact with other persons.

Entry of a guardianship order does not terminate the parent and child relationship, including:[61]

- the right of the child to inherit from his or her parents;
- the parents= right to visit and contact the child (except as limited by the court);
- the parents= right to consent to the child=s adoption;
- the parents= right to determine the child=s religious affiliation; and
- the parents= responsibility to provide financial, medical and other support for the child.

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60 Section 16-2389 (a) of the Act.

61 Section 16-2389 (c) of the Act.

The permanent guardian is not liable to third persons, by reason of the relationship, for acts of the child.[62]

A guardianship order may be modified or terminated if the court finds, by a preponderance of evidence, that there has been a substantial and material change in the child=s circumstances subsequent to the entry of the guardianship order and that it is in the child=s best interests to modify or terminate the guardianship order.

17.6.4 **Comments received**

The following questions were posed in the Worksheet:

> How could parental rights and responsibilities be extended to long-term foster parents? When does a foster care placement become long-term?
>
> What rights and responsibilities should foster parents have vis-a vis the biological parents of the child?
>
> What rights and responsibilities should foster parents have vis-a-vis their foster children?
>
> Should the rights and responsibilities of foster parents be determined by agreement, by the parties involved, by court order, or specifically in the new child care legislation? If so, how? Please motivate your answers.

The majority of respondents submitted that a foster care placement should become long-term after the expiry of the initial court order, i.e. after two years. However, Communicare in Cape Town stated that long-term foster care placements should not be allowed and that children need permanency in their lives. (This approach seems to be based on the assumption that foster care cannot be made permanent.)

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62 Section 16-2389 (b).

The Department of Social Development, Free State, was of the view that foster parents should be vested with parental rights and responsibilities only after a period of two years and if there is no prospect of family reunification. Cape Town Child Welfare Society submitted that foster care should become long-term in cases where children are orphaned, their parents have been certified as mental patients, the prognosis for family reunification is minimal or nil, or there is a history of relapses as with alcoholic parents.

South Peninsula Legal Aid Clinic recommended that a foster care placement should become long-term in the following circumstances: (a) there is no prognosis for family reunification, (b) the child has been abandoned, (c) the parents cannot be traced, or (d) the parents are deceased.

The Department of Health and Social Services, Western Cape, stated that parental rights and responsibilities should be transferred to foster parents only if family reunification is not possible. However, provision should be made for revoking an order granting parental rights and responsibilities to foster parents in instances where the biological parent starts building up a meaningful bond with the child.

Respondents identified the following responsibilities of foster parents towards the biological parents of the child:

- to ensure ongoing contact between child and biological parents;
- to maintain, promote and encourage the child/parent relationship;
- to promote family reunification;
- to treat the biological parents with respect;
- to include the biological parents in special events concerning the child and to keep them informed of developments in the child=s life;
- to plan holidays in advance; and
- to respect the wishes of the biological parents with regard to the language and religion of the child.

The following were seen as rights of foster parents:

- to be treated with respect;

- to privacy;
- to be in a position to consent to an operation on the child;
- to voice their opinions, thoughts and feelings.

Foster parents were regarded as having the following responsibilities towards their foster children:

- to provide for their basic needs;
- to provide emotional support;
- to protect them from mental and physical harm;
- to respect them;
- to provide opportunities for their development;
- not to differentiate between their own children and their foster children, specifically with regard to discipline;
- to build their relationship with their biological parents;
- to be honest and open with them;
- to exercise discipline;
- to place them in suitable schools.

Further, respondents felt that foster children were entitled to expect from their foster parents that they be brought up in a stable environment. It was also suggested that foster children had a responsibility to respect and accept the guidance of their foster parents.

The majority of respondents submitted that the rights and responsibilities of foster parents should be set out in the new child care legislation. A substantial number of respondents proposed that the rights and responsibilities of foster parents be determined by agreement between the parties and that such agreement be made part of a court order. A few respondents suggested that the new child care legislation should lay a broad framework for the rights and responsibilities of foster parents and that more specific rights and responsibilities should be included in a court order.

The Department of Health and Social Services, Western Cape, was of the view that basic rights and responsibilities for foster parents should not only be legislated, but also be determined by way of agreement between the parties, and that the agreement should be made part of the court order. Further, the court order should be subjected to periodical review.

17.6.5 Evaluation and recommendations

The Commission recommends as follows:

- **The new children=s statute should provide for a procedure whereby a foster parent or a relative who has been appointed by the court to care for a child may, on application to the court by him or herself or by the department or organisation managing the case, acquire specified parental rights and responsibilities in addition to those initially conferred by the court.[63]**
- **The parties to the proceedings must include the parent(s) of the child, the foster parent(s) or relative(s) and the child if appropriate.**
- **If a parent has been given proper notice, but fails to appear, the court may proceed in the parent=s absence.**
- **Where parents cannot be found, and therefore not be given notice, the court may dispense with the requirement of giving notice to the parents.**
- **The children=s court may allocate additional parental rights and responsibilities to a foster parent(s) or relative(s) only if this is in the best interests of the child concerned.**
- **An agreement regarding specific rights and responsibilities of the foster parents reached between all the parties, including the department or organisation managing the case, may, at the discretion of the court, be incorporated into the court order.**
- **In instances where a child has been abandoned, or his or her parents are deceased, or where reunification is not in the best interests of the child, the children=s court may, when making a placement order, grant certain parental rights and responsibilities to the foster parent(s) or relative(s) over and above those normally allocated, at the time of the initial enquiry.**

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63 For the manner in which the Commission proposes that parental rights and responsibilities should be acquired, see Chapter 8 above.

- **The children=s court should have the discretion to request that a written report be submitted to it within six months or any other specified period concerning the suitability of the arrangements made in respect of the child.**
- **Following the approach taken by the District of Columbia, an order conferring certain parental rights and responsibilities may be altered or terminated if the court finds that there has been a substantial and material change in the child=s circumstances and that it is in the best interests of the child to alter or terminate the order.**
- **The new children=s statute should broadly outline the rights and responsibilities of biological parents, foster parents and children in the foster care setting.**

17.7 Termination of parental rights and responsibilities over certain children in foster care

17.7.1 Introduction

There is an impression that the majority of foster placements last until the children reaches the age of 18.[64] Although the goal of the agencies is to return the children to their biological families, success appears to be limited. Resources available for reunification services are inadequate, and neglect, abuse or abandonment are seldom resolved in such a way that children can return to their natural parents. Also, kinship care arrangements are frequently of a long-term nature as the biological parents may have disappeared or have ongoing problems. The recommendations outlined in 17.6.5 above are designed to create a more secure situation for children in long-term foster care. However, an additional contributing factor to the insecurity of many children in foster care is the fact that their biological parents continue to have legal rights and responsibilities with respect to them even where efforts towards family reunification have been exhausted. This situation creates barriers to permanency planning.[65]

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64 Van de Vijver L **Current trends in transracial adoptions and foster care placements in the Western Cape** 12 June 1998. Master=s thesis.

65 See also 10.4 above.

17.7.2 Current Law and Practice

The Child Care Act, 1983 does not contain a provision which specifically deals with the termination of parental rights and responsibilities except in the case of adoption, which may occur without consent in certain circumstances. For example, consent to adoption may be dispensed with if a parent has physically, emotionally or sexually assaulted, ill-treated or abused the child.[66] Social workers, however, report that there is often a reluctance on the part of commissioners of child welfare to use their powers in this regard. This may be due to a lack of clear guidelines. There is also no legal differentiation between children of different ages at the time of initial placement. Thus the law does not take into account the fact that very young children tend to quickly form attachments to new caregivers. A child may thus be significantly harmed by being uprooted from the foster home after having been there for a substantial period.[67]

Parental rights over a child placed in foster care do not terminate without an adoption, even if it becomes clear that there is no possibility of family reunification. Not only is adoption difficult to attain, for the above reasons, but many foster parents cannot afford to adopt due to their need for ongoing financial assistance in the form of the foster care grant. There may be other reasons why adoption is not advisable. For example, the child (especially an older child) may wish to maintain his or her separate identity. Or, in the case of a placement with relatives, it may be appropriate to maintain the distinction between the biological parents and e.g. the grandparents, uncles and aunts etc., in order to prevent confusion and identity problems in the child.

Foster care as presently structured is inherently insecure. Foster parents are often hesitant to bond with the child because they face the possibility of having to return him or her to the biological parents. Children in care are typically uncertain as to where they belong and tend to have an expectation, based on past experience, that they will sooner or later be rejected. Such a child may act out his or her insecurity in ways which are seriously disruptive and lead to the breakdown of the

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66 Section 19 of the Act.

67 Goldstein J, Freud A and N Solnit **Beyond the Best Interests of the Child** New York: Free Press 1973.

placement, and will then have to be moved to a new foster home or to residential care. Thus many children spend long periods of time >drifting= in care, sometimes moving in and out of a series of placements in the process.

Contact between the child in foster care and the biological parents is an essential part of the foster care process. Helping to manage this contact and to deal with the needs and anxieties of all concerned is an issue in which foster parents require training and strong social work support. However, some biological parents, while making no progress towards resuming care of the child, maintain a pattern of extremely disruptive behaviour towards the child and the foster family. Others make contact after many years of absence, and exercise their legal entitlement to access to their children. Such parents may be immature, emotionally disturbed and/or violent. Their ongoing involvement or sudden re-entry into the child=s life may cause extremes of insecurity both for the child and the foster family, which may precipitate the collapse of the placement. In addition, the continuation of parental rights and responsibilities may have the effect of preventing the recruitment of either foster or adoptive parents for children in residential care, as explained in chapter 10 at 10.4.5 above.

17.7.3 Comparative review of systems in other countries

Many countries have legislative provisions for the termination of parental rights and responsibilities in order to achieve permanency for a child who would otherwise remain indefinitely in an uncertain position in foster care.[68] For example, in the United States of America, the Adoption Assistance and Child Welfare Act of 1980 aims to prevent unnecessary foster care placement, to reunify families where possible, and to limit time spent in foster care by encouraging adoption when return to a natural parent is not possible.[69] The Act assures each child in foster care a permanency hearing no later than 12 months after the date the child is considered to have entered foster care, and not less frequently than every 12 months thereafter during the continuation of foster care. The aim of the permanency hearing is to determine the permanency plan for the child which includes whether, and if applicable when, the child will be returned to his or her parents or placed for adoption. In cases where the State agency has documented to the court a compelling reason for determining that it

68 In this regard see also 10.4.6 above.

69 Guuenheim M >The effects of recent trends to accelerate the termination of parental rights of children in foster care - An empirical analysis in two States= (1995) 29:1 **Family Law Quarterly** 122 - 123.

would not be in the best interests of the child to return home, the case will be referred for termination of parental rights or the child will be placed for adoption with a fit and willing relative or with a legal guardian.[70]

The Adoption and Safe Families Act of 1997 (an Act to promote the adoption of children in foster care) obliges States to file a petition for termination of parental rights under certain conditions.[71]

17.7.4 Recommendations

Measures to promote permanency for children in all forms of temporary care, including foster care, are discussed in detail in chapter 10 at 10.4. Specifically where children in foster care are concerned, **the Commission recommends that an existing bond with a foster parent(s) be taken into account when decisions are taken regarding the termination of responsibilities of biological parents. The securing of an established and positive bond with a foster family should, where appropriate, be given priority as a means to achieving permanency for the child.**

The Commission further recommends that provision be made for subsidised adoption.[72] This would enable long-term caregivers who cannot care for their foster children without financial aid, to adopt these children. The need for subsidised adoption could however fall away if a universal non-means-tested grant were to become available, along with a grant for children with special needs related e.g. to disability or chronic illness, as per recommendations referred to elsewhere in this Discussion Paper.

17.8 Statutory supervision

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70 42 U.S.C. section 675.

71 It should be borne in mind that the substitute care system in the USA is differently structured from that in this country, with foster care being the usual care arrangement for children of all ages who require temporary court-ordered substitute care. In South Africa children in care who are not placed with relatives, especially older children, tend to start off in places of safety and children=s homes, where possible moving into foster care later. Measures aimed at permanency for children in foster care in the USA should thus be looked at in relation to the entire care system in South Africa, and not just foster care. In addition, adoption as promoted in the USA seems usually to be by persons other than the foster parents; hence the aim usually seems to be to open the way for adoption by new families, rather than to make the foster placement permanent as is often the aim in this country .

72 See 18.6.7 below.

17.8.1 Introduction

Statutory supervision serves as a monitoring tool for children in foster care placements. However, limited welfare resources have led to the ineffective supervision of children in foster care.

17.8.2 Current Law and Practice

In terms of current legislation, foster care placements can be formalised only through investigations and court appearances by professional social workers. Once a child has legally been placed in foster care, supervision services have to be rendered by social workers for the duration of the placement and a report must be submitted to the Department of Social Development three months prior to the expiration of the court order.[73] In practice this normally means that a report must be submitted every two years until a child is transferred or discharged. As many placements are of a long-term nature, foster care social workers usually have large and unmanageable caseloads.

The non-governmental welfare sector undertakes a substantial proportion of statutory services carried out in terms of the Child Care Act. This arrangement has long been a source of discontent as this sector feels that it does not receive adequate compensation for these services, which it undertakes on behalf of the state. In recent years, the financial situation of the sector has worsened in view of cutbacks, in real terms, in subsidies paid to these organisations.

Foster care supervision frequently has limited clinical or therapeutic value and professional interventions tend to be crisis-orientated, as high caseloads make it very difficult to deliver services of an appropriate quality or intensity. Very often, statutory supervision is focussed on administrative tasks such as ensuring that foster care grants are paid and orders are extended every second year.

17.8.3 Comments received

Question 23 of the Worksheet read as follows: *How could statutory supervision services for foster care be made more effective?*

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73 Regulation 14(3).

The respondents made the following suggestions:

- volunteers should be trained and empowered to render statutory supervision services under the guidance of social workers officially designated to render such services;
- volunteers or auxiliary workers should render supervision services in long-term placements as these do not need specialised services;
- statutory supervision should be less intensive after three years;
- more resources should be made available to social workers, e.g. vehicles;
- supervision services should only be rendered in placements with non-relatives and where family reunification needs to take place;
- alternative human resource options should be utilised, e.g. community committees, to render supervision services; and
- the difference in amount between the child support and foster care grants should be addressed to reduce the demand for the foster care grant, which would in turn reduce the amount of foster care supervision.

The following question was posed on the Worksheet: *How could the new child care legislation ensure that in appropriate cases family reunification services are rendered to children in foster care?*

Cape Town Child Welfare Society submitted that social workers must every six months, during the period of the order, account to either a commissioner of child welfare or the Director-General on prognosis for reunification. Further, social workers and community leaders must ensure that those social pathologies that were prevalent in the child=s home and community environment which caused the child=s removal in the first place, are addressed and eliminated.

The Child Health Policy Institute suggested that reunification services should be focussed on cases where reunification is likely to take place within a certain period. The Foster Care Association of South Africa proposed that legislation should stipulate that thorough assessment must take place prior to the placement and that a detailed care plan must be drawn up. Based on the assessment, appropriate placement can be made to ensure reunification where appropriate.

CMR Pretoria North recommended that at the first review, a determination should be made whether

reunification is still possible. CMR Rooihuiskraal suggested that intensive reunification services should be rendered in cases where there is a high likelihood for reunification. Where reunification is not possible, the placement should be of a more permanent nature.
The Department of Health and Social Services, Western Cape, stated that section 16(2) reports should motivate why a child cannot be returned to his or her parent(s). Further, the importance of Regulation 15 reports should be emphasised.

Respondents were also asked the following question:

> It is sometimes argued that it is not cost-effective for cases involving stable long-term foster care, especially kinship care, to remain indefinitely on social work caseloads, especially where there is no likelihood of family reunification, but the grant continues to be needed in order to sustain the placement. These cases, the argument goes, should rather be dealt with via administrative processes within the social security system. Group and community work programmes can be designed to provide additional support / enrichment. Scarce social work resources for individualised work should then rather be concentrated on cases where family reunification is possible, or where there is a specific need for support and assistance.= Do you agree or disagree with this view? Please motivate your answer. If you do agree, what suggestions do you have as to how such a system might work?

The majority of respondents agreed with the view. Some, however, felt that there is still a need to monitor long-term placements to a certain extent. Pretoria Child Welfare Society suggested that welfare organisations should offer ongoing programmes to long-term foster parents, in areas such as life-skills training and income-generation. CMR Eastern Transvaal said that although it sounds like a good idea in theory, it might not work in practice. The respondent stated that there would have to be specified criteria to determine which cases could be dealt with administratively and which should be referred for case work. CMR Northern Transvaal agreed with the above view, but suggested that long-term foster parents should still have the responsibility to provide the social worker with school reports of the child and to contact the social worker when problems are being experienced.

17.8.4 **Evaluation and recommendations**

In addition to the measures outlined at 10.4.8 above, the Commission recommends as follows with regard to family reunification services:

- **If a child has not been reunited with his or her family after the expiry of the initial court order, the social worker concerned must submit a report to the children's court in which it should be explained why the child was not reunified with his or her family, whether family reunification is still possible, and what steps will be taken to create stability in the child=s life. At this point the court may -**

  – **authorise the termination of reunification services; or**
  – **terminate some or all parental rights and responsibilities subject to the conditions mentioned in chapter 10 at 10.4.8 and/or**
  – **confer additional parental responsibilities or rights on the foster parents or relatives, should this appear to be in the best interests of the child.**

With regard to statutory supervision, the Commission recommends as follows:

- **Supervision services should not be required for a child in kinship care, unless there is a need for such services, if the child=s parents are deceased or cannot be traced and/or there appears to be no possibility of family reunification.** Scarce social work resources could then be focused on cases where there is a likelihood of family reunification.
- **The children=s court may, when making a placement in foster care or with relatives in respect of a child who has been abandoned or whose parents are deceased, determine the degree of supervision to be rendered with regard to the foster care placement,** particularly if the court has ordered that the placement should be of a more permanent nature.

17.9 Duration and extension of foster care orders

17.9.1 Introduction

Originally, foster care was seen as a short-term placement with a view to the child=s return as soon as possible to his or her family home. However, abandoned and orphaned children often remain in foster care until they reach the age of 18. This raises the issue of whether the court, when making a foster care placement, should not stipulate that the placement be of a more permanent nature. In

addition, there have been concerns that children who >graduate= from foster care by reason of turning eighteen are often in a vulnerable position, being at risk of the removal of material and other forms of support before they are ready to make their way as independent adults.

17.9.2 Current Law and Practice

An order that a child be placed in the custody of a suitable foster parent[74] lapses after the expiration of a period of two years or on a date determined by the children=s court.[75] The Minister may extend the validity of a foster care placement order for a further period not exceeding two years at a time, provided that such an order may not be extended beyond the date on which the child turns 18 years.[76]

The Minister may, if he or she deems it necessary, extend the order that a child remain in a school of industries until the end of the year in which he or she turns 21 years.[77] Section 33(3) of the Child Care Act also provides that the Minister may approve that a child placed in any form of substitute care in terms of the Act remain in such care after he or she has attained the age of 18 years. This is possible on application of, or with the consent of the child, and, if they can be traced, the parents, to enable that child to complete his or her education or training. As children in foster care and children=s homes are not covered by section 16(3), they can only remain in care by the consent of all concerned, without any extension of the court order. The children=s court, like the Minister, does not have the power to extend the stay in foster care or in a children=s home of a person over the

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74 Section 15(1)(b) of the Child Care Act, 74 of 1983.

75 Section 16(1) of the Child Care Act.

76 Section 16(2) of the Child Care Act.

77 Section 16(3) of the Child Care Act.

age of 18 years.[78] The point has been made that young persons in these categories of care are unprotected e.g. from exploitation by parents who may wish them to terminate their schooling and earn an income for them.

17.9.3 Comparative review of systems in other countries

78 See however section 15(3) which provides that an order may be made regarding a person over the age of eighteen if that person was under eighteen at the time of the opening of the inquiry B this appears to be a contradiction in the law as it stands.

In Uganda, the Children=s Statute of 1996 stipulates that a Family and Children Court may make an order or an interim care order placing a child in the care of the warden of an approved home or with foster parents.[79] The Statute further states that a care order shall be for a maximum period of three years or until the child reaches the age of 18 years, whichever is the shortest.[80]

In England, the Children Act of 1989 stipulates that any care order, other than an interim care order, shall continue in force until the child reaches the age of 18, unless it is brought to an end earlier.[81]

17.9.4 Comments received

Question 7 on the Worksheet read as follows: *Should any changes be made to the duration and length of foster care orders, as set out in the current Child Care Act? If so, which changes would you suggest?*

A substantial number of respondents argued that a distinction should be made between short-term foster care where there is a prospect of family reunification and long-term foster care where family reunification is not likely to take place, e.g. where a child has been abandoned or orphaned. Further, short-term foster care should be limited to a maximum period of two years, whilst long-term foster care should be for periods longer than two years.

The Foster Care Association of South Africa suggested that subsidised adoption should be considered in cases where financial need is the motivation for long-term foster care and where there is no possibility of family reunification.

The SA Vroue Federasie proposed that a foster care placement should not be extended more than twice, whereafter adoption should be considered.

17.9.5 Evaluation and recommendations

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79 Section 28(1) of the Statute.

80 Section 30(1) of the Act.

81 Section 91(12) of the Act.

The Commission recommends as follows:

- **In instances where a child has been abandoned, or his or her parents are deceased, or where there is no purpose in requiring family reunification services, the children=s court may make a foster care order for a period of more than two years if this is in the best interests of the child.**

- **The Minister may, if he or she deems it necessary, order that a child whose period of retention in foster care has expired or is about to expire, return to or remain in foster care for any further period, and may from time to time extend that period, provided that no such order or extension shall extend beyond the end of the year in which the person turns 21 years. Further provided that if the child is about to turn or has turned eighteen, such further retention will be subject to the consent of the child.**

The Commission notes that, should the age of majority be lowered to eighteen as recommended at 4.5 above, any young person over the age of eighteen will have to give consent to an arrangement under this Act whereby he or she remains in care, and will be able to do so without the concurrent consent of his or her parents. This will do away with the present discrepancy between those in schools of industries and those in foster care and children=s homes.

17.10 Right of non-South African children to foster care grants

17.10.1 Introduction

Refugee and undocumented immigrant children usually enter South Africa without any means of support. Some are initially in the company of their parents or other adults but become destitute later on, e.g. due to the death or disappearance of the adults involved. Others may be abandoned after being born in this country, or may require protective intervention due to abuse or neglect. Foster care is often the appropriate measure for such children, and access to the foster care grant is usually necessary to arrange this form of placement.

17.10.2 Current Law and Practice

The CRC affords to every child the right to social security,[82] and both the CRC and the African Children Charter prohibit discrimination against children on the grounds of nationality.[83] The South African Constitution gives all children irrespective of nationality the right to basic social services and to appropriate care when removed from the family environment.[84]

Section 4A of the Welfare Laws Amendment Act, 1997, read with Regulation 9(1)(b) of the Social Assistance Act, 1992, entitles a child in need of care who is not a South African citizen to a foster care grant, provided such child has a South African 13-digit identification document or an official document from the country of origin. The Department of Home Affairs has since 2 May 2001 been issuing 13-digit, maroon refugee identity documents. However, these documents are only issued to adults with refugee status. The Commission has been informed that, in practice, children who have fled from their country because of war or who are for other reasons displaced are being denied access to the foster care grant, due to being unable to produce the required identification documents.[85]

17.10.3 Comments received

The following question was posed in the Worksheet: *Are there difficulties in obtaining foster care grants for non-South African children? If so, what are the difficulties and how could these be*

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82 Article 26.

83 Articles 2 and 3 respectively.

84 Section 28(1) (b) and (c)

85 In a presentation at a workshop on *the Protection of Unacompanied Refugee and Asylum Seeker Minors,* held in Pretoria on 3 August 2001, Ms P. Naicker of the Department of Social Development reported that the Department was putting in place administrative measures to overcome this problem. These, however, do not yet appear to be operational.

overcome through legislation?

The majority of respondents agreed that the lack of identification documentation was a major obstacle to obtaining financial assistance for non-South African children. The Child Health Policy Institute recommended that birth certificates be issued at hospitals. South Peninsula Legal Aid Clinic suggested that commissioners of child welfare be empowered to order that the Department of Home Affairs issue identification documents for foreign children. Some respondents, however, felt that only South African children should be entitled to financial assistance.

17.10.4 Evaluation and recommendations

It is a reality that a number of child refugees and others of indeterminate status are in South Africa and are coming to the attention of the child protection services due to destitution, abandonment, abuse or neglect. Constitutionally and in terms of international child rights agreements these children are entitled to appropriate care and protection, with foster care being an important means to this end. In the absence of required documentation, foreign children are denied a basic measure of care and protection. **The Commission therefore recommends that a children=s court order declaring a child in need of care should, in the absence of a 13-digit SA identification document or any official document from the country of origin, serve as a basis for granting financial assistance to any child. The Commission is further of the view that the children=s court should assist, where possible, such undocumented children in obtaining the necessary identification documents**. In this regard, the court could make fruitful use of a personal accountability order in terms of which the court can order any particular individual who may have failed in his or her obligation towards a particular child to appear before the court and explain that failure.[86]

17.11 Social Security

17.11.1 Introduction

86 See 23.10.4 below.

It has been suggested that >social security should provide for the basic needs of a child, and for those special needs that arise from a chronic health condition or a compromised home situation, in order to ensure his or her survival and a standard of living adequate for his or her development=.[87] However, social security has yet to reach many children who are in need of assistance. For purposes of the present discussion, social security is examined as it applies to children in foster care.

17.11.2 Current Law and Practice

Social assistance for children in the form of grants is administered by the provincial Departments of Social Development in terms of the Social Assistance Act of 1992 and the Child Care Act of 1983 as amended.[88] A foster care grant is payable to foster parents in respect of a foster child who has been legally placed in their custody in terms of the Child Care Act. The Constitution also gives children the right of access to social security.[89]

Unlike most other benefits, the foster care grant is not means-tested unless the child has his or her own income. When the child support grant replaced the old maintenance grant, fear was expressed that the demand for foster care grants would increase. There are indications that this has happened in certain areas of the country. Recent research undertaken in rural hospitals in KwaZulu-Natal has shown that social workers are encouraging informal caregivers to apply for foster care grants instead of the child support grant, as the latter is far less than the foster care grant and is only available to children under the age of 7 years.[90] It also appears that parents who would otherwise be able to care for their own children may be handing them over to relatives so that these relatives can access the foster care grant.[91] The number of foster care grants paid increased from 45 599 in

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87 Submission to the Committee of Inquiry into a Comprehensive Social Security System and to the National Department of Social Development on **Social Security for Children in South Africa** (2001) made by the Alliance for Children's Entitlement to Social Security (ACESS).

88 **Issue Paper on Social Security for Children in South Africa** (2000). Prepared for the Committee of Inquiry into a Comprehensive Social Security System in South Africa, prepared by the Child Health Policy Institute and Black Sash

89 Section 27(1)(c).

90 P M Brink **Child abandonment in South African hospitals** (2000) Research report for Health Systems Trust.

91 **Issue Paper on Social Security for Children in South Africa** (2000).

September 1999 to 49 600 in April 2000, an increase of 8,8%.[92]

17.11.3 **Comments received**

The following questions were posed on the Worksheet:

> Should the amount of financial support made available to foster parents differ according to the type of foster care they are providing?
>
> Should means testing for foster parents (a) who are not related to the child (b) in kinship care situations be introduced?

The majority of respondents submitted that financial support should differ according to the type of care involved. Some felt that placements with non-relatives should qualify for a higher amount. Other opined that the amount of financial support should vary in accordance with the needs of the child, e.g. foster parents caring for a child with a disability or with HIV/AIDS should qualify for a higher amount.

One respondent felt, however, that financial support for all foster parents should be the same. The respondent feared that the extended family might become less interested in fostering if paid a lesser amount than an unrelated foster parent.

The majority of respondents argued that foster parents not related to the child should not be subjected to a means test. Some suggested that a means test be introduced for foster parents who were relatives. Communicare and the Catholic Women=s League were in favour of a means test in non-related foster placements.

The Department of Health and Social Services, Western Cape, proposed that a universal means-tested child care grant be introduced, and suggested that this should replace the child support and foster care grants.

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92 Ibid.

17.11.4 **Evaluation and recommendations**

Where children are removed from their parents or primary caregivers through the State intervention (the children=s court process), the State has a constitutional obligation in the light of the **Grootboom**-decision to care for such children.[93] Such care can take the form of payment of a foster care grant. **In our opinion, the State must provide a foster care grant when a child is placed in foster care, whether with a relative or not, through formal State intervention.**

The Commission accordingly recommends:

- **Foster care placements with persons unrelated to the child should be supported through a non-means-tested foster care grant as is presently the case. Should a universal grant be introduced, this would be an additional source of support for persons willing to provide substitute care for children in need thereof. The Commission invites comment on whether the universal grant should be in addition to the foster care grant or whether the amount of the universal grant should be set off against the foster care grant.**

- **Children who require formal protective services and are placed in care with relatives by means of a court order should qualify for the same foster care grant, which should be of the same amount as the grant payable to non-relatives.**

- **Relatives caring for related children on an informal basis may approach the children=s court to formally place such children in their care.** However, it must be born in mind that such placement would involve the children=s court finding a particular child in need of care.

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93 See 3.4 and 3.5 above.

- **Informal care by relatives (non court-ordered placements) should be facilitated through a non-means-tested universal grant[94] or, in the absence of such a measure, a specific grant designed for this purpose. This grant should be supplemented with an additional needs-based grant such as the care dependency grant if the child has special needs with cost implications.[95]**

- **In addition to the current foster care grant, an allowance should be paid to foster parents and relatives caring for children with special needs.[96]**

- **Measures to facilitate the fostering of >special needs= children should be considered. These could include tax rebates, and free health services and education for the biological children of the caregivers as well as the children in their foster care.**

It came to the Commission=s attention that there is reluctance by some commissioners of child welfare to make orders placing children in the long-term care of relatives.[97] There is also apparently reluctance by some officials of provincial Departments of Social Development to process requests for children to be placed in the long-term care of relatives. This happens despite the fact that the Child Care Act as it presently stands provide for assistance to relatives caring for related children.[98] The present Act in no way exclude relatives of the child from being approved as foster parents, and the Social Assistance Act makes no distinction between relatives and non-relatives for purposes of the allocation of foster care grants.[99]

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94 This is the same measure mentioned in several other places in this Discussion Paper, having been recommended to the Taylor Commission by various organisations. Such a grant would help ensure that households do not only rely on the grant of the additional child that they have taken in as all children in a household would have access to such grant. Such a measure would strengthen the capacity of the extended family to absorb more orphaned children, while also greatly reducing the incentive to move children away from their biological parents in order to secure financial assistance.

95 See also 25.4 below.

96 Ibid.

97 See 17.2.1 above.

98 The grounds set out in section 14(4) in terms of which a child can be found in need of care would cover virtually all situations of children whose parents or guardians have died of AIDS or whose parents are too ill to care for them, and whose relatives lack adequate means to support them.

99 D S Rothman >Foster care placements : Section 15(1)(b) of the Child Care Act 74 of 1983 (as amended)= (1999) Vol. 2 No. 3 **The Judicial Officer** 98.

The Commission would therefore suggest as an interim emergency measure that the Ministers of Justice and Social Development send directives to all the relevant offices under their jurisdiction pointing out that foster care with relatives, where available, is usually the placement of choice for destitute children including those orphaned by AIDS, and encouraging them to facilitate such placements and to remove current obstacles until such time as new legislation is in place to provide specifically for these children. The Commission assume that top-up financing might be required to ensure that all provinces have sufficient funds in their social security budgets to cover the children who would then enter the system B failing this, barriers to placement might continue to be raised by officials.

CHAPTER 18

ADOPTION AS A FORM OF SUBSTITUTE FAMILY CARE

18.1 Introduction

The family as a social unit is the foundation of our society. It provides security and a sense of identity for the child, and is the >natural environment for the growth and well-being of all its members . . . particularly children=.[1] Where for some reason such relationship is unavailable or fails, society must provide systems and resources to safeguard the welfare of the child.

How we treat our children, especially those who lack adequate parental care, is a measure of our community. There have been major changes over the past last century, both in our society and in our perception of the significance of a child=s personal status and of the role of the family. It is also evident that the lack of a coherent and principled approach to the placement, protection and care of children in South Africa whose birth families cannot or will not provide properly for them disadvantages these children. However, adoption cannot be viewed in isolation from the wider issue of the placement of children needing alternative care. Rather, it represents one end of a spectrum of available options.

We will dealt with inter-country adoption in Chapter 22 below and will not cover that aspect in this Chapter.

18.2 Adoption as substitute family care

From the following table it appears that, in comparison to foster care, adoption as a form of substitute family care still has lots of potential to accommodate children.

Year	New adoptions registered
1993	2 117

[1] Preamble CRC.

1994	2 290
1995	2 587
1996	3 132
1997	3 048
1998	2 716
1999	2 736
2000	2 769

Source: The Registrar of Adoptions

Adoption, as it is practised today, embodies a deep sense of social purpose - the primary aim of which being the attempt to assuage the need to provide a stable home for a child. This enables a child to profit from an upbringing that he or she would not otherwise enjoy.[2] Adoption can therefore be described as a process by which society provides a substitute family for a child whose natural parents are unable to or unwilling to care for the child.[3] It can therefore be seen primarily as a device for imitating nature in respect of the rearing of a child. This need not be the purpose, or at least the sole purpose, of adoption. It can, in theory at least, also be used simply as a means of altering legal relationships, particularly for the purposes of the law of succession.

18.3 Current South African law and practice

18.3.1 Introduction

The current South African adoption system is regarded as inadequate due to the small number of

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2 See also Divya Singh >Adoption of children born out of wedlock= 1996 (29) **De Jure** 305; Anthony Dickey **Family Law** (third edition) Sydney: LBC Information Services 1997 423.

3 As was done in the **Final Report** (1977) of the Royal Commission on Human Relationships (Vol 4, para 2, p 98), quoted by Anthony Dickey **Family Law** (third edition) Sydney: LBC Information Services 1997 423.

children who are placed in adoption annually.[4] Concern was expressed in the White Paper for Social Welfare about the fragmentation and underutilisation of the adoption system, in particular because of its failure to meet the needs of abandoned children or children who will require care as a result of the predicted HIV/AIDS epidemic.

Although there have been several developments in policy in the child-care field during recent years, no effort has been made to formulate a comprehensive framework for adoption services. The Inter-Ministerial Committee on Young People at Risk, for example, acknowledged adoptive care as one of a range of care services available to children. However, it did not investigate factors related to the feasibility of the existing services. While the need for a system of subsidised adoption was recognised in the White Paper for Social Welfare, the Lund Committee, in its investigation of social security grants for families and children, failed to make recommendations regarding the implementation of such a grant.

The Department of Social Development drafted a policy document on the transformation of South African adoption practice which proposes the standardisation of adoption services, the formulation of minimum norms and standards, and the development of life skills programmes for prospective adoptive and birth parents. It highlighted the importance of awareness campaigns to promote adoption and urged that consideration be given to subsidized adoptions. It suggested that mechanisms to monitor the transformation of the adoption system in South Africa be developed and implemented, as well as indicators for the collection of quantitative and qualitative statistical data on the transformed adoption system.[5] It is unclear how the Department plans to take the process of transformation forward, or to achieve any of the objectives outlined in its policy statement as no plan of action had been formulated.

In addition, recent policy proposals regarding the financing of developmental social services, create considerable confusion about the financing of specialist welfare services, such as adoption. In its Financing Policy, the Department of Social Development recommends that specialised services and those directed at a particular problem area be phased out and be replaced with developmental and integrated services. These proposals, if implemented in their current format, could have a

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4 Petro Brink **An Exploration of South African Adoption Practice in Respect of Abandoned Children**, Master of Social Science=s thesis, University of Natal, Durban, June 1999, p. 26.

5 Issue Paper 13, par. 5.12.

detrimental effect on adoption services in South Africa.[6]

The law relating to adoption is contained in Chapter 4 of the Child Care Act, 1983. Its provisions are designed to promote the welfare of the child by admitting him or her to authentic family relationships, while at the same time safeguarding the interests both of the natural and of the adoptive parents.[7]

18.3.2 Requirements for adoption

Adoption in terms of the Child Care Act, 1983 is a formal process by means of which parental power over a child is terminated, and vested in another person or persons, namely the adoptive parent(s).[8] Section 17 of the Act provides that a child may be adopted by a husband and his wife jointly,[9] by a widower or widow or unmarried[10] or divorced person, or by a married person whose spouse is the parent of the child.[11] Before making an adoption order, the court must be satisfied that the person or persons who are qualified to adopt a child in terms of section 17 meet the following requirements:[12]

* They must possess adequate means to maintain and educate the child;[13]

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6 Petro Brink, Master=s thesis, p. 27.

7 Van Heerden et al **Boberg=s Law of Persons and the Family** (2nd edition) 437.

8 Barnard, Cronjé and Olivier **The South African Law of Persons and Family Law** 279.

9 Married persons can adopt a child only jointly. See also the wide definition of >marriage= in section 1 of the Child Care Act, 1983.

10 Tshepo Mosikatsana >Comment on *The Adoption by K and B, Re* (1995) 31 CRR (2D) 151 (Ont Prov Div)= 1996 (12) **SAJHR** 582 at 583 - 4 argues that the inclusion in section 17 of an >unmarried= person as one of the classes of persons qualified to adopt a child clearly includes single gays and lesbians as prospective adoptive parents. See, however, John B >Prejudice passed off as screening= (February / March 2000) **ChildrenFIRST** 9.

11 In terms of the amendments brought about to the Child Care Act, 1983 by the Adoption Matters Amendment Act 56 of 1998, the natural father of a child born out of wedlock can now adopt his child.

12 Prescribed by section 18(4) of the Child Care Act, 1983.

13 Section 18(4)(a). Van Heerden et al **Boberg=s Law of Persons and the Family** (2nd edition) 448, footnote 64, point out that section 18(4)(a) is consistent with the provisions of article 27 of the UN Convention on the Rights of the Child, which recognises every child=s right to a standard of living adequate for the child=s physical, mental, spiritual, moral and social development. >Though the parents bear the primary responsibility to provide for the child, the state, in terms of article 27(3) of the UN Convention read with section 28(1)(c) of the final Constitution, carries the obligation to assist the

* They must be >of good repute= and be fit and proper persons to be entrusted with the custody of the child;
* The proposed adoption must serve the interests and be conducive to the welfare of the child;
* That necessary consent(s) to the adoption must have been given.[14]

The adequate means test mentioned above is particularly problematic.[15] In the drafting process leading up to the Child Care Amendment Act 96 of 1996, the removal of the requirement that the prospective adoptive parents should have the means to support and educate the child was seriously considered - presumably because it discriminates against poor people who may be suitable adoptive parents. It was suggested that the proposal, designed to increase the pool of possible adoptive parents, should nevertheless be accompanied by some mechanism to ensure that the adopted child does not suffer undue deprivation. This was not done. Sloth-Nielsen and Van Heerden[16] show that a far better, and more constitutionally correct, option would involve establishing whether prospective adoptive parents were willing and able to carry out their parental responsibilities, if necessary with appropriate State aid. This would then not necessarily preclude adoption by poor families and would be in line with the provisions of the CRC and of the Constitution.

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parents in meeting the child=s needs. This suggests that indigent families should be given assistance in the form of government subsidies and tax breaks to enable them to raise their children=.

14 See section 16.3.3 below.

15 See Julia Sloth-Nielsen and Belinda van Heerden >Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa= 1996 (12) **SAJHR** 247 at 254.

16 Julia Sloth-Nielsen and Belinda van Heerden >Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa= 1996 (12) **SAJHR** 247 at 255.

In considering an application for adoption the children=s court is enjoined to >have regard to= the child=s cultural and religious[17] background of the child and of the natural parents, as compared with that of the proposed adoptive parent or parents.[18] This directive constitutes the legal basis for >matching= a particular child to particular adoptive parents, and has been developed into a sophisticated set of criteria by social workers engaged in adoption work.[19] These considerations are not, however, decisive of whether a particular adoption order should be made. Unlike the issues on which a court must be satisfied, these are merely matters to which it must have regard.[20]

There are, however, no legal barriers to trans-racial adoptions.[21]

The Children=s Act of 1960 stipulated age requirements that were stringent and complex: their object was to achieve an age difference between parent and child similar to that found in nature,

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17 Although the Child Care Act, 1983 lays down no religious requirement as such for an adoptive parent, the **Guide to Adoption Practice** at 61 expresses the view that >[t]he home should provide opportunity for the religious instruction and spiritual development of the child adoption=. If this implies that lack of any religious affiliation is per se a disqualification, Van Heerden et al **Boberg=s Law of Persons and the Family** 442, footnote 30 argue that it goes too far: >There is no warrant at all for the view that the legislature disapproved of atheists or agnostics in the role of adoptive parents. This view is reinforced by s 15 of the final Constitution, which protects believers and atheists alike=. Quite different considerations arise when a child who comes from a certain religious group has to be >matched= with particular adoptive parents. But even in this context the courts have stressed that religious background is of little or no importance in the case of a newly born or very young child. See in this regard **C v Commissioner of Child Welfare, Wynberg** 1970 (2) SA 76 (C) at 87D-F, 88 B-H.

18 Section 18(3), read with section 40, of the Child Care Act, 1983.

19 See the **Guide to Adoption Practice** 81, from which it appears that even =physical likeness= of the child to his or her proposed adoptive parents is considered relevant, though not decisive. Other factors are >education= and place of residence.

20 Van Heerden et al **Boberg=s Law of Persons and the Family** (2nd edition) 449.

21 The requirement of >race matching= was done away with in 1991 in terms of the Child Care Amendment Act 86 of 1991. For a discussion of the concept of race matching and the practice of trans-racial adoptions, see J Heaton >The relevance of race and classification in terms of the Population Registration Act 30 of 1950 for adoption in South Africa= (1989) 106 **SALJ** 713; D J Joubert >Interracial adoptions: Can we learn from the Americans?= (1993) 110 **SALJ** 726; N Zaal >Avoiding the best interests of the child: Race-matching and the Child Care Act 74 of 1983' (1994) 10 **SAJHR** 372; T Motsikatsana >Transracial adoptions: Are we learning the right lessons from the Americans and Canadians? - A reply to Professors Joubert and Zaal= (1995) 112 **SALJ** 606, >Examining class and racial bias in the adoption process and the viability of transracial adoptions as a policy preference: A further reply to Professors Joubert, Pakati and Zaal= (1997) 13 **SAJHR** 602. Heaton, Joubert and Zaal argue that trans-racial adoptions may meet the child=s best interests, while Motsikatsana is opposed to such adoptions, arguing that they are not in the best interests of the child concerned.

and to discourage sexual malpractices as far as possible. Thus, no person under the age of 25 years could adopt a child unless he or she or (in the case of a joint adoption) his or her spouse was the natural parent of that child. Further restrictions depended on the child=s age.[22] However, there are no legal requirements regarding the age of the adoptive parents or the age difference between the adoptive parents and the child under the Child Care Act, 1983. This is left to the discretion of the adoption agency and of the children=s court considering the adoption application.[23]

18.3.3 **Consent to adoption**

In terms of the Child Care Act, 1983 consent to an adoption must be obtained from:

(a) both parents of a legitimate child;[24]

(b) if the child is born out of wedlock, by both the mother and the natural father of the child, >whether or not such mother or natural father is a minor or married person and whether or not he or she is assisted by his or her parent, guardian or in the case of a married person, spouse, as the case may be: Provided that such natural father has acknowledged himself in writing to be the father of the child and has made his identity and whereabouts known . . .=;[25]

(c) the child must also consent to the adoption if the child is over 10 years of age and if the child understands the nature and import of such consent;[26]

(d) the foster parent where the child is in foster care and the foster parent has not himself or

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22 See further Van Heerden et al **Boberg=s Law of Persons and the Family** (2nd edition) 443.

23 The **Guide to Adoption Practice** 56 stipulates its policy in this regard as follows:

> [t]he age range for adopters should ideally be within the span that is normal for natural parenthood. As a general rule the adoptive mother should not be more than 40 years older than the child, and the adoptive father not more than 45 years older. It is generally accepted that there are optimum times in life for various life tasks including parenting of a newborn infant. The late 30's are regarded as the upper limit for this important life task. Simultaneously it is not a good idea for a person in their late 50's or early 60's to be parenting an adolescent.

24 Section 18(4)(d) of the Child Care Act, 1983.

25 Section 18(4)(d) of the Child Care Act, 1983, as amended following the **Fraser** judgment by the Adoption Matters Amendment Act 56 of 1998.

26 Section 18(4)(e) of the Child Care Act, 1983.

herself made an application for the adoption.[27]

Consent must be in writing and must, if given in the Republic, be signed by those giving the consent in the presence of a commissioner of child welfare who must attest the consent.[28] Before the commissioner attests the consent he must inform the person granting the consent of the legal consequences of the adoption.[29] The person concerned may withdraw the consent in writing before any commissioner at any time during a period of up to 60 days after having such consent[30] and the children=s court cannot make any order of adoption before the expiration of this 60 day period.[31]

Previously, in the case of a child born of a South African citizen, the applicants also had to be South African citizens and thus resident in the Republic, or if they were not South African citizens they must have qualified for citizenship and have already made application in this connection.[32]

In **Fraser v Children=s Court, Pretoria North**,[33] the Constitutional Court declared section 18(4)(d) of the Child Care Act, 1983, which in its form at that time denied unwed fathers the right to consent to or veto the adoption of their natural children, to be unconstitutional in that it discriminated unfairly against unwed fathers on the basis of their gender and marital status and it also discriminated unfairly against fathers in non-Christian marriages. Parliament was given a period of two years to amend the law to bring it in conformity with the constitutional imperative of equality contained in section 9(3) of the Constitution. The Adoption Matters Amendment Act 56 of 1998, which inter alia amends section 18(4)(d) of the Child Care Act, 1983 so as to require the natural father=s consent to his child=s adoption in certain instances, takes into account the Constitutional Court=s decision in

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27 Section 18(4)(g) of the Child Care Act, 1983.

28 Section 18(5) of the Child Care Act, 1983.

29 Regulation 19(2).

30 Section 18(8) of the Child Care Act, 1983; Regulation 19(2)(b). See also **Re J (an infant)** 1981 2 SA 330 (Z) as to the withdrawal of consent by a father and **Y v Acting Commissioner of Child Welfare, Roodepoort** 1982 4 SA 112 (T) as to the withdrawal of consent by a mother.

31 Section 18(9) of the Child Care Act, 1983.

32 This particular requirement was held unconstitutional by the Constitutional Court in **Minister for Welfare and Population Development v Fitzpatrick** 2000 (3) SA 422 (CC). See further 3.2.4 above.

33 1997 (2) SA 261 (CC).

Fraser.[34]

No consent will be required in the case of a child whose parents are dead and for whom no guardian has been appointed;[35] nor from any parent who is as a result of mental illness incompetent to give any consent;[36] nor from a parent who deserted[37] the child **or**[38] whose whereabouts are unknown;[39] nor from a parent who has assaulted, ill-treated or abused the child or allowed the child to be so assaulted, ill-treated or abused;[40] nor from a parent who has caused or conduced to the seduction, abduction or sexual exploitation of the child or the commission of immoral acts by the child;[41] nor from a parent who is withholding consent unreasonably.[42]

Section 19(b) of the Child Care Act, 1983 was amended by section 5(b) of the Adoption Matters Amendment Act 56 of 1998. In addition to the grounds listed above, no consent to adoption will be required from a parent

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34 Ibid. See also T L Motsikatsana >Is papa a rolling stone? The unwed father and his child in South African law - A comment on *Fraser v Naudé*= (1996) 29 **CILSA** 154 and Van Heerden et al **Boberg=s Law of Persons and the Family** (2nd edition) 397 et seq. See further C J Davel and R A Jordaan >Het die kind se belange uiteindelik geseëvier?= 1997 **De Jure** 330; R A Jordaan and C J Davel >Die Fraser trilogie= 1997 **De Jure** 394; Carol A Gorenberg >Fathers= rights vs. children=s best interests: Establishing a predictable standard for California adoption disputes= (1997) Vol. 31 No. 2 **Family Law Quarterly** 169.

35 Section 19(a) of the Child Care Act, 1983.

36 Section 19(b)(i) of the Child Care Act, 1983.

37 Luanda Hawthorne >Children and Young Persons= in Schäfer **Family Law Service** argues that >desertion= in this context must be given a restrictive meaning more akin to abandonment rather than mere neglect. Thus, a father who has failed to maintain his children in terms of a court order could not be said to have deserted his children: **Van Rooyen v Van Staden** 1984 1 SA 800 (T).

38 Before its amendment by the Adoption Matters Amendment Act 56 of 1998, the consent of the parent who deserted the child **and** whose whereabouts were unknown could be dispensed with. These now form two separate criteria for dispensing with consent: the >and= was changed to an >or=.

39 Section 19(b)(ii) of the Child Care Act, 1983.

40 Section 19(b)(iii) of the Child Care Act, 1983.

41 Section 19(b)(iv) of the Child Care Act, 1983.

42 Section 19(b)(vi) of the Child Care Act, 1983. See also **SW v F** 1997 (1) SA 796 (O). In paragraph 7.2.10 of the First Issue Paper mention is made of the view of some social workers that commissioners in the children=s courts are reluctant to use this ground especially if the parent who is withholding consent is represented by a lawyer. See also question 72 posed on page 86 of the First Issue Paper.

(vii) who, in the case of a child born out of wedlock, has failed to acknowledge himself as the father of the child or has, without good cause, failed to discharge his or her parental duties with regard to the child;

(viii) whose child, in the case of a child born out of wedlock, was conceived as a result of an incestuous relationship between himself and the mother of the child; or

(ix) who, in the case of a child born out of wedlock -

(aa) was convicted of the crime of rape or assault of the mother of the child; or

(bb) was, after an enquiry by the children=s court following an allegation by the mother of the child, found, on a balance of probabilities, to have raped or assaulted the mother of the child: Provided that such a finding shall not constitute a conviction for the crime of rape or assault, as the case may be; or

(x) who, in the case of a child born out of wedlock, has failed to respond, within 14 days, to a notice served upon him as contemplated in section 19A.[43]

The Adoption Matters Amendment Act 56 of 1998 also inserted a new section 19A in the Child Care Act, 1983. This new section provides for the natural father of a child to be given notice of consent given by the mother for the adoption of their child born out of wedlock.[44] It further provides for notification of a parent of consent given by the other parent for the adoption of their child born out of wedlock and affords the natural father the opportunity to acknowledge paternity prior to making an order for adoption of his child born out of wedlock so as to enable him to exercise his rights regarding the adoption of the child.[45] A person who wishes to acknowledge himself as the father of a child born out of wedlock can now apply to have the registration of the birth of such child amended by the recording of an acknowledgement of paternity and having his particulars entered in terms of section 11 of the Births and Deaths Registration Act, 1992.

Non-disclosure adoptions, that is where the parents of the child are not allowed to know who the prospective adoptive parents are, nor what the child=s destination is to be after the adoption, are regulated by section 18(6) of the Act and can only take place if the children=s court is satisfied that this will serve the best interests of the child.[46] To ensure this secrecy, a parent is not allowed to be

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43 For the procedure that must be followed before a children=s court can dispense with a natural parent=s consent to the adoption of his or her child on any of the grounds set out in section 19(b) of the Act, see regulations 21(4) - (6).

44 In terms of the new section 19A(1).

45 In terms of the new section 19A(7).

46 In 1981, 25% of all adoptions were of this type: Van der Vyver and Joubert **Persone- en Familiereg** (2nd edition) Cape Town: Juta 1985 604.

present during the proceedings of the children=s court unless the court is of the opinion that the parent=s presence will serve the best interests of the child.[47]

18.3.4 **Adoption procedure**

The person or couple wishing to adopt a child must apply on Form 11 in respect of each child they want to adopt.[48] The application must be lodged with the clerk of the children=s court in the district where the child resides together with the identity documents or birth certificates of each prospective adoptive parent and each child being adopted. In the case of the adoption of a foster child the written statement of the child=s foster parent(s) that he or she does not wish to adopt the child must be lodged. Where applicable, the written consent of the parent and of the child must be submitted.[49] A report from a social worker that the applicant is a potentially suitable adoptive parent, must also be lodged. An adoption is effected by an order of the children=s court of the district in which the child is living.

18.3.5 **Effect of an adoption**

An adoption order terminates all the existing rights and obligations between the child and his or her pre-adoption parent(s), and the relatives of the parent(s),[50] and an adoptive child is for all purposes whatever deemed in law to be the legitimate child of the adoptive parent >as if he (or she) was born of that parent during the existence of a lawful marriage=.[51] Even in the interpretation of a will, unless the context otherwise indicates, an adopted child shall be regarded as being born from his or her adoptive parent(s) and, in determining his or her relationship to the testator or another person

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47 Regulation 21(3).

48 Regulation 18(1).

49 As is required by sections 18(4)(d) and 18(4)(e).

50 Section 20(1) of the Child Care Act, 1983, read together with sections 1(4)(e) and (5) of the Intestate Succession Act 81 of 1987. If, however, a child is adopted by a married person whose spouse is the parent of that child (i.e. a stepparent adoption), then the adoption order does not terminate any rights and obligations existing between the child and such parent: section 20(1), read together with section 17(c), and with section 1(4)(e)(ii) of the Intestate Succession Act 81 of 1987.

51 Section 20(2) of the Child Care Act, 1983. See also **Venter v Die Meester** 1971 (4) SA 482 (T); **Cohen v Minister for the Interior** 1942 TPD 151 at 153-4.

for the purposes of a will, as the child of his or her adoptive parent(s) and not as the child of his or her natural parent(s) or any previous adoptive parent(s).[52] An adoption order will have retrospective effect and will confer the surname of the adoptive parent on the adopted child.[53] Adoption does not, however, extinguish any rights the adopted child may have against third parties. Thus, the adopted child can still sue a third party who has caused the child loss by the wrongful killing of his or her natural parent despite the fact of his or her subsequent adoption.[54]

Adoption can obviously not do away with the legal consequences of blood relationship. Thus section 20(4) of the Child Care Act 1983 provides that >an order of adoption shall not have the effect of permitting or prohibiting any marriage or carnal intercourse (other than a marriage or carnal intercourse between the adoptive parent and the adopted child) which, but for the adoption, would have been prohibited or permitted=. This means that impediments to marriage based on blood relationship which existed before the adoption of the child, persist in spite of the adoption and also that no further impediments to marriage are created by the adoption of the child, other than that the adoptive parent and the child may not marry one another.[55]

Finally, an adoption order terminates an order by the children=s court or a criminal court concerning the custody of the child.[56]

18.3.6 **Rescission of an adoption order**

An order of adoption can be rescinded.[57] This can be done on application to the children=s court by the adoptive parents, the person who was a parent or guardian of the child at the time of the making

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52 Except in the case of a natural parent who is also the adoptive parent of the child concerned and who was married to the adoptive parent of the child concerned at the time of the adoption: Section 2D(1)(a) of the Wills Act.

53 Section 20(3) of the Child Care Act, 1983. However, the opposite can be provided for.

54 **Constantia Versekeringsmaatskappy v Victor** 1986 1 SA 601 (A).

55 Barnard, Cronjé and Olivier **The South African Law of Persons and Family Law** 282.

56 Section 20(5) of the Child Care Act, 1983.

57 Section 21 of the Child Care Act, 1983. The procedure to be followed in making application for rescission is set out in Regulation 26. For a criticism of section 76 of the 1960 Children=s Act (the equivalent of the present section 21), see Edwin Spiro >Remedies against null and void adoption orders= (1974) 91 **SALJ** 168.

of the order, and the assistant of the children=s court which originally issued the order, if he or she has the consent of the Minister to do so.[58] The child himself or herself cannot make such an application.[59] Application for the recission of an adoption order can be made on the grounds that:

(a) the adoption is detrimental to the child;[60]
(b) the parent of the child did not consent to the adoption, and such consent was necessary for the adoption;[61]
(c) at the time of making the adoption order the adoptive parent did not qualify in terms of section 17 of the Child Care Act, for obtaining an adoption order.[62]

The adoptive parent can apply for the recission of the adoption order on the grounds that:

(a) the child is mentally disordered and was already so at the time the adoption order was

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58 Section 21(1) of the Child Care Act, 1983.

59 See Van der Vyver and Joubert **Persone- en Familiereg** (second edition) Cape Town: Juta 1985 607 for a possible procedure which the child can follow in the event that the child becomes dissatisfied with the adoption.

60 Section 21(1)(c) of the Child Care Act, 1983.

61 Section 21(1)(a) of the Child Care Act, 1983.

62 Section 21(1)(d) of the Child Care Act, 1983.

made;

(b) the child suffered from a serious congenital disorder or injury at the time the adoption order was made; or

(c) the adoptive parent was persuaded to adopt the child by means of fraud, misrepresentation or *justus error*.[63]

Section 21(2) of the Child Care Act 1983 lays down different periods in time within which application must be made for the rescission of an adoption order, depending upon the person by whom such an application is made.

The effect of the rescission of an adoption order is regulated by section 21(8) of the Act. It provides as follows:

> On the rescission of an order of adoption ... , the child concerned shall for all purposes be restored to the position in which it would have been if no order of adoption had been made: Provided that the rescission of the order shall not effect anything lawfully done while the order of adoption was in force.[64]

18.3.7 **Appeal**

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63 Section 21(1)(b) of the Child Care Act, 1983. Section 21(3) of the Act provides that adoptive parents can only succeed in having an adoption order rescinded on the ground of a congenital disorder or mental illness in the child if they were unaware of the existence of such problems at the time the order was made, and that their ignorance cannot be ascribed to their neglect to either examine the child with reasonable care or having the child so examined.

64 After rescission of an adoption order in **S v Kommissaris van Kindersorg** 1967 (4) SA 66 (SWA), the court held, in a sequel to this decision, **S v M** 1968 (1) PH M3 (SWA), that the child had to be restored to the custody of his natural mother.

Appeal to the High Court against decisions of the children=s court lies as follows:[65]

(1) an appeal against an order of adoption may be brought by the child=s natural parent or his or he guardian at the time when the order was made;

(2) an appeal against the rescission of an adoption order may be brought by the child=s parent, guardian or adoptive parent, provided that he or she did not apply for such rescission;

(3) an appeal against the refusal of an application for rescission of an order of adoption may be brought by the disappointed applicant.

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65 Section 22 of the Child Care Act, 1983.

The Act does not provide for an appeal to the High Court against the commissioner=s refusal to make an adoption order. The matter may, however, be taken on review.[66]

18.3.8 **Review**

The commissioner exercises his or her judicial discretion in granting or refusing an adoption order. As already pointed out, when hearing an application for adoption, a children=s court functions as a court of law and, except where a departure is specifically authorised, is bound to observe the ordinary rules of evidence and procedure no less strictly than a magistrate=s court. Therefore, what would amount to a reviewable irregularity in a magistrate=s court would have the same effect if it took place in the children=s court.[67]

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66 Van Heerden et al Boberg=s **Law of Persons and the Family** (2nd edition) 454.

67 Per Marais J in **Napolitano v De Wet NO** 1964 (4) SA 337 (T) at 344.

The High Court has exercised a power of review in a number of cases.[68] Various bases for this review jurisdiction, and for the commissioner=s *locus standi* to bring the application, have been suggested. Common to all the decisions, however, is the need for proper notice to be given to all interested parties, the natural parents (where known) and the commissioner who made the order.[69] In the exercise of its general powers of review, the High Court will entertain, at the instance of a prospective adoptive parent, an application for review of an refusal to make an adoption order on the ground that the proceedings were grossly irregular or that the commissioner misdirected himself or herself of a matter of law. An irregularity must, however, have prejudiced the applicant.[70]

18.3.9 Record and registration of adoption

The adoption order confers the surname of the adoptive parent on the child, unless otherwise provided in the order. The adoptive parent(s) may apply for the adoption of the child and the change of surname to be recorded on the births register. A birth certificate in the surname of the adoptive parent may then be issued in respect of the child.[71]

The clerk of the children=s court must keep an adoptions record book in which all the particulars of applications for adoptions, the orders of the court, and any rescission of and appeals against such orders must be entered. No one except an officer of the court or an

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68 For authority on this point, see Van Heerden et al **Boberg=s Law of Persons and the Family** (2nd edition) 455, footnote 103.

69 See especially **Ex parte Commissioner for Child Welfare: In re adoption of Volczer** 1960 (2) SA 312 (O) at 313 - 314; **Ex parte Kommissaris van Kindersorg: In re Van Wyk** 1964 (4) SA 601 (GW) at 602; **Ex parte Kommissaris van Kindersorg, Krugersdorp: In re JB; Ex parte Kommissaris van Kindersorg, Oberholzer: In re AGF** 1973 (2) SA 699 (T) at 705H, 709H; **Ex parte Kommissaris van Kindersorg: In re B** 1985 (2) SA 137 (SWA) at 140E; **Ex parte Commissioner of Child Welfare, Durban: In re Kidd** 1993 (4) SA 671 (N) at 647B-C.

70 Thus in **Napolitano v De Wet NO** 1964 (4) SA 337 (T), confirmed *sub nom* **Napolitano v Commissioner of Child Welfare, Johannesburg** 1965 (1) SA 742 (A), although the court found that the commissioner had acted irregularly in telescoping an inquiry as to whether a child was in need of care and an application for the child=s adoption into a single proceeding, it refused to set his decision aside because neither the applicant nor the child had been prejudiced by the irregularity.

71 Sections 20(3), 25 and 26 of the Child Care Act 1983.

authorised person may inspect or have access to the adoptions record book.[72] The clerk of the children=s court must as soon as possible after an adoption order has been issued see to it that the order is registered by submitting the necessary documentation to the registrar of adoptions situated in the national Department of Social Development.[73] The registrar must keep a register in which the following must be entered: the registration number allocated to the adoption; the personal particulars of the adopted child, his parents and adopted parents; particulars of successful appeals against and rescission of adoptions; and generally all other information the register considers necessary and expedient.[74]

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72 Regulation 23.

73 Regulation 25.

74 Regulation 24.

Subject to the provisions of Regulations 28(3)[75] and (6)[76] and the instructions of the registrar, the record of the adoption proceedings shall lie for inspection during normal office hours in the office of the registrar. The record may be inspected by an adoptive parent from the date on which the child concerned reaches the age of 18 years,[77] by an adopted child from the date on which he or she attains the age of 21 years,[78] and by a natural parent or a previous adoptive parent of the adopted child, with the written consent of the adoptive parent(s) and of the adoptive child, from the date on which the child concerned reaches the age of 21 years.[79]

The Registrar of Adoptions may require an adoptive parent, a natural parent, or a child to receive counselling from a social worker before allowing that adoptive parent, natural parent, or child access to the adoption records.[80]

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75 In terms of this regulation the registrar may require an adoptive parent, a natural parent, a previous adoptive parent or the adopted child to receive counseling from a social worker before allowing that parent or child to inspect the record concerned or to obtain a copy thereof.

76 In terms of this regulation the registrar may for good reason refuse any person access to the record and register. There is, however, an appeal to the Minister against such decision.

77 Regulation 28(1)(a).

78 Regulation 28(1)(b).

79 Regulation 28(1)(c).

80 Regulation 28(3).

18.3.10 Giving or receiving considerations for adoptions

Nobody may, except as prescribed under the Social Work Act, 1978 give, undertake to give, receive or contract to receive any consideration in cash or kind, in respect of the adoption of a child.[81] Contravention of this provisions constitutes a criminal offence and offenders will be liable to a fine not exceeding R 8 000 or to imprisonment for a period of two years or to both the fine and imprisonment.[82]

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81 Section 24(1) of the Child Care Act 1983.

82 Section 24(2) of the Child Care Act 1983.

In **C v Commissioner of Child Welfare, Wynberg**[83] it appeared that the adoptive parents had paid the mother=s confinement expenses. Holding that in the circumstances no weight could be attached to the mother=s consent to their adopting her child, Steyn J deplored this practice when he said:

> In fact, our Children=s Act, which is a model and highly commendable legislation, has been designed to discourage bartering of children whether directly or indirectly. It may be that applicants have been driven to desperation by reason of the frustrating inability to qualify as adoptive parents; nevertheless, their conduct in placing the mother of the child in a position where she was financially beholden to them is not to be commended.[84]

It is also important to point out that the social worker=s report submitted to the children=s court dealing with the adoption application must include a disclosure statement itemising all monies paid or estimated to be or have been paid in cash or in kind, either directly or indirectly, by or on behalf of the applicant for services rendered, professional fees and disbursements, other fees and other costs incurred or to be incurred in respect of the adoption or for the care of the child, including prenatal, delivery and postnatal medical expenses, housing, food, clothing, travel and hospital costs and legal fees and fees to the messenger of the court.[85]

18.3.11 **Section 10 of the Child Care Act 1983 and private placements of children**

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83 1970 (2) SA 76 (C).

84 At 89A-B.

85 Regulation 21(1)(b)(iii).

This issue was dealt with in the First Issue Paper and the reader is again referred to the relevant part.[86] Section 10(1) of the Child Care Act 1983 provides that no person other than the managers of a maternity home, a hospital, a place of safety, or a children=s home shall receive any child under the age of seven years or any child >for the purpose of adopting him or her or causing him or her to be adopted= and care for that child apart from his or her parents or guardian for longer than 14 days. However, if a person has applied to adopt the child or has obtained the written consent of the commissioner of the district in which the child was living such person may receive and maintain the child apart from his or her parents for longer than 14 days.[87] Where the child is under the age of seven years, a grandparent, brother, sister, half-brother or sister, uncle or aunt or a >designated relative= of the child may receive and care for the child apart from his or her parents, provided such person is older than 18 years.[88] The Minister may determine that the spouse of certain relatives[89] or a person related to the child in the third degree of affinity or consanguinity is a >designated relative= for the purposes of this section.[90]

This section and its amendments have been criticised.[91] One criticism is that where a child is below the age of seven years, a parent cannot place his or her child with a third party (except with certain specified relatives), for any purpose whatsoever for longer than 14 days without the written consent of the local Commissioner of Child Welfare. This could mean, as the authors show,[92] that one would not be allowed to leave one=s five year old

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86 Paragraph 7.2.6 of the First Issue Paper.

87 Sections 10(1)(b)(i) and (ii) of the Child Care Act 1983.

88 Section 10(1)(b)(iii) of the Child Care Act 1983.

89 The grandparents, brothers or sisters, half-brothers or half-sisters, uncles or aunts of the child referred to in section 10(1)(b)(iii) of the Child Care Act.

90 Section 10(4) of the Child Care Act 1983.

91 Julia Sloth-Nielsen and Belinda van Heerden >Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa= 1996 (12) **SAJHR** 247 at 253.

92 Julia Sloth-Nielsen and Belinda van Heerden >Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa=

with a good friend for more than 14 days while attending a conference overseas, or send one=s six year old on a camp or to boarding school for more than two weeks without the permission of the relevant Commissioner. If this is indeed the intention of the legislature, then it is a rather impractical scheme, especially in a country where child arrangements differ widely according to social and cultural settings. Of course parents should not be free to leave their children in the care of unsuitable persons who will ill-treat, abuse or exploit them, but the necessary protection for these situations is to be found in the provisions relating to children in need of care, who can be removed from the care of such persons if need be.

In this regard, Sloth-Nielsen and Van Heerden[93] submit:

> ... with a clear objective in mind, the present drafting gymnastics would be obviated: the provision should simply apply to all children under the age of eighteen years who are left with persons for a period longer than 14 days for the purpose of adoption. Whether consent has been given or not by the parent does not seem to affect the issue.

1996 (12) **SAJHR** 247 at 253.

93 Julia Sloth-Nielsen and Belinda van Heerden >Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa= 1996 (12) **SAJHR** 247 at 254.

At present, parents may place a child with prospective adoptive parents without the assistance of a social worker. Such prospective adoptive parents may then maintain the child apart from his or her parents for an indefinite period, provided that a formal application for the adoption of the child has been made. As Sloth-Nielsen and Van Heerden[94] point out, the problem is that >screening= of the prospective adoptive parents by the social workers apparently only takes place after the formal application is made and the necessary consent to adoption has been obtained. The authors continue:[95]

> In practice, then, a child may be placed with persons who are not suitable adoptive parents, but by the time the reports establishing this lack of suitability have been obtained, and the adoption is heard, the child may have forged close bonds with the applicants. If the application is refused by the Children=s Court and the child removed, breaking these bonds may cause lasting emotional damage to the child. The alternative to removal in such cases, viz granting the adoption despite the unsuitability of the applicants, is also not a satisfactory solution.

18.3.12 **Adoption in customary law**

A process which has the same legal consequences as adoption in terms of the common law is also found in customary law.[96] According to Bekker,[97] both male and female children may be given up for adoption according to customary law. Adoption takes place in public and both the relatives of the adopted child and adoptive parents are involved because the adoption entails the alteration of the status of the child.

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94 Julia Sloth-Nielsen and Belinda van Heerden >Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa= 1996 (12) *SAJHR* 247 at 252.

95 Julia Sloth-Nielsen and Belinda van Heerden >Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa= 1996 (12) **SAJHR** 247 at 252 - 3.

96 I P Maithufi >Recent case law: *Metiso v Road Accident Fund* Case no 44588/2000 (T)= (2001) 34 **De Jure** 390 at 391.

97 **Seymour=s Customary Law in Southern Africa** 236.

Maithufi describes the adoption process and the requirements for it as follows:[98]

> The relatives are called to a meeting where the envisaged adoption is to take place. After this meeting, the adoption has to be reported to the traditional leader of the area or his or her representative. The formalities relating to the agreement between the families of the adopted child and the adoptive parent(s), as well as the report to the traditional leader or his or her representative are aimed at indicating that the adopted child has been formally transferred from one family to another. . . . Even in cases where the adoption was not reported to the traditional leader, the adoption would still be valid if due publicity was given to the process and there was agreement between the families of the adopted child and adoptive parent(s). The validity of an act of adoption in terms of customary law largely depends upon the agreement between these families. A traditional ceremony which may involve the slaughtering of small livestock is normally held to mark the adoption.

There are various reasons for adopting children in customary law. One such reason is the acquisition of an heir by the person who does not have children of his or her own to inherit his or her property at death and the perpetuation of the deceased=s family name. Another reason may be to strengthen the adopting family with more children and to safeguard the interests of children in the case where the biological parent(s) of such children cannot afford to maintain them.

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98 (2001) 34 **De Jure** 390 at 391 - 392.

Maithufi points out that adoption normally occurs between persons who are related to each other by blood but it is also not uncommon between non-relatives.[99] He says adoption should be distinguished from fostering in terms of customary law: >Fostering does not effect the status of the child whereas adoption does, in the sense that the adopted child becomes a member of the family of the adoptive parent(s)=. Bekker[100] captures the distinction as follows:

> Children may be sent to live with relatives, neighbours or close friends for various reasons: the child=s parent may be too poor to raise it; there may be no woman available to look after a child on break-up of marriage; the foster parent might be lonely or might need help to run a household. In all these cases it is understood that the child will eventually return to its own parents, so there is no intention to sever relationships with the biological family, which typifies adoption. Hence the child does not usurp rights of succession, or indeed acquire any rights at all in the foster parent=s family.

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99 (2001) 34 **De Jure** 390 at 392.

100 **A Sourcebook of African Customary Law in Southern Africa** 377 - 378.

The child adopted becomes, for all intend and purposes, the child of the adoptive parent(s). Upon adoption, the adoptive parent(s) become(s) responsible for the maintenance of the adopted child.[101]

Previously, only heads of families, who were normally male, could adopt children according to customary law.[102] Presently, both males and females, married or unmarried, and even persons married according to civil rites may adopt children in terms of customary law.[103] The normal consequence of a marriage accompanied by the *lobolo* contract is that the husband, irrespective of whether he is the biological father of children born before the marriage, is responsible for their upbringing and maintenance according to customary law.[104] In the same manner, African spouses married by civil rites cannot be regarded as having, without reservation, contracted out of duties or rights peculiar to or known in customary law, or waived any of their rights arising from customary law.[105]

Bekker[106] has expressed the opinion that the customary law procedure for adoption should also comply with the provisions of the Child Care Act, 1983. He said:

> It may be argued that the customary law procedure alone should no longer be recognised by the courts, unless the parties also comply with the provisions of Chapter 4 of the Child Care Act. Section 18(1)(a) of this Act provides: AThe adoption of a child shall be effected by an order of a children=s court of the district in which the child concerned resides.

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101 Maithufi (2001) 34 **De Jure** 390 at 392.

102 Bennett **A Sourcebook of African Customary Law in Southern Africa**, 375.

103 As a consequence, a duty of support or maintenance arising as a result of a valid customary law adoption is enforceable and not against public policy or the principles of natural justice: **Zimnat Insurance Co Ltd v Chawanda** 1991 (1) SA 825 (ZS); **Kewana v Santam Insurance Co Ltd** 1993 (4) SA 771 (Tk); **Metiso v Road Accident Fund** Case No 44588/2000 (T).

104 **Thibela v Minister van Wet en Orde** 1995 (3) SA 147 (T).

105 Cf. **Ngake v Mahahle** 1984 (2) SA 216 (O).

106 >Children and young persons in indigenous law= in Robinson (ed) **The Law of Children and Young Persons in South Africa**, 194.

Nevertheless, he mentions that the effect of adoption in customary law and the statutory law is the same as the adopted child >would for all intents and purposes become the child of its adoptive parents=.[107]

Whether the procedure laid down by customary law for a valid adoption should also incorporate some of the requirements prescribed by the Child Care Act, 1983 was dealt with by the court in **Kewana v Santam Insurance Co Ltd**[108] where the court a quo held that >. . . because the child was not adopted under the Children=s Act 33 of 1960, there was no duty of support=. The Transkei Appellate Division, in deciding this issue, said the following:[109]

> Adoption which played a great role in Roman law, was obsolete in Roman-Dutch law. It was first introduced by the Adoption of Children=s Act 1923 (see Hahlo and Kahn The Union of South Africa: The Development of its Laws and Constitution at 358). This legislation therefore introduced a right which did not exist. It filled a vacuum in the common law, but there is no basis for holding that it also modified or replaced adoption under customary law which remains enforceable under s 53 of the Constitution while adoption under the Children=s Act is governed by the provisions of that Act. It cannot be said that only adoption under the Children=s Act is recognised in Transkei. A child adopted according to the law of any country, say England or Germany, would not be precluded from enforcing a right to be maintained by his adoptive parent in Transkei.

In the **Metiso**-case, the biological mother of the adopted children and her family were not involved in the process leading to the adoption in question. The court, by invoking the >best interests of the child= standard, indicated that this omission could be used to invalidate the process as this could be against the interests of the children, even in the case where it was proved that the mother and her family were to be consulted. Maithufi[110] takes it one step further and argues that due to the publicity that accompanies adoptions in

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107 Ibid, 193.

108 1993 (4) SA 771 (Tk) at 776A-B.

109 Ibid, 776B-D.

110 (2001) 34 **De Jure** 396.

customary law, the adoption should be regarded as valid even in cases where there is no court order of the magistrate=s court of the district in which the child resides: >Obtaining such an order would, of course, facilitate proof of the adoption, but should not be regarded as a *sine qua non* for a valid customary law adoption=.[111]

[111] For the response to question 90 of Issue Paper 13, see section 19.3 below.

18.4 Comments and submissions received

18.4.1 Introduction

The Commission consulted widely on adoption as a form of substitute family care. Besides several questions posed in Issue Paper 13 and those presented to the children in the adult consultation process, the Commission had the advantage of holding a dedicated two-day focus group discussion on adoption and foster care in Bantry Bay, Cape Town on 27 and 28 June 2000.[112] The comments and submissions from these consultative processes are summarised in this section. For ease of reference, we follow the sequence adopted above in the analysis of the current legal position.

18.4.2 The concept of adoption

Respondents at the focus group discussion were asked the following questions in regard to the concept of adoption:[113]

> What does adoption mean in different local contexts? What would an indigenous South African model or models of adoption look like? What do you understand under the concept >adoption=?

Miss R van Zyl, a social worker at SKDB, Cape Town pointed out that the meaning of >adoption= differs from one indigenous group to another. She said this causes confusion and she proposes that one uniform legal model be accepted by all. Mr André Viviers of the Department of Social Development, Free State said adoption should be broadened to take into account indigenous practices and the role of the extended family. He said adoption should be seen as a form of permanency planning for a child. However, Mrs Eileen

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112 The research paper on adoption was prepared by Professor Tshepo Motsikatsana and the paper on foster care by Mrs Petro Brink. The Commission gratefully acknowledges their contributions to the debate.

113 Question 1.

Jordaan, an adoption consultant and social worker in private practice, said that it would be difficult to formulate an indigenous South African model of adoption as the transfer of parental rights from one set of parents to another is a legal process that cannot be changed.

Mrs Krawitz and Mrs Stander, two Johannesburg based social workers in private practice, linked adoption to permanency planning for children and suggested that an indigenous model should not depart too much from the current model provided for in the Child Care Act, 1983.

Group 3 saw no need to move away from the term >adoption=. It defined adoption as the transfer of parental rights and responsibilities from one set of parents to another. The Group proposed one adoption model which allows for either adoption with or without a subsidy. The South African Association of Social Workers in Private Practice (SAASWIPP),[114] the Children=s Placement Centre in Cape Town, Mrs Jean Allen of the Catholic Women=s League, and the Adoption Coalition[115] defined adoption as a formal process by means of which parental power over a child is **terminated** with the birth parents and vested in the adoptive parents. Ms Sue Padayachee of Lawyers for Human Rights, Pietermaritzburg defined adoption as the **termination** of the rights of the biological parent(s) to a child.

Mrs Anne Tudhope, chairperson of the National Adoptive Parents= Institute, defined adoption in broader terms to mean the legal **transfer**[116] of parental rights from one set of parents to another with or without the serving of ties to others who have played a significant role in the life of the child concerned. She said the purpose of adoption is to provide permanency and stability for a child where this has not proved possible either within or outside of the child=s kinship system.

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114 The submission was signed by Mrs Mendelle Mendelow.

115 A partnership of formal Welfare organisations in Pretoria doing adoption work.

116 Mrs M Hattingh of the CMR Pretoria also defined adoption as the **transfer** of parental rights.

In her submission, Mrs Francis Prinsloo of DEAFSA said adoption is a legal undertaking to take care of a child >as your own child - in terms of love, care, physical and emotional upbringing, security, educational development as well as stability=. Mr John Bradshaw, an adoptive father, saw the essence of adoption as the commitment of an adoptive parent to nurture and care for a non-biological child.

SAASWIPP saw adoption as a way of family building and a way of ensuring a healthy society made up of healthy families. The Association believed that there should be a place in the legal framework for the professionals or organisations involved in the adoption to allow the biological parents and the adoptive parent(s) to enter into individual agreements which are them made part of the adoption order in respect on non-disclosed adoptions and also family adoptions. This would concern inheritance from and to biological parents and contact with the biological parents, provided it is in the best interests of the child concerned.

Johannesburg Child Welfare Society, in a very comprehensive submission, approached the question from both the perspective of the social worker and the adoptive parent(s). From the perspective of a social worker, the Society said adoption is a way of providing a child with a permanent home and a family.[117] The Society continued:

> In South Africa, we have a need to find homes for large numbers of children - the numbers of children needing to be adopted outnumbers the number of prospective adoptive parents coming forward to adopt. One therefore needs to look at ways of broadening or increasing a child=s options for placement and therefore, in South Africa, we have moved quite a long way from the traditional 1st World model of adoption to include a range of options for children e.g. single parents, families with biological children, gay and lesbian parents, transracial placement, etc. We have also had to develop our own criteria to accommodate the profile of prospective adoptive parents who were approaching the agency to adopt e.g. increased age limits, informal employment, customary marriage, polygamous marriages, etc. We have adopted a flexible >user friendly= model of adoption in order to find the best possible home for the many children coming into the system.

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117 This was also the view of Ms Jacqui Gallinetti of the South Peninsula Legal Aid Clinic.

From the perspective of the adoptive parent(s), the Society said adoption is primarily still seen as an option for childlessness. Infertility is not always, however, the main reason, as many single applicants are not usually infertile as is the case with families who have several biological children but wish to adopt a child. The Society is frequently given the following motivations: >(a) to provide an >heir= to inherit property; (b) to provide someone to care for them in their old age; (c) to ward off loneliness=. The Society said the need to have someone to inherit your home and possessions is very strong amongst Black adoptive parents.

Mrs U F Ledderboge, a senior social worker attached to Durban=s Child and Family Welfare Society, saw adoption as permanent family care. In the indigenous context, she said adoption is seen as providing for a heir, status (vs infertility), marriage-ability, help and old age care. Mrs Ledderboge identified community prejudices about abandonment as a stumbling block to adoption (fear of incest and apprehension of >bad= genes). She raised the possibility of a community as an entity adopting a child (i.e. accepting the responsibility to bring-up the child into adulthood) as a possible solution to the HIV/AIDS epidemic.

Ms L Kaba, in a Northern Province provincial input through the Provincial Committee on Child Abuse and Neglect, pointed out that communities need to be educated in respect of adoption as this still has a stigma attached in some communities.

° **The present constitutional and legal frameworks and their weaknesses**

Respondents at the focus group discussion were also asked to identify and discuss the present constitutional and legal frameworks and their weaknesses in respect of adoption.[118] In this context, Mrs Francis Prinsloo of DEAFSA highlighted the discriminatory practices deaf children and deaf parents face as a result of wrong interpretations of the present legislation. However, she did not elaborate on what those discriminatory practices are.

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[118] Question 2 as per the worksheet.

At the focus group discussion, Group 3 highlighted the lack of consistency in and uniformity of approach by the courts in their application of the present adoption legislation. This was a recurring theme.[119]

In its submission, the Johannesburg Child Welfare Society highlighted two particular sections of the Child Care Act, 1983. The Society said it welcomed the removal of section 18(4)(f) (the requirement of South African citizenship for adoptive parents), but warned that its removal must go hand in hand with safeguards and controls. The Society also referred to sections 18(4)(d) and 19A of the Child Care Act, 1983. In this context, the Society said that it accepts that fathers should have a say in the adoption of their children. However, there seemed to be confusion regarding the implementation and interpretation of these sections by most courts, and this causes problems in the adoption process.

The Children=s Placement Centre in Cape Town identified the following problems with the present legal framework:

° lack of clarity around religious and cultural marriages;
° the rights of birth fathers >seem to supersede the rights of the child=;
° difficulties are experienced when consent to an adoption is signed in another country in a different format.

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119 See, for instance, the submissions by Mrs Eileen Jordaan; Miss R van Zyl; Ms U F Ledderboge; the Pretoria Adoption Coalition; Mrs Anne Tudhope, chairperson of the National Adoptive Parents= Institute; Mrs M Hattingh, CMR Pretoria; SAASWIPP; the Children=s Placement Centre, Cape Town.

Miss R van Zyl also identified as a weakness the different interpretations of the Child Care Act, 1983 by different Commissioners of Child Welfare. She said the language and terminology used in the Act and regulations are vague and suggested that the regulations be amended to provide policy guidelines on the role of social workers and accredited social workers in adoption proceedings. Miss Van Zyl also identified the accessibility of the High Court as problematic.

Mrs U F Ledderboge, a senior social worker at Durban Child and Family Welfare Society highlighted the discretionary nature in which Commissioners of Child Welfare deal with the following aspects as problematic:

° Withholding consent and dispensing with consent;
° Delays caused by the natural father exercising his rights;[120]
° Dispensing with natural father=s consent where he does not visit, pay maintenance, insists upon his name being registered, etc.;
° Bonding of the infants within the 60 day period and the return of the mother / parent in the case of abandonment;
° Rescission many years after finalising on medical grounds;
° Long waiting periods (2 - 4 years) in foster care before infant becomes adoptable;[121]

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120 SAASWIPP and Ms Sue Padayachee of Lawyers for Human Rights, Pietermaritzburg pointed out that the rights accorded to unmarried fathers in certain circumstances are causing delays in finalising adoption proceedings and are leading to the abandonment of infants (i.e. denies the unmarried mother her right to privacy).

° The dichotomy between a formal legal adoption process in terms of the Child Care Act, 1983 and the informal customary community based adoption processes.

In addition to highlighting problems with the 60-day waiting period and the difficulties related to obtaining the consent of the natural father, Mrs Jean Allen of the Catholic Women=s League identified inter-country adoption in the wake of the **Fitzpatrick** judgment as particularly problematic.

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[121] She said once people get used to the foster care grant, they will tend to keep things that way.

Mrs Krawitz and Mrs Stander saw as weaknesses of the present system the restriction placed on certain persons (e.g. same-sex couples) from adopting, the absence of any form of adoption subsidies,[122] and the focus on parental rights rather than parental responsibilities.

The Pretoria Adoption Coalition identified as a weakness the lack of clear legal guidelines regarding the necessary expertise and specialised knowledge on adoption required by social workers in the public sector.

° **The inter-relationship between family care by relatives, by non-relatives and through adoption**

Respondents were also asked to explain the inter-relationship between family care by relatives, by non-relatives and through adoption. In addition, respondents were asked whether clear legal boundaries can be set between the various forms of substitute family care.[123]

Ms Jacqui Gallinetti of the South Peninsula Legal Aid Clinic pointed out there are legal boundaries as family care less than adoption has legal restrictions. She questioned whether this position should remain as it can lead to a hierarchy of status for a child and said maybe the inter-relationship should be based on moral instead of legal grounds.

The Children=s Placement Centre in Cape Town was of the view that family care by

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122 This was also a recurring theme.

123 Question 3 of the worksheet.

relatives, by non-relatives and through adoption are all inter-related and that clear legal boundaries between the various forms of substitute family care should not be set especially in the light of the HIV/AIDS crisis. It was argued that procedures need to be in place to protect children as legalised placements will not able to deal with the sheer number of AIDS orphans. Mrs Krawitz and Mrs Stander supported the view that there exists an inter-relationship between family care by relatives, non-relatives and through adoption. They distinguished between formal and informal processes and said that the formal legal process should take over once the informal process breaks down.

On the other hand, Mrs Jean Allen of the Catholic Women=s League, while recognising the inter-dependence, said clear legal boundaries should be set between the various forms of substitute family care. She pointed out that although adoption is an extreme measure, it is often easier for a relative to apply for the adoption of a child (which can be done in the children=s court) than to get a guardianship order (which must be obtained in the High Court). She concluded by arguing that step-parents and grandparents should be able to get guardianship and custody (in the children=s court) rather than to adopt the child. In a similar vein, Mrs M Hattingh of CMR, Pretoria, pointed out that there is not much difference in practice in the day-toBday care of children in these circumstances. She said clear legal boundaries must be set between the various forms of substitute family care and that the implications of each legal placement must be defined clearly in the new children=s statute.

Mrs U F Ledderboge saw the different forms of substitute family care as forming part of a continuum of care. This continuum is influenced by the amount of bonding developed, co-operation required, and who has final responsibility (and say) in respect of a particular child. She warned that over-regulation might prevent a well adapted individual fit and argues strongly in favour of the need of the child to experience stability. Mr André Viviers of the Department of Social Development, Free State opined that clear legal boundaries can be set between the different forms of substitute family care as the >dynamics= of these options are different.[124]

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[124] This is also the view of the Pretoria Adoption Coalition.

Mrs Eileen Jordaan, an adoption consultant and social worker is private practice, said adoption by relatives and non-relatives differs only in that provision is made for the non-disclosure of the identity of adoptive parents in the case of adoptions by non-relatives. She said at present substitute family care through the children=s court is either through adoption or foster placements, >but other forms will need to be found to deal with the large number of AIDS orphans who will be requiring placement=. Mrs Jordaan pointed out that the State will not be able to afford paying the present foster care grant based on these numbers and argues for the introduction of a form of subsidized adoption in order to find homes for these children.

In its submission, SAASWIPP said fewer regulations should apply with regard to family care by relatives, unless the child is reported as being neglected or ill-cared for. It said family care by non-relatives should be formalised through the courts.

Mrs Francis Prinsloo of DEAFSA pointed out that the inter-relationship between these forms of substitute family care is based on the responsibility to care for a child and to provide for such child=s basic needs. She said with relatives the obligation is moral in nature, while it is a voluntary commitment by non-relatives. Miss R van Zyl, a social worker from SKDB, Cape Town, said there is a definite difference between adoption, foster care and kinship care and that there are clear legal boundaries between different positions of substitute family care. She argued the boundaries are defined by different degrees of permanency and different levels of contact with the biological family.

The Johannesburg Child Welfare Society opined informal adoption of children by relatives and non-relatives is still being practised within the Black community and most of these remain >informal= with the child maintaining links with his or her biological family and eventually returning to them in the late teens or early adulthood. The Society pointed out that the preferred choice of many urban, middle class Black families is the formal adoption of a non-related baby or child. The Society said these families do not want to raise a >family child= with the prospect of having to give that child back to the birth family, but want

a child who will be permanently and legally theirs.

18.4.3 **The purpose of adoption**

Adoption, as it is practised today, embodies a deep sense of social purpose - some see the primary aim of it being the attempt to assuage the need to provide a stable home for the child. In this regard, the worksheet used at the focus group discussion in Bantry Bay posed the following questions:[125]

> Is this a valid premise to base adoption on? What do you think should be the purpose of adoption?

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125 Question 6.

Ms Eileen Jordaan pointed out that adoption was at one time seen as a means of providing a child for childless couples.[126] However, adoption is now seen as a means of providing a child with stability and security within a family context. She said the greater openness about adoption has taken away much of the image of adoption as >imitating nature=. Mrs Krawitz and Mrs Stander also argued that the imitation of nature is not a valid premise on which to base adoption.[127]

SAASWIPP said it is the right of every child to be placed in the best permanent alternative care.

Ms U F Ledderboge also defined the purpose of adoption from a child=s rights perspective. She said it is purpose of adoption to give effect to the child=s right >to a family, to a home and loving care, to matter to a primary care giver, to adequate medical, physical, intellectual care, to socially belong=. She said this right goes beyond >imitation of nature= in respect of the rearing of a child.

Ms Jean Allen and the Children=s Placement Centre said the purpose of adoption is to safeguard the best interests of the child,[128] not the needs of the adoptive parents. In its submission, the Johannesburg Child Welfare Society stated that the purpose of adoption should be to provide a stable, permanent home and family for a child whose biological parents are unable or unwilling to do so. In other words, to provide a caring substitute permanent family for the child. Mrs Anne Tudhope defined the purpose of adoption as to provide a child with a permanent stable home within his or her extended family or with non-relatives if the former proves impossible. Mrs Hendré Dippenaar saw the purpose of adoption as establishing families which form the building stones of a community, society and country. She said the best place for a child is within a family.

Miss R van Zyl said the purpose of adoption is to protect the welfare of children. This can

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126 This view is still held in some circles. See the submission by Ms Sue Padayachee.

127 Ms Jacqui Gallinetti, Ms Jean Allen and the Adoption Coalition shared this view.

128 Ms L Kaba, Northern Province Provincial Committee on Child Abuse and Neglect.

be done through adoption by providing a child in need of care with special protection and a meaningful relationship with significant others with whom the child can identify. She said adoption should provide a secure loving environment where the physical and psycho-social needs of the child are met.[129]

18.4.4 Section 17 qualifications for adoption (Who may adopt?)

° **Married couples**

[129] This view was shared by Mr André Viviers.

The worksheet used at the focus group discussion in Bantry Bay posed several questions on who may adopt a child. The first of these reads as follows:[130]

> Do you think the existence of a marriage (which seems to underlie the assumption that adoption is a devise for imitating nature in respect of the rearing of a child) is a necessary requirement for adoption?

Most respondents were of the view that the existence of marriage, at least in the traditional (Christian) sense, between the prospective adoptive parents should not be a requirement.[131] Some respondents, however, called for guidelines which should taken into account the duration of the marriage or same-sex relationship. Some stated that marriage is the ideal, but not necessarily a requirement.[132] However, Ms Eileen Jordaan stated that if two parties wish to assume parental responsibility for a child, it is important that there be some agreement or contract, whether a marriage contract or not, whereby the interests of the child are protected should the relationship break down.

° **Same-sex couples**

Another questions deals with the exclusion of couples in a same-sex relationship as

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130 Question 13.

131 Johannesburg Child Welfare Society; Ms Blanché Verster; Ms L Kaba, Northern Province Provincial Committee on Child Abuse and Neglect; Ms U F Ledderboge; Mrs Hendré Dippenaar; Children=s Placement Centre; Miss R van Zyl; Mr André Viviers; Mrs Krawitz and Mrs Stander; Ms Jacqui Gallinetti; the Adoption Coalition; Ms Jean Allen; Ms Anne Tudhope.

132 Ms Francis Prinsloo; Johannesburg Child Welfare Society; Mrs M Hattingh.

prospective adoptive parents. This question reads as follows:[133]

> Do you think partners in a long-term same sex relationship as a couple should be excluded as prospective adoptive parents? When does a relationship become long-term? Please give reasons for your answer.

[133] Question 14.

Again most respondents were of the view that partners in a long-term same-sex relationship should not be excluded as prospective adoptive parents.[134] This position was taken despite the difficulties recognised in defining long-term relationships. Implicit in their support was the recognition that such partners should be allowed to adopt **jointly**.

SAASWIPP said minimum guidelines for all prospective adoptive partner(s), irrespective of marital status, should apply. It said screening policies and rules concerning adopters should exist across the board and suggests that section 17 of the Child Care Act be repealed.

Ms U F Ledderboge suggested that only persons (also married couples) who have been in a stable relationship for at least two years should be allowed to adopt children. She referred to the fact that other factors such as life-style and age need to be considered in determining suitability as adoptive parents. Ms Ledderboge mentioned that our existing law is inadequate when it comes to the breakdown of long-term relationships and argued for joint adoption and the introduction of procedures similar to those used in divorce to deal with issues such as custody and access to the children from such unions. Miss R van Zyl also highlighted the need for chances to the marital law if same-sex relationships were to receive legal recognition.

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134 Ms Jean Allen; the Adoption Coalition; Ms Jacqui Gallinetti; Johannesburg Child Welfare Society; Ms Blanché Verster; Ms L Kaba, Northern Province Provincial Committee on Child Abuse and Neglect; Ms U F Ledderboge; Ms Sue Padayachee; Mrs Hendré Dippenaar; Children=s Placement Centre; Mr André Viviers; Ms Eileen Jordaan; Mrs Krawitz and Mrs Stander; Mrs M Hattingh.

Respondents gave different time frames for determining when a relationship becomes long-term: These ranged from two,[135] three[136] to five years.[137] Usually no distinction was made between married persons, persons in a heterosexual relationship[138] or persons in a same-sex relationship in this regard.[139] Mrs Krawitz and Mrs Stander pointed out, however, that the length of a relationship has no bearing on its stability and they argue for an objective assessment in terms of the best interests of the child.

It is interesting to contrast the responses of the focus group discussion in Bantry Bay with the earlier responses to Issue Paper 13 on the same issue. Issue Paper 13 posed the following question in this regard:

> Question 74: Should there be more specific guidance in the law on the adoption or fostering of children by homosexual persons and couples?

While some respondents argued that there is no need for more specific guidance in the law on the adoption of children by homosexual persons and couples,[140] the majority did agree on such need,[141] while others fell back on the best interests of the child standard.[142]

The National Council of Women of South Africa stated that homosexual people should not think in terms of parentage. It said nature is against them and adoptions by such persons

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135 Mr André Viviers.

136 Mrs Hendré Dippenaar.

137 Ms Sue Padayachee suggested that in determining whether a relationship is a >long-term relationship= an assessment must be done. She said a long-term relationship should have been in existence for at least three or more years. Mrs M Hattingh, Mrs Francis Prinsloo, Ms Jean Allen and the Adoption Coalition suggested a minimum period of five years.

138 Ms Jean Allen argued persons in a hetero-sexual relationship should also be allowed to adopt jointly.

139 Johannesburg Child Welfare Society.

140 Mrs J Smith; NICC.

141 Phoenix Child and Family Welfare Society; Durban Child and Family Welfare Society; the Cape Law Society; Mr D S Rothman.

142 S A National Council for Child and Family Welfare; ATKV.

or couples would not be in the best interests of the child as the security of the mother and father of different sexes would be missing and there is the danger of the child's peers despising the adopted child.
In a similar vein, Mrs K Freed said that gay parents do not have a balanced outlook on life and do not have the ability to reflect old fashioned values. While recognising that same-sex couples may be able to give love to a child, Mrs Freed completely rejected the notion of gay adoptive parents.

The Cape Law Society held the view that homosexual persons and couples should be entitled to jointly adopt and said this situation should perhaps be covered by a separate Act which clearly details that the rights of homosexuals include the right to marry, etc. The Durban Committee submitted that there should be no discrimination against any person on the same grounds as those set forth in the Constitution and that any suitable person who is in a position to look after the best interests of the child should be entitled to adopt.

Mr DS Rothman commented that more guidance in the law will be necessary if these adoptions are to be encouraged, but foresaw serious moral objections against this. He remarked that legal requirements, provided they have uncomplicated practical applicability, do make it easier for the court and other role-players to wade through many complex considerations.

° **Step-parents**

The worksheet used at the focus group discussion in Bantry Bay posed the following question:[143]

> Is step-parent adoption always the best way to cement the relevant relationship? Is an alternative approach such as a form of guardianship for step-parents, shared with the non-custodial parent or otherwise, not more appropriate? Please give reasons for your answers.

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143 Question 15.

Most respondents did not see step-parent adoptions as the best solution in all situations.[144] Mrs Eileen Jordaan pointed out that step-parent adoptions often have the effect of denying contact to one of the biological parents, the grand-parents and other relatives on that side of the family. The Johannesburg Child Welfare Society added: >Step-parent adoption is often a way of excluding the biological father from the child=s life. Children are often adopted by the step-parent before they are really able to give an opinion on the matter and in later life, may resent the fact that they were adopted by the step-father and their biological father is no longer part of their life. Biological fathers are also often willing to give consent to a step-parent adoption as a way of getting out of their financial responsibilities towards the child=.

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144 Johannesburg Child Welfare Society; SAASWIPP; Ms M Hattingh; Ms Anne Tudhope; the Adoption Coalition; Ms Jacqui Gallinetti; Mrs Krawitz and Mrs Stander; Mrs Jean Allen; Mrs Hendré Dippenaar; Children=s Placement Centre; Miss R van Zyl; Mr André Viviers; Ms Blanché Verster; Ms L Kaba; Ms U F Ledderboge; Ms Sue Padayachee.

There was also general support for the view that an alternative approach such as a form of shared guardianship or shared parental responsibility for step-parents would be more appropriate.[145] However, Ms Jacqui Gallinetti questioned the need for such an alternative approach. The point was also made that the High Court is inaccessible for most persons wishing to pursue the option of shared guardianship.[146] Rather than to support something such as shared guardianship, Ms Anne Tudhope proposed that an open adoption agreement may be best for a child if the natural parent still plays an important part in the life of the child.

° **Disabled persons**

In representations to the Commission, the disability sector highlighted difficulties experienced by disabled persons in adopting children. The worksheet used at the focus group discussion in Bantry Bay therefore posed the following question:[147]

> How can the issue of the status of persons with disabilities vis-a-vis their eligibility to adopt be addressed in the new child care legislation?

Almost all respondents were of the view that it would be unconstitutional to exclude persons from adopting children simply because they are disabled.[148] In its submission, the Johannesburg Child Welfare Society stated that there should be no discrimination against disabled persons who wish to adopt, >provided that the particular disability does not prevent them from fulfilling their parenting tasks, e.g. if a single, quadriplegic or paraplegic wished to adopt, they would need a very committed support system to help them cope with

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145 SAASWIPP; the Adoption Coalition; Mrs Krawitz and Mrs Stander; Mrs Hendré Dippenaar; Miss R van Zyl; Mr André Viviers; Ms Blanché Verster.

146 Mrs Jean Allen.

147 Question 20.

148 Johannesburg Child Welfare Society; Mrs Jean Allen; The Adoption Coalition; Mrs Eileen Jordaan; Mrs Krawitz and Mrs Stander; Ms M Hattingh; SAASWIPP; Mrs Hendré Dippenaar; Miss R van Zyl; Mr André Viviers; Ms L Kaba; Ms Sue Padayachee.

the care of a child on a daily basis. One would also have to be very aware of the prospective adopter=s motivation to adopt e.g. wanting to adopt an older child to help them in some way=.[149]

[149] This argument was also advanced by Ms L Kaba.

Mrs Jean Allen and Mrs Eileen Jordaan pointed out, however, that some (private) adoption agencies do have their own adoption criteria and some of these agencies do consider the disability of the prospective adoptive parents as one of the factors that will be considered in the screening process. It was also pointed out that too many second marriages also end in divorce.[150] Ms Blanché Verster said adoption by disabled persons can be approved on condition that the adoption is in the child=s best interest: >The adoptive parents must fulfil the needs of the child - not the other way around=.[151]

Mrs Francis Prinsloo of DEAFSA highlighted the need for training and awareness creation around disability as a means of addressing the difficulties faced by disabled persons in the adoption process. Ms U F Ledderboge pointed out that the difficulties are practical in nature and she cite as an example where a deaf couple wishes to adopt an infant with no hearing problems. In such an instance, it might not be in that child=s best interest to be adopted by such couple.

18.4.5 Who may be adopted?

° Adoption of older children

Some practitioners maintain that effective permanency planning requires that adoption be the first choice of arrangement for a significant portion of older children who have no parents (e.g. due to their having died from HIV/AIDS) or whose parents have been unable to succeed in making the changes necessary to resume care of their children within the time frame specified for reunification.[152] In this regard, the worksheet used at the focus group discussion in Bantry Bay posed the following question:[153]

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150 The Adoption Coalition.

151 This argument was also put forward by Ms Sue Padayachee.

152 See also S R Churchill, B Carlson and L Nybell (eds) **No Child is Unadoptable** London: Sage 1979; R A C Hoksbergen (ed) **Adoption in the Worldwide Perspective** Berwyn: Swets North America Inc 1986.

153 Question 7.

Do you agree with this assessment regarding the adoption of older children? Please give reasons for your answer.

There was general agreement with the assessment regarding the adoption of older children.[154] The view was expressed that permanency planning should always be the first priority for a child who has no parents or whose parents are unlikely to ever be able to resume the care of the child.[155] Ms Eileen Jordaan made the point, however, that it would be to the benefit of the adoptive child - particularly the older child - to have contact with family members. She added that post-adoption counselling of adult adoptees makes one very aware of their need to know their roots, to re-establish contact with birth parents and siblings, and the importance of the blood-tie. Several respondents also made the point that the views of the (older) child in this regard should be a primary consideration.

Mrs Anne Tudhope argued that placement stability and early permanency planning with a view to ensuring a stable family life for the child must be the top priority rather than multiple attempts at family reunification or rehabilitation. She questioned the philosophy that child abuse stems from temporary family problems and suggested that foster carers be trained as prospective adoptive parents. She said that following the training and early (initial) placement in foster care, such placement should lead to adoption if the attempts in the first year at family reunification fail. This one year period should be the maximum as it is usually evident within three months that rehabilitation is not working.

However, some respondents did not agree with the adoption of older children.[156] The Children=s Placement Centre said,[157] for instance, that (older) children happily placed in

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154 Mrs Francis Prinsloo, DEAFSA; Mrs Hendré Dippenaar; Mrs Krawitz and Mrs Stander; Ms Jean Allen; Mrs Anne Tudhope; Ms Blanché Verster; Ms L Kaba, Northern Province Provincial Committee on Child Abuse and Neglect; Ms Sue Padayachee.

155 SAASWIPP; Johannesburg Child Welfare Society; Group 3; Ms Eileen Jordaan; Ms U F Ledderboge.

156 Miss R van Zyl;

157 The Centre did not deal with adoption placement of older children.

foster care are not to be moved even if they become available for adoption. Mr André Viviers said older children should only be adopted when they have no parents.

A particular concern regarding challenged children was raised by Ms U F Ledderboge. She referred to instances where adoptive parents had not followed up on the medical care required for challenged children and later come back to the placing agency saying that the child is not >what they hoped for ...=. To address this issue, she suggested the use of some legal form of >informed consent= to record the fact that the adoptive parents are aware of the difficulties faced by a challenged child.

° **Adoption of persons older than 18 years**

The worksheet used at the focus group discussion in Bantry Bay posed the following question:[158]

> Should a person over the age of 18 years be adoptable? If so, under what circumstances should this be allowed? Would the adoption of a person over 18 who has been raised or maintained by the applicant(s) constitute a reasonable exception?

Most respondents supported the idea that a person older than 18 years can be adopted.[159]

Ms Blanché Verster said a physical or mentally retarded person over the age of 18 years should be adoptable as >adoption will ensure that the people who raised or maintained the person will not just >give up= on the disabled person, but will accept long-term responsibility=. Ms L Kaba, presenting the provincial input through the Northern Province

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158 Question 9.

159 Mrs M Hattingh; the Adoption Coalition; Mrs Krawitz and Mrs Stander; Ms Jacqui Gallinetti; Miss R van Zyl; Ms Sue Padayachee; Ms Blanché Verster; Ms U F Ledderboge; Ms Hendré Dippenaar. However, some respondents at the focus group argued for a consistent approach and linked the eligibility for adoption to age of majority.

Provincial Committee on Child Abuse and Neglect, said a person over the age of 18 years can only be adopted if that person is in school and in need of assistance.

Ms U F Ledderboge said persons in the 18 to 21 year old category should be adoptable and she cited the following reasons in support: It can create a sense of belonging, establish family bonds, provide for heirs, allow access to medical aid (in the case of a physical or mentally disabled person), and allow the person to complete his or her education. The Johannesburg Child Welfare Society cited as another reason the expressed wishes of the young person to carry the name of the prospective adopter who may have cared for him or her for several years.

Ms Jean Allen, Mr André Vivier and the Children=s Placement Centre saw no point in providing for the adoption of an adult person. Ms Anne Tudhope also said a person in the age category 18 to 21 years should not be adoptable unless that person has been cared for by the applicant. She pointed out that persons so adopted could be exploited by the adoptive family (by living off their salaries or relying on their labour) and that the process can be abused to acquire citizenship.

18.4.6 **Section 18(4) requirements**

In terms of section 18(4) of the Child Care Act, 1983, an application for adoption must not be granted unless the court is satisfied that the applicant(s) is qualified to adopt the child and possessed of adequate means to maintain and educate the child; that the applicant(s) is of good repute and a person fit and proper to be entrusted with the custody of the child; that the proposed adoption will serve the interests and conduce to the welfare of the child; and that the necessary consent to the adoption has been given.

° **The use of the section 18(4) requirements**

The worksheet used at the focus group discussion in Bantry Bay posed the following

question:[160]

> Are these requirements being applied in ways that are not appropriate? Are extraneous issues being allowed to impede adoption being used more frequently as a means of substitute family care? Please give reasons for your answer citing relevant examples where appropriate.

Mrs Krawitz and Mrs Stander, in a joint submission, were of the opinion that the section 18(4) requirements are being applied in appropriate ways. They also did not see the use of the provisions of this section as impeding adoptions.[161] The Adoption Coalition shared this view, but added that adoption should be handled by a specialist adoption agency.

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160 Question 16.

161 This was also the view of Ms Jean Allen.

Ms Anne Tudhope regarded the provisions of section 18(4) is >extremely problematic=. She said birth fathers are not acknowledging themselves in writing which may indicate that such fathers do not wish to play a significant role in the lives of their children yet the courts are placing an unreasonable burden on social workers to find such fathers. She further identified the consent provision,[162] the 60 day >cooling-off= period, and the first right of refusal of foster parents[163] problematic.[164]

The sentiments above were also raised at the report back sessions at the focus group discussion. Group 2 pointed out, for instance, that the following extraneous issues impede adoption being used more frequently:

- The loss of the foster care grant when foster parents adopt the child;
- The fact that consent is sometimes unreasonably withheld by the biological parents;
- The reluctance of some commissioners of child welfare to dispense with the required consent in such circumstances;
- The lack of weight given to the wishes of the (older) child;
- The wide discretion given to social workers and commissioners of child welfare to determine whether the proposed adoption will inter alia >serve the interests and conduce to the welfare of the child=;
- Judicial prejudices, notably against gay and lesbian adoptions.

While not experiencing practical problems with the criteria listed in section 18(4), Ms U F Ledderboge did suggest some improvements to the present wording. She suggested, inter alia, that in order to determine whether a person is >of good repute=[165] references should be called for and criminal records checked) and that in the case of a foster parent

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162 Section 18(4)(d).

163 Section 18(4)(g).

164 These aspects were also identified by other respondents such as Miss R van Zyl.

165 Section 18(4)(b).

adoption[166] bonding issues should be considered.

Ms L Kaba, Mrs M Hattingh and Ms Eileen Jordaan ascribed the inappropriate application of the requirements of section 18(4) to the different interpretations given to the section by commissioners of child welfare.

° **The adequate means test**

166 In terms of section 18(4)(g).

The worksheet used at the focus group discussion in Bantry Bay posed the following question:[167]

> Should the ability of the prospective adoptive parents to maintain and educate the child remain a criterion to be considered by the children=s court in adoption proceedings? Should the criterion not rather be whether the prospective adoptive parents are willing and able to carry out their parental responsibilities? What kind of State support can encourage poor families to adopt children?

Mrs Krawitz and Mrs Stander argued for the retention of the adequate means test, provided subsidised adoptions are recognised.[168] Ms Jacqui Gallinetti took a contrary position and said the adequate means test should make way for the willing and able test. She identified income tax rebates and subsidised health and educational services for persons who adopt children as forms of State support that will encourage poor families to adopt children. The Adoption Coalition also seemed to support the move to the willing and able tests and said financial ability on its own should never be the only criterion.[169] The Coalition supported the idea of subsidies for poor families who adopt children.

Ms Anne Tudhope said it is important that prospective adoptive parents should have the means to provide for the education and maintenance of the children they wish to adopt. She acknowledged, however, that the means test may not always be appropriate and suggests a community based means test. She also supported subsidised adoptions. Mrs Hendré Dippenaar was of the view that both the adequate means test and the willing and

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167 Question 17.

168 Mrs M Hattingh supported this view, but said parents should not be solely dependent upon the subsidy. She said the adoption subsidy should be a supportive rather than an enabling mechanism.

169 This approach was supported by Ms Jean Allen; Ms Eileen Jordaan; Ms Blanché Verster; Ms L Kaba; Ms U F Ledderboge; Ms Sue Padayachee; Ms Francis Prinsloo: Miss R van Zyl; Mr André Viviers.

able test should apply.

In its submission, the Johannesburg Child Welfare Society stated that the move from the adequate means test to the willing and able test is really a case of semantics: >@the ability of the prospective adoptive parents to maintain and educate the child@ is really not that different to Aare willing to meet the child=s needs@ or Awilling and able to carry out their parental responsibilities@. The Society mentioned that, at the moment, it screens applicants who are not in formal employment, but who are working as street hawkers, running tuck shops or spaza shops from home. It also screens many domestic workers. The Society pointed out that in all of these cases, incomes are low - often as low as R500 per month. The Society contended that the adequate means test still applies to these applicants because >they plan their finances to accommodate the addition of a child=. The Society then posed the following question:

> If you considered anyone earning below R500-00 per month, or not earning at all, you would be expecting them to virtually live on >state support= and would this not then be open to abuse, e.g. Alf we adopt a child, we will get a grant from the state and that will help the whole family survive@?

° **South African citizenship**

Non-citizens are now allowed to adopt children in South Africa. This aspect has been covered extensively in another chapter[170] and we leave matters there.

18.4.7 Consent to adoption

° **Informing persons granting consent of the legal consequences of adoption**

The consent to adoption must be in writing and must, if given in the Republic, be signed by

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170 See 22.2 below.

those giving the consent in the presence of a commissioner of child welfare who must attest the consent. Before the commissioner attests the consent he or she must inform the person granting the consent of the legal consequences of the adoption. In this regard, the worksheet used at the focus group discussion in Bantry Bay posed the following question:[171]

> Are problems being experienced in practice in informing persons granting consent of the legal consequences of adoption? If so, what are these? What can be done to address such concerns?

In its submission, the Johannesburg Child Welfare Society submitted that few problems are being experienced in practice in informing persons granting consent of the legal consequences of adoption.[172] The Society pointed out that apart from the social workers informing the consenting birth parents of the legal consequences of adoption during the counselling sessions, the commissioners of child welfare generally also explain the consequences of signing the consent form. The Society said the commissioners at the Johannesburg Magistrates= Court are particularly sensitive and professional in this area.

To overcome the problem of persons not being informed properly regarding the legal consequences of adoption, Ms Francis Prinsloo suggested that persons giving the consent be required to spell out the consequences of them giving consent to adoption in writing and under oath. Ms Sue Padayachee said social workers should state in their reports to the children=s court that the consequences of giving consent have been explained to the persons giving the consent and this should so become part of the court record.

° **Consent to the adoption by the child concerned**

Section 18(4)(e) of the Child Care Act, 1983 requires the child to be adopted, if over the

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171 Question 22.

172 This seemed to be the general view. See the submissions by Group 2; Group 3; Ms Hendré Dippenaar; the Children=s Placement Centre; Ms Eileen Jordaan; Ms Blanché Verster; Ms L Kaba; Mrs Krawitz and Mrs Stander; Ms Jean Allen; Ms Anne Tudhope.

age of ten years, to consent to the adoption and to understand the nature and import of such consent. The worksheet used at the focus group discussion in Bantry Bay posed the following question in this regard:[173]

> Is it appropriate to set arbitrary age limits (presently ten years) for a child to consent to his or her adoption? Should the consent of a child who is mature enough to understand the nature and import of such consent not rather be the requirement?

While some respondents questioned the arbitrary age limit of 10 years for a child to consent to his or her adoption, most respondents agreed, despite and regardless of what age is decided upon, that:

- the maturity of the child should be the deciding factor;
- the views of the child need to be considered,
- the child needs to understand the nature and import of such consent, and

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173 Question 18.

•••• there is a need for proper counselling.[174]

There was also some support for lowering the age to six[175] or seven years.[176] However, some respondents preferred the legal certainty an age determination brings and questioned the subjectiveness of a maturity (as opposed to an age limit) requirement.[177]

Ms Eileen Jordaan suggested that social workers should be required to state in their reports whether the child has been consulted and that the wishes of the child have been taken into account.

° **Consent to adoption by the unmarried natural father**

In the worksheet used at the focus group discussion in Bantry Bay the following questions were posed:[178]

Do you think unmarried natural fathers should get a >first right of refusal= when their

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174 Group 1; Group 3; Johannesburg Child Welfare Society; Ms Hendré Dippenaar; Miss R van Zyl; Ms Eileen Jordaan; Ms Blanché Verster; Ms Sue Padayachee; Mrs Krawitz and Mrs Stander; Ms Jacqui Gallinetti; Ms Anne Tudhope; Ms M Hattingh.

175 SAASWIPP.

176 Mr André Viviers; Ms L Kaba; Ms U F Ledderboge (provided the child is assessed by a social worker).

177 See, for instance, the submission by Ms Jean Allen, Ms Francis Prinsloo, the Adoption Coalition and the Children=s Placement Centre. The last respondent argued that evaluating a child=s maturity is a time consuming and arbitrary affair.

178 Question 21.

children are given up for adoption? Have the law since the *Fraser* judgment not given the unmarried natural father too much say in the adoption of his children? Have you experienced practical problems with the implementation of the Adoption Matters Amendment Act with regard to the involvement of unmarried fathers? Please motivate your answer.

Most respondents supported the involvement of the unmarried natural father of a child in the adoption process.[179]

Group 3, Mr André Viviers, and Mrs Krawitz and Mrs Stander, in their joint submission, maintained that unmarried birth fathers should not get a first right of refusal when their children are given up for adoption. They added that in their opinion the law has given unmarried fathers too much say in the adoption of their children. The Adoption Coalition and Mrs Hendré Dippenaar, on the other hand, took a different position and said the unmarried birth father should have the first right of refusal should such father be in a position to care for the child. In support of the position taken by the Adoption Coalition, Ms U F Ledderboge said unmarried natural fathers should get a first right of refusal in all instances except where such children are born from rape or incest. Ms Ledderboge further suggested that other indicators such as acceptance of paternity, fatherly involvement, visits made, and financial contributions also be taken into account.

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179 SAASWIPP; Ms Blanché Verster; Ms L Kaba; Ms Anne Tudhope; Ms Eileen Jordaan; Mrs Krawitz and Mrs Stander; Ms Jean Allen; the Adoption Coalition; Ms U F Ledderboge; Ms Sue Padayachee; Groups 1, 2 and 4, Mrs Hendré Dippenaar; the Children=s Placement Centre.

Ms Jean Allen, while recognising the right of both biological parents to consent to the adoption of their child, said too much responsibility has been placed on the social worker involved to trace missing parents (especially the unmarried fathers). She and the Johannesburg Child Welfare Society maintained that the courts are not applying the proviso[180] to section 18(4)(d) consistently[181] and are expecting social workers to find natural fathers who have not acknowledged themselves in writing to be the father of the child and have not made their identity and whereabouts known. This causes unnecessary delays in finalising the placement of the child. Group 4, Ms Anne Tudhope and Ms Eileen Jordaan also referred to the inconsistent approach adopted by commissioners of child welfare. They said commissioners sometimes institute searches for >unknown= fathers, demand paternity testing for fathers who have denied paternity, disregard social worker reports recommending adoption, and that the 60-day waiting period causes unnecessary delays. Ms Tudhope recommended that foster parents be given the first option to adopt the child in their foster care.

In its submission, the Johannesburg Child Welfare Society further said that the provisions of the Adoption Matters Amendment Act works well where both the biological mother and

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180 The proviso reads as follows: >Provided that such natural father has acknowledged himself in writing to be the father of the child and has made his identity and whereabouts known ...=.

181 The Johannesburg Child Welfare Society explains the inconsistency as follows:

> The birth mother makes an affidavit at the time of signing consent to the effect that she does not know the whereabouts of the birth father. Some courts accept this and know that if his whereabouts are unknown, he cannot be notified. Other courts insist we advertise for the birth father in three newspapers informing him about the pending adoption. Who takes responsibility for these adverts? Who pays for them, as placing ads in the newspapers is an expensive exercise. Nowhere in the Act does it say that you have to advertise for a birth father if his whereabouts are unknown. At what point does the birth father acknowledge himself in writing to be the birth father? Added to this problem is the fact that most courts only decide to notify the father when there is an adoption application and as this usually only happens after the 60 days have elapsed. We are now being requested to advertise for a birth father, 2 months after the birth mother has signed consent. The baby could have been with a prospective adoptive family for nearly 2 months as well. Should the birth father respond to an advert and come forward, and he decides to sign consent, he then also gets another 60 days, so the adoption finalisation is then delayed another two months. Should he decide he does not want this child to be adopted, the court will set dates for hearings and this further delays the adoption and in the meantime the baby becomes more firmly bonded to the adopters and vice versa.

biological father of a child born out of wedlock are available and in agreement about the adoption and sign consent together or within a few days of one another. The 60-day period then runs almost concurrently for both the biological parents, at the end of which one can confidently place a two-month old baby or finalise the adoption if the child is already placed. The Society pointed out, however, that problems arise where the natural father of a child born out of wedlock is not available at the time the biological mother signs consent and she makes an affidavit to court about the biological father. Should she supply details of the biological father, including his name and address and the fact that he is aware of the pregnancy, it was expected that the court would inform the biological father of an adoption consent having been give, within a period of 14 days from the time of the biological mother signing consent, affording him the opportunity to give or withhold consent, advance reasons why his or her consent should not be dispensed with or to apply for the adoption of the child, if he is the natural father of the child. The Society maintained this is not happening in practice.

In practice, the Society said, the court is only informing the natural father at the time when application for adoption is made and this is usually only after the birth mother=s 60 day have expired or even later. Should the biological father then decide he wants to sign consent, another 60 days has to be given to him to exercise his rights, thus delaying the finalization of the adoption even further. The Society said this causes anxiety for all concerned and could have been avoided if the natural father had been informed within 14 days of the biological mother giving consent. Should the natural father be informed only after the birth mother=s 60 days have expired and then decide to withhold his consent and adopt the child himself, the whole adoption process has to be put on hold while court hearings are held, postponements are granted, investigations done, etc. The Society pointed out had the natural father been informed after the 14 day period, his intentions would be known early on and possibly before the baby has been placed with a prospective adoptive family.

The Society highlighted another problem being experienced with section 18(4)(d) of the

Child Care Act, 1983. This relates to situations where a birth mother makes an affidavit in court at the time of signing consent, stating the birth father=s name but alleges that he has abandoned her, has denied paternity and whose present whereabouts are unknown. As the section reads, one understands that consent should not have to be obtained from the natural father who has not acknowledged himself in writing or whose whereabouts are unknown. However, as the Society pointed out, the Act does not say where and to whom the natural father should acknowledge himself in writing to be the child=s father. The Society continued: >Does this imply that the birth father should have added his name to the birth registration at Home Affairs? ... If it is not the birth register, where else should the birth father be Aacknowledging himself in writing@=.

Ms M Hattingh pointed out that in order to circumvent the provisions of the **Fraser**-judgment, birth mothers refuse to divulge the identity of the natural father or make false affidavits in this regard.[182] This is not necessary in the best interests of the child. She (and SAASWIPP) further highlighted the dichotomy that the consent of the natural father is required for the adoption of his child while no such requirement applies when the birth mother wishes to terminate her pregnancy.

18.4.8 Dispensing with consent to adoption

° Dispensing with consent in terms of section 19

[182] This problem was also mentioned by Ms U F Ledderboge; Ms Sue Padayachee; the Children=s Placement Centre.

In practice, problems are experienced because courts are very hesitant to disperse with consent despite the provisions of section 19 of the Child Care Act, 1983. In South Africa this is an issue which is simply left up to the individual magistrate, who may not be knowledgeable about attachment and bonding or about children=s needs for permanency.[183] There is no agreement as to the conditions under which a child will be regarded as having been >deserted=, and some courts refuse to allow an abandoned child to be adopted for up to two years.

The worksheet used at the focus group discussion in Bantry Bay posed the following question:[184]

> Under what circumstances should it be possible to dispense with the consent of the parents?

Some respondents regarded the grounds for dispensing with consent in terms of section 19 of the Child Care Act, 1983 as covering all the most likely circumstances where this would be needed.[185] Most respondents also related problems experienced in the application of the section to inconsistency in approach by commissioners of child welfare, especially when it comes to determining when consent is being withheld >unreasonably=.[186] Some of these respondents also argued that this criterion (unreasonably withholding consent) should be defined or alternatively be replaced with the best interests of the child criterion. Other possible criteria mooted for dispensing with consent was the absence of a parent / child relationship and the abuse of another child.

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183 See Elizabeth Cooke >Dispensing with parental consent to adoption - a choice of welfare tests= (1997) Vol. 9 No. 3 **Child and Family Law Quarterly** 259.

184 Question 25.

185 Mrs Jean Allen; Ms Anne Tudhope; Ms M Hattingh; Groups 2 and 3; Ms Blanché Verster; Ms Hendré Dippenaar; the Children=s Placement Centre.

186 Mr André Viviers; Ms Francis Prinsloo; Mrs Krawitz and Mrs Stander; Ms M Hattingh, Ms Anne Tudhope; Ms Eileen Jordaan; Groups 2 and 3; Ms Blanché Verster; the Adoption Coalition.

Mrs Krawitz and Mrs Stander, in a joint submission, said it should be possible to dispense with the consent of a parent if the parent has failed to take responsibility for the child or failed in his or her duty of care. They proposed that courts be provided with more guidelines on what >unreasonably withholding consent= in section 19(b)(vi) of the Child Care Act, 1983 means. The Adoption Coalition also pleaded for clearly defined criteria. In addition to the criteria listed in section 19 of the Child Care Act, 1983, Ms Blanché Verster recommended the inclusion of the following ground for dispensing with consent: Where the parent has not supported a child for a period of one year although able to do so.

SAASWIPP said that dispensing with the consent of the parents should apply to children who have been deserted. The Association further said criminal proceedings should not be instituted against desperate women who abandon their children. The National Adoptive Parents= Institute supported this view and put forward the following recommendations in this regard:

11 DECLARATION OF ABANDONMENT/ DESERTION

A child is to be declared a foundling [deserted] if the child:

1) has been expressly abandoned (by one or both birth parents) into the care of a hospital, children's home, place of care or safety, a department of welfare or a social worker, or left in a public place where the child could be found and cared for (eg under a tree, near a path, in a public toilet, at the station / taxi rank).
2) after its details of date and place of birth or time, date and place of finding and physical characteristics have been put on a Central Register / Search Register and no family member has claimed a child; and / or
c) after its details of date and place of birth or time, date and place of finding and physical characteristics have been put in the local press / made known on local radio stations, and no family member has claimed a child;
d) deserted in the manner described in section (1)(a) if not reclaimed within a period of 30 days.

2) NON DECLARATION OF A CHILD AS ABANDONED / DESERTED

A child is not to be declared a foundling where the child:

a) has been left in the care of family members who claim that the child was abandoned with them. Appropriate safeguards must be put in place to assure that parents' whereabouts are timeously found. Extended family members must be counselled that the child may be adopted locally or sent

overseas for adoption if the whereabouts of the child's parents remain unknown. Adoption proceedings entered into without parental consent when it is suspected that extended family members may know their whereabouts is a problematic area. The best interest of the child to a stable permanent family environment is to be the prime consideration.

b) if the child's family has not been found within a period of 30 days, or does not wish to reclaim the child, the child may be placed for adoption without the express consent of the parents.

3) A CONTACT REGISTER is to be set up.

Ms Sue Padayachee was however of the view that it should only be possible to dispense with the consent of the parents under extreme conditions. She suggested that the onus be placed on the biological parent why consent should not be dispensed with.

° **Dispensing with consent on the basis of unreasonableness**

Issue Paper 13 posed the following question:

> Question 72: Should section 19(b)(vi) of the Act be amended to identify situations in which refusal of parental consent may be regarded as 'unreasonable,' or should the ground be changed to allow for dispensing with parental consent when this is 'in the best interests of the child'?

The SA National Council for Child and Family Welfare answered the question in the affirmative and supported the motivation advanced by the Project Committee in Issue Paper 13.[187] This position was supported by the Durban Child and Family Welfare Society with a view to permanency planning. The Society added that permanent foster care or subsidised adoption should be legalised and that in cases of abandoned children immediate adoption should be possible.

The NICC contended that section 19(b)(vi) of the Act should be retained and that the best interests of the child should underlie all decisions. It could also be included as a specific

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187 This view was supported by Professor C J Davel, Mrs J Smith and the National Council of Women of South Africa.

clause in section 19 but the unreasonableness clause should not be withdrawn. The Cape Law Society, supported by the Durban Committee, believed that the main focus should be the best interests of the child. The Durban Committee added that one should guard against removing too much parental responsibility.

Phoenix Child and Family Welfare Society and the Natal Society of Advocates answered the question in the negative, with the latter respondent adding that the court should have a wide discretion as to what constitutes the term >unreasonable=.

The Johannesburg Institute of Social Services contended that the problem with the application of section 19(b)(vi) of the Act is that commissioners of child welfare are scared for whatever reason to apply this provision in the interests of the child. The Institute submitted that this is a serious issue and can far better be handled by higher ranking courts. If the country could have a regional Family Court and a Family Appeal Court there would be no need to alter this clause. The Institute submitted that the problem is not in the legislation but in the legal system.

Mr DS Rothman did not take kindly to the suggestion that commissioners are reluctant to use the ground referred to in section 19(b)(vi) >especially because the parent is represented by a lawyer=. He pointed out that many social workers have little or no understanding of the way in which evidence adduced is weighed up and evaluated, the admissibility of evidence, credibility factors, etc. The respondent remarked that it is in the first place not the commissioner who should use this or other grounds, but the court assistant. He conceded that section 19(b)(vi) is unclear and should be reformulated. Mr Rothman cautioned that although the identification of specific situations will make the task of the court much easier, no list will be exhaustive and that the real test for reasonableness takes place when it is weighed up against the best interests of the child.[188]

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188 In a letter with enclosures dated 6 June 2001 the Children=s Placement Centre also highlighted practical problems with the circumstances in which consent to adoption may be dispensed with.

The worksheet used at the focus group discussion in Bantry Bay did not include any specific questions on section 19 of the Child Care Act, 1983.

° **Notice of consent to adoption (section 19A)**

In terms of section 19A(1) of the Child Care Act, 1983 if only one parent has given consent to an adoption, where the other parent is not available to give consent or where such parent=s consent is not required, the commissioner for child welfare must cause notice to be served on the other parent within a period of 14 days informing such parent of the consent that has been given and affording him or her the opportunity to also give or withhold consent, or advance reasons why his or her consent should not be dispensed with, or, in the case of a natural father of a child born out of wedlock, to apply for the adoption of the child.

The worksheet used at the focus group discussion held in Bantry Bay posed the following questions in this regard:[189]

> How is section 19A of the Child Care Act,1983 working in practice? What could be done to make it clearer and more effective?

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189 Question 23.

Mrs Krawitz and Mrs Stander, in a joint submission, and Groups 1 and 3 stated that section 19A is causing problems in practice.[190] They said it is often difficult to find one parent and this causes delays in the process. It is also unclear whose responsibility it is to trace the missing parent. They referred to the inconsistency in approach by commissioners regarding the application of the 14 day period. Ms Jean Allen said some commissioners of child welfare do not apply the provisions of section 19A and insist that the consent of the father be obtained.[191]

The Adoption Coalition, on the other hand, stated that the problem does not lie with the section, but with its implementation by commissioners of child welfare. The Coalition therefore recommended training of commissioners and standardisation of procedures.[192]

In its submission, the Johannesburg Child Welfare Society also pointed out that the problem seems to be the different interpretations given to section 19A by different children=s courts. On one reading of the section, if only one parent has given consent to an adoption where the other parent is not available to give consent or where such parent=s consent is not required in terms of section 19, the commissioner must cause notice to be served on the other parent within 14 days, informing such parent of the consent that has been given and affording such parent the opportunity to also give consent or advance reasons why his or her consent should not be dispensed with or, in the case of the unmarried natural father, to apply for the adoption of the child. The Society then posed the question why the commissioner must >cause notice to be served on the other parent= when the other parent >is not available to give consent or where such a parent=s consent

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190 Ms Eileen Jordaan and the Children=s Placement Centre shared this view.

191 This point was also made by Ms Blanché Verster.

192 Mrs M Hattingh shared this view.

is not required=. Does this section imply that notice must be served even if consent is not required, asked the Society.

The Society pointed out that the section provides that notice must be served on the other parent within a period of 14 days informing such parent of the consent that has been given. The Society averred that this is not happening in practice as the courts are not notifying the other parent after the consent has been given, but prefer to wait until there is an application for adoption. This application may come long after the 60-day cooling off period has expired for the parent who did consent.

18.4.9 **Withdrawing consent**

In terms of sections 18(8) and (9) of the Child Care Act, 1983, the parent of a child may withdraw his or her consent to the adoption in writing before any commissioner at any time during a period of up to 60 days after having giving such consent and the children=s court cannot make any order of adoption before the expiration of this 60-day period.

At the focus group discussion in Bantry Bay the following questions were posed in this regard:[193]

> Is there any merit in retaining this 60-day >cooling off= period? What alternatives do you suggest?

Most respondents categorically stated that there is no merit in retaining a>cooling-off= period of 60 days, and most argue for a much shorter period such as 30 days.[194]

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193 Question 24.

194 Groups 1 and 3; Ms Blanché Verster; SAASWIPP; Ms Jean Allen; Mrs Krawitz and Mrs Stander; Ms Jacqui Gallinetti; the Adoption Coalition; Ms Anne Tudhope; Ms U F Ledderboge; Ms Sue Padayachee; Johannesburg Child Welfare Society; Ms Hendré Dippenaar.

Respondents argued that the uncertainty caused by the delay is traumatic to the adoptive parents and birth parents alike and hampers the bonding between the prospective adoptive parents and the child. Ms Anne Tudhope said that if the counselling to birth parents facing a crisis pregnancy is done thoroughly, the decision to give the baby up for adoption is a considered one and then there will be no withdrawal of consent. Mrs M Hattingh shared this view and pointed out that some commissioners of child welfare place the baby in a place of safety during this 60-day period. This has obviously a negative impact on the bonding process and aggravates the position regarding availability of beds in places of safety.

Mr André Viviers, Ms Eileen Jordaan, the Children=s Placement Centre and Ms L Kaba argued for the retention of the 60-day period. Ms Jordaan said it is important in the placement of babies to observe the placement and to establish whether or not bonding has taken place. Ms Jordaan further pointed out that the circumstances of the birth mother might also change and cause her to withdraw her consent. She said adoption is a lifetime decision and what is best for the child and not the adoptive parents is important. The Children=s Placement Centre said their adoptive parents are counselled to accept this risk and the period gives them sufficient time to observe bonding and evaluate the success of the placement prior to finalisation.

18.4.10 The effect of adoption

The worksheet used at the focus group discussion in Bantry Bay posed the following questions:

> Is it necessary in law to link adoption to the termination of parental responsibilities? If so, does it need to be shown that everything possible was done to assist the parents who give a child up for adoption to fulfil their parental responsibilities?

Most respondents saw a need to link adoption and the termination of parental

responsibilities and to show that everything possible was done to assist the parents who give up the child for adoption to fulfil their parental responsibilities.[195] Mrs Eileen Jordaan said that one of the main reasons why children are placed in adoption is the inability of the single parent to maintain the child because she is unemployed, has no accommodation, and because there is no support from the father of the child.

Mrs Jean Allen argued, however, that it is not always necessary to show that everything possible was done to assist the parent(s) to keep the child. She pointed out that not all children are given up for adoption because of financial reasons or lack of support systems.

Mrs Anne Tudhope, chairperson of the National Adoptive Parents= Institute, preferred the phrase >transference of parental responsibility= to >termination of parental responsibility=. She said adoption is to be invoked in cases where there is a lack of parental responsibility. Mrs Tudhope suggested that in such an instance the child be placed with trained foster parents who will become the adoptive parent if attempts to rehabilitate the family fail. Rehabilitation of the family is to take place at the same time and should be limited to a period of three months. She said children are not to be removed from families suffering a short-term crisis.

The National Adoptive Parents= Institute submitted in a separate submission that legislation must provide parents of children born out of wedlock who wish to place their children for adoption with accredited social worker counselling or mediation facilities before

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195 Ms Eileen Jordaan; Mrs Krawitz and Mrs Stander; Ms Jacqui Gallinetti, the Adoption Coalition, Pretoria; Mrs Jean Allen; Mrs M Hattingh; SAASWIPP; Mrs Blanché Verster, SAVF; Mrs Linda Kaba; Mrs Hendré Dippenaar; the Children=s Placement Centre; Mr André Viviers.

the matter is brought to court. It suggested that a social worker=s report should be required before a father of a child born out of wedlock gains parental responsibility in respect of his child and that adopted persons, adoptive parents and birth parents wishing to make contact do so through an intermediary in the person of a trained social worker. The Institute further suggested that post-adoption services be made available to adoptive and foster families where needed.

Mrs Krawitz and Mrs Stander strongly supported the separation of the termination of parental responsibilities from the issuing of an adoption order. The Adoption Coalition, Pretoria pointed out that the termination of parental rights before adoption in a separate process is dangerous if there is no one to adopt the child. On the other hand, Mrs Jean Allen said that the law should allow for the termination of parental responsibilities separately from the issuing of an adoption, such as for children in long-term foster care.

Mrs Ledderboge also saw adoption and termination of parental responsibilities as two different issues. She said a parent who wishes to relinquish parental responsibility should do so separately of the next step regarding substitute care, provided there are community resources. She raised the interesting option of a parent giving up his or her child for adoption, but wishing to retain some aspects of parental responsibility in respect of that child. She said in such an instance, a clearly specified agreement is vital.

The submission of the Johannesburg Child Welfare Society was informative and is quoted in full:

> This is an issue which raises mixed reaction from adoption social workers. While we are aware that many birth mothers sign consent to their newborn babies= adoption with the expectation that the baby will be placed in adoption shortly after this legal requirement has been completed, in reality, this is not always the case and many babies can remain in institutions or temporary foster care for many, many months before being placed in adoption. Should the birth mother remain responsible for the child during this period? Should she be involved in visiting the child, buying things for the child?

The feeling amongst the " 10 adoption social workers at this agency is that the mother=s responsibility towards her child should be terminated at the time of consent and not only when an adoption order is made. The rationale behind this feeling is that the mother Agave up@ her child because she could not fulfil her parental responsibilities due to her circumstances. Should we then force this on her because of not being able to find suitable adopters or because of the child=s special problems delaying his adoption? E.g. HIV + children.

Adoptive placements of older Ahard-to-place@ children is a separate issue. For some such children, the termination of parental rights would increase the chances of recruiting suitable adoptive parents.

18.4.11 Post-adoption contact

At the focus group discussion the Commission pointed out that there are now many variations in adoption practice along a continuum ranging from completely >open= to completely >closed=. This has come about in part because so many older children with pre-existing relationships with biological family members and others are being adopted. It might well be necessary to make provision for the court to allow for parental contact to be maintained under certain conditions in particular cases - especially where older children are involved. The question was therefore posed as to whether the law should provide for some measure of post-adoption contact by adopted children with their biological parents, biological family members or significant others.[196]

Most respondents were in favour of the law providing some measure of post-adoption contact by adopted children with their biological parents, biological family members or significant others.[197]

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196 Question 5.

197 Mrs Krawitz and Mrs Stander; Mrs Jean Allen; Mrs Anne Tudhope, chairperson of the National

In this regard, most respondents added the proviso that such contact should be in the best interests of the child concerned.

Mrs Eileen Jordaan opined that it would be helpful, if at the time of the making of the adoption order, a contract was entered into in which post-adoption contacts were agreed to by the adoptive parents and the birth parents. She pointed out that this would be particularly important in step-parent adoptions which often mean that a child is deprived of contact with the consenting birth parent, grand-parents and the extended family. Mrs Jordaan further argued that in the case of open adoptions, a contract should also be entered into in which post-adoption contact between the birth parent and the child is agreed to. She said such contracts may later be found not to be in the child=s best interests and provision should therefore be made for the contract to be amended.

The Adoption Coalition, Pretoria qualified its support for post-adoption contact to instances where there has been a pre-existing relationship. It also said such contact should be facilitated by a specialist adoption worker or agency and should form part of an agreement or the court order. This was also the view of Mrs M Hattingh of CMR, Pretoria, who said in addition that step-parent adoptions more readily allow for sustainable contact once the adoption proceedings have been finalised.

SAASWIPP restricted its support for post-adoption contact to cases of non-disclosed and family adoptions of older children. It did not support post-adoption contact in the case of baby non-disclosed adoptions of babies. It said where older children are adopted, provision must be made in the adoption order for the maintenance of contact between the adoptee

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Adoptive Parents= Institute; Mrs M Hattingh; SAASWIPP; Mrs Blanché Verster; Mrs U F Ledderboge; Mrs Sue Padayachee; Mrs Francis Prinsloo; Mrs Hendré Dippenaar; Mr André Viviers.

and his or her siblings. This view was supported by Mrs Sue Padayachee of Lawyers for Human Rights, who added that the court should be informed by a social worker=s report. Mrs L Kaba submitted that the rule should be no contact in non-disclosed adoptions. Miss R van Zyl also differentiated between open disclosed adoptions and closed non-disclosed adoptions. She said in the case of the former, contact should be maintained provided it is in the best interests of the child, while in the latter contact should be through the agency that handled the adoption.

Mrs U F Ledderboge cautioned that in those instance where a child has been removed because of abuse, >distance= between such child and his or her parent(s) may be necessary as such a child can be easily manipulated by the abusive parent(s).

On the issue of open adoptions, the National Adoptive Parents= Institute submitted that open adoption arrangements should not be mandatory in all cases: >Contact is not suitable for all children or families=. It therefore suggested that open adoption arrangements need to be flexible, and able to change with time according to needs, particularly of the child concerned. The Institute raised the possibility of entering into an agreement regarding contact during the adoption process. This agreement should provide for possible (later) changes and should provide for possible contact between a child and any member of his or her extended family who has played a significant role in the life of the child, or where such contact would benefit the child. The Institute said contact could take the form of letters, the exchange of photos or personal contact under the supervision of, and/or the consent of the adoptive parents. On the other hand, Ms Jacqui Gallinetti argued that the law should not provide for post-adoption contact by adopted children with their biological parents. She said that if any type of family reunification is still possible, then adoption should not be resorted to.

The Children=s Placement Centre submitted that if ongoing contact with the biological parents is deemed to be in the best interests of the child then adoption is not appropriate. The Centre said infants available for non-disclosed adoption would be very difficult to place

if there was face to face post-adoption contact and that most adoptive parents only want limited post-adoption contact via the agency.

In its submission, the Johannesburg Child Welfare Society pointed out that there is presently nothing legally binding to regulate or enforce post-adoption contact between birth parents, the child and the adoptive family. The Society further highlighted the difficulties in enforcing such contact orders.[198] The Society then said that in terms of the law, it would be helpful to have something >legally binding= in the Child Care Act regarding adopters maintaining contact with the agency or birth parents, via the agency in the case of adoption of a newborn or toddler. The Society also pointed out the difficulties encountered with open adoptions:

> In terms of >open adoption=, adopters sometimes meet with birth parents at the time of placement. During this meeting, certain expectations with regard to future contact between the birth parents (via the agency) and the adopters (via the agency) are expressed. The adopters promise to write letters to the birth mother on the child=s progress (via the agency) once a year or >regularly=. The birth mother goes away, happy in the knowledge that this promise has been made to her and that she will hear news of her child from time to time.
>
> Generally, it goes well initially, maybe for the first year or two, sometimes less, and then the adopters refuse to have any further contact with the birth mother (via the agency). The birth mother cannot understand how the adopters could go back on

198 >The child is legally adopted - the adopters suddenly decide that they no longer want to have contact with the birth parents and they stop all contact - what will the penalty be? Do you bring them back to court for another hearing? Most adoption cases are closed once the adoption is finalised. Would a court order with regard to >ongoing= contact mean that files would remain open for years in order to ensure that this contact was being maintained?=

their >promise= to her and she feels let down, resentful and bitter about her decision, etc. Her previous positive feelings about the adopters become very negative.

Adoption social workers are at a loss to do anything >legally= about the situation. They have to accept the adopters= decision to stop all further contact, sometimes not so long after the child has been placed. The adopters know very well that they are under >no legal obligation= to provide letters or photos for the birth family and therefore feel free to make the decision of no future contact. So, once again, it would be good to have some form of legal duty, should this be an expectation of both the birth mother and adopters (it should not be forced on anyone), but the question again arises as to how this would be >enforced=. Adopters often move to other countries, do not let you know where they are, etc. Who is going to enforce this >order of contact= and what would the penalty be for not maintaining the contact? ...

Perhaps social workers should include a subheading in their section 18 finalization report covering >**Expectations regarding ongoing contact** or **Agreement regarding ongoing contact**=, so that at least adopters see it as part of the adoption proceedings and not just a verbal promise made in the social worker=s office to the birth mother or conveyed to the birth mother via the social worker.

18.4.12 Prohibition of consideration in respect of adoption

Nobody may, except as prescribed under the Social Work Act, 1978 give, undertake to give, receive or contract to receive any consideration in cash or kind, in respect of the adoption of a child.[199] Contraventions of this provision constitutes a criminal offence and offenders will be liable to a fine or to imprisonment or to both.

It is well known that this provision has hardly ever been implemented, mainly due to arguments as to what constitutes a >consideration=. However, it often happens, though not exclusively, in placements managed by social workers in private practice (and some agencies) that e.g. arrangements are made for a particular applicant couple to pay the

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[199] Section 24(1) of the Child Care Act, 1983.

hospital fees and other expenses of a particular mother, who then consents to the adoption of her child by those applicants rather than anyone else.

The worksheet used at the focus group discussion in Bantry Bay posed the following questions in this regard:[200]

> Should the position as to what will and what will not constitute a >consideration= be addressed in the regulations to the Social Work Act 1978? If so, should the current prohibition in the Child Care Act be repealed? If not, how can the current section 24 of the Child Care Act 1983 be made more effective?

Most respondents agreed that the position as to what constitutes a >consideration= needs to be clarified in the regulations to the Social Work Act, 1978.[201] In this regard, Group 3 suggested that valid >considerations= be limited to confinement expenses, medical care, and accommodation of the birth mother in need. It defined >consideration= as anything that pertains to the welfare of the child - all expenses related to the birth and the health of the mother during the pregnancy. The Group made the valid point that >clients are not empowered to complain= about the fact that they had to pay some consideration.

Group 2 suggested that the prohibition on giving or receiving any consideration in respect of the adoption of a child should be retained in the new children=s statute. In order to make the prohibition more effective, the Group suggested that consideration be defined as any benefit (exchange) received by the birth parents in respect of the adoption of their child. The Group mentioned that there must be adequate disclosure on considerations given or received in the social worker=s report.[202]

The Children=s Placement Centre also supported the retention of the prohibition on giving or receiving considerations in section 24(1) of the Child Care Act, 1983, but argued for

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200 Question 32.

201 Ms Jean Allen; Ms Blanché Verster; Miss R van Zyl; Mr André Viviers; Groups 2 and 3; the Children=s Placement Centre; Ms Eileen Jordaan; Ms U F Ledderboge.

202 SAASWIPP, Ms Sue Padayachee, Ms Eileen Jordaan and Mr André Viviers supported the idea that the social worker=s report should disclose all financial matters involved in the adoption to the children=s court. See also Regulation 21 to the Child Care Act, 1983.

stricter enforcement. The Centre said fees should be standardised and upper limits set. Fees should be broken down into its components (e.g. interviews, visits, reports) and a sliding scale should apply so that not only the wealthy are able to afford to adopt. The Centre proposed a narrow definition of confinement to perhaps only cover the confinement, paediatric expenses, and not the >rumoured Alove gifts@ such as study fees, jewellery, cars, etc=.[203]

Ms L Kaba said social workers in private practice should not deal with adoption and that no form of payment should be made in respect of an adoption. She pointed out that payment is often construed as >buying the child=.

Mr André Viviers, Ms Sue Padayachee, and Ms Eileen Jordaan proposed a dual approach. They said the position as to what will constitute a >consideration= should be addressed in the regulations to the Social Work Act,1978, while the current section 24(1) Child Care Act prohibition should be included in the new children=s statute.

Ms Anne Tudhope said adoptive parents >mainly= pay for the professional services of social workers. Fees are often matched to the adoptive parents= ability to pay. She submitted that payment of the confinement costs (private hospitalization of mother and child) benefits the child as the services provided in State hospitals have dropped substantially. She maintained there is inadequate protection for the prospective adoptive parents in these situations as the birth mother might still change her mind and keep the baby despite the costs incurred by the prospective adoptive parents.

It has been argued that the fact that private social workers in private practice are paid directly by the prospective adoptive parents creates a potential conflict of interests, as such social worker is being paid by the person(s) being assessed for their suitability to adopt. The worksheet used at the focus group discussion at Bantry Bay posed the following

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[203] This view was shared by Ms U F Ledderboge.

questions in this regard:[204]

> Should the new child care legislation prohibit social workers from receiving directly payment by the prospective adoptive parents? How otherwise can private social workers be reimbursed for their work? How can legislation ensure that the best interests of the child are considered?
>
> Should the regulations under the Act be amended to provide policy guidelines on the role of social workers in order to minimise or avoid conflict of interests in situations such as those described above? Please give reasons for your answer.

In response to the first question, some respondents argued that the regulations to the Social Work Act adequately regulate the conduct of social workers. Such respondents saw no need to prohibit social workers from receiving a consideration in respect of adoptions, especially if such consideration relates to professional services rendered.[205] Some respondents suggested that payment be channelled through some kind of central fund or authority.[206] In response to the second question posed above, most respondents indicated that they would welcome greater clarity and guidelines on the role of social workers in conflict of interests situations.[207]

Ms Eileen Jordaan argued strongly that adoptions should only be handled by licensed adoption agencies because of potential conflict of interests. She said the person who pays the fees becomes the social worker=s client while the client in adoption work should always be the child. Ms Jordaan said social workers in private practice should be >contracted= to an adoption agency or state department and be paid according to the work undertaken by them. She saw the present system whereby social workers in private practice are required to work in a system of at least two social workers as totally inadequate and mere window

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204 Questions 33 and 34.

205 Ms Anne Tudhope; Mrs Krawitz and Mrs Stander; Ms Sue Padayachee; Ms Blanché Verster; Mr André Viviers; Groups 2 and 3. Contra Ms L Kaba.

206 Ms Jean Allen; Ms Jacqui Gallinetti; Ms Eileen Jordaan.

207 Ms Anne Tudhope; Ms Jean Allen; Ms Jacqui Gallinetti; Mrs Krawitz and Mrs Stander; Ms M Hattingh; Ms Sue Padayachee; Ms Blanché Verster; Mr André Viviers; Miss R van Zyl; Ms Francis Prinsloo; Groups 1, 3 and 4; Mrs Hendré Dippenaar; Ms U F Ledderboge.

dressing as in many cases the two social workers within the system are miles apart and seldom confer.[208] Ms Jordaan continued:

> If social workers in private practice are to continue to do adoption work they should be required to charge fees according to a sliding scale based on the income of the client; the reports should reflect clearly a breakdown of the fees charged; and there should be a limit to what fees can be charged. ... The present state of affairs has as a result that only persons who can afford the sometimes exorbitant fees can adopt.

Ms U F Ledderboge, Ms Jacqui Gallinetti, and Mrs M Hattingh seemed not to exclude the possibility of social workers in private practice receiving direct payment by the prospective adoptive parents, provided the payments are fee-structured and maximum tariffs apply. Ms Gallinetti and Mrs Hattingh said the financial matters related to adoption need to be covered in the new children=s statute.

Mrs Krawitz and Mrs Stander saw no need for a prohibition on receiving direct payment for professional services rendered in respect of an adoption. They said professional fees are charged for professional services, the outcome of which may or may not be a favourable recommendation. The respondents believed there are sufficient checks on who may

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208 SAASWIPP pointed out that it is now necessary under the Social Work Act 1978 for social workers involved in adoption work to register a speciality which has conditions of experience and also the condition that the social worker must operate in a system. SAASWIPP itself has additional requirements for its members practising adoption work. At this stage, until such time as the Council for Social Work finalise their regulations concerning the procedure of adoption work and the tariff, it is necessary for the social workers in private practice to be accredited in adoption work by SAASWIPP.

become an accredited social worker in the legislation.

Ms Anne Tudhope pointed out that the Department of Social Development does not have the funding, resources or manpower to process, monitor and provide pre- and post-adoption services for all adoptions. She said social workers in private practice have very high standards, but conceded that the system of accreditation needs to be refined. She proposed the following possibilities:

- Standardisation of fees in private practice;
- Welfare organisations to charge fees on a sliding scale based on a means test;
- Social workers in private practice to work in a system to prevent conflict of interests.

In its submission, the Johannesburg Child Welfare Society pointed out that trafficking of children and the sale of infants is more likely to occur when independent adoption agents are involved because there is an opportunity for improper financial gain at each stage of the adoption process.

The Children=s Placement Centre said direct payment to social workers can easily lead to a conflict of interests: >The person who pays becomes the client instead of the child=. The Centre mentioned that it has come to its attention that some social workers in private practice pay agents to recruit pregnant women: >Once she takes up the offer of a private hospital confinement (she usually has no medical aid) she is subtly pressured to relinquish her baby for adoption and expenses drawn=.

In its submission, the Children=s Placement Centre said ideally there should be definite conditions for accreditation before a social worker should be allowed to do adoptions. The Centre supported guidelines, limits on the fees charged, and the monitoring and investigation of professional conduct of such accredited social workers. Miss R van Zyl shared these views.

Mr André Viviers said social workers in private practice should work within a >structure= and preferably have an external consultant when dealing with adoptions.

18.4.13 **Subsidized adoptions**

Issue Paper 13 posed the following question:

> Question 68: Should subsidised adoption (i.e. state grants payable to impoverished adoptive parents) become an option in South Africa?

The SA National Council for Child and Family Welfare considered the introduction of subsidised adoption as most essential, stating that Child Welfare Societies have been asking for subsidised adoptions for years. This was also the contention of the Johannesburg Institute of Social Services, Disabled People South Africa, Mr D S Rothman, Phoenix Child and Family Welfare Society, and the Cape Law Society, supported by the Durban Committee. Referring to tax free adoptions which are in existence in the United States as an incentive for the adoption of abandoned children or children with special needs, the NICC answered the question in the affirmative.

The Durban Child and Family Welfare Society, in similar fashion, added that subsidized adoption would be useful for cases of kinship care or placement of abandoned babies. The Society was concerned, however, that more people would apply for adoption with a financial motive and that certain organisations might not apply stringent screening procedures. It was suggested that a means test would need to be applied, but said that the motivation of the family in applying for adoption is more important than financial circumstances.

The Natal Society of Advocates submitted that the issue of subsidised adoption might possibly work in an ideal society. There are, however, many less altruistically-minded persons than materialistic persons in the world and orders of this nature might not operate

in the best interests of the child. It was submitted that this option at present is not practical.

The Department of Developmental Social Welfare of the Northern Cape Province submitted that the concept of subsidised adoption should be investigated to determine if it is cost effective and in the best interests of children.

The ATKV contended that subsidised adoptions should not be considered. It said the reality is that Government cannot afford to pay parents for caring for a child and there are too many children who need care to allow this. It was further submitted that paying parents to care for children may give rise to even more abuse of situations and worse misdeeds.

The worksheet used at the focus group discussion in Bantry Bay posed the following question:[209]

> What form should such subsidized adoption take? Who should be responsible for providing the incentive? If the State, should it be grant based or not? Should there be criteria for receiving such assistance? If so, what should these criteria be?

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209 Question 8.

The idea of subsidised adoption received overwhelming support at the focus group discussion in Bantry Bay.[210] Most respondents supported a means-tested-State (monthly)[211] grant.[212] These respondents said the grant should be reviewed biennially.[213] Some respondents coupled the subsidy to the provision of tax rebates, free education and medical care,[214] while others suggested that the adoption subsidy should involve the provision of such services, rather than a cash grant.[215] Some respondents placed the onus to apply for the subsidy on the adoptive parent(s).[216]

Mr André Viviers, while supporting the principle of subsidised adoptions, said the adoption subsidy should be in the form of a **time-limited** (e.g. for a period of two years only) State grant.

Ms Sue Padayachee and SAASWIPP seemed to suggest that children in foster care who are adopted should benefit from the adoption subsidy. This was also the view of Ms Blanché Verster

As for the criteria to be adopted, Mrs Francis Prinsloo and Mrs Krawitz and Mrs Stander, in

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210 Groups 1, 2, 3 and 4; Ms Francis Prinsloo; Ms Blanché Verster; Ms Eileen Jordaan; Ms Anne Tudhope; Ms Jacqui Gallinetti; Mrs M Hattingh; SAASWIPP; Mrs Krawitz and Mrs Stander; the Adoption Coalition; Ms Sue Padayachee; Ms Hendré Dippenaar; Miss R van Zyl. However, Ms Jean Allen said she does not totally agree with the idea of subsidised adoption. She preferred long-term foster care because there is supervision of the placement. The Children=s Placement Centre said there would be no need for subsidised adoption if the child care grant was made available to all children. The Johannesburg Child Welfare Society=s adoption team was also generally not in favour of subsidised adoption, fearing that such system would be open to abuse. The Society as a whole, however, was strongly in favour of subsidised adoption for AIDS orphans, children in long-term foster care, and children with special needs.

211 Ms U F Ledderboge did not favour a single >once-off= adoption grant as she believed this will not be used in the child=s best interests.

212 Groups 1, 2, 3 and 4; Ms Francis Prinsloo; Ms Sue Padayachee; Ms Blanché Verster; Ms Eileen Jordaan; Ms Anne Tudhope; Mrs M Hattingh; SAASWIPP; Mrs Krawitz and Mrs Stander; the Adoption Coalition; Miss R van Zyl.

213 Groups 2 and 3; Ms Eileen Jordaan; Mrs M Hattingh; SAASWIPP; Mrs Krawitz and Mrs Stander.

214 Ms Hendré Dippenaar; Ms Sue Padaycahee; Mrs M Hattingh; SAASWIPP; the Adoption Coalition.

215 Ms U F Ledderboge; Ms Jacqui Gallinetti; Ms L Kaba.

216 Miss R van Zyl; Group 3; Ms Eileen Jordaan.

a joint submission, stated that the criteria for receiving such assistance should be based on the child=s needs (e.g. being HIV positive) and not on the prospective adoptive parents= resources. Ms Anne Tudhope agreed that the subsidy should be based on the child=s particular needs and said the subsidy should be used to provide for the >special= care of that child. SAASWIPP, Ms Hendré Dippenaar, and Ms Gallinetti said the criteria should be based on the child=s new family.

At the close of the focus group discussion in Bantry Bay the following resolution on the introduction of financial support to adoptive parents was adopted unanimously:

Noting:

(1) That long-term foster care

- is a contradiction in terms
- exists extensively because no financial support exists for adoptive parents;
- deflects attention, finances and effort from the chief purpose of foster care, i.e. family reunification;
- leaves both the foster-child and foster parents without the security which a permanent placement provides;
- allows too easily for the breakdown of the relationship between the foster parents and the foster child when there are problems in this relationship.

(2) That it is in the best interests of the child who cannot be returned to his/her parents to be placed in adoption.
(3) That adoptive parents who require financial support should be eligible to receive this support so as to provide secure long-term care in the best interests of the child.
(4) Failure to provide financial support for adoptive parents who require such support disqualifies poor and overwhelmingly Black people from providing a secure home for children.
(5) Changes to the Child Care Act will still take a considerable time before being put into effect.
(6) The lack of financial support for adoptive parents delays the sense of security which children and parents engaged in long-term care need.

Calls upon the State to urgently introduce financial support for adoptive parents requiring this support.

The resolution was presented to the Minister for Social Development in July 2000.

18.4.14 **Access to information in adoption register**

Closely linked to the issue of >open= versus >closed= adoptions, are issues related to access to information in the adoption register, the need for a contact register, etc.

Mrs K Freed, commenting on the issue of adoption, submitted that the details of the real parent should always be available to the adopted child if asked for from the age of 18 years onward. The respondent further submitted that once it is proved that the adoptive parents have provided a loving family home and the child regards them as its parents, the child must never be taken away, and that the child can decide, at the age of 18 years, to make contact with the real parents.

Reverend AW Doyer, in a well motivated and researched memorandum, called upon the Commission to consider the effects of the secrecy clauses in the Regulations to the present Child Care Act regarding adoption records against the background of certain principles contained in the CRC, namely the best interests of the child, the participation of the child in decisions affecting him or her and the development of the child which would include cognitive, emotional, social and cultural development. The respondent contended that the present legislation does not take these principles into account, and made out a strong case that the historic basis of secrecy of the identity of an adopted child=s natural parents[217] is detrimental to the adopted child, his or her adoptive parents as well as the child=s natural parents.

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[217] Previously, only an adoptive parent (after the adoptive child reached the age of 18 years), and the adopted child (after reaching the age of 21 years) could have access to adoption records to investigate his or her ancestry. With the promulgation of the new Regulations to the Child Care Act on 1 April 1998, open adoptions have been taken a step further with the provision that the natural parents or previous adoptive parents may also have insight into the records, as long as the written consent of the adoptive parents and of the adopted child has been obtained, and the adopted child is over the age of 21 years. Despite this relaxation, it is evident that the concept of secrecy is retained.

Reverend Doyer ***inter alia*** referred to the work of Ivan Boszormenyi-Nagy and Murray Bowen who point out that there is an unbreakable bond between any individual and his or her ancestors which continues even after separation of child and parent.[218] The authors submit that even in the case of adoption immediately after birth, the justified claim of the child to the origin of his or her existence remains. If the adoptive parents acknowledge and integrate this fact into their relationship with the child, both the adoptive parents and the child will benefit. It is further submitted that the well-being of the child requires the freedom to explore the foundations of his or her existence, which would include the adoptive parents never denying either the origins of the adopted child, or the child=s right to learn more about his or her natural parents.

According to the respondent the present secrecy clause severely impacts upon an adopted child in the following ways: the child=s voice is silenced, his or her emotional development is inhibited and interests are ignored. Moreover, adoptive parents are encouraged by the present system of adoption to maintain a closed family unit (with no place for the original parents) in which they are compelled to live a lie, in which the sufficiency of their own parenthood is threatened and in which the relationship with their children is placed under pressure. Reverend Doyer, referring to the concept which implies that it takes a whole village to raise a child, contrasted the exclusivist view of the family with an open, systemic approach in which the adoptive family is viewed as part of a network of relationships which would contribute to the support of the child and of which the natural parents would form an integral part.

The respondent regarded it as paramount that an adopted child should grow up in the knowledge of and having the experience of two sets of parents. It was contended that an adopted child=s natural mother should not be required to sign off the child, as this causes separation anxiety, the effect of which severely threatens the child=s emotional

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218 See also the discussion on the right of the child to an identity in Chapter 8 above.

development. This was also the personal testimony of Mrs Estelle Williams from Lydenburg.

Reverend Doyer viewed the challenge as one of allowing for a much more flexible system in which each case is judged on its own merits in order to give expression to the best interests of all parties involved. To achieve this, the present rigid system which neither takes account of individual circumstances and requirements nor allows any form of discretion, discussion and the conclusion of mutually acceptable agreements should be abolished.

The worksheet used at the focus group discussion at Bantry Bay posed the following questions in this regard:[219]

> Given the provisions of the Promotion of Access to Information Act, 2000, will it still be possible to conduct >secret adoptions=?[220] Is there still a need for secret adoptions?

In its submission, the Johannesburg Child Welfare Society maintained there is definitely still a need for non-disclosure adoption in some instances as it provides protection for the child, the adoptive parents, and in some cases, the birth parents. This view was shared by most respondents.[221] The Society said that with the advent of >open= adoptions, many non-disclosure adoptions eventually evolve into open or disclosed adoptions where this is in the child=s best interests and where all parties concerned are comfortable with their personal or identifying details being disclosed. However, in many instances disclosure adoption would not be in the child=s best interests and most adopters, particular in the Black

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219 Question 44.

220 Most respondents drew the Commission=s attention to the unsuitability of the phrase >secret adoption= and suggested the phrase >non-disclosed adoption=.

221 Groups 1, 2, and 3; the Adoption Coalition; Mrs Hendré Dippenaar; the Children=s Placement Centre; Miss R van Zyl; Mr André Viviers; Ms Eileen Jordaan; Ms U F Ledderboge; Ms Sue Padayachee; Mrs M Hattingh; Ms Jacqui Gallinetti; Ms Jean Allen; Ms Anne Tudhope. Contra Ms Blanché Verster and Ms L Kaba.

community, are more comfortable with a closed, non-disclosure adoption. The Society averred that there is still a tremendous amount of secrecy surrounding adoption in the Black community and adopters would go to great lengths to avoid members of the community and even family knowing about the adoption.[222] The Society said this situation may change with time, but argued that the pool of prospective Black adoptive parents would shrink if non-disclosure adoption was not a possibility.

Some respondents argued that the Promotion of Access to Information Act, 2000[223] and the provisions on non-disclosed adoptions in the Child Care Act, 1983 need alignment.[224] The Johannesburg Child Welfare Society, for instance, pointed out that the Act has the potential to cause welfare agencies serious trouble. The Society said that the Act is not designed with an eye to the special features of organisations which, as part of their core business, handle vast quantities of personal information which is shared on the clear understanding that it will remain confidential. This is also information which is very emotionally laden and sometimes potentially explosive, and which has implications for multiple third parties. The Society maintained the administrative burden and the counselling tasks which would involved in seeking out and consulting all these persons would be beyond the resources of most welfare organisations, as would the time and costs involved in the internal and High Court appeal processes which are provided for in the Act.[225]

Also relevant are questions 42 and 43. These read as follows:

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222 The Children=s Placement Centre shared this experience and said Black adoptive parents want absolute secrecy.

223 Before being enacted this Act was known as the >Open Democracy Bill=. The Act is intended to enable persons to access information which they need in order to exercise and protect their rights. It sets out detailed procedures whereby an application can be made for such information, and for the management of such applications and the granting or refusal of access to records. Provision is also made for the notification of third parties who stand to be affected if information is divulged, and who are given an opportunity to raise their objections - which may or may not be upheld. It also lays down requirements as to the substantial administrative infrastructure which >public bodies= holding information will have to put in place and maintain so as to facilitate access to information.

224 Groups 3 and 4; Ms Eileen Jordaan.

225 See also the letters written by the Johannesburg Child Welfare Society to Mr Cas Saloojee, MP dated 10 January 2000 and to the Office of the President dated 29 January 2000 in this regard.

> Given the enactment of legislation such as the Promotion of Access to Information Act, 2000, should the new child care legislation require the adoptive parents to keep the information on the adoption register up to date to facilitate tracing of the child by the (biological) parents later?
>
> Should the new child care legislation place a duty on the parents who give the child up for adoption to keep their contact details on some kind of register up to date to enable the child to later exercise his or her so-called >birth rights=? How is such a system to be implemented?

Some respondents equated the issues of keeping the contact information of the adoptive and birth parents current with the right of the birth parents to maintain contact with the adopted child.[226] These respondents then either stated that the adopted child may not have contact with his or her birth parents before a certain age or that it should be the decision of the adopted child whether he or she would like to see his or her birth parents.

Some respondents were of the opinion that the new child care legislation should **not** require either the adoptive parents or the birth parents to keep their (contact) information current, although it should be encouraged on a voluntary basis.[227] The Children=s Placement Centre, for instance, said it would not be fair to impose on adoptive parents the duty to keep their contact details current and opined that such a duty >could adversely affect their sense of entitlement to the child and thereby the child=s security and development=. Mr André Viviers was of the opinion that the right to access of information provided for in the Constitution and in the Promotion of Access to Information Act 2000 is to have access to information which was provided at the time of the adoption.

Other respondents argued for the imposition of such a duty on adoptive and birth parents

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226 Groups 1 and 2.

227 The Adoption Coalition; Ms Jacqui Gallinetti; Mrs Krawitz and Mrs Stander; Mrs Hendré Dippenaar; the Children=s Placement Centre; Mr André Viviers; Ms Eileen Jordaan; Ms U F Ledderboge.

alike.[228] In its submission, the Johannesburg Child Welfare Society stated that the new children=s statute should impose a duty both on the adoptive parents and the birth parents to regularly update their contact details either at the placement agency or registrar of adoptions. The Society said this could be built into the social worker=s section-18-finalisation report under a heading >Expectations for ongoing contact or updates=. The Society said that if the adoptive and birth parents knew it was a legal requirement, they would be more inclined to update their details, thus making the search for them easier. In the experience of the Society, adopted children (and birth parents) request information about their birth parents (and adopted children) at various times through the years from the agency involved. Sometimes it is impossible to trace the adoptive parents (and therefore the adopted child). This causes much frustration and disappointment on the part of the adopted child and the biological parents, >who seem to have the expectation that the agency was Asupposed@ to keep in touch with the adopters and the adopters with the agency=.

The National Adoptive Parents= Institute is in favour of open adoptions. The Institute suggested that contact be through a third party ie a social worker. This should be made mandatory. However, the Institute said open adoption arrangements must not be made a duty in the legislation in all cases as contact is not suitable for all children or families. The Institute maintained that open adoption arrangements must be flexible, able to change with time according to needs, primarily of the child. Contact may be between a child and any member of his extended family who has played a significant role in the life of the child, or where contact will continue to be relevant for the child and may be in the form of letters, photos or personal contact under the supervision of, and or the consent of the adoptive

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228 SAASWIPP; Ms Jean Allen; Ms Sue Padayachee; Ms L Kaba; Miss R van Zyl; Ms Blanché Verster; Ms Anne Tudhope.

parents. The Institute recommended that the new children=s statute should provide for counselling or mediation facilities for adoptive children, adoptive parents and birth parents before and after contact is made.

The Institute proposed that a contact register be created. Such register must be kept by the Registrar of Birth, Deaths and Marriages, who must ensure that information is held concerning the child's origin, in particular information concerning the identity of his or her biological parents, as well as the medical history. Adoption agencies and social workers in private practice must provide the Registrar with case histories. The Registrar must ensure that information held concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved. Accredited social workers who are searching for birth relatives or adoptees must have access to this information - not only the social worker or agency who placed the child for adoption.

The Institute stated that an adopted person over the age of 21 and birth parents who placed children for adoption may register an interest in contacting each other. The Registrar of Birth, Deaths and Marriages must ensure that the adopted person, his or her adoptive parents and birth parents have access to such information, under appropriate guidance. Counselling services should be mandatory for all parties prior to contact.

The Institute suggested that the Contact Register be divided into two parts: One containing the names and addresses of adopted people and the other that of birth parents. If a match occurs between the two parties the Registrar will notify the accredited social workers of the interested parties of the name and address of the birth relative, or accredited social workers shall have access to such information. An application form must be completed and a fee paid for registration

However, some respondents seriously questioned the ability of the law to enforce a duty to keep contact details current and suggest that little more can be done than to expect social

workers to encourage the parties to keep their contact details up to date.[229] The Johannesburg Child Welfare Society pointed out that adoptive (and birth) parents know very well that there is no legal obligation on them to update their contact details with the agency and in some cases deliberately disappear in order to avoid any further contact. The Society also conceded that it would be impossible to impose penalties on the adoptive (and birth) parents for their failure to regularly update their contact details.

18.4.15 Section 10 of the Child Care Act, 1983 and private placements

We have seen that section 10 of the Child Care Act, 1983, provides that no person other than the managers of a maternity home, a hospital, a place of safety, or a children=s home may receive any child under the age of seven years or any child of whatever age for purposes of adopting such child and care for such child apart from his or her parents or custodian for a period longer than 14 days. However, if a person has applied for the adoption of that child or has obtained the written permission of the commissioner of child welfare the 14 day restriction does not apply.

In this regard, the following questions were posed in Issue Paper 13:

> Question 58: Does the fundamental underlying protective purpose of section 10 justify its continued existence or should it be replaced? If section 10 is to be retained, should it be limited to situations where the child is placed for adoption purposes? And is it appropriate to include sanctions, other than providing that care of a child in contravention of this provision is a ground for removal?

In response, the SA National Council for Child and Family Welfare considered section 10 to be a very important section and calls for its retention with possible amendments to meet the current situation.

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229 Groups 1, 2 and 3; Mrs M Hattingh.

The NICC answered all three parts of the question in the affirmative.

The ATKV, Durban Child and Family Welfare Society, Phoenix Child and Family Welfare Society, and the Cape Law Society, supported by the Durban Committee, submitted that section 10 should be limited to situations where the child is placed for adoption purposes only. The Johannesburg Institute of Social Services contended that section 10 should be limited to situations where a child is placed in adoption but that the present loopholes should be closed. The Natal Society of Advocates and Disabled People South Africa called for the replacement of section 10 since, in relation to rural areas, it would appear that the underlying protective purpose of this section no longer justifies its continued existence.

Mr DS Rothman, quoting substantial reasons, believed that section 14(4)(aB)(vii), together with most of section 10 should be scrapped.

The worksheet used at the focus group discussion in Bantry Bay basically repeated the question posed in Issue Paper 13:[230]

> What are the different opinions on the effectiveness of section 10 as a mechanism inter alia to prevent trafficking in children? Should section 10 in its current form be retained in the new child care act legislation?

In a well motivated submission, the Johannesburg Child Welfare Society argued for the retention of section 10 as it does provide an interim court order from the time a child is placed with its prospective adopters until the final section 18 report is submitted, finalising the adoption, when a child is being placed in another magisterial district.

The Children=s Placement Centre said section 10 applications or applications to adopt should not be accepted by commissioners of child welfare unless accompanied by a social

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230 Question 45.

worker=s report.[231] The Centre pointed out that at present these are allowed without a report and only many months later the full investigation reveals that perhaps the placement might not be in the best interests of the child but by then the child has settled.

Most of the other respondents to this question also supported the retention of section 10 in its current form.[232] Miss R van Zyl was one of those who do question the effectiveness of section 10. She said section 10 affords little protection and requires too little to prove. She therefore recommended that section 10 be repealed and that section 13, which involves a court process, rather be used.

The Commission is aware of situations where third parties (often for a substantial but undisclosed fee) arrange for a small child to be placed with caregivers who may or may not be suitable. By the time these caregivers apply to adopt the child, a *fait accompli* situation exists where the court either has to formalise the situation or break a bond which has already developed. Thus what may happen is that a short-cut to adoption is created by people who wish to circumvent the normal procedures. In this regard, the following question was posed at the focus group discussions in Bantry Bay:[233]

> What safeguards could be built into the new child care legislation to prevent the fait accompli situation from arising? Will a provision merely requiring that a placement of a child may not be made without the permission of the children=s court if it is for the purpose of adoption solve this problem?

Ms Eileen Jordaan, Mrs M Hattingh and Ms Jean Allen said section 10 should require a social worker=s report before consent to placement of a child is given. Ms Krawitz and Ms Stander said a section 10 placement is essential, but argued that it should be time limited.

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231 Ms Eileen Jordaan is of the same view. She also argues that the age referred to in section 10(1)(a) should be 10 years to correspond with the age at which a child has to sign the consent form to his or her adoption

232 Group 1; Group 2; Group 3; Ms Hendré Dippenaar; Children=s Placement Centre; Ms U F Ledderboge; Ms Eileen Jordaan; Mrs Krawitz and Ms Stander; Ms Jean Allen.

233 Question 46.

They were of the opinion that the new children=s statute should limit the duration of a section 10 placement before an adoption hearing or children=s court enquiry.

In its submission, the Johannesburg Child Welfare Society pointed out that it would be very difficult to prevent >fait accompli= situations even if there was a provision requiring that a placement of a child may not be made without the permission of the children=s court, if it is for the purpose of adoption. In the experience of the Society, the situation usually arises where a birth mother places her child with a family she knows, not always initially with the intention of adoption, but as a private arrangement. The placement could turn into an adoption several weeks, months or even years later, when the birth mother decides she cannot cope with the care of the child and signs consent for the family to adopt the child. In many instances, the birth mother has disappeared and cannot be traced. These situations are usually only reported a long time after the child was left with the family initially. The Society said it would be unaware of these situations anyway, until approached by the family to do the adoption and by then the child is already bonded.

Ms L Kaba emphasised the need for educating the community on the proper role of adoption and suggested that screening of possible adoptive parents must be done prior to any placement.

Ms Ledderboge said that where a child is placed with a person who is not a blood relative, such person should be required to inform the social worker in that region of the placement. The social worker should then monitor the placement. Ms Ledderboge argued that such a mechanism would help to maintain statistics on the number of placements and place an onus on >prospective adoptees= to prove that their reasons for adoption are justified.

18.5 **Transracial adoptions**

The following question was posed in Issue Paper 13:

Question 73: Should there not be more guidance in the law concerning in what situations trans-racial or transcultural placements should be encouraged, and when they should generally be avoided?

The SA National Council for Child and Family Welfare stated that all the arguments for and against placement of children across cultural, racial and language differences are valid. However, the Council said one must not overlook the fact that in the past, although the term >have regard to= may have been vague, this was the only loophole that non-white social workers used to place a child with persons of different religion or language group. The Council strongly recommend that the clause >have regard to= should be retained in the Act. It said the clause gives social workers scope to plan what is best for a child in the absence of proposed adoptive parents or for that matter foster parents meeting all the criteria regarding culture, religion and language or racial requirements. A social worker would naturally look for these criteria but it is in cases where these cannot be met that the problem will be posed. Therefore this clause was carefully selected as it is not rigid and allows for some flexibility.

The NICC and Phoenix Child and Family Welfare Society called for more guidance in the law but adds that this issue requires policy decisions based on research and local conditions. The Durban Child and Family Welfare Society agreed that more guidance is needed. The Society said bonding of the child with the care-giver is regarded as critical. If it is not possible to place the child within his or her own culture, race or religion, the placement family's sensitivity to the child's cultural heritage should be considered.

The National Council of Women of South Africa submitted that transcultural adoptions should be avoided in the interest of the united family after the adoption, but where a person of another culture has cared for the child, given it affection and gained the confidence and affection of the child, then such adoption should be allowed. Disabled People South Africa commented that children should be placed, if possible, in their communities as a first resort. It said trans-racial and transcultural adoptions should be based on informed decisions.

The Natal Society of Advocates contended that guidance in legislation should be avoided lest the guidelines become prescriptive. Each case should be decided on its own merits and in the discretion of the proposed panel of experts comprising the children's court. The overriding principle should always be that which is in the best interests of the child. The Cape Law Society was of the view that there should still be greater guidance in the law, while the Durban Committee maintained that the main focus should be on the best interests of the child.

The Johannesburg Institute of Social Services cautioned that not everything can be written into an Act. There should be competent presiding officers who can use their expert knowledge and discretionary powers. It was submitted that if any party is then not satisfied, an appeal should be possible.

Regarding mixed race adoptions, Mrs K Freed agreed that such adoptions can work very well because it is always a question of quality of parenting. The ATKV submitted that trans-racial or transcultural adoptions will depend on the particular circumstances of the child and the facts of the matter. Mr DS Rothman opined that until such time as there are more certainty on the success or otherwise of such placements, guidelines may seem to be premature. He favoured the neutral approach of allowing matters to develop naturally around the best interests of the child.

The worksheet used at the focus group discussion in Bantry Bay posed several questions on the social and cultural concerns related to adoption. The first of these reads as follows:[234]

> Please describe how the law could be modified to reflect more accurately the cultural and social realities of South African family life.

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234 Question 26.

Some respondents were of the view that the law should **not** be modified to reflect more accurately the cultural and social realities of South African family life, for fear of over-regulation.[235] However, Mr André Viviers suggested that the law should be modified to allow for the whole family to adopt a child instead of only married persons and some individuals. His view was shared by Ms L Kaba and Ms U F Ledderboge who argued for a broader definition of family life which should include recognition of different family models such as >stable unions= and polygamous marriages. Ms Jacqui Gallinetti and SAASWIPP said kinship care should be acknowledged and promoted and acknowledged the importance of keeping children within their family and or their kinship. Mrs Krawitz and Mrs Stander, in a joint submission, argued for the recognition of rights of grandparents as part of the contemporary South African family structure.

Another question posed at the focus group discussion reads as follows:[236]

> How relevant to adoptions is the requirement [in section 40 read with section 18(3) of the Child Care Act, 1983] that regard must be had to the cultural and religious background of the child concerned? Should there be any specific requirements for agencies who arrange placements across religious or cultural boundaries, or for care-givers who accept children from a cultural or religious background different from their own?

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235 SAASWIPP; Group 3; the Children=s Placement Centre; Ms Eileen Jordaan; Ms Sue Padayachee; Ms Jacqui Gallinetti.

236 Question 27.

Most respondents regarded it relevant that regard must be had to the religious and cultural background of the child concerned and of his or her parents as against that of the person in or whose custody that child is to be placed or transferred. These respondents therefore effectively supported the retention of the current section 18(3) read with section 40 of the Child Care Act, 1983.[237] They said the advantage hereof is a more suitable placement for children, while a disadvantage is a more time consuming process. Most of these respondents also supported specialisation of adoption agencies as a requirement.

Some respondents pointed out that the religious and cultural >matching= of the child often depends upon the age of the adopted child concerned and that such >matching= is more important for the older child.[238] Other respondents said social work ethics do take religious and cultural factors into account.[239]

Miss R van Zyl said that when placing a child trans-culturally, the following factors are important: the age of the child; the number of interventions prior to the adoption; previous trauma suffered by the child; and the cultures involved. She suggested cross-cultural matching as a measure of last resort. Ms Anne Tudhope said the main consideration should be whether the prospective adoptive parents can provide a permanent family home as opposed to institutionalisation. Ms Tudhope also regarded screening and post-adoptive support as very important.

Ms U F Ledderboge suggested that social workers and agencies that do arrange trans-cultural placements should involve the **extended family** of the prospective adoptive family in the screening process; a training, education, and parenting programme; and in the post-

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237 The National Adoptive Parents= Institute; the Adoption Coalition; SAASWIPP; Group 3; the Children=s Placement Centre; Mr André Viviers; Ms Eileen Jordaan; Ms Blanché Verster; Ms Sue Padayachee; Ms U F Ledderboge; Mrs M Hattingh; Mrs Krawitz and Mrs Stander; Ms Jacqui Gallinetti; Ms Jean Allen; Ms Anne Tudhope.

238 Ms Anne Tudhope; Mrs Hendré Dippenaar; Ms Eileen Jordaan; Ms U F Ledderboge.

239 SAASWIPP; Group 3; the Children=s Placement Centre.

adoption support groups.[240] She made the important point that culture is acquired and always in a state of flux. Ms Ledderboge further highlighted the differences between urban and rural South Africa and even amongst different metropolitan centres. She said:

> Trans-racial placements work better in metropolitan centres. There is a marked difference between Johannesburg, Cape Town and Durban. In Durban, Blacks are predominately positive!

Ms Ledderboge mentioned that the >local community= is becoming a reference group. She said section 40 of the Child Care Act, 1983, means in practice **ethnic considerations** and should be labelled as such. She continued:

> In terms of placement considerations, racially compatible role models should be available as well as a commitment to acknowledge the child=s ethnic roots. This, however, is part of the screening and selection process which must include an educational / training component. ... [W]henever, there was a proper screening / training process, the children are fine, have a positive self image, are well adjusted and well aware of their roots. The progress of these children should be seen against the impact of institutionalisation and the child=s right to a family and to belong.

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240 Ms Anne Tudhope and Ms Jacqui Gallinetti support proper screening, training, and support pre- and post-adoption for the adoptive parents. Ms Gallinetti says this can include a court order to provide for the teaching of the child=s mother tongue to the child.

While accepting the importance of cultural matching, Mr André Viviers suggested that religious matching is no longer that important and should be done away with. He was perhaps of this view given the fact that discrimination based on religious belief is far less of a problem in contemporary South Africa than discrimination based on colour or race.[241] On the other hand, SAASWIPP said religious beliefs must be considered. In this regard, the Association proposed that a written contract be concluded in terms of which the adoptive parents agree to promote the original culture, language and religion of the child. This contract should form part of the court order and should involve some post-adoption monitoring.

Another question posed at the focus group discussion in Bantry Bay reads as follows:[242]

> Should a duty be imposed on agencies to conduct a >diligent search= for same-race adopters before using trans-racial placement? What are the advantages and disadvantages of imposing such a duty?

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241 Contra Ms Sue Padayachee.

242 Question 28.

Most respondents agreed on the need for a (time limited) >diligent search= for same-race adopters and pointed out that there is an existing professional duty to match the child and his or her adoptive family as closely as possible (who may or may not be of the same race and or culture as the adopted child).[243] However, such search should not indefinitely delay the placement of a child. It was pointed out that efforts to find a suitable same-race placement are reflected in the social worker=s report. In addition, Ms Eileen Jordaan said the social worker=s report should also reflect what guidance, counselling and support the prospective adoptive parents have received on the importance for the adopted child of maintaining his or her cultural links. She believed the adopted child should grow up with the full knowledge of his or her biological background, and should ideally have contact with those who are of the same race and culture, thus enabling such child to grow up with a full appreciation of his or her cultural identity.

Ms Anne Tudhope regarded the early placement of a child into the care of a family as the top priority and identified the following disadvantages of imposing a diligent search duty for same-race adopters:

- the child could get lost in the system (foster care with multiple placements);
- institutionalisation with great danger that child acquires no self-esteem; no cultural ties; experience language difficulties, permanent developmental delays, and permanent emotional trauma.

Mr André Viviers took a different position and said no duty to conduct a >diligent search= for same-race adopters should be imposed on social workers or agencies as the imposition of such a duty will result in >forced= adoptions. He stated prospective adoptive parents should rather be supported and encouraged to adopt children in order to find suitable homes for all the homeless and orphaned children.

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243 The Adoption Coalition; SAASWIPP; Group 3; Mrs Hendré Dippenaar; the Children=s Placement Centre; Ms Eileen Jordaan; Ms Blanché Verster; Ms L Kaba; Ms U F Ledderboge; Ms Sue Padayachee; Mrs Krawitz and Mrs Stander; Ms Jacqui Gallinetti; Ms Jean Allen; Ms Anne Tudhope.

The Adoption Coalition and Mrs M Hattingh proposed the establishment of a national adoption register which should contain the names of approved adoptive parents. Listing on the register would then facilitate the search for adoptive parents.[244]

The worksheet used at the focus group discussion at Bantry Bay also asked the following question:[245]

> Should the biological parents be given a right to express a choice or preference for placing their child for adoption with adoptive parents professing a particular religion or living in accordance with a particular culture?

Most respondents believed the birth parents should be given the right to express a choice or preference for placing their child for adoption with adoptive parents professing a particular religion or living in accordance with a particular culture.[246] Mr André Viviers put it nicely: >They [the biological parents] can state their wishes; not give instructions=. Ms Anne Tudhope suggested open adoptions as a possible solution.

Mrs M Hattingh said the birth parents should consent to the adoption of their child by adoptive parents of a different cultural or religious background.

Without giving reasons, Ms L Kaba stated that the biological parents should have no right to express a choice or preference for placing their child with adoptive parents professing a particular religion or living in accordance with a particular culture.

The worksheet used at the focus group discussion in Bantry Bay posed the following

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244 SAASWIPP supported the idea of a central register of screened adopters.

245 Question 29. See also the responses to question 27 above.

246 The Adoption Coalition; SAASWIPP; the Children=s Placement Centre; Mrs Hendré Dippenaar; Mrs M Hattingh; Group 3; Miss R van Zyl; Ms Sue Padayachee; Ms Eileen Jordaan; Mr André Viviers; Ms Blanché Verster; Ms U F Ledderboge; Mrs M Hattingh; Mrs Krawitz and Mrs Stander; Ms Jacqui Gallinetti; Ms Jean Allen; Ms Anne Tudhope.

question in respect of management structures and practices needed to attract more Black persons to adopt children. It reads as follows:[247]

> What kind of structures and management practices need to be put in place to attract more black people to adopt children? Could or should these structures or practices be built into the legal framework? If so, how?

While some respondents agreed that structures and management practices need to be changed to attract more Black persons to adopt children, this need not be done through legislative intervention.[248] The Children=s Placement Centre and Ms Jean Allen, for instance, recommended that the adoption process be simplified and recruitment efforts be intensified. The Centre believed this can be built into the legal framework without negatively impacting on the child and causing more delays. SAASWIPP believed there should be a campaign for South Africans to adopt South African children. The Association said this will require a great deal of community awareness and media involvement, such as radio and television promotion. The Association stated that the first choice in adoption for a child would be parents of the same race, culture and religion. The second option for adopters would be different culture, race or religion, but still South Africans, while the third option would be inter-country adoption.

The National Adoptive Parents= Institute agreed that welfare agencies need to urgently address the need to find prospective adopters in all communities, particularly in those communities where there are a large number of children in need of care. The Institute said welfare agencies need to address their own structures so that prospective adopters from disadvantaged communities are not prejudiced or alienated during the screening process. It said welfare agencies also need to address the beliefs, and sometimes prejudices, that exist in certain communities that are obstacles in the way of an acceptance of adoption

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247 Question 30. See also the responses to the question on non-disclosure adoptions (Question 44) above.

248 The Adoption Coalition; SAASWIPP; Groups 1 and 3; Ms Eileen Jordaan; the Children=s Placement Centre; Ms Blanché Verster; Ms L Kaba; Ms Sue Padayachee; Ms U F Ledderboge; Mrs M Hattingh; Mrs Krawitz and Mrs Stander; Ms Jean Allen.

>not only as an appropriate option, but as **a positive and desirable option**, for children in need of care=.[249]

Several respondents said subsidised adoptions and a less formidable legal process will attract more prospective adoptive parents.[250]

However, Mr André Viviers stated that structures, whether in a legal framework or not, will make no difference to the size of the pool of prospective Black adoptive parents.

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249 Emphasis in the original.

250 SAASWIPP; Ms U F Ledderboge; Ms Eileen Jordaan; Ms Sue Padayachee; Ms Blanché Verster; Mrs M Hattingh; Mrs Krawitz and Mrs Stander; Ms Jacqui Gallinetti.

Professor Tshepo Motsikatsana of the Wits Law School prepared the research paper on adoption which served as the basis for deliberations at the focus group discussion in Bantry Bay. He is of the view that trans-racial adoptions are not conducive to the welfare of the child, as a child who is trans-racially adopted may suffer racial prejudice. In addition, he maintained that trans-racial adoptees may also suffer identity crises resulting from loss of racial or cultural identity, which is important in a race-conscious society. Respondents at the focus group discussion were asked whether they agreed with this central thesis of Professor Mosikatsana and to give reasons for their answers.[251]

Most respondents agreed with the central thesis of Professor Motsikatsana and said that trans-racial adoptions may not be conducive to the welfare of the child in the long term as such a child may experience racial prejudice.[252] Despite a new constitutional order and legislation and policy aimed at eradicating discrimination on the basis of race, some said racial prejudice (to children adopted across the colour line) is unfortunately still the reality in South Africa.[253] However, most respondents were of the view that the placement a child in a family, despite the potential racial prejudice, is far better than placing a child in an institution.[254] In this regard Ms Eileen Jordaan and the Children=s Placement Centre said that although cross-cultural placements should never be the first choice, the reality is that there are at present not sufficient Black adoptive applicants to meet the needs of the Black children in need of placement.

Ms U F Ledderboge did not agree with Professor Motsikatsana=s central thesis. She warned of the dangers inherent in equating the concepts nationhood, race, ethnicity and culture as this will make South Africa a multi-national and not a rainbow nation. She

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251 Question 31.

252 Groups 1 and 3; Mrs Hendré Dippenaar; the Children=s Placement Centre; Miss R van Zyl; Mr André Viviers; Ms Eileen Jordaan; Ms Blanché Verster; Mrs M Hattingh.

253 Mrs M Hattingh;

254 Mrs Krawitz and Mrs Stander; Groups 1 and 3; Mrs Hendré Dippenaar; the Children=s Placement Centre; Miss R van Zyl; Mr André Viviers; Ms Eileen Jordaan; Ms Blanché Verster; Mrs M Hattingh; Ms Jean Allen.

referred to the high number of abandoned babies and posed the question as to how one would determine the nationality, culture or religion of such a child. She pointed out that in present day South Africa mixed race children fall into the crack - nobody thinks such children fit into their family. Ms Ledderboge cited cases where birth mothers acknowledged that they abandoned their babies because their families rejected their children.
Ms Sue Padayachee did not agree with Professor Motsikatsana.[255] She said the prospective adoptive parents should commit themselves to bring up the child in such a way as to maintain the child=s cultural identity. Ms Jacqui Gallinetti also did not agree with Professor Motsikatsana. She and Ms Jean Allen said we should be culturally and not race sensitive and that an approach such as that of Professor Motsikatsana will perpetuate racial discrimination.

Ms Anne Tudhope also did not agree with Professor Motsikatsana=s central thesis. She said a child who spends his or her childhood in an institution will be deprived of more than his or her culture. She questioned the worth of culture (and religion) in the absence of personal self-worth and pointed to research conducted in the USA which shows that trans-racially adopted children are caring individuals who really understand cultural differences and have few racial prejudices themselves - >an ideal to which we should all aspire=. She further referred to a Johannesburg based trans-racial support group where the evidence seems to suggest that the trans-racially adopted children are well adjusted and happy. However, Ms Tudhope did call for more South African research on this issue.

The Adoption Coalition also called for more research on the outcome of trans-racial adoptions in the South African context and registered its concern that by adopting Professor Motsikatsana=s central thesis race consciousness might be perpetuated.

In a very comprehensive submission the National Adoptive Parents= Institute took issue with the central thesis adopted by Professor Motsikatsana. It said:

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255 Mrs Krawitz and Mrs Stander, in a joint submission, shared this view.

The permanency of placement of children in adoption should be seen as of paramount importance in terms of their emotional development.

The research paper contends, however, that black children who are placed with white parents will almost certainly have identity problems and psychological difficulties to such an extent that such placements are always to be considered undesirable. The author [Professor Motsikatsana] contends that South African society is still largely racist, and that until this changes, trans-racial adoption should not be considered, and the courts should be empowered to disallow such placements. He also concludes with the statement that the outcome in trans-racial adoptions in other countries has been found to be negative in terms of the psychological difficulties that adoptees have encountered in identity formation. We wish to re-iterate our agreement with same race/same culture placements where possible. However, a review of research carried out in the USA and Britain indicates that the developmental outcome (overall adjustment in terms of educational attainment, peer relations and behaviour) for trans-racially adopted children is no worse than for same-race adoptions. It has been found that trans-racially adopted children who grow up in a racially integrated society and attend racially integrated schools, do the best, but overall, the developmental outcomes in this group are acceptable and better than for children raised institutionally.

In talking about the best interests of the child, what appears to be of paramount importance in terms of the emotional and psychological development of children is the formation of permanent attachments from birth. In fact, it is felt that this attachment needs to be formed with one (or a few/small number) of care-givers. Where it is not possible for children to remain with a biological parent, for whatever reason, then the best interests of the child are served by permanent placement with a loving care-giver as early as possible in the child's life. If one has to weigh up the importance of this process (and the proven psychological difficulties that result from the disruption of early attachment and bonding), with the possible psychological difficulties that may arise in children who are trans-racially adopted, there cannot be any doubt really which is more crucial to the healthy development and happiness of the child involved. Compare this also with recent studies on outcomes of institutional care in Britain, where a policy of prohibiting trans-racial adoptions was adopted, and where the majority of children placed in residential care/institutions were black, showed increased psychological and psychiatric problems and a higher incidence of contact with the criminal justice system.

The reality in South Africa is that there are, and will continue to be, large numbers of children in need of care. The majority of these children come from disadvantaged communities, where the number of known prospective adopters is currently very low. There is an urgent need to find solutions to this problem, and there is no time for these children to wait for sufficient same race and same culture placements. If

the choice is between a white family or an institution (if the child is lucky) for such a child, then surely trans-racial adoption must be accepted as the preferred option and not disallowed for theoretical and political reasons?

It is estimated that by the year 2005 South Africa will have more than I million AIDS orphans. One of the options that has been proposed to deal with this problem, is "child-headed families". This is where children, whose parents may have died of AIDS, will remain with each other in their homes, and be clustered with similar families within their communities, and supervised by care-givers. How this option can be considered to be superior to adoption (whether trans-racial or not) defies the imagination. In what way is the hour-by-hour role modelling and character formation provided by an unformed child, itself denied time to access the school system by the responsibilities and selected serendipity by unfortunate circumstance of having lost her parents? In what way are "child-headed families" superior to a stable, economically independent household headed by mature, screened, selected and willing adults - whatever their colour?

In addition, consideration should be given to the effect that such situations will have on the children who will be heading such families. How will such a situation and responsibilities affect the psychological development of these children?

To argue against trans cultural placement is to sacrifice each child's individualism, his rights and dignity on the altar of some mid-twentieth century ideal of a static racial and cultural purity dividing and separating the race of man.

...

The assumption that Professor Mosikatsana makes regarding South African society; that it is essentially made up of two groups: affluent whites and poor blacks, and that these groups are polarized, with totally different cultures and ways of relating to the world, also should be challenged. South Africa, like many countries in the world is a rapidly urbanizing country, with increasing mixing of cultures, "deculturation" in the urban areas, and "enculturation" in terms mainly of many black people abandoning their traditional beliefs and practices, as they adapt to a dominant western mode of life in urban areas. While this may not necessarily be desirable, it is a reality, and many black people living in urban areas today, are faced with similar issues of identity that our black trans-racially adopted children will face. The paper does not at all address the point that many children in need of care do not have a single biological heritage, and often are from mixed and sometimes even unknown backgrounds.

Accordingly, the National Adoptive Parents= Institute came to the following conclusions and made the following recommendations:

- Adoption is a viable option in terms of providing substitute family care for children in need of care. It should be promoted in all communities, and people should be educated about the positive nature of adoption, as there is still much ignorance and prejudice about adoption in all communities.
- Placement agencies should make special efforts to promote adoption in disadvantaged communities, and develop appropriate screening and training programmes for prospective adopters.
- Placement agencies should attempt to match adoption placements for children as closely as possible to the race and culture of the children's biological families/backgrounds.
- In the event that such a placement cannot be found **expeditiously**, trans-racial placements must be considered. This would be in preference to having children waiting for the slim chance of a same-race placement while in an institution or in foster care for more than a short period of time. Placement for adoption should occur as soon as possible to avoid prolonged disruption of attachment and the consequent results.
- Placement for adoption should occur as soon as possible to avoid prolonged disruption of attachment and the consequent results.
- Placement agencies and institutions must have incentives to place young children and babies expeditiously, so as to serve each child's best interests and to increase the rate at which placements are handled. This will give more children the opportunity of some greater personal growth and development than the status quo provides and should aim to remove all children from the life-threatening experiences commonplace within the present system. The present system of support provides incentives to organisations to maximise revenue and minimise the workload by extending and delaying the placement process with structural inefficiencies and specious rationalisations regarding the difficulties of parent/child matching.
- Parents who adopt trans-racially should be encouraged to reflect on the challenges that their children face, to join support groups and to assist and encourage their

children to learn about their birth heritage, and to develop a sense of pride in their biological as well as their adoptive roots. They should take an active stand against racism of any kind that they encounter.

•••• A duty should be placed on placement agencies, and funding made available, to provide post adoption services whenever the need arises.

18.6 Evaluation and recommendations

18.6.1 The need for adoption

Internationally, in the review of adoption laws, the need for adoption has been questioned. However, while suggestions to modify the law have been commonplace, there has been little support for the removal of adoption altogether. In support of its retention, it has been argued that adoption is a familiar, well-understood and uniquely valued concept accepted both nationally and internationally. >Long experience has shown that adoption is a successful way of caring for a child away from his or her birth parents. It appears to have worked well for many adopted people and their adoptive parents. No other form of permanent placement has demonstrated that it can be more beneficial than the established system of adoption. . . . to abolish adoption would remove the legal expression of a valued family commitment=.[256]

An argument strongly advanced in favour of adoption is that, for the child, a sense of security and belonging is founded in the adoptive parent=s sense of entitlement and commitment. A child=s need for security is provided for within a nurturing, protective and permanent family who feel free to treat the child as their own. >Family= in this context has usually been defined very narrowly and it is the perceived legality, finality and exclusivity of adoption that is said to encourage adoptive parents to treat the child as if he or she were their own. However, the development of open adoption challenges the way in which

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256 New South Wales Law Reform Commission **Discussion Paper 34: Review of the Adoption of Children Act 1965 (NSW)**, April 1994, par. 3.5.

adoption has been traditionally perceived and diminishes the strength of this argument. The argument continues that unlike, for example, the insecurity of foster care, adoption provides a level of security and commitment which is said to be fundamental to the child=s upbringing. This argument was made very strongly even in submissions that acknowledged and supported the concept of open adoption, which ultimately challenges the finality and exclusivity of traditional adoption. It was argued or assumed in such submissions that the perception of adoption as irrevocable, and the resulting sense of commitment and security continue even though the child may be encouraged to acknowledge that it is a member of two families.

A closely related argument is the claim that adoption provides a psychological boost to a child's sense of personal identity. The sense of belonging which is enhanced by a solid family environment is invaluable to the child's self-esteem. It was argued that the disruption rate for children who are adopted is dramatically less than for children in other forms of care. Disruption and lack of continuity in children's lives cause emotional problems, whereas secure family membership enhances self worth.

While most people do not want to see adoption abolished, many expressed the view that appropriate modifications could be made to meet changes in social patterns and values. Many submissions referred to the current practice of >open adoption= and felt that it should be incorporated, to a greater or lesser degree, in the new children=s statute.

The thrust of many of these comments was that, in the past, problems had been caused by the 'conspiracy of silence', and that adoption does not have to involve secrecy if all parties acknowledge the reality of the adoption. Nor does adoption necessarily involve the complete severing of a child's existing family relationships; it is flexible enough to accommodate continued involvement of the birth parents and adoptive parents in the child's life where appropriate.

Some submissions to the review contained criticisms of adoption as it is now practised and

called for radical changes in adoption law. One view is that adoption should simply be abolished. Those who supported the abolitionist argument stated that the concept of adoption is so fundamentally flawed that no statutory amendments to the Child Care Act could overcome this essential fault.

Adoption has been criticised as being fundamentally flawed for the following reasons:

° adoption differs from all other legal orders for care in that it purports to change the personal identity of the child by altering historical, genealogical and biological facts about the child. It thus creates a legal fiction about the child's parentage. This legal fiction is gradually being eroded by developments in social work policy, particularly those regarding openness in adoption;

° in order to support the legal fiction that the adoptive parents are the child's only parents, children have been denied access to information about family origins and the circumstances of their birth. The social work objective, to encourage openness and honesty in adoption, runs contrary to the aim of the adoption legislation which is to deny birth parents any relationship with their child;

° adoption treats children as the property of their parents. The legal rights of birth parents and adoptive parents prevail over biological reality and the process has more in common with laws relating to the transfer of property than family law;

° the process of adoption treats children as a homogenous group rather than as separate beings with individual rights;

° critics of adoption also argue that the traditional concept of adoption has already been greatly compromised by developments such as >open adoption=, increased access to information and the declining numbers of adoptions. They conclude that abolishing adoption would represent a culmination of these trends rather than a radical change in direction; and

° medium or long-term care-givers of children can be given the powers and responsibilities necessary to carry out their task ie the rights and responsibilities of biological parents) without any need to pretend that they are the biological parents of

the child and that the child's birth family have ceased to exist.

The role of non-parental care-givers could be recognised by giving the new Child and Family Court ample powers to make orders about some or all the matters now associated with adoption, including the issuing of a new birth certificate and changes in support obligations and inheritance rights.[257] The argument is that, instead of making a single inflexible order for adoption, the Court would be able to assemble a package of legal orders which would be designed to suit members, and the fact that many South African children experience a variety of other family forms. This would include recognition of modern families in a multicultural society.

It is clear from the preceding paragraphs that arguments both for and against adoption provide a valuable source of ideas for change and improvement in the way adoption is practised.[258] **The Commission is not persuaded at this stage, however, that it would be desirable to abolish adoption**.

There are two reasons for taking this position. First, although adoption can be seen as having some or even all of the negative connotations described by its critics, it also has

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257 See also the Commission=s recommendations in Chapter 8 above where provision is made for the possibility to allocate certain components of parental rights and responsibilities to different individuals by court order.

258 See also Nigel Lowe >The changing face of adoption - the gift/donation model versus the contract/services model= (1997) Vol. 9. No. 4 **Child and Family Law Quarterly** 371.

some positive features. These include the idea that adoption involves a complete commitment to the welfare of the child, and a complete acceptance of the child into one's family. It should be remembered, in this context, that adoption was originally resisted in part on the ground that children born to >undesirable= parents were destined to failure, because of their circumstances of birth. It might be argued that the abolition of adoption could discourage people from providing unqualified love and care for children, and might lead us to forget the positive lessons that adoption appears to have taught. It is possible that if adoption is reformed, the connotations which are seen as negative, such as ownership of the child, deception, and an excessive preoccupation with the traditional nuclear family structure would be greatly weakened, and the positive connotations retained or strengthened.

Second, there seem no prospects at this stage that a recommendation to abolish adoption would have any chance of success in the present climate of opinion. As noted earlier, it is well established in many countries, and its abolition does not appear to have been seriously considered by any legislature. The CRC contemplates the continued existence of adoption, although it is fair to say that the main concern of the Convention is to guard against abuses of adoption. It is clear from the submissions and the focus group discussion that there is a great deal of community support for the continuation of adoption. It is difficult to imagine that a recommendation to abolish adoption would have any chance of gaining political acceptance unless there was a very significant shift in community opinion. This is not of course decisive, but it does suggest that the Commission should recommend abolition of adoption only if it were convinced that this was really necessary.

It is the Commission's recommendation that the concept of adoption be maintained but that the criticisms underlying the abolitionist position need to be kept carefully in mind when approaching particular aspects of the law and practice. Adoption law can be modified to remove negative aspects and retain the positive features in order to promote the welfare of children. It is important that:

- there be no infringement of the human rights of birth parents either prior to the consideration of any kind of alternative parental care for children or at any stage of the adoption process;
- adoption be recognised as the most extreme form of order for children in need of permanent care and that it is only used where the circumstances of the particular child dictate that it is necessary;
- adoption be considered critically against all other possible arrangements for each particular child;
- it is recognised that adoption is not always a suitable long-term alternative care plan for a child. In each case, the system should ensure, as far as possible, that thoughtful and informed decisions are made in relation to the needs of each child. This refers not only to the needs in existence at the time the adoption order is made but also to those that may arise later in the child=s life;
- the focus of adoption be on the needs of children who require permanent care. This refers not only to needs in existence at the time that the adoption order is made but also to those that may arise later in the child's life;
- children be recognised as individuals who have valuable ties with people, by virtue of their birth, that cannot be eradicated. The assessment of the best interests of a child should be made in relation to each child and not in relation to children in general.

18.6.2 **Who may be adopted?**

No provision is made in terms of the current Child Care Act, 1983 for the adoption of persons older than 18 years of age. This aspect is evaluated by the Commission in this section and **it is concluded that *children* only may be adopted**. The Commission has pointed out earlier that adoption practice internationally has swung heavily towards the adoption of older children and that several respondents are of the opinion that effective

permanency planning requires that adoption be the first choice of arrangement for a significant portion of older children who have no parents or who could not be reunified with their families. This aspect will also be evaluated in this section. Lastly, the Commission will conclude by making recommendations regarding the possibility of adopting married persons or persons in de facto relationships.

•••• The adoption of older children

From the submissions it is clear that there is general support for the contention that effective permanency planning requires that adoption, as a form of substitute care, be the first choice of arrangement for a significant portion of older children who have no parents or where family reunification efforts have failed. However, the Commission does not regard it necessary to embody this principle in the new children=s statute as a *legal* principle. The Commission believes this principle should form the basis of the assessment and permanency planning process. Obviously, the adoption of older children goes hand in hand with the push to more open adoptions. This aspect is dealt with below.

•••• The adoption of adults

The Child Care Act, 1983 only provides for the adoption of children: It does not provide for the adoption of persons older than 18 years of age. Several overseas jurisdictions, however, allow for such adoptions in special circumstances.[259] The Australian Capital Territory, for instance, has dealt with adult adoptions in section 10 of its Adoption Act, 1993 as follows:

> An adoption order shall not be made if the child has attained the age of 18 years unless the Court is of the opinion that-
>
> (1) the applicants are persons of good repute; and

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259 See section 72 of the UK Adoption Act, 1976; section 10 of the Victoria Adoption Act, 1984; section 66(2) of the Western Australia Adoption Act, 1994; section 12 of the Northern Territories Adoption Act, 1995.

(2) there are exceptional circumstances that justify the order.

Section 18(1)(b) of the New South Wales Adoption Act 1965 allows the court to make an order for the adoption of a person who has attained the age of 18 years provided he or she has been brought up, maintained and educated by the applicant(s) as their child or has been a ward in the care or custody of the applicant(s).[260] The application must be made with the consent of the Director-General or by the principal officer of a private adoption agency. Section 21(1)(c)(ii) of the NSW Adoption Act requires the court to consider a report from the Director-General concerning the proposed adoption and satisfy itself that:

° the applicant or each of the applicants is of good repute; and
° in the particular circumstances of the case it is desirable that the person[261] should be adopted by the applicants; and
° in either case, the welfare and interest of the person to be adopted will be promoted by the adoption.

Pursuant to section 26(6) of the New South Wales Adoption Act, the consents of certain persons required to all other adoptions are not required to the adoption of an adult.

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260 Pursuant to section 18(4) of the Act, the court cannot make an order for the adoption of a person who is or has been married.

261 Awkwardly, the Act uses the word >child= for adult adoptees.

In practice, adult adoptions are rare in New South Wales and mostly not considered appropriate by either the Supreme Court of New South Wales or the relevant Department. The reason for this approach is explained as follows[262]

> The Court is always very careful to see that adoption is used for the purposes contemplated by the [Adoption] Act and not for any collateral purposes. As Selby J said in **Re Lee Yen Chum** (1963) 4 FLR 269 at 299: AThe Court looks with disfavour upon what are sometimes called >accommodation= adoptions, that is to say, adoptions which are sought for a motive other than an intention to establish a parental relationship between the applicants and the person sought to be adopted. In such cases, the Court, in the exercise of its discretion, has refused to make the order asked@.

In considering this issue, the New South Wales Law Reform Commission[263] said that adult adoption lies at the outer margin of adoption. >To allow the adoption of an adult who has never been parented by the applicant(s) *as a child*[264] is too far removed from the fundamental purpose of the [Adoption] Act=. The New South Wales Commission accordingly recommended that adoptions of adults only be allowed where a parenting relationship has been established for at least five years prior to that adult being adopted has attained the age of 18 years.[265]

The recommendation of the New South Wales Commission in respect of adult adoption was given effect to in the Adoption Act 75 of 2000.[266]

The New Zealand Law Commission took a different view and said that it saw no need for adult adoption.[267]

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262 See **Re K and the Adoption of Children Act 1965** (1988) 12 FLR 263 at 264.

263 **Report 81: Review of the Adoption of Children Act 1965 (NSW)**, March 1997, par. 4.20.

264 Emphasis in the original.

265 Recommendation 25.

266 See sections 24(1)(b) and (2) of the NSW Adoption Act 75 of 2000.

267 **Report 65: Adoption and its Alternatives**, September 2000, par. 330.

While the Commission recognises that some adults wishing to be adopted are motivated by emotional or sentimental reasons, or to cement their sense of identity, the Commission is also acutely aware of the potential misuse the recognition of adult adoptions can cause. In particular we fear that adult adoption may open the door to unsubstantiated requests for citizenship or, more worrisome, trafficking in persons. On the other hand, we do want to give legal recognition to adoptions according to customary law. As we will see,[268] the attainment of adulthood in customary law is not linked to the attainment of a particular age, but a process which may only end way after the person involved has passed the age of 21 years (the current age of majority).[269] If the Commission=s recommendation regarding lowering the age of majority for all persons, including those living under customary law, to 18 years of age is not accepted, **then legislation (but perhaps not the new children=s statute) should allow for the adoption, according to customary law, of persons older than 18 years of age**. With this proviso in mind and in the confidence that the Commission=s recommendation regarding the lowering of the age of majority is a sound one, **the Commission is not in favour of adult adoptions**.

•••• Adoption of married persons

If the adoption of persons over the age of 18 years is allowed according to customary law or otherwise, then a determination will be necessary as to whether a married person could be the subject of an adoption order. As stated previously, the Child Care Act, 1983 only allows for the adoption of a child. Marriage, also in terms of customary law, has as one of its consequences the fact that the person (even a person under the age of 18 years) attains majority status upon marriage. Unless we wish to radically change our present matrimonial system, **the Commission sees no need to depart from the general principle that only children may be adopted. In the light of this recommendation the possibility of**

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268 See Chapter 19 below.

269 See also our recommendations regarding the lowering of the age of majority in section 5.3.4. above.

adopting a married person is effectively excluded.[270]

18.6.3 Section 17 qualifications for adoptions (Who may adopt)

The Commission has carefully considered the position of who should be allowed to adopt children and who should be allowed to adopt children jointly. The following categories of prospective adoptive parents were considered:

* **Married persons jointly**

The present position is that married persons may only adopt a child jointly. A married person on his or own may not adopt a child. The Commission sees no need to depart from this established position. However, given the fact that the Commission is recommending that parental rights and responsibilities or components thereof may be assigned to different persons, the possibility does arise that a single spouse may wish to adopt a child without involving the other spouse. Obviously the adoption of a child by one spouse has major implications for the other spouse and not a step one spouse would likely take on his or her own. **It is for this reason that the Commission recommends that married persons should only be allowed to adopt children jointly**.

•••• **Gay and lesbian couples jointly**

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[270] The New Zealand Adoption Act 1955 allows married persons to be adopted. See also the recommendation by the New Zealand Law Commission **Report 65: Adoption and its alternatives**, September 2000, par. 333.

At present, section 17(b) of the Child Care Act 74 of 1983 permits persons (including gay and lesbian persons) to adopt children individually, but only spouses may at present adopt children jointly. This means that couples in gay and lesbian relationships cannot adopt children jointly.[271] Further, the same prohibition would apply to heterosexual couples who are living in a domestic partnership, without their having formalised a civil marriage, a customary union or a marriage by religious rites.[272]

Issue Paper 13 raised the matter of adoption of children by gay or lesbian couples jointly, and asked whether legislation should provide more specific guidance in this regard. There were divided responses to this question from respondents, with more or less the same level of support for gay and lesbian adoption as there was disagreement with this possibility. Many respondents from both camps, however, referred to the best interests of the child as the paramount consideration in adoption matters.

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271 See also Elsa Steyn >Women who love women - A female perspective on gay family law= 2001 **TSAR** 340 at 347. For an international perspective, see the Report of the Swedish Commission on the Situation of Children in Homosexual Families, Stockholm 2001; the Information Sheet prepared by the International Social Service Resource Centre for the Protection of Children in Adoption, 2000.

272 See in this regard the definition of >marriage= in section 1 of the Child Care Act 74 of 1983.

There is no recorded South African case law which specifically addresses the issue of gay and lesbian adoption. However, in **Van Rooyen v Van Rooyen**[273] the access rights of a lesbian mother to her two minor children were restricted because of her homosexual lifestyle. Flemming DJP held that the interests of the children had to be protected and the court order couched in such terms that they would not be exposed to >wrong signals' as to human relationships. Though the **Van Rooyen** decision dealt with the issue of access, it may serve as a useful indicator of judicial attitudes towards gay and lesbian adoptions because the best interests standard applies equally to adoptive placements, custody and access issues.

Flemming DJP's decision in the **Van Rooyen** case has been criticized for promoting homophobic bias by basing its findings on false stereotypes or perceived community intolerance.[274]

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273 1994 (2) SA 325 (W).

274 For a discussion of the **Van Rooyen**-decision, see Elsje Bonthuys >Awarding Access and Custody to homosexual parents of Minor Children: A Discussion of *Van Rooyen v Van Rooyen* 1994 (2) SA 325' (1994) 3 **Stellenbosch LR** 298; Pierre de Vos 'The Right of a Lesbian Mother to Have Access to her Children: Some Constitutional Issues (1994) 111 **SALJ** 687.

However, the constitutional assurance of equality for same-sex couples has recently been the subject of several Constitutional Court decisions, which have a bearing on law reform in this area. Notably, in **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs**,[275] the Constitutional Court held that the exclusion of cohabiting couples of the same gender from the benefits conferred upon spouses by section 25(5) of the Aliens Control Act 96 of 1991 was inconsistent with section 9(3) of the Constitution in that it constituted unfair discrimination against same-sex life partners. The Court agreed[276] that the word 'spouse', and the use of the word 'marriage' in a related section of the Act indicated that only marriages ordinarily recognised by our law would confer the benefit of an exemption from the usual requirements for the granting of an immigration permit. Noting that our statute law has in recent years accorded express and implied recognition to same-sex partnerships,[277] the Court held that the section constituted discrimination both on the ground of sexual orientation, and on the ground of marital status.

Reviewing the impact of such discrimination, the Court held that under South African common law, a marriage 'creates a physical, moral, and spiritual community of life, a *consortium omnis vitae*' which includes duties of co-habitation and fidelity,[278] companionship, love, affection, comfort, mutual services and sexual intercourse.[279]

Gay and lesbian persons 'are likewise capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships . . . '[280] and of constituting a family, whether nuclear or extended. Even though it was argued before the Court that government has a

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275 2000 (1) BCLR 39 (CC).

276 At par 25 and 27.

277 At par 31.

278 Sinclair assisted by Heaton **The Law of Marriage** Vol 1 (1996) 423.

279 **Grobbelaar v Havenga** 1964 (3) SA 522 (N) at 525E.

280 **National Coalition for Gay and Lesbian Equality v Minister for Home Affairs** par 47.

strong and legitimate interest in protecting family life, the Court found no rational connection between this interest and the exclusion of same-sex couples from the benefits of section 25(5) of the Aliens Control Act.[281]

By way of analogy, it seems fairly trite to state that the present provision in the Child Care Act 74 of 1983 which disallows gay and lesbian couples from adopting jointly would, in the light of the reasoning of the Constitutional Court, constitute unfair discrimination on the ground of sexual orientation and on the ground of marital status. Indeed, a legal challenge to the offending section of the Child Care Act was instituted in the first half of 2001 by a lesbian couple who sought to effect a joint adoption of their children, and its likely unconstitutionality conceded by the Minister for Social Development.[282] This matter is still pending before the Constitutional Court.

The Commission therefore proposes that the restriction upon persons in same sex relationships as regards joint adoption be removed.

The issue of joint guardianship by a same-sex couple who are the joint adoptive parents of children obviously will arise only once the court has found that partners in a >permanent same-sex life partnership= can jointly adopt children.

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281 See also **Langemaat v Minister of Safety and Security** 1998 (3) SA 312 (T) on access to medical aid.

282 **Du Toit and another v Minister for Welfare and Population Development and others** (Notice of motion 23704/2000, High Court of South Africa, Transvaal Provincial Division).

In terms of the common law, although the parental power over legitimate minor children was shared by both parents, the father's authority was superior to that of the mother, the mother being confined to participation with the father in the custody of the child's person and the care and control of the child's daily life. In the event of a difference of opinion between the parents, the father's word was decisive. This position was altered by the Guardianship Act 192 of 1993, in terms of which parents of a child born in wedlock now have *equal* guardianship of the child, and are entitled to exercise their rights and powers and carry out their duties arising from guardianship independently of each other. This equal, but independent, guardianship is subject to the requirement that the consent of both parents be obtained for certain specified acts, including the marriage of the child, the adoption of the child by third party, the removal of the child from South Africa by one of the parents or a third party and the alienation of immovable property or any right to immovable property belonging to the child.[283]

Section 1(2) of the Guardianship Act 192 of 1993 makes no provision for the joint guardianship of same-sex couples who are the joint adoptive parents of their children. If the court should allow the joint adoption of children by partners in a permanent same-sex life partnership, then common sense would dictate that such partners be granted joint guardianship. This would then in turn entail an amendment to the Guardianship Act 192 of 1993. **The Commission therefore recommends that persons who jointly adopt children should be granted joint guardianship of those children**.

•••• Persons in a domestic partnership jointly

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283 See further Belinda van Heerden and Brigitte Clark 'Parenthood in South African law - Equality *and* Independence? Recent developments in the law relating to guardianship' (1995) 112 **SALJ** 140.

Further to this, the question arises as to whether heterosexual persons in domestic partnerships[284] should also be allowed to adopt jointly, and whether prospective adoptive 'parents' need even be partners in a conjugal relationship as described above. Joint adoption might be sought by siblings who share a common household, by a mother and her son or daughter, or by persons unrelated by ties of consanguinity who can provide appropriate nurture to an adopted child.

As regards the first point raised above, it is arguably illogical to permit same-sex couples who are living in a permanent domestic relationship to adopt a child jointly, but to deny this benefit to heterosexual persons who are regarded as constituting a family, 'of furnishing emotional and spiritual support and of providing physical care, financial support and assistance in running the common household'.[285] Further, insofar as life partnerships between persons of the opposite sex are concerned, denial of the right to adopt jointly could constitute unfair discrimination on the grounds of marital status.

The Commission therefore recommends that joint adoption by persons who are living in a heterosexual marriage-like relationship, but who have not concluded a civil, customary or religious marriage, should be permitted by law.

The matter of joint adoption by persons who, although they live in a common household, are not living in a conjugal relationship, is not necessarily on the same footing as the above situation. The **National Coalition** decision clearly applied to partners in a permanent same-sex relationship. In the instance of other relatives or persons sharing a household, there can be no argument that discrimination on the grounds of marital status would arise,

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284 For the English position, see Victor Smith >Adoption and unmarried couples= [1998] **Fam Law** 83.

285 Ibid.

for these persons are not living in a marriage-like relationship.

The *consortium omnis vitae* that may exist in this type of household setting excludes the aspect of sexual intercourse[286] which has been held to be an element of the invariable consequences of marriage at common law. The Constitutional Court 's decision in the **National Coalition For Gay and Lesbian Equality** case could support the notion that sexual intercourse is indeed a defining characteristic of the type of relationship that was accorded relief in this particular instance.[287] However, the judgment also refers to couples who commence a relationship at an age when they no longer have the desire for sexual relations, which rather suggests that the defining characteristic is the duty of fidelity that flows from the *consortium omnis vitae.*

The question to be posed, however, is whether a marriage-like or conjugal relationship, with the related aspects pertaining to sexual intercourse or to fidelity, should be a pre-requisite for adoption. In this regard, it is submitted that the decision in **Fitzpatrick v Minister for Welfare and Population Development**[288] gives some guidance. Ruling the absolute proscription on adoption by persons who are not South African citizens or persons who qualify for naturalisation but have not applied therefore, previously contained in section 18(4)(f) of the Child Care Act 74 of 1983, to be unconstitutional, the Court placed a great deal of emphasis upon the paramountcy of the best interests of the child, as required by section 28(2) of the Constitution. The Court explained that the 'reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be

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286 In **National Coalition for Gay and Lesbian Equality v Minister for Home Affairs** supra, the Constitutional Court held that the *procreative* potential of a relationship is not a defining characteristic of conjugal relationships, as this would be deeply demeaning towards couples who are incapable of procreating, or couples who commence a relationship at an age when they no longer have the desire for sexual relations, as well as towards couples who voluntarily decide not to have children (at par 45).

287 See also **Dawood and others v The Minister of Home Affairs** (case CCT 35/99) which too repeats the view that marriage as a community of life includes ' reciprocal obligations of cohabitation, fidelity and sexual intercourse' as well as 'joint responsibility for the guardianship and custody of children born of the marriage= (par 33).

288 2000 (7) BCLR 713 (CC).

interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1)'.[289] Alluding to the historical development of the best interest standard, the Court opined that the standard has been applied beyond custody cases, and in a variety of other circumstances.

The best interest of the child test is apposite in the consideration of whether persons who share a household, but who are not living in a conjugal relationship, should be permitted to adopt jointly. It is submitted that the best interest criterion should outweigh the consideration of the particular type of relationship between the two parties *inter se*.

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289 At par 17.

Since the provisions of the Child Care Act already envisage that a child may be adopted by a widower or widow or unmarried or divorced person,[290] none of which persons are necessarily living in a conjugal relationship, nor indeed in any family setting at all, it cannot be said that present policy demands that an adopted child be assimilated into a conjugal or marriage-like family unit. Further, there would appear to be no logical reason why two or more persons who can provide a nurturing environment in which a child can develop appropriately, would necessarily require that such persons be living in a marriage-like relationship.

•••• Family members jointly

Finally, in a country in which the growth of HIV/AIDS infection rates is alleged to be spiralling, there are cogent practical reasons for permitting joint adoption by persons - such as members of the extended family or kinship group - in the interests of securing the future of such child, lest a single caregiver later be affected by HIV/AIDS.

Thus, given the primacy of the child's best interests and other considerations elaborated above, the Commission concludes that the existence of a conjugal relationship should not be required for adoption by two or more persons jointly. It is, for instance, conceivable that the husband (head of the kraal) and his three or four wives in a customary setting may wish to adopt a child jointly, in a practical application of the spirit of *ubuntu*.

The Commission therefore proposes that persons other than married couples be permitted to adopt a child jointly, provided that the overriding criterion should remain that such adoption will serve the interests and conduce to the welfare of the child.

*** Step-parents**

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290 Section 17(b) of the Act.

Much of the modern literature on adoption combines the treatment of step-parent adoptions and relative adoptions in one category, termed intra-familial adoptions. There is a significant amount of overlap between the two categories, although there are distinct considerations attaching to each which require separate treatment. Step-parent and relative adoptions differ from other types of adoptions in that agencies do not select the adoptive parents. Instead, the issues are whether the existing care arrangement should be transformed into an adoption and whether provision should be made for a simpler, faster adoption process in intra-familial adoptions.

In some foreign jurisdictions, such as New South Wales, the applicants in either a step-parent adoption or a relative adoption may apply directly to the court for an adoption order without the need to obtain first the consent of the Director-General and without the application needing to proceed through an agency.[291] Section 51(2) of this Act excludes step-parents and adoptions by relatives from the operation of section 51(1), which makes it an offence for a person other than the Director-General or the principal officer of a private adoption agency, or someone authorised to act on their behalf, to arrange an adoption. In New South Wales the courts have dispensed with the requirement for the Director-General to submit a report in step-parent and relative adoptions.[292]

Adoption legislation in all Australian states and territories permit an adoption order to be made in favour of a step-parent solely.[293] The Australian Capital Territory legislation adds the proviso that the step-parent and the custodial parent must have lived together, whether married or not, in a heterosexual relationship for at least three years. Whilst the formulations differ from Act to Act, each one achieves the result that the relationship between the child and the parent with whom the adopting step-parent is cohabiting is not

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291 Section 18(3).

292 As required by section 21(1A)(c) of the NSW Adoption of Children Act, 1965.

293 Section 11(5) of the Victoria Adoption Act, 1984; section 15(3) of the Adoption of Children Act, 1994 (NT); section 20(7) of the Adoption Act, 1988; section 67 of the Adoption Act, 1994 (WA); section 18(2) of the Adoption Act, 1993 (ACT); section 9 of the Adoption Act, 1988 (SA); section 12(3) of the Adoption of Children Act, 1964 (Qld).

affected by the adoption order. This overcomes the problem of the custodial parent having to adopt jointly with the step-parent.

Pursuant to the South Australian and Queensland legislation an adoption order will only be made in favour of a relative if, in the former Act, the court is satisfied that adoption is clearly preferable to guardianship in the interests of the child,[294] or, in the latter Act, if a guardianship or custody order is not more appropriate.[295] In terms of the Victoria, the Northern Territory and Tasmania legislation the court must not grant an adoption order in favour of a relative unless it is satisfied of the same three provisos as it must be satisfied of in relation to step-parent adoptions. Under the ACT legislation, the requirements which have to be satisfied before an adoption order can be made in favour of a relative include the same requirements as those for step-parent adoptions. However, there is a further requirement to be met in relative adoptions: There must be circumstances why the relationships within the family of the child should be redefined as such an order would do.

Step-parent and intra-familial adoptions represent a majority of adoptions made today.[296] Concern has been expressed that step-parent adoption is often used, perhaps inappropriately, to sever the relationship between the child and the non-custodial parent. The Commission does recognise that the traditional step-parent adoption is not the ideal situation. Sometimes, the parent who consents to the adoption does so to escape his or her financial responsibilities as the new step-parent will now assume those. As a consequence such parent disappears out of the life of the child involved. In this process the adopted child loses out on the opportunity to maintain meaningful contact with such parent (and or the extended family).

With this qualification, and given our recommendation on the sharing of parental rights and responsibilities amongst more than one person, the Commission concedes that there will

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294 Section 10 of the Adoption Act, 1988 (SA).

295 Section 12(5) of the Adoption of Children Act, 1964 (Qld).

296 In 1999 and 2000, step-parent adoptions respectively constituted 37% and 35% of all adoptions.

always be situations where it is in the best interests of the child to be adopted by his or her stepparent. In some instances, if not most, such adoptions will give legal recognition to the existing de facto position of the child. **We therefore recommend the retention of the present section 17(c) of the Child Care Act, 1983 which allows for the adoption of a child by a married person whose spouse is the parent of the child.**

The Commission did consider the possibility of a two-tier system where adoptions by step-parents and other relatives would be treated differently from adoptions by non-family members. Step-parent and adoptions by relatives differ from other types of adoptions in that agencies do not select the adoptive parents. Instead, the issues are whether the existing care arrangement should be transformed into an adoption and whether provision should be made for a simpler, faster adoption process. However, the Commission accepts that it is necessary to impose the same threshold upon eligibility for step-parent and adoption by relatives as for other adoptees and therefore **does not recommend the introduction of a parallel system for intra-familial adoptions**.

•••• Disabled persons

In terms of section 18(4)(c) of the Child Care Act, 1983, a proposed adoption must serve the interests and conduce to the welfare of the child. This gives effect to the view that the purpose of an adoption is to find the best possible parents for a child and not to find the best possible child for (prospective parents). While disabled persons should not be discriminated against, the disability of a prospective adoptive parent is certainly a factor that needs to be considered when screening adoptive parents. It would, for instance, be difficult to place a baby with a single paraplegic mother unless she has access to a good support system. With the proviso that the adoption should always be in the best interest of the child concerned, the Commission sees no point in disqualifying disabled persons from adopting children.

•••• Age qualifications

There were calls for the reintroduction of minimum age differences between the child and the applicant, as was provided for in the 1960 Children=s Act. Requiring such age differences is not uncommon internationally and usually adoption laws provide that applicants must be a minimum age, say 21 years of age, before being eligible to adopt. Often an upper age limit is also prescribed after which age persons are not considered eligible to adopt. Adoption Guidelines also often prescribe upper and lower age limits of >preferred applicants=.

The Commission is convinced that the >best interests of the child= are not solely dependent on the age of the prospective adoptive parents *per se* so as to exclude all other considerations. While the Commission concedes that the age of the prospective adoptive parents is a factor to be considered, clearly placement agencies should consider a wide variety of would-be parents, so that the wide range of children relinquished for adoption should find the best families to suit their individual needs, experiences and circumstances. This applies especially in cases involving the adoption of >special needs= and older children.

The Commission therefore does not recommend the reintroduction of the requirement of minimum age differences, as was provided for in the 1960 Children=s Act.

•••• Trans-racial adoptions

While the Commission unfortunately has to concede that racial prejudice is still alive in South Africa, it wishes to state categorically that existing racial prejudices, as also applied to children placed trans-racially, should not be tolerated. If racial prejudices are not eradicated, then all future South African generations will continue to live in a race-conscious society. **The Commission therefore does not exclude the possibility of**

trans-racial adoptions, provided it is in the best interests of the child concerned, and sees no need to tamper with the existing provisions of section 18(3) read with section 40 of the Child Care Act, 1983.[297]

To give effect to our recommendations regarding eligibility to adopt, the Commission recommends the inclusion of the following provision in the new children=s statute:

Persons who may adopt a child

A child may be adopted -

(1) by a husband and his wife, partners in a domestic conjugal life-partnership, or other persons sharing a common household and forming a family unit, jointly;

(2) by a widower, widow, unmarried or divorced person;

(3) a married person whose spouse is the parent of the child;

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297 See also Alan Rushton and Helen Minnis >Annotation: Transracial family placements= (1997) Vol. 38 No. 2 **Journal of Child Psychology and Psychiatry** 147; Suzanne Hoelgaard >Cultural determinants of adoption policy: A Columbian case study= (1998) 12 **International Journal of Law, Policy and the Family** 202.

(4) by the natural father of a child born out of wedlock.

To further give effect to an earlier recommendation[298] the Commission has made in regard to section 10 of the Child Care Act, 1983, **it is recommended that no person other than the manager of a maternity home, a hospital, a place of safety or a children=s home may receive any child *under three years of age* for the purposes of adopting such child or causing him or her to be adopted and care for that child apart from his or her parents or care-giver for a period longer than 14 days unless such person has applied for the adoption of the child or has obtained the consent in writing of a commissioner of child welfare**. In considering the application for consent, the commissioner must have regard to the religious and cultural background of the child concerned and of his or her parents as against that of the person in or to whose custody such child is to be placed or transferred.[299]

The provision to give effect to this recommendation could look as follows:

Care of certain children apart from their parents

(1) No person other than the manager of a maternity home, a hospital, a place of safety or a children=s home shall receive any child under three years of age for the purposes of adopting such child or causing him or her to be adopted and care for that child apart from his or her parents or care-giver for a period longer than 14 days, unless such person-

(a) has applied to court for the adoption of the child; or
(b) has obtained the consent in writing of the commissioner of the district in which the child was residing immediately before he or she was received.

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298 See 6.4.4. above.

299 Sections 10(2) and (3) read with section 40 of the Child Care Act, 1983.

(2) The commissioner shall, in considering any application for the said consent, have regard to the religious and cultural background of the child concerned and of his or her parents as against that of the person in or to whose custody such child is to be placed or transferred.

(3) Any consent mentioned in subsection (1) shall be subject to the prescribed conditions and to such other conditions as may be determined by the commissioner in any specific case.

18.6.4 **Consent to adoption**

The Commission notes that the section 18(4) requirements are causing some problems in practice. These problems mainly relate around the difficulties with birth fathers having to acknowledge themselves in writing, the consent provisions and the 60-day cooling off period, and the different interpretations given to and applications of the said requirements by commissioners of child welfare. In this regard, the **Commission recommends a move away from the adequate means test to a willing and able test (section 18(4)(a)). The Commission further recommends that the requirement that the prospective adoptees must be of good repute and fit and proper to be entrusted with the custody of the child (in section 18(4)(b)) be strengthened by requiring proper screening of applicants**.

The Commission notes that few problems are being experienced in practice with informing the persons giving the consent of the legal consequences of adoption. In this regard the Commission supports the contention that most problems related to consent are averted when proper pre- and post-adoption counselling is provided.

Section 18(4)(e) of the Child Care Act requires the consent to his or her adoption of a child older than 10 years of age. In the Commission=s opinion, the views of a child, where a child has the ability to express such views, must always be considered. **The Commission**

therefore recommends that the 10 year age requirement be done away with and be substituted with the following requirement: the child must consent to being adopted if he or she is of sufficient maturity to understand the implications of being adopted and giving consent to such adoption.

Since the ***Fraser*** judgment, it is clear that unmarried fathers have certain rights in respect of their children. The Commission acknowledges this fact and wishes to encourage unmarried fathers to play a far greater role in the upbringing of their children. It is clear, however, that difficulties are being experienced in tracing unmarried fathers and serving notice on such fathers that the mother has consented to the adoption of their child (in terms of section 19(A)). Again the problem seems to be not so much with the existing provisions of the Child Care Act, 1983, but rather their interpretation and application by different commissioners of child welfare. In this regard, the Commission wishes to point out that section19A(1) needs amendment as it in its present form requires the commissioner to cause notice to be served on a parent >where [such] other parent is not available to give consent or where such parent=s consent is not required=, which hardly makes sense.

The Commission recommends the retention of the 60-day cooling off period provided for in sections 18(8) and (9) of the Child Care Act, 1983. This allows the parent of a child who has given consent to the adoption of his or her child the right to withdraw such consent up to 60 days after such consent has been given. In this regard, the Commission was convinced by those respondents who pointed out that proper pre- and post-adoption counselling should prevent any difficulties with parents later wishing to withdraw consent.

•••• Dispensing with consent to adoption

Section 19 of the Child Care Act, 1983 allows for consent to adoption to be dispensed with in certain circumstances. Section 19(b)(vi), which allows for dispensing with consent of a parent who withholds his or her consent unreasonably, is particularly problematic as some commissioners of child welfare are apparently reluctant to make such a finding. Again,

however, the problem seems not to be so much with the law, but with its interpretation and application.

18.6.5 The effect of adoption and post-adoption contact

At present, an order of adoption terminates all the rights and responsibilities existing between the child and any person who was his or her parent immediately prior to such adoption, and that parent=s relatives (section 20(1)). **The Commission maintains this position and recommends that adoption should terminate all the parental rights and responsibilities existing between the child and all persons who held such rights and responsibilities immediately prior to such adoption**.[300] In this regard it must be recalled that the Commission has recommended that parental rights and responsibilities, or components thereof, in respect of a child, may be assigned by the court to more than one person. The Commission would also like to point out that its proposals regarding the allocation and sharing of parental rights and responsibilities should address those needs currently covered by the call for post-adoption contact where ties with the pre-adoption parents, family, and community can be maintained.

18.6.6 Prohibition of consideration in respect of adoption

It was brought to the Commission's attention that the prohibition of considerations as provided for in section 24 of the Child Care Act is regularly flouted with impunity. Among those alleged to be involved, along with prospective adoptive parents and biological parents consenting to adoption of their children by them, are medical practitioners, private clinics, lawyers and social workers in private practice. It also appears that greater clarity is needed as to what should be considered to constitute a >consideration=. **The Commission recommends that the prohibition against considerations be maintained; also that the**

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300 See also Murray Ryburn >In whose best interests? Post-adoption contact with the birth family= (1998) Vol. 10 No. 1 **Child and Family Law Quarterly** 53; Bridget Lindley >Open adoption - Is the door ajar?= (1997) Vol. 9 No. 2 **Child and Family Law Quarterly** 115..

Regulations to the new children's statute provide clear guidance to adoption practitioners and the courts as to what will constitute a >consideration=.

18.6.7 Subsidized adoption

The Commission unequivocally supports the introduction of some form of means-tested State grant for adoptive parents. The Commission believes this will provide a greater sense of security to especially those children currently in long-term foster care.

18.6.8 Access to information

Access to adoption information is a thorny issue.[301] The central question is the extent to which the State ought to be able to control access to one=s own personal information. It also raises significant privacy concerns; the right of individuals to access information about themselves must be balanced against the extent to which such information can be accessed by others and the extent to which individuals might be required to produce such information to others. It also raises questions as to the priority that should be assigned to the desire for confidentiality of the parties involved.

The Commission recommends that the following persons should be permitted to have access to the information contained in the adoption register:

- the adopted child from the date on which the child concerned reaches the age of 18 years;[302]
- the adoptive parent from the date on which the child concerned reaches the age of 18 years;
- the natural parent or a previous adoptive parent of the adoptive child, with the

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301 See, for instance, Geraldine van Bueren >Children=s access to adoption records - State discretion or an enforceable international right?= (1995) 58: 1 **Modern LR** 37.

302 The new suggested age of majority; see 4.5 above.

written consent of the adoptive parent(s) and of the adopted child, from the date on which the child concerned reaches the age of 18 years;

•••• subject to the conditions the Director-General: Social Development may prescribe, by any person for official and bona fide research purposes.[303]

The Commission further supports the present Regulation 28(3) in terms of which the Registrar of Adoptions may require an adoptive parent, a natural parent, a previous adoptive parent or a child who wishes to access the adoption records to receive counselling from a social worker designated by the Registrar before allowing that parent or child to inspect the record concerned or to obtain a copy thereof.

An alternative approach would be not to restrict access to information in the adoption register, unless it is in the best interests of the adoptive child concerned. This can be done without much difficulty by accessing the population register. However, the Commission wishes to point out that access to information should not be equated with unlimited contact with the child. In this regard, the Commission is of the view that the court must in certain circumstances prescribe or even prohibit contact with the child.

18.6.9 Facilitating open adoptions

It has long been accepted that it is highly desirable for adoptive children to be told at an early stage about their adoptive status and to be told in general terms some characteristics of their birth families and the circumstances of their adoption. It is therefore not surprising that one of the most distinctive features of recent thinking and practice in adoption is the view that adoption law should not facilitate deception or secrecy, but should promote

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303 These provisions are currently contained in Regulation 28.

honesty and openness. This mode of thinking developed from research into the long-term effects of adoption and the needs of consumers of adoption services. Research and experience show that openness is in the best interests of the child and should, therefore, be encouraged.

The Commission endorses the position that adoption placements should provide for openness. The issue for consideration here is therefore not whether there should be openness at all in adoption, but the extent to which >open adoption= practices should be implemented in the legislation and the manner in which this should be done. This can include situations such as the following:[304]

- adoptive parents who recognise and are comfortable with the fact that the adopted child is also a member of his or her birth family and are able to discuss issues surrounding the adoption with the child;
- a simple exchange of information and photographs between the birth and the adoptive parents, that may or may not involve the child;
- the situation where the birth parents select the adoptive parents from agency profiles and have an initial meeting with them, which may or may not be followed by subsequent exchanges of information and photographs or actual contact;
- informing the birth parents if the child dies;
- situations where a close relationship develops between birth families and the adoptive family.

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[304] There is no universally accepted definition of open adoption. See further New South Wales Law Reform Commission **Discussion Paper 34: Review of the Adoption of Children Act 1965 (NSW)**, April 1994, par. 4.20.

Each of the situations above provides a snapshot of the way in which an open adoption arrangement may work at a particular time, rather than describing fixed categories of open adoption. The openness of an adoption may change and develop in accordance with the changing needs of the parties involved. Birth and adoptive families may change residences. Adoptees may feel the need for different levels of contact throughout their lives. Adoptive children who have experienced trauma before or during a separation from their birth family may need a period of attaching to their adoptive parents before they are able to benefit from contact with the birth parents. Children who are adopted when they are older may have quite different short and long-term needs with regard to contact, particularly if they have developed relationships with members of their extended birth family.

From the above it is clear that some degree of flexibility is needed in open adoption arrangements so that people can design an arrangement that they feel comfortable living with on a day-to-day basis. Allowing for flexibility also acknowledges that individual children will have differing needs at various times in their lives.

There are a number of legislative schemes for openness in adoption. The most notable of these is the scheme for negotiated adoption plans provided for the in the Adoption Act, 1994 (Western Australia).[305] This Act provides that an adoption plan is to be negotiated, if possible, between the birth parents who have consented to the adoption, the prospective adoptive parents, and if the Director-General believes it to be appropriate, a child=s representative. The Act sets out some of the matters that may be provided for in the adoption plan but does not set out requirements as to content. Schedule 2, entitled >rights and responsibilities to be balanced in adoption plans=, sets out rights and responsibilities of adoptive parents, birth parents and the child, divided into the four stages of the adoptee=s

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[305] The Adoption Act 1994 (WA) implemented the recommendations of the Western Australian Adoption Legislative Review Committee=s **Final Report: A New Approach to Adoption**, February 1991.

life, namely: infancy, childhood, adolescence, and adulthood. Persons who negotiate an adoption plan are to have regard to these rights and responsibilities.

The Director-General is required to provide assistance and mediation services to persons in the process of negotiating an adoption plan. If the Director-General is of the opinion that no adoption plan can be agreed upon, he or she may allow further time for the selection of an adoptive parent or for the negotiation process, apply to the court for an order regarding any disputed matter that is preventing agreement to the adoption plan, place the child with other suitable prospective adoptive parents, or cause notice to be given that it is not possible or desirable to place the child for adoption.[306]

Several child welfare agencies in Illinois in the USA have systems for negotiation of open adoption agreements. Foster parents and birth parents, or any other relatives, meet with a representative of the agency that has responsibility for the child. If open adoption is agreed upon, the details are drafted into a written agreement. The agreement then covers aspects such as locations for future contact, the means and nature of correspondence and the involvement of the child welfare agency. All parties are informed that the agreement is subject to the needs of the child and should be altered in accordance with those changing needs. Adoptive parents, as the legal guardians and day-to-day carers of the child, are considered the appropriate parties to indicate that circumstances require a change to the original agreement. The agreement is negotiated prior to the completion of the adoption.

A Canadian review by a Special Committee recommended that the adoption legislation in Ontario be amended to allow rights of access to coexist with an adoption order, although not in relation to step-parent adoptions. The proposed amendment took the following form:[307]

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306 Two points have emerged from the experience in Western Australia. First, the agreement will be more likely to succeed if it is one with which all parties are completely satisfied; secondly, parties must recognise the need for change over time: New South Wales Law Reform Commission **Report 81: Review of the Adoption of Children Act, 1965 (NSW)**, March 1997, par. 7.35.

307 M Bernstein, D Caldwell, G Bruce Clark and R Zisman >Adoption with access or Aopen adoption@= (1992) 8 **Canadian Family Law Quarterly** 283 at 294.

> The Court shall not make an order for contact ... unless the Court is satisfied that :
>
> (a) It is in the best interests of the child to be adopted and to maintain ties with members of his or her birth family.
> (b) Where there is a meaningful relationship between the child and the proposed contact person, and a disruption of that relationship is likely to be detrimental to the child. Regard should be given to the child=s physical, mental and emotional development, and the child=s views and preferences, where such can be ascertained.
> (c) Where there is a prospective adoptive family, the prospective adoptive parents consent to the contact order.
> (d) The proposed contact person accepts that the child will be adopted.
> (e) The contact person and the prospective adoptive parents, if any, are committed to placing the needs and the stability of the child as a first priority, and to making genuine efforts not to undermine the implementation of the contact order.

While the Commission recognises that there are a number of forceful arguments in favour of a legislative scheme for open adoption agreements, the Commission has concluded that these are overwhelmed by the undesirability of creating legally enforceable rights in the context of such family relationships. Therefore, **the Commission does not recommend that there be a legislative scheme for open adoption agreements. The Commission does, however, support a system of *voluntary* agreements as to openness in adoption**.

In this regard, the Commission wishes to point out that there are a number of practices which agencies can follow which have the potential of increasing the chances of a successful open adoption: These are as follows:

- allowing birth parents to participate in the selection of adoptive parents;
- encouraging adoptive parents and birth parents to meet prior to placement; and
- providing certain post-adoptive services.

Another factor, rather than a practice, which can affect the success of open adoption arrangements is the extent to which birth parents have made a fully informed decision to

relinquish their child and have a realistic understanding of what adoption will mean for themselves and for the child.

18.6.10 Adoption services

In conclusion, the Commission recommends an end to the current situation in which provision for, and the regulation of, adoption services are fragmented between the Child Care Act and the Social Work Act.[308] It is further recommended that all adoption services ultimately be provided by individuals and agencies accredited by the Department of Social Development for this purpose in terms of the new children's statute.[309] It is recognised that an interim arrangement will be necessary to enable the Department of Social Development, child and family welfare organisations and accredited social workers to continue to deliver these services until a system of accreditation is fully operational. Regulations should cover the manner in which applications for accreditation may be made, refused or withdrawn; procedures for appeal and review; annual reporting obligations and so forth. Regulations must, in addition, provide for fee structures and mechanisms for fee payment in respect of adoption services which are designed to preserve the impartiality of the relevant assessment and decision-making processes. Hence there must be no direct payment by any interested party in an adoption application to the social worker dealing with the matter or any person who is in a position to influence the outcome of the process, and no direct or indirect financial incentive for an adoption social worker to recommend adoption by a specific applicant, or to pursue adoption of a child in preference to another appropriate solution. Reimbursement of social workers in private practice, medical practitioners or other service providers should

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308 See, for instance, the Regulations relating to the Registration of a Speciality in Adoption Work issued in terms of section 28 of the Social Work Act, 1978, and published in Government Gazette No. 19930 of 16 April 1999.

309 See also the letter with enclosures of the Children=s Placement Centre dated 6 June 2001 in which changes to the present system of accreditation for social workers doing adoption work are suggested.

therefore be undertaken through contracting of their services to the Department of Social Development or an accredited agency, or through a centralised fund.

CHAPTER 19

RESIDENTIAL CARE

19.1 Introduction

Issue Paper 13 did not deal substantially with the matter of residential care and consequently the responses to the Issue Paper contained very little relating to this form of care. It was decided by the Commission that despite the existence of South African policy documents[1] regarding residential care it would still be important to consult with people working in this field. A research paper on legislative issues relating to residential care was commissioned for the Commission in this regard. The research paper was used as the basis for discussion at a dedicated focus group discussion on residential care which was held in Durban on 29 and 30 May 2000. The Commission has also drawn on this paper for the writing of this Chapter.[2]

A worksheet was developed by the Commission to guide the discussion at the focus group discussion on residential care. Each group taking part in discussions at the meeting filled in one worksheet. Some of the participants filled in worksheets individually. The NACCW[3] was not able to send a representative to the workshop, but they did provide a detailed written response to the worksheet.

Finally, in the last stages of the writing of this Chapter a meeting was held at the Commission's offices which was attended by a number of specialists in residential care.[4] The purpose of the meeting was to reach final decisions in areas in which there were a number of different views or approaches arising from the consultation process. This meeting took place on 5 June 2001, and the meeting is referred to in this Chapter as the 'meeting of specialists'.

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[1]IMC Interim Policy Recommendations 1997, White Paper for Social Welfare 1997.

[2]The discussion paper was written by Professor Sonia Human of the University of Stellenbosch. The Commission is grateful to Professor Human for this research.

[3]National Association for Child and Youth Care Workers.

[4]The meeting was attended by Ms Ann Skelton, Ms Buyi Mbambo, Ms Merle Allsopp, Ms Elmari Swanepoel, Ms Annette van Loggerenberg, and Messrs André Viviers, Harold Malgas, and Gordon Hollamby. Apologies were received from Mr Ashley Theron.

19.2 Forms of residential care

19.2.1 Current South African law, policy and practice

At present the Child Care Act 74 of 1983 makes provision for the following forms of residential care:[5]

a. A **place of safety**, which is defined in the Child Care Act 74 of 1983 as 'any place established under section 28 [of the Child Care Act] and includes any place suitable for the reception of a child, into which the owner, occupier or person in charge thereof is willing to receive a child'. All State-run places of safety fall under the Department of Social Development (formerly the Department of Welfare).

b. A **shelter**, which is defined in the Child Care Act 74 of 1983 as 'any building or premises maintained or used for the reception, protection and temporary care of more than six children in especially difficult circumstances'. Children in especially difficult circumstances are defined in the Child Care Act 74 of 1983 as 'children in circumstances which deny them their basic human needs, such as children living on the streets and children exposed to armed conflict or violence'.

c. A **children's home**, which is defined in the Child Care Act 74 of 1983 as 'any residence or home maintained for the reception, protection, care and bringing up of more than six children apart from their parents, but does not include any school of industries or reform school'. Not all children's homes are run by the State. Children's homes that are maintained and controlled by, for example, the church, welfare organisations or the private sector must be registered in terms of section 30 of the Child Care Act 74 of 1983.

d. A **reform school**, which is defined in the Child Care Act 74 of 1983 as 'a school maintained for the reception, care and training of children sent thereto in terms of the Criminal Procedure Act, 1977 (Act No 51 of 1977)'. Reform schools fall under the Department of Education.

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[5]See also Noel Zaal 'Casting children out into a legal wilderness? A critical evaluation of the definitions of care facilities in the Child Care Act 74 of 1983' (2001) 118 **SALJ** 207.

e. A **school of industries**, which is defined in the Child Care Act 74 of 1983 as a 'school maintained for the reception, care, education and training of children sent or transferred thereto under this Act'. Schools of Industries fall under the Department of Education, with the exception of Newcastle School of Industries which is controlled jointly by the Department of Social Development and the Department of Education.[6]

g. **A secure care facility**, which is defined as 'a facility established under section 28A [of the Child Care Act, 1983]'.[7] '**Secure care**' is defined as 'the physical, behavioural and emotional containment of children offering an environment and programme conducive to their care, safety and healthy development'.[8] A secure care facility is defined in the Child Care Amendment Act as 'a facility established under section 28A'. Secure care is a new concept in South Africa. These facilities will fall under the Department of Social Development. As the Amendment Act has only come into operation recently, no facilities have yet been officially registered as secure care facilities although some are referred to by this name. At present, there is one such facility in each province. The management of two of the nine facilities has been outsourced, one to a non-governmental organisation, another to a private company.[9]

There have been a number of developments in South African residential care policy since 1994. The **White Paper for Social Welfare** which was published in February 1977 contained a section

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[6]KwaZulu Natal is the only province in which the Department of Social Development has played a management role in schools of industry. This dates back to ad hoc arrangements made in the province prior to 1994.

[7]Section 28A of the Child Care Act 1983 empowers the Minister for Social Development to establish and maintain secure care facilities for the reception and secure care of children awaiting trial or sentence.

[8]The definitions of 'secure care facility' and 'secure care' were inserted by section 1 of the Child Care Amendment Act 13 of 1999. The date of commencement of this Act was 1 January 2000.

[9]The IMC **Interim Policy Recommendations** encouraged the outsourcing of the management of facilities, provided that this is done according to strictly applied minimum standards, by way of clear contractual agreements.

on residential care.[10] This provided that where the placement of children through family and community-based programmes is not an option, children will be placed in residential facilities, but only as a last resort. The White Paper also indicated that residential facilities would be more multi-purpose, more flexible and less formal. In addition the White Paper states that 'the training and re-training of child-care and youth-care workers in residential facilities will be provided. Such training programmes will aim at improving the capacity of these workers to render both preventative and protective services in cooperation with social workers'.[11]

In 1995 an Inter-Ministerial Committee on Young People at Risk (hereafter the IMC) was set up and was tasked with developing a policy framework for the transformation of the child and youth care system. The IMC **Interim Policy Recommendations** which were published in 1996 described the child and youth care system as being 'in crisis'. Whist recognising that residential care is an essential part of the child and youth care system, the policy document indicated that in the current system too many children end up in residential care, and that a transformed child and youth care system would provide other services at an early stage to strengthen families and communities thus allowing more children to remain in their own or in substitute families. The policy recommendations set out an integrated framework for the child and youth care system which consists of four levels, namely prevention, early intervention, statutory process and the continuum of care. The Policy recommendations posited that residential care is the appropriate option for some children,[12] and if children are placed in residential care then the quality of care they receive should be greatly enhanced, with an increased emphasis on ongoing developmental assessment as well as constant work on reintegration. The key role player in the transformation of the child and youth care system is the child and youth care worker, and the policy recommendations placed emphasis on their development, as well as the recognition of child and youth care workers as a separate occupational class. The effective management of facilities and accountability of all personnel is also stressed in the policy document.

The IMC **Interim Policy Recommendations** at page 19 recommend that:

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[10]Paragraph 49, p. 43.

[11]Paragraph 49(f), p. 44.

[12]This is a slight policy shift from the White Paper for Social Welfare which indicated that residential should always be a 'last resort'.

> [F]acilities which offer programmes at level 4 (the continuum of care) should be encouraged to include prevention, early intervention and reintegration strategies and establish multi-purpose child and youth care centres which can serve a wide range of community needs with regard to children and youth.

In 1996 the IMC was requested by the Cabinet to undertake an investigation into places of safety, schools of industry and reform schools to establish the availability and suitability of such facilities for the accommodation of awaiting trial children. The investigation report[13] revealed widespread human rights abuses in these facilities.[14] The report included a set of recommendations for immediate action which included the rationalisation of residential care services and the appropriate placement of children, the establishment of appropriate programmes and eradication of abuse and the transfer of the control and management of all care facilities under the Ministry and Department of Welfare (subsequently re-named Social Development). At the time of the writing of this discussion paper these key recommendations have not been fully acted upon. The rationalisation of facilities has only occurred in the Western Cape. The development of new programmes has been negligible and schools of industry and reform schools remain under the Department of Education.

19.2.2 **Comparative law**

19.2.2.1 **Kenya**

The Kenyan Children Bill 1998 provides for the following residential care options:

° Charitable Children's Institutions[15]

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[13]IMC **In whose best interests? Report on Places of Safety, Schools of Industry and Reform Schools** July 1996. See also IMC's **Report on the Pilot Projects** (1998).

[14]The abuse of children in residential care settings is not unique to South Africa. See in this regard the Canadian Law Commission's report **Restoring Dignity: Responding to Child Abuse in Canadian Institutions** (March 2000).

[15] Children Bill 1998 s 55.

A charitable institution is a home or institution established by a person, religious organisation or non-governmental organisation and which has the approval of the Council to manage a programme for the care, protection and rehabilitation or control of children.

° Government Rehabilitation Schools and Remand Homes[16]

A Government rehabilitation school is aimed at the reception, maintenance, training and rehabilitation of children ordered there under the Act.[17] A remand home is established by the Minister and is used for the detention of children.

° Other residential care facilities[18]

* Nursery

A nursery is defined as any institution or place at which, for the time being, five or more children under the age of seven years are received and cared for regularly for reward.

* Place of safety

A place of safety means any institution, hospital or other suitable place into which the occupier is willing to accept the temporary care of a child.

19.2.2.2 **Uganda**

The Ugandan Children Statute, 1996 provides for the following residential care facilities:

(a) Approved homes[19]

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16 Children Bill 1998 s 44.

17 Children Bill 1998 s 44(1).

18 Children Bill 1998 s 2.

19 The Children Statute, 1996 s 57-67.

An approved home is one that has been inspected and given a certificate to show that it is suitable to receive and keep children, who are in need of care and protection or are beyond parental control and are not criminals. Such a home can be state run or it can be a non-governmental home.

The purpose of the home is to give a child a suitable form of care until the parents are able to meet his or her basic needs. Children can only be received in one of two ways: firstly, in an emergency situation, where after the child must be brought to court within 48 hours; secondly, when an interim care order or a care order has been made.[20] An application for a care order shall only be made when other methods of helping the child have failed. The purpose of the order is to remove the child from where he is staying and to make sure that he will return to the community, once the problems have been solved.

(b) Remand home[21]

Where a child is charged with a criminal offence and not released on bail, he or she will be sent to a remand home. It is the duty of all local councils to provide a suitable place where children can be remanded.

(c) National Rehabilitation Centre for Children[22]

This centre is a place for the detention, rehabilitation and re-training of children committed there.

19.2.2.3 **Namibia**

Namibia is in the process of developing a new children's law. The Draft Child Care and Protection Act contains a provision outlining the objectives and purposes of the legislation.[23] Although the stated purposes will inform decisions made regarding children, it is also intended to inform and

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20 The Children Statute, 1996 s 28, 29.

21 The Children Statute, 1996 s 2.

22 The Children Statute, 1996 s 97.

23 Draft Child Care and Protection Act 1996 s 2.

educate society about child and family policy.[24] For example, one of the purposes of the Act is to improve the quality of children's relationships with their families and communities.[25] It is also the purpose of the Act to actively involve families in resolving problems.[26] To summarize, the emphasis is on prevention, intervention only if necessary, and then on active work towards restoration of the family.

The draft Child Care and Protection Act provides for the following types of residential care facilities:

(a) Educational and vocational training centres

This is defined as a school, centre or other place maintained for the reception, care, education and vocational training of children placed there under this Act. These centres are currently called schools of industries.[27] There are four noteworthy aspects regarding these centres.[28] Firstly, the Minister must establish children's homes to accommodate all children, male and female, who are in need of such facilities but cannot be accommodated. Secondly, any school administered by the Minister of Education and Culture can be utilized as an educational and vocational centre on authority of the Minister. Thirdly, it is possible to establish an educational and vocational centre which is not maintained and controlled by the state. Fourthly, the establishment of any centre must be carried out in consultation with the Minister of Education.

(b) Places of safety[29]

A place of safety is any place established, approved or registered in terms of the Act for the temporary reception and care of a child in terms of this act and the Criminal Procedure Act, 1977. The Minister has the obligation to establish places of safety of varying classifications based on

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24 Sloth-Nielsen and Van Heerden 'New Child Care and Protection Legislation for South Africa? Lessons from Africa' (1997) **Stellenbosch LR** 261 at 271.

25 Draft Child Care and Protection Act 1996 s 2(1)(b).

26 Draft Child Care and Protection Act 1996 s 2(1)(e).

27 Draft Child Care and Protection Act 1996 s 60(1).

28 Draft Child Care and Protection Act 1996 s 60(2)-(4).

29 Draft Child Care and Protection Act 1996 s 58.

different children's needs and the interests of community safety. A secure care facility can for example be established in this way.

(c) Children's home[30]

A children's home is defined as any residence or home maintained for the reception, protection and care of children apart from their parents. A children's home does not include an educational and vocational training centre.

19.2.2.4 **New Zealand**

The Children, Young Persons and their Families Act lists the following residential care options:

(a) Family resource centre[31]

This is defined as any premises that provide temporary accommodation for a child or young person and any person who has the care of that child or young person, where that accommodation is provided as part of a programme designed to provide assistance to that person.

(b) Residence[32]

This means any residential centre, family home, group home, foster home, family resource centre, or other premises approved or recognised for the time being as a place of care or treatment.

The Director-General is vested with the necessary authority to establish and maintain any number and type of residences as required in his/her opinion to provide care and control of children and young persons. The Director-General must attempt to establish a sufficient range of residences to cater effectively for the variety of special needs of children and young persons. A residence can be established for the following purposes:

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30 Draft Child Care and Protection Act 1996 s 1.

31 Children, Young Persons and their Families Act, 1989 s 2.

32 Children, Young Persons and their Families Act, 1989 s 364.

(i) Remand, observation, assessment, classification and short-term training purposes.

(ii) The provisions of a variety of programmes of special training and rehabilitation.

(iii) The provision of periodic training of recreational, educational or vocational activities, or of work either in a residence or in the community under supervision.

(iv) The provision of secure care.

(c) Secure care[33]

Secure care is a residence established in terms of the act and it means containment in that residence within a locked room or enclosure with visible physical barriers.

19.2.2.5 **Scotland**

The Children (Scotland) Act provides for the following forms of residential care:

(a) Accommodation[34]

For purposes of support for children and their families, accommodation means accommodation provided for a continuous period of more than twenty-four hours.

(b) Residential establishment[35]

This is an establishment, managed by a local authority, by a voluntary organisation or any other person, which provides residential accommodation for the purpose of this Act.

(c) Place of safety[36]

A place of safety is a residential or other establishment provided by a local authority, a community

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33 Children, Young Persons and their Families Act, 1989 s 367.

34 Children (Scotland) Act 1995 s 25(8).

35 Children (Scotland) Act 1995 s 93.

36 Children (Scotland) Act 1995 s 93.

home, a police station or a hospital, surgery or other suitable place. This establishment provides for the temporary reception of a child.

(d) Secure accommodation[37]

This means accommodation provided in a residential establishment for the purpose of restricting the liberty of a child.

19.2.2.6 **Evaluation**

The African child care and protection legislation which has recently been passed or is still in development does not provide a very fresh approach to the issue of forms of residential care. Although all the jurisdictions considered recognize the importance of prevention and early intervention programmes to keep children in the community as far as is possible, when it comes to the residential care options themselves there appears to be an approach of 'recycling' old forms of residential care, with new names in some instances.

Of the African comparative law examined it is only the draft Child Care and Protection Act of Namibia that shows a partial departure from the colonially inherited approach to residential care. The traces of a new approach are seen in the Namibian draft law in the obligation placed on the Minister to establish places of safety of varying classifications based on different children's needs and the interests of community safety. However, this apparent move towards differentiated child and youth care services is only partial as it applies solely to temporary accommodation. Facilities for longer term care are still defined according to old categorisations although the names may have been changed. One other useful aspect of the Namibian draft legislation is that it will be possible to have educational and vocational centres which are not maintained and controlled by the state. This opens the way to outsourcing of the management of facilities, something which is not possible with regard to the schools of industry under current Namibian law.

What the New Zealand and Scottish Acts have in common is that the order is made for 'residence' or 'accommodation', rather than an order for placement in a particular type of facility. The approach

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37 Children (Scotland) Act 1995 s 93.

recommended by the IMC **Interim Policy Recommendations** of having 'child and youth care centres' which offer a range of differentiated services appears to be closely related to the New Zealand approach in which the Director-General is empowered to establish and maintain any number and type of residences as required to provide care and control of children and young persons. The purposes for which a residence can be established are then described.

19.2.3 Comments and submissions received

The first question posed in the worksheet was as follows: 'Are there any existing residential care facilities which should be cut out of the system? Should they be replaced with different placement options? If so, what should these be?'

All four groups discussing this question made the point that changing the names or definitions of facilities is not in itself sufficient and would have to be accompanied by change in the ethos and paradigm according to which the facilities are run. The programmes on offer would also have to change. Groups 1 and 4 both indicated that the management of all (state) residential facilities should be transferred to the Department of Social Development. Groups 1 and 4 expressed the view state that schools of industry and reform schools in their current form do not currently provide adequately for the needs of the children accommodated in them. However, all four groups indicated that there is a need for more secure care or 'treatment' centres. Group 4 indicated that some children spend long periods in places of safety and that there should be a statutory limit on the time spent in such facilities, possibly a period of six weeks which would allow for an initial assessment.

Moving to the individually completed worksheets, Mr Viviers of the Department of Social Welfare, Bloemfontein,[38] submitted that schools of industries and reform schools should be cut out of the system. He explained that these facilities were established in terms of the 1960 Children's Act and are out of keeping with current approaches. The respondent stated that the 1996 Cabinet investigation conducted by the IMC showed that these facilities operate in a manner that is not helpful to children and that, as the only residential facilities which fall outside of the ambit of the

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[38]The worksheet was completed by Mr André Viviers, the manager: Child and Family Care Services.

Department of Social Development, they have been relatively 'isolated'. The respondent added that his personal experience with these schools has affirmed many of the findings of the investigation. The respondent suggested a shift from schools of industries and reform schools to new forms of residential care that will meet the needs of children appropriately. He further recommended that all residential care facilities should fall under one Ministry.

The NACCW supported the transformation of facilities into one-stop child and youth care programmes offering a range of developmental programmes to meet the individual needs of the young people. The services should be versatile and dynamic and constantly changing to meet the needs of the children in the facility. The NACCW cautioned against transferring all facilities under the Department of Social Development at this stage.

At a meeting of specialists held on 5 June 2001 all of the above views were considered. It was concluded that whilst there may be long term advantages for all residential facilities for children to be placed under one Ministry, this is not an immediate priority. The major problem of schools of industries and reform schools falling under the Department of Education relates to administrative issues and designation of children. It was suggested that the administrative functions linked to placement of children should be transferred to the Department of Social Development.

A second question posed by the worksheet in relation to forms of residential care was as follows:

> Residential care facilities are defined in the Child Care Act mainly by reference to the services provided. One option would be to retain the current distinctions, but to reformulate traditional care functions as programmes. Would you agree with this option?

Almost all respondent agreed with this option.[39] Group 1 made the point that whilst traditional care functions should be reformulated, facilities must nevertheless be empowered to deal with children effectively.

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[39]This view was expressly supported by Groups 1 and 4 at the workshop and in writing by Villa Lubet Kinderdorp; Nelspruit Displaced Children's Trust; Mr Viviers, Department of Social Welfare, Bloemfontein; Moses Sihlangu Health Care Centre, NACCW, and the Asfaleia Temporary Children's Home.

The NACCW also agreed with the option and links it to the issue of funding, stating that facilities should be funded not just because they exist but directly in response to the service programmes offered.

Ms Leisha Cornelius of the Department of Welfare, Pietermaritzburg was of the view that where possible residential care facilities should offer all required services and that children should be freely moved within the different sections within the same institutions, depending on their needs.

Mr Viviers of the Department of Social Welfare: Bloemfontein said that in order to ensure that the Act enables practitioners and commissioners to respond to the needs of a child, provision should be made for orders that are needs-based rather than system-based. The respondent made the following proposals:

° short term residential care placements for not longer than 6 months
° residential care programmes (less restrictive, as in current children's homes)
° secure residential care programme
° open custody programme for emotionally and behaviourally troubled children
° secure custody programme for emotionally and behaviourally troubled children

At the meeting of specialists this list was though to be suitable, although it was said that provision should also be made for special interest groups such as children with substance abuse problems and for young sexual offenders. It was further suggested that the list should describe types of facilities and not types of children. The meeting was of the view that the list should be open-ended, ending with a clause such as 'any other programme in line with the principles and objectives of this Act'.

A third question was posed which related to the issue of forms of residential care: 'Another option would be to rename all the existing residential care facilities for example as "child and youth care centres". This will signify a movement away from traditional service delivery functions. It will also provide the framework for residential care facilities to become centres where children, youth and families from the surrounding communities can access a variety of programmes and resources on a daily, weekly or ad hoc basis. Would you agree with this option?'

The vast majority of respondents was in favour of this suggestion.[40] The expressed advantages are that this moves away from a labelling approach and provides for a range of services under one roof. The dissenters raised concerns that changing names does not change what actually happens within a facility. Group 4 had reservations based on a concern that this can lead to confusion, as outsiders such as magistrates will not be able to discern what type of services are on offer.

The final question relating to forms of residential care described the proposal of IMC for the establishment of reception and assessment centres. The worksheet asked: 'Should statutory recognition be given to such reception and assessment centres?'

The responses to this question were mixed. Although all respondents believed assessment to be essential to the process, a number of respondents pointed out that assessment is a process rather than a place,[41] and that assessment can thus take place at home or in any type of residential care setting. Others pointed out that assessment is an ongoing process and felt that the idea of an assessment centre detracts from this understanding.

However, a number of respondents supported the establishment of such centres, provided that they do not turn into sites for compulsory residential assessments. If assessment centres are seen as an aspect of early intervention services which help to avoid children being referred to residential care (unless such referral is appropriate) then they will be a welcome addition to the system.

19.2.4 **Evaluation and recommendations**

If the policy considerations underlying the transformation of residential care are to be followed, changes to the current forms of residential care will be necessary. These policy changes can be summarized as follows:[42]

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[40]Those in favour were Group 1; Group 2; Group 3; Villa Lubet Kinderdorp; Nelspruit Displaced Children's Trust; Ms Leisha Cornelius, Department of Welfare, Pietermaritzburg; Mr Viviers of the Department of Social Welfare, Bloemfontein; the Moses Sihlangu Health Care Centre; and the NACCW.

[41]Group 3; Group 4; Mr Viviers of the Department of Social Welfare, Bloemfontein.

[42] IMC **Interim Policy Recommendations** 57-59.

(a) Residential care should move away from pathology and problems to a focus on increasing competency and ensuring healthy development. The family, family group and community are central to this paradigm shift.

(b) Residential care should become multi-faceted and integrated into the community.

(c) Residential care should be competent to deliver an integrated and holistic service to a child as client in the residential programme and to his or her family.

The Commission recognises that there is widespread support for the view that the way in which the Child Care Act currently lists different categories of facilities needs to be altered.[43] The majority of views appear to be in favour of requiring the state to be responsible for providing residential care to a child who has been assessed as needing such care. There is also widespread support for the view that the legislation should be flexible enough to allow for these care facilities to be run by the state or for the running of such facilities to be outsourced to non-governmental organisations or other bodies according to strictly applied minimum standards. The respondents were generally of the view that rather than trying to delineate the types of centres, all facilities could be called 'child and youth care centres' with the understanding that different facilities may offer different programmes (e.g. secure care) whilst at the same time allowing for one centre to offer a range of programmes. All centres must include reintegration services as part of the programme they offer. There was wide-spread agreement, also, that the current schools of industries and reform schools are not generally offering the care services required.

The Commission recommends that the new children's statute should provide for the assessment of all children prior to placement, preferably assessment in their own homes unless this is not in the interests of the child (in other words, a child should not be institutionalised merely to be assessed).[44] Assessment is an ongoing process and the record of assessment must be kept and furnished to any service providers undertaking future assessment. The Minister may establish centres to facilitate assessment of the child with the primary aim of preventing children from moving further into the system.

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[43]Good residential care requires 'a clear statement of purpose' for each facility: per Lord Laming as quoted by Zaal 'Casting children out into a legal wilderness? A critical evaluation of the definitions of care facilities in the Child Care Act 74 of 1983' (2001) 118 **SALJ** 207 at 208, 214.

[44]See further 10.3 above.

The Commission recommends, further, that the Minister of Social Development be enabled to establish and maintain child and youth care centres, and that there should be a sufficient range of such centres to cover the various different needs of children requiring residential care. Provisions should also be made for the possibility of one centre offering a range of programmes. The new children's statute should list the purposes for which such centres may be established and maintained. This list could include: shelter, remand, assessment, short-term treatment or training programme for not longer than 6 months, open residential care programme, secure care programme, etc. The list should be open-ended, so that new programmes can be included as the need arises.

The new children's statute should not make a distinction between children being referred by the care system or the criminal justice system. The referring forum is not relevant, although the programmes can be differentiated to care for different groups of children separately if this is seen as the most appropriate way of managing children in the system.

All child and youth care centres should be subject to registration by the Department of Social Development, in accordance with minimum standards to be set out in regulations to the final legislation. The Department should be able to register centres on the basis that they would be fully or partially privately funded. The Department should be enabled to initiate the outsourcing of the establishment and/or maintenance of child and youth care centres on a full or partial funding basis.

On the issue of the schools of industries and reform schools which currently fall under the Department of Education, the consultation process revealed that there is considerable support for the suggestion that these facilities should be placed under the auspices of the Department of Social Development, as the children in these facilities have special care needs rather more than special education needs. However, concern was also raised by those consulted that the process of transferring these facilities to the Department of Social Development will take a long time and will be very complex, with buildings and staff posts needing to be transferred. Bearing these practical considerations in mind **the Commission recommends that schools of industries and reform schools should, for the time being, remain under the Department of Education. All administrative functions relating to placement, designation and discharge should be properly co-ordinated to ensure an efficient and effective process, and this should be ensured through clear regulations about which department is responsible for which task.**

19.3 Regulation of residential care

19.3.1 Current South African law and practice

Where a state-run children's home is established, the Minister must appoint a board of management.[45] This board shall consist of no fewer than three and not more than nine members, who shall hold office during a prescribed period. The 1998 amendment to the regulations also made shelters and schools of industries subject to these management structure requirements. Regulation 30(3) provides that the constitution of a registered facility must contain particulars about the composition, powers and duties of the management board.

No private children's home can function as such unless it is registered and managed by an association of persons consisting of at least seven members. No similar requirement is set for a private place of care or a shelter (government and private) to be registered. On the other hand the regulations to the Child Care Act stipulate that the application for registration shall be accompanied by the constitution of the association of persons that is to manage the children's home, place of care or shelter.

19.3.2 Comments and submissions received

In the worksheet which was used at the focus group discussion on residential care a number of questions were posed which relate to the management of residential care facilities. The first question posed in this regard was as follows:

> What is the role and function of the board of management? Can the continued existence of such a board of management be justified in view of the transformation of the child and youth care system?

Groups 1 and 2 submitted that the board of management is essential, adding that the board should have an advisory capacity, serve as a supportive structure, monitor human resource development and ensure transparency and consultation. Group 3, however, was concerned that the

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[45]Section 29 of the Child Care Act, 1983.

management board sometimes interferes in the work of the professional staff. It was of the view that the powers of the management board should be limited and that these limitations should be clearly spelt out in the legislation or regulations. This view is supported in the individual response of Mr Viviers (Department of Social Welfare, Bloemfontein). The respondent believed that the role of management boards should be limited to key policy and financial issues and to ensure that they remain appropriate and relevant their terms should be for a stipulated limited time.[46] The respondent also said the Minister should be able to intervene if the board is inhibiting the work of the facility. The Moses Sihlangu Health Care Centre was also of the view that the role of the board of management should be clearly limited, and that they should not be involved in the immediate care of children.

The NACCW supported the existence of the boards of management in some form, giving the reason for this view that the inclusion other role players from the community improves decision-making and promotes the acceptance of the facility in the community. It also draws on people with other relevant expertise to contribute to the effective functioning of the facility. However, the respondent went on to emphasise that the differentiation of roles is critical. The professional role of the personnel and their accountability to professional obligations must be clearly understood and respected by the board of management. The board of management must hold the professional staff accountable for the provision of professional services in keeping with the minimum standards in child and youth care. The board members should not themselves be involved with assessment or direction of the professional functioning of the personnel - the professional functioning of a facility is the role of the manager of the facility.

The meeting of specialists also supported the retention of boards of management, and recommended that their role should be spelt out, and that the board should not be involved in the placement, assessment or treatment decisions relating to individual children. It was also stressed that professional staff should be held accountable through their own professional bodies and not through the management board.

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[46]There is support from a number of other respondents for the stipulation of a term of office for board members, as well as a statutory requirement of the number of times that the board should meet. The weight of opinion seems to favour a 2 year term for board members (with a possible renewal of a further 2 year period) and at least 4 meetings per year.

A further question posed in the worksheet was: 'If the board of management still has a role to play, are there any professional requirements to be met before a person can be appointed as a board member?'

The responses to this question were mixed. Some respondents[47] were of the view that no professional qualifications should be required as long as the members are drawn from the community. Some respondents added that the members, whilst not required to have professional expertise, must be clear about departmental policy on child and youth care as well as the vision of the facility. Ms Leisha Cornelius of the regional office of the Department of Welfare, Pietermaritzburg said that the board members should be elected by the community that the facility would serve. Other requirements mentioned were that board members should have no direct interest in the facility, have leadership qualities, have a 'love for children', and have no record of involvement in any case of child abuse, neglect or exploitation.

The NACCW replied that each member of the board must have a role to play. They must come in with clearly articulated expertise to contribute to and enhance the professional programme. They need to understand enough of the professional expectations to be able to assess whether the programme is practising the minimum standards in child and youth care. The respondent indicated that board members may need training to undertake their tasks effectively.

The worksheet then posed the following question:

> Should the community, NGO's, parents and children be represented on the board of management?

Groups 1 and 2 were divided on this issue. Groups 1 argued that parents should be represented on the board of management, whilst Group 2 was of the view that it is desirable but not essential for parents to be represented on the board. Group 3 answered the question in the affirmative and suggested that children who were previously in a facility should be represented on the board. The last point was also suggested by Ms N L T Ngqangweni of the Department of Welfare, Bisho.

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[47]Groups 1, 2 and 3, as well as Ms N L T Ngqangweni, Department of Welfare, Bisho and the Moses Sihlangu Health Care Centre.

NACCW pointed out that the boundaries of the involvement of parents and families need to be clearly defined whilst their children are in care. The subjectivity that could influence decision-making especially about staffing matters could be a concern in terms of the full involvement of children and parents on the board. The respondent suggested that the viewpoint of parents and children could come through formal representation at certain meetings or through a special sub-committee of the board. Similar ideas of sub-committees or other structures to allow for the participation of children and parents were also expressed by some other respondents.

The worksheet posed questions about the reasons for a discrepancy in requirements for private children's homes on the one hand and places of care or shelters on the other hand.

The majority of respondents were of the view that this is an anomaly which should be removed in the draft legislation. The respondents also expressed the view that an 'association of persons' plays the same role as a board of management and that there should be no such distinction in the future legislation.

19.3. 4 Evaluation and recommendations

The weight of opinion clearly indicates that there is a role for boards of management. Concern was expressed that boards have sometimes interfered with the effective management of facilities and for this reason it is deemed appropriate to spell out their role clearly.

It is recommended that each child and youth care centre shall have a board of management. This shall consist of not fewer than 6 and not more than 9 members, although there should be the possibility of co-opting additional members for their expertise. The new children's statute should include a requirement that the details relating to eligibility, tenure, duties, responsibilities and disbandment will be set out in the regulations to the Act.

We accordingly recommend the inclusion of the following provision in the new children's statute:

Establishment of management committees

(1) A management committee shall be established for each child and youth care centre as prescribed by the national Minister by regulation in terms of section XX.

(2) The national Minister shall prescribe, by regulation -

(a) the composition of every management committee to be established under subsection (1), which shall include representation of the residents and staff of the relevant centre and the public in general;

(b) the election and appointment, qualifications, term of office, and grounds of removal from office, of the members of that committee and the filling of vacancies on that committee; and

(c) the number of, and procedure at, meetings of that committee.

(3) A management committee established under subsection (1) shall ensure that the manager of the centre in question-

(a) facilitates interaction between the residents of the centre and their families, the public in general and that committee;

(b) provides quality service to the centre;

(c) provides opportunities for the training of the staff of the centre;

(d) applies principles of sound financial management and submits quarterly financial reports to the Department and the committee;

(e) monitors activities at the centre in order to deal speedily with any incidents of abuse of the residents of the centre and takes steps to report such incidents to the appropriate authority;

(f) consults the management committee in the appointment of the staff of the

centre;

(g) determines whether the names of members of staff appear on the register of persons found unfit to work with children and discloses such findings to the management committee;[48]

(h) establishes complaints procedures for the residents and staff of the centre and persons who wish to lodge a complaint on behalf of any such resident; and

(i) does everything necessary or expedient for the effective functioning of the centre.

19.4 Human resources

19.4.1 Current South African law and practice

The role of the manager is critical to effective and efficient service delivery. It is recognised that this position requires specialised knowledge of child and youth care work and should be filled by a registered professional from an appropriate discipline. In addition such a person must have leadership qualities and the ability to manage staff and children, and must ensure effective administration.

Nowhere in the Child Care Act, 1983, or regulations are any requirements set for the appointment of a residential care manager or a worker at a child and youth care centre. The new child and youth care system can only be successfully implemented if it is supported at every level by persons with the required knowledge and skills.[49]

The following regulations as to the maintenance of good order and discipline in children's homes and places of care reflect some of the skills required from a manager and staff:[50]

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[48] See section 19.4.4 below.

[49] IMC **Interim Policy Recommendations** 84-87.

[50] Child Care Act 74 of 1983 reg 32(4)-(7).

(a) The head of the children's home, place of safety, school on industries or shelter shall ensure that children are provided with the skills and support which enable constructive and effective social behaviour.

(b) The head and staff team of a children's home, place of safety, school of industries or shelter shall demonstrate the expected behaviour by modelling this in their attitudes and interactions with the children.

(c) The head of the children's home, place of safety, school of industries or shelter shall ensure that the children feel respected and physically, emotionally and socially safe when service providers manage their behaviour and provide support.

(d) The head of the children's home, place of safety, school of industries or shelter shall ensure that children are given plenty of opportunity and encouragement to demonstrate and practise positive behaviours.

19.4.2 Comparative review

The **Care Standards Act** 2000 (England and Wales) sets out a number of provisions relating to people working in residential care settings. The main purpose of the Act is to reform the regulatory system for care services in England and Wales, including children's homes. The Act establishes new independent Councils to register social care workers, set standards in social care work and regulate the education and training of social workers in England and Wales.

Another relevant Act is the **Protection of Children Act** 1999 (England and Wales). This Act requires a list to be kept of persons considered unsuitable to work with children. A child care organisation shall refer to the secretary of state the name of any individual who has been:

(a) dismissed on the grounds of misconduct which harmed a child or placed a child at risk of harm, or

(b) who has retired or resigned in circumstances such that the organisation would have dismissed or considered dismissing him if he had not resigned or retired, or

(c) transferred to a position in the organisation which is not a child care position because of the misconduct described earlier, or

(d) suspended or provisionally transferred on the grounds of the alleged misconduct.

When the secretary of state is satisfied that he or she has received sufficient information, the individual's name shall be included in the list. The Act does include a number of protections for the individual whose name is included in the list and he or she may appeal to a tribunal against the decision. The effect of inclusion on the list is that when a child care organisation proposes to offer any individual employment in a child care position the organisation must check whether the person's name is included in the list. If it is, the organisation shall not offer him or her employment in such a position,

19.4.3 Comments and submissions received

The question posed in the worksheet on this topic was:

> Should new child care legislation set minimum standards for a person to be employed within the child and youth care system?

There was wide-spread support for this idea. The NACCW saw a need for specified requirements for the appointment of child care personnel at every level of the staffing structure. Attention must be given to qualifications and experience, as well as the appraisals of the professional functioning of personnel. A broad team of people consisting of boards of management, governmental and non-government role players could then be called to screen prospective employees of a facility. Some of these representatives should be on a team of interviewers in order to bring the relevant professional, cultural and other expertise into the process. This respondent added that the whole process must be in keeping with the expectations of the relevant registration board.

Mr Viviers of the Department of Social Welfare, Bloemfontein felt that it is not the place of the new children's statute to set minimum standards for a person to be employed within the child and youth care system as this is a very complex matter and is operational on another level. The respondent mentioned that the South African Council for Social Service Professions (SACCP) has the mandate to set standards for certain categories of work such as social workers and child and youth care workers. Personnel who are to work directly with children must be registered with the SACCP or any other relevant statutory body. This should apply to all staff working in residential care facilities,

not just managers.

19.4.4 Evaluation and recommendations

Whilst there is broad support for the idea that new child care legislation should include some provisions to ensure that children in residential care are cared for by appropriate people, the comments of Mr Viviers are noted. The new children's statute should not duplicate provisions which are applied through the South African Council for Social Service Professions. Nevertheless, measures can be included in the legislation and regulations which will provide additional protections to ensure that staff caring for children are suitable for that work.

The Commission recommends that a set of minimum standards for residential care (which includes indicators for personnel) be included in or annexed to the regulations to the new children's statute. Further, a code of ethical practice for all personnel working in residential care (linked to the minimum standards) should be included in or annexed to the regulations.

The new children's statute should include some procedures for a staff interviewing process. Where a manager of a residential facility is to be appointed, the interview panel should include at least one independent person who has expertise in child and youth care.

After due consideration of the issue of a list of persons deemed unsuitable to work with children, **the Commission is of the view that there is considerable merit in the approach taken by the United Kingdom in keeping and maintaining a consolidated register of persons found by a court or some other form of due process to be unsuitable to work with children.[51] The Commission recommends that the task of maintaining and administering the consolidated register should vest in the South African Council for Social Service Professions established in terms of the Social Service Professions Act 110 of 1978. The Commission believes such a register should be linked to the national child protection register already provided for in**

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[51]See also 10.5.4 above and Chapter 42 of the Commission's **Discussion Paper on Sexual Offences: Process and Procedure**, 2001.

the regulations to the current Child Care Act.[52] The Commission recommends that the manager of a child and youth centre, in the appointment of staff, must determine whether the name of a prospective employee appears on such register and he or she must disclose the outcome of such investigation to the management committee. In the appointment of a manager, it shall be incumbent upon the management committee to consult such a register. In addition, it must be pointed out that when a professional is found guilty of professional misconduct the registration or licence of that professional can be withdrawn. However, **at present there is no requirement on the manager or management committee of a facility to ensure that a prospective employee is registered to practice, and it is suggested that this be made a requirement of the new legislation**.

19.5 Registration and classification

19.5.1 Current South African Law and Practice

At present the Child Care Act[53] makes provision for the registration and classification of children's homes, places of care and shelters. The children's homes and places of care referred to are limited to non-governmental institutions. The guidelines for application for registration and requirements with which a children's home, place of care or shelter shall comply are set out in the regulations.

In particular, no place of care shall be registered or remain registered after 24 months unless the Director-General is satisfied that behaviour management practices listed in regulation 30A are expressly forbidden. The rights of children in care are also stipulated in regulation 30A serves as an example of compliance with international documents and constitutional provisions.

Registration of a children's home or shelter is not subject to similar requirements to those set out in regulation 30A. What is required is that the Director-General must be satisfied as to the following:[54]

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[52] See Regulation 39B.

53 Section 30.

54 Regulation 31.

> [T]hat proper arrangements have been made or will be made –
>
> (a) for the care, protection and development of each child in the children's home or shelter, in line with established minimum standards; and
> (b) to ensure that children who are of school-going age attend school or are enrolled in an appropriate alternative education programme.

19.5.2 Comments and submissions received

The first question posed in the worksheet on this topic was:

> Should similar requirements for registration not apply, regardless of whether it is a shelter, place of care or children's home?

The response from Mr Viviers (Department of Social Welfare, Bloemfontein) emphasised the fact that a place of care is not a residential care facility. It pointed out that a place of care is a day-care centre or creche. The respondent stated that Regulation 30A is ignored in practice when it comes to places of care as it is totally inappropriate and irrelevant. With regard to the other facilities, which are all residential, the respondent indicated that there need to be basic requirements that regulate the registration of all residential care facilities in order to make sure that children's rights are protected. Additional requirements can be put in place through regulations for certain types of programmes or facilities.

There was widespread support from respondents that there should be no differentiation between different residential facilities with regard to requirements for registration.

A further question was: 'What should the requirements for registration of a residential care facility be?'

Groups 1 and 2 submitted that a residential care facility should be required to have a clear vision and mission as well as the capacity for quality service delivery. Mr Viviers of the Department of Social Welfare, Bloemfontein recommended that the following requirements be set for registration:

- the facility should have a constitution;
- the facility should comply with the minimum standards set for the child and youth care system;
- there should be a need for such a facility in the area;
- the facility should have a local authority certificate certifying that the building and premises meet the basic health requirements;
- the facility must have competent personnel;
- the facility must be subjected to the DQA; and
- registration should be renewed after every 24 months.

The NACCW listed the following requirements for the registration of a residential care facility:

- the constitution of a suitably qualified board of management
- the appointment of a suitably qualified manager of the facility
- the appointment of suitably qualified staff at different levels of the staffing structure
- the provision of a programme within the legal requirements and the policy of the transformation of the child and youth care system
- the maintenance of minimum standards.

At the meeting of specialists it was pointed out that non-profit organisations are encouraged to register in terms of the Nonprofit Organisations Act 71 of 1997. Registered non-profit organisations may receive State benefits or allowances as prescribed by the Minister for Social Development. The question was then posed as to whether the registration requirements envisaged for residential care facilities are in addition to those of the Nonprofit Organisations Act, 1997. The meeting concluded that it should be necessary to first register under the new children's code and then under the Nonprofit Organisations Act. It was agreed that it should be possible to frame an enabling provision is such a way as to make the registration process in terms of the Nonprofit Organisations Act subservient to the registration process envisaged in the new children's code, with the use of wording such as '[n]otwithstanding the provisions of the Nonprofit Organisations Act, ...'. It is also possible to make registration (and therefore the receipt of benefits or allowances) under the Nonprofit Organisations Act subject to registration under the new children's code. This could be achieved through a clause stating '[A] non-profit organisation rendering residential care programmes shall not be registered (in terms of the Nonprofit Organisations Act) unless it is

registered as a facility offering residential care programmes with the Department of Social Development in terms of the Child Care Act'.

After further discussion the meeting agreed that all facilities need to be registered with the Department of Social Development and that the Department will have the responsibility to inspect and investigate facilities offering residential care programmes without registration *for the purpose of registering that facility*. However, it was agreed that registration cannot be the only purpose - there is a need to empower the Minister to also close down a facility, whether registered or not, after a DQA (Developmental Quality Assurance) process. The meeting further agreed that the Minister should be given the power to immediately close down a facility where it is necessary to protect the children involved. In addition to closure, the Minister should be allowed to suspend closure and or registration on certain terms and conditions. He or she may e.g. place the facility under curatorship, order a Developmental Quality Assurance process, or instruct the facility to work with officials of the Department of Social Development. Section 32 of the Child Care Act gives ample guidance on when a certificate of registration can be cancelled. It was agreed that 'the Minister' should be the *national* Minister for Social Development. He or she should be able to delegate functions to the provincial MEC's.

19.5.3 Evaluation and recommendations

There is no doubt that the registration of facilities is essential. This is a way to ensure that a facility has met the basic minimum standards before being permitted to receive children. The registration of a facility is the first step towards accountability and appropriate funding procedures which will then be taken forward through a quality assurance process.

It is recommended that the primary legislation should set out the broad requirements of registration for any facility caring for more than six children. These would include matters such as the appointment of a suitable board of management, the appointment of a suitably qualified manager through an approved interview process, the appointment of sufficient appropriately qualified staff, the provision of programmes in accordance with the minimum standards, and a certificate of approval for health and safety standards. The details relating to the issues can be provided for in the regulations to the proposed Act.

The Commission recommends that all facilities need to be registered with the Department of Social Development (whether or not they are funded by the Department) and that the Department will have the responsibility to inspect and investigate facilities offering residential care programmes without registration *for the purpose of registering that facility*. The Commission recommends further that the Minister should have the power to also close down a facility, whether registered or not, before or after a Developmental Quality Assurance (DQA) process. The Commission further recommends that the Minister should be given the power to immediately close down a facility where it is necessary to protect the children involved. In addition to closure, the Minister should be allowed to suspend closure and or registration on certain terms and conditions, such as placement of the facility under curatorship or mentorship, ordering a DQA process, and instructing the facility to work with officials of Department of Social Development. This could be done through the issueing of an enforcement notice.[55]

19.6 Programmes

19.6.1 Current South African Law and Practice

The CRC[56] establishes the need to provide care and treatment to children clearly indicating that mere custodial care is not sufficient. South African (state) residential care facilities generally lack programmes designed to meet developmental and therapeutic needs of children. The report on the investigation into place of safety, schools of industry and reform school has the following to say in this regard:[57]

> It was found that there is a dearth of appropriate developmental and therapeutic programmes in Places of Safety, Schools of Industry and Reform Schools. While some sport and recreation programmes do exist in most facilities, programmes such as social skills training, life skills, counselling and a range of therapeutic activities to meet the needs of emotionally and behaviourally troubled children and abused, traumatised and neglected

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[55]See 15.8 above.

[56]Articles 3,19, and 25.

[57]**In whose best interests? Report on Places of Safety, Schools of Industry & Reform Schools** (July 1996), par. 3.2.2.

children, were found to be missing in almost every facility. Very few facilities have individual treatment or developmental plans for children and in many facilities children do not have access to a social worker or psychologist.

Programmes should be differentiated or multi-dimensional, offering a range of appropriate child and youth care services to the surrounding community such as family preservation, early intervention services, educational bridging, school return, drop-in shelters, weekend treatment and so on. Programmes should cater for the full range of developmental needs appropriate to the age and developmental phase of the child, including emotional, physical, spiritual, intellectual and social needs.

The amendments in recent years to the regulations[58] of the Child Care Act have introduced various examples of mandating of developmental programmes. In the first place,[59] where a child is ordered to return or to remain in the custody of a parent, guardian or custodian, certain requirements must be complied with.[60] These requirements are as follows:

(a) The parent, guardian, or custodian shall have access to appropriate family reunification services in the form of developmental and therapeutic programmes. The developmental programme must be agreed upon by the parents, the child (where appropriate), the court and the supervising social worker;

(b) Support and guidance must be provided to ensure the most effective use of the developmental programme;

(c) The parties mentioned shall participate in a regular review of the programme, resulting in a progress report to the Director-General and the court; and

(d) The relevant requirements shall form part of the court order.[61]

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[58]The amendments were promulgated on 1 April 1998.

59 Child Care Act 74 of 1983 s 15(1)(a) read with reg 15. Where a child is placed in the custody of a parent, guardian or custodian, as a result of an administrative transfer, similar requirements apply.

60 Likewise, the requirements shall form part of the orders for an administrative transfer.

61 Child Care Act 74 of 1983 reg 15.

Secondly, leave of absence in terms of section 35 of the Child Care Act may be granted to a child with the consent of the Director-General at any time and for any period not exceeding six weeks for the purpose of meeting the developmental goals for a child as mentioned in the developmental programme. No leave of absence shall however be granted where such leave is based on an absence of developmental programmes at the institution or place of safety during the holiday period.

Thirdly, any decision on the transfer of a child from one custody or institution to another, the extension of an existing order, or the discharge of a child, is supposed to be taken within the framework of family reunification services.[62] Developmental programmes form an essential part of these services and this is reflected in the report which is submitted on the child. Such a report must be based on the developmental assessment of the child and his or her ecological circumstances. The report must also reflect the following:

(a) The existing and future developmental programmes for the child and family; and

(b) services provided to the child and family to meet developmental goals, as stipulated in the developmental programmes.

Fourthly, the right of a child in a place of care, children's home or shelter to such a developmental programme is explicitly recognised, along with the following rights:[63]

(a) To participate in formulating their developmental programme, to be informed about their plan, and to make changes to it;

(b) to expect that their plan and programme is based on an appropriate and competent assessment of their developmental needs and strengths and where possible is in the context of their family and community environments;

(c) to a regular review of their placement and care and development plan;

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62 Child Care Act 74 of 1983 reg 34A(c), (d), (e), (l).

63 Child Care Act 74 of 1983 reg 30A.

(d) to the involvement of their family and significant others in their care or development programme.

It must also be noted that behaviour modification may not be used by a person in care facilities[64] unless reflected as treatment or a development technique in a development programme and monitored by a multi-disciplinary team.[65]

The educational component of programmes is also an important matter for discussion. Education for living as well as academic and vocational education play a critical role in the lives of children at risk and thus should be seen as core components in an effective child and youth care system. The experience which each child has in terms of daily formal schooling contributes positively to their holistic development.

The CRC[66] requires that children have a right to education appropriate to their needs. This right is also articulated in Rule 38 of the JDLs[67] which makes allowance for special education for young people who are illiterate or have cognitive learning difficulties. Thus, in order to meet these expectations, where children experience intellectual and/or emotional problems special resources would be required by residential facilities.

Residential care has to date often been used for placement of children who cannot be accommodated in community schools. Ideally, children should never be placed in residential care because community schools are unable to deal effectively with them. This is also reflected in the **Report on Special Needs in Education** which emphasises the neighbourhood schools concept. This concept is based on the view that all children, regardless of their particular needs, should be accommodated and effectively educated within the community schools. It follows from this that no

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64 Children's home, place of safety, school of industries, shelter.

65 This prohibition forms part of the additional requirements to be complied with for the purpose of registration of a place of care.

66 Articles 28 and 29.

67 UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990. For the text, see Geraldine van Bueren (ed) **International Documents on Children** Dordrecht: Martinus Nijhoff Publishers 1993 217.

young person should be placed in residential care on the basis that he or she has been expelled from school and that no community school will accept him or her.

At present all children in a place of care, children's home, place of safety, shelter and school of industries have the right to education appropriate to their level of maturity, their aptitude and their ability.[68]

Residential care for children with special needs is also an area worthy of mention. The principle of non-discrimination embodied in Article 2 of the CRC implies that children with disabilities should have equal access to 'mainstream' residential care services. A certain number of separate residential care facilities for disabled children do exist, and some of them may continue to be necessary. The policy document on learners with special needs in education identifies key strategies which include infusing needs and support services throughout the system. Where residential care services and boarding school facilities exist for children with special needs the care, protection and development of these children will need to be ensured. Collaboration between the Departments of Education, Social Development and Health may be necessary to bring about effective management.

19.6.2 **Comparative law**

19.6.2.1 **Kenya**

A charitable children's institution which intends to implement a child welfare programme must notify the Area Advisory Council and must provide full information on the mode of operation and the specific objects of the programme.[69] The Advisory Council must submit the particulars of the proposed child welfare programme to the Director of Children's Services.[70] It is the duty of the Director to place the proposed programme before the National Council for Children's Services and the Council may approve or disapprove the programme.[71]

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68 Child Care Act 74 of 1983 reg 31A(p), (t).

69 Children Bill 1998 s 65(1).

70 Children Bill 1998 s 65(2).

71 Children Bill 1998 s 65(3).

The Director must review the programme within twelve months of date of approval and thereafter on a yearly basis. The purpose of the review is to advise the Council or whether the programme should continue or be cancelled.[72]

The Council, acting on the advice of the Director, may disapprove of a programme on the following grounds:[73]

(a) The institution is unfit for the care, protection and control of children; or

(b) the children admitted into the institution are suffering or are likely to suffer harm; or

(c) the manager of the institution has contravened any of the regulations made under this Act.

19.6.2.2 **New Zealand**

There is a jurisdictional requirement that a plan[74] be prepared in relation to a child or young person before the court makes any of the following orders: a services order, a support order, a custody order, or a guardianship order appointing any person as the sole guardian.[75] The plan must state the following:[76]

(a) the objects sought to be achieved and the period within which those objectives should be achieved;
(b) the details of the services and assistance to be provided for the child or young person, and any parent, guardian or care-giver;
(c) the persons or organisations who will provide such services and assistance;
(d) the responsibilities of the child or young person and any parent, guardian, or care-giver;
(e) the personal objectives for the child or young person, and for any parent, guardian or care-

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72 Children Bill 1998 s 66.

73 Children Bill 1998 s 67.

[74]See further 10.4 above on permanency planning.

75 Children, Young Persons and their Families Act 1989 s 128(1).

76 Children, Young Persons and their Families Act 1989 s 130.

giver;

(f) other matters relating to the education, employment, recreation and welfare of the child or young person as relevant.

Once a plan has been prepared the court shall on making an order, fix a date by which a review of the plan is to be carried out. Where the child is younger than seven, the review must be within six months from making the order. In any other case, review of the plan must be carried out within twelve months.[77] The results of the review must be submitted to the court in a report.[78] The court must then consider what are the best possible future care arrangements for the child and act accordingly.

Plans and reviews enable the court to oversee the implementation of its orders and to ensure the future wellbeing of the child or young person. It also ensures that all relevant parties are involved in the planning.

19.6.3 Comments and submissions received

Documents relating to the transformation of the child and youth care system make a distinction between the residential care facility and the programme offered at such facility. The Welfare **Financing Policy** indicates that in the future funding of facilities will be linked to programmes. It therefore is apparent that in registering facilities the programme needs to be included in that registration process.

A question was posed in the worksheet: 'What would the requirement for registration of a programme be?'

Groups 1 and 2 proposed that a programme should be developmentally appropriate and culturally sensitive. Villa Lubet Kinderdorp suggestted that a programme must be cost effective, workable, realistic and should be able to address the needs of the client. The Nelspruit Displaced Children's Trust suggested that a programme must:

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77 Children, Young Persons and their Families Act 1989 s 134.

78 Children, Young Persons and their Families Act 1989 s 135.

° develop the child's physical, emotional and spiritual well-being;
° provide skills to sustain the child in the future; and
° provide the child with recreation.

Mr Viviers of the Department of Social Welfare, Bloemfontein recommended that the programme should comply with the minimum standards for the South African child and youth care system, and it should be accessible in terms of language and culture.

The Moses Sihlangu Health Care Centre proposed that a programme should be in line with departmental policy and says the objectives, outcomes, activities, ways of monitoring, time frames, networking and human resources of a programme should be clearly stated.

The NACCW indicated that in their view the programme must demonstrate that it is within the new policy for the transformation of the children and youth care system. It must be in keeping with minimum standards, it must articulate the practice principles of the policy, and it must demonstrate the promotion of children's rights. Programmes must be relevant to the needs of the children and youth in the community serviced and must be developmental. Programmes must be integrated, holistic and creative.

With regard to education, the majority of respondents supported the view that the Department of Education has a responsibility to provide equal access to education for all children, including those in residential care. In open residential facilities children should attend the community schools. There is an exemption from school fees for children in residential care, but the wording of this provision[79] has caused much confusion. Some respondents were of the view that school fees should be waived for these children, others favoured subsidisation of the fees by either the Department of Social Development or the Department of Education. Programmes for in-house schooling should be provided for in some facilities - such as those providing secure care.

19.6.4 **Evaluation and recommendations**

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[79]See the Regulations to the South African Schools Act 84 of 1996 published in Government Gazette 1937 of 12 October 1998.

The current regulations create some confusion with regard to a programme to be a offered by a facility and a plan which is specific to the child. For example, in Regulation 13 the following is stated: 'the reports referred to in sub-regulation (3) should be based on the developmental assessment of the child and his or her ecological circumstances and shall reflect the existing and future developmental programmes for the child and family as well as services provided to the child and family to meet developmental goals, as stipulated in the developmental programmes'. Regulation 31A, however, refers to a 'plan and programme of care and development' in sub regulation (b), but to a 'care and development plan' in subregulations (c) and (e).

A distinction needs to be made between a development plan for each individual child and a programme which is to be offered by a particular residential care facility. The individual development plan relates to every aspect of the child's management including developmental objectives, therapeutic needs, reintegration activities. The plan is developed with the participation of the child and can be regularly reviewed.

The programme is offered by the residential facility, and the child's individual development plan will indicate which aspects of the programme the child will need to access.

The Commission recommends that the new children's statute should provide that each child admitted to a residential facility must have an individual development plan within 7 days of arriving at the facility. New regulations should cover the method of developing the plan (including who should be involved in its development), the aspects which can be included in the development plan and the way in which the plan can be reviewed. The regulations should be similar to those included in Regulation 31A of the current regulations, with the confusion of wording relating to 'plan' and 'programme' resolved.

The Commission further recommends that the new children's statute must also provide that each residential facility should have a programme or programmes. The nature of this programme should be included in the registration documents, but should be flexible and able to be changed fairly easily. The programmes should be reviewed as part of the DQA process. The new children's statute should include an open-ended list of possible programmes.

Issues relating to education should be clarified by the proposed legislation. **It is recommended**

that there should be a subsidy paid for by the Department of Education for every school-going child in residential care to cover school fees to be paid for public school education. The subsidy should be paid directly to the school. The Commission believes that such an approach is better than a 'waiver' system as one particular community school may end up taking large numbers of children in residential care due to geographical proximity to a children's home. The waiving of fees, the costs of which must be borne by the school, is onerous for that particular school. The result is that there is an incentive to fill the school with fee-paying children and exclude those for whom there is no payment. A subsidisation approach avoids this problem. Residential care facilities offering in-house education programmes should build this into their programme descriptions. The costs of employing educational staff and related expenses should be carried by the Department of Education.

19.7 Geographical location and size

19.7.1 Current South African Law and Practice

The following rights of children in a children's home, place of safety, school of industries or shelter listed in Regulation 31A is of particular relevance to this discussion:[80]

(1)(d) to expect that their plan and programme is based on an appropriate and competent assessment of their developmental needs and strengths, and where possible is in the context of their family and community environments;

(k) to regular contact with parents, family and friends unless a court order or their care or development programme indicates otherwise, or unless they choose otherwise;

(l) to the involvement of their family and significant others in their care or development programme, unless proved not to be in their best interests, and the right to return to live in their community in the shortest appropriate period of time;

(2)(d) to communicate with and be visited by his or her parent or parents, guardian,

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80 See Regulation 30A for similar rights for children in a place of care, with exception of regulation 31A(2)(d).

custodian, next of kin, social worker, religious counsellor, medical practitioner, psychologist, legal representative, child and youth care worker or any other person with the approval of the children's home, school of industries, place of safety or shelter concerned.

It is sometimes difficult to enforce these rights due to the distance at which many children are placed away from home. It is required of the Director-General in so far as is reasonably practicable to designate a children's home or school of industries in the same district as where the parent, guardian or custodian resides.[81] This is not always possible, due to the physical location of residential care facilities and/or lack of space available at a particular facility.

19.7.2 Comments and submissions received

The worksheet posed the following questions in this regard: 'How can geographical location be addressed in new child care legislation? Should there be a right of a child not to be placed at a certain distance from his parents or community?'

All discussion group participants were in favour of a right for a child not to be placed at a certain distance from his or her parents or community. It was, however, realised that placing a child in a facility nearer to his family home may not be in the best interest of the child, e.g. the facility nearer to home may not have the required programmes or services for the child. Some group participants recommended that if it is not possible to place a child within a certain distance from home, the decision to place the child further away should be taken by a higher authority. Further, set criteria for the placement of a child should be developed, e.g. that the court should take into account factors such as distance and family reunification. Another suggestion made was that facilities should attempt to obtain funds for the purpose of transporting children from and to parents and vice versa.

Mr Viviers of the Department of Social Welfare, Bloemfontein submitted that geographical location of residential care facilities should not be addressed in legislation. However, the right of every child to be placed close to his / her family or origin should be set out in legislation, e.g. 'Each child shall

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81 Child Care Act 74 of 1983, regulation 12(1).

be placed in such alternative care placement by an order of the children's court that will ensure reasonable access by the parents and/or guardian of the child with priority given to the child's right to family reunification and preservation'. The respondent added that it will be impractical to mention a specific distance, though the principle should be that the placement should support family reunification services.

The Moses Sihlangu Health Care Centre mentioned that it is located in a province (Mpumalanga) that is short of children's homes. It is thus compelled to place a child wherever a place is found irrespective of distance. The respondent added that if the issue of distance is legislated on, its situation would be rendered extremely difficult.

A further question posed in this regard was: 'Should the new children's statute place a limit on the number of children in a residential care facility or on the staff-to-child ratio?'

The discussion groups submitted that the number of children in a residential care facility should be determined by guidelines based on the types of programmes a facility offer, the physical set-up of the facility and the needs of children within that facility. Another suggestion was that the limit on the number of children should be stipulated in regulations and in minimum standards. It was proposed that a children's home should have a maximum of hundred children. The principle should, however, be that a smaller children's home is better than a bigger one. The group participants were hesitant to comment on whether the limit should be based on the staff-to-child ratio as many issues impact on the ratio.

The Nelspruit Displaced Children's Trust opined that if a limit is placed on the number of children in residential care or on the staff-to-child ratio, minimum standards will be adhered to.

Ms Cornelius of the Department of Welfare, Pietermartizburg, proposed that the number of children in a residential care facility should not exceed 150. With regard to the staff to child ratio, the respondent suggested that there should be a different ratio for different age groups and for different behaviour management needs. Further, behavioural assessment should be included in legislation.

Ms N L T Ngqangweni of the Department of Welfare, Bisho, submitted that the staff-to-child ratio should not be included in the legislation, but should rather be dealt with in regulations. The

respondent recommended that the number of children in a residential care facility should not be more than 100. However, if it is a 'campus type' facility, the number of children should not exceed 150.

Mr Viviers of the Department of Social Welfare, Bloemfontein, submitted that huge residential care facilities do not serve the best interest of children and are very impersonal and sometimes clinical. Further, the reason for keeping a large number of children in huge institutions is because it is more cost effective and not because it is efficient in serving the best interests of the child. The respondent mentioned that the international trend is to ensure that residential care facilities are relatively small. Thus, a new children's statute or the regulations thereto should regulate the number of children in a residential care facility and should limit the number of children to a maximum of 80 to 100. The respondent submitted that the issue of staff ratio is complex and will be influence by the following factors: (a) competency of the staff; (b) design and outlay of the building; (c) type of children (age or behaviour or both); and (d) nature of the programme. The respondent recommended that a child-to-staff ratio be set out in the regulations.

The Moses Sihlangu Health Care Centre also indicated that there is a world-wide trend to move towards smaller institutions in order to retain the family aspect of any placement. The respondent submitted that smaller houses such as the SOS type is more desirable. Further, the more intensive therapy a facility is expected to provide, the smaller the facility should be to ensure proper care. The respondent submitted that the staff-to-child ratio depends on the type of programme provided and suggested that a smaller ratio should be required for a more intense programme.

At the meeting of specialists the principle of small units was supported, but is was pointed out with regard to staff-to-child ratios that this will differ depending on the particular programme offered. It was suggested that the ratio of staff to children should be regulated through the registration process. It was further suggested that MECs be required to develop a plan every 5 years in order to ensure appropriate geographical spread of facilities as well as a wide range of programmes available in such facilities.

19.7.3 **Evaluation and recommendations**

It is suggested in the IMC **Interim Policy Recommendations**[82] that all programmes intended as resources for a particular community, town or city should be located as close to the appropriate community as possible and should be designed in such a way as to blend with the community without causing offence or placing young people at risk of stigmatisation. Young people, families and the community should have easy access to the facility, as is appropriate, and the facility should have easy access to community resources. As already explained, a needs assessment confirming the need for this resource in the community is contained in the amended regulation to the Child Care Act pertaining to the application for the registration of a children's home, place of care or shelter. A requirement such as this for all facilities (including state-run facilities) will undoubtedly strengthen the right of a child to be placed in a facility as close as possible to his or her parents, or within his or her community.

It is recommended that there should be a general provision in the proposed legislation that where a child is to be placed in a residential care centre that centre should be as close to his or her family and community as possible and that only where there is no such facility offering the particular programme which the child requires within a reasonable distance from the child's family can this general rule be departed from. A further provision should indicate that new residential care centres should aim towards the pattern of small units and that the staff-to-children ratios should be included in the registration requirements for the particular programme or facility.

It is further recommended that the (national) Minister for Social Development, in consultation with the Members of the Executive Councils (MEC's)[83] should be required to develop a plan for residential care every 5 years, which should include matters pertaining to appropriate geographical spread and range of programmes available in a particular region.

19.8 **Procedures**[84]

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[82] Par 6.6, p. 63 - 64.

[83] The responsible **provincial** Minister.

[84] See further Chapter 23 (Courts) below.

19.8.1 Current SA Law and Practice

19.8.1.1 Designation

Where the child and family court orders that a child be sent to a children's home or a school of industries designated by the Director-General, he or she has thirty days from the court order to make such a designation. The Director-General shall not designate a children's home unless the management of that home agrees to the admission of the child. Most often than not, the child concerned is in a place of safety, awaiting placement. This is a difficult time for children as they wait for finality about their case.

19.8.1.2 Duration of orders

The duration of any court order made under section 15 of the Child Care Act is usually two years. This period of time is regarded as sufficient for the reunification process. The Minister for Social Development can extend this order for two-year periods.[85] If the child is in a school of industry the Minister of Education can extend the order for longer periods of time.[86] He or she can even bring the child back to the institution after the order has expired. The only limitation on the power of the Minister of Education is that the order to return or the extension of an existing order shall lapse at the end of the year in which the child turns 21.[87]

19.8.1.3 Appeals from the children's court

The situational analysis undertaken by the IMC revealed that approximately one-third of children in state-owned and run facilities were considered by the staff to have been inappropriately placed.[88] Due to the lack of a simple procedure to review the children's court decision, the child is usually kept at the facility.

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85 Child Care Act 74 of 1983 reg 12(1).

86 Child Care Act 74 of 1983 s 16(2).

87 Child Care Act 74 of 1983 s 16(3).

88 IMC **Interim Policy Recommendations** 49.

19.8.1.4 **Release at the age of 18**

Under the current law, the Minister of Education has the power to order that any former pupil of or a pupil in a school of industries, return to or remain in that school of industries for such period as he or she may deem fit provided that this order shall not extend the period of retention of that pupil beyond the year in which he or she attains the age of 21 years.[89] However, where a child in any other residential facility is older than eighteen and still at school, the placement can be extended in order to enable him or her to complete his or her education or training. On application of the child or with the consent of the child, the Minister can grant approval for the child to remain in the institution to complete his schooling or education.[90]

19.8.1.5 **Discharge**

According to section 37 of the Child Care Act, the Minister may discharge a child from placement in a residential care facility at any time if he or she considers it to be in the interests of such child. However, the discharge of a child must take place within the context of family reunification services.[91]

19.8.1.6 **Children who abscond**

Certain procedures are prescribed in the current South African law to deal with children who abscond. A child who has absconded may be apprehended by a policeman, social worker or authorized officer.[92] He or she will be brought before a commissioner of child welfare as soon as possible, and must be kept in a place of safety awaiting his or her appearance.[93]

It is expected of the commissioner of child welfare to interrogate the child on the reasons why he or she absconded. After the process of interrogation the commissioner of child welfare may do the

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[89]Section 16(3) of the Child Care Act 74 of 1983.

[90]Section 33(3) of the Child Care Act 74 of 1983.

[91]Child Care Act Regulation 15.

92 Child Care Act 74 of 1983, s 38(1)(a).

93 Child Care Act 74 of 1983, s 38(1)(a).

following:[94]

(a) Order that the child be returned to the facility from which he or she absconded; or
(b) If there are good reasons not to return the child to the facility, order that he or she be removed to a place of safety, pending action by the Minister.

The Minister may, after consideration of the report of the commissioner and such inquiry as he or she may consider necessary, do the following:[95]

(a) transfer or discharge the child; or
(b) deal with the child as if it is the removal from a residential care facility to a place of safety for observation, examination and treatment;
(c) order that the child be returned to the facility from which he or she absconded.

The matter must be dealt with by the Minister within a period of no more than fourteen days after the apprehension of the child.

19.8.1.7 **Administrative transfers**

There has been a practice in South Africa of transferring children from one residential facility to another, through an administrative process. These transfers have been effected in terms of section 34 of the Child Care Act. This section allows the Minister to transfer any pupil or child from any custody in which he or she has been placed to any other custody and leave from any institution which he or she is in to any other institution mentioned in section 15 of the Act, namely a children's home or a school of industries. Until recently, the law also allowed for children to be transferred to a reform school in terms of this section (read with section 34(3)). The amendments to the Child Care Act in 1999[96] removed the option of transferring children into a reform school. Now the only way in which a child can be sent to a reform school is by a criminal court, in imposing such a

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94 Child Care Act 74 of 1983, s 38(2)(a).

95 Child Care Act 74 of 1983, s 38(3).

96 By the Child Care Amendment Act 13 of 1999. The Amendment Act came into effect on 1 January 2000.

sentence.

It is still possible, however, for children to be transferred administratively from children's homes to schools of industries. The former national Minister of Social Development (then described as the Department of Welfare and Population Development) took steps to discourage the abuse of section 34 transfers by issuing a letter to her Department in 1997 placing a 'moratorium' on the transfer of children deeper into the residential care system. The number of children transferred from one facility to another in this way has thus declined.

Any transfer of a child within the residential care system should be based on a decision-making process involving at least the child and his or her parents or family members. The challenge is to find a process which will ensure that any decision on the transfer of a child is made in his/her best interests. On the one hand there may be merit in an administrative transfer if it has certain built-in safety measures in recognizing the right of a child to voice an opinion and to be involved in decisions affecting his or her life. On the other hand, court procedures are not necessarily the answer, as is proven by the track record of children's courts.

To a certain extent, Regulation 15 is evident of the safety measures required for an administrative decision to be taken. This Regulation involves family reunification services and must be read in conjunction with section 15 orders, transfers in terms of section 34 and discharges in terms of section 37. In essence, the relevant parts of this regulation are as follows:

(1) Where it is in the interests of meeting the developmental goals of a child in foster care or in an institution to be transferred or discharged, a report and recommendation must be submitted to the Director-General. The submission of the report and recommendation is the responsibility of the social worker rendering family reunification services and the supervising social worker. These two have a duty to consult each other and where possible people like the parent of the child, the head of the institution and the child concerned.

(2) The report is based on the developmental assessment of the child and must reflect the existing and future developmental programme for the child and the family.

(3) The Director-General must submit the report to the Minister who may review alternative

placement of the child. Certain interested parties shall be entitled to be invited to and to participate in proceedings of the review. It is of particular relevance to this discussion that the child and his or her legal representative are included in the list of interested parties.

According to the Minimum Standards a child in residential care has the right to participate in formulating their plan of care and development; the right to a regular review of their placement and developmental plan; and the right to be consulted and to express their views, according to their abilities, about significant decisions affecting them. These rights are also reflected in Regulations 30A, 31 and 31A.

It is clear from the above, at least theoretically, that ample opportunity is created for a child to be involved in the decision-making process.

19.8.1.8 Leave of absence

Leave of absence may be granted by the manager of an institution, a foster parent or by the Director-General where the child is in a place of safety.[97] A report on the desirability of holiday placement with parents must be furnished before leave is granted. This, however, is not a statutory requirement.

Where a child is placed with parents and the safety of the child is in question, leave can be cancelled by management or the foster parent.[98]

19.8.2 Comments and submissions received

19.8.2.1 Designation

A question considered by the Commission is whether or not the commissioner of child welfare should be empowered to designate a residential care facility, based on the initial assessment and the report of the social worker. In the responses to the worksheet on this matter the discussion

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97 Child Care Act 74 of 1983, s 35(1).

98 Child Care Act 74 of 1983, s 35(3).

groups were of the view that the commissioner of children welfare should be empowered to designate a residential facility based on the social worker's report. In the individual responses this view was supported by Villa Lubet Kinderdorp, Nelspruit Displaced Children's Trust, the Moses Sihlangu Health Care Centre and NACCW. Mr Viviers of the Department of Social Welfare, Bloemfontein, and Ms N L T Ngqangweni of the Department of Welfare, Bisho, did not share the view of the majority, suggesting instead that the power of designation should remain with the Director-General and the period of time be extended from the current 30 days to 60 days. The meeting of specialists suggested that the commissioners of child welfare should be able to designate the type of facility (e.g. secure care facility, temporary facility) without specifying the particular facility by name.

19.8.2.2 **Duration of orders**

A number of questions were posed in the worksheet relating to the duration of the children's court order.[99] The first question posed was: 'Should the Ministerial power to renew and amend children's court orders be altered, and if so, in what way?' Two of the discussion groups held the view that each case should be reviewed by the court and that both the child and his or her parents should have the rights to be heard. The third group felt that the status quo should be retained. The retention of the status quo (the Minister's power to renew and amend children's court orders) was also supported in the individual responses by the Villa Lubet Kinderdorp, Nelspruit Displaced Children's Trust, Mr Viviers, and Ms Cornelius.

A second question posed was whether the two year duration period of a placement order is seen as realistic to implement reunification processes. The majority[100] of respondents were of the view that the two-year period is sufficient, but that there should obviously be some flexibility so that if reunification is not possible the period can be extended. Some respondents[101] pointed out that

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[99] See also Carmel Matthias and Noel Zaal 'Can we build a better children's court? Some recommendations for improving the processing of child-removal cases' (1996) **Acta Juridica** 60-64.

[100] Two of the three discussion groups; Villa Lubet Kinderdorp; Nelspruit Displaced Children's Trust; the Moses Sihlangu Health Care Centre and Mr Viviers of the Department of Social Welfare, Bloemfontein.

[101] Ms N LT Ngqangweni, Department of Welfare, Bisho and NACCW.

reunification could occur more rapidly in some instances and that this should then be facilitated.

A further question posed was: 'Should a maximum period be set for the duration of children's court order, or should a court, in appropriate cases, be able to issue an order that will last, for example, until the child is eighteen years old or until the order is amended?' The discussion groups were all of the view that once a child enters the system his or her placement should be reviewed regularly. Mr Viviers suggested that a maximum period be set for the duration of a placement order. No court should have the power to place a child in residential care indefinitely as this will be in conflict with the Constitution, the CRC and the African Charter on the Rights and Welfare of the Child.

A question posed in the worksheet was whether a child who has been placed should have the right to request a children's court hearing during the currency of the placement, and if so, what should be the grounds for such a request? Should a parent, social worker or manager of an institution have a similar right?

The discussion group participants were unanimous that children should have a right to request a children's court hearing during the currency of a placements. Some discussion group participants suggested that the child should be heard internally first, where after the children's court could be approached. Further, the child's request must be timeously processed and any obstruction of the process should be explained to a court. Finally, the commissioner should inform the child of his or her rights at the time of making the initial order.

Villa Lubet Kinderdorp recommended that the child should not have the right to request a children's court hearing, but should have the right to request a panel discussion involving all the relevant parties. This recommendation was based on the fact that commissioners of child welfare are not always working on ground level and do not have detailed understanding of a children's institution. Nelspruit Displaced Children's Trust, Ms Cornelius (Department of Welfare, Pietermaritzburg) and Ms N L T Ngqangweni (Department of Welfare, Bisho) answered the questions in the affirmative.

Mr André Viviers (Department of Social Welfare, Bloemfontein) proposed the following:

- the child should be able to request a children's court hearing if he or she feels that he or she is no longer a child in need of care;

- the parents should have the same right;
- the child should be able to appeal against the placement order made or the administrative action taken;
- no social worker or manager of an institution should have the right to request a children's court hearing as it will create a major loophole in the legislation which will be open for abuse if a child is no longer wanted (in the facility).

Moses Sihlangu Health Care Centre recommended that anyone should have the right to request a children's court hearing during the currency of the placement of the child, including the child. The respondent submitted that the grounds for such a request could be based on (a) the type of facility the child was placed in; (b) the length of time the child has been in a facility; (c) a social worker's failure to provide reunification services; (d) failure to involve the child in his or her periodic assessment or to provide such a periodic reassessment.

The meeting of specialists was of the view that the duration of the order should be not less than six weeks and not longer than two years, and that placements should always be open to periodic review. With regard to the question of whether it should be possible to request a children's court hearing during the currency of placement, the meeting suggested that the right to approach the court should also be extended to the child's guardian, in addition to the parents of the child. The meeting also noted that a social worker or manager can lodge an appeal in terms of section 16A of the Child Care Act, and recommended that this should be retained. There are, however, different opinions on this issue which hold that social workers are not entitled to lodge an appeal as they are not accorded legal standing by the courts.

A further question relating to children's court placement orders was whether the children's court should be given greater powers to monitor, review and amend their own placement orders?

Some group participants argued that the child and his or her parents should be able to approach a court to review the placement. The Nelspruit Displaced Children's Trust argued that as long as it is in the best interest of the child, a court should have the power to monitor, review and amend its own placement order. The Moses Sihlangu Health Care Centre submitted that as children's courts have all the role players at hand and have a full picture of the child's situation, they should be given all the powers needed to monitor, review and amend their own placement orders. The

suggestion presupposes that commissioners of child welfare are adequately trained (possibly, with the addition of a child care professional as assessor) for the task.

Ms Cornelius of the Department of Welfare, Pietermarizburg, proposed that commissioners of child welfare should have the power to review progress on a case at the request of the social worker, child or parents, and a similar view is expressed by the Ms N L T Ngqangweni of the Department of Welfare, Bisho.

Mr Viviers of the Department of Social Welfare, Bloemfontein, questioned the capacity of the children's court to monitor, review and amend its own placement orders and cautions that this may just become an administrative process that is done somewhere else as a routine. He emphasised that one should not split the system of care too much between the different departments as it usually does not serve the best interest of the child. As the Department of Social Development is primarily responsible for the execution of the children's court order, all administrative processes should be kept within the said Department as it will be easier to manage, and only one party will be held accountable which will avoid an ongoing shifting of responsibilities. The NACCW posed the opposite view, stating that at this point in the transformation of the child and youth care system as many role-players as is possible are necessary to monitor and influence the integrity of the process.

The meeting of specialists noted that the children's court has the power to review and amend placement orders, even those of other courts, in terms of section 15(2) of the Child Care Act. It was suggested that a children's court should in addition be empowered to say that it wants to see the child back in court in six months to see whether the placement has worked out or not. It was pointed out that this approach could allow commissioners the opportunity to make creative orders dependent on certain conditions - for example that a child be placed at home provided that a parent gives up drinking.

On the issue of visits and inspection of facilities by commissioners of child welfare, section 31(1) of the Child Care Act already provides that a commissioner may enter any children's home, place of care, shelter or place of safety in order to inspect that facility and to observe and interview any child therein. The meeting of specialists agreed that the current provisions should be extended by providing that the commissioner must submit a report after such visit to the Director-General: Social Development and may make recommendations where applicable. It was noted that it should be

clear that the commissioner is not allowed to review orders already made without going through a proper court process on the basis of the visit made or interviews undertaken.

19.8.2.3 Appeals from the children's court

A further aspect explored in the worksheet was the issue of appeals against orders made by a children's court. The following questions were posed: 'Should appeals be facilitated by a broad ground that the order appealed against was not in the best interest of the child concerned? To which court should any appeal lie?'

There was general agreement amongst discussion group participants that provision should be made for appeals against all orders made by a children's court. The group participants suggested that a time limit to institute an appeal should be stipulated. It was recommended that not only the parties concerned should have the right to appeal against a children's court order, but also external parties in order to ensure the protection of the child concerned. Further, an appeal should be made to a higher court on regional level and not the High Court.

Nelspruit Displaced Children's Trust and Ms Cornelius (Department of Welfare, Pietermaritzburg) believed that there should be the possibility of appeal from any decision of the children's court. Ms Cornelius added that an appeal from the children's court should be made to the High Court.

Mr André Viviers agreed that people should have a right to appeal against an order of the children's court. He added that an appeal should also be possible against any administrative actions in terms of the child care legislation. Further, appeals should be facilitated based on the best interest of the child and the rights of the child. He suggested that an appeal should be heard in the High Court and each High Court should designate one judge who will be responsible to hear these appeals. Also, appeals should be free of charge and linked to legal aid for the child or parents.

The Moses Sihlangu Health Care Centre was in favour of a right to appeal against all orders made by the children's court, if it can be shown that the order was not in the best interest of the child. The respondent proposed that the appeal should be made to a regional court in order to facilitate the appeal and to reduce costs.

19.8.2.4 **Release of a child at the age of 18 years**

The questions posed in the worksheet relating to this were as follows: 'Does this mean in practice that a child can remain in an institution, regardless of age until education is completed? Compare this with the power of the Minister of Education and Culture who can only extend the placement of a child in a school of industries to the end of the year in which the child turns 21. What is the reason for the difference in approach and can this reason be upheld in new child care legislation?'

The discussion groups suggested that all the residential care facilities should be run by the Department of Social Development as this will enable a uniform approach which should allow children the opportunity to complete their education.

Villa Lubet Kinderdorp was of the view that a child should not be allowed to stay in an institution after the age of 21 and said other arrangements should be made for such a child. Further, the space may be needed for other (younger) children. This was also the view of Ms Cornelius (Department of Welfare, Pietermaritzburg). On the other hand Ms N L T Ngqangweni (Department of Welfare, Bisho), stated that there should be no limit on the time a child can remain in care (while completing his or her education).

Mr Viviers submitted that in theory, section 33(3) allows children to stay in a children's home until they have completed their secondary or tertiary education. However, the cut-off age in practice is 21 years and a section 33(3) order is rarely issued beyond this age. The respondent explained that the historic reason behind the above-mentioned is that children in children's homes and foster care stay there voluntarily after the age of 18 years to complete their secondary education, whereas children in schools of industries or reform schools can be forced by the Minister to stay and complete their secondary education until the age of 18 years. The respondent suggested that the section 33 extension should be upheld in the new child care legislation and limited to the completion of secondary education or the attainment of the age of 21 years, whichever comes first.

The meeting of specialists suggested that provision be made for an application for an order to allow the child to remain in a residential facility until the end of the year in which the child turns 18 years of age in order to allow such child to complete his or her schooling or training. It was further suggested that the order should not be extended past age 21.

19.8.2.5 **Discharge**

The following questions about discharge were included in the worksheet: 'Should any Minister have the power to terminate the effects of a court order? If there appear to be grounds for such a termination, will the child not be better protected if there is a proper hearing before the same court that issued the order? Is a Ministerial power to overrule a court order not also bad in principles, given the role of courts in a democratic society?'

The discussion group participants did not reach consensus on this question. Some, however, argued that the Minister should retain his or her power to overrule a court order.

Villa Lubet Kinderdorp stated that it will not be practical to have an order reviewed by the same court who issued the order. For example, if a child was placed by a court in Durban in an institution in Vereeniging, the child will have to go back to Durban to have his or her case heard. It was thus recommended that the Minister should retain the power to terminate the effects of a court order.

Ms Cornelius (Department of Welfare, Pietermaritzburg) explained that the termination of a court order by the Minister is not done lightly and is usually only done after intensive reunification services which are documented. The respondent proposed that an appeal system should be put in place and that discharge should be done by a panel.

Mr Viviers (Department of Social Welfare, Bloemfontein) submitted that the Minister should retain the power to terminate the effects of a court order. The respondent explained that discharge by ministerial power usually involves a complex process and the child is usually placed on extended leave with the parents or guardians to observe how the child progresses. The discharge will then be based on the social worker's report. The respondent stated that the discharge option is not often used as most of the time the court order lapses or the child is transferred to the care of his or her parents in terms of section 34 of the Child Care Act.

The Moses Sihlangu Health Care Centre held the view that the commissioner of child welfare who issued the order should have the power to terminate the said court order. The respondent stated that in practice, it is not the Minister that terminates the court order, but somebody somewhere in the bureaucracy. No hearing is held and this becomes only an administrative procedure.

The meeting of specialists suggested that the decision to discharge a child should not be the decision of one person, but that of a panel or of an assessment review process. It was further agreed that a child should not be discharged without family reunification services having been rendered. As to the persons to be involved in the decision to discharge, reference was made to regulation 15(1) of the Child Care Act, 1983.

19.8.2.6 **Children who abscond**

The question posed in the worksheet was: 'What changes should be made to abscondment proceedings?'

The discussion groups submitted that it is the responsibility of facilities to adopt measures for the apprehension of children who abscond. It was suggested that abscondment rates should be monitored in order to identify facilities that have a high abscondment rate.

Villa Lubet Kinderdorp recommended that the abscondment proceedings must be more formal and should also allow commissioners to make alternative placements. The commissioner must also obtain a report from the institution from which the child absconded before the hearing.

Ms Cornelius submitted that complaints by children should be followed up with the relevant departments and should not just be included in the record of proceedings. Ms Ngqangweni stated that the responsibility of residential care facility as regards abscondment should be clearly stipulated. Further, residential care facilities should be accountable for efforts made to apprehend the child. The respondent suggested that the Department of Social Development should monitor the abscondment rate in facilities in order to determine whether facilities are functioning properly.

Mr Viviers submitted that there should be a more intensive investigation into the reasons why the child absconded as children usually run from something (such as boredom or abuse) or to something (friends, worry about family). Further, the complexity of abscondment needs to be understood.

The Moses Sihlangu Health Care Centre submitted that a child who absconds should still be apprehended by a police officer, etc. and brought before a commissioner of child welfare as soon

as possible. Further, the child should be kept in a place of safety awaiting his or her appearance. The respondent added that the commissioner should interrogate the child on the reasons why he or she absconded and should request from the social worker who worked with the case any information he or she may deem relevant. The respondent suggested that the present power of the Minister should be transferred to the commissioner as he or she is in a position to take a more meaningful decision. This will also avoid bureaucracy.

The meeting of specialists considered section 38 of the current Child Care Act and expressed the view that more intensive investigations are needed. It was recommended that part of the investigation should focus on what is going on at the facility from which the child absconded.

19.8.2.6 **Administrative transfers**[102]

Questions posed in the worksheet with regard to administrative transfers were as follows:

> Should an administrative system of transfers be maintained? Should a court procedure rather be followed? What alternative options are there for facilities or institutions who do not have the means or skills to deal with 'difficult' or 'problem' children?

The discussion groups were divided on whether an administrative or court process should be followed when transferring children. Some were of the view that an administrative system of transfers should be maintained, provided that the decision to transfer a child is made by a panel consisting of professionals from different disciplines. Clear guidelines for transfers are, however, needed. Further, a person aggrieved by a decision should have a right to an appeal. Others, who were also in favour of an administrative system, proposed that an assessment team should decide whether the child should be transferred. The recommendation was also made that children who are placed in less restrictive environments should be dealt with administratively while the court process should be use for more restrictive placements. Mention was made that currently in the Western Cape, if a child is to be transferred deeper into the system, the case must be reviewed by more than one staff member. Further, both the child and his or her parents can request a hearing at which their lawyer can be present. Some discussion group participants recommended that a court procedure should be followed when transferring children. They were, however, open to

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[102]See further Chapter 23 (Courts) below.

suggestions that an administrative system be maintained provided that such a process is administered properly with the necessary supportive and safety mechanisms. It was submitted that once a child is placed away from home, the state has a responsibility to monitor that child. Further, there need to be incentives for residential care facilities that prove successful.

The following alternative options are proposed for facilities or institutions who do not have the means or skills to deal with some of the children referred to them:

- support teams should be put in place in these institutions;
- ongoing intensive training and screening of staff members should be undertaken;
- programmes should include training on behavioural management;
- there should be differentiation of facilities in terms of skills;
- temporary transfers that are therapeutic and rehabilitative should be introduced as part of the system; and
- interim treatment orders should be introduced.

The Nelspruit Displaced Children's Trust was in favour of maintaining an administrative system. The respondent added that qualified staff are needed to deal with difficult children, and that the transfer of such children should not be the first option.

Ms Cornelius (Department of Welfare, Pietermaritzburg) also argued in favour of an administrative system of transfers and suggested that panels comprising of NGOs and officials from the Department of Social Development should be utilised to consider the transfer of children. The respondent submitted that the courts do not have the time and expertise to deal with the matter.

Mr Viviers (Department of Social Welfare, Bloemfontein) submitted that an administrative system of transfers can both be positive and negative. Mechanisms need to be put in place to ensure that an administrative system of transfers is not abused. The respondent argued that a court procedure may be theoretically appropriate, but in practice can do more harm than good. In the view of the respondent very few commissioners have sufficient knowledge of the Child Care Act and commissioners are often led by social workers or personnel from residential facilities. The respondent believed there is a risk that transfers will be done more arbitrarily and frequently if a court process is followed as the decision need only be made by the commissioner. On the other

hand, administrative transfers involve more people, and thus there are more safeguards to prevent abuse of power and arbitrary transfers.

The Moses Sihlangu Health Care Centre added its voice in favour of an administrative system of transfers. The respondent submitted that the court's roll is always full and suggests that a shift should be made from traditional structures to structures that cater for children according to their needs.

NACCW commented that an administrative system of transfers has the advantage of swift alternative options for the young person in need without the trauma of a court procedure. The disadvantage is the loophole for practitioners in the field to move children without the proper assessment and to take decisions that are not in the best interests of the child. The respondent was of the view that the only safeguard lies in the assessment skill of the person who processes administrative transfers. The respondent asserted further that according to the developmental assessment process a full case review has to take place before a care plan can change - ensuring that all relevant role players are consulted including the child and family. Finally, the respondent was of the view that administrative transfers are most applicable when the child is moved to a more empowering environment rather than a more restrictive one.

A further question posed was '(i)f an administrative system of transfers is to be maintained, what safety measures need to be incorporated in the new child care legislation to ensure that children do not end up being in a one-way street deeper into residential care?'

The discussion groups made the following suggestions:

- facilities should know what kind of cases they can deal with in order to prevent transfers;
- parties involved should have a right to appeal against decisions made;
- decisions on whether a child should be transferred must be made by a panel;
- a child should be properly assessed before referral;
- an individual development plan is needed for each child
- a child's family should be involved in decisions regarding his or her transfer;
- social workers must be aware of all the alternatives available, e.g. programmes, before placing a child.

Villa Lubet Kinderdorp proposed that panel discussions with all the role players involved in a particular case should be held annually. The Nelspruit Displaced Children's Trust recommended that parents, guardians, relatives of the child and the child must be involved in any matter or decision affecting the child. Ms Cornelius (Department of Welfare, Pietermaritzburg) submitted that the child must be consulted by the review panel or a social worker representing the panel on issues or decisions affecting the child.

Ms N L T Ngqabgweni (Department of Welfare, Bisho) made the following recommendations:

- a panel should review whether the child should be transferred deeper into the system;
- the child should first be assessed;
- an aggrieved person should have the right to appeal against a transfer;
- the family of the child and or the community should be involved in decisions affecting the child;
- social workers should be aware of resources available; and
- training of commissioners should involve child care issues.

Mr André Viviers (Department of Social Welfare, Bloemfontein) submitted that the impact and experiences pertaining to Project Go[103] have had positive results and have impacted on the lives of children. He was of the opinion that Project Go has also prevented many children from ending up in a one-way street deeper into the system. Mr Viviers suggested the following safety measures:

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[103]Project Go was a project of the Inter-Ministerial Committee on Young People at Risk, one of the aims of which was to prevent children being transferred to more restrictive placements and to promote the placement of children back in communities as far as this was possible. On the other hand, there has been considerable dissatisfaction with Project Go from NGO's. It is e.g. claimed that children have become destitute and have taken to the streets due to being send home too readily due to pressure to create space in residential care settings for children in conflict with the law. It is also alleged that children who need residential care are being kept out of facilities with very detrimental consequences. A common assertion is that, while the thinking behind Project Go has been very sound, a lack of adequate resources makes its proper implementation impossible.

- all administrative transfers or actions in terms of the legislation should be subjected to an appeal;
- all administrative transfers must be a team decision and based on a developmental assessment and review;
- an independent party, e.g. a small team at the Department of Social Development's provincial office should authorise such transfers after engaging with all parties (child, facility, parents, etc.) concerned; and
- all transfers approved must be subject to submission of all the documents (after the transfer) to a quality control and monitoring process.

The NACCW suggested that all assessments regarding possible transfers should be undertaken by trained personnel and in multi-disciplinary teams.

It was further recommended by one of the discussion groups that the words 'deeper into the system' should not be used as this is labelling certain groups of children. Further, if the issue of permanency is addressed at the outset, the child will not need to be transferred to a more restrictive placement.

At the meeting of specialists it was agreed that the administrative transfer of children in residential care deeper into the system should happen only as a measure as last resort. It was mentioned that some institutions are finding loopholes in section 36 of the Child Care Act by laying criminal charges against a child in the criminal court for a petty offence such as the breaking of a window. It was noted by some of the specialists present that administrative transfers deeper into the system are happening less and less.

As for transfers to less restrictive types of care it was mentioned that such transfers take place after the social worker has filed a report which is then dealt with by the canalisation officer. The meeting agreed that in the case of transfers to less restrictive forms of care, the requirements need not be so strict, especially as regards placements back into the child's family. In all cases, however, more than one person would be involved in the decision-making process to transfer the child.

19.8.3 Evaluation and recommendations

19.8.3.1 **Designation**

The Commission recommends that the commissioner of child welfare should have the power to designate the type of programme, such as a secure care or a treatment programme. The Commission further recommends that the decision as to which particular child and youth care centre where the child is to be placed should be made by relevant officials of the (provincial) Department of Social Development, based on the programmes offered by such centre and on the developmental assessment needs of the child.

19.8.3.2 **Duration of orders**

The Commission has considered the various inputs regarding duration of initial residential care placement orders and is of the view that a children's court can place a child in a residential care programme for longer than 2 years without reviewing the order. However, it may be possible to have an order which is shorter in duration, and the Commission recommends a minimum period of 6 weeks. This might be appropriate in some cases where an assessment of a child indicates that a child has a particular problem which could be dealt with in terms of an intensive but brief intervention, such as a substance abuse treatment programme.

With regard to the extension of a residential care order beyond the original period set by the court, **the Commission recommends that such extensions can be made by way of an administrative procedure. The procedure to be followed should be set out in regulations to the Act, and should include a requirement that the decision is to be made by a team rather than an individual, that the child and his or her family have rights to participate in the decision making process, that they be given reasons for the decision and be informed of their right to a review of the decision. The right of review should lie to the child and family court and this should be provided for in the Act**.

The Commission considers it necessary to leave all orders open to the possibility of periodic review at any time. **Regarding the matter of who should have the right to approach the court for a hearing during the currency of an order, the Commission recommends that the child, his or her parent or a guardian should be able to approach the court. A court may also order**

that a case be brought back to court for purposes of review. A social worker or manager who disagrees with the placement of a child can lodge an appeal in terms of the current Act, and the Commission recommends that this possibility should be included in the new legislation as well.

With regard to the question of whether the children's court has the power to review and amend placement orders, the Commission recognises the power to do so in terms of section 15(2) the current Child Care Act. **It is recommended that this power be reflected in the new children's statute and be augmented to include a power for the presiding officer of the court to request a child to appear again before him or her at a particular time**. The Commission is persuaded by the view that this will allow presiding officers to make more creative orders, on the basis that they will be able to monitor them to some extent.

On the issue of visits and inspection of facilities by commissioners of child welfare, the Commission notes that section 31(1) of the Child Care Act already provides that a commissioner may enter any children's home, place of care, shelter or place of safety in order to inspect that facility and to observe and interview any child therein. **It is recommended that all commissioners of child welfare must at least once a year inspect all child and youth care centres in their areas of jurisdiction. The current provision[104] in the Child Care Act, 1983 regarding inspection of children's homes and places of care can therefore be retained in the new children's statute and be extended by providing that the commissioner must submit a report after any such visit to the Director General: Social Development and by empowering the commissioner to make recommendations where applicable**.

19.8.3.3 **Appeals from the children's court**

The Commission is of the view that in the new children's statute appeals should lie against any residential care placement order, or any variation thereof, made by a children's court. These appeals should lie to a higher court, and provision should be made for application to the Legal Aid Board by the child, parent or guardian should such person lack the financial means to

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[104]Section 31.

obtain legal representation at his or her own cost.

19.8.3.4 **Release of a child at the age of 18 years**

After consideration of all the comments on the issue of the release of a child from a residential facility at the age of 18 years, **the Commission recommends that provision should be made for an application for an order to allow the child to remain in a residential facility until the end of the year in which the child turns 18 years of age in order to allow such child to complete his or her schooling or training**.[105] This should not be dependent on the consent of the parent as is presently the case. **It is further recommended that the order should not be extended past age 21, and that this rule should apply regardless of whether the residential facility falls under the management of the Department of Social Development or of Education**.

19.8.3.5 **Discharge**

The Commission recommends that the power of discharge from a child and youth care centre may remain an administrative one, but that the decision to discharge a child from a facility should be made by a *team* of people rather than by an individual. It is further recommended that the requirement that the discharge of a child should, where possible, be within the context of family reunification services as currently contained in Regulation 15(1) should be included in the new children's statute. Guidelines as to the exact procedures and the persons to be involved in the process of discharge can continue to be reflected in regulations to the Act.

19.8.3.6 **Children who abscond**

The Commission is of the view that the section 38 of the current Act should be expanded upon. Firstly, there should be a more detailed investigation into the reasons that led to the child absconding. Secondly, the court should have the power to change the order where it

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[105]See further 4.5 above.

would be appropriate to do so.

19.8.3.7 **Administrative transfers**

The Commission is of the view that administrative transfers should not be completely removed from the system. In this regard, it is important to distinguish between administrative transfers which lead to children being placed in more restrictive environments, and those which lead to children being placed in less restrictive environments or even back in their own homes. Where children are to be moved to a placement which is less restrictive, such decisions can be made administratively, although the decision should still be made by a team rather than by an individual. **Where a child is to be transferred to a more restrictive environment the Commission recommends that the matter should be referred back to court**. The decision to place a child in 'deeper into the system' is one which has serious implications for the child and it is thus necessary for such a decision to be scrutinised by the court.

Where an administrative transfer is being considered in order to place a child in a less restrictive environment, the requirements may be less stringent, but it should still be a requirement that a team, rather than an individual, be involved in the decision-making process.

19.9 **Rights to care and protection in residential care facilities**

19.9.1 **South African law and practice**

The following excerpt from the **Final Report** (1995-1999) of the Inter-Ministerial Committee on Young People at Risk clearly expresses the need to give urgent attention to care and protection of children in residential care:[106]

> Children in care and custody are the most vulnerable of all. Most of them have never been informed of their rights. In fact in many facilities the manager and staff have never heard of the UN Convention on the Rights of the Child, and if they have, they do not know how to implement it within the facility. The system in which these some 20 000 children find themselves is extremely powerful and power-centred. The majority of the children are neglected, abused, abandoned, homeless, or dislocated from their families and

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106 IMC **Final Report** (1995-1999) 60.

> communities in one form or another. The majority have no recourse to anyone who is available purely to ensure that the child's rights are upheld and take decisive actions when this is not the case.

The protection of children in residential care requires a holistic approach. In the first place it requires a process whereby children are made aware of and understand their rights and responsibilities as children, and specifically as children in residential care. This process must take full cognisance of the language requirements of the specific child and the age and maturity of the child.

In the second place a holistic approach requires a process whereby every service provider fully comprehends the rights and responsibilities of every child with whom they are in contact. Service providers also need to know what their own rights and responsibilities are. Failure to do so or the seeming over-emphasis on the rights of children can easily lead to negativity or a feeling of disempowerment by service providers. It is clear that specialised ongoing training of service providers is required.

Thirdly, grievance procedures and communication channels must be put in place that are user-friendly for children, their families, the local community and service providers. Very often children fail to report violations of rights or instances of abuse. This happens because they fear that they will be victimized in the residential care setting or that they will not be believed because they are children. On the other hand service providers must find confidence in the fact that any allegations of abuse will be handled in an objective and professional manner. As a minimum requirement all parties involved must have the opportunity to voice an opinion.

In the fourth place a system of monitoring is required to ensure the effective care, development and protection of children in residential care. This requirement is in accordance with rule 72 of the United Nations Rules for the Protection of Juveniles deprived of their Liberty. In terms of this rule a duly constituted authority should be established which should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections [of residential care facilities] on their own initiative. There must also be full guarantees of independence in the exercise

of this function.[107]

At present the rights of children in residential care are addressed in much detail in the regulations to the Child Care Act.[108] In terms of thereof all children in a children's home, place of safety, school of industries or shelter shall have the right:

(a) to know their rights and responsibilities;
(b) to a plan and programme of care and development, which includes a plan for reunification, security and life-long relationships;
(c) to participate in formulating their plan of care and development, to be informed about their plan, and to make changes to it;
(d) to expect that their plan and programme is based on an appropriate and competent assessment of their developmental needs and strengths, and where possible is in the context of their family and community environments;
(e) to a regular review of their placement and care and development plan;
(f) to be fed, clothed and nurtured according to community standards and to be given the same quality of care as other children in the children's home, place of safety, school of industries or shelter, as the case may be;
(g) to be consulted and to express their views, according to their level of maturity, about significant decisions affecting them;
(h) to reasonable privacy and to possession of their personal belongings;
(i) to be informed of behaviour expected by service providers and of the consequences of not meeting the expectations of service providers;
(j) to care and intervention which respects their cultural, religious and linguistic heritage and the right to learn about and maintain this heritage;
(k) to regular contact with parents, family and friends unless a court order or their care or development programme indicates otherwise, or unless they choose otherwise;
(l) to the involvement of their family and significant others in their care or development

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107 The Cabinet accepted the report of the IMC on Children in Care and Custody and Care in South Africa and instructed that immediate action be taken on the recommendations made by the IMC. However, in the Final Report on 58 it is remarked that no progress has been made to establish such an authority in accordance with rule 72 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

108 Regulations 30A(2), 31A(1) and (2).

programme, unless proved not to be in their best interests, and the right to return to live in their community in the shortest appropriate period of time;

(m) to be free from physical punishment;

(n) to positive disciplinary measures appropriate to their level of maturity;

(o) to protection from all forms of emotional, physical, sexual and verbal abuse;

(p) to education appropriate to their age, their aptitude and their ability;

(q) to send and receive mail which is not read by others: Provided that in those rare cases when mail must be read by a service provider, the child has a right to be present or to give permission for mail to be read without being present;

(r) to be informed that prohibited items in their possession may be removed and withheld;

(s) to respect and protection from exploitation and neglect;

(t) to opportunities of learning and opportunities which develop their capacity to demonstrate respect and care for others;

(u) to an interpreter if language or disability is a barrier to consulting with them on decisions affecting their custody or care and development;

(v) to privacy during discussions with families or significant others, unless this can be shown not to be in the best interest of the child;

(w) in the event of any violation of their rights as referred to in this subregulation notify

(i) any nurse, social worker, child and youth care worker or person authorised thereto by the Director-General or any commissioner when interviewed in terms of section 31(1)(b) of the Act; or

(ii) any dentist, medical practitioner, nurse, social worker, teacher, child and youth care worker or person employed by or managing a children's home, place of safety, school of industries or shelter, when examined, attended to or dealt with in terms of section 42(1) of the Act, or at any other stage.

Every child who is cared for in a children's home, place of safety, school of industries or shelter must be informed of his or her rights and responsibilities in terms of this regulation.[109] This includes the right –

(a) to be informed promptly in a language which he or she understands of the reason for his or

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109 Regulation 31A(2).

her admission or detention, as the case may be;

(b) to have his or her parent, guardian, custodian or next of kin informed of the place to which he or she has been admitted or in which he or she is being detained, as the case may be, and of the reason of his or her admission or detention, as the case may be;

(c) in the case of a place of safety, to be detained only as a measure of last resort in his or her best interests for the shortest appropriate period of time;

(d) to communicate with and be visited by his or her parent or parents, guardian, custodian, next of kin, social worker, religious counsellor, medical practitioner, psychologist, legal representative, child and youth care worker or any other person with the approval of the children's home, school of industries, place of safety or shelter concerned;

(e) to personal privacy and to privacy with regard to any visitation or any communication addressed to or by him or her, unless there is reason to believe that intervention by a social worker, child and youth care worker, educationist or psychologist, after due consultation with such child, is justified as being in his or her best interests; and

(f) to be cared for separately from persons over the age of 18 years.

The reference to certain prohibited behaviour management practices in the regulation to the Child Care Act must be read with the context of the transferral of parental powers to the management of an institution.[110] The transferral of parental powers expressly includes the right to punish and to exercise discipline. The management of an institution may authorize the head of the institution to exercise on its behalf any powers in connection with punishment and discipline.

The Regulations (as amended) specifically prohibit certain behaviour management practices by any person in a children's home, place of safety, school of industries or shelter.[111] In addition, no place of care shall be registered or shall remain registered after 24 months unless the Director-General is satisfied that specific behaviour management practices are forbidden.[112] These practices are as follows:

(a) group punishment for individual behaviour;

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110 Section 53 of the Child Care Act, 1983.

111 Regulation 32(3).

112 Regulation 30A(2).

(b) threats of removal, or removal from the programme;
(c) humiliation or ridicule;
(d) physical punishment;
(e) deprivation of basic rights and needs such as food and clothing;
(f) deprivation of access to parents and family;
(g) denial, outside of the child's specific development plan, of visits, telephone calls or correspondence with family and significant others;
(h) isolation from service providers or other children admitted to the place of care, other than for the immediate safety of such children or such service providers only after all other possibilities have been exhausted and then under strict adherence to policy, procedure, monitoring and documentation;
(i) restraint, other than for the immediate safety of the children or service providers and as an extreme measure. This measure is governed by specific policy and procedure, can only be undertaken by service providers trained in this measure, and must be thoroughly documented and monitored;
(j) assignment of inappropriate or excessive exercise or work;
(k) undue influence by service providers regarding their religious or personal beliefs including sexual orientation;
(l) measures which demonstrate discrimination on the basis of cultural or linguistic heritage, gender, race, or sexual orientation;
(m) verbal, emotional or physical harm;
(n) punishment by another child; and
(o) behaviour modification such as punishment or reward systems, or privilege systems, other than as a treatment or development technique within a documented individual treatment or development programme which is developed by a team including the child and monitored by an appropriately trained multi-disciplinary team.

The prohibited behaviour management practices which may not be used by any person in a children's home, place of safety, school of industries or shelter are similar in content. As in the case of places of care, the prohibition on physical punishment is formulated in the language of children's rights.[113] Therefore, all children in a place of care, children's home, place of safety,

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113 Regulations 32(3)(d), 30A(1)(d), 30A(2)(m), 31A(1)(m).

school of industries or shelter, shall have the right to be free from physical punishment. A child who is disciplined shall have the right to positive disciplinary measures appropriate to his level of maturity.[114]

The Regulations leave little doubt as to the extent of the responsibilities of the head of a children's home, place of safety, school of industries or shelter within the context of behaviour management practices.[115] This person must ensure that the child and his or her family are oriented appropriately upon the child's admission with regard to the rules and the safety and complaints procedures, as well as the child's rights and responsibilities. Other responsibilities include the following:

(a) The head of the institution must ensure that children are provided with the skills and support which enables constructive and effective social behaviour.[116]
(b) The head and the staff team of the institution must demonstrate the expected behaviour in their attitudes and interactions with the children.[117]
(c) The head of the institution must ensure that children feel respected, and physically, emotionally and socially safe when service providers manage their behaviour and provide support.[118]
(d) The head of the institution must ensure that children are given plenty of opportunity and encouragement to demonstrate and practice positive behaviours.[119]

19.9.2 Comments and submissions received

The worksheet posed the following questions about the regulations: 'Are these regulations user-friendly? Do they serve the purpose of informing children of their rights and responsibilities?'

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114 Regulations 31A(1)(n), 30A(2)(n).

115 Regulation 32(2).

116 Regulation 32(4).

117 Regulation 32(5).

118 Regulation 32(6).

119 Regulation 32(7).

The discussion groups were of the view that the regulations that contain the rights of children are user-friendly. It was, however, felt that the regulations generally should be made more user-friendly.

Villa Lubet Kinderdorp, Mr Viviers (Department of Social Welfare, Bloemfontein) and the NACCW were all in agreement that the regulations regarding children's rights are user-friendly. Moses Sihlangu Health Care Centre submitted that although the regulations are user-friendly, they over-emphasise the rights of children at the expense of their responsibilities. Thus, children in care facilities should be aware of their responsibilities to do house chores, to perform well at school, to participate in sports, to respect their peers, etc. The respondent said that the responsibilities of children in care facilities should be given greater meaning to prepare them for the future.

Ms Cornelius (Department of Welfare, Pietermaritzburg) submitted that the regulations are cumbersome and are not easily understood by children. Further, the regulations are regarded as threatening by the staff and the management of residential care facilities. The respondent proposed that the rights of children should be included in the ethos of each children's home.

A further question was posed asking whether the regulations on care protection, development and control, management of good order and behaviour management work in practice.

Groups 1 and 2 submitted that the regulations do not work effectively in practice due to the lack of trained personnel. Group 3 chose to state the same idea in a more positive way, saying that the regulations do work in practice in cases where staff are well trained, adding that management influences the way regulations are implemented.

Ms Cornelius answered the question in the negative and submitted that management, including the board of management do not always understand the transformation of the child and youth care process. Further, they focus on the negative and confuse behaviour management with behaviour modification. The respondent opined that the system has still not recovered from the banning of corporal punishment and that persons are not imaginative enough to be strength-motivated.

Mr Viviers submitted that the regulations as set out in Regulation 31A in essence facilitate the implementation of the Minimum Standards for the South African Child and Youth Care System.

Further, the regulations do work in practice and are understood where persons in residential care know their job and the philosophy behind child care. However, programmes that lack the competency in residential care usually struggle with them. He was of the opinion that Regulation 31A is there to protect children and to provide them with a system that meets their needs and respects their rights. Thus, these regulations do work in practice for children if properly implemented by the staff of a facility.

19.9.3 Evaluation and recommendations

The Commission recommends that the Regulations continue to set out children's rights. However, greater emphasis should be placed on the responsibilities of children, and additional efforts must be made to ensure that the regulations are easy to understand and work with. **Even more emphasis should be placed on training of staff in residential care facilities**. The wording of the Regulations should be revisited in consultation with practitioners to specifically address concerns related to uncontrollable or unacceptable behaviour of children in such institutions.[120] **The Regulations should include the requirement that children be informed about their rights as well as their responsibilities**.

19.10 Minimum standards and quality assurance in residential care

19.10.1 Current South African Law and Practice

The Child Care Act, 1983, makes provision for the inspection[121] of children's homes, places of care, shelters and places of safety. The procedures and instructions for review and evaluation are set out in the regulations to the Child Care Act, 1983.[122]

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[120] Identified as particularly problematic were Regulations 30A(2)(a), (b), and (o) which respectively forbid group punishment for individual behaviour, threats of removal, or removal from the programme, and certain behaviour modification systems.

[121] Section 31 of the Child Care Act 74 of 1983.

[122] Regulation 34A.

The person designated to do the inspection can be a social worker, nurse, commissioner or any person authorised thereto by the Director-General: Social Development. Such person may enter a residential care facility in order to inspect such facility, as well as any relevant books and documents. As part of the inspection, any child in the facility may be observed and interviewed. This includes the possibility of the child being examined by a medical officer, psychologist or psychiatrist. A report of the inspection must be submitted to the Director-General.

Review and evaluation of children's homes, places of safety, places of care and shelters focus on two aspects: Firstly, whether the requirements for registration of the relevant residential care facility are met, and secondly, the standard of care, protection or development of children in these institutions. This includes disciplinary management and the keeping of the required registers or files.

Where the report indicates that a requirement for registration has not been met, the Director-General has the following course of action:

a. The management and head of the facility must be informed of the content of the report;
b. If necessary the head and management must respond in writing within fourteen days of receipt of the report;
c. A developmental programme, guidance and support shall be provided to enable the management and head to meet the requirements within two to six months;
d. After the six-month period, a further report and review must be undertaken;
e. If the requirements for registration have still not been met satisfactorily, the facility may be closed down.

Should concern be expressed about any matter relating to the care, protection or development of children, the control, maintenance or good order and behaviour management or the keeping of registers and files, the head of the department responsible for the facility shall be informed of the report. He or she shall also be required to respond in writing to the concerns expressed in the report.

The head of the department will be placed under the obligation to provide a developmental plan, guidance and support to the facility for a stipulated period. After this period a further inspection will

be ordered and reported on within fourteen days. Should the report indicate that the original concerns have not been satisfactorily addressed or remedied, the head of the department will be granted another three months to remedy the situation. As a last option, the facility may be closed down by the Director-General.

The IMC on Young People at Risk initiated a process to develop a quality assurance system. A set of minimum standards was circulated for general comment and discussion during 1998. These have formed the basis for a national programme on 'Developmental Quality Assurance' (DQA) which is being integrated into the line function of the national and provincial Departments of Social Development.

The DQA process requires that (i) the residential facility does an internal assessment, (ii) an independent team assesses the facility over a period of 3 to 4 days, (iii) an organisational development plan is established by the facility's team and the DQA team and agreed upon, and (iv) the DQA team appoints a mentor who continues to support the organisation as they implement the plan.

The DQA and the minimum standards are inextricably linked. The Minimum Standards and the DQA are reflected in the regulations to the Child Care Act. All children's homes, places of care, shelters and places of safety (including facilities maintained and controlled by the state) must be subjected to a quality assurance review with respect to the minimum standards for residential care. This review shall be undertaken by the Director-General and will result in a report and developmental programme.[123] The registration of a children's home, place of care or shelter shall be reviewed every 24 months on the basis of a quality assurance assessment undertaken by appropriately trained officials appointed by the Director-General.[124] Subject to the provisions of the Child Care Act and regulations no children's home or shelter shall be registered or remain registered after 24 months unless the Director-General is satisfied that proper arrangements have been made or will be made for the care, protection and development of each child in the children's home or shelter, in line with the established minimum standards.

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123 Regulation 34A(3).

124 Regulation 30(4).

As a monitoring tool, the DQA is intended to ensure that organisations comply with legislation, policy principles and international instruments and that an effective and efficient service is delivered at least at the minimum standards level. Where violations are identified by the DQA team, the following should take place:

(a) The DQA team leader is responsible for reporting these to the DQA authorities telephonically and in writing within 36 hours. In extreme cases the reporting should be done within 24 hours.

(b) The DQA team is responsible for formulating immediate and medium term actions which will provide protection for the individuals, families, or communities concerned.

(c) The DQA authorities are responsible for ensuring that violations are addressed and that there is close monitoring until the situation is satisfactory.

(d) The DQA authorities are responsible for reporting violations, in writing, to the National or Provincial Government authorities that have oversight with regard to the particular service. The reporting should be done within 7 days, except in extreme cases where this should be done within 48 hours. The national and/or provincial government is responsible for either ensuring that the DQA authorities are empowered to follow through on the violations or for monitoring violations themselves.

(e) Where abuses or extreme violations are identified, the DQA team is responsible for ensuring that the appropriate law enforcement authorities (such as the Child Protection Unit of the Police) are called in and charges are laid.

(f) Where registered professionals (such as psychologists, social workers, teachers or child and youth care workers) have been aware of abuse, or party to the abuse, the DQA provides for the reporting of individuals to their respective councils and to the government authorities for any further legal action. This particularly applies where professionals are required by law to report abuse.

19.10.2 Comments and submissions received

With regard to inspections the worksheet posed the following questions: ‘Does inspection really ensure compliance with the regulations? Are there any other means to ensure that the rights of children are recognised and respected?’

All 3 groups submitted that the inspection of facilities in terms of the Child Care Act is not sufficient to ensure adequate protection of children. The groups were in favour of the DQA process and say there is a need for guidelines in the respective provinces. The majority of respondents supported this view.

Mr Viviers (Department of Social Welfare, Bloemfontein) submitted that although inspections have been conducted for the past 40 years, they have had little effect on the compliance of minimum standards. He stated that these inspections were (and in some cases are) still done by officials who have no experience in residential care and very limited understanding of the programme, which resulted in a focus on the physical conditions rather than programme-related matters and the experience of children. Thus, these inspections were usually experienced as negative, non-empowering and absolutely power-based.

Mr Viviers submitted that the DQA is a suitable alternative to the 'old inspections'. He mentioned that when he conducted DQA at children's home, he experienced the DQA process to be very empowering and that it focused on the child rather than the system. Mr Viviers stated that the primary focus of the DQA is to look at how the service recipients experience the service and whether their rights are respected and protected. The residential care programme is thus monitored in a developmental manner. Further, the DQA is conducted by persons who know the service and the standards that apply to the service. It also shows out which programmes are focussing on the child and serve his or her best interest, and which programmes are harmful towards children.

With regard to the DQA process the following questions were included in the worksheet: ‘Who should the team implementing quality control ideally consist of? What qualifications or experience should they have? Should it be a team representing an objective and an independent organisation? Should it be a team represented by community members, NGOs and government personnel?’

All 3 discussion groups suggested that Government personnel and NGOs with relevant experience should serve on the team implementing quality control. The community and other volunteers could also be involved. Broadly speaking, the individual respondents’ views accorded with this.

Mr Viviers suggested that the composition of the team to do the DQA should be flexible and not

rigid. He would prefer that the new children's statute refer to 'developmental quality assurance process conducted by a team of appropriately trained persons'. Mr Viviers saw the following as important:

- the composition of the team should be based on the kind of facility to be subjected to the DQA;
- the team should be balanced with experienced and qualified persons in child and youth care / residential care services;
- it is essential that one of the team members be a government official (though not necessarily the person who leads the team);
- NGO representatives and community members may be part of the team if appropriate; and
- all persons doing a DQA or involved in a DQA team should be trained in DQA.

The Moses Sihlangu Health Care Centre suggested that the DQA should be conducted by an objective and independent organisation and not by the Department. The respondent submitted that the persons conducting the DQA should be knowledgeable and experienced in the particular field of care. Further, people serving on the DQA team should co-opt a departmental person responsible for the facility and a member from the community in which the facility is located. Also, NGOs should be represented in all DQA's, whether it is a DQA for an NGO or a departmental facility.

Further questions posed on the DQA were: 'How often must quality control take place? Is it necessary to differentiate between a process of internal or external control and will it affect the frequency of quality control?'

Groups 1 and 2 recommended that quality control should take place once every two years and as often as needed in special needs cases. Further, a distinction should be drawn between a process of internal and external control.

The NACCW was of the view that DQA's should be done biennially and whenever there is a need for a DQA. However, the mentoring aspect of the DQA should go on between the evaluations to promote a culture of internal assessment.

The recommendations of other respondents were that the DQA should occur between one and five

years apart, with more regular internal evaluations being undertaken.

Mr André Viviers submitted that the DQA is a developmental monitoring tool and is based on a developmental approach. He stated that internal DQA is an opportunity for the organisation or residential care facility to prepare themselves for the external DQA process and also provide them with the opportunity to evaluate themselves. This is thus valuable to the organisation and contributes to the developmental approach. It was further submitted that the external DQA is done by an external team who conducts the DQA. Mr Viviers said that it is necessary to differentiate between the two processes as they are complimentary processes although different from each other.

An additional question posed was whether commissioners of child welfare or children's courts should have a role to play in the inspection of residential care facilities.

Groups 1, 2, and 3 emphasised that commissioners of child welfare or children's courts should play a significant role in the inspection of residential care facilities. This view was concurred with in the individual responses from Villa Lubet Kinderdorp, Mr André Viviers, and Ms N L T Ngqangweni (Department of Welfare, Bisho).

Ms Cornelius (Department of Welfare, Pietermaritzburg) expressed concern over the fact that some commissioners do not understand the Child Care Act. She submitted that commissioners should only play a role in the inspection of residential care facilities if they are trained to understand the purpose of residential care and the transformation of the child and youth care system.

The Moses Sihlangu Health Care Centre stated that as commissioners are usually overburdened, provision should be made that they visit facilities once a year to meet with the board of management, staff members and children. This will help them to become aware of what is taking place within their area of jurisdiction.

The worksheet raised the question as to whether the Minimum Standards should be reflected in the Act itself or in regulations to the Act.

The groups submitted that minimum standards should be reflected in regulations as these are more

flexible. This view was supported by all the other respondents other than Mr André Viviers. He suggested that the minimum standards should be a schedule to the regulations. The Minimum Standards will thus acquire the force of law while changes to the Standards can still easily be effected.

The worksheet posed the question: 'Is monitoring an independent function or does it form part of the general process of quality control?'

The discussion groups agreed that children should be monitored while in the system. Further, children's homes etc. should be compelled to submit a progress report on children in their care. The groups were, however, divided on whether monitoring should be seen as an independent function or not. Some felt that the DQA process can serve a monitoring function whilst others were of the view that monitoring is an independent function. The establishment of a child care control unit was proposed. This unit should be tasked with the monitoring of children in the system. The views of the Villa Lubet Kinderdorp and the Nelspruit Displaced Children's Trust accorded with this general view.

Ms Cornelius (Department of Welfare, Pietermaritzburg) suggested that monitoring should take place internally first, i.e. management should ensure that the plan / programme for each child is implemented. Further, monitoring can also form part of external quality control such as the DQA process. Ms N L T Ngqangweni (Department of Welfare, Bisho) submitted that children should be tracked and monitored while in the system. This can be done by canalizing officers and through an administrative process. Mr Viviers stated that DQA is a monitoring process and that there need not be a separate monitoring process.

The Moses Sihlangu Health Care Centre submitted that DQA is both an independent function and part of quality control. The respondent stated that although monitoring is done by a facility, that facility should still be monitored through DQA as internal monitoring may be poorly done. For instance, some developmental assessments and care plans are poorly done, if at all. They are also not implemented or adjusted in some institutions and this is to the detriment of children. The respondent mentioned that developmental assessment and care plans require a minimum of 10 hours with a child and additional hours are required for the parents. A further few hours will also be required for implementation and adjustment. The respondent, however, emphasised the

importance of funding and personnel.

The NACCW recommended that in addition to the DQA there is still a need for an independent ombudsman or other similar person or body to provide the overall monitoring of the entire process and in this way ensure that the state fulfils its responsibility to protecting children in the system.[125]

At a meeting of specialists it was agreed that the residential care programme of all registered facilities must be subjected to a DQA at least every 36 months. In this context it was pointed out that the DQA process is intended to provide for the monitoring of the programmes offered on an ongoing basis, while an inspection is an once-off undertaking. It was also noted that the DQA process is supposed to include a 'mentoring' aspect, as follow-up after the quality assurance visit, and it was agreed that this aspect should be included in the description of the DQA process in the proposed legislation.

The meeting also discussed the issue of an over-arching mechanism to protect children in residential care. It was suggested that children in custody or residential care should have direct access to a small structure with the power to commission investigations of its own accord and on the basis of complaints received. It was recommended that an independent body should be established outside the Department of Social Development due to the fact that there are difficulties with government monitoring itself.

19.10.4 Evaluation and recommendations

Having considered the various submissions with regard to the Developmental Quality Assurance (DQA) processes, **the Commission is of the view that the DQA processes as being currently tested by the Department of Social Development will form a more appropriate monitoring process than the current inspection procedures do**.

The Commission recommends, therefore, that the DQA process be included in the proposed legislation, with the detail relating thereto to be contained in regulations. It is further

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[125]This was also the recommendation of the Law Commission of Canada report **Restoring Dignity: Responding to Child Abuse in Canadian Institutions**, p. 245.

recommended that every residential care programme of all registered facilities must be subjected to a DQA at least every 36 months. It is recommended that every DQA should be conducted by a team of appropriately trained persons appointed by the Director-General: Social Development. The majority of the members of the team should have expertise in child and youth care. The team should consist of no less than 2 but no more than 6 members. At least one member of the team must be an independent person not in the full-time employment of Department of Social Development. The Council for Social Services Professions should keep lists of such independent persons and they should receive remuneration as is agreed upon by the Minister of Social Development in consultation with the Minister of Finance. **It is also recommended that the DQA process should include a 'mentoring' aspect, as follow-up after the quality assurance visit**. One member of the DQA team or a person agreed upon by them should be appointed to act as a mentor to the facility until such time as the next DQA takes place. The role, qualifications and remuneration of the mentor must be provided for in the regulations to the proposed legislation.

In order to ensure that residential facilities do not get left without funding due to the fact that the DQA has not taken place, **the new children's statute must be clear about the fact that it is the responsibility of the Department of Social Development to ensure that the DQA is carried out every 36 months. There should be a clause which provides that should the Department fail to complete the DQA within this period, the current funding arrangements made by the Department to the facility will continue until such time as the DQA has taken place, and that the DQA must take place within 6 months of the expiry of the 36-month period**.

The Commission has also considered the suggestion that there should be some sort of 'ombudsman' or other independent figure or body which could, together with the DQA process, provide a protection mechanism for children in residential care. **The Commission supports the view that an independent body should be established outside the Department of Social Development**. It is recommended that the members of this independent structure should be appointed by the Minister from nominations received for a 5 year period. The structure should prepare an annual report for tabling in Parliament. A further suggestion was made that copies of all DQA reports need to be filed with this independent structure. The structure can then scrutinise the DQA reports, launch investigations, commission research, visit and inspect facilities, and

monitor DQA investigations.[126]

19.11 Funding of residential care

19.11.1 South African Law and Practice

Of the total amount budgeted for welfare services, 87% is spent on residential services and facilities. However, most of this goes to residential care for the aged (old-age homes). It is recognised that residential care programmes are expensive[127] services and the standards set for these programmes need to be reviewed. Facilities are generally not used as multi-purpose centres and are often inappropriate to the needs of people in informal settlements, large urban township and rural areas.

It is hoped that the planned transformation of the child and youth care system will address these problems. It is intended that over the next 5 to 8 years funding with respect to residential care in both the government and non-government sector should be decreased.[128] It is proposed that this decrease in spending should correspond with an increase in spending with regard to prevention and early intervention measures. This assumes that during the period of transformation rationalisation of residential care services will take place, ensuring that only those centres which are operating within defined practice guidelines based in nationally defined minimum standards, which can demonstrate effectiveness and efficiency, and which are offering programmes needed by the community, will continue to be funded.

The **Financing Policy for Developmental Social Welfare Services** echoes some of the ideas expressed in the **White Paper for Social Welfare**, particularly the recommendation that funding in residential care should not be a unit or per capita cost, but should focus instead on programmes which demonstrate relevance and effectiveness and which are regularly evaluated within the quality assurance process. The quality assurance system is inextricably linked with funding and should

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[126]See also Chapter 24 on monitoring below.

[127]See IMC **In whose best interests? Report on Places of Safety, Schools of Industry & Reform Schools**, p. 7 -8.

[128]See 10.2.8.3 above for a criticism of this plan.

apply to both government and non-government programmes.

The **White Paper for Social Welfare**, published in February 1997, provides the following guidelines for financing of social development programmes:

a. The National Department of Social Development will be responsible for the development of national guidelines on the financing of welfare programmes. The guidelines will be developed in consultation with stakeholders.

b. The Departments of Social Development will facilitate the fundamental restructuring of the financing of welfare services. This will include capacity building initiatives in order to facilitate the changes.

c. All systems and administrative and accountability procedures must be user-friendly and efficient.

d. The financing of social welfare programmes will be based on approved business plans. Standard business plans will be developed to be used by all the provinces.

e. Government will finance welfare services according to the current formula during the change from one system to another. Pending the outcome of the guidelines on the financing of welfare programmes, interim arrangements will be devised in consultation with relevant parties. The criteria which will be relied upon for the reprioritisation of current programmes will be agreed upon on a national basis.

f. The lack of financial management and policy capacity at the national and provincial levels needs to be addressed in order to ensure the effective delivery of programmes.

The **Financing Policy**, published in 1998, follows the recommendation in the **White Paper for Social Welfare**, namely that funding in residential care should not be per-capita cost but programme-cost based. For this purpose three categories of service delivery are identified and programmes represent an essential component in each of the categories. Each category will have generic plus special financing criteria and minimum standards applied to it. Each category will also

be subject to service level agreements and the DQA.

These categories are as follows:[129]

a. Category A: Direct Services. These services are defined as holistic and effective direct services to children, youth and families and /or women and or older persons at one or more of the service delivery levels. These services could be delivered by NGO's, CBO's, local and provincial governments. Programmes are one of the main vehicles for achieving the mission and would be specific to this category.

b. Category B: Policy, management, co-ordination and monitoring of services: These would be holistic and effective services to organisations and departments providing services to children, youth, families and/or women and/or older persons at one or more of the service delivery levels. The services would be delivered by the national and provincial head of offices of the Department of Social Development and NGO's. The broad aim is to maximise and monitor transformation, development, effectiveness and efficiency of social welfare service offices and the organisations affiliated to the national and provincial NGO's. It is envisaged that strategies, programmes and projects would be the main vehicle to achieve the aim.

c. Category C: Capacity Building and/or research services and/or advocacy. These support services would be directed at welfare sector service organisations (including the Department of Social Development) and social service personnel across the broad range of disciplines. Such services would be delivered by national and/or provincial Departments of Social Development, and / or by national and / or provincial NGO's. Here the broad aim would be to maximise the transformation, development, effectiveness, and efficiency of social welfare service departments and organisations, as well as social service personnel, and/or provide research information on trends, needs and policy directions as required by the sector or departments or NGO's, and / or advocates for children's rights. Strategies, programmes and projects would be the main vehicle of achieving the aim and would be of a particular nature for this type of service.

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129 **Financing Policy for Developmental Social Welfare Services** (1999) 19-21.

Each of the categories would be delivered within a service basket. This service basket must have a certain content[130] in order to be financed and would be monitored within the DQA.

There are several financing options available which will be applied in combination or on their own:[131]

° **Differentiated financing of services**

This kind of financing may be applicable in instances where residential facilities render their own family reunification services.

° **Financing in phases**

The condition will inter alia be that transfer payments for a next phase will only be processed after a DQA process for the previous phase has been finalised. This will also include submission of monthly financial statements and audited financial reports.

° **Financing to support early development of a programme or project**

In instances where a service is in the early stages of development but is not yet able to qualify for financing according to criteria set, grant financing may be considered. This will also be applicable to projects which only need seed money and who will ultimately be self sustainable.

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130 The **Financing Policy** (1999) p. 23 provides that the service basket must include :

a. Strategies, project and programmes
b. Staffing/salaries
c. Stationery, fax and telephones
d. Staff development
e. Equipment
f. % Fixed assets.

131 **Financing Policy** (1999) p. 23-24.

° **Project financing**

In instances where specific short-term projects form part of a broader service, financing linked to specific project objectives may be considered.

° **Transfer of lump sum**

Consideration will be given to the transfer of substantial funds where projects have proven credibility and are subject to a contract. This will enable the service to utilize the interest as additional income.

° **Linking social assistance**

Social assistance, i.e. foster care grants, should be linked to service delivery by making a cluster grant payment available to a community caring for children at risk.

° **Outsourcing**

In instances where government identifies the need for services in specific areas, it may outsource the service by means of a tender procedure.

° **Venture financing**

In instances where service deliverers wish to start new innovative services, venture financing may be considered.

° **Service purchasing**

When applicable, Government can also purchase services from service deliverers.

As financing policy and practice represent one of the three cornerstones in the DQA process, the DQA is seen as the core monitoring tool for ensuring that financing is spent wisely, efficiently and effectively and that the maximum benefit is derived from financing.

Financial sanctions will be applied on the basis of a DQA process and can mean that financing is terminated, reduced or not renewed. The circumstances which justify sanctions are outlined in the **Financing Policy** and are as follows:[132]

(a) Failure by an organisation to reflect the principles within their service delivery.

(b) Failure to comply with and maintain principles and minimum standards once a DQA has indicated that an organisation has the resources and capacity to do so.

(c) Where an organisation does not show growth in transformation shifts, in implementing principles throughout service delivery and towards functioning of minimum standard level within a six-month period following the initiation of the Organisation Development Plan.

(d) Failure to comply with the Constitution, all relevant legislation and regulations, and all relevant international instruments.

(e) Failure to report a violation of rights or the abuse of children, women, or older persons and failure to deal effectively with any social service personnel who fail to report abuse or participate in violation of rights and abuse.

(f) Failure to deliver the service level agreement outcomes.

(g) Where an organisation knowingly permits, supports or perpetuates activities which are physically, emotionally, or sexually abusive of service recipients or staff, or which violate rights of service recipients as indicated in the Constitution and the various international instruments.

Although it is possible to restore financing on application it is a time-consuming process. In the interim period, it is the children in the residential care facilities who will be the victims of lack of funding.

19.11.2 Comments and submissions received

The Welfare **Financing Policy** echoes the recommendation in the **White Paper for Social Welfare** that funding in residential care should not be per capita-based but programme-based.

The following questions were posed: 'Will programme-based funding rather than per capita funding be more effective? What are the basic concerns / advantages / disadvantages?'

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132 **Financing Policy** (1999) 37-38.

Most of the discussion group participants seemed to be in favour of programme-based funding as they believed that this would force facilities to adopt certain programmes. The Nelspruit Displaced Children's Trust, Ms N L T Ngqangweni (Department of Welfare, Bisho), the Moses Sihlangu Health Care Centre, and the NACCW supported this view.

Mr André Viviers added that programme-based funding will be more effective than per capita funding. He mentioned that programme-based funding has been tried in the Free State Province and it was found that 79% of the programme cost was funded, compared to the 65% of the per capita cost that was funded. There was also a 10% to 15% reduction in the number of children in children's homes. Mr Viviers stated that programme funding allows children's homes to be creative and innovative with their programmes and the number of children or being filled to capacity does not influence financing any more. This will also ensure that children's homes do not 'cling' to children to ensure that they do not struggle financially.

Ms Cornelius of the Department of Welfare, Pietermaritzburg, differed slightly from the other respondents, suggesting that a combined approach regards per capita funding and programme funding should be followed. She proposed that there should be a basic per capita grant which will cover the child's physical needs, where after extra funding can be made available for programme funding.

Children are accorded certain constitutional rights.[133] The progressive realisation of constitutional rights such as the right to appropriate care when removed from the family environment has huge financial implications. A question raised in this regard was: 'Can the lack of sufficient funding to realise these constitutional rights of children be regarded as a justified infringement (limitation) of those rights?'

Some discussion groups viewed the lack of sufficient funds as a justification for the infringement of the constitutional rights of children. However, the point was made that the state should ensure that programmes are comprehensively funded. Other discussion groups did not see the lack of sufficient funds as a justification for such an infringement of children's rights.

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[133]See also Chapter 4 above.

Mr Viviers (Department of Social Welfare, Bloemfontein) answered the question in the affirmative, but added that children in care are wards of the state and the state must ensure that adequate resources are available to afford these children their basic rights. Further, as the state has the authority to intrude into the lives of the child and his or her family, it also has the responsibility to ensure that sufficient resources are available to take care of these children through programmes, etc.

The Moses Sihlangu Health Care Centre submitted that the most important needs of the child need to be prioritised, and priority should be given to the transformation of existing care facilities by developing adequate programmes that will cater for the individual problems of children. To achieve this, professional caregivers and social workers must be 'transformed'.

A further question was: 'To what extent should questions of funding be addressed in legislation?'

The discussion groups recommended that the Commission should propose legislation on the principles of funding and that the state's obligation to care for and maintain children should be made clear in the new children's statute. Concern was, however, expressed over the way funds are distributed.

Mr Vviers of the Department of Social Welfare, Bloemfontein submitted that funding should to the fullest extent be addressed in legislation. Further, he said the legislation should indicate what the state's obligation is with regard to funding of residential care programmes and should set out the minimum requirements so that they are uniformly applied for all residential care programmes.

The Moses Sihlangu Health Care Centre argued that the question of funding should be addressed fully in legislation so that no demands may be made on NGOs without providing the necessary funds. Further, NGOs are failing to comply with new requirements due to the lack of personnel. Thus, by legislating on funding, NGOs will be protected from being accused of not performing adequately. In addition, legislation should ensure that the same salary scale is used for NGO employees as that of government employees when a service plan is presented.

At a meeting of specialists it was agreed that the primary legislation should include an unambiguous provisions setting out government's obligation to financially support the placement of children in

appropriate alternative care placements.

19.11.3 Evaluation and recommendations

The Commission recommends that the funding principle that the proposed legislation should endorse and be informed by is that funding of residential care will be based on programme *and* per capita funding. The per capita funding must be such as to ensure that the needs of the child in that residential care facility can be met in order to give effect to the State's constitutional obligation to care for that child placed by the State in statutory care. The balance between programme and per capita funding should be managed in such a way as not to endanger viable residential care service providers or children being accommodated in these facilities. This can be achieved through appropriate transitional arrangements.

The fact that funding of residential care programmes will be closely linked to the Developmental Quality Assurance (DQA) process is another important principle which should emerge clearly through the proposed legislation. The new children's statute should make it clear that the constitutional right of children to be provided with appropriate alternative care when removed from the family environment should be the key principle,[134] and lack of funding, the failure to have carried out a DQA and other impediments cannot compromise the child's right to state funded care.[135]

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[134] Article 28(1)(b) of the Constitution of South Africa Act, Act 108 of 1996.

[135] See also **Government of the Republic of South Africa v Grootboom and others** 2000 (11) BCLR 1169 (CC), 2001 (1) SA 46 (CC). See further the discussion in section 4.2 below.

CHAPTER 20

RELIGIOUS LAWS AFFECTING CHILDREN

20.1 **Introduction**

Issue Paper 13 covered the topic of religious laws affecting children in a fair amount of detail and a short summary of the main points raised should suffice.[1] Interestingly enough, only the section on Muslim personal law elicited strong and forceful responses.

As stated in Issue Paper 13,[2] the Committee believes that it is necessary to ensure non-discrimination with regard to different groups of children, addressing especially the cross-cultural conflict of laws that may arise for children subject to one or another religious or customary legal system. The model proposed by the Committee saw a future child law system in which core children's rights and concerns are equally respected and protected, independent of the system of personal law in which a child is raised, while at the same time ensuring that the State honours to the maximum extent the cultural and religious rights of children and families. [3]

20.2 **Hindu law**

There is little evidence of South African Hindus practising Hinduism according to any particular school. By and large, Hindus here follow the civil law of the land and do not feel bound by Hindu law - one exception, however, is that most Hindu couples do go through a traditional marriage ceremony. For most Hindus, the marriage ceremony, bestowing as it does the duties and responsibilities of procreation, is seen as the central religious event of a person's life. Marriages are often still arranged, but there is now more consultation with the young people involved, who can usually veto a proposed union.

The birth of a child is likewise a highly ritualised event. As in India, the child is born into the extended family, and there are specific roles after the birth for the various members of that family. The child's status and 'location' at birth are not determined by chance. In the causal

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[1]Chapter 9.

[2]Paragraph 2.5.

[3]See also Elsje Bonthuys and Marius Pieterse >Divorced parents and the religious instruction of their children: *Allsop v McCann*= (2001) 118 **SALJ** 216.

system of karma and reincarnation, one is born into a certain family, at a certain time and place, and equipped with particular physical and psychological characteristics, because of one's actions in previous lives.

The Secretary of the South African Hindu Maha Sabha, Mr Rugbeer Kallideen stated in his response to a question on the move away from an emphasis on parental power to parental responsibilities that the ancient parental power *ius vitae necisque* certainly cannot apply to the present world. He said parents are responsible for the birth, and hence for the nurture and general development of children into members of society. As a consequence, 'parental responsibilities' have to over-ride parental powers, unless the best interests of the child would be demonstrably prejudiced by the denial of the power'. Mr Kallideen stressed the latter aspect and said a new children's statute must certainly deal with, or take into account, customary and religious laws affecting children in order to arrive at an effective formula for serving the best interests of the child.

In Issue Paper 13, the question was posed as to how the caste system affect children in South Africa.[4] Referring to the fact that the caste system has been abolished in India, the SA National Council for Child and Family Welfare submitted that this system is disintegrating fast in South Africa. The Council said that the Indian community of Hindu origin, especially the younger generation, does not accept the caste system. The respondent submitted that having practised social work for many years with all sectors of the Indian family, there was hardly ever a case where a child's caste was the cause of concern.

The NICC does not consider the caste system to be a serious problem in South Africa. The Johannesburg Institute of Social Services likewise remarked that the caste system is hardly ever practised in South Africa and therefore does not affect children's lives as such.

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[4]Question 95.

In response to another question in Issue Paper 13,[5] respondents were hard-pressed to identify Hindu practices in South Africa concerning children that conflict with the CRC and the Constitution.[6]

The SA National Council for Child and Family Welfare could not conceptualise any situations that will result in conflict with the CRC and the Constitution. If there are situations, it was submitted, these can be rectified by education. The Council submitted that if caste is used as criteria then it is due to lack of knowledge.

The Johannesburg Institute of Social Services remarked that although the practices of the various cultural groups in South Africa should be respected, the protection of children should take priority. The Institute said generally Hindus practice the believe that children should be nurtured, protected and raised with respect and pride and these responsibilities together with teaching the child positive values, are the responsibility of parents and the immediate extended family members. The gradual deterioration of such support systems, it was submitted, and the increasing continuous poor socio-economic climate, is resulting in more children being placed at risk.

20.3 Evaluation and recommendation

[5]Question 96.

[6]The ATKV merely points out that a child's rights according to Hindu religious customs may be contrary to the CRC and the Constitution, while the Natal Society of Advocates submits that ideally under the Constitution the caste system should not affect children in South Africa.

From the responses and our own investigations it would appear that the caste system is not affecting children of South African Hindu religion. Nor would it appear that there are Hindu practices concerning children that conflict with CRC or the South African Constitution. For the record, however, **the Commission states its opposition to any religious practices that would be harmful to children and in conflict with our international legal obligations or our Constitution**.

20.4 Jewish religious law

The Commission did not receive any submissions to the effect that the rights of children living under Jewish religious law are in potential conflict with the fundamental principles (of protection, equality and non-discrimination) underpinning our new children's statute.[7] For the record, however, we would like to point out one effect on Jewish children born after the civil divorce and subsequent civil re-marriage of the mother where the mother has failed to obtain a *get* to end the first marriage.[8]

When a Jewish couple, in addition to a civil marriage, marries in terms of Jewish religious law, a divorce will be acknowledged by the religious community only when the husband[9] gives his wife a Jewish ecclesiastical bill of divorce (a *get*), under the supervision of the Jewish Ecclesiastical Court (the Beth Din). If the husband refuses to do so, the wife will remain married in the eyes of her religious community despite a civil divorce and subsequent civil marriages will be regarded as adultery.[10] Children born from later civil marriages will be illegitimate in terms of Jewish law and may only marry other illegitimate Jewish people or converts to Judaism.[11] This does not

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[7]Although the issue of male circumcission according Jewish religious rites was frequently raised.

[8]On the difficulties in obtaining a *get* and the steps taken to address these, see M Blackbeard >To Get - Or not to get a Get?= (1994) 57 **THRHR** 641; M W Friedman >Jewish divorces - A purposeful and pragmatic solution by the South African Law Commission= (1994) 111 **SALJ** 97; S A Law Commission Project 76: Report on Jewish divorces, October 1994; section 5A of the Divorce Act 70 of 1979.

[9]Note that it is also possible for a Jewish wife to refuse to accept the *get* and thus to keep her husband married in terms of Jewish law. See Elsje Bonthuys >Obtaining a get in terms of section 5A of the Divorce Act: *Amar v Amar*= (2000) 117 **SALJ** 8.

[10]Nathan Segal >The enforcement of an agreement to grant a get or Jewish Ecclesiastical Bill of Divorce= (1988) 105 **SALJ** 97 at 100 - 101.

[11]Sandra Burman and Sally Frankental >@Unto the Tenth Generation@: Jewish Illegitimacy= in

seem to cause any problems as the children born from such later civil marriages are not regarded as 'illegitimate'[12] in terms of the civil law.

20.5 Muslim law

20.5.1 Introduction

Sandra Burman and Eleanor Preston-Whyte (eds) **Questionable Issue: Illegitimacy in South Africa** (1992) 116.

[12]In terms of the Children=s Status Act 82 of 1987, the correct term for >illegitimacy= in South Africa is actually >extra-marital=. For a discussion of the current status of extra-marital or illegitimate children in South African law, see J A Robinson (ed) **The Law of Children and Young Persons** (1997) 42ff.

The Commission would like to emphasise that it is not for it to make pronouncements on the correct interpretation of the *Qur'an* or the *Shari'a* or to codify Muslim personal law.[13] Its task is simply to provide the best possible protection for all children in South Africa within the ambit of the Constitution and our international legal obligations. In any event, aspects related to the possible recognition of Islamic marriages and related matters such as divorce, custody and guardianship of minor children form the subject matter of a separate Commission investigation.[14]

20.5.2 **Submissions received**

As alluded to in the introduction to this Chapter, the section on Muslim law as it affects children in Issue Paper 13 elicited considerable response. The response was mainly directed to questions 97 and 98 posed in Issue Paper 13. Question 97 reads as follows:

> What aspects of MPL (Muslim Personal Law) need to be reformed in order to accord with constitutional and international imperatives?

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[13]The Project Committee on Islamic Marriages and Related Matters is investigating this particular aspect. See **Project 59: Islamic marriages and related matters**.

[14]See **Issue Paper 15: Islamic Marriages and related matters** (May 2000) for more detail on this particular investigation.

The Johannesburg Institute of Social Services argued that Muslim personal law cannot be reformed. Referring to the four major Islamic schools prevalent in this country and the jurisprudence of these schools insofar as the rights and obligations of children are concerned, the respondent submitted that there can only be interpretation of aspects of this jurisprudence. Reform insofar as these schools of jurisprudence are concerned, amounted, according to the respondent, to apostasy. The respondent further referred to the fact that none of the judicial authorities responsible for giving rulings in matters of Muslim personal law has ever succeeded in obtaining compliance in disputes involving two or more parties. The respondent held the view that it will be impossible to obtain this approval of the Muslim community in South Africa for any formulation of Muslim personal law - whether it is done by the secular authority or by any judicial authority of the adherents of one of the Islamic schools of thought. The respondent concluded by stating that religious and cultural concepts and traditions are group rights whereas individual rights should take preference in children's legislation.

Advocate M A Vahed, senior lecturer in Islamic law at the University of Durban-Westville, stated that in order to determine what aspects of Muslim personal law need to be reformed, the following should be considered:

1. A committee of Muslim experts should be established to look into this question and to advise the Commission accordingly. In this regard it is imperative that the committee comprise both Muslim lawyers and academics who are conversant with both South African law and the Shar'iah as well as Ulema representatives.

2. The proposed children's statute should be submitted to the Muslim community for perusal prior to its promulgation. Advocate Vahed submitted that one of the reasons for the above-mentioned suggestions is to address the question of a legal methodology of reform. There has to be a systematical rationale for reform which must be positively rooted in Islamic values and the Shar'iah. Only if this is done will possible reforms be truly accepted by the Muslims of South Africa. If the reforms are not based on a systematic methodology whose roots can be demonstrated, they will inevitably come under heavy fire from the masses of the Muslim population who tend to be more conservative in outlook. This has been the experience with attempts to reform Muslim personal law in both Egypt and Pakistan.

The Jamiatul Ulama-Transvaal and the United Ulama Council of South Africa (hereafter referred to as the ‘Ulama Council’) submitted a joint comment. They submitted that to reform Islamic law in order to accord with constitutional and international imperatives will entail colouring Islamic law with secular and western values which is impossible. It was submitted that when interpreting the Constitution and international law, one must keep in mind the importance of cultural relativism and one should stop looking at legal documents through the spectacles of the

western world only. According to the Ulama Council, what may be perceived as apparent differentiation in relation to aspects of Islamic family law, is in fact rationally based and accords with the quality and guarantees embodied in the new Constitution. The essence of Islamic law, it was contended, is to avoid injury, harm or prejudice to another human being and its only rationale is absolute justice. Islamic law encourages and reaffirms universally accepted fundamental rights. The respondents contended that Muslims believe that Islamic law is revealed law, it is an immutable law, it is not relative, the *Qur'an* emphatically censures those that attempt to reform divine law and that the Qur'anic concept of sovereignty is simple. In the respondents' view the afore-mentioned explicitly prohibits Muslims from attempting to reform Islamic law, thus Muslims will in no way subscribe to reformed Islamic law.

The Natal Society of Advocates submitted that any aspects of MPL which conflict with the Constitution and international imperatives in relation to children should be reformed. The NICC referred to laws affecting children born of polygamist marriages, adoption rights of the father, maintenance and access or custody of children in this regard. The Cape Law Society, supported by the Durban Committee, were of the view that various aspects of MPL need to be reformed, for example custody, access, the age of majority, guardianship, succession and maintenance. It was pointed out that there needs to be equality between females and males.

Mrs J Smith asserted that it is not the function of the state to reform any religious systems of belief, and referred to section 15 of the Constitution which guarantees freedom of religion, belief and opinion in this regard.

Question 98 in Issue Paper 13 reads as follows:

> Should MPL (Muslim Personal Law) be codified and or should the fundamental principles underpinning a new children's statute be made sensitive to and compatible with MPL affecting children? If so, how?

Regarding the first part of the question, that is whether MPL should be codified, Advocate Vahed argued against such codification. Pointing out that the Qur'an was revealed over a period of approximately 23 years and that although 500 to 600 verses of the *Qur'an* deal with laws out of a total in excess of 6000 verses, no attempt whatsoever was made during all of this period to codify the revealed laws or to rearrange or arrange the verses according to their subject matter. The respondent stated that the conclusion to be drawn is that no authoritative codification of the revealed law in any language is permissible. He said there are two reasons

for the prohibition of codification. The first is that codification by a particular ruler or government will generally revolve around his or its particular inclination or view of the revealed law. Such a code may sometimes have the dominant purpose of protecting or strengthening his or its political designs rather than advancing the cause of Islam. Successors of rulers or governments may thus change the previous codification to suit his or its peculiar requirements and this endless process may ultimately disfigure or dismember the *Shar'iah*. Advocate Vahed submitted that the second reason against codification lies in its rigidity. The experience with some recent codifications of Muslim countries is that the codes are based on a particular school of law. The choice of the school is at the discretion of the ruler. Many of these codes make use of the opinion of jurists belonging only to that school to the total exclusion of all other jurists. If the MPL were to be codified in South Africa, Advocate Vahed posed the following questions:

1. Which of the two schools of law (the *Shafi'e* or the *Hanafi* school) should such a code be based on?

2. Should there be two codes, one based on *Shafi'e* law and the other on *Hanafi* law - each applicable to its own sphere of influence?

3. Should all four schools of law be considered in drafting the code?

Regarding the second part of question 98, namely, should the fundamental principles underpinning a new children's statute be made sensitive to and compatible with MPL affecting children, Advocate Vahed answered the question, in regard to those aspects of MPL which owe their source to the revealed text and which are accordingly unchangeable, in the affirmative. He said there is a distinct need for the state to show an awareness that legislation purporting to regulate important areas of social life like, in this case, children's rights be sufficiently flexible to accommodate both customary and Islamic law. The respondent contended that in this regard efforts should be made to recognise those aspects of MPL especially relevant to children, thus, as a start, Islamic marriages should be recognised as valid marriages under South African Law. This would overcome the present problem of illegitimacy faced by many Muslim children with its attendant disadvantage. Similarly, the Succession Act of 1934 should be amended to provide that the estate of a deceased Muslim who dies intestate be distributed in terms of the Islamic law of succession. This will alleviate the present problem of the exclusion of Muslim children from inheriting under certain circumstances under the South African law of instate succession. In the event of those aspects of MPL affecting children being amended, Advocate Vahed stated that the question that needs to be addressed is what if such recognition is inconsistent with the Bill of Rights. The solution to this problem, it was submitted, lies in section 28(2) of the

Constitution itself which reads that a child's best interests are of paramount importance in every matter concerning the child. Advocate Vahed said that it would not be difficult to prove that it would be in the Muslim child's best interests that his or her rights be judged according to Islamic law and not according to South African law.

The Ulama Council contended that there is no need to codify MPL. It was pointed out that there are various countries in the world where the MPL has not been codified. The Islamic judicial system is entrusted with solving problems pertaining to MPL. The respondent pointed out that the concept of codifying and reforming Islamic law has been documented and propagated by many orientalists with a view to distort historical facts and to change the Islamic law. The codification that took place was under the pressure of colonial powers to have a better control over Muslims. The respondent cautioned that this should not happen in our democratic South Africa. Codification of MPL will curtail the elasticity in Islamic law. Referring to the fact that the main texts for Muslims are the *Qur'an* and *Sunnah*, it was submitted that there is no need for further codification. Codification will also lead to judicial problems because of the heterogeneous nature of the Muslim community. The respondent concluded that it is thus better to avoid MPL codification as all the rights given to children in section 28 of the Constitution are consistent with Islam, though the interpretation and limits of these rights may differ. While reiterating that there is no need to codify MPL, the respondent proposed that at the same time any new children's statute must contain provisions to ensure that the Islamic laws relating to child care issues are properly complied with.

The Ulama Council also severally criticised the text as contained in the Issue Paper from pages 109 to 115. It was argued, for instance, that there are much more than 80 verses of the *Qur'an* which deal with legal matters and that to claim that 'most of the approximately 80 verses pertain to personal laws of family and inheritance' is another deviation from the reality of Islamic law. Having criticised several aspects of the text as reflected on the pages referred to, the Ulama Council submitted that it would be appreciated if in future the Commission could substantiate the points regarding Islamic issues by quoting genuine Islamic sources and authorities. It was pointed out that besides footnotes 17, 25 and 28 in the Issue Paper, not a single Muslim scholar as an authority can accept a single reference of the Commission.

The NICC merely recorded that sensitive handling is necessary. The Natal Society of Advocates contended that it is unnecessary to codify MPL except that laws relating to children should perhaps be applied sensitively to and in a manner compatible with MPL. The respondent

reiterated the principle of the best interests of the child and that it should never be compromised.

The Cape Law Society, supported by the Durban Committee, suggested that the fundamental principles underpinning the new children's statute should be made sensitive to and compatible with MPL affecting children, insofar as it does not conflict with the Constitution. The most important consideration should be the best interests of children. The Society said Muslim marriages would have to be recognised.

20.5.3 Conflicts between Islamic law (*Shari'ah*)[15] and South African law relating to children

From the literature[16] and the submissions received it is clear that there are numerous instances where the Muslim child's rights in terms of the *Shari'ah* are in conflict with the rights of the child when judged by foreign standards. To illustrate this point, Advocate M A Vahed cited the difference in the age of majority between the *Shari'ah* and South African law:[17]

> In terms of South African law full majority status is normally acquired for both males and females when the age of 21 (years) is reached. See s 1 of the Births and Deaths Registration Act 51 of 1992. In terms of the *Shari'ah* a male attains majority at the first appearance of *Ibtilam* (discharge of semen) and a female attains majority at the first appearance of *Ibtilam* (menstruation). It is generally accepted that the earliest age of *Ibtilam* for a male is 12 years and for a female is 9 years. In the event of the non-appearance of *Ibtilam* for either of them, both the male and female are presumed to have attained majority at the age of 15 years. See ***Al-Hadis*** being the English translation of *Mishkat-ul-Masabib* by Maulana Fazlul Karim (vol 2) 1939 724-5; Tanzil-ur-Rehman **A code of Muslim personal law** (vol 1) 1984 62-3. According to Mufti E Desai of the Jamiatul-Ulama (Body of Theologians) Kwa-Zulu Natal, although a Muslim child has attained physical maturity at the first appearance of *Ibtilam* or at the age of 15 in the

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[15]For a discussion of the terms >Muslim Personal Law= and Islamic Law (Shari=ah), see Najma Moosa >Muslim Personal Laws affecting children: Diversity, practice and implications for a new children=s code for South Africa= (1988) 115 **SALJ** 479 at 479 - 480 and >Human rights in Islam= (1998) 14 **SAJHR** 508 at 509 -510.

[16]See, for instance, Najma Moosa >Muslim Personal Laws affecting children: Diversity, practice and implications for a new children=s code for South Africa= (1988) 115 **SALJ** 479 at 483 et seq; M A Vahed >Should the question: AWhat is in a child=s best interests?@ be judged according to the child=s own cultural and religious perspectives? The case of the Muslim child= (1999) XXXII **CILSA** 364 at 365.

[17](1999) XXXII **CILSA** 366, fnt 10.

absence of the appearance of *Ibtilam*, it does not mean that the child is invested with full contractual capacity at that age. The *Shari'ah* has laid down detailed rules in this regard.

Advocate Vahed then pointed out some of the conflicts created by this difference. These are:

- **Legal capacity to administer own affairs**. A person may have legal capacity to act according to the *Shari'ah* while still being a minor in terms of South African law.

- **The age of consent to marriage**. In Islamic law marriage is permitted from the age of puberty onwards.[18]

- **Legitimacy of children**. Non-recognition of Muslim personal law in South Africa means that marriages solemnised according to Islamic law are not recognised by the state. Consequently children born of such marriages (and therefore legitimate in terms of Islamic law) are considered to be born out of wedlock.[19]

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[18]Najma Moosa (1998) 115 **SALJ** 479 at 490. See also **Issue Paper 15: Islamic marriages and related matters**, May 2000 p. 11 et seq.

[19]In terms of section 1(c) of the Child Care Amendment Act 96 of 1996, the term >illegitimate= is replaced by the term >out of wedlock=. However, the substantive legal status of, for example, children born of marriages by religious rites remains unaffected. See Julia Sloth-Nielsen and Belinda van Heerden >Putting Humpty Dumpty back together again: Towards restructuring families= and children=s lives in South Africa= (1998) 115 **SALJ** 156 at 157.

- **Guardianship**. Islamic jurisprudence recognises the father alone as the natural guardian of his minor children.[20] The Guardianship Act 192 of 1993 provides for equal and independent guardianship by the parents of a child born in wedlock.[21] Further, majors under Shari'ah may require guardians under South African law.

[20]Najma Moosa (1998) 115 **SALJ** 479 at 490.

[21]See further Belinda van Heerden and Brigitte Clark >Parenthood in South African law - Equality *and* Independence? Recent developments in the law relating to guardianship= (1995) 112 **SALJ** 140.

- **Inheritance**.[22] Persons entitled to inherit under the *Shari'ah* may be requested by the Master to have their inheritance paid into the Guardians' Fund in terms of South African law. This brings with it its own problem in that monies left in the Guardians' Fund earn interest, which is not permitted under the *Shari'ah*.

20.5.5 Evaluation and recommendation

Since South African law is the norm by which the Muslim child's rights must be judged, this law will always take precedence in the event of a conflict between the two legal systems. This, however, is clearly in conflict with the Muslim child's right to freedom of religion and his or her right to be allowed to practice his or her religion.[23] The crux of the question is whether it could be in the Muslim child's best interests that his or her rights be judged by Islamic law and not by South African law or any other system foreign to the child. Advocate Vahed[24] argues that it

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[22]Najma Moosa (1998) 115 **SALJ** 479 at 486 points out that as far as succession is concerned, Muslim children are given a fixed share in what can be likened to >intestate succession.. But while Islam (as opposed to Islamic law) makes the female a co-sharer with the male, her share is always half that of the male. This inequality can, though, be overcome with the effective use of tools such as dower, dowry and gift.

[23]M A Vahed >Should the question: AWhat is in a child=s best interest?@ be judged according to the child=s own cultural and religious perspectives? The case of a Muslim child= (1999) XXXII **CILSA** 364 at 366.

[24](1999) XXXII **CILSA** 364 at 375.

would not be difficult to prove this (i.e. that it would be in the Muslim child's best interests that his or her rights be judged by Islamic law and not by South African law or any other system foreign to the child). Much will therefore depend on the interpretation given by our courts to the founding principle that the best interests of the child are paramount.[25]

20.6 Summary of recommendations

The Commission recommends, provided it is in the best interest of the child concerned, that South African law (including the new children's code) should apply to all children in South Africa. This means that all religious (and cultural) practices harmful to children should be prohibited. However, the Commission is also of the view that this investigation is not the place to consider matters related to the assimilation or codification of religious (and customary) law into (mainstream) South African law.

[25]This in itself is an evolving concept. See also Karin Müller and Mark Tait >The best interests of children: A criminal law concept?= (1999) 32 **De Jure** 322.

The Commission operates within the framework of the South African Constitution[26] and our international obligations. Therefore we can only recommend provisions in the new children's statute which will pass constitutional scrutiny. It is within such a constitutional dispensation that the Commission must decide whether to provide additional protection for children living in accordance with the tenets of any particular religious (or customary law) system.[27] We believe we must. The only question then remaining is how this should be done. Several options suggest themselves:

* Codify specific rights for children living in accordance with the tenets of a particular religion in a codification of those religious laws (such as a code on Muslim Personal Law). **The Commission does not recommend this option**.

* Include provisions dealing with specific aspects related to certain religious law practices in the new children's statute. This would be necessary provided certain religious (and cultural) practices harmful to children do exist.

* Include a general provision to prohibit harmful religious (and cultural) practices along the lines of the Uganda[28] or Kenyan[29] examples in the new children's statute. **This is the Commission's preferred option**.

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[26]For an analysis of the approach adopted by the Constitutional Court to freedom of religion, see Nicholas Smith >Freedom of religion in the Constitutional Court= (2001) 118 **SALJ** 1. See also **S v Lawrence; S v Negal; S v Solberg** 1997 (4) SA 1176 (CC) and **Christian Education South Africa v Minister of Education** 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC).

[27]See also Christof Heyns and Danie Brand >The constitutional protection of religious human rights in Southern Africa= (2000) XXXIII **CILSA** 53; Marius Pieterse >Many sides to the coin: The constitutional protection of religious rights= (2000) XXXIII **CILSA** 300.

[28]Section 8 of the Uganda Children Statute 1996 reads as follows: >A child has the right to be protected from any social or customary practices that are dangerous to the child=s health=.

[29]Section 13 of the revised Kenyan Children Bill 1998 reads as follows: >No person shall subject a child to cultural rites, customs or traditional practices that are likely to affect the child=s life, health, social welfare, dignity or physical or psuchological development=.

CHAPTER 21

CUSTOMARY LAW AFFECTING CHILDREN

21.1 Introduction

In this Chapter we revisit those issues of African customary law affecting children.[1] In particular, we will consider the vexed question of whether to incorporate customary law affecting children in the new children's statute, the manner in which this is to done if at all, the regulation of circumcision schools, aspects related to the age of majority, and related matters.

There can be no doubt that the South African Constitution recognises the importance of customary law to the majority of South Africans.[2] However, there is a substantial dissonance between the new-found extolling of individual rights and the promotion of a human rights culture, on the one hand, and several deep-rooted notions of African custom,[3] on the other.[4] African custom is based on the concept of human dignity, derived not necessarily through the relentless pursuit of individual liberty, but rather through membership of a group. This point is stressed by several prominent writers in the field.[5] These writers do not seek to devalue the protection of individual rights in

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[1]See Chapter 8 of Issue Paper 13.

[2]See sections 15(3), 30, 39, 181 and Chapter 12 of the Constitution, 1996. For a comparative view, see New Zealand Law Commission **Study Paper 9: Maori Custom and Values in New Zealand Law** (March 2001).

[3]It is also important to distinguish between cultural practices and the rules of customary law. See in this regard **Hlophe v Mahlalela and another** 1988 (1) SA 449 (TPD) at 457H - 458B.

[4]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 24.

[5]See, for instance, R T Nhlapo 'The African family and women's rights: Friends or foes?' (1991) **Acta Juridica** 135, 'South African family law at the crossroads: From Parliamentary supremacy to constitutionalism' (1994) **International Survey of Family Law** 419, 'Human rights - The African perspective' (1995) 6 **African LR** 38; Ian Currie 'The future of customary law: Lessons from the *lobolo* debate' (1994) **Acta Juridica** 147 at 151; F Kaganas and C Murray 'The contest

national constitutions and international covenants, but they make us aware that the underlying notions of African custom do not fit altogether well with the rights culture that we are so avidly attempting to promote in our society. The courts, meanwhile, are left to interpret and develop customary law.

21.2 Current South African position

By virtue of the provisions of section 1(1) of the Law of Evidence Amendment Act 45 of 1988 any court may take judicial notice of the law of a foreign state or 'indigenous law insofar as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice' and provided further that it shall not be

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between culture and gender equality under South Africa's Interim Constitution' (1994) 21 **International Journal of Law and Society** 418; Joan Church 'Constitutional equality and the position of women in a multi-cultural society' (1995) 28 **CILSA** 289; A J Kerr 'Customary law, fundamental rights and the Constitution' (1994) 111 **SALJ** 720, 'The Bill of Rights in the new Constitution and customary law' (1997) 114 **SALJ** 346.

lawful for any court to declare that the custom of *lobolo* is repugnant to such principles.[6] This provision does not preclude a party where the indigenous law is not readily ascertainable from proving it by adducing expert evidence to establish it as fact.[7]

In the past, marriages under customary law have not been recognised in South Africa as full marriages and have been termed 'customary unions' to distinguish them from full marriages. This meant that children born to these marriages were regarded as born out of wedlock.[8]

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[6]See, in this regard, **Thibela v Minister van Wet en Orde en andere** 1995 (3) SA 147 (T).

[7]**Hlophe v Mahlalela and another** 1998 (1) SA 449 (TPD).

[8]On the legal position of children born of African customary unions, see Brigitte Clark and Belinda van Heerden 'The legal position of children born out of wedlock' in Burman and Preston-

The Births and Deaths Registration Amendment Act 40 of 1996, however, for the first time provided for children born of African customary unions or marriages by religious rites not to be registered at birth as 'extra-marital' children. This was followed by the Child Care Amendment Act 96 of 1996, which included African customary unions and marriages concluded in accordance with a system of religious law subject to specified procedures as legally recognised marriages for the purposes of the Child Care Act, 1983.

Whyte **Questionable Issue** 36 at 43 - 46; Sandra Burman 'The category of illegitimate children in South Africa' in Burman and Preston-Whyte **Questionable Issue** 21; Sandra Burman 'Illegitimacy and the African family in a changing South Africa' (1991) **Acta Juridica** 36 at 40 et seq; CR M Dlamini 'The legal status of illegitimate Black children' (1984) **Obiter** 8.

The Recognition of Customary Marriages Act 120 of 1998 now confers full recognition of customary marriages and regulates celebration, registration, proprietary consequences and dissolution.[9] Customary marriages are defined as marriages concluded in accordance with customary law. According to section 3(1) of the Act:

> For a customary marriage entered into after the commencement of this Act to be valid-
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> (a) the prospective spouses -
> (i) must both be above the age of 18 years; and
> (ii) must both consent to be married to each other under customary law; and
> (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

The recognition of customary marriages in section 2(1) of the Act as valid marriages 'for all purposes' has the effect that children born of such marriages are henceforth to be regarded as 'legitimate' children.[10] Section 9 of the Act further provides that 'despite the rules of customary law',

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[9]The legislation follows an investigation by the South African Law Commission. See in this regard S A Law Commission **Report on Customary Marriages** (August 1998). For a critical analysis of the Act, see Victoria Bronstein 'Confronting custom in the new South African state: An analysis of the Recognition of Customary Marriages Act 120 of 1998' (2000) 16 **SAJHR** 558.

[10]Previously, under customary law, if lobolo (bride wealth) has been paid, the child was considered legitimate and part of the father's family; if not, the child belongs to the mother's family. See further Ann Skelton (ed) **Children and the Law**, p. 49.

the age of majority of any person is determined in accordance with the Age of Majority Act, 1972.[11] This means, at least for a woman who enters into a customary marriage, that she will no longer be regarded as being under the marital power of her husband, but as a major in her own right.

[11]See further 4.3.4 above.

Within the field of intestate succession, the rule of male primogeniture, a hallowed principle of African customary law, provides another possibility for conflict between customary law and the equality provision in the Bill of Rights. While there is academic writing to the effect that this rule is discriminatory against women,[12] the court in **Mthembu v Letsela**[13] concluded that the rule differentiates but does not unfairly discriminate.[14] On appeal the Supreme Court of Appeal also

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[12]A J Kerr 'Customary law, fundamental rights and the Constitution' (1994) 111 **SALJ** 720 at 725 - 726 observes that 'primogeniture' in itself is not 'unfair discrimination', but that primogeniture 'of males through males' is. He recommends that the rule should provide for the eldest child, male or female, to succeed to the deceased's position, if the Constitution is to be adhered to. See further T W Bennett 'The equality clause and customary law' (1994) 10 **SAJHR** 122 at 128 -9; A J Kerr 'The Bill of Rights in the new Constitution and customary law' (1997) 114 **SALJ** 346 at 350 - 2.

[13]1997 (2) SA 936 (T), 1998 (2) SA 675 (T).

[14]I P Maihufi 'The constitutionality of the rule of primogeniture in customary law of intestate succession' (1998) 16 **THRHR** 142 at 146 welcomes the decision. Contra Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) p. 24, footnote 72 who say that the

rejected the claim that the customary law of succession constituted discrimination on the basis of sex or gender, although the Court did not pursue any inquiry into whether the rules of customary law did not discriminate on the basis of illegitimacy or the child's status by virtue of her birth.[15]

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arguments on unfair discrimination put forward by the counsel for the appellant are compelling and should have been accepted by Roux J. See also A J Kerr 'Inheritance in customary law under the Interim Constitution and under the present Constitution' (1998) 115 **SALJ** 262.

[15] **Mthembu v Letsela and another** 2000 (3) SA 867 (SCA).

In the case of **Hlophe v Mahlalela and another**[16] the Court had the opportunity to consider the award to a father of custody of his minor daughter after the death of his wife where the *lobolo* had not been paid fully at the time of her death. The Court held, per Van den Heever AJ, that whatever the position might have been in general in indigenous law regarding the custody of children, the basic principles thereof have to a certain extent been excluded in favour of the common law.[17] The Court further provided the following guidelines:[18]

- In custody matters (under customary law) the interests of the child take precedence;
- Conclusion of a civil marriage after a customary marriage has the general effect of imposing a new personal status on the spouses, one governed by the common law;
- 'Any arrangement that smacks of the sale of or trafficking in children will not be enforced'.

The Court accordingly held that issues relating to the custody of a minor child cannot be determined by the mere delivery or non-delivery of *lobolo*.

It is worth noting that in terms of section 27 of the Natal Code of Zulu Law[19] a father shall be the legal guardian of his legitimate minor offspring born of his marriage, an unmarried mother shall be the legal guardian of her minor illegitimate child,[20] and a widow shall be the legal guardian of all her minor children. The Natal Code inter alia further provides for the devolution of guardianship where the legal guardian dies or becomes incapacitated[21] and the suspension of guardianship.[22]

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[16]1998 (1) SA 449 (TPD).

[17]At 458F - G.

[18]At 458G - 459C.

[19]Published in Government Gazette 10966 of 9 October 1987 as Proclamation R. 151 of 1987.

[20]Subject to the proviso that 'an illegitimate child of a minor daughter shall fall under the guardianship of its mother's guardian until the child's mother attains majority.

[21]Section 28.

[22]Section 30.

However, it must be pointed out that the whole of the Guardianship Act 192 of 1993[23] was made applicable to the Self-governing territory of KwaZulu, the area to which the Natal Code of Zulu Law applied, by section 2 of the Justice Laws Rationalisation Act 18 of 1996. Should the provisions of these two Acts conflict, then the Guardianship Act 192 of 1993 will prevail.[24]

[23]This Act grants married mothers and fathers equal guardianship rights in respect of the minor children of their marriages.

[24]See also **Prior v Battle and others** 1999 (2) SA 850 (TkD).

In customary law, divorce ends the connection between the families of the couple. The concept of making maintenance payments is therefore generally a foreign one.[25] The rule is that all children belonging to a family group are guaranteed support within the group and by all members acting jointly:[26] customary law is focussed on group rather than individual rights. As far as the children born outside of a customary union or a civil-law marriage are concerned, customary law does nor concern itself with the problem of maintenance. Such obligations are imposed on a natural father only if he has acquired guardianship over the child. This lacuna in the customary law has led to an increased reliance on statutory enforcement in terms of the Maintenance Act 23 of 1963, as both the Maintenance Act 1963 and the Child Care Act, 1983 are applicable to all.[27]

There is an institution in African customary law which resembles maintenance in common law and appears to be confused in our law with maintenance. This is the institution of *isondlo*, which enables any person who has raised a child, whether born in or out of wedlock, to claim payment from a parent if the parent demands custody of the child. *Isondlo* constitutes a token of the transfer of the parental rights to the parent tendering the *isondlo*; payment is limited to one beast. Despite some apparent resemblance between *isondlo* and maintenance, the two institutions cannot be equated: there is no duty resting on a parent to pay *isondlo*, nor does it signify any form of reimbursement for past maintenance.

> If fact, *isondlo* comes closer to purchase and sale of a child, which is not only illegal in terms of the Child Care Act but also contrary to public policy and the principle of the paramountcy

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[25]See e.g. Bennett **Sourcebook of African Customary Law** 277.

[26]Issue Paper 13, par. 8.7.

[27]Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 257.

of the best interests of the child which is now enshrined in the Constitution.[28]

Lastly, it must be pointed out that in terms of section 12 of the Black Administration Act 38 of 1927 any Black chief or headman may be authorised to hear and determine civil claims arising out of Black law and custom brought before such chief or headman by a Black person against another Black person resident within his or her area of jurisdiction. It is therefore within the jurisdiction of these courts to inter alia deal with issues related to custody and guardianship of minor children. The power to determine any question of nullity, divorce or separation arising out of a marriage, however, is specifically excluded from the jurisdiction of these courts. In KwaZulu, a similar power is conferred upon the *amakhosi* and *iziphakanyiswa* in terms of section 28 of the KwaZulu Amakoshi and Iziphakanyiswa Act 9 of 1990.

21.3 Comments and submissions received

Several questions on customary law and its effect on children were posed in Issue Paper 13. One of these was:

[28] Ibid 257 - 258.

> Question 84: To what extent should customary law affecting children be directly or indirectly incorporated in the proposed new legislation? And, if it is decided not to incorporate detailed customary law provisions in the new children's statute, to what extent should the fundamental principles underpinning such a statute be made sensitive to and compatible with existing principles of customary law?[29]

The SA National Council for Child and Family Welfare recommended that there should be only one set of standards and that customary law can be respected in individual cases. Complications can arise, so it was contended, if this is included in the new children's statute. The phrase 'that in dealing with any case due regard to be given to customary law' can be considered. In this way there would be flexibility in dealing with situations of customary law and above all the principle of the best interests of the child will be the guiding factor.

The NICC called for a process of harmonisation between various laws and pointed out that there is a need for public education in this regard.

The Natal Society of Advocates contended that customary law should not be incorporated in the proposed new legislation. It was submitted that customary law in regard to children should be brought in line with the provisions relating to other children.

With regard to all questions regarding customary law, the Johannesburg Institute of Social Services held the view that customary law should be there to assist children and not to trap them in negative situations. The respondent contended that the life of an individual child cannot be sacrificed to serve cultural concepts and traditions. These concepts and traditions, it was submitted, should be built into preventive community-based programmes to improve family life and child care on that level. The respondent reiterated the need for a family court on different levels. The Appeal Family Court should be wise and strong enough to give proper guidance in matters of this nature and these cannot be written into law. The respondent concluded that what should be written into the children's

[29] See also 2.5.8 above.

statute, is the protection of the rights of the child whether inside or outside his or her culture.

The Cape Law Society, supported by the Durban Committee, was of the opinion that all children should be afforded standardised protection in terms of the new legislation. It was proposed that in the event that a child is raised in accordance with particular customary practices and laws, the new legislation should be flexible enough to be sensitive to the principles and practice of the relevant customary law. Expertise regarding the particular customs and practices should be sought from appropriate resources.

Disabled People South Africa considered the recognition and the appropriate inclusion of customary law as important.

Professor C J Davel contended that the new children's statute should at least be sensitive to existing principles of customary law.

The ATKV was of the opinion that legislation should take into account the traditional laws and customs of cultural groups, but cautioned that these customs may not contradict the spirit of the Constitution or the Child Care Act.

Mr DS Rothman observed that if certain customary principles should be taken into account, these should be clearly embodied within the legislation.

Issue Paper 13 also posed the following question:

> Question 85: How can the 'best interests of the individual child', as set out in the Constitution and CRC, best be rendered compatible with traditional African values, bearing in mind the increasing impact of the ideology of individualism on traditional societies?

The SA National Council for Child and Family Welfare pointed out that with the changing norms and values in society it should be borne in mind that children in present day society are very aware of their rights. Further they are actively participating in educational programmes highlighting their rights and responsibilities.

The NICC considered efforts towards harmonisation of traditional values with common law as

essential.

The Natal Society of Advocates submitted that the best interests of the individual child are paramount and whilst traditional African values should be regarded with sensitivity, the paramountcy of the principle cannot be overruled or diluted.

The Cape Law Society, supported by the Durban Committee, referred to the recommendation of the SA Law Commission in Discussion Paper 74 in the investigation **Harmonisation of the Common and the Indigenous Law** where it is recommended that, in accordance with section 28(3) of the Constitution and the CRC, the child's best interests should govern all aspects of custody, guardianship and access to children.

Mr DS Rothman contended that it may be helpful to define the best interests of the child in respect of every area of the child's life, e.g. nutrition, health, education etc in order to arrive at a common ideal applicable to all children regardless of religion, race or culture. Where customary, religious or traditional values are in conflict with these, the best interests principle as defined should take precedence.

Issue Paper 13 invited responses to the following question:

> Question 86: Should initiation ceremonies in customary law be regulated by legislation so as to eradicate their potentially harmful effects on children, particularly insofar as children's rights to bodily integrity may be violated during the course of some ceremonies?

Mrs J Smith contended that if circumcision is understood by 'initiation' ceremonies, the person or persons performing the circumcision should be instructed in basic hygiene, and the initiate should be required to visit a health facility after the initiation to ensure that there is no infection. It was further submitted that apart from this, it is not the function of the state to interfere in tribal customs.

The SA National Council for Child and Family Welfare stated that legislation to regulate initiation ceremonies is essential and will also safeguard against persons using this excuse to commit sexual atrocities against children and young persons, especially females, in the name of religion or culture.

The NICC answered the question in the negative as the Constitution provides the right to practice

traditional values insofar as they do not limit any other rights. Hence it said that any practice which may potentially harm the child should not be condoned. An extensive awareness program would be required for children to know that there is a choice. Cultural rituals cannot be legislated but should adhere to the general principles of health and the interests of the child.

The Natal Society of Advocates answered the question in the affirmative.

The Cape Law Society, supported by the Durban Committee, stated that in accordance with South Africa's obligations in respect of the Constitution and the various international instruments to which it is a signatory and in terms of which it is required, *inter alia,* to adopt legislation or other measures necessary to give effect to the obligations in respect of the various documents, South Africa should be active in protecting children against any potentially harmful, degrading practices which may negatively infringe upon the dignity, bodily integrity, health or welfare of the child. The respondents recognised that it is difficult to legislate broadly against such ceremonies and practices, but pointed out that steps should be taken to eradicate the potentially harmful effects of any such ceremonies or practices - perhaps through the criminal courts.

The National Council of Women of South Africa considered the Ugandan clause which provides that it is unlawful to subject a child to social or customary practices that are harmful to his or her health, as an improvement and something that should be incorporated in the new children's statute.

Professor C J Davel submitted that initiation ceremonies should be regulated by legislation so as to eradicate their potentially harmful effects on children. She submitted that it is not only common law but also customary law that has to be interpreted and altered, if necessary, to be in line with the Constitution.

Mr DS Rothman answered the question in the affirmative, adding that where ceremonies and customs militate against the child's best interests, regulations should play a role.

The following question was posed in Issue Paper 13:

> Question 87: Should the common law and /or legislation be amended (whether or not in a comprehensive children's statute) so as to embrace African children living under customary

law to a greater extent than at present? For instance, should it be spelt out that the determination of the age of majority (whether this is set at 18 years or otherwise) applies to all persons, including those subject to customary law?

The SA National Council for Child and Family Welfare, in response to the first question, stated that this is not necessary as the law should be uniform for everyone but due recognition should be given in broad terms to accommodate children living under African customary law. To overcome this problem, the inclusion of a general and broad clause in the legislation will suffice. It was further contended that the age factor needs to be debated but that pending this the age of 18 should be the norm in respect of all children, including those who are subject to customary law.

The NICC considered one embracing law with cultural and religious sensitivity to be necessary for all children as long as basic rights are not violated.

The Natal Society of Advocates answered the question in the affirmative.

The Cape Law Society contended that the common law and/or legislation should be amended. Minimum ages should be fixed and should apply to all persons including those subject to customary law. The Durban Committee submitted that legislation must be uniform and applicable to and protective of all children without any qualification whatsoever, otherwise the entire purpose of the legislation will be defeated.

Professor C J Davel contended that legislation and the common law should embrace African children. She said the law should spelt out what the age of majority is, that it includes those subject to customary law and that it includes girls.

Mr DS Rothman answered the question in the affirmative, adding that it would be difficult to introduce exceptions to the age of majority because of customary law considerations. There should be no discrimination on those issues which are identified as fundamental to a child's general well-being.

Issue Paper 13 posed the following question:

Question 88: Should legislation attempt to alter customary law so as to remove the remaining distinctions between different classes of children (classified according to the circumstances of their birth) in the field of intestate succession?

The SA National Council for Child and Family Welfare did not consider legislative intervention to be necessary as there are alternative ways of dealing with the problem, for example the drawing up of a will. As long as there is information disseminated to let people know of the options available without interfering with customary law, one could let the people choose which option to follow.

The NICC answered the question in the affirmative, but added that there will need to be an extensive awareness program for implementation as legislation on its own will not result in better achievements.

The Natal Society of Advocates answered the question in the affirmative.

The Cape Law Society referred to the SA Law Commission's Discussion Papers 74 and 76 which investigate this aspect in detail. The Durban Committee stated that there should be no discrimination against any class of child whatsoever. As far as succession is concerned, it was submitted that it is usually the women who are discriminated against and this perpetuation of discrimination on the basis of gender must be eradicated.

The Durban Child and Family Welfare Society argued that there should be no discrimination against children and that there should be only one law.

Pointing out that the common law position was altered by legislation, Professor C J Davel submitted that the same should be done with customary law. Discrimination between different classes of children classified according to the circumstances of their birth is clearly unconstitutional.

Mr DS Rothman submitted that children should not be penalised by classifications because of the circumstances of their birth. The distinctions in the field of intestate succession should be removed.

Question 89: What is the best way of ensuring that the 'best interests of the child principle' is extended to cover <u>all</u> aspects of the parent-child relationship under customary law?

The SA National Council for Child and Family Welfare submitted that persons marrying under customary law should be aware of the rules pertaining to children born of such marriages. If this works in practice, there should be no law to change this. A person should have a choice or can mutually decide whether they would opt for a change rather than following the customary law. The Council called for the inclusion of a broad clause that accommodates children born as a result of customary law.

In its response the NICC referred to education and sensitisation on cultural practices.

The Natal Society of Advocates did not consider this aspect to require legislation. It submitted that the only way to do this is sensitively and through education.

The Cape Law Society referred to the appropriate recommendations contained in the SA Law Commission's Discussion Paper 74, while the Durban Committee, agreeing with the Cape Law Society, further submitted that all legislation applicable to family law should be standardised insofar as the protection of rights is concerned.

Professor C J Davel had no doubt that the best interests of the child principle should be extended to cover all aspects of the parent/child relationship under customary law. She pointed out that the Constitution clearly states the importance of that principle and that both common law and customary law should adhere to it.

> Question 90: Should the customary law relating to 'adoption' of children be adapted to put the child's interests first, in accordance with the dictates of the Child Care Act, the Constitution and CRC? If so, how best can this be done?

The SA National Council for Child and Family Welfare answered the first question in the affirmative. It further contended that the new children's statute can give guidance by stating that 'due recognition will be given to customary law pertaining to adoption but the overriding factor would always be what is in the best interests of a child'.

Referring to the fact that customary law always dictates in the best interest of the family tree but not that of the child, the NICC answered the question in the affirmative.

The Natal Society of Advocates answered the question in the affirmative, stating that the principle of the best interests of the child is paramount and that customary law relating to the adoption of children should be adapted to come into line with this principle. Again it was reiterated that this would have to be through education and practical application by the children's court.

The Cape Law Society, supported by the Durban Committee, recommended that the customary law relating to the adoption of children should be recognised subject to the interests of the child being prioritised. It was submitted that it would be most effective if such adoptions were required, in accordance with the provisions of the Child Care Act, to be registered prior to legal effect being given to the adoption. It was submitted further that by actively encouraging the registration of the adoption, checks and balances could be imposed to ensure that the child's best interests are being secured. The respondents held the view that it would be in the best interests of the child if customary adoptions were registered and that generous provision be made for late registrations.

The Durban Child and Family Welfare Society stated that in its experience people apply for legal adoption because such people found the traditional or customary forms wanting. The Society called for the child's interests, as opposed to those of the parent, to be the focus and that there should be a shift in emphasis from an authoritarian parental rights approach to a child centred approach.

Mr DS Rothman answered the question in the affirmative, adding that the objective could be achieved by direct reference to the relevant custom in the new children’s statute so that it may conveniently be dealt with under the adoption chapter of the Act.

Another question posed in Issue Paper 13 on customary law is the following:

> Question 91: Is legislative intervention necessary to ensure that the interests and rights of children in customary law fostering arrangements are protected?

The SA National Council for Child and Family Welfare contended that the law should not intervene when there is a mutually accepted arrangement between parties. It is considered to be best to

allow for private arrangements but intervention should take place if there are complaints that the children's needs are not adequately met or that their rights are violated.

The NICC and the Natal Society of Advocates answered the question in the affirmative.

The Cape Law Society, supported by the Durban Committee, was of the view that statutory intervention is necessary. It submitted that any child care legislation should apply universally with standardised norms in respect of all children, whether they are subject to common or customary law. Due regard should be had, where appropriate, to the cultural context of any placement of a child.

The ATKV said legal guidelines are essential for cases where children are placed in the care of a guardian for unusually long periods.

Mr DS Rothman suggested that because of practical considerations it may be a good idea to afford such care-givers a means whereby they could formalise these arrangements at their request. It may not have to be the same kind of foster placement as provided for in the Child Care Act but one that could introduce social workers as observers in an informal way.

Another question posed in Issue Paper 13 on customary law is the following:

> Question 92: What are the current social implications of *isondlo* and is legislative intervention in this regard necessary to protect children and their mothers?

The SA National Council for Child and Family Welfare said that the best way to overcome this problem would be to deal with each situation as it arises. The rights of both mother and child must be given due consideration.

The Natal Society of Advocates stated that the social implications of *isondlo* may require legislative intervention to protect children and their mothers.

The Cape Law Society, supported by the Durban Committee, stated that for as long as *isondlo* is

viewed in its correct context, i.e. that it is not maintenance, there is no need for legislative intervention. Referring to the recommendations of the Law Commission in its investigation into the harmonisation of the common law and the indigenous law, it was submitted that cultural expectations should, where appropriate, be accommodated by a court making a decision in the instance of a dispute regarding custody and guardianship.

The ATKV held the view that it is unnecessary to control traditional customs by legislation provided such customs do not contradict the spirit of the Constitution.

Mr DS Rothman, who viewed the use of any legal method to ensure that maintenance on behalf of a child is secured positively, said legislative intervention may be necessary because some mothers have come to court for maintenance and fathers have resisted this approach, claiming refuge within the customary law provisions that fall outside the scope of maintenance legislation.

The second-last question posed in Issue Paper 13 on customary law was the following:

> Question 93: To what extent does the minor's lack of property rights under customary law violate his or her basic human rights?

The SA National Council for Child and Family Welfare contended that it can violate a minor's right if there is conflict in the family and if the head of the family does not meet his obligation. Therefore, if a case of this nature arises, it should be assessed in terms of the particular situation.
The NICC argued that the Constitution, being above all legal instruments, should be applied in instances where there is a legal practice that is discriminatory.

The Natal Society of Advocates submitted that the minor's lack of proprietary rights under customary law seriously violates his or her basic human rights. The respondent suggested that all minor children should have the same proprietary rights under the Constitution.

The Cape Law Society, supported by the Durban Committee, again referred to Discussion Paper 74, where the recommendation that all persons who have attained the age of majority should have individual proprietary capacity, is supported. The respondents were of the view that legislation is required to amend the existing position in respect of customary law. The positions of persons

below the age of majority, whilst subject to customary law, should be afforded the same protection as minors governed by common law.

The ATKV held the view that owning land implies certain financial and other responsibilities. It does not affect a child's basic human rights if the responsibilities are being handled by the guardian on behalf of the child until the child may legally assume the responsibilities.

Mr DS Rothman did not view the violation referred to as too significant.

The last question posed in Issue Paper 13 on customary law is the following:

> Question 94: Does the customary rule of proprietary incapacity go against the child's best interests and, if so, would a child's interests be better served by enabling him or her to own property in his or her own right or rather by making better provision for the administration of family estates?

The SA National Council for Child and Family Welfare submitted that consideration should be given to include section 11(3) of the Black Administration Act 38 of 1927, with amendments, in the new children's statute to meet present day circumstances. Amendments should include better provision for the administration of family estates.

The NICC called for an enquiry into the status of customary law in the country. It was contended that customary law should be afforded the same status as any other law in the country.
The Natal Society of Advocates answered the question in the affirmative, stating that customary proprietary incapacity goes against the best interests of the child and children's interests would be better served by legislation bringing customary law into line with other current legislation relating to the ability of minors to own property.

The Cape Law Society, supported by the Durban Committee, suggested that the property of a minor should be afforded the same protection, whether it is governed by customary or common law. The child's property should be regarded as distinct from the so-called family property and should not be administrated as part thereof. The child as an individual, it was submitted, should be entitled to the full protection of the law as is afforded to children in terms of the common law.

Mr DS Rothman commented that the child's interests would be best served by enabling him or her to both own property and to have an influence in the administration of family estates provided that he or she is old enough for this responsibility - at least 18 years of age.

21.4 Comparative law

Most African countries prohibit cultural practices which dehumanises or is injurious to the physical and mental well-being of the child in their child care legislation. Section 13(1) of the Ghana Children's Act, 1998, places this prohibition in the same category as the prohibition on torture or other forms of cruel, inhuman or degrading treatment and punishment.[30] Section 5 of the Uganda Children Statute, 1996, on the other hand, frames the prohibition as a protective measure. The section provides as follows:

> A child has the right to be protected from any social or customary practices that are dangerous to the child's health.

[30] Section 13(1) reads as follows: ' No person shall subject a child to torture or other cruel, inhuman or degrading treatment or punishment including any cultural practice which dehumanises or is injurious to the physical and mental well-being of a child'.

The Kenya revised Children Bill, 1998, in turn, provides as follows:[31]

> No person shall subject a child to cultural rites, customs or traditional practices that are likely to affect the child's life, health, social welfare, dignity or physical or psychological development.

21.5 Evaluation and recommendations

The Commission accepts the importance of customary law and practices for a very large portion of our population. However, the Commission notes that customary law is recognised as a system of law provided it operates within the broad principles of the Constitution, 1996.[32] Given the paramountcy of the best interests of the child principle in section 28 of the Constitution and the individualistic nature of human rights protection, it would seem that the right of an individual child supersedes that of the cultural (or religious) group. The Commission therefore agrees with those commentators who argue, in response to question 84 posed in Issue Paper 13, that certain basic principles regarding children should transcend customary and religious laws and should be protected and enforced in the new children's statute. Such principles should be universal in their application and should apply to all children throughout South Africa. **The Commission has therefore recommended the inclusion of a general non-discrimination clause in the new children's statute**.[33]

The Commission takes cognisance of the provisions of section 1(1) of the Law of Evidence Amendment Act 45 of 1988 which allows for the recognition of customary law insofar as such law can be ascertained readily and with sufficient certainty, subject to the principles of public policy or

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[31] Section 13.

[32] Section 15(3)(b) of the Constitution, 1996.

[33] See 5.4 above.

natural justice and the developments in the case law in this regard. For this reason, **the Commission sees no need to provide for a 'choice of law' provision allowing for the customary law relating to children to be applied in the new children's statute**.

Similar to our approach on corporal punishment and in order to protect children against harmful cultural practices, **the Commission recommends that cultural beliefs and practices should not serve as a defence against any charge of indecent assault or infringement of the right to privacy**. A person would therefore be denied the opportunity to rely on the absence of unlawfulness, a critical element of any criminal offence, because of his or her unreasonable reliance on an alleged cultural practice.[34] Where a girl therefore lays a criminal charge of indecent assault after having been subjected to a virginity test, the person who conducted the test would not be able to say in his or her defence at the criminal trial that virginity testing is an acceptable cultural practice and therefore completely lawful.

However, **the Commission recommends, in addition to removing reliance on customary law practices as a defence to a criminal charge, the introduction of a regulatory approach which combines prohibition of certain abuses and formal protection measures where required. The aim would be to prevent infection and injury, prohibit coercion and provide recourse for children or their caregivers who choose not to participate in such practices**.

As for female genital mutilation, the Commission has no hesitation in recommending the imposition of severe criminal sanctions for persons and parents who force, coerce or allow girl-children to be circumcised. In this regard, the Commission points out that female genital mutilation is international recognised as extremely harmful, and appears to have minimal support in South Africa.[35] Criminalising the practice of female genital mutilation would be a preventative step aimed at preventing this practice from becoming established in South Africa, support action being taken in other African countries, and facilitate protective action including refugee status for

[34]Although the accused's bona fide belief in the justification a cultural practice could exclude intent, another critical element of a criminal offence.

[35]See also J M T Labuschagne 'Circumcision and female genital mutilation: A human rights and antropo-legal evaluation' (1998) 13 **SAPL** 277 at 307 - 308.

immigrant children who might be affected. It is also worth recalling that the Commission has recommended that the threat of female genital mutilation should constitute grounds for the granting of refugee status to a non-South African child.[36]

[36]See 22.4.5 below.

We have also seen that some provinces have adopted or are in the process of adopting legislation to regulate initiation schools.[37] It is further our understanding that the (national) Department of Health is busy drafting legislation regulating circumcision schools. **The Commission supports this move to regulate circumcision schools under the aegis of the Department of Health and accordingly sees no need to regulate male circumcision in the new children's statute**.[38] **However, we have cautioned against certain forms of virginity testing for girl-children masquerading as a customary practice in Chapter 10 above. In this regard, we believe our recommendation for a general provision prohibiting harmful social and customary practices in the new children's statute, coupled to such new health care legislation so as to regulate circumcision schools, should adequately address the issue**.

The Commission further argues that the Recognition of Customary Marriages Act 120 of 1998 now makes it very clear that, 'despite the rules of customary law, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972'.[39] This includes not only women married according to customary law, but also children born of such unions. **While it should therefore not be necessary to spell out clearly, in the new children's statute, how the age of**

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[37]See the Northern Province Circumcision Schools Act 6 of 1996 and the Eastern Cape's Traditional Circumcision Bill, 2001.

[38]See also J M T Labuschagne 'Besnydenis en die grense van religieuse en kulturele gebruike in 'n regstaat: 'n Regsantropologiese perspektief' (2000) **SATE** 55.

[39]Section 9 of the Recognition of Customary Marriages Act 120 of 1998.

majority of any person, including those living under customary law, is determined,[40] given the clear language of the Recognition of Customary Marriages Act, 1998, the Commission nevertheless considers it prudent to include such a provision in the new children's statute to make it absolutely clear that the new children's statute should apply to all children in South Africa. This prudence is warranted given our recommendations on the determination of the age of majority in 4.3.4 above.

The Commission is investigating succession in customary law in its investigation into Customary Law and has published a discussion paper in this regard in August 2000. It is therefore not necessary for us to respond to question 88 of Issue Paper 13 where the question was posed as to whether legislation should attempt to alter customary law so as to remove the remaining distinctions between different classes of children (classified according to the circumstances of their birth) in the field of intestate succession.

[40]See question 87 of Issue Paper 13 and the response above.

Given these recommendations, and the recognition that customary law enjoys in South Africa, the Commission believes that the fundamental principles underpinning the new children's statute should be sensitive to the needs of customary law. At the same time, it should be clear that the best interests of all children, including those living under a system of customary law, are the paramount consideration. **Accordingly the Commission has recommended that children be protected from harmful social and cultural practices**.[41]

Lastly, the Commission wishes to stress that it sees a definite and expanded role for traditional and community courts as adjudicators of civil (and criminal) disputes involving children. These aspects are covered in more detail in Chapter 23 below.

[41]See 5.4 above.

CHAPTER 22

INTERNATIONAL ISSUES AFFECTING CHILDREN

22.1 Introduction

In the modern world children face risks in a variety of cross-frontier situations. Some are caught up in disputes over custody or contact between parents living in different countries. They may be the subject of parental abduction. Children who run away abroad face the multiple risks which confront the unaccompanied child in an alien environment. Some children are the subject of unregulated inter-country adoption, fostering or other alternative care arrangements. Other forms of cross-border illicit transfer for the purpose of economic or sexual exploitation of children occur.[1] Children may be displaced through war, civil disturbance or natural disaster.

The need for international co-operation at all levels, legislative, administrative and judicial, in addressing the protection of such children is becoming well established. The CRC is full of reminders of this, through its encouragement of bilateral and multi-lateral arrangements or agreements in a number of areas,[2] and through more general references.[3] International administrative and judicial co-operation is needed for a variety of reasons, some of which are well known at the national level. These include the multi-disciplinary nature of child protection work and the need for close liaison between different agencies involved, social work, medical and legal, as well as the vital importance of communicating information concerning children at risk when they move from one place or country to another. In addition, at the international level, there are linguistic barriers to overcome together with the problems which arise from lack of familiarity with other legal and child protection systems, and the need to accommodate differences, which may have cultural

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[1]Professor Geraldine van Bueren 'Invisible exports: Transfrontier problems concerning the protection of children', paper delivered at the Reunite South African Conference 2001, Pretoria, 25 - 26 January 2001argues that globalisation has created a new international commodity: children who are exported for their bodies and for their labour.

[2]Article 11, illicit transfer and non-return of children abroad. Article 21(e), inter-country adoption. Article 22, refugee children. Article 34, sexual exploitation. Article 35, sale, trafficking and abduction.

[3]See, for example, Article 45.

roots, between the systems concerned.

In this Chapter we will therefore look at some of the international dimensions as they relate to children living in South Africa. In particular, we will consider such controversial issues as inter-country adoptions, child abduction, refugee children, and trafficking of children across borders.

22.2 Inter-country adoptions

22.2.1 Introduction

This section focusses on *inter-country* adoption, as opposed to *international* adoption,[4] in the South African context. An inter-country adoption is seen as one that involves a change in the child's habitual country of residence, whatever the nationality of the adopting parents.[5] The distinction between inter-country adoption and international adoption is important, as the 1993 Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption (hereinafter 'the Hague Convention') applies to only those adoptions involving the child's transfer to another country.[6] South Africa is not a signatory to this Hague Convention.[7]

The section is divided into four parts. After a general introduction, the current South African law

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[4]International adoption is the practice whereby adoptive parents adopt a child of a nationality that is different from theirs irrespective of whether or not they reside or continue to reside in the child's country of habitual residence. A South African child who is adopted by Canadian citizens resident in South Africa would be involved in an international adoption but not an inter-country adoption. If the South African child were to be adopted by Canadian citizens living in Canada, it would be both an international and inter-country adoption. Tshepo Motsikatsana 'Intercountry adoptions: Is there a need for new provisions in the Child Care Act?' (2000) 16 **SAJHR** 46, footnote 3.

[5]UNICEF 'Intercountry adoption' (1998) **Innocenti Digest** 2.

[6]Article 2 of the Hague Convention.

[7]However, South Africa has acceded to the Hague Convention on the Civil Aspects of International Child Abduction, 1980. See also the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, in operation from 1 October 1997.

on inter-country adoptions will be discussed. This discussion will include an analysis of the recent judgment of the Constitutional Court in **Minister for Welfare and Population Development v Fitzpatrick and others**.[8] A comparative analysis will follow and the section will conclude with some options for law reform.

22.2.2 History of inter-country adoptions

When it first began to be practised widely, in the aftermath of the Second World War, inter-country adoption was an ad hoc humanitarian response to the situation of children orphaned by war. Children from Germany, Greece and the Baltic States were sent by religious organisations for adoption in other European countries and in the USA. From 1953 large numbers of orphaned or abandoned children from the Korean war were adopted overseas.

Since the 1970s another momentum has overtaken the original impetus for inter-country adoption. While demand for children in adoption has continued to rise in the industrialised world, fertility has fallen, and consequently the number of children who can be considered for domestic adoption has declined. Some of the demographic and social changes contributing to these dwindling numbers are the greater availability of contraceptive aids, the legalisation of abortion, the higher workforce participation of women, the postponement of childbirth to later ages - and an increasing destigmatisation of single motherhood, as well as state support for single mothers in many cases, leading to greatly reduced abandonment rates.

This structural demand for children in adoption in high-income countries has been met with the 'structural supply' of children available for adoption abroad in low-income countries.[9] Over the last

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[8] 2000 (3) SA 422 (CC).

[9] The only identified study seeking to gauge the global incidence of inter-country adoption, written by S L Kane and published in the (1993) Vol 30 No 4 **Social Science Journal** pp. 323 - 339, found that at least 170 000 - 180 000 children were involved in inter-country adoption in the 1980 - 1989 period. Inter-country adoption over that decade increased by 62%, and 90% of all children were drawn from only 10 countries. At the same time, the number of sending countries had jumped from 22 in 1980 to 68 a decade later. The USA is the world's foremost receiving country of foreign

several decades, increasing numbers of children have been and are being abandoned and orphaned in the developing world in the wake of socio-economic change, especially the rapid urbanisation in Latin America, Africa and certain Asian countries; and the upheavals, wars, ethnic conflicts and natural disasters that affect populations in different parts of the world.[10] At this stage, the HIV/AIDS pandemic is redirecting socio-economic change.

It can be seen, then, that inter-country adoption is a shifting, evolving phenomenon, responding to both domestic and international forces. One of the more recent concrete expressions of this lies in the use of the Internet to promote adoption in ways that often involve the marketing of children[11] - as well as spawning private adoptions and offering shortcuts to the legal adoption process.

During the adoption process, violations of the most basic rights of the child can occur. These violations are often perpetrated under the cover of the supposedly humanitarian aim of the act and 'justified' by the simplistic view that a child will somehow always be 'better off' in a materially rich country. Illegal acts and malpractices can involve criminal networks, intermediaries of all kinds, and couples prepared to carry out, be accomplice to, tolerate, or simply ignore abuses in order to secure an adoption. The diversity of the methods used, and the wide range of actors that may play a role, demonstrate the vastness of the task of protecting the rights of the child in inter-country adoption. The challenge is all the greater in that, in many if not most cases, the resulting adoption bears all the hallmarks of a perfectly legal procedure.

22.2.3 **The position before Fitzpatrick**

Before the Constitutional Court ruling in the **Fitzpatrick**-case, inter-country adoptions were not

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adoptive children, responsible for roughly half of all adoptions.

[10]UNICEF 'Intercountry adoption' (1998) **Innocenti Digest** 3: 'In other words, intercountry adoption, which should be viewed as one option among a series of child welfare measures for an individual child in need of care and protection, is no longer always the purely child welfare measure it was originally intended to be. In a certain number of cases, instead, it has become a lucrative profit-making activity, sometimes involving major financial interests and its own lobby, in which children are treated as commodities'.

[11]See, for instance, 'Tug-of-war over twice-sold babies', News24.co.za, 1 January 2001.

legally possible in South African law.[12] Section 18(4)(f)[13] of the Child Care Act 74 of 1983 stipulated that a children's court shall not award an order of adoption unless the applicant or one of the applicants for the adoption of the South African born child is a citizen of and resident in South Africa, except where the applicant is a spouse of the parent of the child.

To cross this legislative barrier, adoption practitioners found different ways to facilitate the adoption of South African children in other countries. One such way was to use the provisions of section 52 of the Child Care Act, 1983. Section 52 makes it an offence to remove a foster child or pupil without ministerial approval from the Republic. The scheme works as follows: The child is placed in the foster care of a non-South African citizen,[14] and then ministerial approval is sought for the removal of the child by the foster parent(s) of the child from the Republic to another country, whereafter an application for the adoption of the child in that other country would be made.

Another option open to adoption practitioners is to obtain the consent of the parent(s) of the South African born child under section 18(4)(d) of the Child Care Act, 1983. Prior to the expiration of the 60-day 'cooling off' period in which consent may be retracted the South African parent would then apply for a South African passport on behalf of the child and consent to the child leaving the Republic in the company of the prospective adoptive parents. After the expiration of the 60-day period, the birth parent's consent to adoption becomes irrevocable and the child is considered abandoned and becomes a child in need of care. The foreign couple would then apply to become curators personae over the child and submit a home study, done in the foreign country, to a South African court which would then approve the foreign couple as curators personae on the basis of the

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[12]The CRC is the only international instrument concerning inter-country adoptions to which South Africa is a party. See the discussion of this UN Convention below.

[13]'A children's court ... shall not grant the application unless it is satisfied, in the case of a child born of any person who is a South African citizen, that the applicant, except an applicant referred to in section 17(c), or one of the applicants is a South African citizen resident in the Republic, or the applicant has or the applicants have otherwise the necessary residential qualifications for the grant to him or them under the South African Citizenship Act 44 of 1949, of a certificate or certificates of naturalisation as a South African citizen or South African citizens and has or have made application for such certificate or certificates'.

[14]Which placement does not require citizenship of the Republic as a precondition.

consent granted and the foreign home study. After the curatorship has been approved by a South African court, the foreign couple would then apply for a visa on behalf of the child with the aim of adopting the child in their country.[15]

In this regard it is worth noting the responses to the following question posed in Issue Paper 13:

> Question 71: Should the requirements for adoptions by non-citizens be made the same as by a citizen? Aside from the question of adoptions taking place within South African territory, should South African law be amended to permit taking children to another country in order to be adopted there in situations (such as close-relative adoptions), where this would be in the best interests of the child?

The SA National Council for Child and Family Welfare answered the question in the affirmative. It submitted that the law should be amended to allow for inter-country adoptions in especially close relative adoptions. The Council said the circumstances of each case have to be carefully evaluated and the best interests of the child should be the guiding factor. It said there should be no restrictions in allowing the adoption of a child outside our borders, provided that in-depth screening and motivation for the adoption is known.

The NICC answered all parts of the question in the affirmative, and added that a think tank should be established to evaluate the ratification by South Africa of the Hague Convention on Intercountry Adoptions. Phoenix Child and Family Welfare Society and the Natal Society of Advocates also answered the question in the affirmative.

The National Council of Women of South Africa submitted that where there is a close relationship between a South African child and a foreigner, the latter should after careful enquiry be permitted to take the child for adoption outside South Africa, but if there is no relationship, the best interests of the child should prevail.

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[15]See also Motsikatsana (2000) 16 **SAJHR** 45 at 67. He points out (at 68) that critics of inter-country adoption argue that the consent given to adoption is usually not given freely by relinquishing parents and that economic and social constraints and pressures play a significant role in relinquishing decisions.

The Johannesburg Institute of Social Services submitted that the best interests of the child principle should be made applicable in all cases of adoption, irrespective of whether the adoptive parents are South African citizens or not. It said all the outdated concepts and ideas that do not serve the interests of the child, for instance whether his or her parents are citizens of this country or not, should be omitted in future legislation.

The Cape Law Society was of the view that the requirements for adoption by non-citizens should indeed be made the same as for a citizen. The answer to the second question was similarly in the affirmative with the Society holding the opinion that the definition should be done away with in suitable circumstances. The Durban Committee added that there should be no objection to a non-citizen adopting a South African child nor should there be any problem with removing that child from the country. In reality, it was submitted, this situation is completely different.

Mr DS Rothman believed that it is necessary to amend the legislation dealing with non-South African citizens on the adoption issue but not necessarily in a way emulating the provisions pertaining to citizens. He was of the view that where non-citizens have a good track record with the child, the procedures should be relaxed.

It must be noted that the above submissions were made well before the Constitutional Court had the opportunity to consider the issue in **Minister for Welfare and Population Development v Fitzpatrick and others**.[16] We now turn to discuss this important decision.

22.2.4 Minister for Welfare and Population Development v Fitzpatrick and others 2000 (3) SA 422 (CC)

The facts in the case are fairly well-known and a brief summary should suffice. The Fitzpatricks are British citizens who have been living permanently in South Africa since March 1997. Mr Fitzpatrick works for a US corporation and expects to be transferred back to the United States. They wished to adopt a minor child, who was born to a South African citizen. The child was placed in foster care with the Fitzpatricks at age two-and-a-half months and strong bonds developed between the child, the Fitzpatricks, and their children. After a brief separation, the family decided

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[16] 2000 (3) SA 422 (CC).

to adopt the child and approached the Cape High Court for relief.[17] In this instance, the adoption of the child was firmly supported by the social worker and the court appointed curator involved.

One of the two[18] main issues for the Constitutional Court to resolve was whether section 18(4)(f) of the Child Care Act, 1983, was in conflict with the Constitution. Goldstone J, in whose judgment the whole Court concurred, held that the absolute prohibition of the adoption of a South African born child by non-South Africans is inconsistent with section 28[19] of the Constitution which requires that the best interests of a child are to be given paramountcy in every matter concerning the child.[20] The Court recognised that in some cases it might be in the best interests of a South African born child to be adopted by non-South Africans:

> It is not difficult to find other illustrations. South African parents may die leaving close non-South African relations in a foreign country. It might well be in the best interests of such an orphaned child to be adopted by those relations. Moreover, South African nationality is no guarantee that adoptive parents will continue to reside within the jurisdiction of South African social welfare services. What is more, the protection conferred by s 18(4)(f) does not extend to children, orphaned or abandoned in South Africa, but born of non-South African parents.[21]

While conceding that section 18(4)(f) of the Child Care Act, 1983, was unconstitutional, both the

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[17]This case is reported as **Fitzpatrick and others v Minister of Social Welfare and Pensions** 2000 (3) SA 139 (C). See also C M A Nicholson 'Inter-country adoptions - The need for South Africa to accede to the Hague Convention - *Fitzpatrick v Minister of Social Welfare and Pensions*' (2001) 64.3 **THRHR** 496.

[18]The other issue related to the form of the order to be made and, in particular, whether an order of invalidity should be suspended.

[19]The so-called children's rights section. Having found the provisions of section 18(4)(f) inconsistent with the children's rights section, it was not necessary for the Constitutional Court to consider whether the section was also inconsistent with the rights of prospective adoptive parents which may be protected by the provisions of sections 9 (the equality clause) and 10 (the human dignity clause) in the Constitution. See par [21] of the judgment.

[20]Par [16] of the judgment.

[21]Par [19] of the judgment.

Minister of Social Development and the amicus curiae argued in favour of the suspension of the order of invalidity. They submitted that striking down the provisions of section 18(4)(f) of the Child Care Act, 1983, in the absence of any amending legislation would expose children to the threat of child trafficking. Moreover adequate background investigations of the prospective adoptive parents could not be undertaken and South African adoptive parents would not be given priority in suitable cases.[22]

The Court reasoned that the remaining provisions of the Child Care Act, 1983,[23] were sufficient to enable a children's court to accommodate the concerns of the Minister and the amicus curiae. The Court said:[24]

> In effect, until the amended legislation, administrative infrastructure and international agreements envisaged by the Minister are in place, foreign applicants will have a greater burden in meeting the requirements of the Act than they will have thereafter. They will have to rely on their own efforts and resources in placing all relevant information before the children's court.

It will be recalled that the Minister and the amicus curiae inter alia argued for a suspension of the order of invalidity on the basis that such order would not give adequate effect to the principle of subsidiarity.[25] The Hague Convention itself indicates that while inter-country adoption has a role to play, it should be considered a measure of last resort.[26] The principle of subsidiarity could therefore be accommodated in the new children's code.

It follows from the Hague Convention's emphasis on good process rather than on the legal formalities involved in the recognition and effects of adoption, that the Hague Convention applies to a wide range of types of adoption, including those where there is a possibility of termination of

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[22]The principle of subsidiarity.

[23]As discussed in paragraphs [30] to [33] of the judgment.

[24]Paragraph [34] of the judgment.

[25]Subsidiarity refers to the principle that inter-country adoption should be considered strictly as an alternative to the placement of a child with adoptive parents who reside in the child's country of birth.

[26]This is reflected in the Preamble and in Article 4 of the Hague Convention.

the adoption relationship, and those where the adopted child retains some links with his or her family (and country) of origin. Under the Hague Convention, recognition of adoptions effected in other countries cannot be limited to those adoptions which have a sufficient degree of identity to a South African adoption. All adoptions, whatever their effects, which have been made through Convention procedures, must then be recognised in South African law.

This could pose a challenge to South Africa as, at the moment, we recognise only one type of adoption - 'full adoption': this creates a new and irrevocable legal relationship between the child and adoptive parents which severs all legal ties between the child and his birth parents.[27] However, given the preliminary decision taken by the Commission to move away from parental rights to the concept of parental responsibilities, and the possibility of assigning components of parental responsibility to different care givers;[28] greater recognition to the role of the extended family; the move to 'open adoptions'; etc., a new South African children's statute might provide for what is called a 'simple' adoption.[29]

22.2.5 Current Practices and Approaches: An Overview of Comparative Law

The majority of states who have ratified or acceded to the Hague Convention on Intercountry Adoption are still in the early stages of the implementation process for the Hague Convention. Others, like South Africa, are still contemplating ratifying or acceding to the Hague Convention. However, a number of states have already either enacted implementing legislation, or have put forward proposals for such legislative measures. Before setting out the implementing measures which need to be taken in South Africa, it is useful to consider the relevant laws of other states.[30]

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[27]Sections 20(1) and (2) of the Child Care Act, 1983.

[28]See 8.4.5.1 and 8.4.5.3 above.

[29]This is an adoption which allows for the legal relationship between the child and the birth parents (and or the extended family) to continue in some form.

[30]For the position in Ireland, see Ireland Law Reform Commission **Consultation Paper on the Implementation of the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 1993**, September 1997; **Report on the Implementation of the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 1993**, June 1998; Ireland Law Society "Adoption law: The case for reform" at

22.2.5.1 **United Kingdom**

The United Kingdom, as a common law jurisdiction which recognises only full adoptions, faces problems of implementation similar to those encountered in South Africa. The United Kingdom has signed the Hague Convention in January 1994, and legislation has been adopted[31] which amends the Adoption Act, 1976 and the Adoption (Scotland) Act, 1978 in respect of inter-country adoption, enables the United Kingdom to ratify the Hague Convention, and introduces sanctions to deal with unacceptable practices in inter-country adoption.

In the United Kingdom, adoption is entirely a creature of statute. It is regulated by the 1976 Adoption Act and in Scotland by the 1978 Adoption (Scotland) Act. Inter-country adoption was unusual at the time this legislation was passed and detailed provisions were therefore not included (other than for the implementation of the 1965 Hague Convention). Every local authority has a duty to establish and maintain an adoption service in its area. Only local authorities and adoption agencies approved by the Secretary of State may make arrangements for the adoption of a child (except where the child is a relative). The process is set out in regulations.

The UK Adoption (Intercountry Aspects) Act, 1999, extends to all forms of inter-country adoption or adoption with a foreign element.[32] It enables England, Wales and Scotland to give effect to the 1993 Hague Convention through regulations. It establishes a Central Authority for each of England, Wales and Scotland to be responsible for the operation of the Convention and the appointment of approved adoption agencies as Accredited Bodies.[33] Provision is also made to enable the Secretary of State to make regulations for Convention adoption orders and for the recognition and annulment of Convention adoptions. The British Nationality Act 1981 is amended to enable children

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www.lawsociety.ie/adoption(report).htm . For the position in New South Wales, Australia, see New South Wales Law Reform Commission **Report No. 6: Intercountry Adoption and Parent Support Groups**, March 1997.

[31]The Adoption (Intercountry Aspects) Act 1999. See also Kisch Beevers 'Intercountry adoption of unaccompanied refugee children' (1997) Vol. 9. No. 2 **Child and Family Law Quarterly** 131.

[32]For the text of the legislation, see www.bailii.org/uk/legis/num_act/aaa1999353/ .

[33]The Secretary of State for Health; Sections 1 and 2.

adopted overseas under the Convention to receive British citizenship automatically under certain conditions.[34]

The Act also amends the 1976 Adoption Act and the 1978 Adoption (Scotland) Act to regulate inter-country adoption in both Convention and non-Convention cases. It clarifies that there is a duty on local authorities to include inter-country adoption within their adoption services and enables adoption societies to be approved for inter-country adoption work.[35] It makes changes to the period a child must live with the adopters before an adoption order is made in inter-country cases and provides that adoption agencies will have responsibilities towards the placement.[36]

Where the UK is the receiving state, in a 'simple adoption'[37] made under the Hague Convention, the Act provides for automatic conversion to a full adoption in the United Kingdom, provided that the UK authorities are satisfied that the birth parents consented to the adoption in the knowledge that it would be converted into a 'full' adoption once the child was brought to the UK.

Where the UK is not the receiving State, it is possible that a child may be brought to the UK in circumstances where simple adoptions are recognised in both the State of origin and the receiving State and no consent to full adoption has been given (a so called 'third country case'). In those cases, the adoption will still be treated as a full adoption by operation of law, but if any issue of status arises where it is felt it would be more favourable to the child to treat the adoption otherwise than as a 'full adoption',[38] an application may be made to the High Court. Insertion of a new subsection (3A) provides that where a child has been adopted under a Convention order and the High Court is satisfied, on an application under this subsection,

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[34]Section 7.

[35]Sections 9 and 10.

[36]Sections 11 and 13.

[37]A "simple adoption" does not have the effect of totally severing all ties from the birth parents.

[38]The adoption law of the United Kingdom recognises only one type of adoption - "full adoption" : this creates a new and irrevocable legal relationship between the child and the adoptive parents which severs all legal ties between the child and his or her birth parents.

(a) that under the law of the country in which the adoption was effected the adoption was not a full adoption;

(b) that the consents referred to in Article 4(c) and (d) of the Convention have not been given for a full adoption, or that the United Kingdom is not the receiving State (within the meaning of Article 2 of the Convention); and

(c) that it would be more favourable to the adopted child for a direction to be given under this subsection, the Court may direct that subsection (2) shall not apply, or shall not apply to such an extent as may be specified in the direction.

The effect of this new subsection is to provide a new legal mechanism for the High Court to give a direction whether and to what extent a child adopted through a simple adoption under the Hague Convention should be treated as if he were not the child of any person other than the adopters or adopter. It will be available only if the adoption was not a full adoption, if the consents to a full adoption were not given or the UK is not the receiving State. It must be more favourable to the adopted child for the direction to be given.

Changes are made to the procedure which requires the Registrar General to enter in the Adopted Children Register adoptions effected under the Convention and overseas adoptions.[39]

Sections 14 to 18 deal with miscellaneous and supplemental provisions which include the introduction of new sanctions to make it a criminal offence in inter-country adoptions for a person to make arrangements for the adoption of a child or place a child for adoption unless requirements to be prescribed in regulations are complied with. These sanctions will not apply to birth parents, legal guardians or blood relatives. The Act makes the necessary provisions to enable the United Kingdom in due course to denounce the 1965 Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees relating to Adoptions, concluded at the Hague on 15 November 1965. This Convention was ratified by only two other countries - Austria and Switzerland - which have also declared their intention to denounce it.[40] The purpose of the Convention was to resolve some of the difficulties and legal conflicts which may arise in inter-country adoption relating to recognition of adoption orders granted in other countries. This Convention has now been overtaken by the

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[39]Section 12.

[40]Sections 15 and 17.

1993 Convention.

22.2.5.2 **France**

France signed the Hague Convention on 5 April 1995, but has yet to ratify. On 24 February 1998, the French National Assembly approved the implementing legislation to enable France to ratify the Convention. Under the legislation, the body designated as Central Authority is the International Adoption Mission (Mission de l'adoption internationale) (MAI), which is under the aegis of the Ministry of Foreign Affairs, and which also includes representatives of the ministry of social affairs and the ministry of justice. The role of the MAI is to supervise the conduct of inter-country adoptions under the Convention and to ensure that the child has permission to enter and reside in France.[41]

22.2.5.3 **Sweden**

Sweden ratified the Hague Convention on 28 May 1997, and the Convention entered into force on 1 September 1997. The legislation which implements the Convention is the Act consequent upon Sweden's accession to The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1997.191) (The Hague Convention Act). The Intercountry Adoption Intermediation Act (1997:192) also makes provision for inter-country adoptions in which Sweden is the receiving State.

The Hague Convention Act provides that the Central Authority for Sweden is to be the Swedish National Board for Intercountry Adoptions (NIA). The NIA is responsible for issuing certificates under Article 23 of the Convention. Under section 5 of the Intercountry Adoption Intermediation Act, the NIA is also responsible for the accreditation of agencies and for their supervision. Under section 6 of the same Act, accreditation may only be granted to an agency which has as its main purpose the facilitating of inter-country adoptions. It must be shown that the agency will provide adoption assistance in a competent and judicious manner, without expectation of profit and in the

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[41]Ireland Law Reform Commission **Report on the Implementation of the Hague Convention on Protection of Children and Co-Operation in respect of Inter-Country Adoption, 1993**, June 1998, p. 8.

child's best interests. Under section 7, authorization is for a fixed term. Authorization enables the agency to administer inter-country adoptions in respect of specified countries of origin only, and may also be subject to other conditions, for example in relation to the imposition of charges or the rendering of accounts. However, the Act does permit an accredited agency to make some reasonable charges. Accreditation may be revoked by the Central Authority if the agency no longer meets the standards set in section 6.

Under the Swedish legislation, all inter-country adoptions must be conducted through an accredited agency, except in certain cases where the child is related to the prospective adoptive parents, or where there are other special circumstances. Provision is made for fines to be imposed where a person provides inter-country adoption services without authorization, or where a child is removed from the country of his or her domicile, without the approval of the NIA.

A number of the responsibilities of the Central Authority are delegated under the Swedish legislation. Article 14 applications to adopt a child under the Convention are to be made to municipal social welfare committees. The social welfare committee must then prepare reports on the prospective adoptive parents' eligibility and suitability to adopt, under Article 15, and agree to the adoption proceeding to the placement stage under Article 17.c. The social welfare committee is also responsible for taking any necessary measures under Article 21, where the continued placement of the child with the prospective adoptive parents is no longer in the child's best interests. Functions are also delegated to the accredited agency, which is responsible for the transmission of reports on the prospective adoptive parents under Article 15.2, and the receiving of reports on the child drawn up under Article 16.1. Agencies are also charged with obtaining permission for a child to enter and reside in the State, ensuring the safe transfer of the child under Article 19, and with supplying information to the authorities in the State of origin as to the progress of the adoption.

Under the Swedish Code of Parenthood and Guardianship, the effect of adoptions carried out in Sweden is to terminate the parent-child relationship between the child and the biological parents, and to create a new parent-child relationship with the adoptive parents. The adoption is thus a "full" adoption similar to that under UK and Irish law. Under section 5 of the 1997 Hague Convention Act, an adoption made abroad which has the effects of a ‘simple’ adoption may be converted to a full adoption in the Swedish courts. As a necessary condition to conversion, the consents required

under Article 27.1.b of the Convention and Chapter 4, section 5 of the Code of Parenthood and Guardianship must have been granted. No provision is made for the recognition of simple adoptions as having the effects of a simple adoption in Swedish law.

22.2.5.4 **Canada**

Implementing legislation for the Hague Convention has been enacted by seven of the twelve Canadian provinces: British Columbia, Prince Edward Island, Manitoba, New Brunswick, Saskatchewan, Alberta and Yukon.[42] Each province has a provincial Central Authority, who may be either a government minister or a public official. In British Columbia,.the Central Authority is the Director of Adoption at the Ministry of Children and Families; in Prince Edward Island, the Director of Child Welfare; in Manitoba, the Director of Child and Family Services; in New Brunswick, the Minister for Health and Community Services; in Saskatchewan, the Minister for Social Services; and in Yukon, Director of Family and Children's Services. There is a Federal Central Authority for Canada, the National Adoption Desk (NAD).

The majority of the implementing statutes allow for the delegation of the functions of the Central Authority to public authorities and accredited agencies, and for some functions under the Convention to be performed by independent operators, subject to the approval of the relevant Minister. For example, the legislation of New Brunswick provides as follows:

> 5. ... (2) Where the Minister so authorizes, the functions of a Central Authority under Articles 15 to 21 of the Convention may, to the extent determined by the Minister, be performed by a person or body who meets the requirements of subparagraph (a) and (b) of paragraph 2 of Article 22 of the Convention.

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[42]Manitoba: The Intercountry Adoption (Hague Convention) and Consequential Amendments Act, 1995; Prince Edward Island: The Intercountry Adoption (Hague Convention) Act, 1994; New Brunswick Intercountry Adoption Act, 1966; British Columbia, Adoption Act, 1995; Yukon: Intercountry Adoption (Hague Convention) Act, 1997. Quebec, Nova Scotia, Newfoundland and the Northwest Territories intended to implement the Hague Convention by the end of 1998. See also Tara Mani “Monitoring the implementation of the Hague Convention on Intercountry Adoption”, Canadian Coalition for the Rights of the Child, December 1997 at www.crin.org/crpublic1.nsf/14.../992f2c904bfc091d80256695003c249d?OpenDocumen .

However, the implementing legislation of Manitoba does not allow for delegation of functions to independent operators. Under section 5 of the province's Intercountry Adoption (Hague Convention) and Consequential Amendments Act, functions of the Central Authority may be delegated to public authorities or accredited bodies only. The legislation of all of the provinces provides that bodies accredited in other Contracting States may operate on their territory, with ministerial authorization, and that the Minister may authorise a body accredited in the province to operate in other Contracting States.

The legislation of the Yukon and Manitoba provides that the certification of consents provided by State of origin in a Convention adoption shall be accepted as valid by the authorities of the province.[43]

The legislation for British Columbia makes detailed provision for the conversion of adoptions under Article 27 of the Convention. Section 55 of the British Columbia Adoption Act provides that:

> (1) On application by a person resident in British Columbia, the court may make an order converting an adoption referred to in Article 27 of the Convention to have the effect of an adoption under this Act.
>
> (2) An application for an order under this section must be accompanied by proof that the consents required under Article 27 of the Convention have been given.

Under the Adoption regulations for British Columbia, an adoption cannot be converted unless the court is provided with proof that the required consents have been obtained; a certified copy of the adoption order granted in the State of origin; a certificate of conformity issued by the State of origin; a Convention letter of approval issued by the British Columbia Central Authority; the child's birth registration; and, where applicable, details of any access orders or orders dispensing with consents.[44]

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[43]Intercountry Adoption (Hague Convention) Act, section 10 (2) (Yukon); The Intercountry Adoption (Hague Convention) and Consequential Amendments Act, section 9 (3) (Manitoba).

[44]British Columbia Adoption Regulations (4 November 1996), section 33.

22.2.5.5 **New Zealand**[45]

In 1997, New Zealand passed the Adoption (Intercountry) Act, 1997, which allowed the State to accede to the Hague Convention. Whilst the Act makes comprehensive provision for implementation, it also allows (under section 24) for regulations to be made by the Governor General for the administration of the Act. The Act provides that the Hague Convention shall have the force of law in New Zealand, and provides for a Central Authority, which is to be the Director-General for Social Welfare, the chief executive of the Department of Social Welfare. The Act also provides for delegation of the Central Authority's functions to accredited agencies.

The Act makes detailed provision for accreditation of agencies. Agencies are accredited by the New Zealand Central Authority, where it is established that the body in question purses only non-profit objectives, that it is capable and competent to carry out the tasks that may be delegated under the Convention, that it will operate in the best interests of the child, and that it is directed and staffed by persons who are properly qualified in the field of inter-country adoption. Accredited bodies must report annually, under section 21, to the Director-General on the exercise of the functions delegated to them under the Convention. The Director-General can at any time carry out an assessment of an accredited body and must do so at intervals of not more than twelve months.

The Act provides that foreign agencies may operate in New Zealand, if they are authorised by the Central Authority. In addition, New Zealand agencies may operate in other jurisdictions, with the approval of the Central Authority.

Where an application is made to the Director-General for accreditation, the Director-General must place an advertisement in at least one daily newspaper circulating in the area where the organisation's principal office is situated in order to allow for submissions to be made on whether the organisation should be accredited. Where the Director-General refuses accreditation, the unsuccessful applicant must be given a copy of any information on which the Director-General relies in proposing to decline the application, and the organisation must be given a reasonable time in which to make submissions in relation to this information.

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[45]See also the New Zealand Law Reform Commission **Report 65: Adoption and its Alternatives**, September 2000, 293 et seq.

Section 19 of the Act provides that the Director-General may suspend or revoke accreditation, where an organisation is not performing its functions adequately, is pursuing profit objectives, or has imposed unreasonable charges for its services. There is also a provision, in section 20 of the Act, that any decision of the Director-General, to decline, revoke or suspend accreditation, may be appealed to the District Court.

Section 26 of the Act deals with the prohibition of payments to agencies accredited under the Convention. It provides that the prohibition does not extend to the payment of reasonable costs and expenses to any organisation approved as an accredited body, provided that these costs are in connection with a function delegated under the Act. By section 27 of the Act, accredited bodies may not advertise, but may notify the public that they have been accredited under the Act, and that functions have been delegated to them under the Act.

It is stipulated under the Act that prospective adoptive parents must be offered a choice, of a governmental or a non-governmental authority to prepare the report as to their eligibility to adopt.[46] Reports may be prepared either by the Director-General as Central Authority, or by a public authority or an accredited body.[47] Where a prospective adoptive parent applies to the Director-General and requests him or her to prepare the report, this request must be complied with.[48]

With regard to recognition of adoptions effected outside New Zealand, section 11 of the Act provides that an adoption recognised under the Convention has the same effect as a New Zealand adoption, that is, it fully terminates the pre-existing parent-child relationship. The Act does not make provision for the recognition of simple adoptions. Section 12 provides that, if the adoption does not already have the effects of a full adoption, it may be converted to such by an order of the Family Court, if the Court is satisfied that, inter alia, the consents to the conversion of the adoption have been given for the purposes of conversion.

Section 12(3) of the Act reflects Article 24 of the Convention, in allowing for the New Zealand Central Authority to refuse to recognise an adoption made under the Convention, subject to such

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[46]Section 7(3).

[47]Sections 7(1) and (2).

[48]Section 7(1).

terms and conditions as it thinks fit. It appears that this would allow the Central Authority to refuse recognition to a simple adoption where it was not possible to convert it to a full adoption in the New Zealand courts.

Section 13 of the Act details the right of access to information relating to adoptions effected under the Convention. It places an obligation on the Central Authority to ensure that all reports prepared or received under Article 16, are retained either by the Central Authority or by the Chief Archivist, where such reports result in an adoption.

22.2.5.6 **Ecuador**

Ecuador ratified the Convention on 21 August 1995. It is primarily a sending State in which there is a 2:1 ratio of inter-country to domestic adoptions. Ecuador has a history of corrupt commercial inter-country adoptions which has led to an increase in regulation.[49] The Code of Minors of 7 August 1992 regulates both domestic and inter-country adoption.

The Central Authority for Ecuador is the National Court of Minors. Inter-country adoptions are administered by the Technical Department of Adoptions - a component of the Welfare and Popular Promotion Ministry. It is State-financed, and has 3 regional offices, as well as a central national office. The National Court of Minors oversees adoptions, pre-and post-placement. It receives adoption applications from prospective adoptive parents, selects and advises adopters and. children, and also prepares all the requisite reports and provides post-adoption services. The matching of the child with the prospective adoptive parents is the responsibility of the Assignment Committee of the Technical Department of Adoptions.

Accreditation agreements, signed by the Ministry of Social Welfare in consultation with the Technical Department of Adoptions, are valid for two years, and are renewable. Only one indigenous agency has been accredited - the 'Adoption Foundation for Our Children'. There are also foreign agencies which have been accredited through signing agreements with the Ecuadorian

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[49]Ireland Law Reform Commission **Report on the Implementation of the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption**, 1993, June 1998, p. 13.

authorities. Again, the competent body is the Ministry for Social Welfare, in consultation with the Technical Department of Adoptions.

Prospective adoptive parents must adopt through an accredited agency. The child is consulted where appropriate, and in the case of an adolescent adoptee, he or she is required to give consent to the adoption. However, the practice of this varies between the provinces. A declaration of adoptability can be made where a child is orphaned or abandoned, or where the birth parents consent. Before adoptability can be declared, there must be a study carried out on the family of origin.

22.2.5.7 **India**

India is a multi-religious and multi-ethnic society, consisting of Hindus, Muslims, Khojas, Christians, Parsis and Jews. With the exception of Christians, Hindus and Khojas, the personal laws of these groups do not recognize a complete legal adoption. In general there is a lack of uniform adoption policies. The Supreme Court Judgment of February 1984 and its subsequent review provided guidelines for the inter-country adoption procedure. These guidelines are based on the Hindu Adoption and Maintenance Act of 1956, the Guardians and Wards Act of 1980 and the Juvenile Act of 1986.

It is a prerequisite that the foreign country must have:

(a) Enacted adoption laws under which a child from India can be legally adopted.

(b) Enacted immigration laws that allow Indian children to legally immigrate into the foreign country.

(c) Enacted citizenship laws that allow the Indian child to receive the lawful citizenship of the foreign country.

(d) Established diplomatic relations with India so that the foreign social welfare agency can apply directly to the Indian Social Welfare Ministry for an Intercountry Adoption License.

(e) Approved and licensed the foreign social welfare agency that is applying for the inter-country adoption of an Indian child.

As a point of departure, a document releasing the child for placement in adoption/guardianship (relinquishment document by a parent/relative or juvenile court order or release order from the government) is required.

The documents in respect of the child are the following:

(a) child study report;
(b) physical examination report;
(c) photograph; and
(d) I.Q. report (if the child is older).[50]

A Home Study Report is required, and the following supporting documents:

(a) Marriage certificate;
(b) medical certificates of both prospective parents, and their children (if any);
(c) medical report concerning the couple's prospects for having biological children (if relevant);
(b) certificate of employment/income of the working parents (a copy of the income tax return form, a bank reference and/or evidence of property ownership, if any);
(c) three reference letters from relatives, friends, colleagues, neighbours, or persons knowing the petitioners for at least two years;
(d) photograph of the family;
(e) statement about child care arrangements (if the prospective mother is working away from home);
(h) views of the other children on adoption (if relevant); and
(i) copy of the adoption order of the adopted children (if applicable).

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[50]Standard formats for the child study and physical examination report are available. These documents and the photograph are to be countersigned by the adopting parents, as evidence of their approval of the child.

Certain documents relating to consents and undertakings of the petitioners and the agencies concerned are required:

(a) Consent affidavits of the petitioner to be appointed a guardian; consent of the spouse; joint declaration of intent to act as if the adopted child is a biological child.
(b) Undertaking of the petitioner(s) to abide by the conditions set by the court for adoption and follow-up reports of the child.
(c) Consent affidavit of the placing institution/agency's representative affirming the proposal contained in the petition.
(d) Undertaking by the institution/agency to abide by the conditions of post-placement follow-up and supervision, and to keep responsibility for the welfare of the child in case of a disruption of the adoption.
(e) Mandatory authorization of the designated government agency (in cases of inter-country adoption).

The following documents are also required:

(a) Delegation or authorization instruments and attestation of the documents (in cases of inter-country adoption).
(b) Petition to adopt.
(c) Foster care agreement or the order of the juvenile / state authority.
(d) Clearance of the coordinating agency (in cases of inter-country adoption).
(e) Post-court order documents: Court order, indemnity bond; and follow-up report.

A foreign adoption agency must send a written application for each prospective adoptive family. The foreign adoption agency must prepare a home study report according to the laws of its country and this report must accompany the application. Upon receipt of the application and the home study report, the collaborating Indian social welfare agency locates a particular child for the family. The Indian agency must prepare and send to the foreign country a child study report which includes the child's name, medical history, physical and emotional status and other relevant information.

The foreign social welfare agency must share the child study report with the prospective adoptive family. If the family wishes to adopt the child they must sign the child acceptance form. It is the

responsibility of the two collaborating agencies to make the necessary arrangements if the prospective adoptive parents choose to visit their assigned child in India.

The Indian social welfare agency can appoint an attorney to petition the local state court to award guardianship of the assigned child to the prospective adoptive parents in terms of the Guardians and Wards Act of 1890.

A local court can by decree award the guardianship of the child to the foreign adoptive parents residing in the foreign country. The court can also grant permission to arrange for the child to travel to the foreign country where he will be adopted. The prospective adoptive parents can be present at the court hearing, but it is not a requirement. The prospective adoptive parents are required to follow other court decree stipulations. They may be required to execute a bond in the child's name for a short period of time, for the welfare of the child and to ensure his repatriation to India if the court should so order. The prospective adoptive parents must apply for a visa and arrange for the child's travel according to the immigration law of their country. This is done with the assistance of the collaborating social welfare agencies of the two countries. The adoptive parents are not legally required to pick up the child themselves. However, they may choose to do so in order to familiarize themselves with the child's culture and life prior to adoption. The child must be legally adopted by the adoptive parents in their own country within two years of the guardianship order. The adoptive parents must ensure that the child receives the same legal status and inheritance rights as biological children receive. The adoptive parents must also see to it that the child receives citizenship of the country.

The foreign social welfare agency must provide the collaborating Indian agency with regular post-placement reports for a specified period of time and a copy of the final adoption decree granted in the foreign country. Should the original adoption be disrupted, the social welfare agency of the foreign country must ensure, in consultation with the collaborating Indian social welfare agency, that an alternative adoption is arranged. It is also possible that an Indian court may order that the child be repatriated to India where the original adoption is disrupted.

Each collaborating social welfare agency provides its fee schedule based on its funding source. Prospective adoptive parents should anticipate the following expenses:

(a) Daily maintenance costs such as food, clothing and medicine;
(b) major medical or surgical costs;
(c) fees to free the child for adoption;
(d) lawyers fees; and
(e) passport and visa fees.

No provision is made for a Central Authority as understood under the Hague Convention. To a certain extent this role is fulfilled by the Social Welfare Ministry. Any social agency from a foreign country applying for an Inter-country Adoption Licence must submit its application to the Ministry. The Social Welfare Ministry reserves the right to accept or reject any application and its decision is based on prevailing Indian child welfare policies, specified quotas of children for inter-country adoption and other factors. A list of all the approved foreign social welfare agencies and the approved Indian social welfare agencies licensed to work with foreign agencies is maintained and updated by the Ministry.

The Central Adoption Resource Agency (CARA) also plays an important role. It was established in 1984 and has the following role and functions:

(a) It serves as a clearinghouse for information on children available for adoption. Through its monitoring and supervision, it provides uniformity to nationwide inter-country adoption practice.
(b) Applications from the foreign prospective adoptive parents are submitted to the CARA who then forwards them to recognized Indian agencies for processing. The CARA also maintains data both on children admitted to Indian social welfare agencies and on children available for adoption.
(c) The CARA monitors and regulates the operation of recognized child welfare agencies and inspects their annual audited reports. It receives adoption data from all competent courts and submits it to Indian Diplomatic Missions in the respective countries. The Indian Diplomatic Missions submit progress reports to the CARA and in this way it is possible to keep a watch on the development and progress of the children adopted by foreign parents.
(d) The CARA organizes and arranges periodic meetings of voluntary coordinating agencies and sponsors training programs for social workers and other people involved in adoption matters.

The social welfare agency from a foreign country applying for an Intercountry Adoption License must submit a notarized copy of its state/country adoption license, together with accompanying documents as requested by the Social Welfare Ministry of the Government of India. This Ministry reserves the right to accept or reject any application and its decision is based on prevailing Indian child welfare policies, specified quotas of children for inter-country adoption, and other factors.

If the foreign social welfare agency is approved for inter-country adoption, the name of that agency will be placed on a master list of all approved agencies from different countries. This list is periodically updated and distributed to all the social welfare agencies in India involved in providing adoption and children's services. As only a few of the Indian social welfare agencies are licensed to work with foreign agencies for the purpose of inter-country adoption, these agencies are also listed. This list is also periodically updated by the Social Welfare Ministry.

Once a foreign social work agency receives the Intercountry Adoption License from the Social Welfare Ministry of the Government of India, it may work directly with any one or more of the licensed Indian social welfare agencies.

Indian children are to be placed with Indian families as a first priority. They can only be placed for inter-country adoption with foreign nationals when parents of Indian origin, either in the country or in foreign countries, are not available.

It is only Indian social welfare agencies licensed by the Social Welfare Ministry of India that can place children for inter-country adoption.

A direct application from a foreign individual may not be considered by an agency in India. The application can only be presented by a social welfare agency licensed or recognized by the Social Welfare Ministry of the Government of India.

A single biological parent or legal guardian has three months to reconsider his decision and a married couple has four months to reconsider their decision. A licensed social welfare agency in India must honour these waiting periods.

All licensed social welfare agencies in India must ensure that a child is legally free for adoption in accordance with the Juvenile Justice Act of 1986.

If possible, a child placed for inter-country adoption should be under three years of age, so as to accelerate his assimilation into the new family, community and society.

22.2.5.8 **Romania**

The legislative framework for adoption was modified by Law No 11 which came into effect on 1 August 1990. Articles 73 and 74 of the Family Code that had assigned the responsibility for granting adoptions to the Guardianship Authority were abrogated. The responsibility for granting adoptions was given to the jurisdiction of the courts. International adoptions now belonged to the jurisdiction of the country court (*judet*), while domestic adoptions formed part of the jurisdiction of the local courts.

As a result of the growing number of inter-country adoptions of Romanian children, plus Romania's ratification of the CRC, Law No 11/1990 was amended. This was done by the passage of Law No 48 on 16 July 1991.

The amendments were primarily aimed at inter-country adoptions. The new regulations stipulate that foreign citizens, or Romanian citizens domiciled or with habitual residence abroad, may only adopt children who could not be placed or adopted in the country during a period of at least six months from the date of their registration. The names of these children are recorded in the files of the Romanian Committee for Adoptions. In effect inter-country "direct" or "independent" adoptions from private Romanian families are no longer possible.

The Romanian Committee for Adoptions is the Central Authority under the Hague Convention. It is a governmental organisation with the purpose to supervise and support actions for the protection of minors and to foster international cooperation on issues dealing with adoption.

Some of the State Departments represented on the Committee are as follows: the Ministry of Health, Ministry of Justice, Ministry of Finance, Ministry of Foreign Affairs, Ministry of Education and Science, Minister of Labour and Social Security, the State Secretariat for the Handicapped and the

Department for Local Administration. The permanent Secretariat of the Committee is located in the Ministry of Health and is made up of physicians, lawyers and experts on social security matters.

One of the main tasks of the Committee is to establish a centralized listing of children being protected through adoption, and to ensure placement or adoption of these children within the country, during a period of six months from the date of their registration. It is only when the child cannot be placed or adopted that the Committee will issue an acknowledgement of the fact. A court can then notify the prospective foreign adoptive family.

Foreign citizens or Romanian citizens domiciled or with habitual residence abroad, who wish to adopt Romanian children, have to apply to the Central Authority in their country of residence with competence in the field of child welfare and inter-country adoption, or to another legally authorized adoption organization in that country approved by the Romanian Committee for Adoptions.

The criteria set by the Committee in selecting foreign adoption authorities or agencies for mutual cooperation are the following:

(a) Their legislative status;
(b) the date of their establishment;
(c) their aims in the field of inter-country adoption;
(d) the diversity of their actions;
(e) the legislation in effect in the respective country;
(f) the agency's ability to provide the Committee with follow-up reports about the child's adjustment for a period of at least two years after the adoption;
(g) the experience of the agencies in counselling applicants, especially applicants who wish to adopt an older, handicapped or sick child.

The Committee prefers to limit its selection to a small number of adoption authorities in the receiving countries and priority is given to those organizations placing older, sick or handicapped children.

The basis for cooperation between the foreign adoption authority or agency and the Romanian Committee for Adoptions can be found in a working arrangement. This arrangement is signed by

the institutions involved and stipulates certain obligations for parties involved in the inter-country adoption, in particular the obligation of parties involved to abide by the principles of the CRC.

The working arrangement has the following content:

(a) It establishes guidelines for concluding inter-country adoptions, taking into account both parties' national legislation.

(b) It places an obligation on the foreign authority or agency to cooperate exclusively with the Romanian Committee for adoptions in coordinating the adoption of Romanian children by applicants in its country. In terms of the arrangement, the Romanian Committee can only accept the applications forwarded by the selected foreign authority or agency.

(c) The procedures and requirements for conducting inter-country adoptions are set out in an annex, which forms part of the working arrangement. The following obligations are stipulated:

(i) The obligation of both parties to give priority to applications submitted by foreign citizens of Romanian origin, or Romanian citizens domiciled or with habitual residence in the country in question.

(ii) The obligation of the Romanian Committee to provide the prospective adoptive parents, or their legal representatives, with an acknowledgement that the child could not be placed nor adopted in Romania within the six month period from the date of his registration.

(iii) The obligation of the Romanian Committee to provide the file containing documents regarding the applicants necessary for the future court proceedings.

(iv) The obligation of the foreign authority or agency to follow up the adjustment of the child in the adoptive family for a period of at least two years and to send periodic reports to the Romanian Committee.

(v) The obligation of the foreign authority or agency to assume responsibility for protection and placement of the child in the event of a breakdown of the adoption process.

Applications for adoptions should be accompanied by the file prepared by the foreign adoption authority or agency for every family or person adopting. In general, the file includes the following:

(a) The application from the applicants expressing their desire for a full adoption of a Romanian

child, with an authenticated statement to that effect.

(b) The birth and marriage certificates of the applicants.

(c) Police clearance.

(d) Authenticated medical certificates for the applicants, their children, and other members of their household.

(e) Statement of family income.

(f) Photographs of the applicants and their family (children and parents).

(g) A certified copy of a home study prepared by a specialised welfare authority or a registered social worker, as outlined in the working arrangement. This home study includes: the motivation for adoption, the psychological history and family dynamics of the adopting party, the attitude of children over age ten in the household toward a possible adoption, the family's interest and attitudes toward Romania, the attitudes of their immediate community, and the family's cultural, religious and general interests.

(h) A certified, authenticated copy of the agreement of the adoption agency, or other competent authority, regarding the applicant's capability to adopt the child in accordance with the respective country's legislation.

If necessary, the documents are translated into Romanian by an authorized translator. The Romanian Committee then proceeds to review the applicants' files together with the records of children available for adoption in order to select the family or person considered to be the most appropriate for the child.

Once the choice has been made the Romanian Committee informs the foreign authority or agency. More documentation can be requested and can include the following:

(a) The child's social case history and the circumstances surrounding his becoming available for adoption.

(b) The child's medical history.

(c) The child's current health status report.

(d) A recent photograph of the child.

(e) A social and medical history of the child's birth parents, if available.

If the prospective parents, upon seeing the documentation, accept the choice made by the

Romanian Committee, they may travel to Romania where they will meet the child. They can then begin the necessary legal procedure in court. Should the Romanian Committee's choice not be acceptable to the prospective adoptive parents, they must provide their reasons in writing to the foreign authority or agency. These reasons will then be forwarded to the Romanian Committee.

An inter-country adoption cannot be concluded without the Romanian Committee's confirmation, and the application for adoption is dealt with by that country's court. The following documents are needed for the court proceedings in cases of adoption, whether domestic or inter-country:

(a) Documents with reference to the adopted child:

(i) Notarized and authenticated copy of his birth certificate.

(ii) Notarized and authenticated copies of birth certificates of the biological parents and, if specific to the case, marriage or death certificates,

(iii) Authenticated declaration of consent to adoption given by the child's biological parent(s), guardian, legal custody representatives, or the Guardianship Authority.

(iv) Medical certificate attesting to the minor's current health status, issued either by the country, city, or district polyclinic.

(v) The Romanian Committee for Adoptions' acknowledgement, in an inter-country adoption case, that the child could not be placed nor adopted within the country during the six month period from the date of his registration.

(b) Documents with reference to the adopting family or individual:

(i) Notarized, authenticated statement in which the applicants specify whether the adoption is made with full or restricted effects.

(ii) Notarized, authenticated copies of birth and marriage certificates.

(iii) Certificates of police clearance.

(iv) Medical certificates of current health status.

(v) A document, in the case of an inter-country adoption, issued by the foreign competent authorities regarding the applicants' capability to adopt a child in accordance with the country's legislation.

(vi) A home study, in the case of an inter-country adoption, prepared by the competent

foreign authorities in the place of domicile stating their opinion regarding the adoption.

The application is heard by two judges and all those who must consent to the adoption are summonsed to be present. The court delivers its ruling by means of a court order. The court needs to be convinced that the child will enjoy safeguards and standards in the receiving country at least equivalent to those existing in Romania.

There is a right to appeal the court's decision within fifteen days from the date of its pronouncement. After the decision becomes final, a new birth certificate is drawn up for the adopted person, and the adoptive parents are entered as the natural parents in domestic adoptions. Their place of residence is entered as the child's birthplace. In the case of inter-country adoptions, Law No 48/1991, Article IV stipulates that the adoptive parents' place of residence should not be entered as the child's birthplace. The former birth certificate is retained and the new certificate is mentioned. The adopted child is also given a passport and accompanied to the foreign country by at least one of the adoptive parents.

A parent, guardian or foster parent who claims or accepts money or other material goods, for himself or somebody else, in exchange for a child's adoption, can be sentenced to imprisonment from one to five years. The same sentence applies to a person who obtains improper financial gain through acting as an intermediary or facilitator in a child adoption. The money, valuables or other goods received as payment will be confiscated. Where these cannot be found, the person sentenced is forced to pay their equivalent in money.

22.2.5.9 **Colombia**

The institution of adoption in Colombia has changed over time from initially private arrangements between families to a highly formalized legal institution under public control. Formerly, orphaned and abandoned children were absorbed by local families for domestic or agricultural work or were left to the care of the church and private charities. Although these private bodies continue to provide daily care for children they are now under state control.

When centralized health and welfare services were created in the 1960s, the control of substitute

care and adoption was transferred from the family and private sector to the State, which began to use adoption systematically as a child protection measure. A special children's division was created in the Ministry of Justice that included an adoption service. Decree 1818 of 1964 and Law 75 of 1968 created a central authority, the Colombian Institute of Family Welfare (hereafter the Institute) to provide family and child care services nationwide.

The Institute sought to expand adoption services and foreign placement for unwanted institutionalized and abandoned children. Specialized private agencies set up to cater for increasing foreign demand for children were contracted by the Institute to arrange adoptive placements. The Institute also made contact with western adoption experts and agencies to guide service planning and to promote the placement of Colombian children abroad.

The National Adoption programme is based at the head office of the Institute in Bogota and forms part of the larger health and welfare structure. Adoption is classified as a "special protection" measure along with fostering and institutional care, but is administered separately. Responsibility for the programme is divided between the Legal Assistance Division and the Adoption Division. The Adoption Division monitors services and processes applications from adopters addressed to the Institute. Local services are implemented through the Institute's regional offices and via municipal authorities and eight licensed private agencies. These are called *casas de adopcion* and are located in the larger cities. The Legal Assistance Division has the responsibility to oversee legal aspects and to give advice in difficult cases.

Cases referred to the Institute, which handles two-thirds of all adoptions, are dealt with by regional adoption panels and interdisciplinary teams based in local service units. The teams are headed by children's advocates (*defensores de menores*), who are lawyers specialized in child legislation. The *defensores* are in charge of all Institute child protection cases and deal with all legal aspects. They are assisted by psychologists, nutritionists and other professionals who advise on individual cases. Most of the preliminary investigation and assessment of children and adopters are done by social workers, but the *defensor* is the primary decision-maker.

Specific responsibilities of the *defensores* include the following:

(a) They authorize children's admission to care and placement in foster, residential or

adoptive homes, attend court hearings and grant exit permits for children going abroad;

(b) They must order an investigation of the child's circumstances on referral of a case, assess the child's eligibility for adoption, notify the parents and obtain their consent and that of the older child; and

(c) They issue the declaration of abandonment on completion of the investigation process, and refer the child for adoptive placement. The declaration is a requirement for every adoption petition and if contested, must be ratified by the court. Once it is finalized, it is equivalent to termination of parental rights.

Applications from prospective adopters are processed by the Institute's head office in collaboration with the Prosecutor-General. Approved applicants are then redistributed to the regions for allocation of children.

Adoption *casas* manage their own referrals and applications and adoptive placements. They must however, submit case histories and documentation to the Institute *defensor*, certifying the parents' consent or the child's abandonment. The majority of children dealt with are referred by their mothers, who are mostly poor, uneducated women. The case directors and their staff do not necessarily have professional training in child care work, but most have long-standing experience and are assisted by various professionals. *Casas* all have accommodation facilities and care-taking staff where children are cared for pending placement with adopters.

Eligibility criteria for adopters are very flexible. Anyone, whether single or married, Colombian or foreign, related or unrelated to the child can adopt, provided they are older than twenty five and fifteen years older than the child and can provide a suitable home. Applicants must provide certification of their physical and mental health, occupation and income and personal references.

Institute guidelines on adoption also recommend a social work assessment of the applicant's family circumstances, lifestyle and motivations, 'natural' age matching of child and adopters, and follow-up of foreign adoptive placements by agents in the receiving country. Foreigners bear the responsibility of obtaining an exit permit and immigration clearance for the child to enter their country. They also have to sign an undertaking to care for the child and that they will inform the

Colombian authorities of their whereabouts and the child's condition.

Practitioners are obliged under article 107 of the 1989 Code to give preference to Colombian applicants over foreigners. This principle is confirmed in Institute Resolution 773/81, Article 67 in the following way: 'Colombian and foreign adoptive applicants having equal conditions, the former shall be given preference'. It is also specified that the socio-economic situation of applicants is not decisive, but they must have sufficient means to provide for the child's integral development.

A particularly unsatisfactory feature of Colombian adoption practice is the inexpert handling of the placement process and children's surrender to adopters. The placement process is described as follows:

> The Colombian model of adoption can be conceptualized as a configuration of fixed, temporal roles in which adult participants perform a transaction centred on the exchange of the child. The transaction is broken into stages with each set of adult participants vanishing from the scene and the child's life once their part is over and the adopters depart with the child. The natal parents are the suppliers of children, defensores are brokers and managers of the exchange, foster parents are interim care givers until the child's "entraga" or delivery to the final recipients, the adopters.

The child's 'entrega' or handover to the adopters marks the break from previous relationships. Where the adoption is arranged by the Institute, the child is collected by an Institute worker from the foster home or institution and brought to the defensor's office for the entrega. This is handled by the defensor and the social worker and neither the foster parents or institutional staff are present. The entrega usually constitutes the child's first meeting with the adopters, and once handed over to the adopters, all links with former caretakers are terminated.

In the case of an inter-country adoption, the cut-off is even more absolute as the child is not only separated from his parents or caretakers, but also from their language and culture. It is legally required for foreign adopters to collect the child in person and most only stay for a week or just long enough to complete the legal formalities. Thus there is no opportunity for a gradual introduction to the child and assessment of the adoptive relationship before departure, nor is there an opportunity for a trial placement period before issuing the order. Furthermore, foreign adopters are not required to learn basic Spanish and most do not even attempt to do so.

It is left to the discretion of practitioners to manage the adoption process according to their professional and personal viewpoints and interpretation of rules, roles and aims. The result is that much attention is given to legal and medical aspects in adoption work, but little attention to sensitive handling of children, a crucial aspect to successful placement. Institute referred children tend to be older and often have the most problematic backgrounds, but there are very few psychologists who can provide the necessary preparation and counselling. As mentioned earlier, defensores are not trained to deal with deprived children and with their legal background they are more inclined to view adoption as a legal transaction.

Adoption in Columbia involves an extreme, closed procedure and a large scale foreign export of children. According to official statistics, an average of 2 700 Colombian children have been adopted annually over the past ten years. Two-thirds of the children are under the age of three years.

A striking feature of these statistics is that nearly all the adoptions are absolute and that the large majority of the children are placed in adoptive homes outside Colombia, mainly in the USA and Europe. An absolute adoption means that the child loses his past identity and acquires an entirely new legal and social persona, signified by a new surname and in some instances a new first name. The birth parents' name is omitted from the adoption decree, which constitutes a new birth certificate. Hereby the child's knowledge of and link with the birth parents are destroyed.

A second remarkable feature of Colombian adoption practice is the emergence of an absolute or exclusive variant of adoption. Although absoluteness, confidentially and the principle of a 'clean break' from the birth family is the norm in inter-country placements, the Colombian adaptation is extreme and is described as follows:

> [T]he placement process…is handled with little sensitivity and understanding of children. It makes no allowance for a gradual introduction of adopters and child or continuing links between children and their care-givers or relatives. Modern-style Colombian adoption is a secretive, tightly guarded, legalistic procedure managed primarily by lawyers and upper-class women. It involves a series of abrupt breaks in the child's relationships culminating in a definitive shift of the child's socio-legal persona from the natural family to the adopters to the exclusion of all previous ties.

22.2.5.10 **Conclusions**

Of those states which have already put implementation measures in place, the majority have put in place detailed provisions and administrative structures to allow for the operation of the Hague Convention, and for the recognition of adoptions made through Convention procedures. This has been achieved through implementing legislation, or through a combination of legislation and subsidiary regulation. The designated Central Authorities have in all cases been public bodies, either government ministries, or boards or committees established by the State. There are differing approaches to the making of payments to adoption agencies, to be seen in the law of New Zealand and the less restrictive law of Sweden.

22.2.6 **The need for law reform**

Abuses of inter-country adoption lead to serious violations of the basic human rights of the most vulnerable members of society - our children. Legal procedures are circumvented or loopholes in the laws of sending countries exploited, creating the potential for child trafficking; permission to adopt is obtained illegally and false information provided to prospective adoptive parents.[51] That child trafficking or these abuses should not be allowed, is not disputed. How this should be done is a different matter.

The CRC is the only international instrument concerning international adoptions to which South Africa is a party. Of particular relevance is Article 21 of the CRC which states that:

> States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
>
> (a) ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such

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[51]For a discussion of these forms of abuse, see Motsikatsana (2000) 16 **SAJHR** 52 et seq. See also New South Wales Law Reform Commission **Report 81: Review of the Adoption of Children Act 1965 (NSW)**, March 1997, p. 381 et seq.

counselling as may be necessary;
(b) recognise that inter-country adoption may be considered as an alternative means of child care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
(c) ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those in the case of national adoption;
(d) take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
(e) promote, where appropriate, the objectives of the present Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

It is within this framework and the prescripts of the Constitution that the Commission will have to make its recommendations for law reform.

22.2.7. Evaluation and recommendations

If it is true, and we have no reason to doubt the words of Goldstone J in the **Fitzpatrick** case, that 'foreign applicants will have a greater burden in meeting the requirements of the [present Child Care] Act'[52] than they will have after the amended legislation, administrative infrastructure and international agreements envisaged by the Minister for Social Development are in place, then the question arises whether it is indeed necessary to further regulate inter-country adoption by law in South Africa. This question is posed even though the majority of respondents at a focus group discussion on adoption and several prominent persons working in the field agree on the need for [new] legislation governing inter-country adoptions.[53]

If the children's court does a proper screening of the prospective adoptive parents on the basis of

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[52]Par [34] of the judgment in **Minister of Welfare and Population Development v Fitzpatrick** 2000 (3) SA 422 (CC).

[53]See Motsikatsana (2000) 16 **SAJHR** 46 at 69 where he refers to the S A National Council for Child and Family Welfare's, Lynette Schreuder, and Frances Viviers, director of International Social Services Affiliated Bureau in South Africa, which is a directorate of the national Department of Social Development. Professor Motsikatsana himself argues for legislative reform.

a social worker's report;[54] if the court has regard to the religious and cultural background of the child and of his or her parents as against that of the adoptive parents;[55] if the court is satisfied that the prospective adoptive parents are possessed of adequate means to maintain and educate the child,[56] that they are of good repute and fit and proper to be entrusted with the custody of the child,[57] that the proposed adoption will serve the interests and conduce to the welfare of the child,[58] etc;[59] then children's courts are able to prevent the feared abuses in the cases of citizens and non-citizens alike.[60]

This leaves us with a lot of 'if's'. It is in this context that it is worth investigating what other countries are doing in respect of inter-country adoptions. As the comparative review shows, several countries have either signed and or ratified the Hague Convention or are in the process of doing so.[61] The Hague Convention has also been an influential model for national laws, in countries other than those which are party to the Hague Convention. Convention-type structures have been employed in bilateral agreements; and the administrative structure based on a Central Authority, a key component of the Hague Convention, has been used in many other states. Indeed, some sending countries, for example Venezuela and Paraguay, have decided to permit inter-country adoptions only with receiving states which are party to the Hague Convention.

Given the difficulty of national regulation of a quintessentially international phenomena such as

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[54]Section 18(1)(b) of the Child Care Act, 1983.

[55]Section 18(3) read with section 40 of the Child Care Act, 1983.

[56]Section 18(4)(a) of the Child Care Act, 1983.

[57]Section 18(4)(b) of the Child Care Act, 1983.

[58]Section 18(4)(c) of the Child Care Act, 1983.

[59]Section 24 of the Child Care Act, 1983 is designed to deter the practice of child trafficking, making the exchange of consideration in an adoption a criminal offence. See also section 40 that mandates the court to take into consideration the religious and cultural background of the child, on the one hand, and the adoptive parents, on the other.

[60]See paragraphs [30] to [33] of the **Fitzpatrick** judgment.

[61]In the short period of time since its coming into force, the 1993 Hague Convention has had considerable success, with 32 signatories, 17 ratifications, and 4 accessions as on 15 May 1998.

inter-country adoption, it is likely that it will be through the Hague Convention that standards in inter-country adoption will be raised, procedures streamlined and abuses addressed.[62] Having regard to the importance of the Hague Convention for the development of the regulation of inter-country adoption, **we recommend that South Africa should ratify the 1993 Hague Convention on Intercountry Adoption**. Serious consideration should at the same time be given to the incorporation into our domestic law of the principles contained in the UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, 1980.

Ratification of the Hague Convention by the South African government does not in itself give it the force of domestic law and legislation will have to adopted to achieve this. Although legislation cannot independently prevent all the possible abuses surrounding inter-country adoption, a sound legislative framework is fundamental in establishing child-centred standards in its practice and procedures. Equally important is the need for a proper infra-structure for the Central Authority. The situation must not develop where the Central Authority basically operates as a one-person post-office which just directs all requests to NGO's because it lacks the resources to do anything more.

We submit that the new children's code is the ideal place to comprehensively deal with adoption and specifically inter-country adoptions. **We further submit that the aim of inter-country adoption, as of all adoptions, should be to find the best parents for the child, and not to find the best child for adoptive parents**.

This section on inter-country adoptions in the new children's code should follow the section on adoptions in general and should then deal with three specific scenarios.

* Adoption of a child to or from a Hague Convention State in accordance with the provisions of the new children's statute (Hague Convention adoptions);
* Adoption of a child to or from a country with whom a bilateral or multilateral agreement in this regard has been concluded (agreement type adoptions); and

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[62]See Peter H Pfund 'Intercountry adoption: The 1993 Hague Convention: Its purpose, implementation, and promise' (1994) Vol. 28 No. 1 **Family Law Quarterly** 53.

* Adoption of a child to or from a non-Hague Convention State or a country with whom no agreement has been concluded (other overseas adoptions).

To cater for the Hague Convention-type inter-country adoptions, the relevant section of the new children's statute should provide for the Hague Convention to have force of law in South Africa; the establishment of a Central Authority;[63] the recognition of Convention adoptions; termination of pre-existing legal parent-child relationships;[64] access to information; the establishment of accredited bodies; etc. Once the relevant provisions have been complied with, recognition of the adoption could follow automatically.

To cater for the agreement type adoptions, the section in the new children's statute might have to regulate the adoption by a South African parent of a child[65] in that other country as stipulated in that agreement and recognition of the adoption need not follow automatically. As for the case of the other overseas adoption category, the section of the children's code could well be premised on the principle that such adoptions should be discouraged and be subject to very strict regulation.

In addition, it is recommended that the general section dealing with adoptions will have to provide for the financial aspects regarding the adoptions;[66] preparation, assessment and counselling; post-

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[63]Obviously the Central Authority must be properly resourced and equipped to fulfil its functions.

[64]See also Kisch Beevers 'Intercountry adoption of unaccompanied refugee children' (1997) 9(2) **Child and Family LQ** 131 who recommends that in the case of refugee children adoption orders should not end all ties with the country and family of origin.

[65]Or the adoption of a South African born child by non-South African citizens.

[66]At the extreme end of the scale of improper financial gain is the sale of, and trafficking in, children. On the other end of the scale could lie requests for donations to the institution involved. Between these two ends one finds location or agent fees, legal fees, etc. The Johannesburg Child Welfare Society, for instance, is contemplating requiring inter-country adopters to make a contribution towards the costs of maintaining the in-country service to enable the Society eg to ensure that all mothers get good health care and support and not just those who give their babies up for adoption. Dr Jackie Loffell points out that at the moment adopters can gear all their money only to the child who may be coming to them and the mother whose consent they need. She says

placement reports; record-keeping, confidentiality of information; the use of advertising;[67] citizenship, and the like.

The specifics of such a three-pronged approached in legal format is set out below.

INTER-COUNTRY ADOPTIONS

GENERAL PROVISIONS

Object of part

1. The purpose of this part is to give effect to the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption; to give effect to certain bilateral arrangements for inter-country adoption; to deal with miscellaneous matters.

Definitions

2. In this part,

"**Accredited body**" means a body accredited under section XX as an accredited body for the purposes of the Hague Convention;
"**adoption compliance certificate**" means a certificate issued in accordance with Article 23 of the Hague Convention;

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this is a source of pressure on mothers to give up their babies rather than face the future with little or no help. Dr Loffell therefore recommends that the legislation should provide for a fee to be permitted, or even required, for maintaining and improving the local service infra-structure.

[67]It has for some decades been accepted practice in a number of countries (especially the UK and the USA) to use advertising as a way to find families for hard-to-place children. There are programmes which have had a great deal of success in arranging adoptions for eg severely mentally or physically disabled children, adolescents, and those with severe behavioural problems, who would otherwise have spent their entire childhood in institutions. The families have been found by putting photo's of the children in newspapers and even having them appear on TV.

"**Central Authority**" means a person or office designated for a Convention country under article 6 of the Hague Convention;

"**Convention country**" means, subject to Article 45 of the Hague Convention -

(a) a country specified in column xx in Schedule xx; and

(b) any other country for which the Convention has entered into force, other than a country against whose accession the Republic has raised an objection under Article 44 of the Convention;

"**Hague Convention**" means the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption signed at The Hague on 29 May 1993, a copy of the English text of which is set out in Schedule xx.

HAGUE CONVENTION ON INTERCOUNTRY ADOPTION

Convention to have force of law

3. (1) On, from and after the date the Convention enters into force in respect of the Republic as determined by the Convention, the Convention is in force in the Republic and its provisions are law in the Republic.

(2) The law of the Republic applies to an adoption to which the Convention applies but, where there is a conflict between the law of the Republic and the Convention, the Convention prevails.

Central Authority

4. (1) The Director-General of the Department of Social Development is the Central Authority for the Republic for the purposes of the Convention.

(2) The Central Authority must discharge the duties which are imposed by the Convention upon such authorities.

(3) The Central Authority must maintain a register of accredited adoption agencies and approved adoption practices.

(4) Upon application, the Central Authority may accredit an adoption agency and approve an adoption practice, provided the prescribed requirements are met.

(5) No person may process or facilitate an adoption in terms of this Chapter unless such adoption is done through the Central Authority or an accredited adoption agency.

(6) A person who contravenes subsection (5) commits an offence and is liable to a fine or to imprisonment, or to both.

Delegation of functions

5. Where the Minister so authorises, the functions of a Central Authority under Articles 15 to 21 of the Convention may, to the extent determined by the Minister, be performed by public authorities or by bodies accredited under Chapter III of the Convention.

Authority for South African accredited bodies to act overseas

6. The Central Authority may authorise a body accredited in the Republic to act in a Contracting State.

Authority for overseas accredited bodies to act in South Africa

7. If authorised by the Central Authority, a body accredited in a Contracting State may act in the Republic.

Access to information

8. Subject to the regulations; the Director-General may disclose to an adult who, as a child, was adopted in accordance with the Convention, any information in the records of the Director-General concerning the adult's origin.

Adoption in South Africa of a child from a Convention country

9. (1) A person who-

(a) is habitually resident in South Africa; and

(b) wishes to adopt a child who is habitually resident in a Convention country-

may apply to the Court for an order for the adoption of the child.

(2) The Court may make an order for the adoption of a child on an application under sub-section (1) if the requirements of sections xx, xy and xz[68] are satisfied and the Court is satisfied that-

(a) the child is in South Africa;

(b) and the child is not prevented from residing permanently in South Africa-

(i) under a law of the Republic; or

(ii) because of an order of a court of the Republic; and

(iii) the arrangements for the adoption of the child are in accordance with the requirements of the Hague Convention; and

(iv) the Central Authority of the Convention country has agreed to the adoption of the child; and

(v) the South African Central Authority has agreed to the adoption of the child.

(3) For the purposes of a proposed adoption order under this section-

(a) a report under section XX may be made only on behalf of the Director-General or the principal officer of an approved agency that is an accredited body;

(b) a reference in section XY to an authorized agency is a reference to an accredited body.

Adoption of a child in South Africa who is to live in a Convention country

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[68]Sections 17, 18(4) and 40 of the present Child Care Act, 1983.

10. (1) A person who-

(a) is habitually resident in a Convention country; and

(b) wishes to adopt a child who is habitually resident in South Africa-

may apply to the Court for an order for the adoption of the child.

(2) The Court may make an order for the adoption of a child on an application under sub-section (1) if the requirements of section XX are satisfied and the Court is satisfied that-

(a) the child is in South Africa; and

(b) the child is not prevented from leaving South Africa under a law of the Republic or because of an order of a court of the Republic; and

(c) the approved adoption practices are in accordance with the requirements of the Hague Convention; and

(d) the Central Authority of the Convention country has agreed to the adoption of the child; and

(e) the South African Central Authority has agreed to the adoption of the child.

(3) For the purposes of a proposed adoption order under this section, a report under section XX may be made only on behalf of the Secretary or the principal officer of an approved agency that is an accredited body.

Issue of adoption compliance certificate

11. If the Court has made an order for the adoption of a child under section 9 or 10, the Central Authority may issue an adoption compliance certificate.

Recognition of adoption of a child from a Convention country to South Africa

12. (1) Subject to this section, an adoption in a Convention country-

(a) of a child who is habitually resident in a Convention country; and

(b) by a person who is habitually resident in South Africa-

is recognised automatically if an adoption compliance certificate issued in that country is in force for the adoption.

(2) An adoption recognised under sub-section (1) is effective on and from the day the adoption compliance certificate becomes effective.

(3) Sub-section (1) does not apply if-

(a) a declaration is made under section 17; or

(b) a declaration is made under a law of the Republic that corresponds to section 17(2)(a).

Recognition of adoption of a child from a Convention country to another Convention country

13. Subject to section 17, if-

(1) a child, who is habitually resident in a Convention country, is adopted by a person who is habitually resident in another Convention country; and

(2) an adoption compliance certificate issued in the Convention country in which the adoption is granted is in force for the adoption-

the adoption is recognised with effect on and from the day the certificate becomes effective.

Effect of recognition of adoption under this Part

14. (1) Subject to this section, if the adoption of a child is recognised under section 12 or 13, then, for the purposes of the laws of the Republic, the adoption has the same effect as an adoption order under this Act.

(2) If the laws of the Convention country where the adoption was granted do not provide that the adoption of the child terminates the legal relationship between the child and the individuals who were, immediately before the adoption, the child's parents, section XY does not apply to the adoption unless-

(a) an order is made under section 16 or under a law of the Republic that corresponds to section 16; or

(b) a decision is made in a Convention country to convert the adoption in accordance with article 27 of the Convention.

(3) Sub-section (2)(b) does not apply if a declaration is made under section 17(2)(b) or under a law of the Republic that corresponds to section 17(2)(b).

Evidential value of adoption compliance certificate

15. Subject to section 17, an adoption compliance certificate is evidence, for the laws of the Republic, that the adoption to which the certificate relates-

(1) was agreed to by the Central Authorities of the countries mentioned in the certificate; and

(2) was carried out in accordance with the Hague Convention and the laws of the countries mentioned in the certificate.

Order terminating legal relationship between child and parents

16. (1) If -

(a) a child who was or is habitually resident in a Convention country was adopted in a Convention country; and

(b) the adoption was by a person who is habitually resident in the Republic; and

(c) the laws of the Convention country do not provide that the adoption of the child terminates the legal relationship between the child and the persons who were, immediately before the adoption, the child's parents, any of the parties to the adoption may apply to the Court for an order that the adoption of the child terminates the legal relationship between the child and the persons who were, immediately before the adoption, the child's parents.

(2) The Court may make an order on an application under sub-section (1) if satisfied that-

(a) an adoption compliance certificate issued in the Convention country is in force for the adoption; and

(b) the laws of the Convention country do not provide that the adoption of a child terminates the legal relationship between the child and the persons who were, immediately before the adoption, the child's parents; and

(c) the child is allowed to enter the Republic;

(d) to reside permanently in the Republic; and

(e) in the case of refugee children, sufficient provision is made for the child to retain and foster ties with his or her family, tribe, and country of origin.

Refusal to recognise an adoption or an article 27 decision

17. (1) If the Central Authority considers that-

(a) an adoption recognised under sections 12 or 13; or

(b) a decision made in accordance with article 27 of the Hague Convention

is manifestly contrary to public policy, taking into account the best interests of the child to whom the adoption or decision relates, the Central Authority may apply to the Court for a declaration that the adoption or decision is not recognised.

(2) The Court may make a declaration on an application under sub-section (1) if satisfied that-

(a) an adoption recognised under section 12 or 13; or

(b) a decision made in accordance with article 27 of the Hague Convention-

is manifestly contrary to public policy, taking into account the best interests of the child to whom the adoption or decision relates.

(3) If a court declares that an adoption or decision is not recognised, the adoption or decision has no effect in the Republic.

Report on person who wishes to adopt a child in a Convention country

18. (1) If a person-

(a) wishes to adopt a child in a Convention country; and
(b) is on the register of approved persons kept under section xx by the Central Authority or the principal officer of an accredited agency, the Central Authority or the agency must prepare a report that complies with article 15 of the Hague Convention.

(2) The Central Authority must send each report prepared under sub-section (1) to the Central Authority of the Convention country.

BILATERAL AGREEMENTS

Adoption by South African parent in prescribed overseas jurisdiction of a child from that overseas jurisdiction

19. (1) This section applies if-

(a) an adoption, by a person who is habitually resident in the Republic, of a child who is habitually resident in a prescribed overseas jurisdiction, is granted under the law of that overseas jurisdiction, and
(b) an adoption compliance certificate issued by a competent authority of that overseas jurisdiction is in force in relation to the adoption.

(2) The adoption is recognised and effective, for the law of the Republic, on and after the adoption takes effect in the overseas jurisdiction.

Effect of recognition

20. For the purposes of the law of the Republic, an adoption of a child that is recognised and effective under section 19 is to be treated as having the same effect as an adoption order made under this Act.

Evidential value of adoption compliance certificate

21. An adoption compliance certificate issued in a prescribed overseas jurisdiction, or adoption order certified by the competent authority of such a country as having been made in accordance with the law of that country, is evidence, for the purposes of the law of the Republic, that the adoption to which the certificate or order relates was carried out under the law of the overseas jurisdiction whose competent authority issued the certificate or certified the order.

RECOGNITION OF OTHER OVERSEAS ADOPTIONS

Recognition of foreign adoptions in countries other than Convention countries and prescribed overseas jurisdictions

22. (1) This section applies to an order for the adoption of a person:

(a) that was made (whether before or after the commencement of this section) in a country other than the Republic that is not a Convention country or a prescribed overseas jurisdiction, and

(b) if, at the time at which the legal steps that resulted in the adoption were commenced, the adoptive parent or parents:

(i) had been resident in that country for 12 months or more, or

(ii) were domiciled in that country.

(2) An order for the adoption of a person to which this section applies is to have the same effect as an adoption order made under this Act if:

(a) the adoption is in accordance with and has not been rescinded under the law of that country, and

(b) in consequence of the adoption, the adoptive parent or parents, under the law of that country, have a right superior to that of the adopted person's birth parents in relation to the custody of the adopted person, and

(c) under the law of that country the adoptive parent or parents were, because of the adoption, placed generally in relation to the adopted person in the position of a parent or parents.

(3) Despite subsection (2), a court (including a court dealing with an application under section 23) may refuse to recognise an adoption under this section if it appears to the court that the procedure followed, or the law applied, in connection with the adoption involved a denial of natural justice or did not comply with the requirements of substantial justice.

(4) A court that refuses to recognise an adoption may, at the time of refusing or at a later time, give leave to the applicant to seek an order for the adoption of the child concerned.

(5) In any proceedings before a court (including proceedings under section 23), it is to be presumed unless the contrary appears from the evidence, that an order for the adoption of a person that was made in a country outside the Republic that is not a Convention country or a prescribed overseas jurisdiction complies with subsection (1).

(6) Nothing in this section affects any right that was acquired by, or became vested in, a person before the commencement of this section.

Declarations of validity of foreign adoptions

23. (1) Any of the parties to an adoption under an order made outside the Republic may apply to the Court for a declaration that the order complies with section 22.

(2) On an application under this section, the Court may

(a) direct that notice of the application be given to such persons (including the Director-General) as the Court thinks fit, or

(b) direct that a person be made a party to the application, or

(c) permit a person having an interest in the matter to intervene in, and become a party to, the proceedings.

(2) If the Court makes a declaration under this section, it may include in the declaration such particulars in relation to the adoption, the adopted child and the adoptive parent or parents as the Court finds to be established.

(3) For the purposes of the law of the Republic, a declaration under this section binds the State, whether or not notice was given to the Director-General, and any person who was:

(a) a party to the proceedings for the declaration or a person claiming through such a party, or
(b) a person to whom notice of the application for the declaration was given or a person claiming through such a person, but does not affect:

(i) the rights of any other person, or
(ii) an earlier judgment, order or decree of a court or other body of competent jurisdiction.

(4) In proceedings in a court of the Republic, the production of a copy of a declaration under this section, certified by the nominated officer to be a true copy:
(a) if the proceedings relate to a person referred to in paragraph (a) or (b) of subsection (4), is conclusive evidence, and
(b) if the proceedings relate to the rights of any other person, is evidence,
that an adoption was effected in accordance with the particulars contained in the declaration and that it complies with section 22.

Prior approval required before child is brought into South Africa for adoption

24. (1) Before a child who is not a resident of South Africa is brought into the country for adoption, the prospective adoptive parents must obtain the approval of the Central Authority or an accredited adoption agency.

(2) The Central Authority or the accredited adoption agency must grant approval if:

(a) the birth parent or other guardian placing the child for adoption has been provided with information about adoption and the alternatives to adoption,
(b) the prospective adoptive parents have been provided with information about the medical and social history of the child's biological family,
(c) a home study of the prospective adoptive parents has been completed in accordance with the regulations and the prospective adoptive parents have been approved for the child in on the basis of the home study, and
(d) the consents have been obtained as required in the jurisdiction in which the child is resident.

(3) The Central Authority or the adoption agency must preserve for the child any information obtained about the medical and social history of the child's biological family.

(4) The provisions of this section does not apply to a child who is brought into South Africa for adoption by a relative of the child or by a person who will become an adoptive parent jointly with the child's birth parent.

Prior approval required before child is send out of South Africa for adoption

25. (1) Before a child who is resident in South Africa is placed for adoption in another country, the prospective adoptive parents must obtain the approval of the Central Authority or an accredited adoption agency.

(2) The Central Authority or the accredited adoption agency may grant approval if:

(a) a home study of the prospective adoptive parents has been completed in accordance with the regulations and the prospective adoptive parents have been approved on the basis of the home study,
(b) the consents have been obtained as required in the jurisdiction in which the

child is resident, and

(c) if it has been shown that it was not possible to place the child for adoption with a South African parent or parents within a six month period starting from the date on which application for approval is lodged with the Central Authority or an accredited adoption agency.[69]

(2) The provisions of this section do not apply to a child who is resident in South Africa who is to be placed for adoption outside South Africa with a relative of that child or with a person who will become an adoptive parent jointly with the child's birth parent.

OFFENCES

Contravening inter-country adoption requirements

26. A person who contravenes sections xx commits an offence and is liable to a fine or to imprisonment, or to both.

Paying or accepting payment for an adoption

27. (1) No person may give, receive or agree to give or receive any payment or reward, whether directly or indirectly,

(a) to procure or assist in procuring a child for the purposes of adoption in or outside South Africa, or

(b) to place or arrange the placement of a child for the purposes of adoption in or outside South Africa.

(2) Adoption services delivered by an approved adoption practice in terms of this Chapter shall be undertaken under contract to the Central Authority, which shall receive all approved fees and shall make the necessary payments to the adoption practice. The Central Authority has the option of delegating the contracting function and the associated

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[69]See section 24(1) above.

responsibilities with regard to the reception and disbursement of fees to an accredited adoption agency which is willing to undertake this task.

(3) Subsection (1) does not apply to any of the following:

(a) a birth mother receiving expenses that do not exceed those allowed under the regulations;
(b) a lawyer receiving reasonable fees and expenses for legal services provided in connection with an adoption;
(c) the Central Authority or an accredited adoption agency receiving prescribed fees;
(d) any other persons prescribed by regulation.

(3) Any payments or rewards made or given in terms of subsection (2) must be declared in the prescribed manner by the accredited adoption agency to the Central Authority.

(4) A person who contravenes this section commits an offence and is liable to a fine or to imprisonment, or to both.

Advertising

28. (1) A person must not publish or cause to be published in any form or by any means an advertisement dealing with the placement or adoption of a specific child.

(2) Subsection (1) does not apply to any of the following:

(a) the publication of a notice under a court order;
(b) the publication of a notice authorized by the director;
(c) an advertisement by an adoption agency advertising its services only, without referring to specific children;
(d) an announcement of an adoption placement or an adoption;
(e) other forms of advertisement specified by regulation.

(3) A person who contravenes this section commits an offence and is liable to a fine or to imprisonment or to both.

22.3 International child abduction

22.3.1 Introduction

The Hague Convention on the Civil Aspects of International Child Abduction Act, 1996 gives statutory recognition to the Hague Convention with the same name.[70] This Hague Convention has been ratified by many nations, including South Africa. The Hague Convention Act came into force on 1 October 1997.[71] In terms of section 2 of this Act, the Hague Convention, which is a schedule to the Act, applies in South Africa and, in terms of section 231(4) of the Constitution, 1996, it has become law. The Act designates the Family Advocate[72] as Central Authority.

The need for legislation and international agreements with regard to the (parental) abduction of children has been abundantly demonstrated, particularly in recent years.[73] The increase in rapid international transportation, the freer crossing of international boundaries, the continued decrease in documentation requirements when entering foreign jurisdictions, the increase in 'international families', where parents are of different countries of origin, and the escalation of family breakups worldwide, all serve to multiply the number of international abductions.[74]

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[70]For the regulations issued in terms of this Act, see Proclamation No. R 65 of 1997, published in Government Gazette No. 18322 of 1 October 1997.

[71]Following the publication of the **Report on the Accession to the Hague Convention on the Civil Aspects of International Child Abduction** (Project 80) by the South African Law Commission in October 1991.

[72]Appointed in terms of the Mediation in Certain Divorce Matters Act 24 of 1987.

[73]See, for instance, the conference papers at the Reunite Training Seminar on International Child Abduction, Justice College, Pretoria, 21 - 23 January 1998; Reunite Southern African Development Community Conference 2001 on International Family Law in a Commonwealth Context, Justice College, Pretoria, 25 - 26 January 2001; the papers presented at the Common Law Judicial Conference on International Child Custody, hosted by the US Department of State, Washington, D.C., 17 - 21 September 2000.

[74]Per L'Heureux-Dubé J in **Thompson v Thompson** (1994) 119 DLR (4th) 253 at 296, as quoted in **Sonderup v Tondelli and another** 2001 (1) SA 1171 (CC) at 1178I.

22.3.2 The Hague Convention on the Civil Aspects of International Child Abduction, 1980

The Hague Convention applies only to children who have not attained the age of sixteen years and who are habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention was designed to facilitate the swift return of abducted children to their place of habitual residence immediately before the abduction.[75] It is not the purpose of this Convention to regulate the recognition and enforcement of foreign custody orders but to protect custody rights. A court implementing the Convention is required to determine the court best placed to make a custody determination and not to make a custody determination itself. The Convention is premised upon a belief that the court of the child's place of habitual residence immediately before the abduction is best placed to make a determination on the merits and has the most significant interest in resolving the matter. The Convention attempts to deter parents from resorting to self-help in custody matters by providing for the enforcement of custody and access rights of one Contracting State in another.

The central provisions of the Convention are to be found in Articles 3, 12, 13 and 20. Article 3 defines the crucial concept of 'wrongful removal or retention'.[76] It reads as follows:

> The removal or the retention of a child is to be considered wrongful where-
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly

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[75]Article 1 of the Convention. See also B M Bodenheimer "The Hague Draft Convention on International Child Abduction" 1980 (14) **FLQ** 99 at 102 - 103; A E Anton "The Hague Convention on International Child Abduction" 1981 (30) **ICLQ** 537 at 540 - 545; L Silberman "Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis" 1994 (28) **FLQ** 9 at 10 - 11.

[76]See also S Davis, J Rosenblatt and T Galbraith **International Child Abduction** (1993) 12 - 13; **C v S (A Minor)** [1990] 3 WLR 492, [1990] 2 FLR 442; **Re J (A Minor)(Abduction)** [1989] Fam 85; **Re S (Minors) (Wrongful detention)** [1994] 1 All ER 237 (Fam).

or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Rights of custody are defined in Article 5 to include 'rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence'.

Article 12 is the main operating provision. It provides:

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Where a child has been wrongfully removed or retained in terms of Article 3 of the Convention, and a period of less than a year after the wrongful removal or retention has elapsed, the judicial or administrative authorities of the requested State 'shall order the return of the child forthwith'. Such judicial or administrative authority is granted a discretion to refuse to order such return by the provisions of Article 13. It provides:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had

consented to or subsequently acquiesced in the removal or retention;[77] or

(b) there is a grave risk[78] that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.[79]

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

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[77]The leading English case relating to Article 13(a) acquiescence is **Re A (Minors) (Abduction: Acquiescence)** [1992] Fam 106, [1992] 1 All ER 929, [1992] 2 WLR 536, [1992] 2 FLR 14, [1992] 2 FCR 9 in which the court found that acquiescence could be active or passive. A person could not acquiescence unless aware of the rights he or she has against the other parent. Acquiescence that is active must be clearly stated and acquiescence is not a continuing state of affairs. Here the plaintiff need not have day-to-day care and control of the child. Exercising a say in the child's upbringing or a right of access is sufficient. Consent or acquiescence here should not be confused with consent or acquiescence to the child travelling for a specific period of time which, when that period expires, may result in a wrongful retention.

[78]Grave risk has been analysed in, inter alia, **Re C (A Minor) (Abduction)** [1989] 1 FLR 403 in which the court declared that the risk must not be trivial and that risk must not be equated to the child's personal welfare. In **Re A (A Minor) (Abduction)** [1998] 1 FLR 365 Nourse LJ stated at 372 that the risk had to be more than ordinary risk, more than one expects from simply taking the child away from one parent and passing him or her to the other. In America the Article 13(b) exception based on grave risk was invoked but rejected in **Becker v Becker** 15 Fam LR (BNA) 1605 (NJ Super Ct 1989); **Sheikh v Cahill** 145 Misc 2d 171, 546 NYS 2d 517 at 521 (Sup Ct 1989) and **Navarro v Bullock** 15 Fam LR (BNA) 1576 (Cal Super Ct 1989); **Tahan v Duquette** 259 NJ Super 328, 613 A 2d 486 (App Div 1992).

[79]For an examination of Article 13(b) by the English courts see also **Re D (A Minor) (Child Abduction)** [1989] 1 FLR 97; **C V C (Abduction : Custody Rights)** [1989] 2 All ER 465, [1989] 1 WLR 654 (CA). The Article wass examined by the Australian courts in **Gsponer v Johnstone** [1988] 12 Fam LR 755, (1988) FLR 164.

° **The defence of grave risk of exposure to physical or psychological harm; otherwise placing a child in an intolerable situation**[80]

Article 13(b) has, in the main, been narrowly, interpreted by the courts of the Signatory States. This approach is necessarily correct as, not only is it in accordance with the original aims of the drafters it is also clear that, unless Article 13(b) fulfils its original purpose, that of a provision allowing for non-return in **exceptional** cases, it will destroy the effectiveness of the Convention.

Intolerable situation is intended to cover the position when the child would not be exposed to physical or psychological harm but where the situation would otherwise be intolerable for the child on return. It has been said that '... it is not just disruption or trauma, inconvenience, anger. It is something which must be of some lasting serious nature which cannot be tolerated'.[81] In England, it has been said that it must bear some similarity to the serious risk of physical or psychological harm relevant to the first part of the provision.[82]

In order for the defence of grave risk of harm to be made out there needs to be evidence of a **grave** risk. This means not just an ordinary risk but a serious one. So, therefore, what is required is a grave - i.e. a serious - risk of physical or psychological harm. The question here is, what amounts to physical or psychological harm? It is unusual for grave risk of physical harm to the child to be argued, and reliance is far more often placed on the concept of psychological harm. Again, what will amount to psychological harm has been the subject to different interpretations at different times within different jurisdictions.[83]

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[80]The discussion of the Article 13(b) defences is largely based on the paper 'Article 13b and the child's objections under the Hague Child Abduction Convention' presented by Marilyn Freeman at the Reunite Southern African Development Community Conference 2001, 25 - 26 January 2001, Justice College, Pretoria.

[81]**H v H** [1995] 13 FRNZ 498.

[82]**Re N (Minors) (Abduction)** [1991] FCR 765.

[83]See e.g. McClean **The Haque Convention on the Civil Aspects of International Child Abduction**, Explanatory Documentation prepared for Commonwealth Jurisdictions in association

In the United States the leading authority in this area is **Friedrich v Friedrich**[84] where the court stated that the only circumstances in which grave risk of harm could exist is when return would put the child in imminent danger prior to the resolution of the custody dispute, e.g. by returning the child to a zone of war, famine or disease. Additionally, grave risk would exist in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable of giving or unwilling to give the child adequate protection.

In the jurisdiction of England and Wales, the Court of Appeal has adopted a strict and narrow approach to the provision so that in **C v C (Abduction: Grave risk of psychological harm)**[85] Ward L.J. was not prepared to find the provision fulfilled where the harm had been created by the parent's own actions, notwithstanding that the return involved splitting siblings and the serious possibility of criminal prosecution of the mother.

But does the degree of harm have to be grave, or is it just the **risk** of harm which must fulfil this criterion? There is English and Australian authority to suggest that such a degree of harm is required. In England it was held that the phrase 'intolerable situation' cast considerable light on the matter in the case of **Re C (Minor: Abduction: Rights of custody abroad)**[86] and in Australia the court held[87] that it is not a grave risk of **any** physical or psychological harm which would suffice - it must be of a substantial or weighty kind. It is possible, however, to argue that there is no need

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with the Commonwealth Secretariat 1997 at 2: 'It has to be admitted that the courts in common law jurisdictions have failed to develop a consistent approach to the handling of international child abduction cases. That state of affairs is not surprising when one considers some characteristics of the cases and of the legal context in which they have to be addressed'. In the Scottish case of **MacMlillan** [1989] SLT 350 the child was not returned because the petitioner father had been depressed and alcoholic and, although now improved, the court were concerned that he might slip back. Grave risk to the child was found to be 'beyond argument'.

[84]78 F 3D 1060, 1069 (6th Cir 1996).

[85][1999] 1 FLR 1145.

[86][1989] 2 All ER 465.

[87]**Gsponer v Johnstone** [1989] FLC 92-001.

to colour the degree of harm with the degree of risk required for satisfaction of the provision as this relies on the second part of Article 13(b), 'otherwise place the child in an intolerable situation'. The limbs of this provision are disjunctive, and this interpretation is not necessarily consistent with the terms of the Convention.[88] However, most courts appear to have placed the same interpretation on this provision, accepting that the degree of harm that is required is weighted by the juxtaposition of the phrase 'or otherwise place the child in an intolerable situation' to the first part of the provision relating to harm.

In England and Wales, there are not many reported cases where return has been refused on this basis. One such reported example of a successful Article 13(b) defence is in **Re G (Abduction: Psychological harm)**[89] where the court accepted that, if the mother was forced to return, it was likely that she would become psychotic, which would expose the children to a grave risk of harm. This is an unusual outcome because the traditional position of the court in relation to parents who refuse to accompany their children is to hold that it does not amount to an Article 13(b) defence.[90]

Another successful Article 13(b) defence within England and Wales may be found in **Re M (Abduction: Psychological harm)**[91] where two children, aged 7 and 9 years, were not returned to their state of habitual residence both in relation to their objections and the fact that they were at risk of psychological harm if returned based on reports from psychologists both in England and the state of habitual residence.

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[88]See Beamont and McEleavey **The Hague Convention on International Child Abduction** Oxford University Press 1999, p. 151 footnote 129 on the inter-relationship between intolerable situation and harm where they argue that the use of the word 'otherwise' identifies intolerable situation as 'an alternative'.

[89][1995] 1 FLR 64.

[90]In **C v C (Minor: Abduction: Rights of custody abroad)** [1989] 2 All ER 465 Butler-Sloss L.J. asked, in connection with a mother who would not return with her child and argued that the child would, therefore, be exposed to a grave risk of psychological harm by the practical effect of the order for return: 'Is a parent to create the psychological situation and then rely on it?' it would be relied upon by every mother of a young child who removed him out of the jurisdiction ... it would drive a coach and four through the Convention'.

[91][1997] 2 FLR 690.

As stated already, prospective harm to the returning parent will not usually constitute a grave risk of harm to a child within the meaning of Article 13(b). However, it may be that there is now a need to re-evaluate this position in certain circumstances. This is because the pattern of abductions has apparently changed,[92] with far more abductors now being mothers, and usually primary care- givers. Often these women are escaping situations of violence and abuse. As far back as 1988, the judge in the English case of **Re A (A minor)(Abduction)**[93] warned that the court in the requested state could not be blinkered against the practical effect of an order for the child's return. To return the child, and by inference, usually the mother, to a situation of violence or abuse may be to do just that. These mothers have often been unable to secure the necessary protection in the state of habitual residence, or it may be that they have not been able to find the strength to face up to their situation, and to seek protection, without the support of their family and friends, who are far away from the state of habitual residence. There is a strong argument that returning such a parent would, indeed, place her child in an intolerable situation, or expose her to the risk of physical or psychological harm. To ignore such a probability flies in the face of reality.[94]

In the recent Constitutional Court of South Africa case of **Sonderup v Tondelli**,[95] Goldstone J. admirably addressed this situation when he stated:

> ... in the application of art 13, recognition must be accorded to the role which domestic violence plays in inducing mothers, especially of young children, to seek to protect themselves and their children by escaping to another jurisdiction. Our courts should not trivialise the impact on children and families of violence against women. In *S v Baloyi* this court quoted the following statement with approval.
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> 'Domestic and family violence is a pervasive and frequently lethal problem that

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[92]See e.g. Beamont and McEleavey **The Hague Convention on International Child Abduction** Oxford University Press 1999, p. 3 - 4: 'Wrongful removals and retentions are now more likely to be brought about by mothers who may have moved abroad with the father of their children but who subsequently wish to return to their country of origin'.

[93][1988] 1 FLR 36500.

[94]Marilyn Freeman 'Article 13b and the child's objections under the Hague Child Abduction Convention', paper presented at the Reunite Southern African Development Community Conference 2001, 25 - 26 January 2001, Justice College, Pretoria.

[95]2000 (1) SA 1171 (CC) par [34].

> challenges society at every level. Violence in families is often hidden from view and devastates its victims physically, emotionally, spiritually and financially. It threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person.
>
> Where there is an established pattern of domestic violence, even though not directed at the child, it may very well be that return might place the child at grave risk of harm as contemplated by Article 13 of the Convention.

Where such risk of harm is found by the court it may be that a return will still be ordered subject to undertakings or conditions being attached to the return order, designed to ameliorate the risk inherent in such a return. However, such action alone will not usually offer realistic protection. More is required, e.g. in terms of mirror orders, and more may not always be possible or available. In such cases, where protection cannot presently be guaranteed, courts should not flinch from refusing to return a child. This is the reason for the existence of Article 13(b) and the Convention, which is based on the premise that a child's best interests are, in general, served by not being abducted, envisages situations which are outside of the normal.

Such circumstances were considered in the New Zealand case of **Ryding and Turvey**[96] where Inglis J stated that '... in a case where the abductor has provided the child with a haven from emotional and psychological abuse or an intolerable situation, removal of the child from the haven and returning the child to home base, *however protected,* (emphasis added) may be to provide a cure which is worse than the original disease. It is that kind of situation which the framers of the Convention had in mind when they laid down, in article 13, that the judicial authority of the requested State is not bound to order the return of the child'.

Where the mother has been the subject of violence or abuse from which she has escaped, often to the home and security of family members in her country of birth, it may be convincingly argued that her child, too, has been thereby been provided with a haven from an intolerable situation and that return would provide a cure, in the words of Inglis J, 'worse than the original disease'.

° **The child's objections within Article 13**

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[96]New Zealand Family Court, Evin FP 031 14797, 9 December 1997.

Children's objections stand alone under Article 13 but they may also amount to an Article 13(b) defence in that return, in spite of objections, would expose to the child to a grave risk of harm or intolerable situation as envisaged by that provision.

In most cases the child's objections will come to the attention of the court through the abductor. This means that unless the defendant raises the child's objections, there is no other way in which they will be heard unless that child is in some way able to bring his or her objections to the notice of the court. Usually an abducting parent will welcome the opportunity of airing the child's objections to return in the course of Hague Convention proceedings but there are circumstances where this will not be the case. There is no obligation on a judicial or administrative authority to enquire into a child's views. Indeed in the English case of **P v P (Minors: Child Abduction)**[97] the court declined even to find that there was a mandatory requirement for the court to adjourn to enquire further into a child's objections once they had been raised as an issue. Such a decision will be a matter of discretion for the judge. This must create an unacceptable risk that a child's strong objections to return will never be heard as they rely on the willingness of the defendant parent to be raised. There is sufficient anecdotal evidence to raise grave concerns that this matter is one of practical significance. Academic commentators have also expressed disquiet on this issue leading Professor Lowe to state that '... some mechanism needs to be devised for making at least preliminary enquiries about, at any rate, older children's wishes'.[98]

Making enquiries in this way will, it is argued, slow up the summary process which is at the heart of the Convention. This observation is incontrovertible. However, although speed is of the essence in the effective implementation of the Convention, it must be remembered that the purpose of the Convention is to protect the best interests of children generally. Those interests cannot be said to be protected without even an enquiry, as to their objections, even if this is in an effort to further the original aims of the Convention. A culture of 'return at all costs' must be avoided.[99]

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[97][1992] 1 FLR 155.

[98]Lowe [1994] Fam Law 234 in case comment on **Re M (A Minor)(Child abduction)** [1994] 1 FLR 390.

[99]Marilyn Freeman 'Article 13b and the child's objections under the Hague Child Abduction Convention', paper presented at the Reunite Southern African Development Community Conference 2001, 25 - 26 January 2001, Justice College, Pretoria.

On the related issue of separate representation for children, the position in England and Wales is that, as this is not provided for in the Convention, the child has no right to such representation. This is the case even for those of sufficient maturity for their objections to be taking into consideration.[100] This is apparently not the case in other jurisdictions. In Australia, e.g. it has been held that where there is a clear issue as to whether a child objects to being returned, '... the court has an obligation to give the child an opportunity to be heard in an appropriate manner and that is a right of the child independent of the person opposing return. Additionally ... where issues ... arise with respect to a child of [appropriate] age and maturity, there ordinarily should be separate representation'.[101]

Some judicial attention has been paid to the meaning of the term 'objects'. Although it was stated that an objection must amount to more than a mere preference - a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute[102] this was later rejected by the English court which stated that the term should be applied without any additional gloss[103] and this interpretation has been accepted by courts in Australia and New Zealand.[104]

° **Age and sufficient degree of maturity**

As there are no guidelines in the Convention relating to the precise age at which the provision takes effect, the potential for subjective interpretation has been significant both in relation to the age, and the assessment of the child's degree of maturity.

The English courts have refused to lay down any chronological threshold below which a child's

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[100]**Re M (A Minor)(Child abduction)** [1994] 1 FLR 390.

[101]**Director-General Department of Community Services v De L** [19961 FLC 92-674; **De L v Director-General of the New South Wales Department of Community Services** [1996] 20 Fam LR 390. However, anecdotal evidence in Australia indicates that is not always the case.

[102]**Re R (A minor: Abduction)** [1992] 1 FLR 105.

[103]**Re S (A minor)(Abduction: Custody rights)** [1993] Fam 242.

[104]Where the objection arises from a wish to remain with the abducting parent, the English court have stated that 'little or no weight should be given to those views' : **S v S (Child Abduction)(Child's views)** [1992] 2 FLR 492.

objections will not be taken into account. It will be a question of fact to be determined on the evidence. Although the English courts have stated that it is not inappropriate to take into account the objections of children aged 6 years and 7 and a half years respectively,[105] other jurisdictions have taken children's views conclusively into account at earlier ages, which may be more difficult to justify. However, age has been qualified in this Article by consideration of the degree of the child's maturity, and it must be recognised therefore that it may be appropriate to take account of the views of even very young children. In the case of older children, it is a matter of practicalities. Such children tend to 'vote with their feet'. If they do not want to do it, they usually won't. The known views of the older child must be taken into account and the older the child, the greater the weight that must be attached thereto. As another commentator has put it: '... whatever the rights and wrongs of the parents' claim, it seems inconceivable that a child aged 13 should be forcibly returned against his will'.[106]

° **The weight to be attached to such objections**

It is instructive to consider at this point the relevant provision of the United Nations Convention on the Rights of the Child. Article 12 states that State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The right to express the views held within Article 12 belongs to the child 'capable of forming his or her own views'. Article 13 of the Hague Convention refers to the objections of a child who has 'attained an age and degree of maturity at which it is appropriate to take account of his views'. Clearly a child may be capable of forming his or her own views at an earlier age than that at which

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[105]**Re R (Child abduction: Acquiescence)** [1995] 1 FLR 716.

[106]Cretney [1998] Fam Law 580 in relation to **Re HB (Abduction: Children's Objections)** [1997] 1 FLR 392 where children were returned, aged 11 and 13 years respectively. although the judge found that they were both of an age and degree of maturity at which their objections should be taken into account.

it may be considered appropriate to take account of those views.

In those circumstances, it may be that, although the UN Convention on the Rights of the Child assures the right to the child concerned to express the views formed and to have due weight attached to them, those same views do not warrant consideration under the Hague Convention on the subjective interpretation of the 'age and degree of maturity' requirement of Article 13. Also, it is questionable how far Article 13 complies with the Article 12 assurance that the child has the right to 'express those views freely in all matters affecting' him or her. There is, as we have seen, no requirement in the Hague Convention for the child's views to be ascertained. Without such an obligation, the discretion in Article 13 not to return the objecting child begins to sound rather hollow.[107]

The exceptions allowed in Article 13 and that in Article 12 relating to children who have settled in a new environment are permissive, not mandatory. Even if a party opposing the return of the child establishes that the case comes within one of these exceptions, the Convention in Article 18 allows that the judicial or administrative authority of the requested State may still be permitted to order that the child be returned. The Convention would also seem to allow a Contracting State to return a child even when its judicial and administrative authorities have declined to do so pursuant to the Convention. Thus, for example, the power to deport aliens need not be affected by adherence to the Convention.[108]

A further exception to the obligation to return a child to the country of habitual residence is to be found in Article 20. It provides:

> The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

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[107]Marilyn Freeman 'Article 13b and the child's objections under the Hague Child Abduction Convention', paper presented at the Reunite Southern African Development Community Conference 2001, 25 - 26 January 2001, Justice College, Pretoria.

[108]Ireland Law Reform Commission **Report on the Hague Convention on the Civil Aspects of International Child Abduction and some related matters** (LRC 12 - 1985), p. 12.

Accordingly it would be possible for a court to refuse to return a child where its return would be contrary to the guarantees relating to the protection of human rights in the Constitution.

22.3.3 **Sonderup v Tondelli and another 2001 (1) SA 1171 (CC)**

The operation of the Hague Convention on Child Abduction, the constitutionality of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, and the 'grave risk' requirement as set out in article 13 of the Convention were discussed in the recent case of **Sonderup v Tondelli and another**.[109]

The issues placed before the Constitutional Court were (1) whether the provisions of the Convention were applicable to the present case; (2) if so, whether, as incorporated by the Act, they were consistent with the Constitution; and (3) whether these provisions required the return of the child to British Columbia. As to (1), the mother denied that the father possessed a 'right of custody' as defined in the Convention and thus asserted that neither the removal of the child from British Columbia nor her retention in South Africa was wrongful and that consequently the Convention did not apply. As to (2), she contended that the Act was inconsistent with the Constitution in that it obliged South African courts to act in a manner that did not recognise the paramountcy of the best interests of the child. As to (3), she submitted that there should be no order for the return of her child because she would, on the basis of a series of allegations about violent and threatening behaviour by the father and the special needs of the child, be at grave risk of psychological harm and placed in an intolerable situation should she be returned.

Goldstone J, for the Court held, as to (1), that the non-removal provision in the British Columbia Court order could, depending on the circumstances, confer a right of custody within the meaning of the Convention. 'Rights of custody' as defined in the Convention could, in terms of article 3, arise either by court order or agreement having a legal effect under the laws of the requesting State, and

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[109]2001 (1) SA 1171 (CC). Also reported as **LS v AT and Another** (2001) 2 BCLR 152 (CC). See also **K v K** 1999 (4) SA 691 (C) and the discussion of this case by C M A Nicholson 'The Cape Provincial Division of the High Court makes a determination under the Hague Convention on the Civil Aspects of International Child Abduction (1980)' (2001) 64 **THRHR** 332.

it was not in dispute that both the agreement between the father and mother and the British Columbia Court order incorporating it constituted the basis on which the mother was to retain custody of the child and on which the father was entitled to exercise his right of access. The mother was, however, save for a specific period, in effect only entitled to exercise her rights of custody in British Columbia, and accordingly her failure to return to British Columbia with their child on the latter date constituted a breach of the conditions of her rights of custody as well as a concomitant breach of the father's right of access under the agreement and order. It therefore constituted a wrongful retention of their child by the mother outside British Columbia as contemplated by article 3 of the Convention. Accordingly, the Court found that the Convention was applicable.[110]

The Court held, further, as to (2), that, although the Convention clearly recognised and protected the best interests of the child in the determination of custody matters, it could be argued that it might in certain circumstances require that the child's short-term best interests be overridden in favour of his or her long-term best interests in jurisdictional (as opposed to custody) matters, thereby violating section 28(2) of the Constitution (under which the child's best interests were always paramount). This inconsistency was, however, justifiable under section 36 of the Constitution, given the objectives of the Convention (viz to ensure that the best interests of a child whose custody was in dispute were considered by the appropriate court; to prevent the wrongful circumvention of that forum by the unilateral action of one parent; and to encourage comity between States to facilitate co-operation in cases of child abduction across international borders) and the means sought to achieve those objectives (which were narrowly tailored only to achieve them).[111]

The Court held, further, as to (3), that it was clear that the risk contemplated in article 13 was risk of harm of a grave nature. In the instant case the facts were insufficient to support a finding that the return of the child to British Columbia would involve a risk of the harm referred to in article 13: there was no suggestion that the child would suffer physical harm and it was clear that the psychological harm which it was said she would suffer was not the serious harm contemplated by article 13 but rather the type of harm that all children who were subjected to abduction and

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[110]Par [25].

[111]Paragraphs [28], [30] - [32] and [35] - [36]. See also J M T Labuschagne 'International parental abduction of children: Remarks on the overriding status of the best interests of the child in international law' (2000) XXXIII **CILSA** 333.

court-ordered return were likely to suffer, and which the Convention contemplated and took into account in the remedy it provided. The conclusion that the return of the child to British Columbia did not involve the grave risk of the harm referred in article 13 was supported, inter alia, by the following specific considerations: there were no allegations suggesting that the father had abused his daughter either physically or psychologically; the problems experienced by the child were the natural consequence of the tension and trauma associated with the strained relationship between her mother and father; the child's special needs could be adequately catered for in British Columbia; the Court was entitled to make an appropriate order to address some of the concerns of the mother with regard to her possible arrest in British Columbia, her needs and those of the child pending a determination of the custody and guardianship of the child by the British Columbian Court; and it was not established that, if returned, that the child would suffer psychological harm of a serious nature or would otherwise be placed in an intolerable situation.[112]

The Court held, accordingly, that the mother had failed to satisfy the 'grave risk' requirement and that it was in the best interests of the child that the British Columbian Court should determine the questions relating to her future custody and guardianship. That Court, being already seized of the matter, was clearly in a better position than a South African court to resolve the serious disputes of fact between the mother and father, and could also consider an application by the mother for the permanent removal of the child to South Africa.[113]

22.3.4 **Evaluation and recommendations**

The above decision of the Constitutional Court confirms the constitutionality of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 and gives credence to the procedures adopted in terms of this Act. However, a comparative analysis of certain foreign legal systems that have made use of the Hague Convention has revealed that changes to **existing rules of practice**, rather than to **law**, and a purposive approach to the Convention as a living, practical part of the law, are necessary for the effective and economically operation of the

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[112]Paragraphs [44] - [47].

[113]Paragraph [48].

Convention.[114]

One of the most important requirements of the Hague Convention is that a Central Authority be established for each member state. In South Africa, the Family Advocate acts as the central authority.[115] This choice of the Family Advocate as Central Authority presents a potential conflict of interests. The Family Advocate, the appointed protector of children's rights in South Africa, may be obliged to return a child in terms of the Convention in circumstances in which the welfare principle may indicate that this is not the best course of action. Furthermore, the human resources of this office are already stretched to the limit in dealing with matters currently before it. It is also worth recalling that the Commission recommended above that the Director-General : Social Development should be designated the Central Authority for the purposes of the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.[116] To prevent confusion and to ensure optimal use of resources, it is recommended that the same functionary should act as Central Authority for the purpose of both Hague Conventions.

We therefore recommend that the Director-General: Social Development be designated as the Central Authority for purposes of the Hague Convention on the Civil Aspects of International Child Abduction. We make this recommendation realising full well that the Department at the moment lacks the capacity and skill to assume this role. We argue that within the broader framework of the comprehensive children's code proposed by the Commission in this paper, that it would provide greater opportunity for specialisation and resource allocation if the Central Authority for all the Hague Conventions was located within the Department of Social Development. In any event, regardless of where the Central Authority is to be placed, it is clear that

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[114]Henry Setright, an English barrister specialising in Hague Convention cases, points out in his paper 'The approach to Hague Convention cases in England and Wales' presented at the Reunite Southern African Development Community Conference, 24 - 26 January 2001, Justice College, Pretoria that some cherished and important practices - oral evidence, representation of children, recourse to expert evidence, time allowed for careful and full preparation - which are taken as normal in domestic children's cases, are usually ruled out in cases under the Hague Convention in England and Wales.

[115]Appointed in terms of the Mediation in Certain Divorce Matters Act 24 of 1987.

[116]See 22.2.7 above.

additional resources will be required as the number of applications for the return of children in terms of this Hague Convention is certain to increase.

However, we also believe that the Office of the Family Advocate should be involved in child abduction cases, albeit in a different capacity. **We believe the Family Advocate should act, as legal representative for the child, in such applications**, very much on the basis assumed in the **Sonderup v Tondelli and another** case discussed above.

We have given considerable attention to the defences provided for in Article 13 of the Convention and the shortcomings of the Convention in relation to cases where states parties do not deal effectively with domestic violence. At issue here are chronically violent and obsessive men who pursue their partners relentlessly and are highly skilled at evading the law. Women who try to make a final break from these men frequently end up dead; more often they keep going back home to a nightmare situation in which they at least stay alive. The Hague Convention does not adequately provide for such situations; it too easily requires that the court of jurisdiction in the country of origin sort out the custody issues, given that that may be the very court which failed to protect the mother (and child) from domestic abuse in the first place. **We accordingly recommend strengthening the existing provisions in the Convention to provide for the investigation of a case from within the receiving country, and to apply interim protective measures, before ordering repatriation. It is also recommended that specific provision be made for the right of the child concerned to raise an objection to being returned and for due weight to be accorded to that objection in accordance with the age and maturity of the child.**

We further recommend that consideration be given to exercising the right under Article 26 of the Hague Convention to exclude state liability to cover the costs of Convention proceedings where the child has been abducted from South Africa. In circumstances where a child has been abducted to South Africa the abductor is most likely to be a *peregrinus* and unlikely to have assets in the country, making the recovery of costs in such cases problematic. In circumstances where a child has been abducted from South Africa the abductor is unlikely to return to South Africa to settle any outstanding legal costs and thus the recovery of costs in such cases may also be problematic. The present Regulation 8 to the Hague Convention Act which provides for the recovery from the applicant of the expenses incurred by the Central Authority in bringing

about the return of the child seems inadequate.

South Africa needs to introduce certainty into the position regarding cases of parental child abduction which do not fall within the scope of the Hague Convention. The rules that are applied should not distinguish between cases of abduction to or from Convention countries before the implementation date of the Convention and those to or from non-Convention countries. South African courts should be bound by legislation to apply the principles of the Hague Convention in non-Convention cases. Although the Central Authority and the mechanisms of the Convention would not be available in such cases, the policy to return the child to the jurisdiction from which he or she was abducted should apply. Such an approach is both practical and would ensure certainty in non-Convention cases.

In line with our vision of a single comprehensive children's statute for South Africa, we recommend the incorporation of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 into the new comprehensive children's statute. As was the case with the Hague Convention on Intercountry Adoption, **we recommend that the Hague Convention on Child Abduction be incorporated into our national law as a schedule to the new children's statute**. The Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 can then be repealed.

To give effect to the above recommendations we propose the following legal formulation:

INTERNATIONAL CHILD ABDUCTION

Object of part

1. The purpose of this part is to give effect to the Hague Convention on the Civil Aspects of International Child Abduction; to introduce additional measures making the act of parental child abduction a criminal offences; to deal with miscellaneous matters.

Definitions

2. In this Part, unless the context otherwise indicates -

"**Central Authority**" means the Central Authority designated in terms of section 4;
"**Convention**" means the Hague Convention on the Civil Aspects of international Child Abduction, adopted on 25 October 1980 at The Hague, a copy of the English text which is set out in Schedule yy.
"**Family Advocate**" means the Family Advocate appointed in terms of the Mediation in Certain Divorce Matters Act, 1987;
"**Minister**" means the Minister of Social Development acting in consultation with the Minister of Justice;
"**Regulation**" means a regulation made under this Part.

Application of Convention

3. The Convention shall, subject to the provisions of this Act, apply in the Republic.

Central Authority

4. For the purposes of Article 6 of the Convention the Director-General of the Department of Social Development is hereby designated as the Central Authority for the Republic.

Additional powers of the Court

5. (1) In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3 of the Convention, the Court may, prior to the making of an order for the return of the child, request the Central Authority to provide a report on the domestic circumstances of the child prior to the abduction.

(2) The Court may, prior to the making of an order for the return of the child, order interim protective relief for the child, the applicant or the defendant.

(3) The Court must, in considering an application in terms of this Chapter of the Act for the return of a child, afford that child the opportunity to raise an

objection to being returned and in so doing must give due weight to that objection in accordance with the age and maturity of the child.

Role of the Family Advocate

6. The Family Advocate shall act on behalf of the child in all applications in terms of this Convention.

Delegation

7. (1) The Central Authority may, subject to such conditions as he or she may impose, delegate or assign any power or duty conferred or imposed upon him or her by or under the Convention to any official with the rank of director or higher in the Department.

(2) The delegation, assignment and conditions imposed shall be in writing.

Regulations

8. The Minister may make regulations -

(a) to give effect to any provisions of the Convention;
(b) prescribing fees, and providing for the recovery of any expenditure incurred, in connection with the application of the Convention.

Repeal

9. The Hague Convention on the Civil Aspects of International Child Abduction Act, 1996 (Act 72 of 1996) is hereby repealed.

° **Making parental abduction a criminal offence**

The Hague Convention on the Civil Aspects of International Child Abduction by definition deals with the civil law aspects related to such abductions. It does not deal with the criminal law aspects of child abduction. **The Commission accordingly considered strengthening the civil law position by introducing addition measures in the new children's statute criminalising the act of parental abduction**.[117] We did this well realising that the criminal law is not the ideal measure to do deal with family law issues, but unfortunately a civil law action and other mechanisms such as mediation do not always have the required effect. It must also be pointed out that the common law offence of abduction is rather limited in scope as the intention in taking a child out of the control of his or her care-taker (custodian) must be to enable someone 'to marry or have sexual intercourse' with that child.[118] If the intention is something else (even if it is of a sexual or indecent character) which excludes marriage or sexual intercourse, there is no abduction, though the person taking the child may, in appropriate circumstances, be guilty of kidnapping,[119] assault or something else.[120] **The Commission also wishes to make it clear that it is not considering abolishing or modifying the common law crime of abduction or kidnapping by the new children's statute**.

The Commission further recommends that, where appropriate, the abductor should be held

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[117]See the paper presented by Caroline Nicholson "The Hague Convention on the Civil Aspects of International Child Abduction, pill or placebo?" at the Reunite Training Seminar on International Child Abduction, 21 - 23 January 1999, Justice College, Pretoria. See also the report of the Scottish Law Commission **Child Abduction**, Edinburgh, February 1987, para 4.4 - 4.8, 4.30; clause 1 - proposed section 6(1); Ireland Law Reform Commission **Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters**, Dublin, 1985, p. 44.

[118]Milton **Hunt's South African Criminal Law and Procedure (Volume II: Common-law Crimes)** Cape Town: Juta 1982, p. 575, 583 et seq.

[119]Milton **Hunt's South African Criminal Law and Procedure (Volume II: Common-law Crimes)**, p. 509 defines kidnapping as the unlawful and intentional deprivation of the liberty of movement or of custody of a person.

[120]R v Motati; R v Buchenroeder (1896) 13 SC 173 at 178; R v Mhlongo 1942 NPD 134. See further F F W van Oosten and J M T Labuschagne 'Die plagiariese en raptoriese misdade' 1978 **De Jure** 32 at 57 - 62.

liable for all costs reasonably incurred by the State or the other parent in locating and facilitating the return of the child.

To give effect to the recommendation that parental abduction should be a criminal offence, we propose the enactment of the following statutory offences for inclusion in the new children's statute:[121]

Offence of taking or detaining of child

1. (1) Subject to subsection (2) below, a person commits an offence, if, without lawful authority or reasonable excuse -

(a) he or she takes a child with the result that the child is removed from the control of any person having lawful control of the child; or
(b) he or she detains such a child with the result that the child is kept out of the control of any person entitled to lawful control of the child.

(2) In proceedings against any person for an offence under this section, it shall be a defence for that person to show that, at the time of the alleged offence, he or she believed on reasonable grounds that the child had attained the age of eighteen years.

(3) For the purposes of this section, a person shall be regarded as having lawful authority -

(a) who has a right of custody of the child; or
(b) who has a right of access to the child, but only while acting within the scope of that right.

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[121]See also the discussion on trafficking of children in section 22.4 below.

Offence of taking or sending child out of the Republic

2. (1) Subject to subsection (2) below, a person commits an offence if he or she takes or sends a child out of the Republic -

(a) where there is in force in respect of the child an order of a court in the Republic which has the effect of prohibiting the removal of the child by that person (whether named in the order or not) from the Republic or any part of it, or

(b) without the consent of each person who is a parent or guardian or to whom custody has been granted in respect of that child; and

(c) where that person does not first obtain the consent of that court.

(2) In proceedings against any person for an offence under this section, it shall be a defence for that person to show that, at the time of the alleged offence, he or she

(a) did not know that the order referred to in subsection (1) above was in existence;

(b) did obtain the consent of the requisite persons or of the court;

(c) had been unable to communicate with the requisite persons, having taken all reasonable steps, but believed that they would all consent if they were aware of all the relevant circumstances; or

(d) being a parent, guardian or person having custody of the child, had no intention to deprive others having rights of guardianship or custody in relation to that child of those rights.

(3) For the purposes of this section, a duly authenticated document which purports to be a copy or an extract of an order made, or other document issued, by a court of the Republic shall be deemed to be a true copy or extract unless the contrary is shown, and shall be sufficient evidence of any matter to which it relates.

Construction of references to taking, sending and detaining

3. For the purposes of this Part of this Act -

(1) a person shall be regarded as taking a child is he or she causes or induces the child to accompany, or to join, him or her or any other person or causes the child to be taken;

(2) a person shall be regarded as sending a child if he or she causes the child to be sent; and

(3) a person shall be regarded as detaining a child if he or she causes the child to be detained or induces the child to remain with him or her or any other person.

22.4 Refugee and undocumented immigrant children

22.4.1 Introduction

There is no universal definition of the term 'refugee child'. The term is therefore used to include asylum seekers and displaced children up to the age of eighteen years. There are two broad categories of refugee children: those who enter the country with and remain accompanied by their parents or guardians, and those who are unaccompanied or who became separated from their parents or guardians in the process of flight. Flight itself leaves children open to violence, to disruption of community and social structures and to shortages of basic resources, affecting their physical and psycho-social development.[122]

Globally, children are said to form the largest demographic age group amongst refugees. Despite the lack of comprehensive data, it is estimated that children represent half of the world's forcibly displaced population.[123] South Africa has been fortunate in recent years not to witness the large-scale refugee movements faced in many other countries on the continent. Consequently, the number of child applicants has been rather small, but not insignificant.[124]

Since the introduction of asylum determination procedures in 1994 up until June 2000, the South African Department of Home Affairs reportedly received a total of 1 693 'child related' applications for refugee status, all of which concerned children accompanied by their parents. Currently, the Department of Home Affairs is dealing with 1700 child related cases. Nearly half of these child applicants come from the DRC (Zaire), Angola, and Somalia. There is currently no way of knowing how many child applicants arrive unaccompanied, since official statistics do not reflect this

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[122]Russell S 'Unaccompanied refugee children in the United Kingdom' (1999) 11 **International Journal of Refugee Law** 127.

[123]Bhabha, J and W Young 'Not adults in miniature: Unaccompanied child asylum seekers and new US Guidelines' 1999 (11) **International Journal of Refugee Law** 84 at 85.

[124]Victoria Mayer, Jacob van Garderen, Jeff Handmaker and Virginia Lee-Ann de la Hunt "'Protecting the most vulnerable': Using the existing policy framework to strengthen protection for refugee children", research paper for the National Consortium on Refugee Affairs, 19 September 2000, p. 4 (hereinafter Mayer et al "Protecting the most vulnerable".

distinction, although there are some indicators.[125] Mayer et al[126] point to the dramatic and rapid increase in the number of asylum applications which relate to children. Apparently, the increase in applications is partly attributable to an increase in the phenomenon of trafficking in children.

An undocumented immigrant child, on the other hand, can be defined as a child who is unlawfully within the territory of a state other than his or her own, whether because of illicit entry into the state or because of expiry of a legally acquired visa.[127] Undocumented immigrant children can therefore be divided into three broad groups, namely (a) those who enter the country illegally with and remain accompanied by their parents or legal guardians, (b) unaccompanied undocumented immigrant children and those who have become separated from their parents or legal guardians, and (c) children born to undocumented immigrant parents after they enter the country. Due to socio-political and economic instability in the Southern African region, South Africa has seen the influx of some millions of immigrants, many of whom who have entered the country illegally.

Currently, there is no legal protection for undocumented immigrant children under South African law as most do not qualify for asylum-seeker or refugee status. As soon as these vulnerable foreign children do not make it to refugee status, they come under the other, very child-unfriendly legislation. In this regard it has been pointed out that the Aliens Control Act 96 of 1991 and the Immigration Bill 79 of 2001,[128] which will succeed it, are rather xenophobic in their thrust - they are about getting rid of unwanted people of all ages rather than being founded on the rights of

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[125]Service organisations have reported growing numbers of separated child refugees being found on the streets and in shelters and havens. It appears that many cases of unaccompanied and separated children do not engage with Refugee Reception Officers: Mayer et al “Protecting the most vulnerable”, p. 6.

[126] “Protecting the most vulnerable”, p. 6.

[127]South African Human Rights Commission **Undocumented Immigrants**, policy paper, 1997, p. 3.

[128]As reintroduced in the National Assembly in 2001. Various draft bills were published. See the drafts published in Government Gazette No. 20889 of 15 February 2000 and Government Gazette No. 22439 of 29 June 2001. The draft bill published in Government Gazette No. 22439 of 29 June 2001 was originally introduced as Bill No. 46 of 2001.

children.[129]

Dr Jackie Loffell of the Johannesburg Child Welfare Society points out there are a lot of problems for such children on the ground which would seem to indicate that existing legislation is not adequate to protect them. She says:

> A large group of children who are falling between the cracks in legislation are children of 'undocumented foreigners' who do not qualify for refugee or asylum seeker status. They may have accompanied adults who have illegally entered the country, or have been born to such persons after they come to South Africa. In some cases their parents have died or disappeared. In some cases only one parent is an illegal migrant. These children are in a legally undefined situation which creates great problems for them, although they are in theory given equal protection with South African children under the Constitution. . . . There has been a move from quarters such as the current children's social security lobby that eligibility for grants and basic services should cease to be dependent on possession of an ID document. Of course this does not only affect foreign children but is relevant to abandoned children and many other South Africans. Would it be feasible to prohibit schools and any other essential public service from barring children who do not have these documents? Perhaps this could go with some type of interim provision for temporary authorisations plus an automatic referral to Home Affairs.
>
> Another unclear scenario relates to the current dispensation for unmarried fathers. Many mothers who come to us considering releasing their babies for adoption say that the fathers are illegal migrants. They have often disappeared or are known to have returned to their countries of origin. What is the status of such a father in relation to his child born outside of marriage?

Refugee and undocumented immigrant children are regarded as children first and foremost and entitled to the benefit of all the rights accorded to children. This is especially relevant when issues such as the provision of health services, nutrition, shelter and education are discussed. In addition, they have specific needs and rights as refugees[130] and undocumented immigrant children. Protection problems exist in the determination of refugee status, physical protection, the detention and conditions of detention, the accessing of grants, registration and statelessness. Refugee and

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[129]Dr Jackie Loffell, Johannesburg Child Welfare Society.

[130]Position on Refugee Children by the European Council on Refugees and Exiles (November 1996) par 3 (hereafter Position on Refugee Children by the ECRES); Geraldine van Bueren "The Rights of Children with Special Needs" in **The International Law on the Rights of the Child** (1995) 360.

undocumented immigrant children have special assistance needs in the areas of religious, cultural and recreational activities.[131]

22.4.2 International Framework

Refugee children are recognised in international law as benefiting from special protection. This has been implicitly recognised to an extent by South Africa's Constitution which does not distinguish between children on grounds of nationality. In addition, South Africa has ratified a number of international treaties impacting upon the rights and welfare of children. Some of these international instruments are discussed below.

22.4.2.1 The U N Convention on the Rights of the Child, 1989

The CRC is the most important and comprehensive international instrument dealing with the rights of all children, including refugee children. Article 22 (1) of the CRC focuses on refugee children. It provides for equality in the enjoyment of applicable rights for children recognised as refugees and children seeking asylum.[132] Unless a State has attached a specific reservation, the principle of non-discrimination in Article 2 applies. Van Bueren is of the opinion that Article 22 cannot overcome two of the fundamental weaknesses in the general international legal protection of refugees, namely the failure to capture the evolving growth in the definition of refugee and the absence of a duty on states to provide asylum.[133]

Articles 12 and 13 of the CRC, which enshrine the child's right to freedom of expression and are

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[131]Note on Refugee Children (July 1987) par 10.

[132]Van Bueren in **The International Law on the Rights of the Child** (1995) 362; Art 22 (1) of the CRC reads as follows: "States parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties."

[133]Van Bueren in **The International Law on the Rights of the Child** (1995) 362.

equally applicable to refugee children, are of particular importance in determining a child's refugee status. Article 13(1) provides the right to freedom of expression that includes non-verbal forms of communication. The fear of persecution may be more accurately assessed when a child is able to express his or her traumatised feelings through a form of communication such as art.[134]

The right to freedom of expression includes the right of a child to express his or her views on any judicial and administrative matters affecting such a child.[135] In the determination of a child's refugee status, and in providing durable solutions, the child's views should feature prominently in the decision-making process.[136]

The best interests of the child as a primary consideration requires that durable solutions should be found for refugee children as quickly as possible.[137] It often happens that refugee children find themselves in refugee camps for extended periods of time. One of the consequences is the difficulty they have in exercising their fundamental rights and freedoms.[138] The right to family life is often devalued by the structure and organisation of a refugee camp. Similarly, the right to participate is devalued as they do not have the opportunity to receive information or make decisions themselves.[139] The right to play and to be involved in recreational activities is often overlooked.[140]

The right to a name and registration after birth is very important to a refugee child. States Parties that are also countries of asylum, have the duty to register a child if born in the country of asylum. This can happen through the existing national procedure, or, if not possible, by means of a special procedure for refugees that should contain all the necessary safeguards.[141] This will enable

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[134]Van Bueren in **The International Law on the Rights of the Child** (1995) 362.

[135]Article 12 of the CRC.

[136]Van Bueren in **The International Law on the Rights of the Child** (1995) 362.

[137]Article 3 of the CRC.

[138]Van Bueren in **The International Law on the Rights of the Child** (1995) 365.

[139]Van Bueren in **The International Law on the Rights of the Child** (1995) 365.

[140]Article 31 of the CRC; Van Bueren in **The International Law on the Rights of the Child** (1995) 365-366.

[141]Van Bueren in **The International Law on the Rights of the Child** (1995) 366.

children to establish their date and place of birth as well as their family name and will reduce the risk of abductions or disappearances.[142] The question of nationality is also very important for refugee children. Although it is not clearly stated as such, it is suggested that on a proper interpretation of Article 7(1) of the CRC, a child also has the right to acquire nationality from birth.[143]

The state of asylum carries the responsibility to ensure the safety and security of the refugee child. States Parties have the duty to ensure to the maximum extent possible the survival and development of the child.[144]

Unaccompanied refugee children enjoy additional legal protection. States Parties should provide, as they consider appropriate, co-operation with intergovernmental and non-governmental organisations to trace the parents or other family members in order to obtain information necessary for reunification with his or her family.[145] Losing the support of a family is particularly disruptive of a refugee's sense of self and family reunification is a priority. An application by a child for his or her parents to enter or leave a State Party for the purpose of family reunification must be dealt with by State Parties in a positive, humane and expeditious manner.[146] Furthermore, an unaccompanied child is entitled to special protection and assistance provided by the State, which should ensure alternative care.[147]

22.4.2.2 **The African Charter on the Rights and Welfare of the Child (African Charter)**

South Africa acceded to the African Charter on 7 January 2000. The areas of protection that are of specific relevance to refugee children are the following:

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[142]Van Bueren in **The International Law on the Rights of the Child** (1995) 366.

[143]Van Bueren in **The International Law on the Rights of the Child** (1995) 367.

[144]Article 6(1) of the CRC; Van Bueren in **The International Law on the Rights of the Child** (1995) 368.

[145]Article 22(2) of the CRC; Van Bueren in **The International Law on the Rights of the Child** (1995) 370-372. See also Article 7 of the CRC.

[146]Article 10 of the CRC.

[147]Article 20 of the CRC.

- Protection against harmful social and cultural practices;[148]
- Free and compulsory basic education and access to secondary education;[149] and
- An enjoinder to States Parties to prevent children from taking part in armed conflict and hostilities.[150]

Article 23 incorporates the broader definition of a refugee in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 and further states that provisions relevant to refugee children apply 'mutatis mutandis' to children who are internally displaced 'howsoever caused'.[151]

22.4.2.3 The 1951 U N Convention Relating to the Status of Refugees

On an international level refugee status is regulated by the 1951 UN Convention relating to the Status of Refugees. South Africa has ratified this Convention.[152]

The Convention defines a refugee as someone who:

> Owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to it.

The UN definition should be understood to include any person genuinely at risk of serious human rights violations in his or her country of origin, who both needs and deserves protection. There must be a heightened risk to infringe human rights on account of discrimination on the basis of race,

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[148]Article 13 of the African Charter.

[149]Article 11 of the African Charter.

[150]Article 22 of the African Charter.

[151]Article 23(4) of the African Charter.

[152]Draft Refugee White Paper, published in the Government Gazette No. 18988 dated 19 July 1998, p. 8.

religion, nationality, etc. It must moreover be determined that the government in the country of origin either cannot or will not effectively counter the risk to fundamental human rights, in consequence of which there is a need for surrogate protection in South Africa.[153]

To quality for refugee status, children, like adults, must be outside their country of nationality, or, if stateless, outside their country of habitual residence and prove a well-founded fear of persecution for the specified reasons.

Under Article 22 of the Convention there is a duty on State Parties to provide compulsory primary education for refugee children of an equivalent standard to that offered to the State's own nationals. With reference to secondary education, treatment at least as favourable as that given to non-refugee aliens is required. However, States Parties to either the International Covenant on Economic, Social and Cultural Rights or to the CRC are under a duty to make secondary education progressively available to child refugees.[154]

Access to education is complemented by the objectives of education as enshrined in Article 29 of the CRC. The education of a child should be directed towards the development of respect for the child's and parent's cultural identity, language and values, as well as the national values of the state in which the child is living and the country of origin.[155] For refugee children this means that their right to education includes education in their own indigenous culture as well as knowledge of their country of asylum.[156] Education of a refugee child should also be directed towards enabling such a child to live a responsible life in a free society.[157] Such an approach has the potential to overcome a feeling prevalent in refugee children that they are 'takers' rather than 'givers'.[158]

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[153]Draft Refugee White Paper, p. 8.

[154]Van Bueren in **The International Law on the Rights of the Child** (1995) 369; Article 28 of the CRC.

[155]Article 29(1)(c) of the CRC.

[156]Van Bueren in **The International Law on the Rights of the Child** (1995) 369.

[157]Article 29(1)(d) of the CRC.

[158]Van Bueren in **The International Law on the Rights of the Child** (1995) 370.

The US Supreme Court ruling **Plyler v Doe**[159] stands as the federal law regarding the admission of undocumented children to public schools in that country. **Plyler** guarantees undocumented immigrant children the right to free education in the United States of America. The Court believed that denying undocumented immigrant children access to education unfairly punished the children for their parent's undocumented status. The Court further states that under current laws and practices, the illegal alien of today may well be the legal alien of tomorrow and that without an education, these undocumented children who are already disadvantaged as a result of poverty, lack of English-speaking ability and undeniable racial prejudices will become permanently locked into the lowest socio-economic class. Moreover, the Court ruled that these undocumented children are entitled to equal protection under the Fourteenth Amendment. As a result of the ruling, schools may not -

- deny admission to a student on the basis of his or her undocumented status;
- treat a student fundamentally differently from others to determine residency;
- engage in practices that create fear among undocumented students or their families;
- require students or parents to disclose or document immigrant status;
- make inquiries of students or parents that may expose their undocumented status; and
- require Social Security numbers from all students.

Educators are also required not to expose children and their families to the Immigration and Naturalization Service. Fear of exposure, however, leads parents to keep their children from school, and it causes children to worry about being arrested and separated from their parents.[160] The Family Educational Rights and Privacy Act[161] also prohibits schools from providing information to outside agencies that would expose students' citizenship status.

Related to the right to education are religious and cultural rights. Refugee children face two major obstacles. Firstly as they find themselves in a different environment, the country of asylum, they have to learn the culture of that country and secondly they have limited opportunities to learn about

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[159]457 US 202 (1982).

[160]James, D C S 'Coping with a new society: The psycho-social problems of immigrant youth' (1997) 67(3) **Journal of School Health** 98 - 101.

[161]20 US C. Sec. 1232g (1974).

and participate in their own cultural practices.[162] Under the 1951 Convention State Parties have the duty to grant refugees the most favourable treatment accorded to aliens with respect to their right to association for cultural and religious activities.[163] Furthermore, States Parties should provide refugees treatment at least as favourable as that accorded to their nationals in relation to religious freedom and the religious education of their children.[164]

Other than the above provisions, and measures to ensure and protect the family, the 1951 Convention does not specifically recognise the needs and special circumstances of refugee children.

22.4.2.4 **1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa**

This Convention does not specifically deal with the position of refugee children, but it does provide a broader general refugee definition by adding the following to the 1951 UN Status of Refugees Convention definition:

> The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

The many children and adults who flee from environmental upheavals such as famine and drought, can claim that these are events 'seriously disturbing public order' and claim refugee status.[165]

South Africa ratified this Convention in 1995.

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[162]Van Bueren in **The International Law on the Rights of the Child** (1995) 370.

[163]Article 15 of the 1951 Status of Refugees Convention.

[164]Article 4 of the 1951 Status of Refugees Convention.

[165]Van Bueren in **The International Law on the Rights of the Child** (1995) 361.

22.4.2.5 The United Nations High Commission for Refugees (hereafter the UNHCR)

The UNHCR is entrusted with the unique responsibility of promoting and providing international protection to refugees. This body promotes the implementation of the 1951 UN Status of Refugees Convention with regard to unaccompanied minors and relevant principles in the CRC. UNHCR is also involved in the formulation of participating States' policies and legislation. The UNHCR Executive Committee (Excom) as main policy-making body of the UNHCR meets every year in Geneva. Its decisions and conclusions, although not legally binding on State Parties,[166] provide important guidelines.[167]

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[166]NCRA Report (2000) 12.

[167]See, for instance, EXCOM Conclusion No 47 (XXII) 1987 where the Executive Committee:

(a) Noted with serious concern the violations of the human rights of refugee children and their special needs and vulnerability within the broader refugee population;
(b) urged States to take appropriate measures to register the births of refugee children born in countries of asylum;
(c) called upon the High Commissioner to ensure that individual assessments are conducted and adequate social histories are prepared for unaccompanied children and children separated from their parents, to facilitate provision for their immediate needs, and the planning and implementation of appropriate durable solutions;
(d) stressed the need for support programmes for disabled refugee children; and
(e) recommended regular and timely assessment and review of the needs of refugee children.

See also EXCOM Conclusion No 59 (XL) 1989 where the Executive Committee:

(a) Called upon UNHCR to promote the best possible legal protection of unaccompanied minors, particularly with regard to forced recruitment into armed forces and to the risks associated with irregular adoption; and
(b) encouraged UNHCR to strengthen its efforts in assisting host country governments to ensure the access of refugee children to education.

and EXCOM Conclusion No 74 (XLV) 1994 where the Executive Committee:

22.4.2.6 **Refugee Children: UNHRC Guidelines on Protection and Care**

The UNHCR formulated the Guidelines on Refugee Children in 1988 in order to facilitate the protection and care of refugee children. As the CRC provides a comprehensive framework for the responsibilities of its States Parties to all children within their borders, including refugee children, the Guidelines were revised in 1994 to reflect these norms and standards.

22.4.2.7 **UNHCR: Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum**

Unaccompanied children seeking asylum are extremely vulnerable and have special needs that must be met. Issues such as access to the territory, identification and initial action, access to asylum procedures and interim care and protection are addressed.

22.4.2.8 **UNHCR Handbook**

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status states that the same definition of a refugee applies to all individuals, regardless of their age. The Handbook provides guidelines on the determination of the status of an unaccompanied minor.

22.4.3 **National Legislation**

22.4.3.1 **Introduction**

(a) Urged UNHCR, in co-operation with Governments, other United Nations and international and non-governmental organisations, to continue in its efforts to give special attention to the needs of refugee children, ensuring arrangements for immediate and long-term care and which includes health, nutrition and education; and

(b) urged UNHCR in co-operation with Governments, other United Nations and international and non-governmental organisations to give special attention to separated children and to ensure' prompt registration, tracing and family reunion.

According to the Draft Refugee White Paper,[168] the refugee policy of the South African government is premised upon the two sets of inter-related threshold considerations. On the one hand the policy is constructed so as to reflect but also to enable the fulfilment of the international and constitutional obligations and on the other hand it touches on a number of other directly and indirectly related state and national interests and priorities. The most important of these priorities concern the migration control objectives,[169] law and order, concerns over gun-running, drug trafficking and racketeering, money laundering and international crime syndicates and cartels, various other aspects of national and state security and social and economic interests, as well as bilateral, regional and international relations.

The main policy positions of the Government are to effect in legal and practical terms the following distinctions:

> The granting of asylum to refugees and their protection in South African territory is a matter fundamentally of securing human rights protection. The Government will provide asylum and refugee protection to those persons who have lost this in their countries of origin, and have fled into, or are forced to remain in South Africa for reasons or circumstances which are recognised in international refugee and human rights law as giving rise to the need for international protection.
>
> The Government does not consider the refugee protection regime to be an alternative way to obtain permanent immigration into South Africa. It does not consider refugee protection to be the door for those who wish to enter South Africa by the expectation for opportunities for a better life or a brighter future. It does not agree that it is appropriate to consider as refugees, persons fleeing their countries or origin solely for reasons of poverty or other social, economic or environmental hardships.

This policy framework forms the basis of the Refugees Act, 1998 (Act 130 of 1998).

Mayer et al[170] argue that the current legal framework in South Africa 'provides extensive protection to refugee children, which can and ought to be recognised by those involved with refugees and the asylum determining procedure, and translated into a workable policy'. However, this is not to deny

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[168]Published in Government Gazette No 18988 dated 19 June 1998.

[169]See also the White Paper on International Migration, 31 March 1999; the White Paper on Population Policy, March 1998

[170]"Protecting the most vulnerable", p. 15.

the problems relating to unaccompanied[171] or separated[172] children,[173] or the problems such children face at Refugee Reception Offices or detention centres.[174]

22.4.3.2 **The South African Constitution**

Under section 27 of the Refugees Act it is recognised that refugees are entitled to the rights set out in Chapter 2 of the Constitution (the Bill of Rights). The Bill of Rights is therefore an important source when the rights of refugee children are discussed.[175]

22.4.3.3 **The Refugees Act 130 of 1998**

The Refugees Act defines a refugee as 'any person who has been granted asylum in terms of this

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[171]NCRA Guidelines and Recommendations (2000) 6: A child is unaccompanied if no person can be found who by law or custom has primary responsibility for the care of that child.

[172]NCRA Guidelines and Recommendations (2000) 6: The term refers to a child who has been separated from his or her parents, either before or during the flight from the country of origin.

[173]The Department of Home Affairs has no system in place to keep specific statistics on unaccompanied or separated children or a system to specifically deal with their claims for asylum. A system whereby unaccompanied or separated children can be identified, is also lacking.

[174]Mayer et al "Protecting the most vulnerable", p. 7; Lindela Report "At the crossroads for detention and repatriation" by the South African Human Rights Commission, December 2000, par. 4.2.8. The Lindela Repatriation Centre, the largest detention centre for undocumented migrants in South Africa, does not have facilities to keep children separated from adults and has therefore unilaterally decided not to accept anybody under the age of 15 years into the facility.

[175]In **Larbi-Odam and Others v The Member of the Executive Council for Education (North West Province) and Another** 1998 (1) SA 745 (CC) the Constitutional Court struck down a provincial law which prohibited foreign citizens from being permanently employed as teachers in state schools. The judgment reaffirms the general proposition that all rights contained in the bill of rights, with the exception of those limited to citizens, also provide protection to non South African citizens.

Act'.[176] In terms of section 3 of the Act, a person qualifies for refugee status for the purposes of this Act if that person :

(a) owning to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside his or her country of nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or

(c) is a dependant of a person described above.

Section 4 of the Act provides for exclusion from refugee status in certain circumstances.[177] The question whether these exclusions also apply to child asylum seekers, is uncertain.[178]

Sections 21-26 of the Act provides for the asylum application process.[179] It sets out the application

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[176]An asylum seeker, on the other hand, is defined as "a person who is seeking recognition as a refugee in the Republic".

[177]The grounds for exclusion are:

(a) the asylum seeker has committed a crime against peace, a war crime or a crime against humanity;

(b) the asylum seeker has committed a serious non-political crime;

(c) the asylum seeker has committed acts contrary to the purposes and principles of the UN or the OAU; or

(d) the asylum seeker enjoys the protection of any other country in which he or she has taken residence.

[178]NCRA Report (2000) 16.

[179]See also **Parapanov v Minister of Home Affairs and others** (2000) 4 BCLR 393 (W) on the right of a refugee to be furnished with reasons for rejection of applications for asylum and

procedure, the duties of the standing Committee for Refugee Affairs and the Appeal Board. The objective of the procedure is to distinguish genuine asylum seekers from alien migrants, economic migrants and fugitives from justice and to confer on recognised asylum seekers the essential social rights necessary for survival in the country.[180]

The Act read with the Regulations, attempts to deal with applications within 180 days. Provision is made for a preliminary interview with a Refugee Reception Officer and thereafter an oral hearing with a Refugee Status Determination Officer (RSDO). There is also the possibility of an appeal to the Appeal Board on decisions made by the RSDO.

A distinction is made between accompanied and unaccompanied child asylum seekers. The definition of a dependant includes an unmarried dependent child under the age of 18 years.[181] It follows that an accompanied child's asylum seeker status is dependent on his or her parent's status.[182] In other words, if the child's mother or father is granted refugee status, then in practice the child will also be granted that status. The intention of this policy is to keep families together. The relationship between the principal asylum seeker and the child as dependant must be proven by documentary evidence, and in the absence of such evidence by affidavits or sworn statements to that effect.[183] Any dependants applying for refugee status must appear before a Refugee Status Determination Officer for the hearing.[184]

Although children on their own can apply for asylum status, there appears to be confusion in the treatment of asylum applications brought by children. In some instances, unaccompanied children are told by departmental officials that they cannot obtain assistance as their application needs to be linked to that of their parents or that an application in the name of a child can only be made once that child is 16 years old.[185] Where children are accompanied, their applications are linked to those

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refugee status.

[180]HRC Quarterly Review - Children's Rights and Personal Rights 97.

[181]Section 1 of the Refugees Act 130 of 1998; regulation 1.

[182]NCRA Report (2000) 17.

[183]Regulation 16(3).

[184]Regulation 16(5).

[185]NCRA Report (2000) 7.

of their parents. However, the Refugees Act 130 of 1988 specifically provides that an accompanied child can also bring his or her separate asylum application[186] and the parent or guardian must assist the child with such an application.[187] There is no minimum age limit prescribed for making an application.

The status of a dependant of a recognised refugee may change when

(a) his or her parent's status is withdrawn;[188] or
(b) the child's status as dependant ceases to exist.[189]

In these instances, the child may remain in the country and may independently apply for recognition of his or her refugee status.[190]

Section 32 of the Refugees Act addresses the position of unaccompanied children.[191] A child who appears to be in need of care in terms of the Child Care Act 74 of 1983 and who appears to qualify for refugee status under the Act, must be referred to a children's court.[192] The children's court may order that such child must be assisted in applying for asylum.[193]

A child as applicant for asylum has the right to legal representation before the Refugees Status

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[186]Regulation 16(1) and sec 33(4) of the Refugee Act 130 of 1998.

[187]Section 33 (1) of the Refugees Act 130 of 1998.

[188]Section 36 of the Refugees Act 130 of 1998.

[189]Section 23 of the Refugees Act 130 of 1998.

[190]Section 33(4) of the Refugees Act 130 of 1998.

[191]According to the Draft Refugee White Paper (par. 4.9) the policy is that unaccompanied minor children shall be considered as children in need of care, and therefore subject to the provisions of the Child Care Act, 1983.

[192]That is the Children's Court in the district in which he or she was found.

[193]Section 32(2) of the Refugees Act 130 of 1998; regulation 3(5), however, stipulates that unaccompanied children who appear to qualify for refugee status **must** be assisted in applying for asylum in accordance with section 32 of the Act.

Determination Officer.[194] This is a non-adversarial hearing and the representative may present witnesses, submit other evidence and make a statement or comment on the evidence at the end of the initial hearing.[195]

Section 29 of the Refugees Act restricts the authorities from detaining any person for a period longer than 30 days without the prescribed approval of a High Court judge.[196] Echoing the Constitution, section 29(2) of the Act requires that a child refugee may only be detained as a measure of last resort and for the shortest appropriate period of time.[197]

A child refugee can quality for return and repatriation in the following circumstances:

° An application for refugee status has been rejected, and all appeal and review procedures have been exhausted;
° The circumstances in his or her country of origin have changed;
° The child voluntarily wishes to return to his or her country of origin. Voluntary repatriation of children is normally facilitated by the UNHCR;
° A child's parents are subject to an order of removal from the country, and the child has been afforded an opportunity to bring an application for refugee status, but has failed to do so.

The involuntary removal of a child may be ordered by the Minister of Home Affairs, provided that due regard has been given to section 33 of the Constitution and international law.[198]

The UNHCR Guidelines states that the best interests of a child must always be the primary

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[194]Regulation 10(4).

[195]Regulations 10(4) and (5).

[196]See also the Aliens Control Act, 1991 (Act 96 of 1991) which provides the legal ground for the arrest and detention of undocumented migrants in South Africa. The Act is mostly concerned with control of immigration and provides controversial selection processes for who is allowed into the country. See also **Dawood v Minister of Home Affairs** 2000 (8) BCLR 837 (CC).

[197]In this regard, the Commission notes with distress that some refugee children are being detained in police cells prior to being admitted to the Lindela Detention Centre.

[198]Section 28(2) of the Refugees Act 130 of 1998.

consideration when a decision for the return and removal of the child is taken. In addition a child may not be returned unless, prior to the return:

° a parent has been located in the country of origin who can take care of the child, and the parents is informed of all the details of the return; or
° a relative, other adult care-taker, government agency, or child-care agency has agreed, and is able, to provide immediate protection and care upon arrival.

22.4.3.4 **The Aliens Control Act 96 of 1991**

Unlike the Refugees Act 130 of 1998, the Aliens Control Act does not recognise undocumented immigrant children as a specific vulnerable group. In terms of this Act, undocumented immigrant children are treated the same as their adult counterparts. The following provisions of the Aliens Control Act specifically affect undocumented immigrant children:

° *Prohibited persons in the Republic of South Africa*

Section 39(2) of the Act lists certain persons as 'prohibited persons'. This list includes persons likely to become a public charge; persons deemed undesirable inhabitants or visitors to South Africa; persons living on the earnings of prostitution, certain convicted persons; mentally ill persons; persons afflicted with any contagious, communicable or other disease; and persons who has been removed from the Republic by warrant issued under any law.[199] If an immigration officer suspects that a person is a prohibited person, he or she may issue to such person a provisional permit subject to certain conditions.[200]

° *Manner in which an alien[201] may apply for an immigration permit*

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[199]See also clause 23(1) of the Immigration Bill 79 of 2001 in terms of which certain foreigners do not qualify for a temporary or a permanent residence permit. The categories of foreigners involved differ markedly from the list of prohibited persons in section 39(2) of the Aliens Control Act 96 of 1991.

[200]Section 10(1)(a) of the Aliens Control Act 96 of 1991.

[201]'Alien' is defined as a person who is not a South African citizen.

Section 25 of the Aliens Control Act 96 of 1991 regulates the manner in which an alien may apply for an immigration permit and the consideration of such applications. Subsection (5) makes specific provision for the authorisation of the issue of an immigration permit to the spouse[202] or dependent child of a person who is permanently and lawfully resident in the Republic. Section 28(2) of the Act empowers the Minister for Home Affairs, if he is satisfied that there are special circumstances justifying it, to 'exempt any person or category of persons from the provisions of section 23'. Section 23 is a provision which prohibits entry into or sojourn in the Republic by an alien who is not in possession of a permit.

In **Dawood and another v Minister of Home Affairs and others**[203] the Constitutional Court had the opportunity to consider the effect of section 25(9)(b) of the Aliens Control Act 96 of 1991. In casu the Court declared section 25(9)(b) read with sections 26(3) and (6) of the Act to be unconstitutional[204] as these provisions have the effect of limiting the right of cohabitation of spouses in certain marriages between a South African citizen and a foreign spouse. In respect of the right to family life or the right of spouses to cohabit together, the Court held:[205]

> The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most people and to prohibit the establishment

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[202]The Constitutional Court held in **National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others** 2000 (1) BCLR 39 (CC) that the provisions of section 25(5) of the Aliens Control Act 96 of 1991 were in conflict with the guarantee against unfair discrimination contained in section 9(3) of the Constitution to the extent that they confer a benefit on spouses of persons permanently and lawfully resident in the Republic while not expressly conferring such benefits on same-sex life partners of such residents. See also **Kohlhaas v Chief Immigration Officer, Zimbabwe and another** 1998 (3) SA 1142 (ZSC).

[203]2000 (8) BCLR 837 (CC). See also **Dawood and another v Minister of Home Affairs and others; Shalabi and another v Minister of Home Affairs and others; Thomas and another v Minister of Home Affairs and others** 2000 (1) SA 997 (C); **Booysen and others v Minister of Home Affairs and others** (CCT 8/2001), judgment delivered on 4 June 2001.

[204]The declaration of invalidity was suspended for two years to enable Parliament to correct the inconsistency that resulted in the declaration of invalidity.

[205]Per O'Regan, J for the unanimous Court, par [37].

> of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. In my view, such legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right.

Given this dicta, and the judgment of Van Heerden J in **Makinana and others v Minister of Home Affairs and another; Keelty and another v Minister of Home Affairs and another**[206] it is hard to imagine that the Constitutional Court will uphold the constitutionality of any law allowing for the separation, on principles similar to that in the Aliens Control Act 96 of 1991, of parents and their children.

° *Prohibition of certain acts in co-operation with, or in respect of, certain aliens*

The Act makes it a criminal offence for anyone to -[207]

(a) employ or continue to employ an illegal alien;
(b) provide instruction or training to such an alien or allow him or her to receive instruction or training;
(c) issue to such an alien a licence or other authorization to conduct any business or to carry on any profession or occupation;
(d) enter into an agreement with such an alien for the conduct of any business or the carrying on of any profession or occupation;
(e) assist, enable or in any manner help such an alien to conduct any business or to carry on any profession or occupation; and
(f) do anything for or on behalf of such an alien in connection with his or her business or profession or occupation.

Thus, the Act makes it illegal for any undocumented immigrant to engage in any form of employment. Undocumented immigrants who have left their countries due to, eg. starvation and

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[206] 2001 (6) BCLR 581 (C).

[207] Section 32 (1) of the Aliens Control Act 96 of 1991.

who are not in possession of sufficient means will not be in a position to support themselves or their dependants once they get to South Africa. The children of such persons are also at risk of destitution or of being exposed to or involved in illegal activities or to being exploited for prostitution or other forms of child labour.

° *Detention*

An illegal immigrant may not be detained for a period longer than 48 hours from the time of his or her arrest and must be informed for the reason of his or her further detention after the first 48 hours in detention, and the detention must be reviewed after a period of 30 days by a judge of the High Court.[208] Despite these statutory requirements, Human Rights Watch found that all of the persons at Lindela Detention Centre in Krugersdorp who had been detained there for more than thirty days were detained without review, in some cases for several months.[209]

° *Removal from the Republic of dependent family members of certain persons*

If a warrant is issued for the removal from the Republic of a person who is the head of the family, any other member of such family who is not a South African citizen may be included in such a warrant for removal from the Republic.[210]

The Aliens Control Act 96 of 1991 is under review and will be repealed if the Immigration Bill 2001 becomes law. This Bill was reintroduced in Parliament in late 2001. The Bill does not have a particular child focus and there is hardly any recognition that the officials involved could be dealing with children or that any special consideration for children might be necessary. Specific issue related to the Bill is discussed below.[211]

22.4.3.5 **The South African Citizenship Act 88 of 1995**

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[208]Section 55 of the Aliens Control Act 96 of 1991.

[209]Human Rights Watch **Prohibited persons: abuse of undocumented migrants, asylum-seekers and refugees in South Africa** 1998 at 98.

[210]Section 48 (1) of the Aliens Control Act 96 of 1991.

[211]See paragraphs 22.4.3.6, 22.4.3.7 and 22.4.3.8 immediately below.

There are three main forms of South African citizenship, namely citizenship by birth, descent or naturalisation. Only citizenship by birth is relevant for purposes of this discussion. In terms of the South African Citizenship Act, the following categories of children are South African citizens by birth:

- a child who is born in the Republic on or after the date of the commencement of the Act[212] provided that at the time of his or her birth, one of his or her parents had been lawfully admitted to the Republic for permanent residence therein and his or her other parent was a South African citizen;[213]
- a child born in South Africa who is not a South African citizen, and who is adopted in terms of the Child Care Act, 1983 by a South Africa citizen;[214]
- a child born in South Africa who is not a South African citizen and who does not have the citizenship or nationality of any other country or who has no right to such citizenship or nationality (a stateless child),[215] and his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act 51 of 1992.[216]

However, the South African Citizenship Act does not make provision for children of undocumented immigrants who have been abandoned and whose citizenship status is unknown to acquire South African citizenship.

22.4.3.6 **The Child Care Act 74 of 1983**

The Child Care Act is a primary source of protection for refugee and unaccompanied children found to be in need of care.[217] The Children's Court, the procedures followed in Court and the orders that

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[212]Section 2(1)(b) of the South African Citizenship Act 88 of 1995.

[213]Section 2(2)(b) of the South African Citizenship Act 88 of 1995.

[214]Section 2(4)(a) of the South African Citizenship Act 88 of 1995.

[215]Section 2(4)(b)(i) of the South African Citizenship Act 88 of 1995. Conclusive proof that the child has no other citizenship or claim to any other citizenship is required.

[216]Section 2(4)(b)(ii) of the South African Citizenship Act 88 of 1995.

[217]NCRA Report (2000) 18.

can be made, play a very important role in the protection and care of unaccompanied children.[218] However, unlike the Refugees Act 130 of 1998, neither the Aliens Control Act 96 of 1991 nor the Immigration Bill 79 of 2001 gives recognition to the fact that undocumented immigrant children may be in need of care and therefore entitled to the protective measures provided by the Child Care Act, 1983.

The Immigration Bill 79 of 2001 makes it a criminal offence for any person to knowingly aid, abet, assist, enable or in any manner help an illegal foreigner or a foreigner inter alia by providing instruction or training to such person or by harbouring him or her, which includes providing overnight accommodation.[219] The question is then who is going to be prepared to risk educating and sheltering a destitute (foreign) child.

22.4.3.7 **The Social Assistance Act 59 of 1992**

Under the Social Assistance Act, the Department of Social Development can pay a foster care grant to a foster parent who is taking care of a child without a parent or guardian, or whose parent or guardian cannot be traced. Any person is entitled to a foster care grant if he or she is the foster parent and the foster parent and the child are resident in the Republic and comply with the prescribed conditions.[220]

Section 39(2)(a) of the Aliens Control Act 96 of 1991 stipulates that any person who is likely to become a public charge by reason of infirmity of mind and body, or because of lack of sufficient means to support himself or herself or his or her dependants brought into the Republic, shall be a prohibited person. This provision is echoed in clause 24(1)(a) of the Immigration Bill, 2001 which states that foreigners 'who is or is likely to be or become a public charge' may be declared 'undesirable', justifying deportation. Undocumented foreign children are very likely to fall in this category should application be made for any form of social assistance.

22.4.3.8 **South African Schools Act 84 of 1996**

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[218]See sections 11, 12, 13 and 14 of the Child Care Act.

[219]Clauses 45(i) and (viii).

[220]Section 4A of the Social Assistance Act.

The South African Schools Act 84 of 1996 makes it compulsory for all learners from the age of seven to the age of 15 years to receive a basic education. Although refugee and undocumented immigrant children have the right to receive basic education, schools tend to be unco-operative as regards allowing entry to child asylum-seekers. Refugee children are being denied access to schools based on the endorsement: 'Not entitled to work or study' on the permits of their parents whilst the application for asylum is pending. After much lobbying, the National Consortium on Refugee Affairs managed to get the Department of Home Affairs to exclude children from this provision. However, it is not certain whether all schools are aware of this. Even if children are admitted, they struggle with language issues[221] and school fees,[222] and often display behavioural problems associated with traumatic experiences.

'Illegal foreigners',[223] including illegal foreign children,[224] will be in an even worse position should the Immigration Bill 79 of 2001 be adopted. In terms of clause 42(1) of this Bill, no person employed by or associated with any type of learning institution shall provide training or instruction to an illegal foreigner, a foreigner whose status does not authorise him or her to receive such training or instruction, or to a foreigner on terms, conditions or in a capacity different to those contemplated in such foreigner's status. Anyone who intentionally facilitates an illegal foreigner to receive public services to which such illegal foreigner is not entitled shall be guilty of an offence punishable by a fine not exceeding R25 000.[225]

22.4.4 Comparative analysis and evaluation

The characteristics of the legal status accorded to asylum seekers vary from country to country. In the Netherlands, for example, there are currently three 'categories' of legal status accorded to

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[221]Especially with children from French and Portuguese speaking backgrounds.

[222]The UNHRC partly contributes to the school fees of refugee children. Discussion with Ms Joyce Tlou of the National Consortium of Refugee Affairs on 19 April 2001.

[223]In terms of the Bill, an 'illegal foreigner' means a foreigner who is in the Republic in contravention of the Immigration Act and includes a prohibited person.

[224]The Immigration Bill, 2001, makes no specific provision for illegal foreign children.

[225]Clause 52(4) of the Immigration Bill, 2001.

asylum seekers.[226] Furthermore, the granting of status varies not only according to situation (e.g. 1951 Convention status versus alternative 'humanitarian-based' status), but also age. In particular, unaccompanied minors who apply for asylum (AMA's)[227] are, on a pre-determined country basis, often granted a special form of status[228] giving them temporary residence in the country while their asylum applications are being considered, a process that can take many years. This temporary status grants AMA's residence, not entitling them to work, for a period until they reach the age of 18 years, whereupon they continue in the procedure as an adult applicant. Their application for political asylum is separately considered on the basis of 1951 Convention status or, alternatively, in terms of non-Convention status (e.g. in terms of Article 3 of the European Convention on Human Rights).[229]

° **Age determination**

In accordance with international guidelines, in the Netherlands, age and capacity issues are very important. From the point of view of eligibility for 'AMA-vtv', it must be established that the applicant

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[226]The first is 'A status', accorded in terms of the 1951 Refugee Convention, which comes with an unlimited residence permit. In the case of 'A status', refugees are immediately granted the same rights as Dutch citizens, and can eventually become citizens themselves. The second, 'C status', relates to Article 3 of the European Convention on Human Rights, granting indefinite residence on 'humanitarian grounds'. This status grants fewer rights, but eventually builds into a permanent status, and can also lead to citizenship. Finally, there is 'F status', a temporary status renewable annually, and leading to 'C status' if the applicant is not able to return to his or her country of origin within three years. This is set to change. In terms of the proposed Immigration Act, currently before the Dutch parliament, all three 'categories' would be merged into a single, temporary status, which is later 'readjusted' according to the grounds on which one is finally determined to reside in the Netherlands. See also Joanne van Selm 'Asylum in the Netherlands: A hazy shade of purple' (2000) 13 **Journal of Refugee Studies** 74 at 77.

[227]In the Netherlands, such persons are referred to as 'Alleenstaande Minderjarige Azielzoekers' or AMA's.

[228]This status is called 'AMA-vtv' - vtv meaning 'vergunning tot verblijf'.

[229]Determination of Article 3 status is roughly equivalent to the grounds on which one is recognised in South Africa as a refugee under the 1969 OAU Refugee Convention.

is younger than 18 years. If the government questions this, then an investigation into their age is conducted, through a simple medical test. This test involves an x-ray of the applicant's shoulder area. If the applicant's collarbone is not yet wholly fused, then it is presumed that the applicant is younger than 18 years of age. The converse also applies.

In the United Kingdom, provided an immigration officer make an initial identification, the unaccompanied refugee child is referred to a children's panel, which acts as a liaison in the early stages of the procedure. In the Netherlands, a child is referred to 'De Opbouw' organisation, which provides a guardian / social worker for the child. This person is specially trained to assist refugee children. The United States, on the other hand, does not statutorily require the appointment of an individual to act as guardian and / or representative, though new guidelines as least provide the possibility for adults other than the legal representative to participate in the adjudicating process.[230]

In the Mayer et al 'Guidelines and recommendations for protecting refugee children' it is recommended that should a formal age determination need to be made, the child should be referred to the District Surgeon for an independent medical examination. This age assessment should encompass both physical appearance and psychological maturity. The use of a medical examination should take place after the informed consent of the child has been obtained. Mayer et al also argue that special care and attention should be given to asylum seekers who are between the ages of 18 and 21 years, as their asylum application may be based on events that took place while they were under the age of 18.

° **Assistance in applying for refugee status**

Unlike other countries, including the USA where it is reported that 'the majority of children receive minimal legal information',[231] in the Netherlands legal advice is provided to all unaccompanied asylum-seeker minors (AMA's) in connection with their application for political asylum. In the event that an applicant receives a negative decision, they are legally entitled to appeal, and are provided

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[230]US Department of Justice, Immigration and Naturalisation Services **Guidelines for Children's Asylum Claims**, 10 December 1998.

[231]Human Rights Watch **Slipping through the cracks: Unaccompanied children detained by the US Immigration and Naturalization Services** New York 1997, p. 27.

with a lawyer free of charge.

While there is a *right* to legal representation for asylum seekers in Britain[232] and in the USA, *access* to competent legal advice tends to be limited. The Netherlands fare better. The Dutch Bar Association has, in association with an independent legal training institute, approved a certified course. This training is complemented by legal help desks operated by NGO's such as the Dutch Refugee Council and Amnesty International, providing expert advice to lawyers.

In South Africa, the children's court making an order related to a separated child is entitled to make an order that the child be assisted in applying for asylum.[233] Although this is a useful provision, Mayer et al[234] suggest that consideration should be given to empowering the children's court to appoint a (temporary) guardian ad litem to an unaccompanied or separated minor asylum seeker or refugee. Such person would be appointed in addition to a care-giver or custodian and would assume full parental responsibility for that child in the absence of the biological parents, and would provide psycho-social support to the child through the status determination process and thereafter. In addition, Mayer et al[235] recommend that an unaccompanied or separated child should obtain free legal assistance for the status determining process. The authors say it should be the responsibility of the Refugee Reception Officer to make sure that the child has obtained legal representation. However, it is crucial that unaccompanied and separated children are assisted with their applications as the reception officer records the evidence given by the child, and also makes an assessment as to credibility.

° **The use of a support person**

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[232]Simon Russell 'Unaccompanied refugee children in the United Kingdom' (1999) 11 **IJRL** 126 at 146.

[233]Section 32 of the Refugees Act 130 of 1998. However, it is not clear from the Refugees Act, 1998, or from the regulations, who should be appointed to provide this assistance.

[234]**"Protecting the most vulnerable" : Guidelines and Recommendations for Protecting Refugee Children**, p. 12.

[235]**"Protecting the most vulnerable" : Guidelines and Recommendations for Protecting Refugee Children**, p. 14.

The asylum determination procedure takes place in a hostile environment in any country, particularly in South Africa where limited resources and an over-stretched staff mean that applicants are usually forced to wait in large rooms with other asylum applicants, waiting for their interview before a (frequently uniformed) immigration officer. In advising child asylum seekers through what is a particularly hostile procedure, legal practitioners in other countries have recognised the importance of both providing an additional 'trusted adult' for unaccompanied child asylum seekers, and ensuring that decisions are made quickly. Mayer et al[236] state that it is not appropriate for a child refugee to be interviewed without the assistance of an adult.[237] Child refugee applications should therefore be prioritised, though not at the expense of making a good decision.[238]

° **Citizenship**

The Fourteenth Amendment of the US Constitution confers citizenship on those born within the United States. The relevant part of the Fourteenth Amendment reads as follows: '[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside'. While adopting the English common law concept of territorial birthright citizenship, the US has never definitely articulated its position of children born to illegal immigrants. Social and political controversy over the influx of illegal immigrants in the US have increased activity aimed at altering the doctrine of territorial birthright citizenship. The US is further faced with the constitutional dilemma of whether children of illegal immigrants fall within the Fourteenth Amendment definition of a citizen. Based on the plain text of the Fourteenth Amendment, the status of children born to illegal immigrants appears settled in favour of conferring citizenship on these children. Case law does not definitely state that children born to illegal immigrants are to be recognised as citizens. Neither, does case law definitely state the converse position - that these children are not US citizens. This ambiguity has led to legislative efforts

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[236]**"Protecting the most vulnerable" : Guidelines and Recommendations for Protecting Refugee Children**, p. 14.

[237]The UNHCR document **Refugee Children - Guidelines on Protection and Care** states that arrangements should be made 'to have a trusted adult accompany the child during the interviewing process, either a family member of the child, a friend or an appointed independent person'.

[238]Mayer et al "Protecting the most vulnerable", p. 24.

seeking to define the scope of the Citizenship Clause by narrowing it to exclude children born in the US to illegal immigrants. It is argued that such an endeavour must fail as Congress has no power to define what a clause in the Constitution means - that power is left to the Supreme Court alone. Thus, Congressional efforts to abandon the Fourteenth Amendment territorial birthright citizenship will be unconstitutional.[239]

22.4.5 Recommendations

From the Mayer et al research it is clear that there is no specific policy for refugee children, especially unaccompanied children.[240] Such a policy is clearly required that should provide for a sharing of responsibilities by the various government departments and that involve civil society organisations.[241] The Mayer et al document **"Protecting the most vulnerable": Guidelines and recommendations for protecting refugee children** is a very useful starting point in this regard. It is also clear from the Mayer et al research that the existing limited service provision is not well co-ordinated.[242] Service organisations, for example, report that there are growing numbers of separated child refugees found on the streets, in shelters and in havens.[243] On the other hand, many unaccompanied or separated children are not being identified by immigration officials, Home Affairs structures or welfare authorities.[244] However, the Mayer et al research[245] also concedes that **'the current legal framework in South Africa provides extensive protection to refugee**

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[239]Houston M R W 'Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to Children Born of Illegal Immigrants' (May 2000) 33(3) **Vanderbilt Journal of Transnational Law** 693 - 738. The United Kingdom has abolished pure territorial birthright citizenship, thus denying citizenship to children of illegal immigrants. A major exception to this is that new born infants found abandoned in the United Kingdom are invested with citizenship.

[240]NCRA Report (2000) 4.

[241]NCRA Report (2000) 4.

[242]NCRA Report (2000) 21.

[243]NCRA Report (2000) 6 -7.

[244]NCRA Report (2000) 6 -7.

[245]"Protecting the most vulnerable", p 15.

children'.

In view of the above, South Africa's international obligations, the impact of the Bill of Rights and legislative framework provided in the Refugees Act, the following conclusions are drawn and recommendations made:

° **The Commission accepts the need for developing a realistic and morally appropriate refugee policy on the basis discussed above**. In this regard we support the Guidelines and Recommendations for Protecting Refugee Children as proposed by Mayer et al.[246]

° **Given the rights and obligations[247] of refugees enumerated in Chapter 5 of the Refugees Act 130 of 1998, and given the fact that these rights and obligations also apply to refugee children, it is not necessary to specifically include similar provisions to this effect in the new children's statute**. In this context it is worth pointing out that refugees enjoy full legal protection, which includes the rights set out in the Bill of Rights and the right to remain in South Africa in accordance with the provisions of the Refugees Act;[248] that public schools and health facilities and the social security system may not discriminate against refugee children on the basis of nationality;[249] that refugee children are entitled to the same basic health services and basic primary education which ordinary South African receive from time to time;[250] that the detention of refugee children must be used only as a

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[246]The Mayer et al proposals are also supported by the National Consortium on Refugee Affairs.

[247]One of the major obligations of refugees is to abide by the laws of South Africa. See section 34 of the Refugees Act 130 of 1998.

[248]Section 27(b) of the Refugees Act 130 of 1998.

[249]Section 27(b) of the Refugees Act 130 of 1998, read with sections 9, 27, 28 and 29 of the Constitution, 1996, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the National Education Policy Act 27 of 1996, the Health Act 63 of 1977, and the Social Assistance Act 59 of 1992.

[250]Section 27(g) of the Refugees Act 130 of 1998.

measure of last resort and for the shortest appropriate period of time;[251] that a refugee must be issued with an identity document;[252] that a refugee may apply for a travel document,[253] etc.

° The way in which applications for asylum should be handled when the subject is a child, the manner in which and the circumstances under which refugees and refugee children in particular are detained, the treatment of refugees at the detention facilities, the grounds for refugee status,[254] etc. are matters that need to be covered in detail in the Refugees Act, the regulations to that Act, and policy instruments related thereto. **We therefore do not regard it necessary to provide for such specifics in the new comprehensive children's code**.

° Any child who appears to qualify for refugee status and who is found under circumstances which clearly indicate that he or she is a child in need of care as contemplated in the Child Care Act, must forthwith be brought before a children's court.[255] This injunctive in the Refugees Act allows the protective measures provided for in the Child Care Act to be activated. The needs of that particular refugee child in need of care will then determine the appropriate welfare response. Provided it is understood that this should also be the case under the new children's statute, **we believe this issue related to unaccompanied refugee children is adequately dealt with in the Refugees Act**.

In order to afford greater protection to refugee and undocumented immigrant children, and to make it very clear that the Commission regards the new children's statute as the ultimate word in areas where there may be uncertainty as to the rights of children, **the Commission would like to propose the inclusion of the following basic protection measures for foreign children into**

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[251]Section 29(2) of the Refugees Act 130 of 1998.

[252]Section 30 of the Refugees Act 130 of 1998.

[253]Section 31 of the Refugees Act 130 of 1998.

[254]The Commission recommends below that section 3 of the Refugees Act 130 of 1998 be amended to include the following as grounds for refugee status: female genital mutilation, forced child marriages, and child slavery.

[255]Section 32 of the Refugees Act 130 of 1998.

the new children's statute:

(a) No public health care facility or school may exclude a child on the basis of nationality, immigration status, or lack of identification documentation;

(b) An order of the children's court is sufficient basis for access to a state grant, rendering ID documents of whatever description unnecessary;[256]

(c) An asylum-seeker may be recognised at least as an interim care-giver for a refugee or undocumented immigrant child, in keeping with the policy that the child should stay within the refugee community as far as possible, and should be entitled to retention order fees on the basis of whatever form of identification he or she possesses;

(d) No child (refugee or undocumented) may be repatriated without proper arrangements for his or her reception and care in the receiving country being in place as per the UNHRC guidelines for refugees;[257]

(e) In tracing family members of refugee children and in taking steps to facilitate contact between refugee children and family members, there must be cooperation in efforts made by the UNHCR and by other competent intergovernmental or non-governmental organizations which work with the UNHCR;

(f) An adult assistant (support person) must be present when an asylum-seeking or refugee child is interviewed by the authorities;

(g) Provision that a child who has appeared before the children's court as a refugee child in need of care must again appear before that court for ratification or rejection

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[256]For refugee and undocumented immigrant children to receive social assistance, a 13-digit identification document or an official document from the country of origin is needed. In the absence of such documentation, refugee and undocumented immigrant children are denied the social assistance most needed for their survival. The Department of Home Affairs has issued since 2 May 2001 13-digit, maroon in colour, refugee identity documents. The Department of Home Affairs should in the absence of any documentation needed for the granting of social assistance to refugee and undocumented immigrant children, issue temporary 13-digit identification documentation to such children.

[257]See paragraph 22.4.3.3 above where this requirement is discussed in the context of the Refugees Act 130 of 1998.

of any decision to move or deport that child;

(h) In instances where the age of an asylum-seeker or undocumented immigrant is in dispute and there are no identification documents to confirm that he or she is indeed under the age of 18 years, the Commission recommends that a commissioner of child welfare should be allowed to estimate the age on the basis of available information. However, should a formal age determination need to be made, the child should be referred to the District Surgeon for an independent medical examination. The age assessment should encompass both physical appearance and psychological maturity. However, the use of medical examination should be avoided in cases where consent from the applicant is lacking, or if it might violate the physical or cultural integrity of the child;

(i) Refugee and undocumented immigrant children should not be detained, except as a measure of last resort and for the shortest possible period. Further, unaccompanied or separated refugee and undocumented immigrant children should not be detained with adults. If a family with children are detained, the Commission recommends that the children should not be separated from their family;

(j) Assistance to and harbouring of illegal foreign or foreign children in need of care shall not constitute a criminal offence.[258]

The Commission also recommends that the following amendments to the Refugees Act 130 of 1998:

(a) The amendment of section 3 to include the following as grounds for refugee status: a well founded fear of being subjected (in the 'home' country) to (a) female genital mutilation; (b) a forced child marriage; (c) forced (military) conscription and armed conflict; (d) child slavery, and (e) child trafficking.[259]

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[258]In other words, assistance will not constitute a breach of section 45(viii) of the Immigration Bill 79 of 2001. To give effect to this recommendation, the provision in the new children's statute can stipulate that assistance to an illegal foreign child or a foreign child in need of care may be given in terms of the new children's statute 'notwithstanding the provisions of any other Act'.

[259]See section 22.5.4 below.

(b) The amendment of section 32 to provide that any child who appears to qualify for refugee status and who is in need of care and who therefore has appeared before a children's court, must again appear before that children's court to confirm any decision to remove, return or deport such a separated or unaccompanied child.

(c) The amendment of section 28(3) to provide that a child, who is a dependant of a refugee who has been ordered to leave the Republic and who may bring an asylum application in his or her own name, shall be regarded as an unaccompanied child. This will entitle such a child to the protection measures embodied in the current section 32 of the Refugees Act 130 of 1998.

Unaccompanied or separated child asylum-seekers are in a more vulnerable position than those accompanied by their parents. **The Commission therefore recommends that the relevant authority or official must as soon as possible refer an *unaccompanied* or separated child asylum-seeker, *as a child in need of care*, to social services who should immediately make arrangements for the child to appear in the children's court**.[260] Further, if an authority or official is of the opinion that an **accompanied** asylum-seeker child is a child in need of care, it must refer the case to social services for further investigation. However, an accompanied child should not be removed from his or her family, unless there are grounds for removal in terms of section 14(4) of the current Child Care Act, 1983. **The Commission further recommends that border authorities, the police, officials at Refugee Reception Offices, etc. should be trained in the proper and appropriate treatment of refugee children, including the referral of such children to the relevant welfare structures**. Such training should include strategies and techniques for the recognition of unaccompanied and separated refugee children. For example, when interviewing an asylum-seeker applicant, the Refugee Status Determination Officer can start by asking whether the applicant is caring for any child other than his or her own, or knows, of any families caring for children other than their own. This information should be shared with the relevant welfare structures who could take steps to assist such children. Referral of unaccompanied and separated children to social services must take place before any application for refugee status is processed as the wellbeing of these children is the primary concern. This will also give the children's court a chance to order that the unaccompanied or separated child be assisted with his or her asylum

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[260]As is provided for by section 32 of the Refugees Act 130 of 1998.

application.

The Commission recommends that the asylum applications brought by unaccompanied or separated children, and families with children should be received and processed as a priority. Proper guidelines on how to interview asylum-seeker children should be established. Guidelines should include the following:[261]

- what the nature of the interview should be (formal/informal);
- how questions should be asked;
- that the child should be allowed to express his or her views freely and that due weight should be given to such views;
- where a child asylum-seeker can not express him/herself in English, a competent interpreter must be made available to the child;
- that interviewers must be sensitive to cultural and gender factors;
- that allowance must be made for the fact the children are not able to present evidence with the same degree of precision as adults and do manifest their fears differently from adults;
- that children seeking asylum usually suffer from post traumatic stress disorder which can have an effect on their testimony.

Sadly, the Aliens Control Act 96 of 1991 and the Immigration Bill 79 of 2001 lacks a child focus and compare poorly to the Refugees Act 130 of 1998. The Immigration Bill 79 of 2001 gives no recognition that the officials involved could be dealing with children or that any special consideration for them might be necessary. Particularly worrisome are provisions such as clause 47 in the Immigration Bill. Clause 47 provides that when possible, any organ of state in any sphere of government, except health care facilities, must endeavour to ascertain the status or citizenship of the persons receiving its services and must report to the Department of Home Affairs any illegal foreigner, or any person whose status or citizenship could not be ascertained. The organ of state must inform the illegal foreigner or the person with the uncertain status or citizenship through public notices or directly of this reporting obligation. Given the existing difficulties inter alia with 13-digit identification numbers and the accessing of foster care grants, the exclusion of children from

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[261]See **"Protecting the most vulnerable" : Guidelines and Recommendations for Protecting Refugee Children**, p. 15 -17.

schools on the basis of nationality, etc., the Commission warns that illegal foreign children or children of uncertain citizenship will face massive risks of being detained and of being deported should the Immigration Bill 2001 become law in its present form.

The Commission urges Parliament to at least consider excluding schools, social welfare facilities, and the children's courts, as is the case with health care facilities, from the obligation to ascertain the status or citizenship of their clients and to report illegal foreign children and children of uncertain status to the Department of Home Affairs as is required by clause 47 of the Immigration Bill. These children are already extremely vulnerable and the possibility of being convicted and fined up to R75 000 will deter even the most courageous welfare organisation or school from accepting such children, if only for a night.

The Commission further urges Parliament to provide in the new Immigration Bill that any *accompanied* illegal foreign child found under circumstances which clearly indicates that such a child is a child in need of care as contemplated in the Child Care Act, 1983, must immediately be brought before the children's court for the district in which he or she was found.[262] However, an accompanied undocumented immigrant child should not be removed from his or her family, unless there are grounds for removal in terms of section 14(4) of the Child Care Act, 1983. **Where the child is *unaccompanied*, we recommend that such child automatically qualify as a child in need of care.** Such child must be referred to the Department of Social Development or an agency who should immediately make arrangements to bring the child before the children's court. The obligation to refer an accompanied or unaccompanied / separated undocumented immigrant should also be placed on schools and health services who have first contact with the child. Also, border officials should be trained on the treatment of and how to detect whether an undocumented immigrant child is a child in need of care, including the referral of such children to the relevant welfare structures.

Neither the South African Constitution nor the South African Schools Act limits the right to basic education to citizens. South Africa is also a party to various international instruments that guarantee basic education to 'every' child. However, parents of undocumented immigrant children may not admit their children to schools due to fear of arrest and / or deportation. In order to ensure

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[262]See section 32(1) of the Refugees Act 130 of 1998.

that non-South African children regardless of their status enjoy the right to basic education, **the Commission recommends that, similarly to the federal position in the United States, schools should not deny admission to learners on the basis of their undocumented status. Neither should schools report the undocumented status of children and that of their parents to the authorities. The Commission further recommends that service providers that provide services to which undocumented immigrant children have a right may not report the undocumented status of the children and that of their parents to the authorities**. This will ensure that undocumented children will not be hesitant to access services such as health care due to fear of arrest.

With regard to citizenship, the Commission is of the view that no refugee or undocumented immigrant child should be vested with South African citizenship, unless it is proved that the child has no right to acquire the citizenship of his or her parents' country of origin or any other citizenship,[263] or that acquiring South African citizenship would be in the best interests of the child concerned. This recommendation should prevent statelessness and is based on the fact that a child in terms of South African law has the right to acquire a national identity.[264]

Research conducted by Human Rights Watch and the South African Human Rights Commission[265] indicates that detention conditions at the Lindela Detention Centre do not meet minimum requirements in a number of important areas. **The Commission therefore recommends that the Department of Home Affairs, as the government agency under whose authority undocumented immigrants are detained, should take primary responsibility to ensure compliance with minimum standards at this Centre.** This will ensure that children who are detained with their parents at Lindela and other detention facilities that may be established in future,

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[263]See also Raylene Keightley 'The child's right to a nationality and the acquisition of citizenship in South African law' (1998) 14 **SAJHR** 411.

[264]Article 7 of the CRC; section 28(1)(a) of the Constitution, 1996.

[265]**Lindela : At the crossroads for detention and repatriation**, Johannesburg December 2000; 'Access to Justice - Focus on refugee and asylum seekers' March 2001 **HRC Quarterly Review**; Jonathan Klaaren 'South African Human Rights Commission Report on Treatment of Persons Arrested and Detained under the Aliens Control Act' (1999) 15 **SAJHR** 131.

live in conditions that will not hamper their development or impair their health.

22.5 Trafficking of children across borders[266]

22.5.1 Introduction

The Commission deals with the issue of trafficking in children (for purposes of sexual exploitation) under the umbrella term 'Commercial sexual exploitation of children' in its Discussion Paper on **Sexual Offences: The Substantive Law**.[267] The Discussion Paper has a particular focus on sexual abuse. It is pointed out that the trafficking in persons is an ill-defined concept[268] at best but may be considered the brokered movement of persons across state lines or borders. The Commission further points out that the tendency to define trafficking as broadly as possible often leads to the obfuscation of different legal concerns with regard to the sexual exploitation of children.

For present purposes, however, the definition used in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organised Crime, 2000, will suffice. It defines "trafficking in persons" as follows:[269]

> (a) "Trafficking in persons" means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

With regard to the trafficking of children, the article further states that:

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[266]On the issue of commercial sexual exploitation, see also 6.4.8 and 13.9 above.

[267]Project 107: Sexual Offences, August 1999, par. 3.7.11.1.

[268]A fundamental problem in responding to the issue of trafficking is the lack of a precise and coherent definition. See also Marjan Wijers and Lin Lap-Chew "Trafficking in Women, Forced Labour and Slavery-Like Practices in Marriage, Domestic Labour and Prostitution", report submitted to the UN Special Rapporteur on Violence against Women, April 1997.

[269]Article 3(a).

(b) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this Article.

'Trafficking in persons' must be distinguished from the exploitation[270] and smuggling of persons. Smuggling is the procurement of illegal entry of a person into a state of which that person is not a national.[271]

22.5.2 The trafficking of children in South Africa

Little is know as to the true extent of trafficking of children in South Africa. However, recent research by Molo Songololo, a child rights based organisation in Cape Town, indicates that the trafficking of South African children is predominantly an in-country phenomenon.[272] According to the study, most of these children are trafficked within the vicinity of the place of origin. Girl children are the primary targets, although boy children have also been identified as victims. Girl children range in age from four to seventeen years. The study finds that parents and local (criminal) gangs are the primary traffickers of children, sometimes in collusion with each other: Traffickers in South Africa are thus predominantly locals. The Molo Songololo report states that:[273]

> The in-country trafficking of children takes place between provinces from city to city and rural areas to cities. It can also take place within provinces from rural to urban areas. Several sources identified the traffic of children from KwaZulu Natal to Gauteng and the Western Cape and from the Eastern Cape to Gauteng and the Western Cape. If this is a fair reflection of the inter-provincial traffic in children then it would be reasonable to assume that Gauteng and the Western Cape are provinces of destination and the Eastern Cape and KwaZulu Natal are provinces of origin.
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> The most commonly reported trafficking routes however are those that do not need long

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[270]For the importance of maintaining this distinction, see 22.5.4 below.

[271]See the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention against Transnational Organised Crime, 2000 (not yet in force) for a definition.

[272]Molo Songololo **The Trafficking of Children for Purposes of Sexual Exploitation - South Africa**, Cape Town, 2000, p. 2, chapter 5.

[273]**The Trafficking of Children for Purposes of Sexual Exploitation - South Africa**, Cape Town, 2000, p. 38.

> distances to travel. These are indicated by the trafficking of children from informal settlements in the north of Johannesburg to the northern suburbs of Johannesburg. In areas where gangs operate children can be abducted and held captive in their own community as in the case of informal settlements in Johannesburg and several unconfirmed reports of a similar situation in Mitchell's Plain, in Cape Town.

According to the Molo Songololo report, with regard to the cross-border trafficking of children, traffickers have been identified as foreign. Those involved in the trafficking operations from Eastern Europe have been identified as the Russian Mafia, Bulgarian syndicates and individual South African and Bulgarian agents. Besides the traffic from Eastern Europe reports also indicate the traffic of children from Southeast Asia, especially from Thailand and Taiwan. Children from Thailand are typically girls between the ages of 15 and 17 and are trafficked primarily to escort agencies in Gauteng and Cape Town. With regard to children from the rest of Africa being trafficked to South Africa, the report states that indications are that children as young as seven are being trafficked from Zambia, Senegal, Kenya, Tanzania, Uganda, Ethiopia, Angola and Mozambique.

The Molo Songololo report states that the causal factors that give rise to the increase in the phenomenon lie primarily in the economic situation in South Africa. This together with related phenomena such as the breakdown in extended and nuclear families, which is often accompanied by changes in cultural attitudes and practices, places children at risk. The report also identifies the demand for sex with children as another primary cause.

The Molo Songololo report also provides a sketch of the nature of the trafficking of children for the purpose of sexual exploitation and states that trafficking typically assumes the following six forms:

- Strangers, individuals and others who are linked to (criminal) gangs or syndicates forcibly recruit children to work in the sex industry.
- Parents or relatives coerce children to engage in sex work from their homes or the homes of sex exploiters.
- A child is forced to submit to sexual exploitation by a family acquaintance or a person in authority or through a person in authority.
- The trafficking of children into the sex industry by children already in the industry.
- Through the advertisement in the media for teenage girls of working age for work in the hospitality or film industry.

° The cross-border trafficking of children by organised crime syndicates and individuals.

In conclusion, the Molo Songololo report recommends inter alia that legislation be developed to prohibit the trafficking of persons for any exploitative purpose.[274] We will return to this issue after an analysis of the existing measures available to combat the trafficking of children.

22.5.3 Trafficking in persons and the South African legal system

International instruments to combat trafficking in children and women date back to 1904 with the League of Nations' International Agreement for the Suppression of the White Slave Traffic[275] and its subsequent 1910 International Convention for the Suppression of the White Slave Traffic.[276] During the course of the twentieth century the League of Nations and its successor the United Nations adopted a number of international instruments related to trafficking.

South Africa has signed and or ratified a number of these international instruments to combat trafficking in persons. Amongst these are the UN Slavery Convention (1926), the Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications (1923 - amended by Protocol of 12 November 1947), the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949), the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the African Charter on Human and People's Rights (1981), the CRC (1989), the African Charter on the Rights and Welfare of the Child (1990), the Optional Protocol to the Convention on the Rights of the Child (not yet in force), the UN Convention against Transnational Organized Crime (2000 - not yet in force), the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime (2000, not yet in force), the UN Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention against Transnational Organised Crime (2000, not yet in force). All these instruments

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[274]Molo Songololo **The Trafficking of Children for Purposes of Sexual Exploitation - South Africa**, Cape Town, 2000, p. 99, Chapter 8.

[275]Amended by Protocol of 3 December 1948.

[276]Amended by Protocol of 3 December 1948.

prohibit explicitly or implicitly trafficking in persons and oblige member states to take legislative or other measures in this regard.

Although South Africa has no specific anti-trafficking legislation, the following statutory legal measures (in addition to certain common law offences)[277] can be used by law enforcement authorities (or the child itself in the case of domestic violence) to prosecute offences relating to the trafficking of persons, to provide relief, or to protect the victims of trafficking.[278]

22.5.3.1 Child Care Act, 1983

Section 50A(1) of the Child Care Act, 1983 prohibits the 'commercial sexual exploitation' of children. It reads as follows:[279]

> Any person who participates or is involved in the commercial sexual exploitation of a child shall be guilty of an offence.

'Commercial sexual exploitation' is defined in the Act as the 'procurement of a child to perform a sexual act for a financial or other reward payable to the child, the parents or guardian of the child, the procurer or any other person'.[280] Procurement of a child for purposes other than to perform a sexual act with that child for reward is not covered by this provision.

22.5.3.2 The Basic Conditions of Employment Act, 1997

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[277]Such as abduction and kidnapping.

[278]For a discussion of the relevant provisions of the Aliens Control Act, 1991 and the Refugees Act, 1998, see 22.3 and 22.4 above.

[279]The provisions on the commercial sexual exploitation of children in the Child Care Act, 1983, as set out in the Child Care Act Amendment Bill, 1999, are critically analysed by the Commission in the Discussion Paper on **Sexual Offences: The Substantive Law**. The existing provisions in the Child Care Act, 1983 dealing with commercial sexual exploitation are dealt with in 6.4.8 above.

[280]Section 1.

The Basic Conditions of Employment Act, 1997 makes it an offence for any person to employ a child under the age of 15 or who is under the minimum school-leaving age.[281] The Act also prohibits the employment of a child in any kind of work that is inappropriate for the age of that person and that places at risk the child's well-being, education, physical or mental health, or spiritual, moral and social development.[282] It can certainly be argued that children forced by traffickers or any other person to work in the sex industry or other forms of hazardous employment are in situations that endanger their well-being, physical or mental health, or spiritual, moral or social development.[283] Molo Songololo therefore argues that any form or method of trafficking for the purpose of children's sexual exploitation should automatically be regarded as forced labour and therefore be prosecutable under section 48 of this Act.[284]

22.5.3.3 **Domestic Violence Act, 1998**

The Domestic Violence Act, 1998 (Act 116 of 1998) recognises a broad range of "domestic relationships"[285] in which violence can occur, including the parent of a child or persons who have or had parental responsibility for that child as well as persons who share or recently shared the same residence with the child. In addition, the definition of "domestic violence" allows for the inclusion of a variety of forms of abuse, intimidation, harassment, as well as "any other controlling or abusive behaviour". By applying for a protection order, the provisions of the Act can be used to protect the child from further abuse and violence in situations where the child is forced to submit to sexual exploitation by a family acquaintance or where parents or relatives coerce children to engage in sex work from their homes or the homes of sex exploiters.[286]

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[281]Section 14(1) of the Act.

[282]Section 14(2) of the Act.

[283]Molo Songololo report **The Trafficking of Children for Purposes of Sexual Exploitation - South Africa**, p. 86.

[284]**The Trafficking of Children for Purposes of Sexual Exploitation - South Africa**, p. 86.

[285]A domestic relationship is not only formed between married couples, but also between people who are dating or family members related by consanguinity, affinity or adoption.

[286]See 22.5.2 above.

22.5.3.4 The Prevention of Organised Crime Act, 1998

The Prevention of Organised Crime Act, 1998 (Act 121 of 1998) introduces measures to combat organised crime, money laundering and criminal gang activities. As we have seen, cross-border trafficking of children by criminal gangs is one of the forms trafficking of children typically assumes.[287] The Act makes it an offence for any person to actively participate in or be a member of a criminal gang or to wilfully aid and abet any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang, or to threaten to commit, bring about or perform any act of violence; or to participate in any criminal activity by a criminal gang or with the assistance of a criminal gang; or to threaten any person with retaliation in any manner or by any means whatsoever, in response to any act or alleged act of violence.[288]

This section would therefore allow for the prosecution of gangs and individual gang members in communities who traffic children for purposes of sexual exploitation in exchange for 'protection' and survival. This, it will be recalled, is one of the forms which trafficking of children in South Africa typically assumes.[289]

22.5.3.5 The Sexual Offences Act, 1957

Section 9(1) of the Sexual Offences Act, 1957 (Act 23 of 1957) provides for prosecution of a parent or guardian of any child under the age of 18 years who permits, procures or attempts to procure such child to have 'unlawful sexual intercourse', or to commit any immoral or indecent act, with any person other than the procurer, or to reside in or to frequent a brothel; or orders, permits, or in any way assists in bringing about, or receives any consideration for, the defilement, seduction, or prostitution of such child. This provision covers the form of trafficking described in the Molo Songololo report where parents or caregivers coerce and force their children to engage in sex work.

Section 10 of the Act covers the situation where persons forcibly recruit children to work in the sex

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[287]See 22.5.2 above.

[288]Section 9(1) (a), (b) and (c).

[289]Molo Songololo **The Trafficking of Children for Purposes of Sexual Exploitation - South Africa**, Cape Town, 2000, p. 94; see 22.5.2 above.

industry. It reads as follows:

> Any person who-
>
> (a) procures or attempts to procure any female to have unlawful carnal intercourse with any person other than the procurer or in any way assists in bringing about such intercourse; or
>
> (b) inveigles or entices any female to a brothel for the purpose of unlawful carnal intercourse or prostitution or conceals in any such house or place any female so inveigled or enticed; or
>
> (c) procures or attempts to procure any female to become a common prostitute; or
>
> (d) procures or attempts to procure any female to become an inmate of a brothel; or
>
> (e) applies, administers to or causes to be taken by any female any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower her so as thereby to enable any person other than the procurer to have unlawful carnal intercourse with such female,
>
> shall be guilty of an offence.

Section 12 of the Sexual Offences Act, 1957 creates an offence which is aimed at persons taking or detaining any female against her will to or in or upon any house or place or brothel with the intent that any male have unlawful sexual intercourse with that female. Where the female is under the age of sixteen years it is deemed in terms of this section that she has been taken thereto or detained therein or thereon against her will.[290] There is a further provision that says that a person shall be deemed to detain a female in or upon a house or place or in a brothel in terms of this section if such person withholds from the woman any clothes or other property such as her passport or travelling documents.[291]

Section 12A of the Sexual Offences Act, 1957 provides that any person who, with intent or while he or she reasonably ought to have foreseen the possibility that any person may have unlawful

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[290]Section 11(2)(a) of the Sexual Offences Act, 1957.

[291]Section 11(3) of the Sexual Offences Act, 1957.

sexual intercourse, or commit an act of indecency, with any other person for reward, or performs for reward any act which is calculated to enable such other person to communicate with such other person, shall be guilty of an offence. This rather broad provision can be used against brokers who place clients in contact with persons trafficked into the sex industry.[292]

Section 13 of the Sexual Offences Act, 1957 is aimed at the prohibition of activities related to abduction. It allows for the prosecution of any person who takes or detains or causes to be taken or detained any unmarried person under the age of 21 years out of the custody and against the will of the parent or guardian with the intent to have or allow unlawful sexual intercourse with such abducted person.

As pointed out earlier,[293] the Commission also addresses the issue of commercial sexual exploitation of children in its Discussion Paper on **Sexual Offences: The Substantive Law**.[294] Clause 12 of the draft bill accompanying the Discussion Paper makes it an offence for any person to intentionally offer or engage a child for purposes of the commercial sexual exploitation of that child, while clause 13 makes it an offence for any person to intentionally **facilitate**, in any way, the commercial sexual exploitation of a child. In addition, clause 13(2) makes it an offence for any parent, guardian or caregiver to intentionally **allow** the commercial sexual exploitation of a child. The terms 'facilitate' and 'allow' are not defined in the draft bill.

In order to deal with trafficking as an offence that is linked to another offence (i.e. the commercial sexual exploitation of children), the Commission recommended in the Discussion Paper on **Sexual Offences: The Substantive Law** that the trafficking or transporting of a child, for the purposes of commercial sexual exploitation, from the place where the child usually is resident to another destination, whether within the country or abroad, be included in the definition of commercial sexual

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[292]See also the presumption created by section 21(4) of the Sexual Offences Act, 1957.

[293]See 22.5.1 above.

[294]Discussion Paper 85, August 1999. The issue of commercial sexual exploitation of children is one area of overlap between the two investigations where no convenient dividing principle could be devised. See the minutes of the joint meeting of the Project Committees on Sexual Offences and the Review of the Child Care Act held in Durban on 22 October 1999.

exploitation.[295] The Commission also recommended in that Discussion Paper that the phenomenon of commercial sexual exploitation of children be regulated in terms of the new sexual offences legislation and not the Child Care Act, 1983.[296]

This recommendation of the Commission has been criticised by Molo Songololo.[297] It says:

> [T]he inclusion of trafficking as part of the definition of commercial sexual exploitation would not allow the South African legal and justice systems to deal with trafficking as an offence. Section 13(1) of the proposed Draft Bill provides for the prosecution of anyone who directly or indirectly facilitates the commercial sexual exploitation of a child and it can be argued that trafficking directly and indirectly facilitates the commercial sexual exploitation of children. To view traffickers as mere facilitators of the commercial sexual exploitation of children places them in the same category as taxi drivers who transport children from a brothel to a sex exploiter's house. The difference in the two types of transportation is that traffickers create the supply for the industry in the prostitution of children as well as the use of children in pornography whereas taxi drivers would transport children to the place where the sexual exploitation will occur.

Citing Trijntje Koonstra[298] and the definition of 'trafficking in persons' in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organised Crime, 2000, Molo Songololo argues that it is important to distinguish between trafficking and sexual exploitation. With regard to the latter, it is pointed out that the definition in the UN Protocol restricts trafficking to the illicit transportation or transfer of persons through coercive measures that has as its primary objective to deliver such persons into situations that will exploit their labour or services.

Molo Songololo concludes by saying that the Sexual Offences Act should make the trafficking of children for sexual purposes a specific and separate offence, in keeping with the definition of

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[295]Discussion Paper 85, par 3.7.11.6. This recommendation is not embodied in the definition of 'commercial sexual exploitation' as contained in the draft Bill to the Discussion Paper.

[296]Discussion Paper 85, par 3.7.10.2.

[297]Submission dated 29 March 2001.

[298]**Background study on Basic Principles for a Code of Conduct within the Member States of the European Union to Prevent and Combat Traffic in Women** (Dutch Foundation Against Trafficking in Women, 1996), p. 15.

'trafficking in persons' of the UN Protocol to Prevent, Suppress and Prevent Trafficking in Persons, Especially Women and Children. Further, it is argued that the inclusion of trafficking, as part of the definition of commercial sexual exploitation of children, would exclude the possibility of prosecutions for trafficking for sexual exploitation.[299]

There is considerable merit in the submission made by Molo Songololo and **we are persuaded that there is a need to include a general provision on the trafficking of children in the new children's statute**.[300] We therefore abandon the idea of including trafficking in children under the definition of commercial sexual exploitation as originally suggested in the Discussion Paper on **Sexual Offences: The Substantive Law**. However, we still hold that the provisions on criminalising the commercial sexual exploitation of children belong in the new sexual offences act and not the new children's statute.[301] This does not, however, preclude a cross-reference to the commercial sexual exploitation of children in the new children's statute. Children who have been subjected to commercial sexual exploitation are also entitled to special protection measures in the new children's statute as a subcategory of children in need of special protection.[302]

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[299]In a separate submission, prepared by Natasha Distiller for SWEAT, an NGO focussing on sex workers, it is pointed out that legislation that criminalises sex work in an attempt to deal with the trafficking in women facilitates the continued abuse of sex workers, trafficked or otherwise: "We [SWEAT] are not arguing that women, men or children who suffer extreme labour exploitation or slavery-like conditions do not deserve immediate and extensive legal aid, nor that criminals who facilitate such abuse should not be most severely punished. However, inaccuracies about the trafficking in women result in further harm to sex workers, especially if they result in more stringent legislation against sex work, which runs the risk of happening when trafficking is sensationalised in the sex industry and not addressed in its broader labour context."

[300]See also our recommendations on the new offences related to the taking or detaining and taking and sending of a child out of the Republic in 22.3 above.

[301]At its meeting held in Pretoria on 19 and 20 January 2001, the Project Committee on the Review of the Child Care Act decided to concentrate on providing protective and preventative measures for children subjected to commercial sexual exploitation as a special subset of children in especially difficult circumstances. The Project Committee on Sexual Offences agreed to focus on the criminal law aspects of commercial sexual exploitation.

[302]See Chapter 13 above.

22.5.4 **Evaluation and recommendation**

South Africa is regarded as a country of destination rather than a country of origin for trafficked children. South Africa is a signatory to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organised Crime and has assumed the obligation to facilitate the safe return of a victim of trafficking to his or her country of origin. All State Parties to the Protocol must ensure the safe return of their nationals and must render further assistance, such as medical and psychological assistance, to victims of trafficking. South Africa thus needs to build the requirements of the Protocol into domestic legislation.

In cases where South Africa is the country of origin and in order to comply with the Protocol, it is recommended the new children's statute should stipulate that -

° **South Africa should facilitate and accept, without undue or unreasonable delay and with due regard for the safety of that person, the return of a South African child or a child who at the time of entry into the territory of the receiving State (country of destination) had permanent residence in South Africa, and who has been the victim of trafficking;**

° **South Africa should at the request of another State Party to the Protocol, without undue or unreasonable delay, verify whether a child who is a victim of trafficking is its national or had the right of permanent residence in its territory at the time of entry into the territory of that other State Party;**

° **In order to facilitate the return of a South African child or a child who at the time of entry into the territory of the receiving State had permanent residence in South Africa who is without proper documentation and who is a victim of trafficking, South Africa must issue, at the request of the receiving State, such travel documents or other authorisation as may be needed to enable the child to travel to and to re-enter South Africa**.

In order to ensure the safe repatriation of victims of trafficking to their countries of origin and their reintegration into the community, it is recommended that South Africa should conclude bilateral or multilateral agreements with the major countries that are not Parties to the Protocol and whose children are trafficked to South Africa or to which South African children are being trafficked. Further, the appropriate authorities of the country of origin should be notified whenever a victim of trafficking, who is a national of that country, is in the territory of South Africa. This can be done through the embassy of such country. It is recommended that the Department of Social Development should serve as the appropriate authority in South Africa.

The Commission recommends that section 3 of the Refugees Act 130 of 1998 be amended to provide that children who have been trafficked to South Africa and who are afraid to return to their country of origin due to a well-founded fear that they may be trafficked again or that their lives may be in danger should qualify for refugee status.[303]

From the above it is clear that various forms of trafficking for purposes of commercial sexual exploitation can be prosecuted in terms of the Child Care Act, 1983 and the Sexual Offences Act, 1957. However, it must be realised that not all forms of trafficking happen for purposes of commercial sexual exploitation and for this reason the call[304] for the introduction of legislation that will prohibit the trafficking of persons for any exploitative purpose is supported. **However, the Commission is of the opinion that a general provision on trafficking in children should clearly distinguish between trafficking in children and the commercial sexual exploitation of children**.

Because our mandate is related to children and their protection, we limit ourselves to trafficking in children, as opposed to trafficking in persons in general. However, the Commission wishes to make it plain that the prohibition on trafficking in children it is about to propose is not limited to trafficking for purposes of sexual exploitation only, but extends to the protection of children trafficked for **any** purpose. We also wish to make it clear that the envisaged new prohibition on the trafficking of

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[303]See also 22.4.5 above.

[304]Molo Songololo **The Trafficking of Children for Purposes of Sexual Exploitation - South Africa**, Cape Town, 2000, p. 99, recommendation 2.1.

children should not be seen to abolish or modify any of the common law offences relating to the abduction or kidnapping of children.

The Commission accordingly recommends the inclusion of the following provisions in the new children's statute:

Trafficking in children

Any person who trafficks in children shall be guilty of an offence.

(a) '**Trafficking in children**' means the recruitment, transportation, transfer, harbouring or receipt of a child by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over a child, for the purpose of exploitation.

(b) Exploitation shall include the commercial sexual exploitation of children (as defined in the new sexual offences act), forced labour or services, any form of illegal (child) labour, slavery or practices similar to slavery, servitude or the removal of organs.

CHAPTER 23

A NEW COURT STRUCTURE FOR SERVING THE NEEDS OF CHILDREN

23.1 Introduction

An effective decision-making forum for children in need of alternative care, protection and parental responsibilities dispositions is a key component that will be crucial for the proper implementation of the proposed new children's legislation in South Africa. The question of an appropriate forum for the handing down of legally-binding decisions affecting children has therefore been regarded as a significant one in the earlier phases of the work of the Child Care Project Committee. Key questions, such as the continued role of the High Court as the 'upper guardian of all minors,' and when children should have a right to legal representation in court, were debated both at the regional workshops held by the Project Committee in 1998, and at a focused workshop specifically on Forums and Forum Orders that was held in Pretoria on 15 April, 1999.

A Law Commission Research Paper entitled: 'Children and the Courts: How Can We Improve the Availability and Dispositions of Legal Forums?' (hereafter cited as 'The 1999 Forum Paper') has been circulated by the Commission.[1] Whilst the 1999 Forum Paper discussed possible models for reform of South African Law and provided foreign comparative material, the purpose of this Chapter is to provide specific recommendations for a new court structure designed for producing certain legally-binding decisions for children. The specific focus of this Chapter is on an improved court structure for children in need of alternative care arrangements, whether this is to be provided by the State or by a reallocation of parental responsibilities between caregivers acting in a private capacity.

It should be noted that the situation of children who are charged or appear as witnesses in criminal trials is not covered in this Chapter. This is in line with government policy decisions to the effect that these aspects need to be dealt with in other legislation.

Many of the recommendations in this Chapter are based upon responses to our Issue Paper. We have also been influenced by the outcomes of debates and views presented at our Workshops.

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1 Written in January 1999 by Professor FN Zaal and available from the Law Commission.

Aside from group responses at Workshops, the Commission has also received individual responses to its courts worksheet which took the form of a questionnaire on courts. In addition, the Commission has collected responses from children who took part in a child participation process. An overview of opinions contained in these different categories of responses is provided in 23.2 of this Chapter, below.

23.1.1 **The Family Court Pilot Project**

It needs to be borne in mind that a Family Court Pilot Project has been established in South Africa and that legislation establishing a network of Family Courts may be promulgated. This initiative follows on from important work done earlier by the Hoexter *Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court*.[2] This Commission recognised that there was a need for the establishment in South Africa of a specialist Family Court of comprehensive jurisdiction.[3] In a submission to the Hoexter Commission, the Association of Law Societies of South Africa recommended that the proposed Family Courts should, inter-alia, take over the work of Children's Courts.[4] The Child Care Project Committee supports this submission and considers that the work currently carried out by Children's Courts should in future become part of the work carried out by Family Courts.

Aspects of proposed new Children's legislation which relate to court services will obviously need to be in line with any future legislation covering the work of Family Courts. The data collected by the Child Care Project Committee and discussed in this Chapter may, to some extent, be of assistance to future drafters of Family Court legislation. The proposals with regard to courts in this Chapter are designed to be congruent with a possible future Family Court system. It should particularly be noted that a complete design covering all details needed for a new court system has not been offered in this Chapter. Such a design will more appropriately be provided in future

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2 *Commission of Inquiry into the Rationalisation* of *the Provincial and Local Divisions of the Supreme Court*: *Third and Final Report* (17 Dec. 1997, Government Printer RP 203/1997). Note that this Report is hereafter referred to as the '*1997 Hoexter Commission Report*'.

3 See generally, *1997 Hoexter Commission Report* at Vol. 1 Book 1 Part 2. The latter Part is entitled 'The Need for the Establishment in South Africa of a Specialist Family Court of Comprehensive Jurisdiction'. See also Debbie Dudlender **Doing something for nothing: The Family Centre Pilots** Law, Race and Gender Research Unit, UCT, 2000 ; Rashida Manjoo (ed) **Family Courts In South Africa (Proceedings of a workshop held in Cape Town in November 2000)** Workshop Report, Law, Race and Gender Research Unit, UCT, 2001.

4 *1997 Hoexter Commission Report* Appendix A, at p15 item(e).

specialised Family Court legislation. However, appropriate court services are essential for children and a fundamental reform of the current Children's Court system as provided for in the Child Care Act 74 of 1983 is urgently needed. Therefore, some important reforms are proposed in this Chapter and in the draft Bill. The idea has been to provide for an improved Court system for children in need of care or placement decisions which can be initiated either before or together with specialised Family Court legislation that will be promulgated in the future.

23.2 **Responses received by the Law Commission**

23.2.1 **Responses to the Issue Paper**

Responses to the Issue Paper are contained in a document entitled *Collation of Comments on Issue Paper 13 - Review of the Child Care Act* (SA Law Commission 1999). For convenience, this document will hereafter be referred to as '*Collation*'. Responses to the Issue Paper stressed the importance of the child's right to be present and to participate in decision-making processes.[5] With regard to whether courts dealing with different aspects of child and family matters should continue to operate as separate kinds of courts (the present approach) the majority of responses to the Issue Paper favoured an integrated court which could deal with the whole range of domestic matters.[6]

With regard to the role of the High Court in the future, the majority of Issue Paper responses favoured a transferral of the functions of the High Court as a court *a quo* to a lower court that would be less expensive, more specialised and geographically more accessible than the High Court.[7] For convenience, such a specialised lower court has been referred to in this Chapter by the suggested title of the 'Child and Family Court'.[8] There was, however, strong support for the High Court continuing to serve as a Higher Court of Appeal or Review. With respect to the High Court serving as the 'upper guardian of all minors,' this was supported only insofar as commensurate with transferring a much greater role down to the Child and Family Court. The idea of a three-tier system with District and Regional Child and Family Courts and then High Courts was supported in some

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5 *1997 Hoexter Commission Report* Appendix A, at p15 item(e).

6 *Collation* pp. 45-47 & pp. 74-75

7 *Collation* pp.52-53.

8 This title is recommended because it indicates that children would be a priority concern.

of the responses to the Issue Paper.[9]

In responses to the Issue Paper, there was considerable support for the Child and Family Court being a specialised forum in the sense that its adjudicating officers would be specialists both as regards their training and their concentration on child and family work. It was considered acceptable, if resources were limited, that one such court might serve several magisterial districts in areas where the case load might be low (*Collation* p.74-76).

On the question of whether all magistrates should continue to be eligible to do Child Care work, there was a division in responses to the Issue Paper. Respondents who stressed the need for specialisation and appropriate interpersonal skills felt that not all magistrates should continue to be eligible. Respondents who gave priority to the need for a sufficient number of adjudicators to be accessible to children throughout the country considered that all magistrates should continue to be eligible, but argued in favour of the need for special training.[10] With regard to the training of adjudicators, there was support for a concept of apprenticeship and training through actual experience. There was also considerable support for qualifications involving exposure to disciplines such as psychology and social work, as well as law.[11]

With regard to the rank or status of the adjudicating officer, respondents to the Issue Paper were split between suggesting the level of a magistrate and suggesting a level half-way between that of a magistrate and a High Court judge.[12] With regard to other persons sitting together with legally-trained adjudicators in order to decide matters, responses to the Issue Paper were cautious. Having additional persons may unnecessarily complicate and slow down adjudication and may also intimidate the child. However, the preponderance of opinion leaves room for the possibility of an additional person, even a lay person, provided that the additional person in some way supplements the knowledge or language skills or experience of the adjudicator in a manner that will assist with the proper adjudication of the matter. Additional persons should not be added to the legally-trained

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9 *Collation* pp.52-53.

10 *Collation* pp.77-79.

11 *Collation* pp. 78-80.

12 *Collation* pp.80-81.

adjudicator unless there are reasonable grounds for this.[13] Insufficient training of many of our present court adjudicators was stressed in some responses received.

In Issue Paper 13, respondents were asked how a balance could be struck between allowing child-parties to give evidence, but not pressuring them to do so. Many responses favoured the use of legal representatives to assist in this regard. There was also a view that striking this balance could be difficult in practice and would require appropriate experience and understanding of children from the court adjudicators. One adjudicator argued that a screening function should come into play so that the child's wishes about appearing can be ascertained before the hearing. It can then be decided beforehand whether the child should appear.[14] There was support for the adjudicating officer being accorded the power to speak to the child privately where this is essential for promoting the best interests of the child.

Issue Paper respondents were asked who should represent children. It was pointed out that there is a tendency at present for lawyers who represent children to present views other than those of the child herself. Nevertheless, there was strong support for the use of lawyers to represent children, although it was realised that this might not be feasible or necessary in simpler or less contentious matters. There was, in particular, strong support for specialist legal representatives, rather than the use of any available legal representative. Specialisation could be achieved by extending the role of family advocates, by using court staff or, finally, by using private legal practitioners (inter alia, via the medium of Legal-Aid). But only lawyers who have experience and/or training in child and family law work should be used.[15]

With regard to the kind of training needed by persons who represent children in court, there was considerable support in the Issue Paper for such representatives requiring a legal training. However, appropriate legal training and knowledge in family and child law was stressed and there was strong support for additional appropriate training from other disciplines such as social work.[16]

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13 *Collation* pp. 81-82.

14 *Collation* pp.82-84.

15 *Collation* pp. 84-86.

16 *Collation* pp.86-87.

Issue Paper respondents were asked to assess the grounds when a legal representative should be appointed to a child via Legal Aid. They were referred to S8 (A) and Regulation 4(A) of the Child Care Act 74/1983. The majority of respondents approved of these provisions and recommended that they be incorporated within a Children's Code.[17] However, an experienced Children's Court commissioner criticised all but two of the sub-provisions of Regulation 4A in a manner which points to a need to reformulate some of them.[18] With regard to Regulation 4A(1)(b), it does not seem appropriate that a social worker should be able to compel an adjudicating officer to appoint a legal representative.

The Commission recommends as follows:

Where a hearing is to be held in order to determine whether a child is in need of removal by the State into alternative care, a social worker who has investigated the circumstances of the child may recommend to the Child and Family Court that a legal representative should be appointed to act on behalf of the child. Such a recommendation should be made where the social worker's investigation indicates that the child may be substantially prejudiced if no such appointment is made.

Issue Paper respondents were asked whether adult parties should be provided with legal representation at State expense. Views were divided on this question, largely because of the resource implications. Respondents were also asked whether unmarried fathers should be required to proceed directly to the High Court where they wish to apply for guardianship, access or custody.[19] A strong majority of respondents considered that it should rather be a lower court which should become a forum of first instance in cases of this nature. Perceptions about the inaccessibility and expense of the High Court appear to have motivated these responses.

In the Issue Paper, respondents were asked some questions about specific types of possible court orders. There was considerable support in favour of an 'anti-harassment' order that would prohibit a named individual from interfering in specified ways with a particular child. It was suggested that

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17 *Collation* pp.88-90.

18 Response of Mr D Rothman at p.90:*Collation*.

19 Response of Mr D Rothman at p.90:*Collation*.

such an order could take the form of a rule *nisi* which would set down a return day on which the respondent could challenge the order if she/he saw fit. This would be similar to the provisions of the Domestic Violence Act of 1998.[20]

On the question of whether a court should have the ability to award a State grant to children in urgent need, responses to the Issue Paper were mixed. There was considerable support for the concept, but concerns were expressed by many respondents about the State's ability to fund such grants. Since many respondents agreed that appropriate cases do occur in practice, it would seem appropriate to allow for courts to have a power to award a special emergency grant, from a special budget, but in exceptional cases only, where both the investigative social worker and the court feel that this is appropriate on a short-term basis whilst another, longer-term grant is being arranged through the normal social security system.[21]

There was strong support in the Issue Paper for the idea of courts which issue orders concerning children being accorded a power to change such orders. It was felt by respondents that such courts should be able to monitor, vary or review their own orders where this became necessary in best interests of a child affected by the order.[22] Some respondents considered specifically that a court must have the power to review, monitor and amend its orders especially insofar as they affect children. Respondents also pointed out that, where a court does change its order, the change (like any other order) should be subject to an appeal process by any aggrieved party who can establish grounds.

Issue Paper respondents were asked to comment on the present system, as set up in the Child Care Act 74 of 1983, whereby officials functioning under the authority of the Minister of Social Development and the Minister of Education have the power either not to implement or else to alter child placements as ordered by the children's court. There was no support for the present system in this regard. A strong majority of the respondents argued that the ability to alter children's court orders must be that of the court alone.

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20 *Collation* pp. 100-101.

21 *Collation* pp.101-102.

22 *Collation* pp.102-104.

Children's court orders can presently last for a maximum of two years. A strong majority of respondents to the Issue Paper were of the view that this time limit is not appropriate. It was felt by many of these respondents that in care proceedings and other forms of child placement situations the court should have an unfettered discretion to decide upon how long its order should last. In particular, the court should have the power to issue an order that will last until a child reaches the age of majority if this is appropriate. It was therefore recommended by some Issue for the and Paper respondents that the children's court or its future replacement have an unfettered discretion to decide upon how long orders should last.[23]

Respondents to the Issue Paper strongly supported the idea that, once a child has been placed by a court, that child should have the right to be brought back before the court if the child is substantially unhappy about some aspect of the placement. It was considered by some respondents that this right could serve as a way of uncovering abuse which sometimes occurs during the placement of a child.[24] Respondents to the Issue Paper were particularly strongly against the idea that any administrative\civil service officials delegated powers by a Minister should have the power to terminate a court order.[25]

It has been widely recognised internationally that undue delays in completing court cases involving children tend to be particularly prejudicial to such children. Respondents to the Issue Paper were therefore asked whether more deadlines should be imposed with regard to the completion of court cases in new Child Care legislation. Whilst there was some support for this approach, the majority view was to the effect that there is a danger of over-regulating where, in practice, each case has to be dealt with on its own merits and in a context where appropriate time frames may differ widely. There was, however, support for the current S14(3) of the Child Care Act 74/1983 which indicates that, once a care proceedings case has been started on the children's court roll, it can be remanded, at most, for fourteen days at a time.[26]

There was also support for a court's power to impose deadlines as and when it saw appropriate.

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23 See *Collation* pp. 105-106.

24 *Collation* pp.106-108.

25 *Collation* pp.126-127.

26 For a recommendation, see Part 20.7.4.3 below.

This power should therefore be accorded to courts which deal with issues affecting children. The court will then be able to impose deadlines as appear appropriate to a particular case.[27]

With regard to the court procedures to be followed in future, respondents to the Issue Paper were of the view that these should predominantly be covered in Regulations to the proposed new Child Care legislation. In considering procedural reforms, there is a difficult question of balance. There was a recognition amongst many persons consulted by the Children's Code Project Committee that a decrease in formality and technicality of court procedures and proceedings might make courts more accessible to the majority of our population, but this would have to be achieved in a way that retained fairness to all parties.[28]

Respondents to the Issue Paper were strongly in favour of a capability for a future Court to be able to issue urgent interim orders in all types of cases affecting children, pending a main hearing at a subsequent date. There was even support for an approach (similar to that of the Domestic Violence Act 116 of 1998) allowing for an interim order to be issued, in emergency or very serious situations, even before there is an opportunity to hear the other party on a subsequent return day.

23.2.2 **Responses to the Worksheet on Courts**

A Worksheet which took the form of a questionnaire on children and the courts was prepared by the Child Care Project Committee for its Workshop on Courts and for distribution to other interested persons. The responses to the Worksheet on children and the courts were collected and collated in 1999 by Law Commission researcher, Ananda Louw.[29]

Like Issue Paper respondents, Court Worksheet respondents generally accepted the concept of a three-tier court structure placed at district magisterial court, regional magisterial court and High Court levels. It was considered by some respondents that the Courts need a screening component and the Family Advocate concept should be extended so that Family Advocates become broadly-empowered child assistance officers who can investigate and bring before courts any appropriate

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27 *Collation* p131.

28 *Collation* pp.149-160.

29 Law Commission Project 110 (1999) *Review of the Child Care Act: Children and the Courts* -hereafter cited as '*Project 110*'

case concerning a child. Staff attached to the Family Advocates' offices should be able to instigate investigations on behalf of children and could register privately-reached parental responsibility agreements (plus variations thereof) or parenting plans.[30] Some respondents considered that the Family Advocates' offices could instigate or carry out mediation and facilitate family group conferences where these are required by the Court.

Many respondents considered that the new courts dealing with children in the future must have the power to instigate lay forum hearings where appropriate.[31] It was suggested by some respondents that lay forums should be designed to reach decisions without utilising a legally-trained judge as final adjudicator. Lay forums specifically indicated could include family group conferences, mediation, and use of community courts or traditional courts.[32] Lay forums could provide preventive services and should be overseen by an officer of the court.[33]

The role of the High Court should be that of appeal and review of decisions from the lower tiers.[34] With regard to adjudicators in the future courts, there was considerable support by court Worksheet respondents (like the Issue Paper respondents as noted above) for additional training in other relevant disciplines besides law. There was also support, once again, for a power to have an assessor from another discipline sit with the adjudicator if the adjudicator considered that this is necessary.[35] With regard to the training of High Court adjudicators, Worksheet respondents supported the idea of a specialized section of the High Court to hear appeals in child and family law matters or, failing this, at least having certain High Court judges who specialize in such work.[36]

As far as the cultural and linguistic affinity of Child and Family Court adjudicators is concerned, Worksheet respondents supported the idea of adjudicators who can speak at least three official languages. Failing this, it was considered that assessors who could speak the home language of

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30 *Project 110* p.20.

31 *Project 110* pp. 2-5.

32 *Project 110* p.5.

33 *Project 110* p.7.

34 *Project 110* p.7.

35 *Project 110* pp.10-11.

36 *Project 110* p.12.

a child or other party could sit with the adjudicator. An additional factor is proper training of interpreters for child and family work where interpreters have to be relied upon.[37]

As regards the procedural role of adjudicators in courts dealing with children, court Worksheet respondents were of the view that a more activist role, involving a shift to a more inquisitorial approach, should be required of adjudicating officers. It was felt that an adversarial procedure would still be required where there are disputes of fact to be settled.[38] Insofar as any child may be involved or affected, the most important function of any lawyers who may appear will be to assist the court in reaching a decision which treats the best interests of the child/children involved as paramount.

The need to improve the general public's access to the courts was also stressed as an important requirement by respondents to the court Worksheets. It should not be essential to have a lawyer in order to be successful in court. Adjudicating officers will need to adapt their role accordingly. Legal-Aid must be available where it is needed.[39]

There was strong support amongst the court Worksheet respondents for an integrated court system where a single court could deal with different aspects of a domestic matter at one time. It was felt by respondents that this would save considerable time delay.[40]

Monitoring by a court of its order could be achieved by imposing a return day where the court sees fit. An additional form of monitoring would be to allow any social worker who is supervising or investigating parties during a post-court-order phase to instigate a re-hearing if the court's order is not being complied with.[41]

Worksheet respondents were concerned to provide the courts which work on behalf of children with 'teeth'. It was suggested that both criminal sanctions and contempt of court orders should be

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37 *Project 110* pp.13-14.

38 *Project 110* pp. 22-23.

39 *Project 110* pp.23-24.

40 *Project 110* p. 24.

41 *Project 110* p.25.

available to these courts. In addition, the courts should be able to impose punitive costs orders on any party.

As regards the geographical jurisdiction of courts, the solution recommended by some respondents was a broad availability of courts, regardless of where in the country a cause of action arose. In this regard, there was support for an approach such as has been taken in the Domestic Violence Act 116 of 1998. A factor, however, could be in which locality it would be best for a child-party to have the matter heard. In the court Worksheet responses there was support for greater involvement of local authorities and designated lay community safe-guarders.[42] This would necessarily involve additional persons becoming subject to court orders. Court Worksheet respondents were of the view that lawyers who appear in cases involving children should be required to undergo specialized training in family law issues. They should have experience of working with children and understand family dynamics.[43]

As can be seen, a wide range of issues were helpfully addressed in the court questionnaires. It is also noteworthy that the majority of court Worksheet respondents and the Issue Paper respondents were in agreement on most matters considered by both groups.

23.2.3 **The Child Participant Responses**

As was indicated in Chapter 1 of this Discussion Paper above, the Child Care Project Committee was able to collect responses from children as a result of a Child Participation Process.[44] The data obtained from this process was collected and presented in a document entitled *Report on workshops held to give effect to Article 12 of the United Nations Convention on the Rights of the Child (Children's Participation)*.[45] For ease of reference, this document will be cited hereafter as the '*Children's Participation Report'.* Part 3.6 of the *Children's Participation Report,* which is entitled 'Law Courts,' provides some useful information concerning children's views about courts. In this Part, children were asked, 'Should there be a special Court that deals only with children who cannot live with their

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42 *Project 110* p.28.

43 *Project 110* p.30.

44 For a discussion of the process, see Chapter 1 at Part 1.5, above.

45 This Report was prepared for the Child Care Project Committee by the Community Law Centre of the University of the Western Cape. The Report is undated.

parents?' The record of responses indicates that all children asked this question answered in the affirmative.[46] It may thus be concluded that there was very strong support amongst the child participants for a separate, specialised Court that deals only with child care issues.

When asked about training for adjudicators in courts that deal with care issues, more than 80 percent of the children who responded to this question considered that the kind of training that was needed would be of a kind which would teach adjudicators how to understand children better.[47] It would thus seem that the children's concerns were not so much about legal training for adjudicators as about the kinds of listening and other interpersonal skills that would enable them to hear and appreciate the voices of children.

An interesting result obtained was that fewer than 5% of the child participants felt that social workers are able to perform sufficiently well in representing children in care proceedings. The remaining children felt that it would be better to have an additional representative.[48] When asked in a follow-a question who that representative should be, fewer than 4 percent of the children felt that it could be the court adjudicator. Also, fewer than 4 percent of the children felt that the representative ought to be a lawyer, although more than 80 percent of the children felt that lawyers could form part of the pool of persons from whom a representative could be chosen.

Approximately 12 percent of the children had a specific concern about lawyers needing proper training to equip them to deal with matters involving children. The majority of children (more than 75 percent) seem to have been predominantly concerned about the representative being a person whom the child knows and trusts.[49] From the perspective of the children, therefore, the relationship that the representative is able to build up with the child is by far the most important factor.

When asked to make additional comments about courts, a significant proportion of the child participants were of the view that child-friendly courtrooms with colourful time-out rooms were important. Adjudicators should be dressed informally and children should be given a chance to speak

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46 See the responses to question 3.6.1 in the *Children's Participation Report* at pp 37-38.

47 See the responses as presented in Table 3.6.3 of the *Child Participation Report* at p 38.

48 See the responses presented in Table 3.6.4 of the *Child Participation Report* at pp 38-39.

49 See the responses presented in Table 3.6.5 of the *Child Participation Report* at p 39.

for themselves. A minority of the children wanted to be able to speak in their mother-tongue and have cases dealt with promptly. Some children felt that the adjudicators should be able to speak to them privately before reaching a decision. A few children who had obviously had bad experiences in this regard stressed the importance of having transport available to take them back to a residential care institution after the hearing. A small group who had had the rare experience of being provided with a lawyer in children's court proceedings indicated that younger “student lawyers” were more understanding of children than the older lawyers and thus better.[50] In a particularly damning finding, a group of children who had experience of both criminal courts and the children's courts indicated that they had a better experience in the criminal court from the point of view of being allowed to express their opinions![51]

The Child Participation Responses thus contained some important perspectives regarding courts. The views expressed by the children have been kept in mind in planning a proposed new system of courts for dealing with care, protection and parental responsibility issues.

23.3 **Fundamental Problems in the Present System**

23.3.1. **Too Many Courts**

As is well known, we presently have a variety of courts which can issue orders that may refer to and significantly affect the lives of children. These courts include the High Court, Divorce Courts, Maintenance Courts, Children's Courts, Juvenile Courts and courts issuing domestic violence orders. A first serious point of weakness in the present South African court structure as it affects children is therefore the multiplicity of forums dealing with various aspects. As has emerged from the research of the Project Committee, this multiplicity of courts has numerous disadvantages. For example, because each court deals only with certain types of case, a child or adult applicant\witness may have to appear in more than one court.

The present system of conducting hearings and issuing court orders in an incremental manner and

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50 Table 3.6.9-responses to the question, ‘Are there other things that you want to say about the Courts?’. See the *Child Participation Report* at pp 40-41.

51 The *Child Participation Report* at p 41.

in a multiplicity of forums frequently increases privately-incurred and State expenses, and results in delays whilst the child and/or other parties are left to suffer from uncertainty and insecurity about her/their future. Another negative consequence of our multiple-court system is that children are sometimes 'systemically abused' by having to undergo multiple assessments and questioning by different persons for purposes of different court hearings. These children may have to relate painful details -for example, in regard to sexual abuse- over and over again to different professionals who are preparing for and conducting different cases. The system of a multiplicity of courts is thus not only frequently ponderous and slow, it subjects children and others to secondary, systemic abuse which could be reduced by the use of a single, broadly-encompassing forum which could deal with all or most legal aspects of a multifarious familial problem.

The present variety of courts is so daunting in terms of expense and time consumption that it is not surprising that the general public, and even child care professionals, often do not make full use of the services which the courts offer. Whilst it would be quite unfair to place the blame wholly at the doors of the courts, the large numbers of street children in many parts of South Africa are surely clear evidence that many children in need of alternative care decisions are not being dealt with effectively through the courts. As the AIDS pandemic progresses, the numbers of orphaned children and other children affected and infected by the disease is growing steadily, and it is indeed necessary for the court system to be reformed so that considerably more children can receive the benefit of prompt, efficient, and effective decision-making about their future placements, and legal rights generally.

23.3.2 **Courts as Out of Touch with the Parties**

Aside from the overly narrow jurisdiction of many of our current courts and their inaccessibility as discussed above, there are further fundamental problems in regard to their functioning. In terms of effectiveness, our courts need to become places where children feel empowered - they must genuinely feel that they can speak out and\or be properly represented, so that their voices will indeed be heard and their wishes and needs be sufficiently taken into account.[52] Not only will this require a new culture of sensitivity to children, but it will also require far more effective communication between

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52 As is required by article 12 of the 1989 UN Convention on the Rights of the Child to which South Africa is a signatory. See also articles 7,8 and 9 of the 1990 African Charter on the Rights and Welfare of the Child. Frans Viljoen describes these articles as allowing for “self-asserting rights". See Frans Viljoen ‘The African Charter on the Rights and Welfare of the Child’ in CJ Davel *Introduction to Child Law in South Africa* (Juta, 2000) 214, at 221.

children (or their representatives) and decision-makers or decision-facilitators than has often been the case under the present court system. Major barriers in this regard have come to light in the course of the research already conducted by the Project Committee, and some are noted in the next paragraph below.

It has been pointed out by some respondents that there are weaknesses in the training, motivation, interpersonal skills and other skills of many of those who staff our courts. The problem includes adjudicators and can be found up to and including the level of the High Court. Many judicial officers conduct proceedings only in one or two of the official languages and, indeed, they are often obliged so to do. Regardless of what the position may be with adults, there is a need for decision-makers to be able to communicate directly with children in the languages with which the children are most familiar.[53] There is also an urgent need for new forms of inter-disciplinary training for those who work with children in our courts. Current University systems of legal training do not produce sufficient graduates properly equipped to work constructively and effectively in courts with traumatised children and their dysfunctional families. Conversely, graduates who have had a social work (or other relevant discipline) training are not being equipped to understand the nuances of, for example, evidential law and the purposes of cross-examination in certain situations. Nor is the difference between genuine child advocacy and making protective decisions for the child always appreciated, even by family advocates.[54]

23.3.3 **Conclusion**

As can be seen from the discussion above, there are a range of serious and fundamental problems which beset our current hierarchy of courts when viewed from the perspective of their ability to provide cost-effective, rapid and appropriate interventions on behalf of significant numbers children and their families. It is with a view to addressing these problems that a recommendation for a new court structure is offered in this Chapter. A further consideration which has to be kept in mind is the constraint of the limited financial resources available in South Africa at the present time. Any new

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53 See FN Zaal 'Language, Culture and the Detritus of Apartheid: Understanding and Overcoming Secondary, Systemic Abuse in South African Child Care Proceedings' in JA Eekelaar & T Nhlapo, eds. *The Changing Family: Family Forms and Family Law* (1998 Oxford University Press) 341, at 347.

54 This was unanimously agreed by more than 60 delegates (most of them South African social workers and lawyers) at the Cape Town Conference on 'The Changing Concept of the Best Interests of the Child'. The Conference was held on 28 January, 1999.

structure has to pass stringent tests of cost-effectiveness.

23.4 **A new model for a Decision-Making Forum: basic considerations**

It may be submitted that an important reform would be to move from a multiplicity of segmented courts to a more broadly-encompassing decision-making forum that can deal with legal issues affecting children and/or familial situations in a integrated, holistic manner. Ideally, the new forum must offer an attractive degree of accessibility, together with prompt, well-communicated decision-making. It should further offer strong powers of direct and culturally-empathetic communication with children and other family members.

An aspect which needs careful consideration where children are involved is the extent to which a court should insist upon formal and technically-perfect procedures in all aspects of all cases. It would seem that the ideal forum may sometimes require some degree of flexibility in *its modus operandi*\method of working. For example, there are cases (or aspects of cases) where an informal procedural mode may be the ideal one in encouraging the child and other involved persons to speak freely and to genuinely accept a constructive solution that is likely to meet the best interests of the child and a dysfunctional family unit. On the other hand, there frequently occur what may be termed the 'hard phases' of cases where it may be necessary to resort to cross-examination and other aspects of a formal, sometimes adversarial, procedure in order to get at the truth and protect the interests of persons at whom accusations have been directed. By way of illustration, it may be pointed out that the informal children's panels in Scotland, whilst they have proved successful for many forms of child care proceedings, have been recognised as subject to shortcomings when it comes to dealing with child abuse cases.

In a case of child abuse, the stakes are high and a child might be considered by a forum for possible removal from a parent who has been accused of abusing the child. If the parent denies the abuse, it may well be argued that the parent has a right to all the protective features of a traditional adversarial hearing (obviously, subject to the child receiving appropriate procedural protection). On the other hand, in a case where the parent does not deny abuse and now wishes to help achieve what is in the best interests of the child, an adversarial approach might simply cause deeper familial rifts which may endanger future familial reunification that might be in the best interests of the child in the longer term.

As can be seen from the discussion in the previous paragraphs above, the question of how to strike a correct balance between child-friendly informality and the protective functions of formal, technical procedures is a difficult one.[55] A detailed new system of court procedures may need to be left to future Family Court legislation. For the purposes of the proposed new Children's Legislation in its initial phase (prior to the arrival of Family Court legislation) some specific recommendations concerning urgent matters of procedure and evidence have been made later in this Chapter.[56]

The Commission recommends that:

Better methods need to be developed for the selection and training of court adjudicators who are required to make decisions about future placements of children.[57] Such adjudicators should be required to use formal court procedures in a child-friendly manner that is supportive of family unity where appropriate.

Aside from the need for some degree of procedural flexibility as recommended above, it is further recommended that it is necessary for a new forum structure to be able to discriminate between complex and straightforward cases. In terms of cost-effectiveness, accessibility and a productive, high case turnover, it is recommended that it is necessary to be able to fast-track urgent, simpler and less-contested matters.

On the other hand, there will always be more complex cases or ones in which there is a large array of disputed issues. In order to achieve optimum efficiency on behalf of the public, it appears to be necessary to have a simpler and faster procedure or a different, quicker forum to deal with more straightforward matters and emergency relief applications. Conversely, those involved in more complex matters deserve and require a forum which is capable of providing the time and expertise necessary to produce an appropriate response and resolution.

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55 For example, the child who is the subject of care proceedings may need to be questioned in order to discover the truth in regard to an important fact. If the adjudicator allows the questioning to take the form of harsh cross-examination in Court, this may inflict psychological harm on the child. For further discussion see Noel Zaal and Carmel Matthias 'The Child in Need of Alternative Care' in CJ Davel, ed. *Introduction to Child Law in South Africa* (Juta, 2000) 116, at 119.

56 See Part 20.7.4.2, below.

57 For further recommendations which flow from this recommendation See Part 20.6.1, below.

Unfortunately, the staff of the present children's courts are often culturally or linguistically out of touch with persons who appear in those courts as parties.

It is recommended that the cultural understanding and linguistic skills of staff in a new forum structure designed for making child-placement decisions must be made a training and selection priority.

23.5 Lay Forums

In the 1999 Forum Paper, detailed consideration was given to lay forums as utilised in many other legal systems[58] in order to reach important (and sometimes legally-significant) decisions concerning children.[59] Lay forums may be understood as serving purposes not altogether dissimilar from those of courts, but as avoiding the use of trained judicial officers for reaching a final decision.[60]

23.5.1 Advantages of Lay Forums

Avoidance of the use of legally-trained adjudicating officers and, concomitantly, avoiding formal court procedures, have been noted in various countries as bringing a number of basic advantages. In a less formal and adversarial environment, the child often feels less intimidated. This may also be true for other family members and may thus be conducive to more successfully healing problems that have occurred within the family.

Dispensing with trained judicial officers (and sometimes lawyers) may also bring improvements in accessibility and inexpensiveness of lay forums. With these advantages, the setting up of large numbers of lay forums at community or 'grassroots' level for children and domestic cases may begin to seem worthwhile. The South African Law Commission, in its Discussion Paper entitled *Community Dispute Resolution Structures*, has endorsed community involvement in the resolution of disputes.[61]

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58 For a comparative analysis, see Sanette Nel 'Community courts: Official recognition and criminal jurisdiction - a comparative analysis' (2001) XXXIV **CILSA** 87. See also the Queensland Children's Court Act, 1992; the Law Reform Commission of Canada's **Working Paper 1: The Family Court**, January 1974; the Ireland Law Reform Commission's **Consultation Paper on Family Courts**, March 1994.

59 For further information in regard to the 1999 Forum Paper, see Note 1 and the accompanying text, above.

60 For discussion and comparative materials see generally the 1999 Forum Paper at pp. 3-15 and pp.26-30.

61 Discussion Paper 1987, Project 94 (31 October 1999), especially at p.vi and pp.54-55.

There is thus support for involving community members in case adjudication.

One of the most successful forms of lay forum in many countries, the family group conference, uses the wider family of the child to compose the forum. Self-help and self-empowerment for dysfunctional or disputing families can thus be put forward as significant advantages of the family group conferencing concept.

23.5.2. **Disadvantages of Lay Forums**

Whilst an investigation of the advantages of lay forums was undertaken in the 1999 Forum Paper, it must also be realised that there are some difficulties and problematic aspects attendant upon their utilisation.

Just as much as informal proceedings may encourage some children to speak freely, case studies have shown that in other situations children may feel completely vulnerable and unprotected from abusing adults in an informal situation.[62] Where the decision reached at a lay forum is to be accorded any kind of legally-binding status, concerns immediately arise in regard to the way in which the decision was reached. Specifically, in the absence of any legally-trained person making the decision, there is always a danger that unsubstantiated, incomplete or one-sided information may have been given undue weight. Fair and objective evaluation of evidence is a vitally important skill which legal adjudicative training and experience provides.

In the absence of a trained judicial officer, there is always the possibility that the rights of a person or persons involved may have been infringed. Persons who are not legally trained may, for example, confuse between a mere allegation and a fact which is properly proven. Children, being vulnerable and generally less effective than adults in asserting themselves, are especially at risk of having insufficient weight accorded to their wishes in lay forums. As was noted above, these dangers have been recognised in the Scottish system. Although Scottish children's panels have trained adjudicators and 'Child Reporters' involved, they do not attempt to settle disputed facts. These are sent to a court for adjudication and the matter is then returned to the Panel.

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62 Lillian Edwards *Green's Concise Scots Law: Family Law* (Edinburgh 1997) at 232.

23.5.3 **Conclusion**

It is submitted that South Africa, as a nation with limited financial resources, will not be in a position to afford the luxury of moving a matter back and forth between a court and a lay forum in the manner used in Scotland to settle any serious factual dispute that might arise. Multi-culturalism and high levels of corruption and violence endemic in many South African communities at the present time also count against the viability of setting up a network of lay forums throughout the country.

A major additional problem would be the expense of setting up, monitoring and maintaining a whole new network of lay fora. It is submitted that the undeniable value of informal procedures for certain cases can be incorporated in a less expensive manner than setting up an entire separate network of lay-resolution bodies and supporting structures intended to assist children and dysfunctional families. A recommendation designed to allow for a less expensive method for incorporating the advantages of informally-reached decision-making is therefore suggested below at Part 20.6.3 of this Chapter.

23.6. **Child and Family Courts**

The Project Committee recommends as follows:

The primary legal decision-making forum structure for children who appear to be in need of alternative care or placement should be a 'Child and Family Court' network which will provide adjudicators in every magisterial district, down to the present District Court level. These adjudicators should not merely hand down legal decisions; they should also be capable of engaging constructively during the court-hearing process with traumatised children and other members of dysfunctional families. The title of 'Child and Family Court' is recommended for two reasons. Firstly, it gives recognition to the fact that a family environment is ideal for children and thus needs to be kept in mind at all hearings of the Court. Secondly, the proposed new name (in place of the present, 'children's courts') signals a new departure in the form of a new kind of court with much wider powers and better resources on behalf of children who require legally-binding parental care or alternative care decisions.

23.6.1 **Capabilities for Decision-Makers in the Child and Family Courts**

As compared with the present children's courts in South Africa, and effective court for child care and protection decision-making will require enhanced capabilities. One aspect which will require attention he is support staff. In this regard, a specific recommendation which can be made at this point is as follows:

Efforts must be made to ensure that the proposed Child and Family Courts can draw upon the services of sign language interpreters who have had proper training in court procedure in legal language.

An effective court for dealing with children and domestic matters in South Africa requires what may loosely be described as four fundamental capabilities. Firstly, it is clear that its functioning and adjudication are dependent upon a good degree of appropriate legal expertise. An adjudicating officer in this court will require a law degree and must be sufficiently legally-trained in the sense that she/he has a sound knowledge of family and child law, constitutional rights and court procedures.

The Commission therefore recommends that:

A legally-trained and sufficiently experienced judicial officer who has a law degree is an essential element for protecting the rights of those who appear before the Child and Family Court and for making fair and legally-valid decisions.

However, when it comes to domestic matters and other matters significantly affecting children, mere legal training and experience is not sufficient. A second area of capability is required which draws on a range of 'extra-legal' skills and knowledge traditionally associated with certain other disciplines besides Law. It must and recognised that Child and Family Court adjudicators require more than just a knowledge of legal rules -'black-letter law'- if they are to work really effectively in cases of relationship-dysfunction.

The Commission recommends that:

Persons who are appointed to serve permanently as Child and Family Court adjudicators must, as a result of prior experience and/or training, have some basic understanding of child

development, familial relationships and psychology. Such adjudicators must also have a basic understanding of local cultural practices that affect child-rearing. Such and adjudicators must also have a basic knowledge and appreciation of our current welfare resources (such as different residential care environments) and what can be achieved by mediation, family group conferences, play therapy, family therapy and social work techniques generally.

Aside from the legal expertise traditionally required of judicial officers and the other-discipline expertise alluded to the in the previous paragraph above, there are yet further capabilities which decision-making officers of a Child and Family Court will require if they are to have a significant impact in the face of our child- and family-related social problems.

The Commission recommends as follows:

Persons selected for permanent positions as adjudicating officers in the proposed Child and Family Courts must have a personality and motivation which are appropriate for dealing with dysfunctional families and, particularly, children who may be traumatised.

Judicial officers who are only capable of working in a formal and adversarial manner are not appropriate for a genuinely effective Child and Family court. Their inter-personal capabilities should e such as to enable them to interact effectively and constructively with children and dysfunctional family members.

It is also recommended by the Commission that:

The Child and Family Courts must be designed in such a way that they have the ability to communicate meaningfully with those who appear before them and, in particular, with any child who wishes to express views and who will be significantly affected by the decision to be reached in these Courts.[63]

Many children who presently appear before South African Courts are confused, intimidated and

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63 More specific follow-up recommendations are provided in Part 20.6. 2, below.

alienated by what becomes, for them, a strange, meaningless process.[64]

A significant problem in South Africa is that, in many situations where children appear as parties, the language which the judicial officer uses differs from the language with which the child is most familiar. In a situation where adjudicating officers of a Court can neither speak directly to a child nor understand, at first-hand, what she or he is saying, it can hardly be said that the child has genuinely been given a right to be heard as is mandated by Article 12 of the 1989 UN Convention On the Rights of the Child. Article 12 of the Convention provides the child with a right to express views freely and to have due weight given to those views.[65] In the absence of direct communication between the child and court, this right is necessarily diminished. The use of a court interpreter inevitably introduces an artificial constraint in communication and to some extent blurs meaning so that the child will never be fully certain about the weight accorded to her or his views.[66]

Whatever may be the considerations which affect adult parties, it would seem important, if we are to advance a genuine children's rights culture, that we strive to produce courts which can communicate directly, supportively and meaningfully with the majority of children who appear before them. Where this is not achieved, it can be hardly be said that a court is treating a child-party's best interests as "paramount" as required by S28(2) of our Constitution.

It is recommended by the Commission that:

Where a child is a party to a matter in the Child and Family Court or is likely to be significantly affected by the decision of the Court, the child's wishes in regard to direct communication must be considered. If the child is able and wishes to communicate directly with the adjudicating officer during the hearing in one of the official languages of South Africa, direct communication with the court must be arranged unless the urgency of the matter precludes this. In such a situation of direct communication, at least one of the adjudicating officers, or

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64 See generally Karen Muller & Mark Tait 'Little Witnesses: A Suggestion for Improving the Lot of Children in Court' 1999 THRHR 241.

65 South Africa became a signatory to the 1989 Convention on 16 June 1995. See also article 4(2) of the 1990 African Charter on the Rights and Welfare of the Child.

66 For further discussion and comments by children's court commissioners KGT Kutshwa, BM Mchunu and MP Mtshali, see FN Zaal 'Children's courts: An underrated resource in a new Constitutional era' in R Robinson, ed. *Law of Children and Young Persons in South Africa* (Butterworths 1997) 925 at 112.

someone sitting as an assessor with such adjudicator, must be able to communicate directly with the child in the official language requested by the child.

It is submitted that where children seek direct communication with an adjudicating officer and this is denied without good cause, the procedure of the forum is flawed, and may fall short of promoting a children's rights culture which treats the best interests of the child as paramount.

23.6.2 **How Are the Capabilities To Be Achieved?**

The capabilities referred to above appear to be essential ones for a genuinely-effective Child and Family Court which interacts meaningfully with members of the community, produces decisions and reasoni and and ng which parties can understand, and provides the best possible and most correct outcomes.

How, then, is the broad range of skills and capabilities required to be concentrated and embodied each time that the Child and Family Court sits?

20.6.2.1 **Longer-term Solution**

In the longer term, there are significant implications for training of adjudicating officers. As has already been suggested, correct and supportive decision-making in regard to traumatised children in particular and dysfunctional families in general are not sufficiently facilitated by a merely legal training. As has also been suggested, a genuinely effective Child and Family Court requires staff with an inter-disciplinary range of skills and/or experience. Present methods of University study which tend to confine students mainly within, for example, either Social Work or Legal Training, need to be altered to permit students to obtain qualifications of a more inter-disciplinary nature. A mix between appropriately selected Law, Police Science, Social Work, Psychology and Criminology courses, for example, could produce graduates who, after appropriate experience, could serve as adjudicators who have the requisite range of capabilities. University students with career interests in children and families should also be encouraged to study practical courses in least three official languages.

23.6.2.2 **Short-term Solutions**

The Commission recommends as follows:

With regard to the capabilities needed so that an adjudicator in the Child and Family Court can deal with a particular case, where it is not possible to combine the requisite range of expertise within a single individual, the proposed new children's legislation must make it possible for up to three persons to adjudicate in Court as a panel.

The first member of the panel (and chair) would be a legally-trained judicial officer. The second could be a person qualified in social work or another relevant discipline and the third (added if necessary) would be a person fluent in the official language of preference of a child-party who expressed a wish to communicate with the court in that language. This third person could be a professional or could add a lay element (with its attendant advantages as discussed earlier under lay forums) to the Court and would ensure that direct communication with the child (and\or other party) was possible. Of course, if either the judicial officer or the second professional adjudicator could speak the parties' language of preference and had sufficient community empathy, then a third panel member would usually not be necessary. They should be some flexibility with the possibility, for example, of including two judicial officers and perhaps a third person according to the range of skills required for a particular case.

The simple answer, then, to providing the range of expertise essential to create a genuinely-effective Child and Family Court would be to create a capability for employment of more than one individual as a decision-maker if and where necessary and feasible.

An alternative or additional solution for the short-term would be to provide short, concentrated courses of training for adjudicators that are designed to complement the skills and knowledge which they already have. For example, a prospective adjudicator could be required to spend a set number of hours observing certain courts (where she/he had not had experience) in session. The prospective adjudicator could also be required to do a course of study on child development, child abuse and non-adversarial dispute-resolution methods. Appropriate institutions such as Universities or the Justice Training College should be contacted with a view to offering courses for local candidates. Courses in indigenous languages and culture should also be provided for Child and Family Court staff at all levels.

The Commission therefore recommends that:

The Department of Justice must arrange for appropriate courses of study and periods of observation at court proceedings being conducted by experienced adjudicators as part of the training requirements for all staff of the Child and Family Courts. Whilst the child's (and other parties') right to confidentiality must be respected, this must be balanced against the provision of sufficient access to the Child and Family Courts for bona fide trainees (including private practitioners and students from appropriate disciplines) and for bona fide researchers.[67]

23.6.3 **Incorporating a Lay Element**

It is submitted that the lay component of the proposed new Child and Family Court should be incorporated in two ways. Firstly, as has already been recommended above, the proposed new children's legislation should make it possible for a person to be placed on the adjudicating panel of the Child and Family Court purely in order to provide someone who can speak directly to and empathise culturally or community-wise with the child and/or other party. Such a person can be selected for appropriate experience in working with children and/or families and also to provide an element of community representation that will help to link the Court with those who appear before it. There is nothing strikingly new about this proposal. As early as 1937, it was proposed that assessors should sit with legally-trained judicial officers to deal with child care cases in South Africa.[68] In article 21 of the Family Court Bill 62 of 1985 it was again proposed that up to two persons could sit with a family magistrate hearing a civil or criminal matter in the proposed Family Courts.

Secondly, aside from the presence of adjudicators with extra-legal skills or experience, there is another way in which the advantages of informal decision-making ought to be incorporated. A recommendations and supporting comments are provided in the next section of this Chapter, below.

20.6.3.1. **Instigating a Lay Forum**

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67 Note that some further recommendations concerning the eligibility and training of adjudicators are put forward in Part 20.8.1 of this Chapter, below.

68 For further discussion of the historical situation, see F N Zaal 'Language, Culture and the Detritus of Apartheid: Understanding and Overcoming Secondary, Systemic Abuse in South African Child Care Proceedings' in John Eekelaar & Thandabantu Nhlapo, eds. *The Changing Family: International Perspectives on the Family and Family Law* (1998). 341, at 342.

The Commission recommends that:

The new Child and Family Court should have included amongst its capabilities the power to instigate extra-curial problem-solving or solution-seeking methods such as either mediation or a family group conference.

Family group conferences, in particular, have been found in several jurisdictions to be an extremely successful method for resolving certain types of child care and other familial cases.[69]

It is further recommended by the Commission that:

Within available financial resources, the Child and Family Court should have a discretion to choose the most appropriate form of extra-curial remedy available. For example, if it appears to a Child and Family Court that a tribal authority or other community organisation is well placed to assist with resolving or monitoring a case, or can assist in any other way, the Court should have the power (and budget) to make an appropriate order. The Child and Family Court should therefore be able to require traditional leaders to attempt to mediate\monitor certain familial disputes where this appears to be appropriate.

Relevant factors would be what resources are available in a particular community and whether the family regards itself as falling under a particular tribal authority.

In line with the previous two proposals, the Commission thus recommends that:

The proposed new Child and Family Court should be able to make use of lay forums where these appear appropriate. Where the Court instigates such a Forum, the results must be reported back to the Court.

It is submitted that the recommendations above would allow for selective and occasional use of lay

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69 See, for example, the 1999 Forums Paper at pp.12-16 for some comparative materials. See also Part 20.5.1 of this Chapter, above.

forums on behalf of children in appropriate cases without South Africa being committed to the expense and the difficulties of setting up and maintaining an entirely separate network of lay forums and supporting structures. It is thus submitted that the recommendations above allow for cost-effective use of the advantages of informal decision-making in the familial sphere.

The Commission further recommends that:

The proposed new children's legislation should be framed in such a way as to require Child and Family Courts to consider available financial resources before deciding to employ extra-curial solutions. Also, such solutions should only be instigated where these appear to be the most appropriate way of dealing with a significant problem or reaching a decision on behalf of a child who is in need of a placement solution.

Thus, lay forums should be used in a practicable and cost-effective manner with the financial implications and possible gains for the child being taken into account. With the Child and Family Court instigating the process and being reported to, the Court will be in a position to give legal validity to appropriate decisions reached by the lay forum or to hold proceedings of its own where no decision is reached or anyone wishes to appeal to the Court in regard to the lay forum decision.

It is recommended by the Commission that:

Both the proposed first and second levels of the Child and Family Court should have the power to instigate lay forums.[70] Whilst the Court should have the power to instigate extra-curial problem-solving mechanisms in appropriate cases, adjudicators of the Court should not themselves purport to sit or operate as a lay forum.

As has already been suggested above, instigation of lay forums should be done selectively and within the limits of a fixed court budget. Using the Child and Family Protector in certain cases should reduce costs.[71] Practice should be allowed to develop naturally with regard to the types of

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70 For recommendations concerning the proposed first and second levels of the Child and Family Court, see Part 20.7.1 below.

71 For comments and recommendations regarding the use of the Child and Family Protector in this role, see Part 20.8.3 below.

case\criteria that indicate instigation of a lay forum. A social worker's or Child and Family Protector's report could be required as motivation by a court contemplating instigating a lay forum. Both levels of the Child and Family Court will need to have the ability to instigate lay forum strategies such as family group conferences where these appear to have potential for promoting the best possible outcome in a case. The Court should not sit/operate as a lay forum itself.

In terms of who should provide family group conferencing and mediation services, family advocates may, in the course of their work, help to reduce intra-familial\domestic tensions or hostility, since they have been trained in mediation. However, if they become directly involved in intensive mediation\lay forum activities, they may come under procedural attack for not being in an independent position if they or a colleague later have to represent a child from the same family in court. It is for this reason that the Child and Family Protector is proposed for a primary role in certain less-formal, extra-curial techniques.[72]

23.7 **Levels and Jurisdiction of the Child and Family Court**

23.7.1 **Multiple Courts Versus An Integrated Approach**

The South African Family Court Bill of 1985 envisaged family courts as operating at the level and with the status of regional magistrates' courts. The South African Family Court Pilot Project begun in 1997 currently utilises a hybrid approach whereby both magistrates' and divorce courts operate alongside one another.[73]

The Commission recommends that:

From the point of view of children who require alternative care and parental responsibility decisions, it is necessary to work towards the establishment of a court system capable of providing, a holistic resolution of a broad range of child and related familial problems, rather

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72 See Part 20.8.3 below.

73 Professor Cheryl Loots 'Family Court Pilot Project' p.2 (Department of Justice: 6 November 1997). See generally also Department of Justice *Family Court Action Plan* (ND -issued on 16 February, 2000).

than continuing with what has been identified as a major weakness of the current system, namely, parties moving back and forth between different, narrow-jurisdiction forums.

In order to provide the most efficient and cost-effective service for children who require alternative care and and parental responsibility decisions, it is recommended that it is necessary to have a Child and Family Court which can function at two different levels.

With regard to the types of case to be allocated to the proposed two different levels of the Child and Family Court, it is recommended that it is necessary to allocate cases according to their complexity or the length of time that they appear to require.

It is worth noting that there are simpler child care or parental responsibility matters which do not need a considerable amount of court time. For example, in some child-placement cases there is only one very obvious and appropriate placement for the child. An example of such a case would be where the child's parents have been killed in a motor accident and there is a relative with excellent parental skills who is the only available applicant to take over parental responsibility for the child. On the other hand, there are difficult matters which may reveal themselves by such possible indicators as more than two parties in contention, appointment of legal representatives and\or complex evidence or ethical issues arising out of factors such as artificial conception of a child and\or surrogate motherhood.

The Commission therefore recommends as follows:

With regard to the two levels of the proposed Child and Family Court, it is recommended that the first component should be designed for a higher case turnover of simpler and shorter matters. Its adjudicator or adjudicating panel should still where necessary be able to provide the range of interdisciplinary expertise and communication-ability already recommended above, but could be less experienced officers than those who should sit in level two. It is recommended that the officers in the second level should deal with matters that require more time or are complex. These officers will thus need to be more experienced and/or more extensively trained than those who staff level one.

It needs to be stressed that, in terms of a vision for a new and genuinely effective Child and Family

Court, adjudicating officers in both level one and level two must be able (where appropriate) to take a holistic approach and deal with all aspects of a case that bear directly upon the care needs of the child. This may require more than one court appearance, with remands needed for investigation or preparation relevant to additional aspects (such as the rights of other parties) which the court decides, *mero motu* (of its own accord), require resolution. In order to save on time and expense, the same adjudicator should, where possible, attend at subsequent hearings. This would be in accordance with the "One Judge One Family" approach as used in Hawaii.

The Commission recommends that:

Should it appear that a case is not appropriate for the proposed level one of the Child and Family care Court, then procedural machinery must be built into the new child care legislation to allow for a quick and easy transfer to level two of the Court. Level two should also serve as an appeal or review facility from level one, and the High Court should serve as an appeal or review facility from level two, particularly in view of the support for this role which was expressed at the workshops held by the Project Committee.[74]

23.7.2 **A Reception Component**

Criteria for dividing cases between different court tiers have been proposed above in Part 20.7.1 of this Chapter.

The Commission recommends that:

A necessary component of a genuinely effective Child and Family Court is a reception and screening officer to make decisions about which level of the Court a case should be referred to and also about whether additional investigation, additional adjudicators and/or a lay forum should be a necessary prerequisite to further resolution of the case. The reception officer could be named a Child and Family Protector.

An introduction of this Officer is recommended as important since the current children's courts have

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74 On the role of the High Court see further Part 20.9 of this Chapter, below.

been severely hampered in their functioning since the withdrawal of children's court assistants. It is submitted that the current description/terminology of, 'children's court assistant,' does not accord sufficient recognition of work importance. Hence, a designation of 'Child and Family Court Assistant' is not recommended.

As per the Law Commission's Child Care Issue Paper responses, it is recommended by the Commission that:

Children should be granted a legal right to be placed back before the court where they wish to raise an objection about some aspect of their placement.[75] The Child and Family Protector, as a staff member attached to the Court, should be required to arrange this procedurally on behalf of any child who needs to reappear.[76]

If provided for a new child care legislation, the Child and Family Protectors would be able to carry out an important function in deciding whether matters should be referred to a Level One or Level Two Court. This should be done before evidence is led in order to avoid unnecessary expenses and delays.

23.7.3 **Case Jurisdiction**

In terms of the actual range of cases which should be dealt with by the proposed Child and Family Court, it is important to keep in mind that it has been proposed that the Court ought to be able to draw upon a broad range of legal, relevant extra-legal and communication skills which will render it capable of performing valuable services. Given this, it is necessary, from a cost-effective point of view, to get as much use from the Court as possible. It would therefore seem most appropriate to give the Court a wider jurisdiction and the present children's courts as regards the remedies which it can offer on behalf of children.

Aside from cost-effectiveness, there is also the point that, if one goes forward on the basis of a broader approach to child and familial problem- and dispute-solving (as has been discussed earlier

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75 See Part 20.2.1, above.

76 Further on the Child and Family Protector see Part 20.8.3 of this Chapter, below.

in this Chapter as an important basic principle), then a wider category of dispute-jurisdiction is also indicated.

It is therefore recommended by the Commission that:

The Child and Family Court should take over the current case jurisdiction of the present children's courts. The Child and Family Court should replace these courts. It should also be able to provide the additional care and protection orders recommended later in this Chapter, below. It should have jurisdiction to allocate parental responsibilities and deal with parental disputes about children except where these arise as part of divorce litigation in a case where the divorce has not yet been finalised.[77]

It is submitted by the Commission that the Child and Family Courts should not serve as criminal courts for the purpose of trying children who have been charged with criminal offences. However, it should be noted that a juvenile criminal case may be converted to a Child and Family Court enquiry through diversion to the latter Court.

It is recommended by the Commission that:

If a matter is heard in a Sexual Offences Court, that Court should have the power to make any Care Order that a Child and Family Court could make if the child is in need of alternative care. Thus, the matter should not necessarily have to be referred to a Child and Family Court for an order relating to the protection of the child.

The aim behind the above recommendation is to reduce the problem of children who are victims of sexual abuse having to appear in or be assessed for more than one Court. The aim is therefore to reduce secondary systemic abuse currently imposed by our multiple-court system.

It is recommended by the Commission that:

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77 Where parental responsibilities fall to be allocated between divorcing parents at divorce, this should at present continue to be dealt with by the divorce courts and the High Court. In the light of the possibility of Family Court legislation being prepared in the future, the Child Care Project Committee does not believe that it ought to offer recommendations at this stage which might interfere unduly in the jurisdiction of the courts which currently handle divorces.

Where, in the course of conducting an alternative care or parental responsibilities inquiry, a Child and Family Court adjudicator or adjudicating panel reach the conclusion that a domestic violence protection order or a maintenance order are needed, it should be made possible for the Court to issue such orders.

Although a lay forums and extra-curial decision-making have already been dealt with earlier in this Chapter, for the sake of completeness it should be mentioned again here that it has been recommended that adjudicating officers in the Child and family care Court require a power to instigate lay settlement techniques such as mediation or family group conferences if they conclude that such are appropriate.[78] But these lay techniques should be implemented outside the Court and the outcome reported back to the Court.

It should be noted that some further aspects relevant to the case jurisdiction of the Child and Family Courts are discussed in Parts 20.7.5, 20.9 and 20.10 below.

23.7.4 **Procedures of the Child and Family Court**

23.7.4.1 **The Procedural System**

It is recommended by the Commission that:

Pending the promulgation of new procedures in future Family Court legislation and subject to some specific procedural proposals in the proposed children's legislation which are discussed below, currently existing court procedures should be used by the Child and Family Court. These should as far as possible be those which presently govern the Children's Courts, but with additional modifications as appropriate to new types of work.

The present Children's Court procedures are primarily governed by sections 8 and 9 of the Child Care Act 74/1983. A key provision is S9(1)(iv) of the Child Care Act which indicates that 'the conduct of proceedings' is to be in accordance with the provisions of the Magistrates' Courts Act 32/1944. However, this and the other procedural provisions in S9 of the Child Care Act are currently subject

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78 See further Part 20.6.3 of this Chapter, above.

to an introductory limiting clause in that section. This introductory clause requires the provisions of the Magistrates' Courts Act to apply 'Save as is otherwise provided in this Act or in any other law'. A second important limitation to be found in the introductory part of S9 of the Child Care Act is that the provisions of the Magistrates' Courts Act are only to apply to Children's Courts '*mutatis mutandis'* -in other words, with 'the necessary changes being made' according to essential differences in the nature of Children's Courts work.

As has been discussed in the previous paragraph, the procedural system for the Children's Courts has involved using the procedural rules in the Magistrates' Courts Act as a foundation. This foundation is subject to any specific changes necessitated by the wording of the Child Care Act. Secondly, adjudicators in the Children's Courts have a discretion to use additional procedural modifications, '*mutatis mutandis,*' where these are necessary because of differences in the nature of their work as compared with work in the ordinary Magistrates' Courts. This combination of rules appears to have worked reasonably well.

It is therefore recommended by the Commission that:

The current procedural rules governing the children's courts be utilised for the proposed Child and Family Courts, subject to some specific, urgently needed procedural provisions recommended for the new children's legislation in the next Part of this Chapter, below.

The drafters of the South African Family Court Bill 62/1985 decided to create a special power that would allow the Minister of Justice to make procedural rules for the Family Courts that were proposed in the Bill. In article 37(1) of the Bill, they proposed a power for the Minister, after consultation with the chief family magistrates envisaged under the Bill, to make rules regulating the proceedings of Family Courts. A question to be considered is whether a similar provision is needed for the purposes of the proposed children's legislation. If the Minister were accorded a power to make or amend rules of procedure applicable to the Child and Family Courts, this would add flexibility to the existing Children's Courts procedural scheme as summarised in the previous paragraph, above. It has been proposed earlier in this Chapter that, as compared with the existing children's courts, a wider range of additional duties should be taken on by the proposed Child and Family Courts that would replace the Children's Courts.

In view of the greater range of categories of work proposed, it is recommended by the Commission that:

It is necessary to include a provision in the proposed new children's legislation that would allow the Minister of Justice to make additional or amend existing rules of procedure in the Child and Family Courts.

The power recommended above might also be useful in allowing the Minister to phase in certain types of work so that the Child and Family Courts could, if necessary, increase their range of work by stages.

23.7.4.2 **Specific Recommendations**

It is important to appear in mind that a Department of Justice Family Court Project Committee (as referred to above) is drafting new Family Court legislation which will ultimately cover court procedures. Pending the drafting of such legislation, it has been recommended in the previous section of this Chapter above that the procedures currently governing the children's courts should in the meantime continue to be applicable to the proposed Child and Family Courts. As exceptions to this approach, certain urgently needed procedural reforms have been proposed in this Part of the Chapter.

The specific procedural recommendations offered below should be provided for by means of specific rules in the proposed new children's legislation.

It is recommended by the Commission that:

The basic mode of functioning in the Child and Family Court be inquisitorial, as opposed to accusatorial. Given the need for an inquisitorial role for the presiding officer, she/he must also have the power to call witnesses, or direct that there be further investigation or other investigation where she/he feels that this is necessary for a proper resolution of the case.

It is further recommended that it be expressly stated, as part of the procedures of the Child and Family Court, that a child-party has the right to be present and to participate at a court hearing (or to convey her views in chambers to the Adjudicating Officer), if she so wishes and

is able. Amongst the procedural provisions included in the proposed new children's legislation should be one which compels the presiding officer to ensure that the view of any child-party is heard if the child wishes to express a view. This must be facilitated and due weight given to the views and wishes of the child.

It will be remembered that it was recommended in Part 20.4 of this Chapter that Child and Family Court adjudicators need to be able to direct proceedings in a way which is child-friendly and which promotes family unity where appropriate. At the same time, they need to be able to enforce procedural formalities to the extent that these are appropriately protective of persons involved. They need to have sufficient experience, authority and discretion to enable them to avoid and prevent an overly technical use of procedures and formalities where such an approach would be inappropriately damaging to the best interests of a child or other vulnerable person. The use (also recommended above) of decision-makers with additional expertise or training in relevant non-legal disciplines would, it is submitted, help to produce a child- friendly environment in the Child and Family Court where this is procedurally appropriate.

It is recommended by the Commission that:

A provision should be included in the proposed new children's legislation that requires Child Family Court adjudicators to direct court proceedings in a way which is child-friendly and which promotes family unity where appropriate.

It is also recommended by the Commission that:

A provision should be included in the proposed new children's legislation which indicates that whilst a child should have the right to remain present throughout the proceedings if she or he is a party, the Court must have the power to allow a child to leave the proceedings or be questioned through an intermediary system where the Court decides that this is in the best interests of the child (child-party or witness).

It is submitted that the greater range of skills at the disposal of the proposed Child and Family Court (by comparison with existing courts) will place it in a better position to assess when or if a child needs

to be present in Court.

It is recommended by the Commission that:

In line with international trends in favour of less formal and technical proceedings in child and family matters, the presiding officer should have a discretion to accept hearsay evidence and relax other rules of evidence if she/he deems that this is appropriate. The Court must be permitted to take into account hearsay evidence, provided that this is in the best interests of justice or the child or other party.

It is further recommended by the Commission that:

The proposed new children's legislation should include a provision to the effect that the Child and Family Court must ensure that any child who appears before it is not subjected to any interrogation and verbal or non-verbal intimidation which, given the age, personality and psychological state of the child, she or he is not able to sustain without the likelihood of serious harm.

The above recommendation, if implemented, would require a judgement-call by the Court, aided by any assessor and/or representative of the child.[79] Children or other vulnerable persons ought not to be subjected to unnecessarily harsh cross-examination which is aimed primarily at confusing or intimidating them, as opposed to seeking legitimately to establish the truth in an appropriate manner.

It is recommended by the Commission that:

A provision should be included in the proposed new children's legislation which indicates that presiding officers in the Child and Family Courts have the power and discretion to halt cross-examination of a person appearing at an inquiry when it goes beyond the bounds of what is appropriate.

The above recommendation, if implemented, will require that presiding officers have the necessary

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79 See also Part 20.11 of this Chapter, below.

skills to make the decision required. The reason for including such a provision is that instances of very destructive cross-examination [secondary, systemic abuse] of abused children have been reported as occurring during court hearings.

It is recommended by the Commission that:

The proposed new children's legislation should include a provision to the effect that the presiding officer in a Child and Family Court has a power to consult in chambers with a child who may be significantly affected by an order of the Court. This power should only be exercised if it is found to be necessary in order to achieve a proper resolution of a case. When the power is exercised, the presiding officer should be required to record his/her reasons for deciding to meet with the child in chambers in writing on the Court record.

An example of when the above proposed power might be needed is in a situation where it appears to the presiding officer that a child has been or may be too intimidated to speak about an important aspect during a court session. Alternatively, in another case it may be inappropriate for a child to be expected to choose between two opposing caregivers in open court. Where it is essential in the best interests of a child, the presiding officer should therefore be accorded the right to consult with a child-party or child-witness in private before or during a matter. As indicated in the recommendation above, the officer must record his/her reasons for so doing as part of the court record.

It is further recommended by the Commission that:

Where a presiding officer in the Child and Family Court decides that it is necessary to consult with a child in chambers (in accordance with the previous recommendation above) the officer should have an unfettered discretion to decide whether any other person should be present during the consultation.

The Court may, on occasion, need the power to remove a person from its proceedings - either temporarily or permanently. An example would be a situation where a child is suffering trauma at the proceedings. An abusive parent might be continuing with abuse during the proceedings – verbal or body-language abuse. Or a legal representative might be using inappropriately adversarial methods after being requested not to.

The Commission therefore recommends that:

The proposed new children's legislation should include a provision to the following effect: any person may be ordered to leave the proceedings where a presiding officer of the Child and Family Court decides that this is in the best interests of any child who may be significantly affected by a decision to be reached by the Court, Where a court uses this power, it must justify having done so by putting down reasons in writing.

It is further recommended by the Commission that:

The proposed new children's legislation should contain a provision which is to the effect that the Child and Family Court is required to conduct its proceedings *in camera*. However, the legislation should indicate that an exception to this is that limited numbers of persons other than the parties before the Court should have the right to request permission from the presiding officer to attend proceedings of the court for purposes of training or *bona fide* research - this should override the confidentiality aspect. It is recommended that written permission must be obtained from the Court where any person wishes to publish\reveal the name\identity of any party\witness to proceedings in the Court. This latter requirement should apply where the publishing\revealing is to go beyond what is necessary in conducting a case or working on\investigating the case by involved professionals working in the best interests of a child or other party.

23.7.4.3 **Prompt Services**

It is submitted that the emphasis in the Child and Family Court must be on prompt services.[80] The Commission is of the view that there should also be a general presumption written in at the beginning of the proposed new children's legislation that delays are presumed to be against the best interests of children. Legal representatives must not be permitted to delay proceedings based on reasons that have nothing to do with the merits of the case.

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80 See also Ziyad Motala 'Judicial accountability and court performance standards: Managing court delay' (2001) 34.2 **CILSA** 172.

It is therefore recommended by the Commission that:

The proposed new children's legislation should contain a provision which is to the effect that officers of the Child and Family Court must in all situations endeavour to provide prompt services for children and other applicants. The legislation should also contain a clause which is worded to provide a general presumption that delays will be prejudicial to children involved or affected by the services of the Court. A further provision should indicate that, in particular, the Court should not allow itself to be unduly delayed by awaiting other Court decisions, and should have the power to prevent legal representatives or other persons from unduly drawing out proceedings or postponing them without very good reason.

In accordance with the Commission's Issue Paper responses as provided by practitioners, it is not recommended that the proposed children's legislation should contain numerous specific time deadlines. However, as recommended by respondents, it is recommended by the Commission that:

The current section 14(3) of the Child Care Act 74\1983, which allows for court remands of only up to 14 days once a care inquiry has begun should appear in the new children's statute specifically for such cases.

As proposed by respondents to the Commission's Issue Paper, it is recommended that:

In any case where the Child Family Court has jurisdiction, it should be accorded the capability to provide urgent interim orders. Where appropriate, these should be provided even in the absence of the other party.

It is submitted that the above capability would assist in the provision of prompt services where these are needed.

23.7.5 **Court Levels**

As has already been mentioned above, the Committee recommends that:

The Child and Family Court should consist of two levels. Firstly, there should be a level one

operating at district magisterial level and, secondly, a level two operating at regional magisterial level.

The above recommendation is made in view of the importance of enhancing accessibility and affordability for the majority of our population. Personnel who staff both levels of the Court should undergo specialised training and should then be accorded a status different from that of staff who are only trained to serve in the ordinary magistrates' courts.

It is further recommended by the Commission that:

Both the proposed Level One Child and Family Courts and the proposed Level Two Child and Family Courts should have a court assistant named a 'Child and Family Court Protector'.

The Protectors will carry out important functions, inter alia, in deciding whether matters should be referred to a Level One or Level Two Court. This should be done before evidence is led in order to avoid unnecessary expenses and delays.[81]

As has already been suggested, it is recommended by the Commission that:

When hearing cases, presiding officers at Level One and Level Two Child and Family Courts should have a discretion to appoint up to two additional adjudicators.[82]

It is recommended by the Commission that:

Level Two of the Court should be required to deal with more complex matters. It thus requires presiding officers with greater experience and expertise. In order to assist with the problem of accessibility, Level Two Courts should be able to exercise jurisdiction over matters that can be dealt with in a Level One Court.

For reasons of accessibility, it is recommended that all emergency orders and urgent

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81 See further Parts 20.7.2 and 20.8.3 of this Chapter.

82 For further discussion see Part 20.6.2 of this Chapter, above.

interdicts in all matters that can be dealt with by a Child and Family Court should be available from a Level One Court.

The Level Two Court should deal with more complex and time-consuming cases. Factors that ought to be taken into account in considering whether matters should go to a Level One or Level Two Court are with of the cases contested or whether there is an international dimension. It is recommended that the proposed children's legislation should contain an express provision to the effect that international adoption cases should be dealt with by Level Two Courts.

A matter in regard to which the Committee seeks further comment and would appreciate guidance is whether artificial procreation cases should be dealt with in the High Court. The Committee is of the view that cases involving surrogate motherhood contracts should preferably be dealt with in the High Court, but it would welcome responses in regard to whether such cases, or other categories which may be suggested, should be excluded from the jurisdiction of the proposed Child and Family Courts.

With regard to allocation of cases between the proposed kept level One and kept level kept two kept courts, the Commission further recommended as follows:

Parental agreements should be registered or interpreted in a Level One Court, but if disputed, should be dealt with in a Level Two Court. The Committee recommends that an unmarried father should be eligible to apply to a Level One Court to obtain some/all parental responsibilities, but if the allocation of such responsibilities is disputed by any person, he will have to apply to a Level Two Court. Proof that paternity of a child is unknown may be provided in a Level One Court, but disputed paternity matters would have to be heard in a Level Two Court. If a Court directs that a family group conference should be held in a case of child abuse, it must provide reasons why it has so directed, since this will often not be an appropriate step.[83]

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83 On scope of work see also Part 20.10 of this Chapter, below.

The Committee would welcome further responses regarding alternative care or parental responsibility cases with an international dimension. It could be argued that, because of the problems of accessibility and expense, even matters with an international dimension should ordinarily fall within the jurisdiction of a Level Two Child and Family Court. At the present time, the children's courts, with their relatively poor resources, are expected to deal with international adoption cases. On the other hand, it could be argued against this that the greater resources available at the level of the High Court indicate that it might be better to have only the High Court deal with alternative care or parental responsibility cases with an international dimension. At the present time, the High Court deals with international parental abductions and the Committee would welcome responses specifically in regard to whether the High Court should continue to do so as a Court of first instance.[84]

23.7.6 **Accessibility of the Child and Family Courts**

The parties who would tend to appear before the proposed Child and Family Courts will most probably usually be children and parents (or other primary caregivers). However, child protection, alternative care or parental responsibilities cases may sometimes involve other persons, such as members of an extended family, siblings, cohabitees or neighbours.

It is recommended by the Commission that:

The proposed children's legislation should contain provisions designed to discourage the proposed Child and Family Courts from adopting a technically-restrictive procedural approach in order to deny someone who has a substantial interest in the proceedings from presenting his or her case and, where appropriate, from being regarded as a party.

Cases may occur where, for example, two or more sets of persons wish to apply to become adoptive parents of one particular child. As regards such applicants, a 'first-come, first-served,' approach may not be in the best interests of the child concerned, nor may it be fair to all concerned.

It is further recommended by the Commission that:

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84 On the role of the High Courts, see further Part 20.9 of this Chapter, below.

A provision needs to be enacted in the proposed new children's legislation which is to the effect that any person who wishes to assert the right to be a party in a case pending or currently underway in the Child and Family Court should be permitted to appear and/or place documentation before the Child and Family Protector of the Court in order to try to make out a case that she or he has an interest in the proceedings sufficiently substantial that she should receive the status of being a party. Should the person establish a *prima facie* case, the Child and Family Protector should immediately refer the matter to the Court for a decision which might involve a special hearing. Nor should cases involving children be finalised until a reasonable opportunity has been provided for hearing any known and available person who, in the view of the Court, has a substantial interest in the case or appears to have a substantial contribution to make that may be relevant to the proceedings .

The Commission recommends that:

With accessibility to the Courts being a major failing at the moment, any *bona fide* person be permitted to bring a case or potential case to the notice of the Court assistant named the Child and Family Protector. It is recommended that the Protector should be legislatively accorded the power, if necessary, instigate an investigation by a social worker, other professional or via the auspices of the nearest office of the Child and Family Advocate.

A wide range of persons including, for example, neighbours or social workers, should be encouraged to bring cases or possible cases to the attention of the Child and Family Court Protector.

The Commission recommends that:

The Child and Family Protector should be legislatively empowered to play an important role in receiving information and screening applications for hearings in the Child and Family Court.

Child and Family Protectors will therefore need to have the necessary experience and knowledge to make a correct decision about whether a particular matter should first be referred to a social worker, the police, the Child and Family Advocate or a lay agency before it is referred to the Child and Family Court for a hearing.

The Commission further recommends that:

When a child has been or needs to be subjected to an emergency removal, the Child and Family Protector must see that the matter is dealt with as a matter of urgency.[85] Matters involving children with disabilities may also need urgent attention. Part of the work of the Child and Family Protector should be to consider whether any case requires a preliminary/or interim order from the Child and Family Court.

23.8 Human Resource Aspects relevant to the Child and Family Courts: Staffing, Training and Motivation[86]

23.8.1 Selection and Training of Adjudicators

It is recommended by the Commission that:

As regards training, although all adjudicating officers in the Child and Family Courts should have a Law degree and undergo the rounded and multi-disciplinary training or experience recommended and discussed above,[87] this should, realistically, not be an essential requirement before a magistrate or other appointed person can exercise the functions of an adjudicator in the Child and Family Court.

This recommendation is made for reasons of practicality and because it will take time to achieve the overall training required. It is essential that children and families have access to courts down to district magisterial level in the meantime.

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85 For the current provisions governing emergency removals of children, see S12 & S13 of the Child Care Act 74\1983.

86 As regards interpreters, see 13.4.7 above, at recommendation (e).

87 See Part 20.6 of this Chapter, above.

It is further recommended by the Commission that:

Because of the vital importance of court accessibility for children and/or families, all magistrates, even at district court level, should, in the first phase of a new legislative dispensation, be *ex officio* empowered to sit in the Child and Family Court.

However, it is important to recognise that non-specialist magistrates are not ideal and should be used only for what is referred to as 'the-initial phase' of implementation of the proposed new children's legislation in Part 20.13 of this Chapter below.

It is recommended by the Commission that:

In order to provide staff with additional motivation and skills, the proposed new children's legislation should allow for salary and status implications to attach to a course of training which should be set up for Child and Family Court adjudicators.

A classic example of a situation which requires special training of adjudicators is the so-called, 'child abuse accommodation syndrome'. It is well-documented that children find it difficult to disclose abuse and that they do not necessarily recall and retell abuse in a systematic and chronological fashion. It is typical for children to retract disclosures about child abuse, due to the fear generated by the crisis to which the disclosure gives rise.[88] This frequently gets them labelled as liars and unreliable witnesses. A judge who has only legal training about the credibility of witnesses might tend to reject evidence of a child given in such a fashion unless she/he was aware of the effects of the child abuse accommodation syndrome.

As regards placement of children in residential care, adjudicators in the Child and Family Courts need to be trained to the point where they are able to constructively explore other options with investigative social workers, particularly at hearings involving babies and pre-schoolers.
The Commission recommends that:

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88 See CJ Hobbs, HGI Hanks & JM Wynne *Child Abuse and Neglect: A. Clinician's Handbook* (Churchill-Livingston Publishers, 2ed.1999) at 181-182.

Specifically as regards alternative care orders which they will sometimes need to issue, adjudicators in the proposed Child and Family Courts should be trained in regard to the limitations and disadvantages inherent in any institutional ('residential') child care facility environment as opposed to a family environment. They should be required (by an express provision in the proposed new children's legislation) to consider all possible alternatives before placing a child in a residential care facility.

23.8.2 Child and Family Advocates

It is submitted that it is unfortunate that family advocates are presently confined mainly to undertaking work in certain divorce cases and international parental abduction cases. Other types of case arise where children may need skilled representation - for example, care proceedings arising out of abuse of a child. Also, confinement mainly to divorce and international abduction tends to limit family advocates somewhat to working primarily with a wealthier part of the population, namely, those who can afford court divorces and international travel or litigation.

The Commission therefore recommends that:

In the proposed new children's legislation, Family Advocates should be rendered (in addition to their present duties) eligible to represent children in any type of case that comes before the Child and Family Courts. They should be legislatively empowered to do so where requested by the Child and Family Court, by a Child and Family Protector, and of their own initiative.

The current title of ‘family advocate’ does not expressly indicate a child focus. Some children who desperately need the assistance of family advocates do not have families in the form of surviving close relatives.[89] In order to encourage support for children and accurately portray the true emphasis of their work, the current appellation of ‘family advocate’ should be changed.

The Commission therefore recommends that:

The present family advocates be renamed ‘Child and Family Advocates’. Should the legislature

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89 Some AIDS orphans fall into this category.

also wish to open the work of family advocates to attorneys in the future, within an appropriate new title would be 'Child and Family Representative'.[90] The Child and Family Advocates should be legislatively tasked with the function of representing children (or else arranging for appropriate legal representation) in the Child and Family Courts and in Child and Family Court matters taken on appeal or review to the High Court.

A possible concern with the recommendation above might be that it poses a danger of family advocates becoming overloaded with work. In the light of this concern the Commission recommends as follows:

Child and Family advocates should not be required to appear in every Child and Family Court case. Rather, they should be legislatively required to appear (or else arrange for appropriate legal representation) in cases where they consider it necessary or where they are requested to do so either by a Child and Family Protector or by an adjudicator in the Child and Family Court or in the High Court. The proposed legislative ground that should be used by a relevant person in deciding whether to require such representation should be:

"In any situation where it appears that the child would benefit substantially from legal representation either as regards the proceedings themselves or as regards achieving in the proceedings the best possible outcomes for the child.

In considering whether this ground applies, any views expressed by the child in regard to such representation must be taken into account. The Child's maturity must be taken into account when deciding how much weight to accord to the views of the child."

The Commission also recommends the following provision:

If she\he considers it necessary in order to represent (or arrange for legal representation of) a child in the Child and Family Court, the Child and Family Advocate can direct a family counsellor and/or other appropriate person to investigate the matter and prepare a report.

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90 For convenience and in order to avoid confusion with terminology, the designation of 'Child and Family Advocate' has been used in this Chapter.

Appropriate cases sometimes occur where an adult party deserves and requires legal representation at state expense.[91] For reasons of expense, it is anticipated that it will not be possible to cater for many such cases.

The Commission therefore recommends that:

The proposed new children's legislation should contain a provision which is to the effect that where an adjudicator in a Child and Family Court or a judge in a High Court dealing with a case taken on review or appeal from the Child and Family Court the considers that any adult party should in an exceptional case have legal representation at state expense via legal aid, an instruction to this effect will be directed to the nearest office of the Child and Family Advocate. The Child and Family Advocate may either undertake the representation or contract the representation out to a private lawyer who is currently on the Family-Law Roster.[92]

23.8.3 **The Child and Family Court Protector**

As is clear from earlier recommendations in this Chapter, the Commission believes that it is necessary to appoint an officer to each Child and Family Court to assist generally in its functions and also to carry out some specific tasks. The Child and Family Court Protector is based upon the previous concept of the children's court assistant as provided for under the Child Care Act 74/1983. However, by comparison with the children's court assistants a greater range of functions is proposed for the Child and Family Court Protector.

The Commission recommends as follows:

An officer called the Child and Family Court Protector should be appointed to serve at every Child and Family Court. In addition to the tasks already recommended for this officer, the

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91 For the results of some South African field research regarding representation for adult parties in the children's courts, see F. N. Zaal *Do Children Need Lawyers in the Children's Courts?* (Community Law Centre: University of the Western Cape, 1997) at pp. 52-58. Whilst this Study dealt mainly with legal representation for children in the children's courts, it included some findings in regard to representation for adults in these courts.

92 As to the proposed Family Law Roster of lawyers, see further Part 20.8.4, below. On representing adult parties, see also the last paragraph in Part 20.8.4.

proposed children's legislation should contain a provision indicating that it is and the function of the Child and Family Court Protector to assist the Child and Family Court generally in its functioning. In addition, express provisions in the legislation should indicate that it is the duty of the Child Family Court Protector to screen all matters brought to the court:

a) To see whether the case falls within the jurisdiction of the court and, and if so, whether further investigation\preparation is necessary and, if so, to issue directions; and\or
b) Where a Child is a party or may be significantly affected by an order of the Child and Family Court, to consider whether the ground for appointment of a legal representative to the child applies.[93]

Where it appears to the Child and Family Court Protector that the ground for appointment of a legal representative to a child does apply, the proposed new children's legislation should indicate that it is the duty of the Child and Family Court Protector to direct the local Child and Family Advocate to provide or arrange for child representation.

The Commission does not recommend that the Child and Family Court Protector be legislatively empowered to undertake legal representation of the Child or other party. However, as will appear from the recommendations below, the Commission does propose some other tasks for this officer.

The Commission recommends that:

The proposed new children's legislation should contain a provision which indicates that, where necessary, the Child and Family Court Protector should advise and assist unrepresented parties in their preparations for a hearing which is pending in the Child and Family Court. As part of their job requirements, Protectors should have an up-to-date knowledge of local services (such a social work or legal advice services) which may be useful to persons preparing for a hearing in the Child and Family Court. As part of their advice service, the Protectors should be able to explain such local services to Court clients, and offer

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93 Note that the wording of a ground for appointment of a legal representative to a child in a Child and Family Court matter has been recommended in the previous Part of this Chapter, above.

referrals to clients who wish this.[94]

In order to allow for as many cases as possible to be dealt with, and for cases to be dealt with as appropriately as possible, the Child and Family Court Protectors should also have to undertake certain further tasks.

The Commission recommends that:

The proposed new children's legislation should contain provisions which indicate that Child and Family Court Protectors may attempt to undertake mediation themselves or arrange for a family group conference (which they may not undertake themselves) where one of these two remedies appears to be particularly appropriate. Where the Child and Family Court Protector considers that a family group conference may be appropriate, it is recommended that the following procedure be legislated for: the Child and Family Court Protector must recommend to the Child and Family Court that a family group conference be instigated. If the Court agrees, or when instructed by an adjudicator of the Child and Family Court, the Child and Family Court Protector must set up a family group conference, record the outcome thereof, and convey this to the Court. Details of the conference must be kept on file as part of the Court's records. A member\s of the family may be required to pay the costs of the family group conference or, within the confines of the available Court budget, some or all of the costs may be borne by the State.

The capabilities proposed in the above recommendation are in line with the conclusions reached earlier in this Chapter as regards the usefulness (in some cases) of extra-curial problem-solving or 'lay forums'.

The Commission further recommends that:

A protector or adjudicator in the Child and Family Court should not instigate either mediation or a family group conference where he/she is currently aware that there has been an allegation

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94 On the reception duties of the Child and Family Court Protector, see also Part 20.7.2 of this Chapter, above.

of physical or sexual abuse of a child involved in the case. The protector or adjudicator may require a social worker or other professional person to provide a report if this will assist in reaching a decision about whether to initiate mediation or a family group conference.[95]

Because of the importance of the duties proposed for Child and Family Court Protectors, the Commission felt that it was necessary to give some consideration to the status of these officers.

The Commission recommends that:

One of the duties of the Child and Family Court Protector should be to issue an appropriate form to parents who wish to fill out a joint Parenting Plan in the form of a mutual and private contractual agreement between themselves. The proposed new children's legislation should allow for such a form to be issued. In addition to issuing the form, the Child and Family Court Protector should be prepared to sign as a witness to such a contract and keep an official copy of it.[96]

The Commission recommends that:

Child and Family Court Protectors must be recognised as court staff and, as such, their salaries must be paid by the Department of Justice. A dual-Departmental control structure will be damaging to the efficiency of the functioning of the Child and Family Courts and will thus be detrimental to the many children and families who need their services.

23.8.4 **Legal Aid Representation of Parties**

With regard to lawyers who represent persons at proceedings of the Child and Family Court, two basic considerations need to be kept in mind. Firstly, a party to such proceedings must, of course, always be at liberty to hire any legal representative of his or her choice. Secondly, in regard to payment or provision of legal representatives by the State, it is necessary to avoid wasting precious State financial

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95 In alternative care inquiries a social worker will have investigated the case before the final hearing in the Court. In other cases the request for the report could be sent to a family counsellor based at the local Child and Family Advocates' office.

96 For discussion and further recommendations concerning Parenting Plans, see 8.6, above.

resources.

The Commission recommends as follows:

Only the following lawyers should be eligible to represent children (or adult parties) at State expense in proceedings of the Child and Family Court:

1. **Child and Family Advocates**
2. **Lawyers on the Family-Law Roster**

Family Advocates are generally overloaded with cases at present. By opening their work to cover some additional forms of representation they may sometimes be extended beyond their capabilities in terms of staff availability.

It is therefore recommended by the Commission that:

The proposed new children's legislation should contain a provision which is to the effect that the Senior Child and Family Advocate at each office is empowered to contract Child and Family Court work out to private lawyers on the Family-Law Roster.

It should be noted that the above recommendation, if implemented, will have the added advantage of extending the possibilities of legal representation, for example, to rural districts not presently served by family advocates.

The Commission further recommends that:

Aside from what is provided for in this recommendation, the requirements for an attorney or advocate being listed on the Family Law Roster should be consigned to the regulations of the proposed children's legislation. These requirements should confine the Roster to lawyers who have appropriate interpersonal skills and experience for Child and Family Law work. Specialised courses of training and/or an accredited 80 hours of observation of proceedings in the Child and Family Court should qualify a lawyer for a placement on the Roster.

In order to improve the work of Child and Family Advocates and lawyers on the Family Law Roster, a set of guidelines should be developed 4 legal representatives who work in the Child and Family Courts. These guidelines could include, for example, rules preventing legal representatives from interfering with the work of investigative social workers and preventing them from using adversarial tactics in Court except where it absolutely necessary.

It is therefore recommended by the Commission that:

The proposed new children's legislation should contain a provision which empowers the Minister of Justice to publish in the regulations a set of guidelines in the form of a Code of Conduct for all lawyers representing parties in the Child and Family Courts. The Minister should also have the power to amend these guidelines.

The purpose underlying the Proposed Family Law Roster is to ensure that only lawyers with appropriate personal orientation and skills and knowledge be the recipients of precious State-funding for appearances in the Child and Family Court or appeals/reviews/referrals therefrom. Research has shown that where appropriate lawyers are not available for children's court work in particular, it is better to have no lawyer at all.

Provision must be made for the removal of lawyers from the Roster where it becomes apparent that they are not appropriate for work in the Child and Family Courts. Failure to do this will result in wastage of state financial resources and considerable disadvantage to vulnerable members of the public who appear in the courts.

It is therefore recommended by the Commission that:

The proposed new children's legislation should include a provision which is to the effect that three separate notations by three different Child and Family Court adjudicators in three separate cases should result in a lawyer being removed from the Family-Law Roster for 3 years. A lawyer should be entitled to challenge whether his\her removal was well-grounded in the High Court.

Lawyers not on the Roster must be eligible to appear or continue to appear when they are appointed privately by clients. Their removal from the Roster should only apply to legal-aid cases.

When it comes to State subsidisation of legal representation of parties (and affected children) in the Child and Family Courts, it is recommended that a distinction must be drawn between straight-forward matters and more complex or disputed matters. In order to save costs, only the latter should normally be considered appropriate for legal-aid all representation provided by the Child and Family Advocate.

As has been discussed earlier in this Chapter, children who are the focus of Child and Family Court proceedings will usually benefit considerably from a speedy resolution of their cases.[97]

The Commission therefore recommends that:

The proposed State subsidy system for legal representation by Family-Law Roster lawyers should be structured in such a way as to discourage legal representatives from unnecessarily dragging out and/or adjourning Child and Family Court proceedings. Failures in this regard must result in a negative Roster notation being made by the Court adjudicator.

The Commission further recommends that:

When legal representatives on the Family-Law Roster are appointed at State expense in order to represent children, they must come to Court prepared and able to present the hopes and wishes of the child-client (genuine child advocacy), as opposed to merely conveying to a Child and Family Court what certain adult persons feel is best for the child.

As has been indicated earlier in this Chapter, the question of legal representation at State expense for indigent adult parties also needs to be addressed in the proposed new children's legislation.[98]

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97 For further discussion and recommendations in regard to this issue, see Part 20.7.4.3 of this Chapter which is entitled, ‘Prompt Services’.

98 See Part 20.8.2 of this Chapter, above.

It is therefore recommended by the Commission that:

A provision should be included in the proposed new children's legislation to allow adult parties to apply, in exceptional cases, for the appointment of a legal representative at State expense. Such applications should be directed to be Child and Family Court Protector. The purpose of any such application should be to make out a case that there are reasonable grounds to consider that substantial injustice might result if legal representation is not provided to the applicant at State expense. On this limited basis, it is recommended that legal-aid be occasionally available to adult parties.

23.8.5 **Career Path and Motivation of Personnel**

Many of the problems currently being experienced in the children's courts can be attributed either to shortcomings in the training of staff or to a lack of the necessary interpersonal skills.

The Commission therefore recommends that:

It is necessary to be able to develop and retain in the Child and Family Court system a sufficient quota of professional persons who are child- and family-oriented, motivated and skilled. It is therefore recommended that a career ladder be opened up. Persons could begin as Child and Family Protectors (Level One Court, then Level Two) and then become eligible to serve as Child and Family Advocates (provided that they have been admitted as an Advocate). The next step up the ladder should be service as a Level One Child and Family Court adjudicator. A Level Two Child and Family Court adjudicator would be the next step. From there, the adjudicator should become eligible to be considered for possible promotion to a specialised family division of the High Court.

It is further recommended by the Commission that:

Private lawyers (attorneys and advocates) in good standing on the Family-Law Roster should, by completion of set numbers of cases involving preparation for and appearance in the Child and Family Court, become eligible to apply for appointments on the career ladder. Legal aid,

private representation or *pro amico* cases (to be encouraged as a community service) should all count. The details concerning the amount of experience required should be discussed by the Minister of Justice with bodies representing advocates and attorneys. The proposed new children's legislation should include a provision to the effect that the Minister of Justice, after consultation with representatives of the legal profession, has the power to issue regulations that indicate the requirements that will need to be met by an advocate or attorney in order to be placed either on the Family-Law Roster or at a specified point on the Child and Family Court career path. Social workers should be eligible for possible appointment as Child and Family Court Protectors. Upon completion of a University law degree, they should be able to apply to move up the ladder in accordance with the normal additional requirements. For any candidate, service as a Child and Family Court assessor or intermediary should also be considered.

By creating such life-time career prospects, it should become more possible to attract high-calibre personnel to appear in and staff our Child and Family Courts. This, in turn, should make these Courts much more cost-effective, in that more appropriate decisions will be given and a higher caseload accommodated. Obviously, children will be the main beneficiaries if more supportive and appropriate services are provided by the courts tasked with making alternative care, child protection and parental responsibilities orders.

The low status accorded to children's courts and the lack of a viable career path within the children's court structure were identified as problems by the Department of Justice in 1996.[99]

The Commission recommends that:

When magistrates and other persons work in the relevant capacity, they should be referred to in the proposed new children's legislation as Level One or Level Two (respectively) Child and Family Court adjudicators.

As has been noted in Part 20.7.2 of this Chapter above, the current title of 'Children's Court Assistant' as currently used in the Child Care Act 74 of 1983 implies a low status for these functionaries - that

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99 *National Plan of Action for the children of South Africa and the Role of the Department* (Dept. of Justice 1996) see the attached 'Report back to the NPA Steering Committee on Activities of the Justice Sectoral Working Group' at p.16.

they do no more than 'assist'.

It is therefore recommended by the Commission that:

An appropriate title for those who will work in a reception, screening, and general-support capacity in the Child and Family Courts in the future would be, 'Child and Family Court Protectors'.

In list form, the levels of the proposed career path could be indicated as follows:

1) Child and Family Court Protector: Level One Court;/Intermediary working in any Court with children;
2) Child and Family Court Protector: Level Two Court;
3) Child and Family Advocate/Family-Law Roster Representative/Assessor in Child and Family Court
4) Child and Family Court Adjudicator : Level One Court;
5) Child and Family Court Adjudicator: Level Two Court;
6) High Court Judge : Child and Family Division.

The Commission recommends as follows:

The minimum period of time that would need to be spent working at each of the levels of the career path listed above should be two years. It is not recommended that upward progress should be automatic because additional requirements might apply.

It is submitted that the career path set out in list form above should, if utilised in the proposed new children's legislation, help to provide a career path sufficiently attractive to encourage quality personnel to move into the field of Child and Family Court work.

The Commission further recommends as follows:

Allowing voluntary work to count will save the State costs. It should therefore be encouraged at all levels of the career path where feasible and appropriate.

As has already been recommended, for purely practical reasons and in order to have a system available immediately, the proposed new children's legislation should indicate that those who are currently magistrates are eligible to be selected to serve also as interim Level One Child and Family Court adjudicators. Experienced children's court commissioners should alternatively be rendered eligible to be selected to serve as Level Two Child and Family Court adjudicators. However, in order to encourage the multi-disciplinary training which has been recommended for these positions, it is suggested that additional status and/or pay should be linked to completion of requisite training courses that will enable adjudicators to appreciate and to some extent provide multi-disciplinary assessments of children's and other family members' developmental and therapeutic needs. The aim should be to have staff who interact constructively with dysfunctional/disputing family members.

Lawyers currently designated as 'family advocates' in terms of the Mediation in Certain Divorce Matters Act 24 of 1987 should, in terms of the proposed new children's legislation, be required to carry out the functions indicated for 'Child and Family Advocates' in the proposed new legislation.

Further to the basic model for a career path as listed above, the Commission recommends as follows:

The proposed career path for Child and Family Court work should be opened to certain other persons besides those who have traditionally become magistrates. For example, social workers who have had extensive Child and Family Court experience or academics who have taught Family Law should also be considered for entry into the career ladder. In the next Chapter of this discussion Paper, below recommendations are made in regard to a proposed unit of officers who will monitored Child care services. If such a unit is established, then it is recommended that service in such a unit for at least two years should render an officer eligible to apply for employment at stage 2) of the proposed Child and Family Court career path as listed above.

This less restrictive approach regarding eligible staff will have the added advantage of helping us to work more quickly towards a Court staff which has the appropriate interpersonal skills and which

better represents the demographics of our population.

It is submitted that a broad-based, rather than narrowly-technical approach to employment in the Child and Family Court career path will be more likely to secure applicants who are genuinely child and family oriented and capable in this specialist field. As has been recommended elsewhere in this Chapter, there needs to be full acceptance of the principle that Child and Family Court work requires inter-disciplinary skills and appropriate inter-personal skills, as opposed to merely legal skills alone. However, as has been recommended earlier, a law degree should be treated as an essential qualification for anyone who wishes to work as a Child and Family Court adjudicator. It has also been noted above that Child and Family Advocates will still have to be qualified advocates.

23.9 **Appeals, Reviews and the Role of the High Court**

It has been recommended earlier in this Chapter that a network of 'Child and Family Courts' should be set up in place of the children's courts and accorded jurisdiction to hear cases that may lead to alternative care for children and/or to the reallocation of parental responsibilities where this does not arise as part of divorce litigation. Although the High Court mainly deals with the reallocation of parental responsibilities (in the form of guardianship, custody or access) at divorce, its additional power to allocate these responsibilities between unmarried parents/caregivers will produce some concurrent jurisdiction between the High Court and what has been proposed by the Commission for the 'Child and Family Courts'.

The Commission recommends that:

Any party should be able to appeal against a decision of a Level One or Level Two Child and Family Court. The ground for the appeal should be that the decision was not in the best interests of a child or children who was/were the subject of the order or significantly affected by it. In addition to a party, a Social Work Agency which investigated the circumstances of a child should be able to appeal, as if the Agency were a party, where an alternative care or protection order was sought on behalf of the child.

The Commission recommends that:

With respect to matters heard at Level One Child and Family Courts, Level Two Courts should serve as courts of appeal or review. With respect to matters heard at Level Two Child and Family Courts, the High Court should serve as a Court of appeal or review.

Until the Child and Family Court network is functioning effectively, the High Court should retain all of its present jurisdiction with regard to the reallocation of parental responsibilities and generally in regard to children. However, once the Child and Family Court network is fully operational and working successfully, the question of whether the High Court should have concurrent jurisdiction with Child and Family Courts can be considered.

The question of the role of the High Court will no doubt have to be considered further by the Committee of the Department of Justice which is drafting Family Court legislation. Concerns presented to the Child Care Project Committee at workshops related to a perceived need to reduce the costs and delays associated with High Court litigation and to prevent rich applicants from having an unfair advantage because they can take matters directly to the High Court as a Court of first instance. At present, High Court judges do not specialise in child and Family-Law work and this is a matter for concern.

It is recommended that:

The question of creating a specialist Child and Family-Law division in the High Court merits careful consideration. However, detailed proposals in this regard would be beyond the jurisdiction of the Child Care Project Committee. If established, such a division could, inter alia, appropriately deal with reviews, appeals and occasional direct referrals from the Child and Family Court.

It is further recommended by the Commission that:

Whilst the proposed Level Two Child and Family Court will usually only consider documents and hear argument from legal representatives in appeals\reviews from the Level One Court, it is recommended that it be accorded the discretion to call for any or all parties or witnesses to give additional direct evidence where it considers, *prima facie*, that this appears to be

essential in the best interests of a child.[100]

Expanding the role of children's courts and renaming (and restructuring) them as proposed in this Chapter would be a major undertaking. It is likely that gaps in capabilities will sometimes appear, particularly during the early years of the operation of the proposed new Child and Family Court network. In a Level One Court, it will always be possible to move the matter up to a Level Two Court. However, it is conceivable that even a Level Two Child Family Court might occasionally find that a matter arises which it does not feel equipped to deal with. A cautious formulation of the proposed new children's legislation with 'safety-net' provisions is therefore necessary. It is for this reason that the Commission has not recommended any reduction in the jurisdiction of other courts besides the proposed Child and Family Courts (although the current children's courts would be replaced by them).

Because of the need for a cautious approach with backups in place (as discussed in the previous paragraph, above), the Commission recommends as follows:

A provision should be included in the proposed new children's legislation which renders it possible for a matter which would ordinarily fall within the jurisdiction of a Level Two Child and Family Court to be referred to the High Court for resolution. It should be possible for a Level Two Child and Family Court to make such a referral where the Level Two Court is able to provide reasons why it does not feel itself qualified to deal with a particularly complex matter and the High Court to which the matter is sent accepts those reasons as sufficient. The High Court would then hear the matter in its capacity as 'the upper guardian of all minors'.

Aside from the question of Level Two Courts sometimes referring individual matters to the High Court as recommended above, there is also the question of whether certain types of case are inherently so complex that they should be expressly excluded from the jurisdiction of the proposed Child and Family Courts and thus always dealt with directly by the High Court.

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100 The courts in Ireland have this power and it has been recommended by judges within that system as occasionally very useful for protecting children where the evidence furnished to the court *a quo* is found to be inadequate on a point or aspect.

In this regard, the Commission would welcome responses in regard to whether cases involving international abduction of children, surrogate motherhood, and perhaps other categories of cases which may be suggested, should expressly be designated in the proposed new children's legislation as falling within the jurisdiction of the High Court and not within that of the proposed Child and Family Courts.

23.10 Orders of the Child and Family Courts

23.10.1 Scope of Work

There is a wide range of remedies that children may need from the various South African courts. In order to give an idea of the scope of court decisions that may be needed by children in different circumstances, a list is provided below. The list provides some of the categories of cases that may lead to children needing assistance from courts.[101]

a)
Nasciturus, Child-Birth, Conception of Children,
Surrogate Motherhood.
Education and Health\Medical Rights of Children.
Abortion, Sterilization.
Name and Nationality Rights of Children.
Allocation or Termination of Parental Responsibilities (Current terminology: Guardianship, Custody, Access)
Child Aspects of Domestic Violence
Applications by Children for Adult Status

Applications by Children for Special Assistance : for example, for a guardian *ad litem*, or legal representative.
Consent of Child to Marry
Passports for Children

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101 Mr D Rothman, Director of the Family Court Centre, Durban, most kindly proposed some of the items on the list and his contribution is appreciatively acknowledged.

Child Abuse
Child Neglect
Foster Care Placements/Disputes
Residential Care Supervision
Adoption
Family Treatment
Children or Primary Caregivers in Need of Supervision
Referrals of Children or Primary Caregivers to Rehabilitation (for example, because of drug or alcohol abuse).
Assessments of Children or Family Members Who Interact with Children in a Dysfunctional Way.
Early Intervention and Protection for Children
Disability and Other Children in Need of Special Protection (Previously Referred to as Children in Especially Difficult Circumstances).
Child Abduction (Includes international aspects),
Refugee Children.
Child\Domestic Aspects of Immigration.
Early Childhood Development Programmes
Partial Care

b) Financial Aspects:

Child Maintenance to be received from private individuals: (comprises local and foreign/trans-national aspects).
State Grants for Children (includes proposed temporary emergency grants from Child and Family Court budget)
Paternity Testing,
Contribution Orders,
Protection of Property which Belongs to Children.

c) Delictual Damages for Children: arising out of cases under a) and b) above.

In regard to many of the above-listed categories of work, not merely final orders, but also emergency or urgent interim court relief\remedies may also sometimes be needed by children.

Court remedies for children is therefore a very wide and important area of service-delivery. In proposing a new system of courts, care must be taken that certain types of remedy do not cease to become available to the children who need them or become more difficult to obtain. It is for this reason that the Commission, in proposing the establishment of Child and Family Courts, has not recommended that the case jurisdiction of any of the other courts be reduced until there has been time to review the success of the proposed new system .[102]

The Commission recommends that:

The most appropriate time to consider whether certain types of Child or Family-related cases should be removed from the jurisdiction of courts where they are presently dealt with will be after the proposed network of Child and Family Courts become successfully operational. In the short-term, a situation where there is some degree of concurrent jurisdiction will be safer and will allow for a natural testing of the services of the proposed Child and Family Courts. Concurrent jurisdiction in a few categories of cases may even benefit some children by allowing for improved access to court services. The Project Committee preparing Family Court legislation is the appropriate body to recommend the removal of certain types of case from the jurisdiction of some of our courts so that they may be reallocated to other courts.

The basic approach recommended by the Commission is that:

The proposed Child and Family Courts should replace the present children's courts and take over all of their existing functions. Also, the Child and Family Courts should have additional capabilities. The Child and Family Courts should be set up as centres of excellence that specialise in providing legally-binding care, protection and parental responsibilities orders (the latter outside of divorce litigation) on behalf of children.

The main focus of the Child and Family Courts should thus be the overlapping concepts of:

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102 Although, of course, it has been recommended that the present children's courts be completely replaced by the proposed Child and Family Courts.

a) alternative care arrangements for children;

b) protection of children;

c) reallocation of parental responsibilities outside of divorce litigation

In accordance with the above three categories of remedies, some specific capabilities for the Child and Family Courts are proposed below. Whilst it is somewhat artificial to try to make the distinction, for convenience and ease of reference, the remedies have been grouped under the 5 headings of:

1. Existing remedies or orders that can be provided by the children's courts;
2. Additional alternative care orders;
3. Additional child protection orders;
4. Parental responsibility orders;
5. Other orders.

23.10.2**Existing Powers of the Children's Courts**

It is recommended by the Commission that:

All of the existing functions and powers of the children's courts should be taken over by the proposed Child and Family Courts. However, it should be noted that the Commission has recommended specific improvements and additions in many instances.

23.10.3**Additional Alternative Care Orders**[103]

In this section, additions and modifications to existing care order powers are suggested.

It is recommended by the Commission that:

The wording of the current S15(1)(a) of the Child Care Act 74 of 1983 should be amended. The Court should continue to have the power to order that a child be returned to or remain in the custody of the parent/s or other primary caregiver. However, in the alternative, it should be

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103 See also the recommendations in 13.3.7 and 19.8.3.1 above where additional court powers are proposed.

accorded the power to change the child's present custody by placing the child in the custody of any other suitable person designated by the Court.

The order presently allowed for in terms of S15(1)(a) must also be amended to allow for the possibility of a return date when the matter can be brought back to the Court for monitoring purposes. However, this is a general capability which the Commission recommends should be applicable to any order made by the Child and Family Court.

It is further recommended by the Commission that:

When making a care order under the present S15 of the Child Care Act, the Court needs the power to reallocate any or all parental an responsibilities and rights. These may need to be divided out between the person designated to have custody of the child and other persons.

The Court should be accorded a power to place any/all caregivers under the supervision of another person such as a social worker, and should have the power to impose any condition or any other requirements the Court deems appropriate. Where supervision is imposed, it is recommended that the order be termed,(as proposed in Kenya), 'a supervision order'.

As can be seen from the above recommendation, in terms of a proposed 'Supervision Order,' a child may be permitted by the Court to remain in the care of a person/s; but that care will henceforth be exercised under the supervision of a social worker or other suitable person designated by the Court.[104]

It is further recommended by the Commission that:

The Court should not be compelled to require supervision as it currently is if it makes an order under S 15(1)(a) the Child Care Act. Other conditions should be available as an alternative.

It is recommended by the Commission that:

•• **The Child and Family Court must be empowered to place children with special needs**

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104 See the Kenyan Children Bill 1998 S125-127.

in appropriate facilities registered by the Departments of Health or Education.[105]

- **Placement with a suitable foster parent as is presently possible under S15(1)(b) of the Child Care Act should continue to be an option. But the Court should have the power to allocate any/all parental responsibilities and rights to the foster parent during the period of foster care. It should no longer be mandatory for all foster care placements to be 'under the supervision of a social worker'. Instead, it is recommended that the Court should have to make a specific decision in this regard.**

The Commission recommends that:

As regards S15(1)(c)-(d) of the Child Care Act, the Child and Family Court should have the power to send a child to any available category of residential child care facility which it deems appropriate for the child concerned. In accordance with previous recommendations in this Discussion Paper, the Court would designate a specified form of residential care programme as offered in a Child and Youth Care Centre.[106]

With regard to a child in need of special protection (such as a disabled child or child infected by AIDS) the Court should have the power, subject to the consent of the person in charge of the Facility or Centre, to designate a specific Facility or Child and Youth Centre as a first-choice placement destination for the child.

The Court should have the power to allocate any/all parental responsibilities and rights (with regard to the child) to the person in charge of the designated child care facility if this is deemed appropriate.

As an alternative to removing a child into a new form of care, the Child and Family Court should be accorded the power, in an appropriate case, to instigate early intervention services for a child and her family and/or prefer the family to an approved family preservation programme.

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105 See 13.4.7 above.

106 See 17.6.4 above.

It is therefore recommended by the Commission that:

The proposed new children's legislation should contain a provision which is to the effect that the Child and Family Courts can, in a suitable case, refer a child and her present caregivers to early intervention services and/or an approved family preservation programme.[107] The Court should also have the power to order the removal of another person (such as a perpetrator of child abuse) from the child's home, rather than the child.

Under the Child Care Act in its present form, some of the alternative care orders of the Children's Courts can be administratively altered or terminated.

It is recommended by the Commission that:

As a general principle, orders of the Child and Family Court must be accorded proper, binding status in that it should only be possible to change, reverse or terminate them by going back to the Child and Family Court, or by a process of review or appeal in a higher Court.

However, one exception to this which is proposed is Care Orders which have resulted in a child in need of alternative care being placed in a residential care facility. Where officials designated by the Minister of Social Development decide to change such an Order, this should be permissible without returning to the Court which gave the Order for permission, but only provided that the intention is not to move the child deeper into the care system. In other words, it should be permissible where the child will not be moved into a more restrictive or controlled environment -the child would not be facing increased restrictions upon his/her liberty as compared with what was laid down in the Court Order. However, the child must have the right to be returned to the court if she wishes where any change in her placement is proposed. Also, in order to move a child into an environment where she/he will face greater restrictions upon his/her liberty, it must be necessary to go back to the Child and Family Court with ground.

It is recommended by the Commission that:

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107 See further 9.6 and 9.9 above.

As regards S15(3) of the Child Care Act 74 of 1983, it should continue to be possible for a child to be kept in a place of safety where necessary and appropriate, pending implementation of an order of the Court. As regards S15(5), it should not be permissible for the Court's order to be administratively altered in a manner which will lead to the child being placed in a more restrictive environment than was ordered by the Court. If it is not possible for officials within the Department of Social Development to implement an Order of the Child and Family Court in a manner that avoids this, they should be obliged to bring the matter back to the Court for reconsideration.[108]

23.10.4**Additional Child Protection Orders**

With respect to the child protection powers currently accorded to children's courts under the present wording of the Child Care Act 74/1983, this Part of the Chapter lists some proposed additional or modified powers designed to add to the capabilities of the proposed Child and Family Courts.

Release\Return Order: It is recommended that the Court should have the power to order that a child be released from or returned to the custody of any person. This provision is designed to deal with wrongful holding of children - including children not designated as being in need of alternative care.

Consent to medical treatment or a medical operation: Subject to the recommendation in 11.9.5 above, it is recommended that the Child and Family Court should have the power to provide legally-binding consent to any medical treatment of or operation performed on any child. It is further recommended that the Court should be accorded the power to supply such consent in any situation where it decides that this is necessary in the best interests of the child. The proposed power should allow the Court to replace or override consent that would normally be supplied (in law) by another person (including the child concerned). The Court should even have the power to supply consent after medical treatment or an operation has been completed. Any person with an interest in the welfare of the child should have the power to

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108 See 17.8.1.1 and 17.8.1.7, above.

seek such an order from the court.[109]

Counselling Order: the Court should be accorded the power to order a person to seek the assistance of a professional counsellor where this is necessary for the care or protection of a child. The Court may need to designate State funding for this purpose.

An important aspect of Child protection work involves assessments of children and/or their family members. It is necessary that the proposed Child and Family Courts should be accorded the power to send children or their family members for assessments relating to , for example, the risk of abuse to the child. Other assessments, such as psychological assessments and assessments regarding whether a child needs remedial education, may also be useful in certain cases.

The Commission therefore recommends that:

Assessment Order: the Court should be accorded the power to order a child or other person to undergo a professional assessment considered by the Court to be necessary in the best interests of a child and necessary for the proper resolution of a case. The Court should have the discretion to provide for State funds for this if a party involved in the case cannot afford to pay for the assessment.

Hospital Retention Powers: it is recommended that all registered hospitals should be accorded the power to retain custody of a 'suspected child' for up to 72 hours. A 'suspected child' is a child who has injuries which a member of staff of the hospital or any medical doctor believes, on reasonable grounds, are indicative under the circumstances of child abuse. Within 72 hours, the hospital must obtain an order from the Child and Family Court directing it to hold the child for a longer period of time pending further inquiry or else directing another resolution of the matter. Hospital staff or medical doctors who have made bona fide representations under the section, as well as the hospital concerned, should be rendered immune from any legal action against them arising from use of this provision.[110]

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109 With regard to street children, see 13.7.5, second recommendation (a), above.

110 See further 10.2.11 above.

In order to protect children, it will sometimes be necessary for the Courts to require persons to undertake programmes required for different purposes -for example, treatment for alcohol dependency or a specified programme for sexual offenders.

The Commission therefore recommends as follows:

Treatment or Service Order: it is recommended that the Court should be accorded the power to order that any person undergo a treatment or training programme (such as a treatment programme for sexual offenders or a parenting skills programme, for example) where this is needed for the protection of any child or children.

Because of the extreme vulnerability of children, it may sometimes be necessary to make other individuals accountable for their actions against children or failure to take action. It will also be remembered that the Child Care Project Committee has been urged by many respondents to equip with the proposed children's legislation with 'teeth' in the form of sanctions against non-compliance. In the light of these considerations, the Commission would like to receive views in regard to whether one or both of the next two orders proposed below should be included as part of the remedies available to the Child and Family Courts:

Personal Accountability Order: this order would accord to the Court the power to order to appear before it any particular individual who may have failed in his/her obligations towards a particular child. These obligations may have arisen contractually, because of consanguinity or a relationship with child, or simply *ex officio* because of a position which a person occupies. They may have also arisen from a professional obligation towards a child or simply from a profession practised by the person.

It is recommended that in the case of a personal accountability order the obliged person should be required to appear before the Court and to show good reason as to why she/he failed to perform or acted wrongly. The Court, at its hearing, should consider whether there has been a wrongful or negligent failure to provide a service delivery or action to which the child was entitled. If it finds that there has been a failure, the Court may fine the person concerned and/or take such other steps as it considers appropriate.

Service Injunction: This would be relevant where it appears to the Court that an official or Government authority has failed to sufficiently assist a child in getting access to services to which he/she is legally entitled. It is recommended that the Court may order such officials/authority to provide the assistance and/or service by a date set by the Court. Should the official/authority not oblige by due date, the Court should have the power to call the official or a representative of an authority before it to explain the failure. Should the Court find that an official has negligently or otherwise wrongfully failed in his/her duties, then the Court should have the power to issue an appropriate fine. The Court may also\alternatively require the official to pay damages\costs to the person disadvantaged. The Court should have the power to order an official to pay from his\her private funds\through a garnishee order, or require the relevant Department\Provincial\Local or other authority to pay a fine and\or damages\compensation.[111]

A concern which the Commission has with regard to the Personal Accountability Order and Service Injunction as described above is whether the powers accorded under them might be abused by Child and Family Court Adjudicators. The idea is to have adjudicators who are sufficiently well-trained and appropriately selected that they would not abuse their powers. The Commission would like to seek opinion in regard to whether the next recommendation below would provide a sufficient safeguard.

It is recommended by the Commission that:

Any person who is subjected to a personal accountability order or a Service Injunction may appeal against the order to a higher Court. The appeal will be successful if it is established by the appellant that the Order was imposed without sufficient cause.

Alternative Remedies Order: This Order would accord to the Court the power, at any stage before or after it issues any other kind of order, to require any person to undergo or participate in counselling, mediation, a family group conference, or any other form of appropriate non-

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111 At the time of writing, reports appeared in the press in Durban to the effect that officials had failed to pay a disability grant to an applicant despite persistent attempts by the applicant to gain payment and despite the fact that the grant to been approved more than six years ago.

adversarial extra-curial problem-solving or decision-making meeting or forum, where this appears to be necessary in furthering the best interests of a child .[112]

Child Protection Register Order: It is recommended that a person who considers that his or her name has wrongly been listed on the National Child Protection Register should be entitled to challenge that listing by bringing an application in the Child and Family Court.

It is further recommended by the Commission that:

The Child and Family Court ought also to be able to reach a determination, on a balance of probabilities and if necessary *mero motu*, that a person should not be permitted to undertake employment or voluntary services which involve him\her in activities with children. An aggrieved person should have the right to appeal against this determination to a higher Court. A Child and Family Court which reaches such a determination should be required to send the personal particulars of the person to be recorded on a National Child Protection Register. Any person who applies for employment which involves contact with children may be required by the prospective employer to furnish a certificate from any Child and Family Court Protector that she\he is not listed on the register. Failure to supply such a certificate when requested to do so may be treated by the prospective employer as a negative factor when considering the prospective employee.[113]

Child Protection Orders: Although the Child and Family Court is not a Criminal Court, it should have extensive powers in respect of a person whom it finds (on a balance of probabilities) to have perpetrated child abuse, child neglect, or domestic violence. It will need the power, on appropriate occasions, to order the perpetrator to leave the home where the child lives, to order the perpetrator to contribute to an abused child's or other person's treatment, or to provide maintenance.

Orders made by a Child and Family Court in respect of persons found to be perpetrators should not provide immunity for such offenders with regard to a possible criminal court prosecution.

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112 Aspects of this may be found in S83 of the New Zealand, Children, Young Person and Families Act, 1989.

113 A similar system is used in the Netherlands. See also Chapter 10 at Part 10.5 above.

However, it is recommended by the Commission that:

The proposed new children's legislation should contain a provision which is to the effect that the prosecution, in considering whether to prosecute any person who has allegedly abused a child, should be required to consider any representations made by a Child and Family Court Protector if these are to the effect that the offender [perhaps conditionally or temporarily] should not be subjected to prosecution. Such representations must only be made where (from the evidence obtained by the Child and Family Court) the best interests of a child will not be served by an immediate prosecution of the offender.

The motivation underlying the above recommendation does not relate to an intention to interfere with the discretion of prosecutors. Rather, the concern is with the child victim in cases where the perpetrator is closely related to the child. Where the perpetrator accepts full responsibility for the abuse and agrees to commit himself to an approved treatment programme (with the prospect of a criminal case being opened if he deviates in any way from the requirements of the programme) it may sometimes be in the best interests of the child victim to withhold a criminal prosecution. The recommendation would therefore entail a constructive relationship between prosecutors and Child and Family Court Protector's.

It is further recommended by the Commission that:

Where it finds that this is necessary in the best interests of a child, the Child and Family Court should have a power to order a perpetrator of child abuse or any other person to undertake a specified rehabilitation programme and may attach conditions.

As far as requesting the Child and Family Court to change an Order goes, any person should be entitled to make such an application and be permitted to attempt to show that good reasons exist for the requested change. For example, a person might be permitted to show that an Order is no longer in the best interests of a child who was the subject of the Order. It is recommended that technical procedures should not be set up which limit persons who can approach the Child and Family Court. Even persons who were not originally parties to the Order should be permitted to approach the Court. Frivolous applications or ill-motivated applications to interfere with Orders of the Court can be dealt with by the Court making an appropriate Order as to costs or, in extreme cases, issuing a fine and

ordering that no branch of the Child and Family Court will entertain repetitions of the application.

Protection for foreign children: the Commission believes that the proposed Child and Family Courts have a role to play in protecting refugee children.

It is therefore proposed by the Commission that:

The proposed new children's legislation should contain a provision which is to the effect that, where South African government authorities intend to deport or repatriate any foreign child, they must first obtain an order from the Child and Family Court which is to the effect that proper and sufficient arrangements have been made for receiving the child at the place to which the South African authorities propose to deport or repatriate the child. The child concerned should have a right to appear before the Court for a hearing which is aimed at establishing whether proper and sufficient arrangements have been made.

In the light of recommendations in regard to refugee children that have been made earlier in this Discussion Paper, the Commission would welcome responses in regard to the above recommendation and whether the proposed Child and Family Courts ought to provide any further remedies for refugee/foreign children.[114]

23.10.5 Reallocation of Parental Responsibilities

In Chapter 8 of this Discussion Paper, it has been recommended that the existing common-law system utilising the three basic parental rights over children of guardianship, custody and access be replaced by a more flexible system utilising a wider range of parental responsibilities. It is often difficult to make appropriate alternative care or protection orders for children without dealing with the related question of which caregiver should exercise parental responsibilities. An inability to reallocate parental responsibilities has therefore left a significant gap in the services which the children's courts are currently able to provide.

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114 For discussion and recommendations concerning refugee and undocumented immigrant children, see 22.4 below.

It is therefore recommended by the Commission that:

The proposed children's legislation should include a provision which is to the effect that the Child and Family Courts are accorded a power, on behalf of any child, to reallocate parental responsibilities to any suitable person or persons. However, where a reallocation of parental responsibilities needs to occur as part of divorce arrangements in a situation of a pending divorce of caregivers, then such a reallocation must be made by a divorce court or a High Court.

The purpose of the above recommendation is to provide for reallocation of parental responsibilities by the Child and Family Courts, but in a manner which will not allow them to intrude upon the jurisdiction of the courts which currently grant divorces.[115]

It is further recommended that the Child and Family Court should have the following capability:

Parental Responsibilities Undertaking: The Court should have the power to order a person to sign an undertaking with or without sureties to exercise certain parental responsibilities.[116]

The Commission recommends that:

Besides the Child and Family Courts, all other courts which presently allocate guardianship, custody and access should be legislatively empowered to use the proposed new system of parental responsibilities.[117]

23.10.6**Other Orders**

Ordering a Lay Forum

The Commission recommends that:

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115 See 8.5.3.4 above.

116 This idea is drawn from article 120(2)(b) of the Kenyan Children's Bill 1998.

117 For the specific powers recommended for foster care cases, see 17.6.5 above.

The Child and Family Court ought to have the power to instigate extra-curial decision-making systems such as mediation and/or family group conferencing if and when required.[118]

Of the lay forums, mediation by the Child and Family Court Protector would sometimes be a relatively simple and inexpensive option. On the other hand, family group conferences require a thorough preparation process and specialised skills by the facilitator. If inappropriately used, they can result in failure to protect an abused child.

The Commission recommends that:

The proposed children's legislation should contain a provision to the effect that Family group conferences should only be ordered by the Court where they appear to be essential and there is a recognised family group conference programme in place.

The Commission also recommends that:

The proposed children's legislation should contain a provision which is to the effect that the Minister of Justice may, by means of regulations published in terms of the proposed children's legislation, regulates the instigation of exra-curial programmes or services (including lay forums) by Child in Family Courts.

The Commission further recommends that:

The Child and Family Courts should have access to a limited budget to allow them to provide for expenses that are essential in achieving a proper resolution of certain cases. Some recommended uses for the budget are as follows:

Emergency Maintenance Grant: The Court should be provided with a limited budget from which it may order the payment of short-term maintenance on behalf of a child in urgent need. An example of such a case is where a Court, having heard the evidence, comes to a

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118 See further Part 20.6.3.1 of this Chapter above.

conclusion that a grant would prevent the removal of a child into (much more expensive) alternative State care. Another case might be where a child with special needs is in dire need of maintenance of some kind. Again, the maintenance could be made on a temporary basis until some other form of financial grant can be accessed or increased or supplemented.[119]

Monitoring and Variation of Orders

It is recommended by the Commission that:

The proposed new children's legislation should include provisions which accord to the Child and Family Court the power to monitor and\or vary any of its orders and to set times at which a party/ies or the child may have to reappear before the court.[120]

In regard to variation of orders of the Child and Family Courts, it should be noted that it has already been recommended that the Ministerial powers to alter alternative care child placements as ordered by a court should be reduced the court substituted as the authority for some aspects of this work.[121]

Aside from the power to vary orders, the Commission believes that, where it deems this to be appropriate, the Child and Family Court should also be accorded a monitoring power. What is meant here is a power to do a follow-up on any case which it heard earlier and, if necessary, amend the original Court Order.

It is therefore recommended by the Commission that:

The proposed new children's legislation should contain a provision which is to the effect that the Child and Family Court may, when making its original order, instruct that a party/ies or any other person, be required to reappear before the Court at a date set in the future.

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119 See 9.9 above. See also the recommendations at the end of 13.1 above.

120 See *Collation* at pp 102-104. At 19.8.3.2 above it is recommended that the court should have the power to review extensions of placements.

121 See the recommendations in Part 20.10.3 of this Chapter, above. See also the responses considered in Part 20.2, above.

The Court should be encouraged to use this power where it is placing a child in residential care or where it is, for any reason, concerned to monitor the future progress of the child or, occasionally, an adult party (such as an elderly foster parent). From its proposed budget, the Court should have a discretion to decide to pay travel and accommodation costs necessarily required.

Variation of Orders: since the circumstances of any child may change, it should not be procedurally difficult to approach a Child and Family Court in order to apply for a change in the Court's order. For example, a person may wish to approach the Court in order to show that an Order is no longer in the best interests of the child who is the subject of the Order. Frivolous, ill-motivated or unnecessarily repeated applications to interfere with Orders of the Court can be dealt with by the Court making an appropriate Order as to costs or, in extreme cases, issuing a fine and ordering that no branch of the Child and Family Court will entertain repetitions of the application.

The Commission therefore recommends that:

Any person with an interest in the welfare of a Child who is currently subject to an order of the Child and Family Court should be permitted to apply to the Child and Family Court in order to attempt to show that there are good reasons which indicate that it is in the best interests of the child for the order of the Child and Family Court to be changed.

Except in the case of an application for variation by the child who is subject to the order sought to be varied, or by the parent or sibling of such a child, all applicants will bear an onus to convince the Child and Family Court Protector *in limine* that the application is well grounded.

Where the Court hears an application for variation and considers that the application is ill-motivated or has been unnecessarily repeated, it may take this into account when considering a possible costs order and/or it may fine the applicant. The Court may also order that no branch of the Child and Family Court will entertain repetitions of the application.

Maintenance orders: it is not envisaged by the Commission that the proposed Child and Family Courts should be expected to function as duplicate Maintenance Courts. However, after the evidence in a Child and Family Court has been traversed, it may appear to the Court that it is necessary to give an instruction in regard to payment of maintenance, on behalf of the child, by a private individual. It

is submitted that, in such an instance, it would be better to allow the Child and Family Court to make the necessary order, rather than the case having to be sent to another court.

It is therefore recommended by the Commission that:

The proposed children's legislation should contain a provision to the effect that, where it appears to a Child and Family Court that it is necessary to issue an instruction in regard to maintenance, the Court may issue an order in this regard.

Domestic Violence: the Commission is not of the view that the proposed Child and Family Courts should operate as duplicate Family Violence Courts. However, after having heard the evidence in an alternative care, child protection or parental responsibilities case, the Court may perceive that a Domestic Violence Order is needed.

The Commission therefore recommends that:

Where it finds that this is necessary on behalf of any child, the Child and Family Court should have full powers to issue an interim protection order or a protection order as provided for in the Domestic Violence Act 116/1998.[122]

The Commission recommends as follows:

The proposed new children's legislation should include a provision to the effect that the Minister of Justice may publish regulations in which a power to make additional types of order on behalf of children is accorded to the Child and Family Courts. However, the Minister may only provide for additional orders which are relevant to the reallocation of parental responsibilities or the care or protection of children.

With regard to either existing or new categories of orders to be issued by the Child and Family Courts, the Minister of Justice may, by means of regulations published in terms of the proposed new children's legislation, indicate that certain types of order may be issued only

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122 See especially sections 5-7 of the Domestic Violence Act 116/1998.

by a Level Two Child and Family Court, and not by a Level One Court.

The motivation for including the above recommendation is a view by the Commission that some flexibility, in the form of an ability to provide new or additional Court services in the light of possible changing needs of children, it is required. The proposed provision is also a 'safety net' one in that it would also allow the Minister to respond to any gaps in Court services relevant to parental responsibilities or care /protection of children.

Urgent/Interim Orders: with regard to all the types of orders that have been recommended for the Child and Family Courts, it is recommended that, where the urgency of the matter so requires, the Court should have the power to issue and interim order, if necessary, upon an *ex parte* basis combined with use of a return day.

Damages\Compensation Order: It is recommended that, amongst the new powers which ought to be accorded to a Child and Family Court, is the power to award damages (like a regular Civil Court) which have arisen out of a case heard by it. For example, where a child has been raped, it should not be necessary for that child to have to be taken before another Court for damages to be obtained from the perpetrator. Further, it should even be possible for the parent of the child, or a witness or other person, to claim damages. For example, damages might be claimed for *crimen iniuria* by a third person who was compelled to witness abuse of the child. This adds support to the suggestion made earlier that the right to become a party to proceedings in the Child and Family Court should not be overly circumscribed by a barrier of technical requirements.

Openness to multi-party involvement is supported by the above recommendation. The aim of the recommendation is to encourage reparations to victims and not to force them to go to another court, namely, a civil court, in order to obtain such reparations. The capability recommended above might be used for purposes of restorative Justice by, for example, ordering a perpetrator of child abuse to cover the costs of treatment for the child or, in any other way, to compensate financially for the damage done.

It should be noted that other orders for the proposed Child and Family Courts have been recommended in other chapters of this Discussion Paper.

23.10.7 **Duration of Orders**

As regards duration of orders, S16 of the Child Care Act 74 of 1983 currently provides that a children's court order made on behalf of the child found to be in need of care under S15 'shall lapse' after a maximum period of two years.
The Commission recommends that:

Subject to the recommendation in 17.9.5 above, the present maximum duration of two years should continue to be applicable to Child and Family Court orders directing temporary placements of children into alternative care. However, for other types of order, the Court should have the power to indicate the duration of its order without a two-year limit. It is submitted that this will be necessary because many different kinds of orders will be issued by the Court.

Costs Orders: It is recommended that the proposed new children's legislation should contain an express provision to the effect that, whilst the Child and Family Courts should not normally make costs orders, they have the power to do so.

The purpose of the above recommendation is to allow the Court the power to make a costs award against a party whose behaviour merits this.

23.11 **Evidence**

One of the most serious problems which our present multiple-court system poses for child victims or child witnesses is enhanced possibilities for secondary systemic abuse.[123]

It is therefore recommended by the Commission that the proposed new children's legislation should contain provisions which expressly direct as follows:

Information which emerges at a completed criminal trial may be used at a subsequent Child and Family Court hearing. Information which emerges at a Child and Family Court hearing can

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123 For a discussion of this problem, see Part 20.3.1 of this Chapter, above.

only be used at a different court hearing if it will not be to the disadvantage or against the best interests of a child who was the subject of the original Child and Family Court hearing or gave evidence as a witness. In order to use such information, the permission of the Child and Family Court which obtained that information would have to be obtained from the presiding officer in writing.

It is further recommended by the Commission that:

Once any other Court has reached an evidential determination - whether it be on the, "beyond reasonable doubt" or merely upon the, "balance of probabilities," evidential test, a Child and Family Court should be able to use such a determination without requiring the same evidence to be produced again before it. The Child and Family Court or any party appearing before it should have the right, however, to add to the record received from the Criminal or any other Court by obtaining or producing additional evidence.

The motivation underlying the above to recommendations is that, by suggesting procedures encouraging the Child and Family Court to use evidence obtained from other Courts, the Commission aims to reduce the need for the child-victim to go through the traumatic process of rehearsing evidence again for a second time.

The Commission also recommends that:

The Child and Family Court requires the power and capability to order that the evidence of a child be taken via an intermediary. Whether or not intermediaries are used to take evidence from a child, the proposed children's legislation should contain a provision which forbids the putting of any 'insulting question', to the child.[124] [See also Part 7.4., above].

23.12. **Court Budget\power to Order Payments**

A number of the capabilities recommended in this Chapter involve the Court ordering limited payments.

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124 See also Part 20.7.4.2 of this Chapter, above.

It is therefore recommended by the Commission that:

The Child and Family Court should have a power to order such payments from a special budget, subject to availability of funds still remaining in that budget.

As can be seen in the Chapter, the idea behind the proposed Court budget would be to apply it to cases where limited, short-term or one-off funding, as ordered by the Court, is urgently required in the best interests of a child and\or could save the State much more expenditure in the long-term. The instances recommended are thus mainly those of a cost-saving kind. The aim would also be to meet the best interests of children in dire circumstances and where other resources have, for whatever reason, not been accessed or have not sufficed.

It is further recommended by the Commission that:

The Child and Family Court's power to impose fines should be used to bring funds into the Court's budget.

23.13 Implementation: Should Child and Family Court Work Be Phased in by Stages?

In this Chapter, it has been proposed that the Child and Family Courts, by comparison with the existing Children's Courts, should take on a broader range of work. It would be necessary to ensure that the Child and Family Courts had the resources to cope with this wider range of work. As regards implementation, the legislature might possibly decide that work should be accorded to the Child and Family Courts in stages.

The proposals in this Chapter have been designed in such a way that the legislature could, if it so desires, implement the work of the proposed Child and Family Courts in phases. Aspects which could be separately implemented (although not necessarily in the sequence indicated) are as follows:

1) Select and provide courses of training for staff who are to serve as Child and Family Court adjudicators and protectors.

2) Rename the existing children's courts as Child and Family Courts and allocate the alternative

care functions in the proposed new children's legislation.

3) Allocate the protection order functions proposed in the new children's legislation to the Child and Family Courts.

4) Select and provide courses of training for staff who are to serve as Level Two Child and Family Court adjudicators and protectors.

5) Designate certain courts as Level Two Child and Family Courts. Designate the remaining Child and Family Courts as Level One Courts.

6) Staff courts which will serve as Level Two Child and Family Courts.

7) Allocate the parental responsibility order functions proposed in the new children's legislation to the Child and Family Courts.

8) Bring into force the provisions in the new children's legislation which enable and require family advocates (or the renamed ‘Child and Family Advocates’) to appear in all Child and Family Courts.

9) Allocate a budget to the Child and Family Courts and then bring into force the provisions in the new children's legislation that require such a budget.

10) Accord to all other courts (besides the Child and Family Courts) the power to issue parental responsibilities orders.

11) Accord to Sexual Offences Courts the power to issue alternative care or child protection orders.

As indicated above, if a phasing-in approach is used, the Child and Family Courts could initially, for example, be accorded only the work currently done the by the Children's Courts and thus replace

them only.[125] Related but additional categories of work as recommended earlier in this Chapter could subsequently be added as and when the legislature found this to be appropriate.

The proposed new children's statute could be worded in such a way as to make this possible.

125 However, it should be noted that, because of the much wider powers recommended in the proposed new children's legislation for child care work, the Child and Family Courts would be able to choose from a much broader range of orders for children in need of alternative care than the present Children's Courts can under the existing Child Care Act 74/1983.

CHAPTER 24

MONITORING THE IMPLEMENTATION OF THE NEW CHILD CARE LEGISLATION

24.1 Introduction

Whether children enjoy the full protection of their rights needs to be determined through monitoring. Monitoring, in general, is a continuous follow-up of the activities of government, non-governmental organisations (NGOs) and other child related structures to ensure the effective implementation of the CRC and child welfare legislation. For effective monitoring, a sound monitoring structure is needed. The kind of structure a country will adopt will depend on its own domestic situation.

This Chapter commences by examining international mechanisms that monitor the protection of children's rights. An overview is then given of mechanisms in other countries that monitor the protection of children's rights. Monitoring mechanisms in the form of legislation and mechanisms that currently exist in South Africa at national, provincial and local level are also outlined. Finally, recommendations for monitoring the implementation of the new child care legislation are made.

24.2 International child's rights monitoring mechanisms

The protection of children in South Africa is an international concern. South Africa is a signatory to various international instruments relating to children. Chief among these are the CRC and the African Children Charter.

For the purpose of examining the progress made by State Parties in achieving the realisation of the obligations undertaken in the CRC, a Committee on the Rights of the Child was established.[1] The Committee monitors the implementation of the rights protected in the Convention. This is done through a system of reports, through the Secretary General of the United Nations, on the measures adopted which give effect to the rights recognised in the CRC and on the progress made in the enjoyment of those rights.[2] A report for the country concerned must be submitted within two years of the entry into force of the CRC and thereafter every five years. The report must indicate factors and difficulties, if any, affecting the degree of fulfilment

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1 Article 43(1) of the Convention.

2 Article 44(1) of the Convention.

of the obligations under the CRC. The Committee may request from a State Party further information relevant to the implementation of the CRC.

South Africa submitted its first report in terms of the CRC in November 1997. The National Children's Rights Committee (NCRC) prepared the NGO report.

In terms of the African Children Charter, an African Committee of Experts on the Rights of the Child is to be established within the Organisation of African Unity to promote and protect the rights and welfare of the child.[3] A function of this Committee would be to monitor the implementation of and ensure protection of the rights enshrined in the African Charter.[4] One of the ways in which the Committee is to fulfil this monitoring function is by considering reports by State Parties on the measures adopted to give effect to the provisions of the Charter and on the progress made in the enjoyment of these rights. State Parties would be obliged to submit a report within two years of the entry into force of the Charter for the State Party concerned, and thereafter, every three years.[5] The report must contain sufficient information on the implementation of the Charter in the relevant country and must indicate factors and difficulties, if any, affecting the fulfilment of the obligations contained in the Charter. Unlike the CRC, the African Children Charter specifically provides for the receiving of communications, from 'any person, group or non-governmental organization recognized by the Organisation of African Unity, by Member States or the United Nations' relating to any matter covered by the Charter. In addition, the Committee may resort to any appropriate method of investigating any matter falling within the ambit of the Charter.[6]

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3 Article 32 of the Charter.

4 Article 42(b) of the Charter.

5 Article 43(1) of the Charter.

6 Article 45(1) of the Charter.

Several international agencies are actively involved in the child care field in South Africa.[7] Their input, together with a vociferous press and the commitment of and lobbying by a strong NGO and CBO (community-based organisation) community, also play an important role in monitoring the implementation and effectiveness of internationally accepted measures to protect and safeguard children in South Africa. These mechanisms also encourage South Africa to adhere to its international commitments in terms of the aforementioned international instruments.

24.3 **Comparative systems in other countries**

In order to protect the rights of children, a number of countries have made efforts to establish structures for the monitoring of children's rights. These structures are discussed below.

24.3.1 **Monitoring of children's rights by the Office of the Children's Commissioner or Ombudsman**

24.3.1.1 **Norway**

7 Such as UNICEF, Save the Children, Rädda Barnen, etc.

The Norwegian Ombudsman[8] was created by the Ombudsman for Children Act, 1981, with a wide mandate to promote the interests of children in society and to monitor the development of conditions under which children grow up. As the body acting on behalf of children, the ombudsman cannot be left out of any issue concerning children. The ombudsman is responsible for ensuring that legislation relating to the protection of children's interests has the necessary strength to let their voices be heard and also that sufficient information concerning children's rights is given to the public and private sectors. The ombudsman has the right of access to documentation, at the disposal of public authorities, affecting children and the right of access to public institutions. The ombudsman, however, cannot intervene in individual conflicts between a child and his or her guardians or between guardians and cannot become involve in cases already being handled by courts. The ombudsman, however, may criticise the grounds for court rulings once the courts have completed their case.

24.3.1.2 **Sweden**

8 UNICEF 'Ombudswork for Children'(1997) **Innocenti Digest** (1) 4; See also MG Flekkoy **A Voice for Children: Speaking Out as Their Ombudsman** (1991) London: Jessica Kingsley Publishers.

The Swedish Ombudsman[9] for Children was established in 1993 under the Act to Establish the Office of the Children's Ombudsman. The main task of the ombudsman is to safeguard the rights and interests of children and young people and to ensure that Sweden lives up to its commitments under the CRC. Other important tasks of the ombudsman are to represent children and young people in the course of public debate, to participate in public debates, to shape opinion on important issues and to influence the attitudes of politicians, decision-makers and the general public on issues concerning children and young people. The ombudsman has the power to classify as secret any information received concerning the situation of a particular individual. In order to effect greater conformity between the CRC and Swedish law, the Office of the Ombudsman makes recommendations for changes in legislation that relates to children. For its effectiveness, the ombudsman tries, as far as possible, to obtain children and young people's views on issues that concern them through questionnaires, letters, via the telephone as well as the Internet. The ombudsman also presents an annual report to the Swedish Parliament in which areas are highlighted where it is felt that Sweden does not live up to the CRC. Similar to the position in Norway, the Swedish ombudsman cannot intervene in individual cases. The Swedish ombudsman can, however, propose amendments to existing laws in the light of an individual case.

24.3.1.3 **Iceland**

In Iceland the Ombudsman for Children[10] was established in 1995 by the Children's Ombudsman Act 83 of 1994, with the task of 'improving the children's lot, as well as safeguarding their interests, needs and rights'. It is also within the ombudsman's power to investigate organisations or individuals that have acted in a way that undermines the rights, needs and interests of children. The ombudsman functions independently from the executive, but is required to report annually to the prime minister.

24.3.1.4 **New Zealand**

The New Zealand Office of Commissioner for Children was created by the Children, Young

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9 The information can be accessed at www.bo.se/barnombudsmannen/chom.html; See also UNICEF (1997) **Innocenti Digest** (1) 4;; M G Flekkoy (1991) 204; S Ek 'Can we make reality of children's rights? NGO Monitoring in Sweden' in E Verhellen **Monitoring Children's Rights** (1996) Netherlands:Kluwer Law International Publishers.

10 UNICEF (1997) **Innocenti Digest** (1) 4-5.

Persons and Their Families Act 1989.[11] The Commissioner is assigned the following functions in terms of the Act:[12]

- to investigate any decision or recommendation made, or any act done or omitted under the Act in respect of any child or young person;
- to monitor and assess the policies and practices of the Department of Welfare, and of any other person, body or organisation exercising or performing any function, duty or power conferred or imposed by or under the Act, in relation to the exercise or performance of any function, duty or power conferred or imposed by or under the Act;
- to encourage the development, within the Department of Welfare, of policies and services designed to promote the welfare of children and young persons;
- to undertake and promote research into any matter relating to the welfare of children and young persons;
- to inquire generally into, and report on any matter, including any enactment or law, or any practice or procedure, relating to the welfare of children and young persons;
- to receive and invite representations from members of the public on any matter relating to the welfare of children and young persons;
- to increase public awareness of matters relating to the welfare of children and young persons;
- to advise, on the Commissioner's own initiative or at the request of the Minister, the Minister on any matter relating to the administration of the Act; and
- to keep under review, and make recommendations on, the operation of the Act.

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11 The Act can be accessed at www.knowledge-basket.co.nz/gpprint/acts/public/text/1989/an/024.html

12 Section 411(1) of the Act .

The Commissioner, however, has no authority to investigate any decision or recommendation made by, or any act or omission of, any court.[13] The Commissioner further has all such powers as are reasonably necessary to enable him or her to carry out its functions.[14]

21.3.1.5 **Michigan(USA)**

13 Section 411(2) of the Act.

14 Section 412 of the Act.

In the State of Michigan, the Office of the Children's Ombudsman was created by Act No. 204 of the Public Acts of 1994.[15] The ombudsman, inter alia, has to investigate administrative acts[16] alleged to be contrary to law or rule or contrary to policy of the Department of Social Services or child placing agency,[17] hold informal hearings and request that individuals appear before the ombudsman and give testimony or produce documentation or other evidence that the ombudsman considers relevant to a matter under investigation,[18] and make recommendations to the Governor and the legislature concerning the need for protective services, adoption or foster care legislation.[19]

24.3.1.6 **British Columbia (Canada)**

In British Columbia, Canada, the Children's Commission was created by the Children's Commission Act of 1997.[20] This Act establishes a range of responsibilities to ensure that key aspects of the child serving facilities of government are monitored, the quality of their work assessed and reported on publicly. The Children's Commission monitors the child and family serving facilities of government through -[21]

- collecting information about the deaths of all children and investigating the death of any child if the Commission considers that an investigation is necessary to determine the adequacy of services to children or to examine public health or policy matters. This allows the Commission to make recommendations for changes that could help children in similar situations;
- collecting information about critical injuries sustained by children while receiving designated services,[22] investigating such injuries and recommending changes aimed at

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15 The Act can be accessed at www.state.mi.us./dmb/ombudsman/PA204.html

16 The Act defines an administrative act as including an action, omission, decision, recommendation, practice, or other procedure of the Department of Social Services, an adoption attorney or child placing agency with respect to a particular child related to adoption, foster care or protective services.

17 Section 6(a) of the Act.

18 Section 6(d) of the Act.

19 Section 6(e) of the Act.

20 The Act can be accessed at www.childservices.gov.bc.ca

21 Section 4 of the Act.

22 A service or program that is provided by a ministry or agency of government, provided in a facility or class of facility licensed or regulated under an Act or authorised or funded under an Act.

better protecting these children;

- setting standards to be complied with by prescribed ministries or agencies of the government to help ensure that their internal review processes are responsive to complaints about decisions concerning the provision of designated services to children;
- monitoring whether the above-mentioned ministries and agencies are meeting the set standards;
- reviewing and resolving complaints (made under section 10 of the Act) about-
  - breaches of the rights of children in care, and
  - decisions concerning the provision of designated services to children;
- in relation to plans of care for children in the continuing custody of a director[23]-
  - monitoring whether the standards set by the director for those plans are being met;
  - identifying any of those plans that, in the commission's opinion, need to be reviewed by the director; and
  - conducting random audits of those plans;
- at the request of a minister of the government or on the commissioner's own initiative, conducting special investigations and preparing special reports concerning matters affecting children;
- collecting data about, and conducting or encouraging research into matters relevant to services for children;
- the Commission has a right to any information in the custody of a director or of a public body which is necessary to enable the Commission to perform its duties under the Act and such director or public body must disclose that information to the commission at the request of the Children's Commissioner;
- the Children's Commissioner must present the following to the Minister:

an annual report on the work of the Commission (this report must be laid before the Legislative Assembly as soon as possible);

- reports or summaries of reports made by the Commission on-
  - the Commission's findings and recommendations concerning children's deaths or critical injuries;
  - any responses made by ministries or agencies; and
  - any report prepared for the minister or presented to any other minister.

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23 A director designated under the Child, Family and Community Service Act.

24.3.1.7 **Austria**

In Austria[24] a national Children's Ombudsman was established in 1991 within the Ministry of Environment, Youth and Family. The ombudsman does not advocate for the rights of any individual child, but promotes and defends children's rights collectively within the framework of judicial and administrative procedure. The ombudsman also monitors government accountability in respect of children and responds to proposed legislation. Apart from an ombudsman at national level, provincial Children's Ombudsmen were also created through child welfare legislation, specifically, through the Youth Welfare Act of 1989. Unlike the ombudsman at national level, it is within the mandate of the provincial ombudsmen to deal with the child on an individual basis. Their mandate also includes the provision of counselling and individual support to children and to those legally responsible for them in all matters relating to the interest and rights of young people, the promotion of public awareness about child related issues and the CRC, the monitoring of legal provisions and decrees concerning children and adolescents and the making of recommendations where necessary. Although all of them are government institutions, they have a provincial constitutional privilege, which frees them from political interference. The mandate of the provincial children's ombudsmen seems to differ from province to province - some, for example, have the power to object to the results of judicial proceedings while others may not.

The national ombudsman also collaborates with the provincial ombudsmen for children and with other public and private youth welfare institutions.

Finally, both the national ombudsman and provincial ombudsmen have to submit annual reports. The national ombudsman is accountable to the Ministry of Environment, Youth and Family and has to submit an annual report which is published. The provincial ombudsmen submit annual reports to their respective governments.

24.3.2 **Monitoring of children's rights by NGOs**

24.3.2.1 **Sweden**

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24 UNICEF (1997) **Innocenti Digest** (1) 5, 14.

The NGO Child Convention Group in Sweden[25] monitors the implementation of the Convention from an NGO perspective. This is done by questioning representatives of the Swedish government on the implementation and monitoring of the CRC in Sweden. Questions contained in a report are sent annually to the responsible ministries to elicit individual statements and responses to the questions. Based on these 'annual hearings', the NGO Child Convention Group will then, apart from the government's report to the UN, submit a supplementary report to the UN Committee on the Rights of the Child.[26]

Apart from the NGO Child Convention Group in Sweden, a group named Rädda Barnen[27] meets on a regular basis with the Swedish Network of Parliamentarians for Children's Rights to discuss matters relating to children. Rädda Barnen follows the debates in Parliament. Although it cannot pose questions, it can discuss issues with MP's and propose concerns to raise. Rädda Barnen also publishes a newsletter regularly containing the latest news on children's issues in Parliament.

24.3.2.2 **Philippines**

An NGO Coalition was established in 1993 in the Philippines,[28] specifically to monitor the implementation of the CRC in the Philippines. This Coalition is composed of all the major networks of child-focussed NGOs and other international and local child-focussed NGOs. The Coalition consists of a Working and Organisational Committee. The Working Committee is tasked to do research on the situation of children and apart from the government's report, also to submit a separate report, reflecting the concerns of the Coalition, to the UN Committee. The Coalition's first report to the UN Committee was submitted in 1994. The Organisational Committee is tasked to broaden the membership of the Coalition and to promote public awareness of the Coalition.

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25 S Ek 'Can we make reality of children's rights? NGO Monitoring in Sweden' in E Verhellen **Monitoring Children's Rights** (1996).

26 The National Children's Rights Committee (NCRC), an umbrella body of some NGO groups in South Africa, has submitted an NGO report in 1998 to the Committee on the Rights of the Child in which areas where it was felt that South Africa does not live up to the CRC were identified. This is also a method of determining whether government's report to the UN accurately reflects the reality about South African children.

27 A Swedish non-governmental organisation, also active in South Africa.

28 N Sancho 'Monitoring the Implementation of the UN Convention on the Rights of the Child: The Experience of Philippine NGOs' in E Verhellen **Monitoring Children's Rights** (1996).

One of the immediate results of the submission of the NGO report was that the government requested the Coalition for comments on the criteria for selection of the NGO representatives in the Council for the Welfare of Children. A challenge for the Coalition is, however, to remain independent so that it can be free to serve as a watchdog while being a partner of the government agencies in order to influence policy-making and monitoring processes of children's programmes.

21.3.3 **Other child's rights monitoring mechanisms**

24.3.3.1 **England and Wales**

In England and Wales the Secretary of State has certain supervisory functions and responsibilities. In terms of section 80(1) of the Children Act 1989, the Secretary of State[29] may cause an inspection from time to time in children's homes and basically any premises at which a child is living, whether the child is being cared for by a local or health authority, adoption agency or other institution. The Secretary of State may also cause an inquiry to be held into any matter connected with the functions of the social services committee of a local authority or of a voluntary association, in so far as those functions relate to children, the functions of an adoption agency, registered children's home or voluntary home, residential care home, nursing home or mental nursing home, as far as it provides accommodation for children, a home provided by the Secretary of State and the detention of a child under section 53 of the Children and Young Persons Act of 33.[30]

If the Secretary of State finds that any local authority has failed, without reasonable excuse, to comply with any of the duties imposed on it by or under the Children Act, he or she may make an order declaring that authority to be in default with respect to a particular duty.[31] Such an order may contain directions for the purpose of ensuring that the duty is complied with within a period specified in the order. Any such directions will, on the application of the Secretary of

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29 A Secretary of State, being a member of the Cabinet, occupies one of the highest positions in British Government.

30 Section 81(1) of the Act.

31 Section 84(1) of the Act.

State, be enforceable by *mandamus*.[32]

32 Section 84(4) of the Act; *Mandamus* is a mandatory order requiring the performance of an act or duty.

Local authorities are obliged to supply the Secretary of State with such information as he or she may require in respect of the performance by the local authority of all or any of their functions in terms of the Children Act, the Children and Young Persons Act of 1933, and two particular sections of the English and Scottish mental health legislation.[33] In addition, local authorities are obliged to submit to the Secretary of State such information as he or she may require in connection with the accommodation of children in a residential care home, nursing home or mental nursing home, and the children in relation to whom the local authority has exercised those functions.[34] Voluntary organisations are also obliged to supply such information in respect of children accommodated by them or on their behalf as the Secretary of State may direct.[35] The Secretary of State may also direct the clerk of each magistrate's court to supply such particulars as he or she may require in respect of proceedings of the court relating to children.[36] The Secretary of State annually submits a consolidated and classified abstract of the information so supplied to Parliament.

24.3.3.2 **Uganda**

In Uganda, it is the general duty of every local government council from village to district level to safeguard and promote the welfare of children within its area.[37] Every local government council has to designate one of its members to be responsible for the welfare of children. This person is referred to as the Secretary for Children's Affairs.[38] In particular, it is the duty of every local government council (and therefore the duty of the Secretary for Children's Affairs) to mediate in any situation where the rights of a child are infringed and especially with regard to the protection of a child, the child's right to succeed to the property of his or her parents, and the duty to maintain a child.[39] Each local government council is also obliged to keep a register of disabled children within its area of jurisdiction and to give disabled children the necessary assistance, to provide assistance and accommodation for any child in need, and to make every effort to trace the parents or guardians of any lost or abandoned child.

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33 Section 116 of the Mental Health Act of 1983 and section 10 of the Mental Health (Scotland) Act 1984 (in so far as it relates to children for whom local authorities have responsibility).

34 Section 83(3) of the Act.

35 Section 83(4) of the Act.

36 Section 83(5) of the Act.

37 Section 11(1)(a) of the Children Statute 6 of 1996.

38 Section 11(1)(b) of the Children Statute 6 of 1996.

39 Section 11(3) of the Children Statute 6 of 1996.

24.3.3.3 **Ghana**

In terms of the Children's Act, 1998 of Ghana, District Assemblies have the duty to protect the welfare and promote the rights of children.[40] The Act further provides that the Social Welfare and Community Development Department of a District Assembly (hereafter 'the Department') must investigate cases of contravention of children's rights.[41] If the Department has reasonable grounds to suspect child abuse or a need for care and protection, it must direct a probation officer or social welfare officer accompanied by the police to enter and search the premises where the child is kept to investigate.[42] If it is determined that the child has been abused or is in need of immediate care and protection, the Department must authorise the removal of the child to a place of safety for a period of not more than seven days.[43] The child must then be brought before a Family Tribunal before the expiry of the seven-day period for an order to be made.[44]

The Department also has a duty to monitor children's homes within its district.[45] The Minister for Social Welfare may also authorise the inspection of a children's home by the Department at any time to ensure that the home is being maintained at the required standard.[46] The Department is also responsible for inspecting the premises, books, accounts and other records of a day-care

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40 Section 16 (1) of the Act.

41 Section 16 (2) of the Act.

42 Section 19 (1) of the Act.

43 Section 19 (3) of the Act.

44 Section 19 (4) of the Act.

45 Section 106 of the Act.

46 Section 108 of the Act.

centre at least once in ever six months. If the inspection reveals that the day-care centre is not being managed efficiently in the best interest of the children, the Department must suspend the permit and the owner or operator must be ordered to make good any default within a stipulated time. Failing to do so, the permit must be cancelled.[47]

24.3.3.4 **Namibia**

47 Section 116 of the Act.

In terms of the Namibian draft Child Care and Protection Act of 1996, a Child Welfare Advisory Council is to be established.[48] The Council is to consist of 13 members of whom at least five should be women. The various Ministries[49] are to be represented on the Council. Three members of the Council must be appointed from nominations received from NGOs committed to children's issues, while another three members are to be appointed from amongst individuals in the community at large with a demonstrated interest in children's issues.[50] The respective Ministers are obliged to consult with the Council in proposing any repeal or amendment of any provision of the draft Child Care and Protection Act, the regulations promulgated in terms of the Act or any other law that would affect the Act.[51] These Ministers also have to submit reports, at least annually, to the Council on the preventative programmes adopted and implemented by their ministries and the results thereof. The reports by the respective Ministries are to be tabled in the National Assembly.

The Council has the following duties:[52]

- to consult with the Ministries on any proposed measure to repeal or amend any provision of the Act;
- to consult with the Ministries on any proposed measure to promulgate or amend any regulations implementing the Act;
- to receive, review, comment on, and, if necessary, act in response to a report prepared by a particular Ministry;
- to design and propose to the appropriate Ministers such programmes of prevention, protection or care as the council deems necessary for the best interests of children;
- to investigate and report to the relevant Minister any complaint about programmes or services that the Council may receive and make recommendations to such Minister on measures to remedy such complaint;
- to study and investigate the implementation of the Act and other laws related to it for the purpose of making such recommendations for improvement to the Ministers as the Council deems necessary for the best interests of children; and

48 Section 8 of the Act.

49 Those responsible for Health and Social Services, Justice, Youth and Sport, Regional and Local Government and Housing, Education and Culture, and Home Affairs.

50 Section 10(2) of the Act.

51 Section 5 of the Act.

52 Section 9(2) of the Act.

- to monitor the implementation of the CRC .

With regard to the inspection of child care facilities, section 69 of the Namibian draft Child Care and Protection Act states as follows:

> (1)(a) Social workers shall inspect facilities used as places of safety, children's homes, and educational or vocational training centres as frequently as determined necessary by the Minister of Health and Social Services, or the Child Welfare Advisory Council, but in no case less frequently than once a year, to determine whether the best interests of the children or young persons staying there are being met.
>
> (b) Subject to the direction of the Minister, a Commissioner, or the Council, social workers exercising their duties under this section may enter a facility to inspect its books and documents, or the children or young persons accommodated there.
>
> (2) The powers conferred upon social workers by subsection (1) may be exercised by any Commissioner of Child Welfare within his or her district, and a Commissioner may appoint a police officer or justice of the peace to exercise such powers.
>
> (3) A written report of any inspection undertaken by a social worker or other authorised person pursuant to subsection (1) or (2) shall be submitted to the Minister, any Commissioner who may have ordered such an inspection in terms of subsection (1)(a), and the Council as soon as possible after conclusion of the inspection.
>
> (4) If the Minister has reasonable grounds to belief that a facility or placement is detrimental to a particular child who has been received and placed there, the Minister may, by an order in writing, direct a social worker or Commissioner of Child Welfare to visit the child, inspect the situation , and report back to the Minister on the child's circumstances.

24.3.3.5 **Kenya**

In terms of the Children Bill, 1998,[53] of Kenya a National Council of Children's Services is to be established. The purpose and object for which the Council is to be established are 'to exercise general supervision and control over the planning, financing and co-ordination of child welfare activities and to advise government on all aspects thereof'.[54]

The Children Bill, 1998, also provides for the appointment of a Director of Children's Services, Deputy Directors of Children's Services, such number of senior children's officers, children's officers and other officers as may be necessary for the purposes of the Act. The Director has to safeguard the welfare of children and should in particular, assist in the establishment,

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53 The Bill has not yet been introduced.

54 Clause 29(1) of the Bill.

promotion, co-ordination and supervision of services and facilities designed to advance the well being of children and their families.[55]

The Director has to perform, *inter alia*, the following functions:[56]

- supervise children's officers and co-ordinate and regulate their work in the provision of children's welfare services;
- secure the conduct of investigations on cases of hardship affecting children throughout the country;
- make such enquiries and investigations and provide such reports and assessments as may be required by any court of competent jurisdiction for the determination of any matter before a court or for the enforcement of any order made by a court under the Act;
- safeguard the welfare of any child or children placed into care, by virtue of a care order or an interim order;
- supervise all children's rehabilitation centres, children's homes and safeguard and promote the welfare of any children admitted therein;
- provide to the quarterly reports on the state of children's rehabilitation centres, children's homes and remand homes; and
- safeguard the welfare of children in foster care.

24.3.3.6 **New South Wales (Australia)**

55 Clause 35(1) of the Bill.

56 Clause 35(2) of the Bill.

In New South Wales, Australia, the Children (Care and Protection) Act of 1987 provides for Children Review Panels and Boards of Review. The function of a Board of Review is to consider applications for the review of a child who has been in care for a period of three months or more.[57] A child in care is defined as a child who is in custody pursuant to a temporary care arrangement; a child who is residing in a residential child care centre; a child who is being fostered; a child who is in the custody of a person pursuant to a children's court order in force under section 72(1)(c)(ii) of the Act; or a child who is a ward or protected person.[58] An application for review may be made by the child, the person responsible for the child, a foster parent, by any person with a sufficient interest in the welfare of the child, or by the Minister or Director-General.[59] The Board of Review must review such aspects of the welfare, status, progress and circumstances of the child as are referred to in the request, having particular regard to any arrangements that exist to encourage continuing contact between the child and the child's parents, and make a written report informing the Minister as to the results of the review.[60]

The New South Wales legislation also makes provision for a Child Death Review Team. This inter-departmental team[61] has the following functions:[62]

- to formulate recommendations as to policies and practices to be implemented by government and private agencies and by the community for the prevention or reduction of child deaths, and for that purpose:

  – to identify, and undertake a detailed review of information concerning deaths of children that are due to abuse or neglect or that occurs in suspicious circumstances or in circumstances of a kind prescribed by the regulations;
  – to maintain a register of child deaths occurring in New South Wales after a date prescribed by the regulations, classifying such deaths according to cause,

57 Section 100(1) of the Act.

58 Section 97(b) of the Act.

59 Section 100(3)(a) of the Act.

60 Section 100(6) of the Act.

61 The team is to include representatives of the Child Protection Council, the Department of Community Services, the Department of Health, the Police Service, the Department of School Education, the Attorney-General's Department, and the Office of the Coroner.

62 Section 103(1) of the Act.

demographic criteria or other factors prescribed by the regulations;

– to analyse data accumulated with respect to the causes of child deaths reviewed or registered, and to identify patterns and trends relating to those deaths;

- to identify areas requiring further research by the team or other agencies; and
- to undertake such research or other projects as the Minister may require concerning the causes of child death.

Government agencies are obliged to provide the team with full and unrestricted access to records that are under their control.[63] Access includes the right to inspect and, on request, to be provided with copies of any such record.

63 Section 104(1) of the Act.

The team annually submits a report to the Minister involved.[64] The report is tabled in Parliament, as though it were the annual report of a statutory body. In addition, the team publishes at least once each year, for the information of the public, a report consisting of data collected and information relating to child deaths that occurred in the State during the period covered by the report.[65] In each of the reports, the team is to provide details on the extent to which its previous recommendations have been accepted and may comment on the extent to which those recommendations have been implemented in practice.[66]

24.4 Child's rights monitoring mechanisms in South Africa

24.4.1 Legislation

24.4.1.1 The Constitution of the Republic of South Africa[67]

Section 28 of the Constitution guarantees certain children's rights. Should these fundamental rights be infringed or threatened, a competent court may be approached for appropriate relief, which may include a declaration of rights. To approach the courts is often a lengthy and costly exercise and may not be the best way of ensuring immediate protection of children's rights.

24.4.1.2 The Child Care Act 74 of 1983

There are limited examples of what can be termed 'monitoring mechanisms' in the Child Care Act, usually with reference to single issues affecting children. The Act, for example, provides for the registration and classification of children's homes and places of care,[68] the inspection of children's homes and places of care,[69] and the cancellation or surrender of certificates of registration.[70] In addition, the Regulations to the Act provide for files and registers to be kept by

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64 Section 105(1) of the Act.

65 Section 105(5) of the Act.

66 Section 105(6) of the Act.

67 Act 108 of 1996.

68 Section 30 of the Act.

69 Section 31 of the Act.

70 Section 32 of the Act.

children's homes, shelters, places of safety, and places of care.[71] Non-compliance with any of the provisions of the Act is followed by criminal sanction.[72] The Courts and the relevant Department therefore play a very important role in monitoring the conduct of office bearers in accordance with the Act and Regulations.

24.4.2 **National Government**

71 See, for instance, regulations 33, 33A, 33B, 34, and 34A.

72 Section 58 provides that any person convicted of an offence under any provision of this Act for which no punishment is specially provided for, is liable to a fine not exceeding R4 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

In South Africa, the National Programme of Action (NPA)[73] is the instrument by which the government commits itself to enhance the survival, protection and development of millions of children. It is a mechanism for identifying all plans for children developed by government departments, non-governmental organisations (NGOs) and other child related structures, and for ensuring that all these plans converge in the framework provided by the CRC. In order to give effect to this commitment, government created a number of mechanisms. These include the appointment of the Inter-Ministerial Core Group (IMCG) to oversee the process of the NPA. A National Programme of Action Steering Committee (NPASC) has also been established within government which is the executive instrument for overseeing the identification of plans, implementation and co-ordination of all role-players in order to ensure compliance with the obligations of the CRC. The NPASC annually submits progress reports to Cabinet or whenever required. These reports reflect the progress made at national and provincial level and provide an opportunity to identify shortcomings and to develop plans to overcome them.[74]

In 1996, the NPA established a Data Collection and Monitoring Task Group (MTG), for the particular purpose of monitoring the implementation of the CRC and the African Children Charter. The NPA envisages as its main objectives and aims of monitoring children's rights to be the following:

- To collect and analyse data to monitor the progress of the impact of the NPA in the implementation of children's rights.
- To develop a systematic and sustainable statistical information system for the collation of information, statistics and data on the national conditions of children.
- In developing a systematic and sustainable statistical information system for monitoring children's rights that, this can also serve as inputs for NPA national reports, for fulfilling

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73 The NPA process is coordinated by the Office on the Rights of the Child, the Presidency.

74 **Initial country report of South Africa on the Convention on the Rights of the Child**, November 1997.

reporting obligations, for evaluating exercises and as a tool for advocacy, policy and programme development for children.

Within this framework the MTGs broad vision for developing a systematic and sustainable statistical information system for monitoring children's rights is a data-based approach. The strategy is to use data to monitor the situation of children in South Africa.[75]

Provincial Plans of Action (PPAs) are in place in all nine provinces. Similar to the NPA, the PPAs also have formal monitoring systems which are largely based on data collection. These monitoring systems are used to monitor the government's implementation of the CRC.[76] Statistics South Africa plans to conduct workshops in three provinces. UNICEF as part of the NPASC and MTG will be facilitating these workshops. At these workshops, the PPAs will be presented with the current vision of data collection and monitoring of the MTG. These workshops will also focus on what the needs are and what systems exist for the monitoring of children's rights at provincial level.[77]

Apart from the MTG, there are also other monitoring mechanisms at national level, which include, inter alia, the Parliamentary Joint Monitoring Committee on Children, Youth and Persons with Disabilities, the South African Human Rights Commission, the Commission for Gender Equality and the National Youth Commission. The effectiveness of these mechanisms in monitoring the rights of the child is discussed below.

(a) **South African Human Rights Commission**

In terms of section 184(1)(c) of the Constitution, the South African Human Rights Commission (SAHRC) must monitor and assess the observance of human rights in South Africa. A Committee on the Rights of the Child[78] has been established within the SAHRC. This Committee

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75 The information can be accessed at http://www.statssa.gov.za/RelatedInverseSites/Children%20Internet_ne.../Homepage.htm

76 Personal communication with Mrs Crystal Theron, Office on the Rights of the Child, the Presidency, on 14 August 2001.

77 Personal communication with Ms Sharmla Rama, Chairperson of the Data Collection and Monitoring Task Group (MTG), on 10 August 2001.

78 This committee was established in terms of section 5 of the Human Rights Commission Act 54 of 1994. On completion of the duties and functions assigned to the committee by the HRC, this committee must submit a report thereon to the Commission.

inter alia has to:[79]

- advise the SAHRC on children's rights issues and on strategic planning for implementing the protection and promotion of the rights of the child;
- ensure that violations of the rights of the child are investigated and dealt with as expeditiously as possible;
- ensure that both the public and private sectors promote respect for children's rights;
- promote child rights education and advocacy;
- advise the SAHRC on monitoring of child rights, including the development of performance indicators and the identification of barriers to the implementation of the NPA and the CRC.
- provide support to the NPASC and other child rights initiatives;
- advise and assist the SAHRC in the promotion and protection of the rights of the child; and
- study the SAHRC Conference report and plan of action as it pertains to the rights of the child and advise the SAHRC on its role in implementing the recommendations made.

79 Accessed at www.sahrc.org.za/sahrc/committees.html on 99/01/26.

The SAHRC still has not established monitoring mechanisms at any level of government. The SAHRC is currently in a process of identifying the activities of the various departments and organisations at the different spheres of government in relation to the situation of children, and also the shortcomings at each level of government. It is therefore also important for the SAHRC to identify where most of the resources are allocated. In so doing, the SAHRC will then be able to identify areas where government support is most needed. The SAHRC also intends to conduct workshops with children from all provinces, to inform them about the nature of the SAHRC and to identify other issues that should be addressed. Consultations will also be held with a variety of organisations to determine ways in which the SAHRC can successfully link up with them in order to better protect children. In so doing, the SAHRC aims to establish linkages with both empowered and underpowered organisations. The SAHRC is also envisaging researching the monitoring of the rights of children in other countries, within the limitation of resources available to them. The SAHRC is hopeful that after such process, it will be in a much better position to identify the monitoring mechanisms that should be established at the different spheres of government.[80] When and how the SAHRC will achieve all this, is still to be seen. The SAHRC, however, has an important role to play in assisting with the monitoring of the implementation of the new child care legislation.

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80 Personal communication with Ms. Mabusela, deputy chair SAHRC on 99/02/10.

The SAHRC has established provincial offices in the Northern Province (Pietersburg), KwaZulu-Natal (Durban), Eastern Cape (Port Elizabeth) and Western Cape. These provincial offices have a general mandate concerning human rights issues, and presumably are also concerned with the monitoring of children's rights. [81]

(b) Parliamentary Joint Monitoring Committee on Children, Youth and Persons with Disabilities

A Parliamentary Joint Monitoring Committee (JMC) on Children, Youth and Persons with disabilities was established in October 1999. The JMC consists of 17 Assembly members and 9 Council members. The function of the JMC is to monitor and evaluate progress with regard to the improvement in the quality of the life and status of children, youth and disabled persons in South Africa, with special reference to the Government's commitments in respect of any applicable international instruments and to duties and responsibilities in respect of any applicable legislation. Further, the JMC will have an input in proposed legislation which have an impact on the lives of children and the disabled. The JMC may make recommendations to both or either of the houses of parliament, or any joint or house committee on any matter arising from its functions. The JMC may also influence the legislative process by participating in joint sittings with relevant portfolio committees when bills relating to children are being discussed, amended and passed.[82] It seems that the functions of the JMC will overlap with those of other committees, such as Education and Health, which are concern with the welfare of children. However, the JMC will play a more monitoring and evaluating role.

(c) Commission for Gender Equality

In terms of section 187(2) of the Constitution, the Commission for Gender Equality (CGE) has the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality. Unfortunately, there seems to be no evidence of the development of systems and indicators for monitoring gender equality, particularly pertaining to the girl child. Any role that the CGE can fulfill in this regard, will certainly contribute to the improvement of the status of South African children.

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81 Ibid.

82 Gilbert and Proudlock 'Keeping an eye on the government' **ChildrenFirst** December/January 2001 Vol 4 No.34.

(d) **National Youth Commission**

In terms of the National Youth Commission Act[83] a National Youth Commission (NYC) was established, *inter alia*, to co-ordinate and develop an integrated national youth policy; to develop an integrated national youth development plan; to develop principles and guidelines and make recommendations to the government regarding such principles and guidelines, for the implementation of an integrated national youth policy; and to 'co-ordinate, direct and monitor the implementation of such principles and guidelines as a matter of priority'.[84]

To meet these objectives, the NYC is empowered, in consultation with the government, to prioritise the allocation of resources to youth affairs; to report, on a quarterly basis, to the President on its activities; to evaluate any Act of Parliament or any law proposed by Parliament or any other legislature, affecting or likely to affect the implementation of the integrated national youth policy and to make recommendations to Parliament or such other legislature with regard thereto; to recommend to Parliament or any other legislature the adoption of new legislation which would promote the implementation of an integrated national youth policy; and monitor and review the compliance with international instruments, acceded to or ratified by South Africa, relating to the objects of the NYC.[85] However, the NYC can do no more than make recommendations.

The NYC is obliged to 'monitor and review policies and practices of ... organs of state at any level; ... statutory bodies or functionaries; ... public bodies and authorities, and ... any other persons, bodies or institutions, with regard to youth matters, and may make any recommendation that the Commission deems necessary'.[86]

It should, however, be pointed out that the National Youth Commission Act focusses on the youth of South Africa. 'Youth' is defined in the Act as any 'person between the ages of 14 and 35 years.[87] In terms of this definition all children below the age of 14 years are automatically excluded from the Commission's terms of reference. This unfortunately leaves a gap regarding

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83 19 of 1996.

84 Sections 3(a) - (d) of the National Youth Commission Act, 1996.

85 Sections 8(1)(iv), (ix), (xii), (xiii) and (xiv) of the National Youth Commission Act, 1996.

86 Section 8(1)(x) of the National Youth Commission Act, 1996.

87 Section 1(vi) of the National Youth Commission Act, 1996.

the monitoring of issues facing children below the age of 14 years in South Africa.

24.4.3 Provincial Government

At provincial level, the Western Cape and KwaZulu-Natal have taken the initiative by providing for the establishment of offices of Commissioners for Children. In the Western Cape this was done through a provision in the Constitution of the Western Cape Act 1 of 1998.[88] In terms of this provision, the duties of the Commissioner will include 'protecting and promoting the interests of children in the Western Cape, in particular as regards ... health services, ... education, ... welfare services, ... recreation and amenities, ... and sport'. The powers and duties of the Commissioner are spelt out in section 79 of the Constitution, and include monitoring, investigating, researching, educating, lobbying, advising, and reporting on matters pertaining to children within the sphere of provincial competency. A draft Bill on the Commissioner for Children in the Western Cape is to be submitted on 24 October 2001 to the Western Cape Department of Social Development for consideration.[89]

In KwaZulu-Natal the KwaZulu-Natal Provincial Office of the Commissioner for Children Bill provides for the establishment of the KwaZulu-Natal Commissioner for Children.[90] In terms of the Bill, the Commissioner must:[91]

- conduct and develop information programmes to foster public understanding of the Bill, the Bill of Rights in the Constitution, the CRC, and the role and activities of the Commission;
- maintain close liaison with institutions similar to the Commission to foster common policies and practices and to promote co-operation concerning the handling of complaints in cases of overlapping jurisdictions;
- maintain close liaison with Commissioners of Child Welfare to facilitate the effective administration of juvenile justice;
- maintain close liaison with the Police Service to combat crimes against children and to foster co-operation at all levels in this regard;
- evaluate and make recommendations to the provincial Parliament or other legislatures

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88 Section 78 of the Constitution of the Western Cape Act 1 of 1998.

89 Personal communication with Ms Carol Johnston from the legal division of the Provincial Administration of the Western Cape on 23 October 2001.

90 Clause 1 of the Bill.

91 Clause 12(1) of the Bill.

concerning any Act of that Parliament, any system of personal and family law custom, any system of indigenous law, custom or practice; or any other law affecting or likely to affect laws that pertain to the child; and

- monitor the compliance with international instruments acceded to or ratified by South Africa.

In addition, the Commission may consider recommendations, suggestions and requests concerning the fundamental rights that pertain to a child; recommend to the provincial Parliament or any other legislature the adoption of new legislation which would promote the best interests of the child; and conduct research to further the objects of the Commission.[92] The Commission can also, by mediation, conciliation and negotiation, endeavour to resolve any dispute or to rectify any act or omission emanating from or constituting a violation of any fundamental right of a child.[93]

The Bill further provides for extensive powers of investigation,[94] the search and seizure of premises and the attachment and removal of articles.[95]

There was, however, some controversy over the KwaZulu-Natal Commissioner for Children Bill. Opposition against the Bill seemed much stronger than general acceptance. Some of the criticism against the Bill were that it had not been debated across the sectors that deal with child protection, and that it provided for child protection structures that had no clear function and no accountability. Consequently, this Bill was withdrawn by the KwaZulu-Natal Parliament.[96]

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92 Clause 12(2) of the Bill.

93 Clause 13 of the Bill.

94 Clause 14 of the Bill.

95 Clause 15 of the Bill.

96 Personal communication with Ms Joan van Niekerk on 17 August 2001.

24.4.4 Local Government

The welfare development division of the Department of Social Development, in terms of regulation 30(4) to the Child Care Act, after every two years inspects children's homes, places of care and shelters to ascertain whether these facilities are still complying with set standards. Incidental inspections on receipt of complaints are also conducted. Albeit these inspections are the responsibility of Department of Social Development, other departments such as the Departments of Health and Education are also assisting with the inspections. If it is found that a facility is not complying with set standards, the Department of Social Development (development division) will set a prescribe period within which such facility should remedy the situation. If the management of such facility, after the expiration of the said period, remains in default with respect to particular duties, recommendations will be made to the legal division of the Department of Social Development that such facility be closed.

24.5 Evaluation and recommendations

The existing monitoring mechanisms in South Africa, in comparison to those in other countries, are still in their embryo stages. In order to promote the protection of children's rights, an effective monitoring structure is needed. There is also a dire need to create a child-focussed monitoring mechanism. **The Commission thus recommends the establishment of a body to be called the 'Office of the Children's Protector'**. Unlike similar structures in the countries discussed above which monitor the protection of children's rights in general, the proposed Office of the Children's Protector should only be concerned with the monitoring of the implementation of the new child care legislation.[97] **The Commission further recommends that the Office of the Children's Protector should operate independently from the Department of Social Development.** If independent, it would effectively act as a watchdog over the activities of those responsible for the implementation of the new child care legislation, and would be in a position to criticise government when necessary and to act without fear of political interference. The Chapter on Residential Care recommends that an independent structure such as the proposed Office of the Children's Protector should be appointed by the Minister from nominations received for a 5-year period. Further, that such independent structure should prepare an annual report

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97 See, for instance, the report on the monitoring of the Domestic Violence Act by Penny Parenzee, Lillian Artz and Kelly Moult **Monitoring the Implementation of the Domestic Violence Act, First Research Report 2000 - 2001**, Institute for Criminology, UCT, 2001.

for tabling in Parliament.[98] **This report should also indicate difficulties, if any, hampering the proper implementation of the new children's statute**.

The Office of the Children's Protector should consist of people with specialist knowledge in the field of child care. Candidates should be screened on the basis of their education, training, experience and their potential for developing the skills necessary to carry out their responsibilities. A few members of the Office of the Children's Protector should be legally trained. This is important as it will always be necessary to consider whether legal or other action should be taken whenever a contravention of children's rights occur.

The Office of the Children's Protector may -

- **establish such offices as it may consider necessary to enable it to exercise its powers and to perform its functions assigned to it by the new children's statute, and**
- **appoint such staff as may be reasonably necessary to assist with the work incidental to the performance of its functions.**

The Commission recommends that the Office of the Children's Protector should, *inter alia*, have the following powers and functions:

98 See 19.10.4 above.

- **The Office of the Children's Protector should receive, investigate[99] and resolve complaints relating to any matter falling within the ambit of the new children's statute, or direct such complaints to the relevant authorities if these are better placed to deal with such complaints.** A child who is being abused or any person on behalf of such child, should be able to approach the Office of the Children's Protector for help. This, however, should not mean that a complaint cannot be laid with other institutions such as the proposed Commissioner for children in the Western Cape or the SAHRC. A complainant can first exhaust all other avenues before deciding to approach the Office of the Children's Protector, but should not be compelled to follow such procedure.

- It is important that the Office of the Children's Protector assists in individual cases involving violations of children's rights.[100] **The Office of the Children's Protector should therefore have the power to take legal action, if necessary, on behalf of a child where it is not possible for the child or anybody legally responsible for the child to do so.**

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99 In Iceland, the Ombudsman for Children has the power to investigate organisations or individuals that have acted in a way that undermines the rights, needs and interests of children.

100 See also the position in Austria at 21.3.1.7 above.

- The Chapter on Residential Care recommends that the DQA process as being currently tested by the Department of Social Development be used as a monitoring mechanism for the care of children in residential care.[101] **The proposed cluster foster care schemes as a residential care option for children in need of care should also be subjected to the DQA process.[102] The Commission further recommends that the Office of the Children's Protector may, on receiving of a complaint, authorise an inspection of a residential care facility in order to -**

  – **inspect whether that facility is complying with set minimum standards and may make such enquiries as he or she may deem necessary;**
  – **inspect and make copies of any books or documents kept on the premises;**
  – **seize any document or any other thing on the premises which in his or her opinion may be relevant to the investigation concerned;**
  – **observe and interview any child in the facility, or caused such child to be examined by a medical officer, psychologist or psychiatrist.**

  If it is found that a facility does not comply with set minimum standards, the Office of the Children's Protector must inform the Director-General of the Department of Social Development who should take the necessary action to ensure that the facility comply with set minimum standards.[103]

  Residential care facilities for children with disabilities such as the blind, the deaf, the dumb and mentally retarded children might need different monitoring approaches. When inspecting these facilities, outside expertise should be obtained to assist with the inspection. For example, when inspecting facilities for the deaf, an organisation such as DEAFSA can be approach. DEAFSA can, for example, provide sign language interpreters if any deaf child need to be interviewed.

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101 See chapter 19 at 19.10.4 above.

102 See chapter 17 at 17.3.1 above.

103 See also chapter 19 at 19.10.1

- **It is also recommended that commissioners of child welfare must at least once a year inspect all child and youth care centres in their area of jurisdiction, and must submit a report after any such visit to the Director-General of the Department of Social Development.**[104]

- The Chapter on Children in Need of Special Protection makes recommendations with which a drop-in centre[105] and outreach programme[106] for children living on the streets should comply before registering as a drop-in centre or outreach programme.[107] As these are non-residential, there is no need to comply with residential care minimum standards, but it is important to monitor whether drop-in centres and outreach programmes do comply with set minimum standards. **The Commission therefore recommends that the management of a drop-in centre and an outreach programme should submit a report to the Office of the Children's Protector on their work. The Office of the Children's Protector should also conduct on a random basis inspections in drop-in centres to ensure that they comply with minimum standards.**

- The Chapter on Early Childhood Development recommends that the provincial Departments of Social Development and Education should be accorded the power to

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104 See also chapter 19 at 19.8.3.2 above.

105 A non-residential facility which on a regular basis provides basic services and programmes for street children.

106 Aims to refer vulnerable children to appropriate resources through a process of befriending, counselling and providing some material assistance in disadvantaged communities.

107 See chapter 13 at 13.7.5 above.

inspect and monitor ECD services.[108] The Commission further recommends that the adequacy and appropriateness of care provided at partial care facilities should be monitored by the Department of Social Development.[109] **The Office of the Children's Protector may also conduct periodical inspections in partial care facilities and may monitor ECD services.**

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108 See 15.8 above.

109 See 15.7 above.

- The Chapter on Children: The International Dimensions recommends that the Department of Home Affairs, as the government agency under whose authority undocumented immigrants are detained, should take primary responsibility to ensure compliance with minimum standards in order to ensure the well-being of children who are detained with their parents at detention centres.[110] **The Office of the Children's Protector may, on its own accord or on receiving of a complaint, inspect any immigrant detention centre for the purpose of ensuring the adequate protection of children in that centre.**

- A child in foster care's progress and condition should be monitored as frequently as the child's age and circumstances require.[111] As monitoring of children in foster care is usually conducted by social workers, the Office of the Children's Protector should only play an overseeing role to ensure that these children's progress are monitored on a regular basis. However, due to the lack of resources, social workers find it difficult to frequently visit children in foster care. Proper resourcing on ground level is thus essential to ensure effective service delivery. **The Commission thus recommends that the new child care legislation should stipulate that each provincial Department of Social Development should annually count the children in out-of-home care in its province, and should ensure that measures are taken for the provisioning for children in out-of-home care.**

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110 See 22.4.5 above.

111 See also 17.8.4 above where it is recommended that supervision services should not be required for certain children in foster care.

- Investigating the deaths of and serious injuries to children in care is an important element of monitoring the quality of services to children in care. In terms of section 42(1) of the Child Care Act every dentist, medical practitioner, nurse or social worker who examines, attends or deals with any child in circumstances giving rise to the suspicion that the child has been ill-treated or injured is obliged to notify the Director-General (DG). In practice if it is found that the death of a child was negligently or intentionally caused, criminal prosecution will usually follow. With regard to children in alternative care, there is no obligation to notify the DG of deaths of children that are due to abuse, neglect or that occur in suspicious circumstances. **It is therefore recommended that, similar to the Child Death Review Team of New South Wales (Australia)[112] the Office of the Children's Protector should be informed of the death of all children in alternative care in order to consider whether an investigation is necessary to determine the adequacy and quality of services to children.**

- **The Office of the Children's Protector should have the power to hold accountable any person or organisation that fails to implement or contravenes any provision of the new child care legislation**. For example, if a border official fails, without reasonable excuse, to refer an unaccompanied or separated child asylum seeker as a child in need of care to social services,[113] the official should be liable in his or her personal capacity too, e.g. a fine or suspension.

- **Similar to the position in Norway,[114] the Office of the Children's Protector should have the right of access to documentation affecting children at the disposal of any department or organisation to enable it to perform its functions.**

- **Similar to the position in Michigan(USA),[115] a procedure should be developed in terms of which the Office of the Children's Protector could summons any person to appear before it and to give testimony or produce documentation which might be relevant to an investigation.**

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112 See 24.3.3.6 above.

113 See 22.4.5 above.

114 See 24.3.1.1 above. See also the position in British Columbia at 24.3.1.6 above.

115 See 24.3.1.5 above.

- The Office of the Children's Protector should increase public awareness of its existence and also disseminate sufficient information about the operation of the new child care legislation to the public.

- For effective implementation of the new child care legislation, it is essential that the Office of the Children's Protector work in collaboration with the relevant departments, organisations or processes concerned with child welfare. **The Commission therefore recommends that the Office of the Children's Protector should maintain close liaison with authorities, organisations, bodies and processes concerned with child welfare in order to foster common practices and to promote cooperation in cases of overlapping jurisdiction.** This will avoid a duplication of efforts and thereby maximising available resources.

- The Commission has recommended in Chapter 23 above that the Child and Family Court must be accorded a monitoring power to do a follow-up on a case which it heard earlier.[116] There is therefore no need to consider the issue of monitoring by the courts in this Chapter.

The Commission further recommends that -

- **It should be a criminal offence for any person who interferes with or hinder any person, authorised by the Office of the Children's Protector, in the exercise or performance of his or her powers and functions.**
- **The Department of Health should inspect circumcision schools to ensure that these schools comply with required health standards.[117]**

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116 See 23.10.6 above.

117 See 10.2.8.4 and 10.2.11 above for a more detailed discussion on harmful cultural practices.

CHAPTER 25

GRANTS AND SOCIAL SECURITY FOR CHILDREN

25.1 Introduction

Even before the release of Issue Paper 13, it was clear that a range of intersecting areas of law would have to be addressed in this investigation. There has been an overall perception that spending on social welfare services (as opposed to direct transfer payments in the form of grants and pensions) has diminished in the period since 1996, and financial strains experienced by the non-governmental welfare sector have been widely reported. Thus, a range of intersecting economic issues were explicitly identified as part of the challenge of child law reform.[1]

Money issues and the scarcity of resources for both prevention of abuse and neglect and for the protection of children were raised by numerous workshop participants. It also emerged at consultative workshops and in responses from service providers that social security issues pertaining to children should form a central aspect of the proposed new children's statute. This is because the alternative care system for children who are removed, abandoned, or orphaned necessarily involves a review of the existing grants payable to the care-givers of such children, such as the foster grant, as well as subsidies currently payable to places of care. In other words, the alternative care system is inextricably intertwined with available subsides and grants. The Commission has therefore been aware from the outset of the financial implications of the investigation, and of the important policy options that often fall to be decided based on affordability rather than principle or practicality.

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[1] J Sloth-Nielsen and B van Heerden 'The political economy of child law reform: Pie in the sky?' in CJ Davel (ed) **Children's rights in a transitional society** Pretoria: Protea Book House 1999, p. 107.

Over the period of time that this investigation has been underway, a number of other issues relevant to the financing of welfare services have arisen. These are firstly, the release of the Department of Welfare's Financing Policy in 1998; second, the phasing out of the State Maintenance Grant (SMG)[2] along with the introduction of the Child Support Grant (CSG) in 1998; third, the appointment of a Committee of Inquiry[3] into the Social Security system by the Minister for Social Development in 2000, hereafter named the Taylor Committee. In January 2000, the Minister for Social Development identified ten priorities to be addressed over a five year period by the Department of Social Development. Priority two was stated as follows: 'developing and implementing an integrated poverty eradication strategy that provides direct benefits for those in need, within a sustainable developmental approach'.[4] Priority three ('developing a comprehensive social security system that links contributory and non-contributory schemes and prioritises the most vulnerable households')[5] gave rise to the appointment of the abovementioned Committee. The Project Committee on the Review of the Child Care Act has made a formal submission to the Taylor Committee,[6] and Project Committee members have attended a range of workshops, seminars and conferences linked to the process of reviewing

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2 Which was phased out over a three year period which ended on 1 April 2001.

3 At the time of writing, the Taylor Committee had submitted a report to Cabinet (on 14 November 2001), but the contents were not available for public scrutiny.

4 'Department of Social Development inputs to Yearbook 2001/2002' at www.welfare.gov.za [accessed 14 November 2001].

5 Ibid.

6 On 17 October 2000.

aspects of the social security system.[7] The Commission has also benefitted from having received copies of submissions made to the Taylor Committee by a range of other organizations, lobby groups and consortia.[8]

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7 For example, the National Consultative workshop on Children's Entitlement to Social Security, held in Cape Town during March 2001 by the Child Health Policy Institute, Soul City, the Children's Rights Centre and the Committee of Inquiry into a comprehensive social security system; the National conference entitled 'Poverty eradication should start with children' hosted by the Institute for Child and Family Development on 31 October 2001 at the University of the Western Cape.

8 For example, submissions by the Black Sash and by the Alliance for Children's Entitlement to Social Security (ACESS).

Prior to the appointment of the Taylor Committee, the Commission commissioned a research paper[9] on grants from a well-known expert on social security, and this paper has formed the backdrop to some of the proposals contained in this Chapter. The research paper argued that maintenance and foster care grants play a key role in promoting community care and family preservation,[10] but that there are large categories of needy people for whom the present system does not provide coverage.[11] For example, based on statistics from 1998, old age pensioners accounted for 6 out of every 10 beneficiaries of state social security, whilst recipients of disability grants accounted for another quarter of the total number of beneficiaries. However, for children under the age of 18, who form approximately half of the population of 40 million people,[12] the main grant available to combat poverty, the child support grant (CSG), will be available to only 3 million children over the next budget cycle. Significant barriers to accessing the CSG have been noted by NGO's and advocacy groups, including over-stringent criteria that have been set in the regulations to the Welfare Matters Amendment Laws, difficulties in accessing welfare offices as well as in finding offices of the Department of Home Affairs in order to apply for the necessary identification documents, not to mention some welfare officials who are allegedly unhelpful in assisting care-givers to successfully complete the required applications.

The current situation as regards children living in extreme poverty has been widely reported.[13] According to IDASA, '[I]f we use lack of income to measure child poverty, and define a child as poor if he or she lives in one of the bottom 40% of households in South Africa, 60% or 3.8 million of our children, aged 0 - 6 years, and 10.2 million aged 0 - 18 are poor. Research based on the absolute definition of child poverty that counts a child as poor if he or she has income per month below the level estimated necessary to ensure a healthy, secure existence, finds that

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9 D Budlender 'Social Security and Grants', research paper commissioned by the Commission, 1999.

10 'Social security and grants' p. 28; see too the Lund Committee report (Department of Welfare 1996) p. 20.

11 'Social security and grants' p. 6.

12 There are 17 million children aged under 18 in South Africa, 44% of the population and just over half of these children live in three provinces, Kwa Zulu-Natal, Eastern Cape and the Northern Province. 13% of the child population is aged under 6 years, and there are 1 million children under the age of 3 years. Two thirds of all children live in rural areas, and 49% of all children do not have birth certificates (Shirin Motala 'Children in South Africa: A contextual analysis' unpublished paper presented at the National Workshop on Social Security for Children in South Africa, 7 and 8 March 2001).

13 See, for example, IDASA Budget Brief no 61 (2001) 'Budget 2001 does little for child poverty'; Opening address by the Minister of Social Development at the National Conference in Children in Need of Special Protection, University of the Western Cape, Bellville October 2001 (http://www.welfare.gov.za/ accessed 12 November 2001).

72% of children or 4.6 million aged 0-6, and 12,3 million aged 0-18 are poor'.[14] 55% of the South African population earn less than $2 per day, and about 12 million people are very poor, existing on under $1 per day. It has been shown that the impact of HIV/Aids has exacerbated the above situation, and reports of child headed households with no access to food whatsoever have surfaced at different forums.[15]

It can be concluded that poverty and the effects of the HIV/Aids pandemic together constitute the most serious threats to children's well being in South Africa at present.

25.2 Current legal framework

[14] IDASA Budget Brief no 61 (2001) p. 2.

[15] See for example **Mail and Guardian** October 26- November 1 2001 for a report on the National Children's Forum on HIV/Aids held in Cape Town on 27 and 28 August 2001.

The three year process of phasing out of the State Maintenance Grant (which was payable in a amount much higher than the grant which replaced it) has now been concluded, with the result that, the only grants for children that currently exist are: the child support grant, introduced by the Welfare Laws Amendment Act 106 of 1997, which commenced on 1 April 1998; the foster child grant (FCG) which has been applied since 31 March 1998 in accordance with the Social Assistance Act 59 of 1992; and the so-called care dependency grant, also applied since 31 March 1998 in accordance with the Social Assistance Act.[16]

Presently, the amount payable for the CSG is R110, and the 'take-up rate' has increased from 30 000 children who benefitted in 1998, to 1.2 million children by April 2001.[17] The Department of Social Development expects the take-up rate to exceed the projected target of reaching 3 million children aged below 7 years.[18]

Because the foster care grant is payable in an amount that is approximately four times larger than the CSG, there have been reports that there have been increased applications for payment of this grant.[19] It must also be born in mind that there are, independent of the direct financial

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16 See, in general, Van Heerden et al **Boberg's Law of Persons and the Family** 260 -7. The Care Dependency Grant is payable in the amount of R520 per month to a caregiver who remains out of the employment market because of the necessity of caring for a profoundly disabled child on a more or less permanent basis. It is, in other words, an income substitute for the caregiver of the child, to replace what would otherwise have been earned, rather than a child related grant targeting the caregivers of special needs children whose costs in respect of such children are higher than is ordinarily the case. See further 'Social security and grants' supra 10-15.

17 'Department of Social Development inputs to yearbook 2001/2002' at www.welfare.gov.za [accessed 14 November 2001].

18 Ibid.

19 G O Hollamby ' Submission to the Committee of Inquiry into a Comprehensive Social Security System' delivered on 17 October 2000 p. 6.

transfer involved in this grant, also associated costs linked to the administration of the foster care grant, for example the costs associated with children's' court enquiries, statutory supervision services and the required reports that have to be completed every two years to ensure continuation of the grant. The amount payable under this grant is in the region of R370 per month.

At March 2001, a total of 52 642 FCG's were being paid,[20] up from approximately 42 000 grants paid in 1995/6.[21] The most recent statistics on beneficiaries of this grant suggest that two provinces together account for 42% of all FCG's. These are the Western Cape and the Eastern Cape. In the North West and Northern Province respectively, fewer than 2000 FCG's were paid in each province as at 31 March 2001.[22] It has been suggested that some magistrates are reluctant to award FCG's where children are placed with relatives, such as grandmothers.[23] There is, however, no legal impediment to the payment of FCG's to relatives, as the present section 15(1)(b) permits the placement of a child 'into the custody of a suitable foster parent designated by the court under the supervision of a social worker' which indicates that there is no legislative distinction between placements with relatives as opposed to non-relatives.

Further, in contrast to the CSG and other grants available in South Africa, it must be noted that the FCG is not means tested.

The third grant payable in regard to the care of children is the Care Dependency Grant (CDG), which, like to FCG, is payable until the child reaches the age of 18 years. The amount paid under this grant is in the region of R520 per month. After attaining the age of 18 years, a child beneficiary may apply for a disability grant. Problems in regard to the payment of this grants have been identified by non-governmental organizations and service providers, including the lack of clear criteria for the awarding of this grant, and these include the lack of a coherent definition of 'care dependency' with a consequent lack of uniformity in assessments of care dependent children. The criteria for assessment are also based on medical factors, which goes

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20 This does not mean that 50 000 children benefited, as a foster parent may receive a grant for more than one child. Hollamby estimated in 2000 that approximately 100 000 children benefited from the FCG.

21 Department of Welfare (1996) **Report of the Lund Committee of Inquiry on Child and Family Support**.

22 'Department of Social Development inputs to Yearbook 2001/2002' at www.welfare.gov.za [accessed 14 November 2001].

23 South Africa National Council for Child and Family Welfare 'Supplementary report to the Committee of Inquiry into a comprehensive Social Security System' 29 November 2000.

against the social model of disability which government would prefer to promote.[24]

A significant problem facing South African children at present concerns the availability of financial support for children orphaned by HIV/AIDS, and especially those living in child headed households. Unless they are aged under 7, and living with a primary care-giver who can apply for a CSG, or placed in formal foster care in order for the FCG to be payable, there is no monetary support available. Further, children who themselves are HIV/Aids positive are not regarded as able to qualify for the CDG.

25.3 The constitutional and policy considerations underpinning the allocation of grants to children

[24] Children with HIV/Aids do not presently qualify for the CDG. The proposals discussed later in this Chapter concerning the payment of a 'top-up' grant for children with special needs must be viewed in relation to amendments /alterations to the CDG, rather than as constituting an altogether new grant. The proposals discussed below are in essence simply a change of name, not a new financial allocation.

The Constitution provides, in section 27(1)(c), for the rights of everyone to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. Section 27(2) spells out the nature of the State's obligation in regard to social security, namely that the State is obliged to take reasonable legislative and other measures, within its available resources, to achieve progressive realization of this right. Section 28(1)(c) of the Constitution refers directly to the child's rights to basic social services, and it has been alleged that 'there is a close link between social security and social services rights'.[25] The CRC provides an indication as to what social services should be provided by ratifying States Parties to children in articles 26 and 27. These include protecting children from physical or mental violence, injury or abuse, neglect or negligent treatment, and protecting children against economic exploitation.

In it's concluding observations on the First Country Report submitted by the South African Government to the Committee on the Rights of the Child, Government was urged to extend the reach of the CSG to provide greater support to children, and further to extend it's availability to children aged above 7 years.

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25 S Liebenberg and K Pillay 'Socio-economic rights in South Africa' Community Law Centre, University of the Western Cape 2000 at 324. See too S Liebenberg 'The Protection of Economic and Social Rights in Domestic Legal Systems' in A Eide et al **Economic Social and Cultural Rights** Kluwer Publishers, Netherlands, 2001.

The starting point for any analysis of the scope and nature of the State's obligations with regards to socio-economic rights is the constitutional court decision in **Government of the Republic of South Africa v Grootboom and others**.[26] Although the judgement concerned the right to housing rather than the right to have access to social security, the judgment nevertheless underlined the constitutional obligation which rests upon the State to protect children from maltreatment, neglect and abuse (section 28(1)(d)). This obligation is not subject to progressive realization over time, nor to the constraints of available resources that qualify other (socio-economic) rights. The Constitutional Court's judgment in **Grootboom** thus supports the notion of state responsibility for preventive action where child neglect stems solely from parental poverty, and, further, it can be inferred from the reasoning of the Cape High Court in the first **Grootboom** judgment[27] that family preservation is a policy goal that is worthy of state support. However, the Commission is of the view that there are currently inadequate prevention and early intervention strategies in our children's legislation, as the entire Child Care Act 74 of 1983 is weighted towards removal procedures, i.e. taking children away from parents into one or another form of alternative care, which they are at risk of neglect due to parental or familial poverty.

Further, although Yacoob J spelt out that the primary responsibility for supporting children lies on parents and families,[28] the State does bear the primary responsibility for providing for children who are abandoned or who otherwise lack a family environment. This strongly suggests that urgent and immediate steps need to be taken to provide state support and social services to children orphaned by HIV/Aids, of whom there are an ever-increasing number.[29]

It is axiomatic that the CSG is limited in reach to children aged under 7 years, and that the amount payable is insufficient to address children's basic needs.[30] There is no available financial relief for parents or children living in dire poverty where the children are aged over 7

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26 2000 (11) BCLR 1169 (CC).

27 **Grootboom v Oostenberg Municipality** 2000 (3) BCLR 277 (C).

28 In terms of the Constitutional Court's reading of the interplay between section 28(1)(b) and section 28(1)(c).

29 Although exact statistics are unavailable, one recent study estimates that there are 420 000 children in South Africa who are Aids orphans, and predicts that there may be as many as 800 000 children orphaned by Aids by the year 2005 (Report on a study into the situation and special needs of children in child headed households, unpublished study for the Nelson Mandela Children's Fund dated 18 June 2001 (hereafter Nelson Mandela report).

30 The amount payable was until recently R100 per month, an amount which was increased to a meagre R110 in the 2001 budget.

years. Yet, one source estimated that of the750 children for whom foster care placements had been arranged recently, 520 of these were placements due to severe parental poverty.[31] Submissions received and sources consulted by the Commission revealed not only the strong links between poverty and neglect, but also the apparent rising incidence of extreme forms of poverty - and consequent neglect - amongst children.

31 G O Hollamby 'Submission to the Committee on Inquiry into a Comprehensive Social Security System by the Project Committee on the Review of the Child Care Act of the South African Law Commission', 17 October 2000.

In summary, bearing in mind the rationale in the decision in **Government of the Republic of South Africa v Grootboom**, and bearing in mind the links between neglect and abuse of children and poverty in present day South Africa,[32] it is suggested that the constitutional obligation regarding the prevention child abuse, malnutrition and neglect contained in section 28(1)(d) of the Constitution requires a more concerted effort to provide social security to children in dire poverty than obtains at present. In August 2001, widespread reports of severe child malnutrition in the Eastern Cape were profiled after a study conducted by the School of Public Health at the University of the Western Cape. The Minister for Social Development reacted strongly to the plight of these children in the light of their difficulties in obtaining financial relief through the present Child Support Grant, reportedly requesting departmental officials to relax the criteria for successful applications in order to facilitate greater access to the grant.

25.4 Evaluation and recommendations

The Commission recommends addressing the lacuna identified above in a variety of ways. First, the overall proposals contained in this Discussion Paper **focus far more strongly than present legislation on providing a concrete legislative framework for preventive and early intervention strategies to combat child abuse and neglect**,[33] as an adjunct to more expensive and more invasive tertiary intervention strategies, such as removal of children in need of services into formal alternative care settings.

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32 J Sloth-Nielsen 'The child's right to social services, the right to social security, and primary prevention of child abuse: some conclusions in the aftermath of *Grootboom*' 2001 (16) **SAJHR** 317.

33 IMC policy proposals included the concept of different levels of intervention, with statutory removal of children placed lower down the rung of options by comparison to both prevention and to early intervention strategies. See the Chapter entitled 'Prevention and early intervention' above.

Second, the Commission proposes that the foster care system should be rationalised and it's focus altered. Ideally, the FCG should not function as a poverty alleviation measure, but rather as a mechanism for ensuring short term, temporary care of children pending a more permanent placement or return to the family setting. In addition, the unnecessary reviews that have to be undertaken ever two years to secure continued payment of the FCG for what is in reality a permanent placement, is a waste of scarce resources. However, the Commission cannot suggest removal or diminution of the current amount payable under the FCG unless adequate measures are implemented in place of the FCG system to provide a safety net for current beneficiaries.[34] **The Commission therefore recommends that the FCG should be restricted to court ordered temporary placements, and where a placement takes on a permanent nature, the foster placement should be converted**. It has been suggested that the amount of the grant should possibly be reviewed,[35] although **the Commission is reluctant to propose a lowered amount for foster-carers who are needed to provide alternative care for children who have to be removed from the family environment**. The Commission recognizes, however, that non-uniformity in amounts payable to children as social security may create the adverse consequence that it is financially more beneficial to place the child in informal foster care with a relative who can then claim a formal FCG than to apply as a primary care-giver for a CSG to maintain one's own child.[36] Nevertheless, the Commission is not, at this

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34 See Pia Zain 'A Small Process of Dying: The impact of the cancellation of the State Maintenance Grant' Nadel research report no 12 (2000) details how the phasing out of the SMG adversely affected especially the ability of women caregivers to meet their care duties towards children.

35 See T Guthrie 'Options and Improvements for social security in South Africa' unpublished paper presented at the National Workshop for Social Security for Children in South Africa, Cape Town, March 2001.

36 See J Sloth-Nielsen and B van Heerden 'The political economy of child law reform: Pie in the sky?' in CJ Davel (ed) **Children's rights in a transitional society** 107; see too, Department of Social Development 'Proposed Amendments to the Social Assistance Act, Act no 59 of 1992', a briefing to the Portfolio Committee for Welfare and Population Development dated 27 September 2000, to be found on www.welfare.gov.za [accessed 14 October 2001].

stage, proposing the amount payable as a FCG should be reviewed downwards.

The Commission is of the view, however that where the carer of the child is related to the child by kin (so-called kinship care), the category of foster care should be renamed, to be named 'care with relatives'.[37] Other alternatives to foster care should also be provided for by law. In this regard, there have been many submission received by the Commission pointing to the inequality that currently exists as regard semi-permanent fostering arrangements (which do attract a cash grant) and more permanent placement of children, adoption, which attracts none.

37 G O Hollamby 'Placement of children in foster care with relatives', unpublished submission to the Portfolio Committee on Social Development, 22 November 2001.

To achieve this end, **the Commission consequently recommends the establishment of grants aimed at subsiding adoptions, to enable long-term foster care to be converted into the more secure and permanent option of adoption**. It is also suggested that if a grant was available to enable adoptions to be subsidized, this would have the further benefit of assisting to encourage the development of community placements for at least some proportion of children who have been orphaned by HIV/AIDS. It is arguable that the introduction of adoption grants are supported by the view of Yacoob J in **Grootboom**, as he regarded the State as bearing the primary responsibility (as regards the duty of support) where children lack a family environment, such as where they are orphaned, abandoned, or removed from their families. Therefore, where willing prospective adoptive parents are available, but unable to bear the additional costs attendant upon raising a child, it is again arguable that the State (in **Grootboom**'s reasoning) is obliged to adopt measures to ensure fulfillment of its primary obligation to support such children. While the judgment the **Grootboom** case does not *prescribe* in any way what such measures might be, there are, in reality, only two choices: to require the state to ensure that children are looked after in state or other institutions, or find some other form of care. And, if state institutions do not exist, or are full, the second option compels an examination of existing subsidies and grants to facilitate alternative placements outside institutional settings.[38]

Indeed, insofar as fostering constitutes a relief for the state from its subsidiary 'parental' function, there can be no logical distinction between long-term foster care (more often than not until the child reaches the age of 18 years) and a more permanent legal relationship between adult and child in adoption. The costs to the State may in fact diminish, as bi-annual social worker reports and reviews of placement are rendered unnecessary once a more permanent solution is put in place.

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38 Both foster care grants and any idea of subsidized adoptions fulfil other important international law requirements. Both ensure that children grow up in a family environment, rather than in an institution, as international law recognized the undesirability of institutionalisation of children (see, for example, the United National Rules for Juveniles Deprived of their Liberty (1990) and the CRC.

Third, as regards the present Child Support Grant, it must be pointed out that the Committee on the Rights of the Child responded to the South Africa country report by urging Government to consider extending the ambit and reach of the child support grant.[39] **The Commission also recommends the extension of the CSG to become a more universal social security system, targeting all poor children aged under 18 years**. This proposal accords with recent advocacy efforts to lobby for the introduction of a Basic Income Grant (BIG) which would be payable to all South Africans, including children, and that it would be recovered via an increase in the amount of revenue raised through VAT (Value Added Tax) as well as other tax mechanisms.[40] Some lobbyists have proposed that even if Government were to find the immediate implementation of such a grant to be financially beyond the realm of possibility, at least it should be implemented incrementally, commencing with children up to the age of 18 years. **The Commission supports such proposals, as they would go along way towards addressing some of the problems with the present system of grants outlined in this Chapter. We are further of the view that this basic income grant, whether payable to adults and children alike, or whether it commences with payments regarding children, should not be means tested**.

The Commission is further of the view that the current amount of the CSG is inadequate to enable care-givers to provide for children's primary needs. Although the amount payable was increased in 2001, as mentioned above, this was the first increase in the amount since introduction of the CSG in 1998. **The Commission therefore proposes that the legislation require government to review the amount payable for the CSG on an annual basis, and to adjust it in line with, or preferably above, the inflation rate**. The Commission would like to recommend that Government review the amount payable as social security for children, and if this is fiscally at all feasible, to increase the amount to a level which is commensurate with the actual costs of feeding and otherwise raising children.

Fourth, because we have committed throughout our consultative processes to ensuring that new child care legislation pays specific attention to children with disabilities and other special needs children, **the Commission is of the view that, in certain circumstances, an 'add-on grant' (such as the existing care dependency grant) should be provided for in the new**

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39 'The Committee recommends that the State party expand its Child Support programme to develop alternative programmes to include support to children up to the age of 18 years, who are still in school' (CRC/C/15/Add.122 par 16).

40 The proposal which was allegedly initially tabled by COSATU, but which has found broad support from numerous other organizations (see the Acess submission to the Taylor Committee dated March 2001).

children's statute.[41] The focus here would be on children who are especially vulnerable, such as children living in child-headed households and children in foster care who are also disabled. This view has been supported in numerous submissions to the Commission, and **the Commission therefore recommends that the Department of Social Development should identify which categories of special needs children should benefit from such a 'top-up grant' and design criteria outlining the precise circumstances within which such a top-up grant would be payable**.

Fifth, the Commission believes it is counter-productive to dispense state social security resources via the Social Development budget, only to have the positive financial effect for children and families mitigated be reason of the fact that these state funds are then used to subsidise other government services, such as education. **The Commission therefore proposes that recipients of state social security such as the CSG and the CDP, as well as beneficiaries of the FCG, should be exempted from school fees in respect of the children at whom the grant is targeted**. This was previously the position, and, although still in place, is reportedly not proving to be an effective access mechanism for children to ensure their right to education. The use of school user fees has reportedly caused undue hardship for grant receiving families. In addition to the above, there are supporting proposals elsewhere in this Discussion Paper which are aimed at providing financial relief to welfare organisations involved with the care of abused, neglected, orphaned or abandoned children. One example is the possibility of rebates from local government.

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41 The same reasoning would ensure retention of the foster care grant for children in out-of home care.

Sixth, the Commission is mindful of the problems that have been experienced as regards ensuring the CSG actually reaches children in dire need, and more particular those living in remote and in rural areas. The present means test as provided for in the regulations to the Welfare Laws Amendment Act have proved difficult to implement, and thus served as a serious impediment to care givers wishing to access the grant. It has been suggested that as at March 2001, the CSG reached only 7% of children in need, and only 33% of those targeted.[42] Further, it is unrealistic to demand of children orphaned or otherwise abandoned due to the HIV/Aids epidemic to fulfil complicated administrative requirements as a pre-condition to accessing state social security.

The Commission therefore recommends that administrative impediments and hurdles caused by over onerous regulations, which are frequently overzealously applied, be addressed in the regulations which specify the conditions for the payments of grants. These should be simplified and the barriers caused by the requirement of proving compliance with the means test altogether removed. Provision must also be made for the payment of persons who must be deputised or designated to lawfully receive grants on behalf of children who are living in child-headed households, and who cannot themselves receive the grant directly by virtue of their youthful age.[43]

The above proposals are substantially in accordance with the proposals of Acess (Alliance for Children's Entitlement to Social Security) proposals, which include the following:

In respect of the Care Dependency Grant (CDG)

- Eligibility should be needs based.
- The CDG should extend to children with moderate disabilities and chronic illnesses, including those with HIV/Aids.
- Permanent home care should not be a pre-requisite in order to be eligible for the

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42 ACESS submission to the Taylor Committee of Inquiry, March 2001.

43 Currently grant receivers must be aged over 18 years, even with regards to the CSG.

CDG.

In respect of the Child Support Grant (CSG)

- The CSG should be extended to 18 years.
- The amount of the CSG should be increased and determined by objective poverty measures linked to inflation.
- The CSG should be non-means tested and universally available.
- Aids orphans and child-headed households should be enabled to access the CSG immediately.

In respect of the Foster Care Grant (FCG)

- Subsidized adoptions must be introduced in order to encourage families to adopt children.
- The process of accessing the FCG should be simplified.
- Incentives should be introduced for fostering HIV/Aids orphans, such as tax rebates, free health care and education for foster children and biological children, coverage of funeral expenses of HIV positive children etc.

A key issue which has been the subject of debates during the course of this investigation is the question as to whether legislation dealing with child-related grants should feature in the new children's statute, or whether it should remain within the context of overall social security or social assistance legislation. The advantage of transferring legislation on children's grants to the new child care legislation is that it would promote a comprehensive approach to key issues affecting children's lives, and have the benefit of linking children who are extremely vulnerable to the means to address that vulnerability. The FCG is a good example of this, in that child and family courts are - and will be - the primary protective mechanism to ensure that neglected children are provided with alternative care within a family environment, and that the family is in turn provided with the means to care for such child. It has been suggested in responses to the Commission that when the FCG was linked to the 1960 Children's Act, the overall protection of child beneficiaries was better than is presently the case.

A counter argument is that, especially as regards non-court related grants, such as the CSG, it might be preferable to include all detail, regulations and conditions in one piece of legislation, to promote uniformity of policy and practice amongst those who implement that payment of the grant at the local level. It must be born in mind here that the child related grants discussed in this Chapter are but part of a larger social assistance scenario, which includes payments of old age pensions, disability grants to those aged over 18 and war veteran grants to name three. This line of reasoning would suggest that administrative delivery might be impeded if welfare officials had to apply different pieces of legislation to carry out their day-to-day duties.

The Commission is, at this stage, awaiting the recommendations of the Taylor Committee of Inquiry on this aspect, particularly as a key focus of that Committee was to conduct a review, and develop recommendations to promote administrative efficacy in the grants system. The Commission however, is of the opinion that a via media is possible here, as the child related grants must ideally be referred to in the new children's statute, as well as the conditions under which they must be paid. Thus for example, it should be spelt out that a court-ordered grant should be payable as from the date of the court order. However, administrative details concerning the administration of grants can fruitfully be included in social assistance legislation.

The Commission is fully cognisant of the fact that the grants system and the recommendations concerning the broadening of access of children in dire need to state provided social security, as contained in this Chapter, will have far reaching fiscal implications for the State. The Commission has, as has become the norm with respect to investigations concerning law reform that will have financial implications for Government, always intended to commission thorough costings of the proposals contained in the Discussion Paper. This would include the financial implications of broadening the CSG, altering the FCG, providing for subsidised adoption grants, and the introduction of the 'top-up' grants payable in certain defined situations to children in special need. The Commission is, however, hopeful that some of the required costing of improvements to the grants system will have been undertaken at the behest of the Taylor Committee of Inquiry, thus diminishing the need for further financial forecasts.

In summary, the Commission recommends:

- **a stronger focus on preventive and early intervention strategies to combat child abuse and neglect;**
- **the continuation of the FCG;**
- **a differentiation between foster care and care by relative situations;**
- **the introduction of subsidised adoptions;**
- **the extension of the CSG, both in the amount payable and its reach;**
- **payment of an 'top-up grant' to certain categories of special needs children;**
- **exemption from school fees in respect of children in receipt of state social security; and**
- **the simplification of the regulations which specify the conditions for payment of social security grants**.

The Commission further proposes that enabling provision be enacted to permit the Minister to (by regulation) spell out under which circumstances more than one grant, or a portion of a specific grant, may be claimed. Thus, although a person may be able to apply for a CSG and a FCG, the amount payable under the latter may be lower where a 'care by relative' situations is concerned.