REVIEW OF THE CHILD CARE ACT
EXECUTIVE SUMMARY

The South African Law Commission was requested to investigate and review the Child Care Act, 1983 and to make recommendations to the Minister for Social Development for the reform of this particular branch of the law in 1997. A project committee was appointed and an issue paper was published for general information and comment in May 1998. The issue paper was workshopped extensively. This discussion paper follows on these public consultation processes and contains the Commission's **preliminary** recommendations and findings. It is published in full so as to provide persons or bodies wishing to comment or make suggestions for the reform of this particular area of the law with sufficient background information to enable them to place focussed submissions before the Commission.

The Commission is committed to consulting with all relevant stakeholders and will engage in a consultation process with this discussion paper and draft legislation as its basis. In this regard, consultation with and participation by children in the law reform process will play a crucial role. After the consultation process, the Commission will prepare a report which will contain its **final** recommendations and a refined children's statute. This report will be submitted to the Minister for Social Development who may implement the Commission's recommendations by introducing the draft children's statute in Parliament.

From the very beginning the Project Committee saw its mandate as going beyond the confines of the present Child Care Act, 1983 to include all statutory, common, customary and religious law affecting children. In the light of this broad mandate, the Project Committee formulated as its vision a single comprehensive children's statute for South Africa's children. This vision is based not only on the constitutional protection accorded to children's rights in the South African Constitution, the effect and interpretation given thereto by our courts, and the impact of HIV/AIDS on children, but also flows from South Africa's international obligations inter alia in terms of the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

In the consultation processes, it was repeatedly stated that any proposals made for law reform must be accompanied and supported by the necessary human and financial resources. 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 on a pragmatic approach where it attempted to strike a balance between the available current resources, their optimal use and application, and the realisation that social welfare and other services for children in South Africa will continue to need massive injections of resources in the foreseeable future in order to fulfil the basic needs of the most vulnerable members of our society.

The essence of the recommendations and findings made by the Commission in this discussion paper is summarised below.

Chapter 2: The scope of the investigation

Inherent in the Commission's vision of a new children's statute are the twin principles of enabling a child's growth and development within a family environment and protecting children in vulnerable situations. At the workshops the vision of the Commission received overwhelming support, particularly because of its holistic, all-inclusive and child-friendly approach, which emphasises the best interests of the child. However, it was conceded by respondents that one single comprehensive children's statute might not be that accessible and user-friendly precisely because of its sheer scope and size.

The Commission remains committed to the concept of a single comprehensive children's statute. It is accordingly recommended that the new children's statute should go beyond the scope of the existing Child Care Act, 1983 specifically to include provisions on parental rights and responsibilities, children in need of special protection, the age of majority, surrogacy, artificial insemination, prevention and early intervention, early childhood development, partial care, the health rights of children, the rights of children as consumers, to name but a few of the new areas. This implies that some areas of our existing private family law will be codified.

However, the Commission does not recommend that the following pieces of legislation be repealed and summarily 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 other areas of the law, the Commission does not recommend, save for cross-referencing to the relevant legislation or where a specific aspect relating to children needs to be addressed, the incorporation in the new children's statute of legislation on children in trouble with the law, sexual offences by and against children, measures aimed at making it easier for children to give evidence in court, education, access to health, and child labour. The effect of this recommendation is that these aspects will remain (or will in future be) in the primary education, health, labour, sexual offences or child justice legislation.

Chapter 3: The constitutional imperatives relating to children

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. In this regard, South Africa is rather fortunate in that it does accord constitutional protection to children's rights in section 28 of the Constitution. This Chapter presents an analysis of the judicial interpretations given to this section of the Constitution.

Chapter 4: Childhood - Its beginning and end

International law and our Constitution define a child as a person below the age of eighteen years. Therefore only persons below the age of eighteen years of age are entitled to the protection afforded by section 28 of the Constitution and those listed in the relevant international instruments. The Child Care Act, 1983 also defines a child as any person under the age of eighteen years. The Commission therefore recommends that a child be defined for the purposes of the new children's statute as any person under the age of 18 years of age.

The consequence of this approach is that the new children's statute will not apply to unborn children: childhood will begin at birth.

In terms of the Age of Majority Act 57 of 1972, South African's of both sexes attain majority on reaching the age of 21 years (the age of majority). A minor can also attain majority status by concluding a valid marriage, or in terms of the Age of Majority Act through a High Court process allowing for express emancipation.

The Commission recommends 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. An application for extension of parental responsibility and State support may be made before the child's eighteenth 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.

If the age of majority is advanced to 18 years, then little justification for the retention of the Age of Majority Act 57 of 1972 remains, and the Act can be repealed.

Chapter 5: The principles underpinning the new children's statute, the best interests of children-standard, and the rights and responsibilities of children

(a) **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. Principles can be derived from international law such as the African Charter on the Rights and 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, as well as from accepted social work practice. The escalating numbers of reported cases of child abuse and neglect in recent times, as well as the crisis faced by South Africa as regards the HIV/AIDS pandemic also provide cogent reasons as too 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. The Commission accordingly recommends that the objects of the new children's statute be as follows:

(1) 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;

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

(4) 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

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

The Commission further recommends that the new children's statute should contain the following list of general principles and guidelines:

(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 interests of the child.

(b) The best interests 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;

(c) to treat the child fairly and equally;

(d) to protect the child's fundamental human rights set out in the Constitution

(e) 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 -

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

(b) **The 'best interests of the child' standard**

Section 28(2) of the Constitution, article 3(1) of the Convention on the Rights of the Child, 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'; (ii) the different professionals involved with matters relating to children have different perspectives on the concept; and (iii) the way in which the criterion 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. While the Commission accepts that the application of the 'best-interests' standard does create problems in practice, it is of the opinion 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.

(c) **The rights and responsibilities of children**

While children are afforded constitutional rights, the Commission considers it necessary, in addition, to 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.

Chapter 6: The Child Care Act 74 of 1983

The Chapter on the Child Care Act, 1983 is an introductory one as specific aspects related to the Act are being dealt with in broader detail in subsequent chapters of the Discussion Paper. However, the Commission does recognise that the present Child Care Act, 1983, despite its deficiencies and limited scope, presents a workable basis and therefore recommends that most of the provisions of the current Act be retained.

(a) **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. 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. The Commission recommends that the position of children's court assistant be reactivated and given an expanded role.

(b) **Legal representation for children**

The Commission recommends putting into operation section 8A of the Child Care Act, 1983. This section was inserted by the 1996 amendments and provides that a child may have legal representation at any stage of a proceeding under the Child Care Act, 1983. It is obligatory for the children's court to 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' (section 8A(2)). However, in order to provide greater guidance on the question of when children should have an enforceable right to legal representation in care proceedings, the Commission recommends that legal representation, at State expense, must be provided automatically for a child involved in any proceedings under the new children's statute, in the following circumstances:

(a) where it is requested by the child;
(b) where it is recommended in a report by a social worker or an accredited social worker;
(c) where it appears or is alleged that the child has been sexually, physically or emotionally

abused;

(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;

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

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

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

(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.

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. 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.

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 the role of legal representative and of the interpreter.

(c) **The right of children to self-expression**

It is a matter of concern that the Child Care Act does not provide a 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 a child and the children's court assistant or the social worker, police officer, or authorised officer', but does not refer to the child's evidence. Unfortunately, the same criticism applies to other areas such as those provisions dealing with the presentation of evidence at the actual inquiry itself.

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.

(d) **Removals in terms of section 11**

In terms of section 11 of the Child Care Act, 1983 a children's court may effect the removal of a child to a place of safety where such child has no parent or guardian or where it is in the interests of the safety and welfare of the child that he or she be taken to a place of safety. The children's court enjoys a wide discretion in this regard. The Commission recommends that this section be retained.

(e) **Removals in terms of section 12**

A police officer, a social worker or an authorised person 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 in need of care and that the delay in obtaining a warrant could be prejudicial to the safety and welfare of the child. Where the police, social worker or authorised person 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.

The Commission notes with concern that the present Form 4 procedure is being abused. In practice, the tendency has developed to use the Form 4 procedure in all cases, even in non-emergencies. The Commission accordingly recommends 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 Commission further 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.

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.

(f) Bringing children before the children's court

The Child Care Act, 1983 provides for three ways in which a child may be brought before a children's court. However, regardless of how the child was brought before the children's court, in all cases the court before which the child is brought is required to conduct an inquiry to determine whether the child is in need of care. The Commission also points out that there is often a time lag between the initial appearance or 'opening' and the date set down for the inquiry. In some instances, this causes delays in finalising children's court inquiries.

The Commission therefore recommends that there should always be a formal 'opening' of an enquiry, even in the absence of Form 4. It is 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.

(g) Finding a child in need of care (section 14(4))

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 which required that the parents be found 'unfit' or 'unable' to care for the child. With this amendment, the legislature moved care proceedings from a predominantly fault or parent-based approach to a predominantly child-centred approach. The Commission supports this move to a child-centred approach and recommends that the primary ground for the removal of children

remains that of a ‘child in need of care’.

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 criterion for finding a child in need of care. 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 necessarily 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.

The Commission does not support linking the criteria for reporting, in terms of the mandatory reporting provisions, 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, because as they stand they apply to many children who never will or should come before the courts.

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 would be of important to know in addition to the grounds upon which the order was made. At present no-one knows, for instance, 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.

Where the child in need of care is to be removed the present 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. The Commission, however, argues that the children's court needs broader powers. The Commission accordingly recommends that the powers of the children's court be extended. In this regard, see chapter 23 below.

(h) 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 prohibits any person other than the managers of certain specified institutions or certain specified relatives 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 background of the child concerned as against that of the applicant.

However, 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. The Commission accordingly recommends that section 10 be repealed and that the parts of the section relating to adoption be incorporated under the general adoption provisions. Comments are invited as to what further legislative measures could be included to prevent trafficking in children.

(i) Ill-treated and abandoned children; children whose parents fail to maintain them properly

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 (which provides that 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) be amended by substituting the word 'ill-treats' with the words 'maltreats, abuses, neglects or degrades'. 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. The Commission recommends that the abuse or ill-treatment of a child by a parent or guardian should remain a ground for finding a child in need of care.

(j) 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. However, 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') 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 recommends 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.

(k) 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. The Commission is, however, 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 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 of Social Development for his or her information.

Chapter 7: Establishing parenthood and the status of children

In order to allocate parental rights and responsibilities, it is necessary to determine parentage. Rapid advances in medical science over the past few decades have made the determination of parentage very problematic in certain areas, notably in cases involving artificial fertilization techniques.

(a) **Artificial insemination**

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 was ordinarily extra-marital even if, in the latter case, the husband was a consenting party.

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.

Section 5 of the Children's Status Act 82 of 1987 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.

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.

The Commission also recommends that neither the recipient nor the child should have access to the information regarding the donor's identity. 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. 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.

(b) **Surrogate motherhood**

A surrogate mother is a woman who (usually before becoming pregnant) agrees (for financial

or compassionate reasons) 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. 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 the surrogate mother (nor her husband, if she is married) should have any parental rights or responsibilities in respect of the child.

There is as yet no legislation in South Africa dealing specifically with surrogacy arrangements, and the only way in which the commissioning person or couple can become the *legal* parents of the child is by adopting such child, 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. 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). Thus, 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.

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' (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.

Our recommendation will have the effect that **direct** parentage will be established for children born 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)).

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, 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.

Chapter 8: The parent - child relationship

This is one of the core chapters underlying the new children's statute and lays the foundation for the move from the concept of parental power or authority to parental and children's rights and responsibilities.

(a) **The diversity of family forms**

South African law has no single definition of a 'family'. Different pieces of legislation recognise individual relationships for particular purposes. It is clear, however, 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. This diversity of family forms is not unique to South Africa or even the African continent, but is increasingly encountered throughout the world.

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 Convention on the Rights of the Child, as 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.

The Commission further 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.

(b) **The shift from 'parental power' to 'parental responsibility'**

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. The implication of this move is that a large part of our private law of parent and the child will be codified in the new children's statute. The Commission also recommends the following changes in terminology:

'Access'	➛	'Contact'
'Custody'	➛	'Care'
'Guardianship'	=	'Guardianship'

(c) **The components of 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 Commission identifies the following three components as composing parental responsibility:

(a) **Care**, which includes the responsibility (and right) 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; to safeguard and promote the well-being of the child; to protect the child from ill-treatment, abuse,

neglect, exposure, discrimination, exploitation and from any other physical and moral hazards; to safeguard the child's human rights and fundamental freedoms; 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; 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; to guide (discipline) the child's behaviour in a humane manner; and generally, to ensure that the best interest of the child is the paramount concern in all matters affecting the child.

(b) **Contact**, which includes the responsibility (and right) to maintain personal relations and to have direct access to the child on a regular basis.

S **Guardianship**, which means the responsibility (and right) to administer and safeguard the child's property; to assist and represent the child in contractual, administrative and legal matters, and to give or refuse any consent which is legally required in respect of the child. In the latter case and in certain clearly defined instances, such as where a child wishes to marry, where the child is to be adopted, or is to be removed from the Republic, etc. the consent of all persons who hold guardianship rights will be required.

(d) **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. 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.

(e) **The acquisition of parental rights and responsibilities**

The Commission recommends that the **mother** of a child should in all instances have parental rights and responsibilities in respect of her child. Where the child's mother is an unmarried minor and the child's father does not have parental rights and responsibilities in respect of the

child, the Commission recommends that the person(s) who has parental rights and responsibility in respect of the child's mother should have parental rights and responsibilities in respect of that mother's child.

The Commission recommends that a child's **father** should acquire automatic parental rights and responsibilities in respect of his child if such father is married to the child's mother or was married to her at the time of the child's conception. In this regard, the Commission wishes to point out that marriage is given an extensive definition in the new children's statute to include 'any marriage recognised in terms of South African law, or customary law, or [a marriage] concluded in accordance with a system of religious law ...'.

As for the **unmarried father**, the Commission recommends that the new children's statute should provide for a procedure whereby such a father can acquire parental responsibility by entering into an agreement with the mother, which agreement must be in the prescribed form and must be registered with the appropriate forum and in the prescribed manner. There should, however, be certain exceptional cases (such as, for example, where the child was conceived through rape or incest) where this procedure would not be open to the unmarried father. Failing a parental responsibility agreement with the mother, the unmarried father who does not have automatic parental responsibility should, in the view of the Commission, be able to obtain parental responsibility or certain components thereof by making application to the appropriate forum and satisfying such forum that this will be in the best interests of the child concerned.

The Commission further recommends that certain categories of unmarried fathers should be vested automatically with parental responsibility. These categories should include the following:

(a) the father who has acknowledged paternity of the child and who has supported the child within his financial means;

(b) the father who, subsequent to the child's birth, has cohabited with the child's mother for a period or periods which amount to not less than one year;

(c) the father who, with the informed consent of the mother, has cared for the child on a regular basis for a period or periods which amount to not less than one year, whether or not he has cohabited with or is cohabiting with the mother of the child.

The Commission did consider, in the light of the developments regarding the **De Vos** judgment, whether one partner in a same sex or opposite relationship should also automatically acquire parental rights and responsibilities in respect of his or her partner's children. In this regard, and to ensure legal certainty, the Commission recommends that the partner in a domestic relationship who does not have parental rights and responsibilities in respect of a child can acquire such rights and responsibilities either by agreement in the prescribed form with the other partner, or on application to the court.

The Commission recommends that any caregiver who is not a biological parent of a child who is concerned with the care, welfare or development of the child, should be able to obtain parental responsibility and parental rights, or certain components thereof, but only by making application to the court and by satisfying such court that this will be in the best interests of the child concerned. Non-biological parents should not be able to acquire parental responsibility and parental rights simply by entering into agreement with the biological parent or parents. There should, however, be no differentiation in the manner in which different categories of non-biological parents may acquire parental responsibility and rights or certain components thereof – the procedure prescribed for making application to the appropriate forum should be the same for all non-biological parents. Unlike the position under the English Children Act 1989, neither the leave of the forum concerned, nor the consent of any other person with parental responsibility, should be a prerequisite to making such an application.

The Commission further recommends that a biological parent who, for whatever reason, has either no parental responsibility and parental rights, or only limited parental responsibility and rights, should be able to apply to the same forum in order to obtain parental responsibility and parental rights, or certain components thereof. Moreover, the child himself or herself should be able to apply to the same forum for an order conferring parental responsibility and parental rights, or certain components thereof, on an appropriate (and willing) adult person, provided that the forum is satisfied that, taking account of the child's age and maturity, the child has sufficient understanding to make such an application.

As regards a person who does not have parental responsibility for a particular child, but has the *de facto* care of the child (either on a temporary or part-time basis or on a longer term or full-time basis), the Commission recommends that the legal position of such a person in relation to the child should be spelt out in the new children's statute, as has been done in the English and Scottish legislation, as also in the revised draft of the Kenya Children Bill.

The Commission is also of the view that, even if no application for parental responsibility and parental rights in respect of a child has been made, if it appears to any court in the course of any proceedings before that court that it will be in the best interests of that child to make an order conferring parental responsibility and parental rights, or certain components thereof, on any willing and competent adult person, the court should, of its own accord, be able to make such an order. The Commission also recommends that the court should have the power to rescind, suspend or vary any order made by it in regard to parental rights and responsibilities.

(f) **The management of parental rights and responsibilities where several persons (parents or otherwise) simultaneously have parental rights and responsibilities or components thereof in respect of a child**

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 responsibilities for the same child at the same time;
° a person who has parental rights and responsibilities for a child at any time shall not cease to have those rights and responsibilities simply because some other person subsequently acquires parental rights responsibilities for that child;
° where more than one person has parental rights and responsibilities in respect of a child, each of them may act alone and without the other(s) in fulfilling those responsibilities, with certain exceptions mentioned below;
° the fact that a person has parental rights and responsibilities 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 responsibilities for a child may not surrender or transfer any part of those responsibilities to another, but may arrange for some or all of it to be undertaken by other persons on his or her behalf.

The Commission is of the opinion that the consent of all persons who have parental rights an responsibilities in respect of a child must be obtained:

(a) when the child wishes to conclude a marriage;
(b) when the child is to be adopted;
(c) when the child is to be removed from the Republic;

(d) when an application is made by or on behalf of the child for a passport; and

(e) when the immovable property or any right to immovable property belonging to the child is to be alienated or encumbered.

(g) Parenting plans

Given the reality of modern family life, the Commission believes parents should be trusted to act in the best interest of their children. The Commission recommends that parents must be given the option to register their parenting plans with the court (or Family Advocate) should they wish to do so. In so doing, the court may make the parenting plan an order of court. It is in this context that the court should scrutinise the parenting plan to ensure that it is in the best interests of the child concerned. In the majority of cases, however, the Commission believes parents should simply be encouraged to prepare parenting plans, where appropriate in consultation with the child involved, and to agree about matters concerning their child rather than to seek court orders. The Commission therefore does not recommend that all parenting plans be lodged or registered with some authority or court, or that all such plans be scrutinised by such authority or court. A parenting plan is defined by the Commission as an agreement in writing made between the parents of a child. It may deal with one or more of the following:

(a) the care of the child, including decisions as to with whom the child is to live;

(b) contact between the child and another person or other persons;

(c) the appointment of a parent-substitute for the child;

(d) maintenance of a child;

(e) any other aspect of parental responsibility for the child.

(h) Termination of parental rights and responsibilities

The Commission recommends that the wilful failure of the person having parental rights and responsibilities in respect of a child to fulfil his or her parental rights and responsibilities when able to do so should constitute a section 14(4) criterion for finding a child in need of care.

The Commission has also considered the option of a *summary termination process* where parents are, for instance, found guilty of trafficking their children for purposes of sexual exploitation. However, in this context the Commission has decided too rather recommend the suspension, pending an enquiry, of all parental rights and responsibilities of such a person in

relation to such a child. Ultimately, however, the court may find it necessary to terminate all or some of the parental rights and responsibilities of a parent.

Chapter 9: Prevention and early intervention services for children and their families

The Commission recognises prevention and early intervention services as vitally important components in any future strategy on behalf of children.

(a) **Defining prevention and early intervention services**

Prevention is very broadly defined in the Welfare *Financing Policy* as 'any strategies and programmes which strengthen and build the capacity and self-reliance of families, children, youth, women and older persons'. Early intervention services are defined in the Policy 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 …'.

Prevention activities generally occur at three levels: primary, secondary and tertiary. 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.

Primary and secondary prevention do not feature prominently in the current Child Care Act, 1983. The emphasis in the current Child Care Act, 1983 is on tertiary prevention which involves dealing with abuse once it has occurred in order to prevent its continuation. Neither prevention nor early intervention services are defined in any South African legislation, and it is

recommended that definitions be included in the new children's statute.

(b) Going beyond prevention: Promotion of the well-being of children

While the concept of prevention services is relatively well understood in the welfare sector, the Commission is convinced of the need to go beyond prevention to safeguarding and promoting the well-being of children. The Commission recommends that a 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 where both promotion of children's well-being and prevention services are referred to. Such provision should provide that out of monies appropriated by law for the provision of preventative assistance and services under the new children's statute, the Minister must provide such assistance and services to children and to their families and communities as he or she deems appropriate to

- prevent the neglect, abuse or inadequate supervision of children or other failure to meet children's needs;
- promote every child's well-being and the realisation of his or her full potential; and
- actively involve and promote the full participation of families in identifying and resolving their own problems.

(c) Promotion, prevention and early intervention: An inter-sectoral responsibility

In order to address the problems of abuse, neglect and maltreatment of children effectively and to promote the welfare of all children, it is necessary that an inter-sectoral approach be adopted. The Commission has therefore made recommendations for the inclusion of provisions in the new children's statute to give effect to an inter-departmental, inter-sectoral approach in prevention and early intervention services.

(d) The role of local government

The Commission also sees a specific role for local government in the provision of prevention and early intervention services for children and their families. 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 should be obliged, in terms of the new children's statute, to:

- Safeguard and promote the welfare of children within its area.
- Ensure integrated development planning in respect of child care facilities within its area.
- 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.
- 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.
- 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. 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, family tracing and family reunification services for children.
- Maintain a database of all available child care facilities in their area of jurisdiction.
- Provide and maintain sufficient and appropriate recreational facilities for the children in its area of jurisdiction.
- Ensure the environmental safety of the children in its area of jurisdiction.
- 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.
- 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 providing services to children and families must be exempted from paying property rates. In addition, it is recommended that local authorities be accorded a discretion to entertain applications for full or partial exemptions from payment of electricity and water tariffs by non-profit organisations providing social services for children. The local government's availability of financial resources is a legitimate factor which can be taken into account in considering such applications.

(e) **The role of traditional leaders in the delivery of prevention and early intervention services and in safeguarding and promoting the welfare of children.**

The Commission is likewise 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 their jurisdiction. The Commission believes that traditional authorities can best fulfil their role in this regard by participating at the government levels provided for by the Constitution and the Local Government: Municipal Structure 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.

(f) **Court-instigated services**

The Commission is of the view that the Child and Family Court needs to be part of a coherent strategy for delivering prevention and early intervention services for children. By virtue of its specialisation, 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:

- 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
- 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 set up either such programmes or outsource them to other appropriate service providers.

Chapter 10: Child protection

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 children's statute is likely to be much broader in its reach, protective measures will remain a crucial component.

(a) **Circumstances in which protective intervention may be required**

Circumstances where protective measures may come into play generally fall into one or both of the following categories:

(a) Neglect, which involves a failure to meet the child's basic physical, intellectual, emotional, and social needs;
(b) Abuse, which is generally understood to occur when some form of harm is actively perpetrated against a child.

(b) **Corporal punishment (physical punishment of children by their parents or caregivers**

The Commission recommends that an educative and awareness-raising approach be followed, in order to influence public opinion on the issue of corporal punishment. However, the Commission is further 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. 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.

(c) **Setting broad principles for child protection measures**

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 service infrastructure. In South Africa such a system would probably not be affordable and, given that resources for its implementation would be thinly spread, could generate high levels of secondary abuse. At the same time, the Commission recognises that 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 a very high rate of severe child abuse and neglect, and this has extremely damaging implications for the present and future well-being of the nation. In such a context, a strong and effective child protection services system is essential for the realisation of the constitutional right of every child to protection. The new children's statute 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 child protection services 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:

  - **S** time-limited, voluntary foster care placement agreements between parents / caregivers and structures providing foster care services;
  - **S** 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;

- **S** 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;
- **S** 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;
- **S** 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;
- **S** 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 child protection services responsibilities of personnel in the Departments of Safety and Security, Justice, Correctional Services, Education, Health and Social Development, and relevant NGOs 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 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.

- An educative approach towards corporal punishment, implemented by the above-mentioned coordinating mechanism, and involving the social development, health and education sectors, using awareness campaigns and parenting skills training programmes. Formal protective interventions and the criminal justice system would continue to be used in cases where injuries to, or physical assaults on, children are concerned.
- Removal of the common law defence of 'reasonable chastisement' in any case involving a charge of assault against a child.
- 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) and educative and criminal law approach to virginity testing. 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 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.

(d) **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 being equitable. In this regard, the Commission recommends the inclusion of provisions for:

- greater clarity as to the right of child protection services 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.

(e) **Permanency planning**

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.

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 custody of the parent(s), unless the Minister for Social Development extends its validity for a further period not exceeding two years, or parental responsibilities are terminated through adoption. In practice, however, many children in South Africa remain in substitute care arrangements for many years.

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 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 well-being 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

  - **S** was aged seven years or more, and has been in foster or residential care for at least two years;
  - **S** was aged three to six years, and has been in foster or residential care for at least a year; or
  - **S** 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 parental rights and responsibilities only if -

- **S** there are clear indications that the termination of parental rights and responsibilities would be in the best interests of the child;
- **S** 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
- **S** there is a high probability that adoption or another form of permanent family care can be arranged.

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 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 should the recommendations by various constituencies for a universal grant accessible to all children not be accepted.
- 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.

(f) Reporting and registration of reported cases

South Africa has followed the pattern set by the USA since the 1960's by making the reporting of child abuse compulsory, with failure to do so being a criminal offence for those to whom the obligation applies. In terms of section 42(1) of the Child Care Act of 1983 as amended, reporting of suspected ill-treatment of children is 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'.

With hindsight, the wisdom of proceeding with a system of mandated reporting in the South African context is perhaps open to question. However the Commission acknowledges that the reporting system and the national child abuse 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. 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 proposed comprehensive 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, 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 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. 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 confirming that his or her name does not appear on such a list or register. This is regarded as the least invasive way of applying this protective measure.

Chapter 11: The protection of the health rights of children

(a) **Accessing children's health rights**

As the health care rights of children are currently scattered throughout a number of different pieces of legislation, it is not easy to determine to what health rights children are entitled. The Commission therefore recommends that the following health care rights of 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 or health promotion information;
- confidential access to contraceptives regardless of age;
- informed consent as a requirement 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 and other harmful cultural practices;
- right of boys not to be subjected to unhygienic circumcision and other harmful cultural practices;
- an accessible complaints procedure;
- the right to use alternative health care systems if so desired.

(b) Children's rights to basic health care services

Section 28(1)(c) of the Constitution states that every child has a right to basic health care services. It is, however, not clear what the right to basic health care services entails and what the state's responsibility is in relation to children with disabilities and those infected with HIV/AIDS with regard to their right to basic health care services. For example, the provision of assistive devices and rehabilitation services to children with disabilities is essential to improve their level of functioning within society. Whether this can be included under a child's health rights is debatable. The Commission accordingly recommends that children's right to basic health care services be confirmed in both the new child care legislation and the National Health Bill. Further, that 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.

(c) Consent to medical treatment and consent to surgical intervention

The Commission recommends that the age at which children may consent to medical treatment should be lowered to 12, whilst until they are 18 they cannot consent to an operation without the assistance of their parent or guardian. The following should, however, be exceptions to this

general rule: (a) a child of any age should be entitled to obtain information on and access to contraceptives; and (b) any child should be able to obtain treatment for sexually transmitted diseases regardless of age. In order to provide for a simpler procedure to obtain consent to medical treatment or an operation, the Commission recommends that 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. Further, that 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. It is also recommended that the National Health Bill 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. The procedure set out in section 39(1) of the Child Care Act which requires a medical practitioner to apply to the Minister for consent (in instances where a parent or guardian refuses consent, or cannot be found, or is deceased, or is by reason of mental illness unable to give consent) is criticised for being impractical in practice. For this reason, the Commission recommends that the children's court, instead of the Minister, be approached to obtain the necessary consent. The Commission further recommends that the new child care legislation should explicitly provide that no child may be submitted to any medical treatment or surgical intervention without informed consent. Informed consent may 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.

(d) **HIV-testing in relation to placement of children in need of care**

As HIV testing may often not be in the best interest of the child because it can be used to discriminate against the child, the Commission recommends that no child may be tested for HIV without informed consent and HIV testing may only take place where this is in the best interests of the child. The testing should also take note of the National Policy on testing for HIV. The Commission further recommends that, where appropriate, a child should receive pre and post-test counselling. The Commission also recommends as follows:

- The age at which a child may consent to an HIV test should be lowered 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.
- 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 (who is not of sufficient maturity) 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) 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 Commission therefore recommends that consideration be given to making the Polymerase Chain Reaction (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. 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 PCR test. The PCR test can detect the HIV virus in the blood immediately.

(e) **Confidentiality of information relating to the HIV/AIDS status of children**

As children infected with HIV/AIDS face high levels of discrimination, it is important that information regarding their HIV/AIDS status be kept confidential. For this reason, the Commission recommends as follows:

- **A child 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, the right to play and should not be 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**.

(f) **Access to contraceptives**

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.

(g) **Access to termination of pregnancy**

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.

(h) **Right to refuse medical treatment**

As a refusal of medical treatment may lead to a child's death or permanent damage, the Commission recommends that every child above the age 12 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. Further, that the Children's Court may be approached if the child 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. The Commission is also of the view 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 an medically accepted alternative choice.

Chapter 12: The protection of children as consumers

(a) **Protecting and informing children as consumers**

In order to educate children on their consumer rights, the Commission recommends 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.

(b) **The sale of dangerous goods to children and safety standards**

In order to comply with the vision of a single comprehensive children's statute, the Commission recommends that a complete audit of national, provincial and municipal by-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 comprehensive children's statute. The provisions incorporated can then be repealed in the various other statutes.

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. It also stipulates general principles and particular risks as criteria against which a toy's safety is measured. 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 regime.

(c) The sale of solvents and other harmful substances to children

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. Also, given the practical difficulties in defining harmful substances, the Commission does not recommend the enactment of a provision in the new children's statute prohibiting the sale of harmful substances to children.

The Commission supports the Drugs and Drug Trafficking Act 140 of 1992 which make it a very serious criminal offence to manufacture and supply certain scheduled substances, to use and possess any dependence-producing, dangerous dependence-producing or undesirable dependence-producing substances (such as dagga and mandrax), or to deal in such substances. The Commission thus condemns the sale of these to children and adults alike.

The Prevention and Treatment of Drug Dependency Act 20 of 1992 provides for a procedure for bringing persons dependent on drugs before a magistrate. The magistrate can then commit a person dependent on drugs to a treatment centre after holding an enquiry. 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. 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. The Commission regards the provisions of this Act, 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 substance 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.

(d) Media regulation

(i) 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'.

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. The existing Code of Conduct for Broadcasting Services does not provide any specific guidance on children. 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'. 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.

The Commission recommends that the Department of Trade and Industry, in consultation with the Department of Communications and the Independent Communications Authority of South Africa (ICASA), investigate the possibility of introducing legislation to compel manufacturers to install technological blocking devices in all new television sets.

(ii) **Radio broadcast**

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.

(ii) **On-line services**

Section 27 of the Films and Publications Act 65 of 1996 as amended creates the offence of knowingly creating, producing, importing or being in possession of a publication or film which contains a visual presentation of child pornography. The definition of 'film' 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 Act does not, and cannot, specifically regulate Internet material, including advertisements, accessible to children.

(iii) **Printed material**

Although the Films and Publications Act 65 of 1996 as amended sets out certain conditions for the publication of a publication, it has been criticised for not protecting children effectively, especially as regards the use of the Internet. Although the classification scheme provided for by the Act does provide some form of protection to children, the administration of the scheme is reactive 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 (See also chapter 13, point (f) paragraph 3 below). 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 effect 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 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) must be age-appropriate.

(e) **Advertising**

The Commission recommends 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 research 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.

Chapter 13: Children in need of special protection

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. 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 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. 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. 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 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;
- 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 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 sexually 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 has been dealt with comprehensively in the Commission's investigation into juvenile justice.

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 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.

The Commission accordingly 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.

- 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.

(a) **Children living in poverty**

In South Africa, six out of every 10 children live in poverty. Children account for 25% of South Africans living in poverty. 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. 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. Poverty, poor primary health care and unhealthy living conditions are major factors causing illness and death. In South Africa, malnutrition is one of the biggest contributors to childhood morbidity and mortality. 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.

In addition to proposing that a universal non means-tested grant be paid to all children, the Commission also 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) in the new children's statute. Such provision will include an obligation on Government to

initiate programmes providing for a package of services comprising nutrition, immunisation, and health and referral services for children below a certain age, and regular health check-up, immunization 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.

(b) **Children infected with and affected by HIV/AIDS, including orphaned children**

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. The following categories of children are identified as AIDS-affected children in need of special protection: children in infected households, children orphaned by AIDS, children who are HIV-positive or have AIDS and abandoned infants. 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.

As social assistance for sick children is a key form of provision to promote family-based care, the Commission recommends 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. As children who are HIV-positive are subjected to discrimination in a variety of contexts, the Commission recommends that the new children statute should 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. Further, that the Department of Social Development should 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.

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. Cognisance is also taken of the fact that care facilities do not receive a subsidy from government to cater for the additional needs of HIV-positive children. This 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 for formal placement of children in need of care and protection due to HIV/AIDS are inadequate to cater for the massive numbers of children who will be affected by the AIDS pandemic. The Commission thus recommends that the new children statute should 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 from taking on other adult responsibilities. The Commission further recommends that 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.

As the HIV/AIDS pandemic spreads, child-headed households will become 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. In order to provide support to child-headed households, the Commission recommends as follows:

- 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.
- 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.

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 absent due to AIDS and to refer such children to the Department of Social Development or link them to community support structures.

(c) **Children with disabilities**

The Commission is of the view that children with disabilities should be enabled to live with their families. In order to achieve this, the Commission recommends that -

C 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. Support programmes for parents must also, if necessary, include the teaching of sign language.

C 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.

Children with disabilities are forced into institutions for the disabled as existing residential care facilities are not 'disabled friendly'. 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. 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 -

- 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.
- 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.

- 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.

As the children's court has the power to place children with special needs, who are found to be in need of care, in facilities established under the Child Care Act only, the Commission 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.

In order to ensure basic education for 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:

- The definition of a 'care-dependent child' should be amended to remove the reference to permanent (24-hour) care.
- Where the circumstances of the child with a disability and that of his or her family demand 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.
- The Children's Code should recognise sign language as deaf children's first and natural language and as the primary medium of their communication.
- Sign language services should 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 should be used who understand the dialect used by the deaf child.
- 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 from the one being in use by a deaf adult.

- 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.

As public transport is inaccessible to children with disabilities, the Commission recommends 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.

(d) **Child Labour**

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. South Africa has also very few programmes aimed specifically at removing children from labour or protecting them within the labour context.

Section 52A of the Child Care Act provides that no person may employ or give work to any child under the age of 15 years. Similar, section 43 of the Basic Conditions of Employment Act (BCEA) stipulates that no person may employ a child who is under 15 years of age; or who is under the minimum school-leaving age in terms of any law, if this is 15 or older. This Act further states that no person may employ a child in employment that is inappropriate for a person of that age, and that places at risk a child's well-being, education, physical or mental health, or spiritual, moral or social development. Despite these provisions, both section 52A of the Child Care Act and section 43 of the BCEA are ignored on a wide scale. The Child Care Act lacks specific provisions designed to protect children who are in illegal employment, except in the case of prostitution. 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. For these reasons the Commission recommends as follows:

- That “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 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 NGOs 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, 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.

(e) **Children living or working on the streets**

The Commission 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:

(e) 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.

(f) 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 emphasise 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.

With regard to the education of street children, the Commission takes cognisance of the fact that street children often find it difficult to reintegrate into mainstream schooling, and that an alternative form of education is needed to deal holistically with the needs of the child. The Commission thus recommends 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. Further, 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 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.

(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.

The Commission 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 Child Act, 1983. 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 to 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 to cause or allow 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. 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.

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 focused 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 ideal situation is for the street child to be reunited with his/her family and supported in the family unit. For this reason, the Commission recommends that counselling be done with both the child and the family before and after reintegration in order to prepare them for the moment of reintegration and to ensure that the child does not leave the family home and community again. Further, that 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.

(f) **Commercial sexual exploitation of children**

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. 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 for more than one of the stated purposes. The Commission has critically analysed the current provision on commercial sexual exploitation in its investigation into Sexual Offences and has decided to incorporate the provisions criminalising commercial sexual exploitation in the new sexual offences legislation and not the new children's statute. The Commission has, however, 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.

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. 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, that the court holding such an enquiry may terminate all parental rights, and that the child immediately be placed in alternative care.

The Commission's principal approach to child prostitution is that the child prostitute is not a criminal, but a child in need of care and protection and should be brought before the children's court. With regard to child pornography, 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.

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.

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 voluntarily 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

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.

(a) Improving outcomes for children

(i) Hearing children's voices

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.

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, the Mediation in Certain Divorce Matters Act 24 of 1987 does not require the Family Advocate or the Family Counsellor to hear the views of the child. The Commission believes a simple amendment to the regulations to the Act 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 towards solving this problem. However, special care must be taken to ensure that children are not forced to choose between their parents.

(ii) Reducing conflict

In its attempt to find ways to reduce conflict between divorcing and separating parents, to the benefit of the children, the Commission recommends that 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. 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.

The use of the words ‘custody’, ‘sole custody’, ‘guardianship’, ‘sole guardianship’ and ‘access’ in the Divorce Act 70 of 1979 promote a potentially damaging sense of winners and losers and more neutral language would help reduce conflict and let both parents focus on their responsibilities rather than their rights. The Commission therefore recommends that the terms ‘custody’ and ‘access’ be replaced with the terms ‘care’ and ‘contact’ respectively. Further, 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;

(iii) **Parenting education**

The Commission recommends that any parent seeking a divorce should be required to participate in an education programme 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 programmes 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 needs of their children during and post the divorce.

(iv) **Joint custody**

The Commission believes the law should encourage parents to enter into consensual arrangements for shared parenting (joint custody) in the form of parenting plans. 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 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.

(v) **The Commission further recommends as follows:**

- 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 children who are at risk of abuse with the protective framework of the new children's statute;
- 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.

(b) **The 'maternal preference' or 'tender years' rule**

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, unless the

mother's character or past conduct renders her 'unfit', 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). It has been argued that this 'maternal preference' or 'tender years' principle could be seen as violating the equality clause 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). 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. The Commission accordingly recommends that the common-law 'tender years doctrine' or 'maternal preference rule' be rejected as a guide for decision-making about parenting.

Chapter 15: Early Childhood Development (ECD)

In this Chapter, the question of legislative support for early childhood development (ECD) services is considered.

(a) **Defining ECD**

The Commission recommends that the following definitions of ECD and of ECD services be included in the new children's statute:

'**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.

These definitions should not be premises-based, in order to allow for facilitation of ECD where a building is not available. The Commission is of the view that the provisions of the new children's statute should not apply where ECD services are to be provided to less than six children. This position was taken to prevent an over-regulation of the ECD sector.

(b) **Responsibility for providing ECD services**

The Commission 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 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 ECD services are to be rendered at school premises is therefore the deciding factor.

(c) **Minimum standards for ECD services**

While ECD services can and should be offered at a range of facilities (such as a children's home, in a community centre, inside a private home or in the shade of a tree), and 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.

However, the Commission recommends that the (provincial) Departments of Social Development and of Education may prescribe, by regulation, the minimum standards with which all registered ECD services must comply. 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, be included in the regulations which are to accompany the new children's statute.

(d) **Registration ECD services**

The Commission recommends that 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. Further, 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.

The Commission recommends that the adequacy and appropriateness of State-funded or subsidised ECD services should be assessed by the Department of Social Development. The

Commission further recommends that local authorities should be responsible for environmental and health inspections relevant to registration applications where ECD services are to be premised-based.

(e) Lines and levels of Government responsibility

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. The Commission therefore recommends that the (provincial) Departments of Education, Social Development and local authorities be given joint responsibility for developing and implementing a plan to ensure that children and their families in their jurisdiction who are in need of ECD services can progressively access such services. The Ministers for Social Development, and Education 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. In addition, it is recommended that Treasury should budget for ECD services specifically, as an essential service along with health, education, policing, etc.

The Commission further recommends that a local authority may support, financially or otherwise, any registered ECD service by:

- making buildings or premises available at no cost to a person or persons who or organisation which proposes to administer such service;
- providing water or electrical power at reduced rates or at no charge to buildings or premises used for the administration of such service;

It is also recommended that a local authority must not levy rates on land which is used by a registered non-profit organisation to administer ECD services.

(f) Monitoring, inspection and closure of ECD services

The Commission further recommends that the (provincial) Departments of Social Development and of Education may inspect, monitor, suspend and close down ECD services, whether registered or in receipt of a State ECD grant or subsidy or not. More specifically, the Department of Education should concern itself with monitoring and (where necessary) closing down of ECD services that are provided on school premises The Department of Social Development should

particularly concern itself with monitoring and closing down of ECD services not offered on school premises.

Chapter 16: Partial Care

This Chapter deals with the temporary care of children by persons other than their parents or ordinary care-givers.

(a) **Defining partial care**

For purposes of the new children's statute, a definition of partial care 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. The Commission believes the definition of 'partial care' should be linked to that of 'partial care facility', which is a reworking 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, but does not include

(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 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;
(d) ECD services as defined in this Act.

'**Partial care**' means the services offered at a partial care facility.

(b) **Licencing of partial care facilities**

The Commission recommends that the existing registration system be replaced with a licensing system. 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.

The Commission therefore recommends that where more than six children are cared for on a partial basis apart from their parents, whether for profit or otherwise, in any building or premises maintained or used for such purpose, that such facility be licenced as a partial care facility. We believe the term partial care facility more accurately reflect the type of facility involved and accordingly recommend a change in terminology from ‘place of care’ to ‘partial care facility’.

(c) **Minimum building standards for partial care facilities (places of care)**

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 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.

However, the Commission recommends that the health and safety appropriateness of the *building or premises*, whether it 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. 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.

(d) **Assistance to providers of partial care services**

The Commission recommends that the (provincial) Department of Social Development, or any local authority may support, financially and otherwise, any licenced partial care facility. Such support, or the continuation of such support, may be made subject to conditions.

(e) 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) 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 Commission also realises that some partial care arrangements involving fewer than six children can be very harmful to children. The Commission thus 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. It is accordingly recommended that where an 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.

(f) Monitoring and inspection

The Commission recommends that monitoring provisions 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.

Chapter 17: foster care

(a) Conceptualising foster care

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 reunification services, and care by relatives when undertaken by informal arrangement on an indefinite basis. 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.
- Relatives caring for children who have been abandoned or orphaned or are for some or other reason in need of their assistance, but who are not per se 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 such children, and capacity to apply for state financial assistance on their behalf. Comment is invited as to whether such an arrangement should involve an initial once-off investigation and 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 kinship care is not in the best interests of the child should be able to approach the children's 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.

(b) **Cluster foster care, or community foster care**

In addition to the current statutory foster care and informal kinship care (care by relatives), the Commission recommends that -

- The new child care legislation give legal recognition to both state-funded and privately-funded ‘cluster foster care’ schemes subject to regulation in terms of the Act.
- 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 court have the option of committing a child to the care of a specific cluster foster care scheme rather than 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.

(c) **Specialist or professional foster care**

The majority of children currently placed in foster care are children with behavioural problems. 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. The notion of ‘professional foster care’ also 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 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.
- 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.

(d) **Selection criteria for prospective foster parents**

The training needs of extended family caregivers and those offering indefinite care differ from those who are, for instance, participating in reunification services in relation to children unrelated to them. Standardised recruitment and training procedures are therefore unlikely to be viable. However, to ensure that all children in foster care receive at least a basic standard of care, the Commission recommends that the Department of Social Development embark on consultative process of developing broad minimum standards for the selection and training of substitute family caregivers in various categories.

(e) **Social and cultural issues when placing children in foster care**

Section 31(1) of the Constitution of 1996 states that every person belonging to a cultural, religious or linguistic community may not be denied the right to enjoy their culture, practise their religion and use their language. 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, or practise their religion or to use their language. 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. 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 into 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.
- 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 the child in the care of such parent.

(f) **Parental rights and responsibilities for foster parents**

The rights and responsibilities of foster parents in terms of the Child Care Act are limited. Foster parents are vested only with custody of the foster child and those responsibilities that go with custody. The rights transferred to a foster parent do not include the power to deal with the child's property or to consent to the performance of an operation upon the child or the provision of medical treatment. As the majority of foster placements last until the children reaches the age of 18, the Commission is of the view that foster parents should be given greater rights and responsibilities in respect of their foster children. Accordingly, the Commission recommends as follows:

- The new child care legislation 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.
- 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.
- 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 among 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.
- 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.

- 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.

(g) **Termination of parental rights and responsibilities over certain children in foster care**

Measures to promote permanency for children in all forms of temporary care, including foster care, are discussed in detail in Chapter 10 above. 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. 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.

(h) **Reunification services and statutory supervision**

In addition to the measures outlined in Chapter 10 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 expiration of the initial court order, the social worker concerned must submit a report to the children's court in which it should be motivated 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 -

- **S** authorise the termination of reunification services; or
- **S** terminate some or all parental rights and responsibilities subject to the conditions mentioned in 15.7.4; and/or
- **S** 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.

(i) **Duration and extension of foster care orders**

The Commission recommends that in instances where a child has been abandoned, or his or her parents are deceased, or where there no requirement for 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.

Unlike children in schools of industries, the length of the stay of children in foster care cannot be extended until the end of the year in which they turn 21. The Commission believes that children in foster care should be entitled to the same protection as those children in a school of industries. Accordingly, the Commission recommends that 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 child turns 21 years. Further provided that if the child is about to turn or has turned 18, such further retention will be subject to the consent of the child.

The Commission notes that, should the age of majority be lowered to 18 as recommended in Chapter 5 above, any young person over the age of 18 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.

(j) Rights of non-South African children to foster care grants

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 a foreign child.

(k) Social security

The Commission recommends as follows:

- Kinship care placements not requiring court intervention should be facilitated through a non-means-tested universal grant 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.
- Foster care placements with persons unrelated to the child should be supported through a non-means-tested 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.
- Children who require formal protective services and are placed in care with relatives by means of a court order should qualify for a grant, which could be structured on the same basis as the foster care grant. The Commission invites further discussion on this issue.

- In addition to the current foster care grant, an allowance should be paid to foster parents and relatives caring for children with special needs.
- 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.

Chapter 18: Adoption as a form of substitute family care

The Commission recognises 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 Commission is also of the opinion that the focus of adoption must 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 must 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 therefore be made in relation to each child and not in relation to children in general.

(a) **Who may be adopted?**

The Commission recommends that **children** only may be adopted. As a result, the Commission sees no need to provide for the possibility to adopt persons over the age of 18 years. The Commission concedes, however, 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 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 as this should form the basis of the assessment and permanency planning process.

(b) **Who may adopt a child?**

Section 17 of the Child Care Act, 1983 provides that a child may be adopted by a husband and his wife jointly, by a widower or widow or unmarried or divorced person, or by a married person whose spouse is the parent of the child. In addition and 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 (as set out in section 18(4) of the Act):

* They must possess adequate means to maintain and educate the child;
* 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.

Two issues need to be highlighted. The first revolves around the provision (section 17(a)) that only married couples may adopt a child jointly. The second issue relates to the section 18(4) requirements.

The Commission sees no reason to limit joint adoptions to married couples. It therefore proposes that married couples, partners in a domestic conjugal life-partnership, or other persons sharing a common household and forming a family unit may adopt a child jointly. This recommendation, for instance, will allow for the joint adoption of a child by the husband and all his wives (the kraal) in a customary law setting. (On the joint adoption by gay and lesbian couples, see the very recent ***De Vos v Minister for Social Development*** case).

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 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. However, the Commission accepts that it is necessary to impose the same threshold upon eligibility for step-parent and relative adoption as for other adoptees and therefore does not recommend the introduction of a parallel system for intra-familial adoptions.

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 does not recommend the reintroduction of the requirement of age differentials, as was provided for in the 1960 Children's Act. Nor does the Commission support South African citizenship as a requirement, given the judgment of the Constitutional Court in ***Minister for Welfare and Population Development v Fitzpatrick and others*** 2000 (3) SA 422 (CC).

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.

(c) **Consent to adoption**

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 counseling 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 age requirement of 10 years 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 counseling should prevent any difficulties with parents later wishing to withdraw consent.

(d) **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 the dispensing of the 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.

(e) **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. 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.

(f) 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 Regulations to the new children's statute provide clear guidance to adoption practitioners and the courts as to what will constitute a 'consideration'.

(g) Subsidised adoption

The Commission 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, especially to those children currently in long-term foster care.

(h) Access to information

The Commission recommends that the following persons 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;
- 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 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.

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.

(i) **Facilitation open adoptions**

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 that agencies can follow which have the potential of increasing the chances of a successful open adoption: These areas 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.

(j) Adoption services

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. 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. 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 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

(a) Forms of residential care

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). 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. Provision should also be made for the possibility of one centre offering a range of programmes.

(b) **Regulation of residential care**

The Commission recommends that each child and youth care centre should have a board of management. This will 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.

(c) **Human resources**

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. Thus, 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. 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 the regulations to the current Child Care Act. 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.

(d) **Registration and classification**

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. The Commission accordingly recommends 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 Commission further 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 of inspecting and investigating 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 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 close down a facility immediately 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 issuing of an enforcement notice.

(e) **Programmes**

The current regulations create some confusion with regard to a programme to be offered by a facility and a plan which is specific to the child. A distinction thus 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 programme should be offered by the residential facility, and the child's individual development plan must indicate which aspects of the programme the child will need to access. The Commission thus recommends that the new children's statute should provide that each child admitted to a residential facility must have an individual development plan within seven days of arriving at the facility.

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.

It is also recommended that there should be a subsidy paid for by the Department of Education for every child in residential care to cover school fees to be paid for public school education. The subsidy should be paid directly to the school.

(f) Geographical location and size

The Commission recommends 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) 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.

(g) Procedures

(i) 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.

(ii) **Duration of orders**

The Commission recommends that a children's court should be able to 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.

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 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. It is also 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.

(iii) 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 obtain legal representation at his or her own cost.

(iv) Release of a child 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. 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.

(v) 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.

(vi) 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 would be appropriate to do so.

(vii) Administrative transfers

The Commission recommends that where children are to be moved to a placement which is less restrictive, such decision can be made administratively, although the decision should still be made by a team rather than by an individual. Further, where a child is to be transferred to a more restrictive environment, 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.

(h) Rights to care and protection in residential care facilities

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. The Regulations should include the requirement that children be informed about their rights as well as their responsibilities.

(i) Minimum standards and quality assurance in residential care

The Commission is of the view that the Developmental Quality Assurance (DQA) processes as being currently tested by the Department of Social Development will form a more appropriate monitoring process than the current inspection procedures provided for in section 31 of the Child Care Act. 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 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. It is also recommended that the DQA process should include a 'mentoring' aspect, as follow-up after the quality assurance visit.

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.

(j) Funding of residential care

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, as is provided for in section 28(1)(b) of the Constitution, 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.

Chapter 20: Religious laws affecting children

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.

The Commission operates within the framework of the South African Constitution 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. 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).
- 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 or Kenyan examples in the new children's statute. This is our preferred option.

Chapter 21: Customary law affecting children

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. 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 has therefore recommended the inclusion of a general non-discrimination clause in the new children's statute.

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 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. 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 internationally recognised as extremely harmful, and appears to have minimal support in South Africa. 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 immigrant children who might be affected.

We have also seen that some provinces have adopted or are in the process of adopting legislation to regulate initiation schools. 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. 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'. 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 majority of any person, including those living under customary law, is determined, 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.

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.

Chapter 22: Children - The international dimensions

In the modern world children face risks in a variety of cross-frontier situations. Some children are caught up in disputes over custody or contact between parents living in different countries. Children 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. Children may be displaced through war, civil disturbance or natural disaster. This illustrates the need for international co-operation at all levels in order to ensure the protection of such children.

(a) **Inter-country adoptions**

Before the Constitutional Court ruling in the ***Fitzpatrick*** case (reported as ***Minister for Welfare and Population Development v Fitzpatrick and others*** 2000 (3) SA 422 (CC)), inter-country adoptions were not legally possible in South African law. Section 18(4)(f) 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. Goldstone J, in whose judgment the whole Court concurred, held in the ***Fitzpatrick*** case that the absolute prohibition of the adoption of a South African born child by non-South Africans is inconsistent with section 28 of the Constitution which requires that the best interests of a child are to be given paramountcy in every matter concerning the child.

Despite the assurances given that foreign applicants will have a greater burden in meeting the adoption requirements of the present Child Care Act, 1983, the Commission recommends that inter-country adoption be regulated in the new children's statute. This section of the new children's statute should follow the section on adoptions in general and should address three specific scenarios. These are:

* 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
* 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, it is recommended that the new children's statute should provide for the Hague Convention on Intercountry Adoptions to have force of law in South Africa; for the establishment of a Central Authority; for the recognition of Convention adoptions; termination of pre-existing legal parent-child relationships; 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, it is recommended that the section in the new children's statute must regulate the adoption by a South African parent of a child 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 Commission recommends that such adoptions should be discouraged and 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; preparation, assessment and counselling; post-placement reports; record-keeping, confidentiality of information; the use of advertising; citizenship, and the like.

Naturally, the Commission recommends that South Africa should ratify the 1993 Hague Convention on Intercountry Adoptions.

(b) **International child abduction**

South Africa has ratified the Hague Convention on the Civil Aspects of International Child Abduction and has incorporated the provisions of this Convention in its domestic law by the promulgation of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996. This Act designates the Family Advocate as Central Authority.

The operation of this Hague Convention, 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 considered in the recent case of **Sonderup v Tondelli and another** 2001 (1) SA 1171 (CC). This decision of the Constitutional Court now 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 the Act.

The Commission recommends that the provisions of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 be incorporated in the new children's statute. The Hague Convention on Child Abduction should be incorporated into our domestic law as a schedule to the new children's statute. The Hague Convention on the Civil Aspects of International Child Abduction Act can then be repealed. The Commission further recommends that the Department of Social Development take over the responsibility for the administration of this Act and that the Director-General: Social Development be designated as Central Authority. As to the role of the Family Advocate, the Commission recommends that the Family Advocate should act as legal representative for the child in such applications.

The Commission has given considerable attention to the defences provided for in Article 13 of this Hague Convention and its shortcomings in relation to cases where states parties do not deal effectively with domestic violence. The Commission accordingly recommends strengthening the existing provisions in this Hague 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.

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. 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. 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, assault or something else. 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 liable for all costs reasonably incurred by the State or the other parent in locating and facilitating the return of the child.

(c) **Refugee and undocumented immigrant children**

It has been argued that the Refugees Act 130 of 1998 provides extensive protection for refugee children in South Africa. However, there is currently 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 resort under the Aliens Control Act 96 of 1991. This Act and the Immigration Bill, 2000 which will succeed it, are aimed at getting rid of unwanted people of all ages rather than being founded on

the rights of children.

Given the rights and obligations 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, the Commission does not regard it necessary specifically to 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; that public schools and health facilities and the social security system may not discriminate against refugee children on the basis of nationality; that refugee children are entitled to the same basic health services and basic primary education which ordinary South Africans receive from time to time; that the detention of refugee children must be used only as a measure of last resort and for the shortest appropriate period of time; that a refugee must be issued with an identity document; that a refugee may apply for a travel document, etc.

Any child who appears to qualify for refugee status and who is found in 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. This injunction in section 32 of the Refugees Act 130 of 1998 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, this issue related to unaccompanied refugee children is therefore adequately dealt with in the Refugees Act 130 of 1998.

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 prescriptive in areas where there may be uncertainty as to the rights of children, the Commission recommends the inclusion of the following basic protection measures for foreign children into 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;
(c) In keeping with the policy that the child should stay within the refugee community

as far as possible, an asylum-seeker may be recognised as an interim care-giver for a refugee or undocumented immigrant child 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;

(e) An adult assistant (support person) must be present when an asylum-seeking or refugee child is interviewed by the authorities;

(f) 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 of any decision to move or deport that child;

(g) 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 is detained, the Commission recommends that the children should not be separated from their family.

(h) Assistance to and harbouring of illegal foreign or foreign children in need of care shall not constitute a criminal offence.

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. 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. 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.

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.

The Commission is critical of the Immigration Bill 2000 and recommends that Parliament should reconsider provisions such as clause 47 which obliges organs of state, with the exception of health care facilities, to ascertain and report on the status or citizenship of persons receiving its services. In this regard, 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.

The Commission further urges Parliament to provide in the new Immigration Bill that any *accompanied* illegal foreign child found under circumstances which clearly indicate 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. 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.

(d) **Trafficking of children across borders**

Internationally, trafficking in persons and children in particular is receiving renewed attention. Several countries, South Africa included, are signatories to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organised Crime, 2000. The Commission therefore recommends the inclusion of a general provision on the trafficking of children in the new children's statute which makes it a criminal offence for any person to traffic in children. This is in addition to provisions criminalising the commercial sexual exploitation of children provided for in the new sexual offences legislation. Obviously children who have been subjected to commercial sexual exploitation, as children in need of special protection, are entitled to the protection measures provided for in the new children's statute.

The Commission recommends that the provisions of the UN Protocol be incorporated in the new children's statute. Further, that bilateral or multilateral agreements be concluded 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.

It is also recommended 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.

Chapter 23: a new court structure for serving the needs of children

Obviously, our courts have an important role to play in upholding the rights of children. It was therefore necessary for the Project Committee to look closely at the functions and structure of the courts as part of their task of reviewing legislation which protects children. The three main recommendations of the Project Committee with regard to the courts are as follows:

(a) That the children's courts be renamed and accorded a wider jurisdiction to allow them to provide more remedies.
(b) That all courts should begin using the more flexible system of parental responsibilities, rather than merely guardianship, custody and access.
(c) That practitioners working in courts which make child placement and child care orders must be more effectively utilised and trained in future.

These three main recommendations are discussed and explained below.

(a) **A wider jurisdiction and new name for the children's courts**

As a result of its investigations, the Committee has reached the conclusion that the children's courts need broader powers than they are presently afforded under the Child Care Act,1983. This recommendation is motivated by reasons of cost effectiveness (gaining as much as possible from these courts) and efficiency on behalf of children in need of alternative care or placements.

The Committee does not feel that the functions of the children's courts should be reduced in any way. Thus, they should continue, inter alia, to conduct hearings on behalf of children who appear to be in need of alternative care and decide upon appropriate placements for children such as supervised parental care, adoption, foster care or institutional placements. Children who appear to require alternative care are a vulnerable group and therefore children's courts should continue to perform the important functions of ensuring that their legal rights are respected and that correct placement decisions are made on their behalf. A court which specialises in alternative care and alternative placement decision-making is an essential resource for South Africa -

especially during the present period of social dislocation which is being experienced by many children.

It is recommended that, in order to perform their basic functions on behalf of children in need of alternative care more efficiently, children's courts require additional powers besides those which they already have in terms of the Child Care Act, 1983. For example, a children's court should have the power to monitor a case by setting a date for the future recall of the child. It is not suggested that this power should be used in every case, but it would create a new capability for the courts that could be used in appropriate cases. On the side of the child placed by a children's court, it is recommended that the child should have a right to reappear before the children's court where she is experiencing serious problems with her placement or where she finds that conditions that were imposed by the court are not being fulfilled. The intention behind this recommendation is to give a more effective voice to a child who, for example, experiences abuse in her new placement or discovers that reunification services ordered by the court are not being provided. Courts working on behalf of children need to be able to take into account new circumstances or additional information, and it is therefore recommended that the children's courts require a new power to vary their own orders where there is good cause.

In order to strengthen the status and effectiveness of the children's courts, it is recommended that the situations in which their orders can be administratively changed (as is presently possible under S34 of the Child Care Act) be reduced. At present, officials working under the authority of the Minister for Social Development have relatively wide powers to change children's court orders. It can be argued that this negates the time and expense utilised in order to reach court placement decisions. Placement changes without legal due process are also of concern because of fundamental ways in which they may affect the child involved. It is therefore recommended that any decision to move a child deeper into the continuum of alternative care must in future be reached by way of a court hearing that would amend the original children's court order. In other words, where caregivers decide that the child requires to be moved into a more restrictive placement that may have implications for his/her liberty, the matter must be taken back to the children's court.

Amongst other recommendations designed to improve the care and placement work of the children's courts in the future are:

- An express power to order that a person undergo mediation, counseling or assessment

where this is in the best interests of a particular child.

- A personal accountability order to require that a person who has allegedly failed in his/her care obligations towards a child appear before the court in order to defend the claim or show good cause for such failure - this remedy could be used against someone who was taking a foster care grant but not using it on behalf of the foster child. It should also include the public domain, for example, where a corrupt official refused to pay out a disability grant for a child because he required a bribe.
- A power to award delictual damages on behalf of a child where this appears appropriate at the end of a care or alternative placement hearing. This could be used, for example, to order payment of compensation by an abuser of a child who had been a party at a hearing.
- A power to award a short-term, temporary emergency State maintenance grant for a child where this appears to be necessary to prevent the child from being removed from his/her family/present home into more expensive alternative State care.
- A power to arrange for extra-curial and non-adversarial decision-making (sometimes involving the extended family)such as mediation, counseling or family group conferences where appropriate.
- Since the court is to have expertise in child care issues, it is recommended that it would be an appropriate forum for persons to bring applications against the State where they have allegedly been wrongfully refused permission to set up or maintain a care centre or early childhood development programme for children or have allegedly been wrongfully placed on the national register of child abusers.
- The court should have the power to sanction, monitor and direct support for in-community placements of children -including those involving child-headed households.
- The court requires the power to allocate some or all parental responsibilities to any suitable person.

Aside from the new tasks which have been recommended above, it is further recommended that divorced or other unmarried parents/caregivers be granted the power to approach the children's courts where they wish to apply for the allocation or reallocation of any parental responsibility. Placements of children at divorce would continue to be decided upon by the divorce courts/high courts.

In order to signify a new departure in the form of a court with much wider powers on behalf of children, it is recommended that the children's courts be renamed **Child and Family Courts.**

It is recommended that the present children's courts, operating at district magistrate court level, be converted into **Level One Child and Family Courts.** It is further recommended that, in the second phase and as resources can be made available, a smaller network of **Level Two Child and Family Courts** should be set up. More experienced personnel should staff these Level Two Courts. Level Two Courts should deal with more complex or time-consuming matters. They should also serve as a Court of Appeal in respect of the Level One Courts.

(b) **A new system of parental responsibilities**

The Committee recommends that a new and more flexible system of parental responsibility components be used to supplement (and to some extent replace) the present caregiver rights of guardianship, custody and access. This recommendation is mentioned again here because it will significantly affect the work of courts. It should be noted that the Commission makes this proposal for all courts. The parental responsibilities approach would particularly impact upon courts where they do Family Law work- not only the proposed Child and Family Courts but also, for example, courts conducting divorce cases.

(c) **More effective training and use of staff**

Court work with (often traumatised) children who require consideration for alternative care or placement requires specialised staff with the correct skills. These skills include interpersonal abilities appropriate for work with children and dysfunctional families, good communication skills, understanding and respect for other cultures and, at a professional level, interdisciplinary knowledge and understanding. The Committee has therefore recommended improved selection and training requirements for staff of the proposed Child and Family Courts as compared with the present children's courts.

The present children's courts are often viewed as a dead-end from a career prospect point of view. In order to attract and retain the type of quality staff needed, a proposal for a career ladder has been worked out by the Committee.

It should be noted that it is recommended that family advocates be renamed child and family advocates and they be legislatively empowered to work in the Child and Family Courts. It is also recommended that officers to be called ‘child and family protectors’ perform screening, reception, advisory, mediation and other services at the Child and Family Courts. The

Committee's research has indicated that many private legal practitioners, due to a lack of the necessary skills and knowledge, are not effective or even have a negative effect when they work in the children's courts. The Committee therefore recommends that, where such practitioners are appointed to provide legal aid at State expense in certain cases in the Child and Family Courts in future, they be drawn from a special roster of appropriate practitioners.

Chapter 24: Monitoring the implementation of the new child care legislation

This chapter focusses on the monitoring of the implementation of the new child care legislation. As an effective monitoring structure is needed for the proper protection of children's rights, the Commission recommends the establishment of an independent body to be called the 'Office of the Children's Protector'. The Commission further recommends that the Office of the Children's Protector should operate independently from the Department of Social Development. It is further recommended that the Office of the Children's Protector should prepare an annual report for tabling in Parliament. This report should also indicate difficulties, if any, hampering the proper implementation of the new child care legislation.

In order to act effectively as a watchdog over the activities of those responsible for the implementation of the new child care legislation, the Commission recommends that the Office of the Children's Protector should, *inter alia*, have the following powers and functions:

- The Office of the Children's Protector should receive, investigate and resolve complaints relating to any matter falling within the ambit of the new children statute, or direct such complaints to the relevant authorities if these are better placed to deal with such complaints.
- The Office of the Children's Protector should 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.
- 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 -

  - **S** inspect whether that facility is complying with set minimum standards and may make such enquiries as he or she may deem necessary;
  - **S** inspect and make copies of any books or documents kept on the premises;

- **S** seize any document or any other thing on the premises which in his or her opinion may be relevant to the investigation concerned;
- **S** observe and interview any child in the facility, or caused such child to be examined by a medical officer, psychologist or psychiatrist.

- In order to ensure that drop-in centres and outreach programmes for street children comply with set minimum standards, the Commission 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 Office of the Children's Protector may also conduct periodical inspections in partial care facilities and may monitor ECD services.
- 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.
- 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.
- 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.
- 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.

For effective implementation of the new child care legislation and in order to avoid a duplication of efforts and thereby maximising available resources, the Commission 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.

The Chapter on a New Court Structure for Serving the Needs of Children, recommends that the

Child and Family Court must be accorded a monitoring power to do a follow-up on a case which it heard earlier. This will also serve as a method of monitoring the implementation of the new child care legislation.

The Commission recommends that it should be a criminal offence for any person to interfere 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.

Chapter 25: Grants and social security for children

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, 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.

The Commission proposes that the foster care system should be rationalised and its 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. 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. The Commission is, however 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 further 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. 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. 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 of the view that the current amount of the CSG is inadequate to enable care-givers to provide for children's primary needs. 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.

The Commission is further 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 children's statute. 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.

The Commission recommends that recipients of state social security such as the CSG and the CDG, as well as beneficiaries of the FCG, should be exempted from school fees in respect of the children at whom the grant is targeted.

The Commission 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.

Lastly, the Commission recommends 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.