

SOUTH AFRICAN LAW COMMISSION

PROJECT 110

REVIEW OF THE CHILD CARE ACT

REPORT

December 2002

To Dr P M Maduna, Minister for Justice and Constitutional Development

I have the honour to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for your consideration the Commission's report on the **Review of the Child Care Act**.

Madam Justice Y Mokgoro
Chairperson: South African Law Commission
December 2002

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are:

The Honourable Madam Justice Y Mokgoro (Chairperson)
The Honourable Madam Justice L Mailula (Vice-Chairperson)
Adv J J Gauntlett SC
Prof C E Hoexter (additional member)
The Honourable Mr Justice C T Howie
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CHAPTER 1

INTRODUCTION

1.1 Background

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.

After the issue paper stage, and in order to expedite the investigation, the Commission prepared a series of research papers. These papers covered specific focus areas and formed the basis for discussion at specially convened expert meetings. Research papers were prepared on aspects such as the parent-child relationship, children living with HIV/AIDS, children living on the street, children in residential care, and child protection.

The Commission considered it important to take the views of children into consideration in this investigation and originally intended to submit a separate children's report alongside the Commission's report to the Minister. The idea of a separate children's report was abandoned in the light of comments received from children who stated that their submissions should be accorded the same weight as that of adults. The input received from children was therefore reflected in the discussion paper. Given the time frames imposed, it was not possible to repeat the child participation process with the discussion paper or Children's Bill as basis.

The Commission has been fortunate in that the Portfolio Committee on Social Development has maintained close ties with the Commission throughout this investigation and the Committee was briefed on several occasions on progress made with the investigation. Prior to the finalisation of the discussion paper, a dedicated workshop with members of the Portfolio Committee was held on content in Gordon's Bay.¹ The fruitful interaction with this Committee is appreciated.

¹ 5 – 7 October 2001. The title of the workshop was 'Towards drafting a new Child Care Act'.

A discussion paper was released for comment in December 2001. It contained the Commission's **preliminary** recommendations and findings. The discussion paper is a voluminous document of close to 1300 pages published in five volumes. It did not contain a draft Bill as is customary in our discussion papers. However, the drafting of the Bill was conducted as a parallel process to the report writing and it was informed by the public consultation process conducted after the release of the discussion paper.

At the Gordon's Bay workshop, the Minister for Social Development, through the Chairperson of the Portfolio Committee, Mr Cas Saloojee, registered some concerns relating to the time it might take to complete the investigation. It was then agreed that the Commission would submit to the Minister and the Portfolio Committee the draft legislation at the end of June 2002 in order to allow the Minister the opportunity to introduce the legislation in the second half of 2002. The Commission did submit the seventh draft of the Children's Bill to the Minister and the Chairperson of the Portfolio Committee on 28 June 2002. As the imposition of such a deadline may have compromised the quality and extent of the Commission's consultation processes, the Commission and the Department for Social Development agreed to a joint consultation process with the draft Bill as basis.

This report contains the Commission's **final** recommendations and findings. It includes a new draft Children's Bill, which embodies the Commission's recommendations. The report does not include draft regulations, a costing analysis or an implementation strategy. These aspects will be attended to by the Department for Social Development.

In the report, the Commission proposes consequential amendments to several other pieces of legislation not falling under the administration of the Minister for Social Development. The Commission recommends, should the Minister for Social Development agree, that the need for such amendments be brought to the attention of the relevant Minister in order to present a holistic child protection framework for South Africa. The Commission also makes some recommendations of a non-legislative nature. Where appropriate, the Commission indicates what action needs to be undertaken by which role player.

This report is submitted to the Minister for Social Development² who may implement the

² Section 7(1) of the South African Law Commission Act 19 of 1973.

Commission's recommendations by introducing the draft Children's Bill in Parliament.

1.2 The Commission's mandate

From the very beginning the Commission 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 Commission 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. A difficulty faced by the Commission was whether to make recommendations within the current resource framework which all accept to be wholly inadequate, even for present purposes, or to 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.

1.3 Consultation

The report is the product of a long consultative process. We would like to record our sincere appreciation to all those dedicated and concerned individuals, officials and organisations which made submissions, participated in the various workshops, or contributed to this process.

While every attempt was made to have as inclusive a consultation process as possible, the Commission acknowledges that the consultation process on the discussion paper itself was not adequate. We would have liked to have done more to include children in

the consultative process.³ We appreciate the urgency attached to completing this investigation in the shortest possible period of time, but remain concerned that we were unable to ensure a wider debate. Following the release of the discussion paper in December 2001, the Commission embarked on a consultation process where individuals, organisations, and institutions were invited to make submissions on the preliminary recommendations made in the discussion paper. Numerous submissions were received.⁴ In addition to keen media interest, several workshops were held and conferences attended where these preliminary recommendations were discussed.⁵ A workshop on the content on the 8th draft of the Bill was also held in Gordon's Bay on 29 and 30 October. The purpose of this workshop was to give other departments and civil society structures an opportunity to comment on the Commission's preliminary recommendations. Several briefing sessions on the content of the Bill were also held.⁶ Submissions received were incorporated in the Bill, where appropriate. The Commission would like to record its appreciation to all those who made submissions.

As mentioned earlier, the Commission has been debating progress and content issues relating to this investigation with the Portfolio Committee on Social Development on an ongoing basis.

Also, as stated above, time did not allow a repeat of the child participation process or an extensive consultation on the Bill.

1.4 The way forward

It has been pointed out that this report is submitted to the Minister for Social Development. The Minister, as advised by his Department, and in consultation with the MEC's at provincial level and local government structures, is at liberty to implement the recommendations contained in this report by introducing the draft Bill in Parliament.⁷

³ See also the **Report on Children's Rights (2002)**, Community Law Centre, University of the Western Cape; **Report on the Access Child Participation Process (2002)**, Alliance for Children's Entitlement to Social Security.

⁴ See Annexure A for a list of respondents to the discussion paper.

⁵ See Annexure B for details.

⁶ Ibid.

⁷ As 'welfare services' fall within the functional areas of concurrent national and provincial legislative competence listed in Schedule 4, Part A of the Constitution, the Bill will have to be introduced as a section 76 Bill.

However, before this can happen, a number of processes must first be adopted.

Firstly, the Minister, MEC's and senior departmental officials must be acquainted with the Commission's final recommendations as contained in this report.

Secondly, the Department must advise the Minister (as the provincial Departments must advise their MEC's) whether the final recommendations contained in this report adhere to Government and Departmental policy. While all attempts were made to ensure that the recommendations made do match stated policy, this was not possible in all cases. For one thing, some departmental policies are still in draft form. In other instances, policies still need to be developed. As the recommendations made in the report have an impact on most, if not all, directorates within the (national) Department such process should ideally be led by the Director-General: Social Development. Obviously the Directorate: Legal Affairs will play a critical role in evaluating the adequacy of the draft Bill from a legal perspective.

Thirdly, the Department will have to consult with its provincial counterparts and local government structures on the recommendations made and the draft Bill. Once clarity has been obtained from a social developmental perspective, the Department needs to engage in serious dialogue with other departments, NGO's, CBO's, and the organised professions. Prior consultation within the social development cluster at cabinet level with other Departments, and especially Treasury and Finance, can decisively influence the Minister's decision to proceed with the draft Bill as proposed by the Commission. In this regard, it is worth emphasising that the Commission is recommending, in this report, that certain consequential amendments be affected to existing legislation not administered by the Minister for Social Development in order to provide for a holistic approach to child protection. Obviously, this requires consultation with the relevant Minister(s). In addition, the Commission also makes recommendations of a non-legislative nature, especially where it relates to inter-sectoral cooperation and training. Once again, consultation with all stakeholders would be required.

Should the Minister decide to proceed and introduce the legislation, a critical fourth step would be to cost the draft legislation. As stated in the Background section above, the Commission adopted 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. Thus, there is an urgent need to determine what it would cost to implement the new legislation. However, the challenges surrounding such a costing exercise are compounded by the lack of information as to what the existing system costs and what it would cost, not only in rands and cents, but also in human potential, if the current system is not radically improved. Ideally the costing exercise should form part of the consultations at government level.

Determining the financial implications (to the State) of the proposed legislation is a precondition for obtaining Cabinet approval to introduce the draft legislation in Parliament. Such Cabinet approval is sought on the basis of a memorandum setting out the purpose and object of the intended legislation, and importantly, whether the legislation envisaged would have a cost implication and if so, what that would be. It is the responsibility of the Department to prepare such Cabinet memorandum.

In the Commission's deliberations and consultative processes, the importance of proper communication not only as to content but also process was repeatedly stressed. It is therefore recommended that the Department of Social Development develop an implementation and communication strategy surrounding the proposed legislation. Proper (financial) planning will also ensure smooth implementation of the legislation once adopted by Parliament.

The draft Bill proposed by the Commission in this report would need a comprehensive set of regulations for its effective operation. Practically, the drafting of regulations usually starts when the draft legislation is in its final form: To do so otherwise, would require drafting in a vacuum. However, given the need for regulations and the historic, practical usage thereof in the child care sphere, it is suggested that the new regulations be drafted parallel to the Parliamentary process – otherwise, the implementation of the legislation would be delayed by the absence of the supporting regulations.

Lastly, it must be pointed out that in the light of the fact that the draft Bill will affect the status, institutions, powers or functions of local government, it must be published for public comment before it can be introduced in Parliament 'in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation'.⁸ Rule 241 of the Rules of

⁸ Section 154(2) of the Constitution.

Parliament (National Assembly) further requires the Minister to publish notice of his intention to introduce such a Bill in the Government Gazette. Such a notice must contain either an explanatory memorandum or a copy of the draft Bill. As this Bill clearly impacts on local government, it must therefore be published in draft form for public comment before it can be introduced in Parliament.

1.5 A word of thanks

In this investigation, the Commission was fortunate that it could rely on the dedication and commitment to children and children's rights in particular by a broad range of persons and organisations. These include the Portfolio Committee on Social Development,⁹ the Project Committee,¹⁰ the respondents who submitted input, the participants at all the workshops, the legal drafters employed,¹¹ the researchers involved,¹² and the secretariat of the Commission. The Commission would like to record its appreciation for these services and thank sincerely all those who contributed to the process of drafting a new Children's Bill for South Africa. In this regard, we would in particular like to recognise the contribution of children in the consultative phases of the investigation.

1.6 A guide to reading this report

This report builds on the discussion paper and closely follows its structure. With the exception of chapter 5 of the discussion paper, which has been incorporated in Chapter 3 of the report, all the chapters in the report follow on the corresponding chapters of the discussion paper. The discussion paper therefore forms an integral part of the report and the two documents should ideally be read together. This caveat applies in particular to those seeking extensive legal comparative analysis in the report.

For ease of reference, however, the Commission's preliminary recommendations as set out in the discussion paper are again presented in summary form in this report. This

⁹ Under the chairmanship of Mr Cas Saloojee, MP.

¹⁰ See page (iii) above for the list of persons who were members of the Project Committee at the time of the writing of this report.

¹¹ Mr Gideon Smit and Adv Gerhard Grove, SC.

¹² See page (iii) above for the names of the researchers who were responsible for the investigation at the time of the writing of this report.

exposition is then followed by a summation of the submissions received on the particular set of preliminary recommendations, whereafter an evaluation and recommendation section follow. This evaluation section is linked directly to the draft Children's Bill annexed to this report. In the evaluation process particular emphasis was placed on divergence from the Commission's preliminary position as per the discussion paper to the final recommendations as per this report.

Please note that while it is technically incorrect to refer to clauses of the draft Children's Bill as sections, this approach was adopted given the fact that a large percentage of the audience of this report is not legally qualified.

CHAPTER 2

THE SCOPE OF THE INVESTIGATION

2.1 Introduction

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. As pointed out in the discussion paper 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 sufficiently accessible and user-friendly precisely because of its sheer scope and size.

2.2 Comments received

The **Consortium**¹ supported the approach that the new child care legislation should focus equally on primary prevention strategies that will enable children to develop within their family environment. It submitted that the child care legislation should contain legislative provisions to ensure that the necessary resources are allocated for the purposes of primary prevention. The Consortium stated that although the new child care legislation cannot be all-encompassing, it can set minimum standards and create co-ordinating and reporting mechanisms to ensure that children's well-being is given appropriate attention in all government departments. The Consortium thus proposed that the legislation should contain a list of each sector's responsibilities in respect of the rights of children. Departments should then be required to amend national legislation, e.g. the National Health Act, for purposes of incorporating the rights of children in such legislation. Furthermore, each department should be obliged to report to the Minister for Social Development and the proposed Office of the Children's Protector (see chapter 24 of the discussion paper) on its plans to promote and protect children's well-being, and must submit annual reports on progress made on the implementation of these plans.

¹ Joint submission by the Children's Institute (UCT), the AIDS Law Project (University of Witwatersrand), the Alliance for Children's Entitlement to Social Security (ACCESS) – endorsed by the AIDS Consortium and the AIDS Legal Network.

Children in Legal Disputes (CHILDS) agreed with the Commission's recommendation that the Divorce Act, 1979, the Maintenance Act, 1998, and the Domestic Violence Act, 1998 should not be repealed. However, the respondent recommended that these Acts should be revisited in order to bring them in line with internationally accepted legal and normative standards. Furthermore, these Acts should be integrated into an 'umbrella Act' that should be named the Divorce Family Care Act.

2.3 Evaluation and recommendations

The Commission remains committed to the concept of a single comprehensive children's statute. It is accordingly recommended that the new Children's Bill should go beyond the scope of the existing Child Care Act, 1983 specifically to include provisions on parental rights and responsibilities, children in especially difficult circumstances; international adoption, the age of majority, prevention and early intervention, child trafficking, the rights of children as consumers, and social security for children, to name but a few of the new areas. This implies that some areas of our existing private family law will be codified.

After scrutinising the regulations issued in terms of the current Child Care Act, 1983, the Commission has proposed the inclusion of some of the present regulations in the principal Act – the details are still left to regulations.

Further, in line with the Commission's vision and for the reasons stated in the discussion paper,² the Commission recommends the repeal and incorporation into the new Children's Bill of the following statutory provisions:³

- X The Age of Majority Act 57 of 1972;
- X The Children's Status Act 82 of 1987;
- X The Guardianship Act 192 of 1993;
- X The Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996;
- X The Natural Fathers of Children born out of Wedlock Act 86 of 1997.

² Par. 2.6.

³ Section 360 of the Bill.

However, the Commission does not recommend that the following pieces of legislation be repealed and summarily incorporated in the new Children's Bill:

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

However, as pointed out in the discussion paper and highlighted by some of the respondents, some of these Acts do require amendment as is proposed further in this report. The amendments suggested to the Divorce Act, 1979 in particular, could address the difficulties children caught up in divorce proceedings face. However, as the administration of this Act and the other Acts resort under other Departments, the Commission recommends that the Minister for Social Development should request his relevant colleagues at Cabinet level to effect the necessary amendments. In that way functional areas are not trespassed upon, nor legislative time-tables of other Departments affected.

The Commission has addressed the issue of surrogate motherhood in the discussion paper.⁴ A Bill on the issue of surrogacy has been drafted and is awaiting introduction into Cabinet. However, given the delay in passing this Bill, the Commission has decided to include a mirror provision on the status of children born of surrogacy in the Children's Bill.

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 and access to health. The effect of this recommendation is that these aspects will remain (or will in future be) in the primary education, health, sexual offences or child justice legislation.

⁴ See Chapter 7 of the discussion paper. See also Chapter 6 below.

CHAPTER 3

THE CONSTITUTIONAL IMPERATIVES RELATING TO CHILDREN

3.1 Introduction

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.

A thorough exposition of the case law on section 28 of the Constitution, 1996 was provided in Chapter 3 of the discussion paper and there is no need to restate it here. This exposition included an analysis of the Constitutional Court decision in the groundbreaking case of *Government of the Republic of South Africa v Grootboom and others*.¹

3.2 Principles underpinning the new Children's Bill

The Child Care Act 74 of 1983 does not contain a list of principles to guide decision-makers in the implementation of its provisions. This has been seen as one of the major shortcomings of the present Act. In the discussion paper, the Commission has therefore provisionally recommended that an objects and general principles clause be incorporated in the new Children's Bill.²

All those respondents who commented upon this section of the discussion paper approved of the Commission's preliminary position to include a general principles section in the new Children's Bill.³ Some suggestions were made for refinement of the draft provision contained in the discussion paper. For instance, with reference to the Commission's recommendation that 'it is the duty of everyone who performs any function

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

² See Par. 5.2 of the discussion paper.

³ SWEAT; CHILDS; Pro-life; The Right to Life Campaign; Durban's Children's Society; the Consortium; Ms Julie Todd; Ms R van Zyl.

in respect of a child or takes any decision affecting a child ... to protect the child from unfair discrimination on any ground ...',⁴ **Pro-life** submitted that not even fair discrimination against children should be permitted. The respondent therefore suggested that the words 'unfair discrimination' be replaced with the word 'discrimination' throughout the discussion paper.

This suggestion was endorsed by **The Right to Live Campaign**, KwaZulu-Natal. Referring to section (2), the **Durban Children's Society** questioned the feasibility of developing community structures which would provide care and protection for children. The respondent argued that owing to the lack of funds and manpower, the establishment of such structures would be difficult. Furthermore, basic causes of poverty need to be addressed to improve existing structures. In its submission, the **Consortium** stated that the promotion of substantive equality and a clear focus on primary prevention need to come through more strongly as a primary principle of the child care legislation.

As is pointed out in the discussion paper, the trend in modern child care legislation is increasingly towards the inclusion of central principles underpinning how decisions should be made in regard to children in domestic legislation. From the submissions made, strong support is evidenced for the inclusion of such principles. The Commission therefore endorses its preliminary view and proposes the inclusion in the new Children's Bill of a set of general principles to guide decision-makers in the implementation of its provisions.⁵

These principles are 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 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

⁴ Discussion paper, p. 77.

⁵ Section 9 of the Bill.

most at risk of suffering harm, and to ensure that the needs of the most vulnerable groups of children are taken into account.

3.3 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 most respondents to the discussion paper supported the inclusion of criteria to give content to the 'best interests of the child' standard, some respondents had difficulty with the concept and or the listed criteria. **CHILDS**, for instance, submitted that the Commission's proposed list of criteria to determine the best interests of the child is unhelpful for the following reasons:

- (i) The starting-point of the list of criteria is negative rather than positive. The respondent recommended that the best interests of the child-standard should begin with a positive description of the environment that is best suited for the healthy growth and development of a child. Furthermore, the format of such description should be similar to the one used in the Preamble to the Convention on the Rights of the Child.
- (ii) No distinction is made between parental vulnerabilities and limitations versus parental inadequacy versus parental abuse. The respondent believed that all parents have vulnerabilities and/or limitations that may impact negatively on their parental functioning. Further, that the Commission's list of criteria for determining what is in the best interests of a child focus on the vulnerabilities and limitations of

parents. However, these acts do not threaten the child and therefore should not be the focus of the criteria on which decisions are made to exclude and/or limit the extent of the involvement of the parent or caregiver in the life of a child. The respondent thus recommended that the following three lists of criteria be outlined: (a) parental limitations, e.g. a parent spending insufficient time with his/her child, (b) parental inadequacies, and (c) parental abuse. Furthermore, these lists should include consequences and remedial possibilities to be undertaken by the parent(s) or caregiver(s).

- (iii) The criteria proposed by the Commission do not accommodate the changing realities of life. For example, the needs of children, the circumstances of parents and caregivers and the bonds between children and their parents / caregivers may change over time. The respondent thus recommended that the decision-making structures be sufficiently flexible to accommodate these changing realities.
- (iv) The Commission has paid insufficient attention to the abuse of children by parents and caregivers seeking to gain advantage over the other parent or caregiver. As a case in point, the respondent cites as examples false allegations of sexual abuse being made or denying the other party contact with the child. The respondent proposed that such acts be criminalised.

On the other hand, the **Consortium** recommended that, owing to its indeterminate nature and the inevitable subjective interpretation by different decision-makers and service providers, the best interests of the child standard should be further defined to promote its use and to promote equity in its application. It said that the general list to determine what is in the best interests of a child as recommended by the Commission appears to be based on case law surrounding judicial proceedings on custody, adoption, access and children's court proceedings. It is not user-friendly for service providers making out-of-court decisions. It therefore recommended the inclusion of a general list that is applicable to all decision-making situations, and the development of specialised guidelines for applying the test in each situation. The Consortium identified the following situations that would require specialised guidelines and training:

- deciding whether to test a child for HIV;
- deciding whether to appoint a caregiver as a foster parent;

- deciding whether to place a child in an institution;
- custody / care decisions;
- adoption decisions;
- deciding whether to disclose a child's HIV status to his or her parents;
- deciding whether to provide a child with certain medical treatment;
- administering a child's property;
- deciding whether a parenting agreement between a mother and an unmarried father is in the best interests of a child, before registering such agreement; and
- deciding whether to grant an unmarried father parenting rights.

Furthermore, all persons required to administer the new child care legislation should be sensitised continuously and trained on the issue of the general list and the specialised situation guidelines.

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, will benefit greatly from having 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 Bill.⁶ The Commission accordingly affirms its preliminary position in this regard.

3.4 The rights of children

While children are afforded constitutional rights, the Commission considers it necessary to formulate for inclusion in the Children's Bill certain additional rights 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 in the Children's Bill. This confirms the preliminary position taken by the Commission in the discussion paper.

3.4.1 Comments received

The **Consortium** made several suggestions for improvement of the children's rights

⁶ Section 10.

chapter in the discussion paper.⁷ With regard to the right to ‘family relationship’, the Consortium submitted that, given the fact that many children are in the *de facto* care of other family members such as grandmothers, the right of children not to be arbitrarily removed from their primary caregivers (not only from their parents) should also be protected. Concerning children’s right to ‘property’, the Consortium mentioned that orphaned children often struggle to hold on to property, which property is often tied up for years in the administration process with the result that the children’s basic needs are not being provided. It therefore recommended the inclusion of the following provisions:

- “6(2) Property which a child is legally entitled to inherit, must be administered promptly and without delay and the administration system must ensure that children have access to financial means to provide for their basic needs.
- 6(3) The property concerned must be administered for the benefit of the child in both the present and the future.”

With regard to the right of children to be ‘protected from maltreatment, abuse, neglect, exploitation and other harmful practices’, the Consortium expressed concern over the use of the wording in section 7(1)(b)(i) which stipulates that ‘Every child has a right to be protected ... from encouragement to engage in ... any form of sexual activity’. It submitted that this provision could be misinterpreted to imply that some LoveLife publications should be prohibited. It said that some of these publications are aimed at encouraging youth to live ‘sex positive’ lives which can have the effect of encouraging forms of sexual activity, in an effort to remove the silence and taboo surrounding sex that fuels the HIV/AIDS pandemic. The Consortium therefore recommended that an appropriate adjective be inserted before the phrase ‘sexual activity’ to confine the prohibition to circumstances that are illegal or otherwise not in the interests of the child. Furthermore, it was suggested that section 7(2) should be improved by including the right to have access to counselling and not just medical treatment.

With regard to children’s right to protection from harmful social and cultural practices, the Consortium proposed that virginity testing of girl children be prohibited in section 8(3). It asserted that virginity testing is a cultural practice which harms the girl child. Furthermore, the Consortium said virginity testing, while intended to encourage certain values, exposes the child to further abuse as:

⁷ Par. 5.4 of the discussion paper.

- it discriminates against the girl child;
- it publicly shames and isolates young people who do have sex, making them feel that they have done something wrong;
- it infringes the child's privacy and dignity;
- it publicly identifies virgins, thereby potentially exposing them to further abuse owing to the myth surrounding HIV and having sex with a virgin; and
- the public exposure of a girl's 'lack of virginity' shames young people who may also have been sexually abused or raped, thereby adding secondary trauma to their abuse.

With regard to the right of children to protection from exploitative labour practices, the Consortium suggested that this provision should incorporate the rights of children who have jobs that do not qualify as 'exploitative'. It submitted that these children must be supported by the state to enable them to continue their schooling. For example, it could be negotiated with their employers to allow some time off to do homework.

With regard to children's right to education, the Consortium mentioned that many children are being refused admission to school based on their inability to pay school fees, to buy school uniform, shoes or stationery. It therefore recommended the inclusion of the following provision: 'Every child has the right to receive an education, without discrimination, regardless of their inability to pay school fees or to afford a school uniform, shoes or stationery'.

With regard to the rights of children with disabilities, the Consortium stated that the wording in section 12(2) does not improve the current disadvantaged position of children with disabilities as the phrase 'for which he or she may qualify' does not set a principle, but allow another body to decide whether a child with a disability qualifies for financial assistance. It therefore proposed the following wording: 'Every child with a physical or mental disability has the right to receive special care and such financial assistance as is necessary to ensure a standard of living adequate for his or her development and equal enjoyment of his or her constitutional rights'.

The Consortium recommended that the following additional children's rights be included in the list:

- *The right to health care*

- *The right to social security*
- *The right to food*
- *The right to water and sanitation services*
- *The right to be heard and to participate in decisions*
- *The right to an environment that is not harmful to the child's safety or wellbeing.*

The Consortium supported the recommendation in chapter 11 of the discussion paper that a list of health rights be included in the National Health Bill. It suggested that a list of health rights should also be included under chapter 4 (dealing with children's rights) of the new child care legislation. The inclusion of the following provision was proposed: '(1) Every child has the right to basic health care services'. The Consortium suggested that 'basic health care' be defined as care that promotes the child's health, adequately treats acute and certain chronic health conditions, prevents acute and chronic health conditions, and which as a minimum includes (a list of essential health care services or programmes to be listed). Furthermore, it said the following provisions should also be included:

- “(2) Every child has the right to have access to health care services.
- (3) Every child has the right to have confidential access to contraceptives and health related information on sexuality, reproduction, STDs and HIV, regardless of age.
- (4) Every child has the right to be treated with dignity regardless of his or her health status, HIV/AIDS status, age, disability, socio-economic status, sexual orientation, or nationality, or any other ground.
- (5) Every child has the right to request and receive information on health promotion and the prevention of ill-health and disease.’

The Consortium also recommends the inclusion of the following provisions:

- ‘(1) Parents are primarily responsible for ensuring that a child's basic needs are provided for. However, if parents are unable to provide for the child's basic needs, the State is obliged to provide support and material assistance to the child and his or her caregiver, with an emphasis on facilitating the child's or caregiver's ability to provide the child with nutrition, shelter, clothing and health care.
- (2) Every child has the right to have access to social security, including social assistance if their parents are unable to provide for their basic needs in order to

- ensure their survival and a standard of living adequate for their development.
- (3) A child suffering from malnutrition, or living in a situation of crisis, has the right to emergency social assistance from the state without undue delay.
 - (4) A child with a disability or chronic illness that renders him or her in need of special care and medical treatment is entitled to social assistance in order to ensure his or her survival or development.’

As far as the right to water and sanitation services is concerned, the Consortium recommended the inclusion of the following provisions:

- ‘(1) Every child has the right to have access to clean water, within a reasonable distance from his or her home.
- (2) Every child has the right to have access to sanitation services aimed at promoting their health and preventing infections and diseases.’

The Consortium recommended that the proposed list of rights should include a child’s right to be consulted and heard before decisions affecting his or her well-being are made. Also, the right to participate in policy and legislative drafting processes that affect children could be incorporated under this provision.

The **Department of Correctional Services** in turn suggested the inclusion of the following children’s rights:

- Every child has the right to have access to psychological, social, educational, and spiritual services when necessary with the aim to improve social, spiritual and physical well-being;
- Every child has the right to privacy, confidentiality, self-determination and autonomy.

3.4.2 Evaluation and recommendations

There is considerable merit in the recommendations made by the Consortium and most of these suggestions have been incorporated in the draft Children’s Bill.⁸ However, it must be pointed out that children do enjoy the full protection afforded by the rights set

⁸ Sections 16(1), 17, 22, 23 and 25.

out in the Bill of Rights⁹ in the Constitution and these rights do not need to be restated.

It is further important to point out that infringement of any of the rights enumerated in this chapter of the Children's Bill will not constitute a criminal offence in terms of this Bill, as the rights are framed as protective measures similar to their constitutional counterparts. This is not to say that unfair discrimination against children or maltreatment and abuse of children will be allowed or even tolerated: Unfair discrimination constitutes a criminal offence in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 while ill-treatment of children is specifically made a criminal offence in another provision in the Bill.¹⁰

3.5 The responsibilities of children

As stated in the discussion paper, the Commission hesitantly proposed the inclusion of a provision on the responsibilities of children in the new Children's Bill. This reluctance was in part attributed to the fact that the corollary of any right is the responsibility or duty to respect the rights of others and the absence of any similar obligation on adults. In the end, however, a provision on the responsibilities of children was proposed in the discussion paper on the strength of the commitment to the African Charter on the Rights and Welfare of the Child, from which the responsibility provision originates.

3.5.1 Comments received

In general, respondents to the discussion paper were opposed to the concept of formulating a responsibility clause for children. **Africa Christian Action** is one of those respondents. The respondent posed the question whether children will be obliged to spy on their parents for the state as children in former communist countries were subject to such an obligation. **The Consortium** was of the same view. It argued that the proposed clause is vague and generalised and thus has no effect. Furthermore, the Consortium was of the view that inclusion of a responsibility on the child 'to support family life' with no comparative proposed insertion of a parent's (or the state's) duty to support family life is not desirable.

⁹ Chapter 2 of the Constitution, 1996.

¹⁰ Section 353.

The **Department of Correctional Services** suggested that the responsibilities of children be expanded to include the duty to be aware of their own belief systems, values, needs and limitations and the effect of these on others bearing in mind the child's age, maturity and level of understanding.

3.5.2 Evaluation and recommendation

The Commission proposes the inclusion of a responsibility clause in the new Children's Bill.¹¹ This is done on the strength of our commitment to the African Charter on the Rights and Welfare of the Child.

¹¹ Section 28.

CHAPTER 4

CHILDHOOD - ITS BEGINNING AND END

4.1 Introduction

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. In the discussion paper, the Commission therefore recommended that a child be defined for the purposes of the children's statute as any *person* under the age of 18 years of age.¹ The consequence of limiting the protection accorded to 'persons' was that the children's statute would not apply to unborn children: childhood will begin at birth.

In terms of the Age of Majority Act 57 of 1972, South Africans 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. In the discussion paper, the Commission recommended 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 eighteenth birthday in special circumstances.² In terms of this preliminary proposal, 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.

The Commission further noted that if the age of majority is advanced to 18 years, then

¹ Par. 4.2.

² Par. 4.5.

little justification for the retention of the Age of Majority Act 57 of 1972 remains, and the Act can be repealed.

4.2 Comments received

- *The beginning of childhood*

A substantial number of respondents to the discussion paper argued that the new child care legislation should be extended to unborn children. This is linked to the view that no woman should be allowed to terminate a pregnancy. The majority of the submissions in this regard were made from a Biblical point of view.³ It seems that most of these respondents are unaware of the fact that abortion has been legalized by the Choice on Termination of Pregnancy Act 92 of 1996. They also seem unaware of the High Court decision in ***Christian Lawyers Association of S A v Minister of Health***⁴ in which it was held that an unborn child is not a legal person.

- *The end of childhood / the age of majority*

The **Law Society of the Cape of Good Hope** recommended, from a protective and supportive perspective, that the age of majority should remain 21. The respondent argued that it is difficult for a minor of 18 to negotiate his / her maintenance with a parent. Furthermore, the Society argued that lowering the age of majority to 18 may discourage minors from furthering their tertiary education.

Christian Lawyers Association of Southern Africa submitted that majority should still be attained at the age of 21. The respondent argued that when the law considers a vulnerable group such as children, the protection should be broadened not narrowed. Furthermore, that access to the courts will be easy for a child who alleges that the protection has become a restriction that should be removed. The respondent identified the following difficulties should the age of majority be lowered to 18:

³ Chapel of Our Lady and St Michael, Father Eldred Leslie; N G Gemeente, Secunda – Goedehoop, Dr A W Knoetze; East Claremont Congregational Church; Leon Vosloo; Marnus Roodbol; M Rautenbach; Brian Drury; Wolfie Wolfaardt. The following respondents recommended that the definition of 'a child' should include unborn children: Doctors For Life, Pro-life, The Right To Live Campaign and Christian Lawyers Association of Southern Africa.

⁴ 1998 (4) SA 1113 (T).

(i) *Prescription*

Prescription has normally been interrupted until a child is no longer a minor. Should the age of majority be lowered to 18, children will be required to institute action before they reach the age of 21. Failing to do this will result in the prescription of their claims when they reach the age of 21 years.

(ii) *Contractual liability*

Children who leave school are often vulnerable to persons in the commercial world. Thus, the three-year period (after 18) during which the child is still protected by the law in respect of the ability to contract, constitute a valuable time for training children as they become active in the commercial world. Furthermore, when persons know that children need the assistance of their parents, they are more careful when contracting with minors.

The **Department of Social Development, Free State**, suggested that the age of majority should remain 21 years. The respondent stated that it is not clear how children will be informed of their right to apply for the extension of parental responsibility before they attain the age of 18 years.

The **Consortium** supported the Commission's recommendations that (a) a child be defined as any person under the age of 18, (b) the age of majority be reduced to 18, and (c) the Age of Majority Act 57 of 1972 be repealed. **Ms R van Zyl** also supported the Commission's recommendation that the age of majority be lowered to 18 years.

4.3 Evaluation and recommendations

As pointed out earlier, the relevant international instruments, the Constitution, 1996, and our case law militate against extending the protection *afforded by this Children's Bill* to unborn children. This is not to deny the continued use of other common law provisions such as the *nasciturus* fiction to protect the rights of unborn children or to prevent the adoption of legislation or policies to, for instance, provide nevirapine to pregnant mothers. By recognising unborn children as persons, the Commission would also enter the debates surrounding abortion and the rights to reproduction and wrongful life, which deserve attention in their own right.

The Commission further confirms its preliminary position as stated in the discussion paper to lower the age of majority to 18 years of age, for the reasons advanced in the discussion paper.⁵ We note the objections of the Law Society of the Cape of Good Hope and the Christian Lawyers Association to such a step, but point out that the limits on the contractual capacity especially have tended to work rather in favour of business interests than to protect persons in that age category from 'unwise' business decisions.⁶

It is worth pointing out that the definition of 'major' or 'person of age' as defined in the Births and Deaths Registration Act 51 of 1992 is in the process of being amended.⁷ In terms of the new definition of 'major' or 'person of age' the age is lowered from 21 years to 18 years of age. For the purposes of the Births and Deaths Registration Act, 1992 then, minority (childhood) would end once a person attains 18 years of age.

It is worth recalling that in the discussion paper the Commission did state that should the Age of Majority Act 57 of 1972 not be repealed, then the Act should be amended to provide express guidance to the courts to assist them in making a decision whether or not to grant an order for advancement of majority. In amending the Act, provision should also be made for the inclusion of a provision allowing the court discretion to grant a qualified or conditional order (for the advancement of majority). Should the Commission's recommendation that the age of majority be lowered to 18 years not be accepted, then the Commission would recommend that the Minister request the Department⁸ responsible for the administration of the Age of Majority Act 57 of 1972 to at least have these amendments affected.

In the discussion paper provision was made for the extension of parental responsibility and or State support in special circumstances in respect of persons in the 18 -21 age category.⁹ This was done part in response to submissions received and in order to counter any negative effects the lowering of the age of majority might have for children in the formal care and protection system still attending school or completing their tertiary

⁵ Section 29 of the Bill.

⁶ Banks and business enterprises are more concerned about collateral for their debts and would in all likelihood continue to demand surety from the parents or caregivers of such person concerned.

⁷ See section 1 of the Births and Deaths Registration Amendment Bill 53 of 2001.

⁸ It could not be established which Department is responsible for administrating the Age of Majority Act, 1972.

⁹ For the formulation, see Par 4.5 of the discussion paper.

education. The idea seems to be that because some persons in the age category 18 – 21 years still live with and are financially dependent upon their parents, they are entitled to such support. However, it must be pointed out that a reciprocal duty of support exists in terms of which parents and children are obliged, within their respective means, to care for and maintain each other. Such a duty has no age limit or cut-off; often the position is inverted later in life when the now adult children take care of their aged parents. Indeed, some persons see this mutual support obligation as one of the cornerstones of healthy family life.

As is pointed out by Van Heerden *et al*,¹⁰ the attainment of majority does not *per se* terminate the parental duty of support: it is the child's ability to maintain himself or herself that is important. Thus the obligation to maintain a severely handicapped child persists throughout the child's life.¹¹ Similarly, a duty which ceased when a son started work or a daughter married may revive when the child faces financial difficulties.¹² By the same token, the duty to maintain children ceases when they become self-supporting. After reconsidering the issue, the Commission is therefore of the opinion that lowering the age of majority to 18 years of age would not adversely affect the parental duty of support.

In line with the Commission's preliminary recommendations in the discussion paper, it is therefore recommended that provision be made in the Children's Bill for the possibility to extend parental rights and responsibilities in respect of a particular child after that child has turned 18 years of age.¹³ Such an extension would be made on application in special circumstances. The Commission further recommends that a person placed as a child in alternative care on application to the MEC be allowed to remain in that care until the end of the year in which that person reaches the age of 21 years.¹⁴ A similar recommendation in respect of a person placed in foster care as a child is made.¹⁵ This should allow persons placed as children in alternative and foster care arrangements to finish their education and training. Obviously the extension of the placement must be

¹⁰ **Boberg's Law of Persons and the Family** (2nd edition) 247.

¹¹ Per Jansen J in **Kemp v Kemp** 1958 (3) SA 736 (D) at 737.

¹² Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 247, footnote 76.

¹³ Section 40 of the Bill.

¹⁴ Section 196(2) of the Bill.

¹⁵ Section 196(2) of the Bill.

accompanied by the necessary state support, such as the foster care grant.

Provision is also made for a child placed in alternative care to continue staying in that care until the end of the year in which that person reached 18 years of age.¹⁶ This would allow a person who turned 18 in the beginning of the year, to finish at least that year's schooling or training should he or she so wishes. Such placement should also be accompanied by the necessary State support.

¹⁶ Section 196(1) of the Bill.

CHAPTER 5

THE CHILD CARE ACT 74 OF 1983

5.1 Introduction

Even a cursory overview will reveal that the draft Bill proposed by the Commission in this report goes far beyond the confines of the Child Care Act, 1983. However, despite the deficiencies and limited scope of the Child Care Act, the Act and the regulations issued in terms of the Act nevertheless served as a workable basis for a review of children's legislation. All the provisions of the current Act (and regulations) were carefully considered and it is recommended that certain provisions should be retained. Given the purpose of the overview of the Child Care Act, 1983 in the discussion paper¹ and the fact that the current provisions of the Act (and regulations) are considered throughout this report, only certain provisions of the Act are discussed here.

5.2 The children's court assistant

As pointed out in the discussion paper,² children's court assistants 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 assistants, and so ended even this limited resource for children. The removal of children's court assistants also left Children's Court Commissioners in the ethically difficult position of having to serve both as the adjudicator and as the person who conducts each case. This had not been to the advantage of the children who appear before them.

5.2.1 Comments received

The respondents to the discussion paper welcomed the Commission's recommendation that the position of the children's court assistant be reactivated.³

¹ Chapter 6 of the discussion paper was a 'foundational and introductory chapter'.

² Par. 6.3.2.

³ Ms R van Zyl, H Gerryts and the Dutch Reformed Church.

5.2.2 Evaluation and recommendations

The Commission confirms its initial recommendation that the position of children's court assistant be reactivated and given an expanded role. The designation of this position has been changed to 'child and family court registrar'.⁴ The Bill makes specific provision for the appointment of child and family court registrars and support staff⁵ and sets out the required qualifications, duties and functions of child and family court registrars.⁶

The Commission further recommends that the registrar must screen all matters brought to or referred to the child and family court.⁷ In this process, the registrar must determine if a matter –

- may be brought before court;
- require a pre-hearing conference or further investigation;
- needs referral to a lay forum for an attempt to settle the matter out of court; or
- needs referral to the presiding officer in chambers.⁸

On referral of a matter to court, the registrar will also determine whether a matter is to be heard at district or regional court level.⁹ The registrar may hold pre-hearing conferences¹⁰ and may cause family group conferences to be arranged.¹¹ In addition, the Commission recommends that the registrar must attend all child and family court hearings, may present evidence and information at such hearings; with the permission of the court, question or cross-examine any party or witness before the court; must arrange legal representation for a child when necessary and may assist an unrepresented party in the proceedings before the court.¹² Seen from this perspective, it should be clear that

⁴ Section 1 of the Bill: definition of child and family court registrar.

⁵ Section 92(1) of the Bill.

⁶ Sections 93 to 101 of the Bill.

⁷ Section 94 of the Bill.

⁸ Section 94(1)(b)(iv) of the Bill.

⁹ Section 95 of the Bill.

¹⁰ The registrar may conduct a pre-hearing conference with the parties in order to mediate and settle the disputes and to define the issues to be heard by the court (section 96(1)). The registrar will preside at such conferences (section 96(4)(a)).

¹¹ Section 97 of the Bill.

¹² Section 101 of the Bill.

the child and family court registrar is imbued with far more responsibility and can play a far more active role than even the children's court assistant could in terms of the existing legislation.

5.3 Legal representation for children

In the discussion paper¹³ the Commission recommended putting into operation section 8A of the Child Care Act, 1983. This section was inserted by the 1996 amendment 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".¹⁴

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 recommended in the discussion paper 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 contests the placement recommendation of a social worker who has investigated the current circumstances of the child;
- (e) Where two or more adults are applying in separate applications for the placement of the child with him, her or 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

¹³ Par. 6.3.1.

¹⁴ Section 8A(2) of the Child Care Act, 1983.

- 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.

5.3.1 Comments received

Durban Children's Society supported the following recommendations of the Commission:

- That a child be provided with legal representation when trans-racially placed with adoptive parents.
- That social workers in private practice be excluded from the definition of "authorised officer" in section 1 of the Child Care Act, 1983.

Africa Christian Action questioned the ability of the state to provide legal representation for children given the limited resources. The respondent submitted that care should be taken that the absence of legal representation does not become a barrier to trans-racial adoptions.

The **Dutch Reformed Church, Pretoria**, welcomed the Commission's recommendations with regard to legal representation for children. The respondent, however, questioned the ability of the system to implement these recommendations given the lack of funds and human resources and in view of the duration of children's court cases.

Mr D S Rothman, Commissioner of Child Welfare in Durban, made the following submissions in respect of the above recommendations:

With regard to recommendation (b), Mr Rothman submitted that it is generally known that many social workers fear the presence of legal representatives and feel intimidated by them to the extent that social workers have requested legal representation for themselves in his court. In his view, social workers are not qualified to assess the need for legal representation for a child. On the other hand, the **Department for**

Correctional Services suggested that the categories of persons on whose recommendation legal representation should be appointed be broadened to include psychologists.

With regard to recommendation (c), Mr Rothman stated that abuse of this nature may form part of the removal criteria for the child as provided for in section 14(4)(aB)(vi) of the current Child Care Act. This will mean that legal representation for the child must be arranged in all section 14(4)(aB)(vi) cases. Mr Rothman is of the opinion that the guidelines should not refer to events as these may be too broad, but should rather focus on the section 14(4) categories.

With regard to recommendation (d), Mr Rothman mentioned that in most cases social workers produce their reports for the first time when they appear in court on the day of the hearing. Thus, the nature of the recommendations may only become known to the parties on the day of the hearing. He added that the social worker's report is a court document which has yet to be tendered as evidence and consequently remains privileged until this stage. Furthermore, the courts usually only become aware of the dispute during the hearing and the adjournment of the proceedings will then become inevitable.

With regard to recommendation (e), Mr Rothman presumed that the recommendation refers to adoption applications as the current Child Care Act does not provide for contested applications for the placement of children involved in a children's court enquiry. This instance is thus irrelevant.

With regard to recommendation (g), Mr Rothman submitted that the court will be inclined to assess the matter on the physical attributes (colour) of people. This could be discriminatory, especially if the court must provide its own interpretation of whether the differences in appearance are sufficient to justify legal representation.

With reference to chapter 6 paragraph (b) of the executive summary, **CHILDS** proposed that point (c) should also refer to a report by a psychologist, and that point (d) should also refer to a placement recommendation by a psychologist. The respondent further recommended that legal representation must be provided at State expense or in cases

where the parent(s) can afford it, at the cost of the parent(s). This would imply some form of means testing.

CHILDS proposed that an “intake process” be implemented to determine the needs of a child and his/her family as well as all legal and social welfare and related actions undertaken prior to any legal process being instituted. The respondent proposed that a process of mediation followed by an assessment procedure should precede litigation. Furthermore, it recommends that in the event of urgent applications as well as removals, a process of mediation followed by an assessment procedure should precede litigation.

Ms R van Zyl stated that legal representation is important for children who are to be placed trans-racially.

The Children’s Rights Project and Local Government Project (Community Law Centre, UWC) submitted that although section 8A of the Child Care Amendment Act, 1996 (Act No. 96 of 1996) goes a long way to afford children the right to be heard in children’s court proceedings, it does not go far enough. The respondents added that a further problem relates to the qualification in sections 8A (3) and (4) requiring legal representation only if it is in the best interests of the child. It is argued that this qualification is as broad as the constitutional rider of “substantial injustice”. The respondents mentioned that the Child Care Regulations (in Regulation 4A(1)) provide detailed situations where a child should be provided with legal representation at state expense. Notwithstanding these developments in providing children the right to be heard in child care proceedings, provisions for legal representation for children in the Child Care Act are still not in operation. The respondents supported the Commission’s recommendations with regard to legal representation for children.

5.3.2 Evaluation and recommendations

Legal representation in children’s court enquiries is rather the exception than the rule. If a legal representative does appear in the children’s court, it is usually at the behest of one or both of the parents. There is seldom legal representation for the children themselves. The Commission is concerned about the fact that section 8A of the Child Care Act, 1983, is not yet in operation. The failure to put this protective measure into

operation after more than five years is apparently due to the inability of the Departments of Social Development and Justice and Constitutional Development to agree as to who should pay for these services. One would have thought that the budgetary issues would have been addressed in the drafting process or at least by now. Unfortunately, it seems that while the principle of legal representation for children attracted virtual unqualified parliamentary support, it is not backed up with the necessary financial means. Several of the respondents also questioned the viability of the system to give effect to the right of a child to legal representation given the budgetary and structural challenges.

The failure to put into operation section 8A of the Child Care Act, 1983 is particularly worrying given the constitutional provision that states that every child has the right to legal representation 'assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result'.¹⁵ Given the focus of children's court enquiries (i.e. to determine whether a particular child is in need of care and protection), the above constitutional provision, and the failure to put into operation section 8A, the Commission at one point seriously entertained the idea of excluding all legal representation, except that for the child, in the child and family court.

However, as in the discussion paper,¹⁶ the Commission opines that a child involved in a matter before the child and family court is entitled to legal representation.¹⁷ The Commission states that a child may appoint a legal representative of own choice and at own expense.¹⁸ Should such legal representative not serve the interests of the child in the matter, the court must terminate the appointment.¹⁹ A duty is also imposed on the court to inform the child or the person exercising parental rights and responsibilities in respect of the child of the child's right to legal representation.²⁰

The Commission further recommends that the court must order that legal representation be provided for the child at State expense if it is requested by the child; recommended

¹⁵ Section 28(1)(h) of the Constitution of the Republic of South Africa, 1996.

¹⁶ Par. 6.3.1.

¹⁷ Section 78(1) of the Bill.

¹⁸ Section 78(2) of the Bill.

¹⁹ Section 78(2)(b) of the Bill.

²⁰ Section 78(3) of the Bill.

by a social worker; where it appears or is alleged that a child has been abused or deliberately neglected; where placement recommendations are contested; where other parties besides the child are to be legally represented; or broadly if substantial injustice would otherwise result.²¹ Should the court deny a child the right to such legal representation, the court must record its reasons for declining to issue such an order.²²

The Commission recommends that a child who must be represented at state expense must be represented by a family advocate, a child and family law practitioner whose name appears on the family law roster, or the child and family court registrar, in urgent matters.²³

It is true that many social workers do feel intimidated by the presence of legal representatives in the children's court, as was pointed out by Mr Rothman. In their defence, however, the same could be said about some commissioners of child welfare. While Mr Rothman argues that social workers are not qualified to assess the need for legal representation for a child, and given the perceived opposition of social workers to legal representatives being involved in the process, it must be pointed out that in our opinion social workers have no incentive to recommend in their report that a legal representative for the child be appointed. Indeed, if social workers are intimidated by legal representatives to the extent suggested, then it is not in their self-interest to make the recommendation that a child be legally represented. However, the Commission is of the opinion that social workers should be entitled to make a recommendation to the court in their reports that legal representation for the child is called for.²⁴ The social worker has worked with the family, has investigated the circumstances of the child, and should have a very good idea of the dynamics involved in the family once the case is before the child and family court.

The general thrust of Mr Rothman's submission that the Commission's preliminary recommendations in respect of mandated legal representation for children are not useful

²¹ Section 78(5).

²² Section 78(6).

²³ Section 78(7).

²⁴ Section 78(5)(b).

is far more serious. As framed presently,²⁵ the court will have no discretion to refuse legal representation for a child, at the expense of the state, under the circumstances listed.

The Commission takes note of Mr Rothman's comment that it is difficult to know whether the placement recommendation of a social worker will be contested by the parties before the hearing, as the social worker's report will be produced for the first time on the day of the hearing. However, a social worker usually knows whether the placement recommendation would be contested by one or some of the parties and should therefore inform the court beforehand in order to avoid unnecessary delays.

The Commission has no desire to impede trans-racial adoptions. We take note of the submissions in this regard and no longer recommend that legal representation be provided to children when adopted trans-racially.

The Commission maintains its original recommendation with regard to Regulation 4A(1)(g). As explained, Regulation 4A(1)(g) provides that where a 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. As indicated in the discussion paper, the Commission regards such a provision as unworkable in practice as it could lead to confusion between the role of legal representative and that of interpreter.

5.4 The right of children to self-expression

The recent amendments to the regulations to the Child Care Act allowing a child to express his or her views at a children's court enquiry²⁶ do not go far enough to give effect to a child's right to self-expression. It is also a matter of concern that a child's right to express his or her views if able to do so, is not reflected in the principle Act.²⁷

²⁵ Section 78(5).

²⁶ Regulation 4(1) and Regulation 4(2).

²⁷ Mr Rothman also drew the Commission's attention to the fact that Regulation 4(1) and Regulation 9(2)(d), as amended in 1998, do provide a child with a right to express his or her views. He adds that a child's right to self-expression has been recognised by the children's court.

5.4.1 Comments received

CHILDS recommended that the circumstances under which children give evidence should be child-friendly and in a child-friendly environment. Furthermore, it is recommended that such a process should be inquisitorial in nature.

The **Consortium** supported the recommendation that the new child care legislation should explicitly allow children to give evidence, if capable of doing so, in any proceedings in terms thereof. The Consortium proposed that structures and standards be established that prepare and protect the child in the process of giving evidence.

5.4.2 Evaluation and recommendations

The Commission confirms its recommendation 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.²⁸

5.5 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 and that the child and family court should have the same powers.²⁹

In its submission, the **Department of Correctional Services** posed the question whether prisons or correctional facilities are also regarded as places of safety. In this regard, the Commission wishes to point out that the Child Justice Bill and not the Children's Bill would regulate the position of children in trouble with the law. The

²⁸ Section 84 of the Bill.

²⁹ Section 169 of the Bill.

Commission is, however, of the view that prisons or police cells should not be regarded as places of safety for children.

5.6 Removals in terms of section 12

In terms of section 12 of the Child Care Act, 1983, 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.

5.6.1 Comments received

Mr Rothman pointed out that the removal procedures relating to the use of the Form 4 as provided for in regulation 9 are far clearer since the 1998 amendments to the Child Care Act. He stated that these procedures are specifically designed to eliminate abuse and that the new Form 4A and Form 4 documents are user-friendly and transparent. Mr Rothman submitted that training and education in the use of these documents are required and not legislation. Mr Rothman pointed out that notwithstanding ample legislation and improved forms to assist role-players in the proper handling of removals, there is still a need for court staff to constantly assist social workers, and police officers in particular, to properly complete forms and to adhere to the rules. In his opinion, apart from intense training, there is a need for the SAPS to introduce a national policy with accountability undertakings (similar to domestic violence matters) to cause police to have better regard for their roles in the removal of children.

Mr Rothman stated that the warrant referred to in section 12(1) of the current Child Care Act is the warrant described in section 11(2) of the same Act. He argued that section 12(1) implies that a warrant should accompany each removal. He, however, is of the view that a warrant should be required only in certain circumstances. The reason for this is that the section 11(2) warrant refers to the “safety and welfare” of a child, which is a more restrictive removal criterion than the removal criteria relating to the categories

describing a “child in need of care”. Mr Rothman asserted that if section 12(1) is to be strictly applied in each case, it will become child-unfriendly, fetter social workers in their initiatives and consequently expose children to further risk. He added that issuing a warrant is a time-consuming exercise requiring two rather than one hearing.

The Commission has recommended that section 12 of the Child Care Act, 1983 be amended to spell out clearly that removals without a warrant are only to take place in emergency situations. Responding to this, **H Gerryts** stated that “emergency situations” must be clearly defined.

The Criminal Justice Initiative, Open Society Foundation for South Africa supported the recommendation that officials who do remove children without a warrant be held accountable. The respondent is of the opinion that more thought should be given to the job specifications of persons allowed to remove children. Qualifications, training and level of experience should be considered in particular.

The **Department of Social Development, Free State** stated that in some areas police officers and social workers are not aware of Form 4 procedures and that greater awareness of the Form 4 procedure is required.

The Commission recommended in the discussion paper that “a police officer, a social worker or an authorized person may, without a warrant from the commissioner remove a child to a place of safety”. Responding to this, **CHILDS** proposed that the words “a police officer” be replaced with the words “two police officers” and that the words “from different stations, practices, or organizations” should be inserted after the words “authorized person”. The Commission also recommended 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 organizations or superiors where appropriate) where children are removed in non-emergency situations. Responding to this, CHILDS proposed that the words “who should act speedily and without unnecessary delay and take a dim view of any irregularity” be inserted after the word “superiors”. The respondent suggested that the circumstances surrounding the removal of a child should also be spelt out in detail in a written report to avoid any misunderstanding and/or misinterpretation should queries arise in future. The respondent added that a supervisor

should be informed of the circumstances of a particular case and the intentions of the party removing the child and should be jointly liable for any misconduct, if any. Furthermore, teams working together should be investigated regularly and reorganised to prevent a perception of fraudulent activity.

The SA Council for Social Service Professions supported the Commission's recommendation that social workers in private practice be specifically excluded from the definition of "authorised officer" in section 1 of the Child Care Act, 1983. The Council thus agrees with the view that it would be improper for a social worker in private practice being paid by an interested party to remove a child to a place of safety. In addition, the Council recommended that steps be taken against commissioners of child welfare who condone such acts by private social workers.

Ms R van Zyl and the **Sinodale Kommissie vir die Diens van Barmhartigheid** also felt that social workers in private practice should be excluded from the definition of "authorised officer".

5.6.2 Evaluation and recommendations

It is clear that the present Form 4 procedure is being abused in that a tendency has developed to use the Form 4 procedure in all cases, even in non-emergencies. The Commission therefore confirms its proposal regarding this procedure as made in the discussion paper, and recommends that the legislation on this provision should set out clearly that removals without a warrant are only to take place in emergency situations.³⁰ The Commission further recommends that misuse by social workers in the service of a designated child protection organisation of the power to remove children without a warrant, is a ground for the withdrawal of that organisation's designation.³¹

The Commission also recommends that police officers, designated social workers and authorised persons should be the only persons who may remove a child without a warrant to a place of safety in terms of the Children's Bill. While there are certainly situations where the court could authorise an interested third party such as a relative to

³⁰ Section 170(1) of the Bill.

³¹ Section 170(3) of the Bill.

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 the definition of “authorised person” should indicate that the person authorised by a child and family magistrate to perform an act must have no financial interest in the performance of that act.³²

5.7 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 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 and the date set down for the inquiry. In some instances, this causes delays in finalising children’s court inquiries.

In the discussion paper the Commission recommended 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 its family, as interim measures.

5.7.1 Comments received

Mr Rothman supported the Commission’s recommendations. He suggested that the recommendations should be extended to endorse the need for a formal “opening” of an enquiry, including when children are referred from criminal courts and when enquiries are referred from other districts, to ensure that the child does not get lost within the system. Mr Rothman argued that the child should be brought before the court hearing the enquiry at least once, and can thereafter be excused if circumstances justify this. He further agreed that the powers of the children’s court should be extended beyond that already provided for in section 14(1), which deals with an examination by a medical

³² Definition of ‘authorised person’ in section 1 of the Bill.

officer or psychologist.

H Gerryts welcomed the Commission's recommendation that there should always be a formal "opening" of an enquiry.

CHILDS pointed out that there is a lack of co-ordination and integration between the courts and the professionals involved in a case, which is often the reason for postponements and the subsequent delays. The respondent recommended that a list of accredited service providers, services and programmes be compiled to assist the children's court when making referrals. Furthermore, these practitioners and organisations should undertake to work at a pre-published tariff and according to a sliding scale.

5.7.2 Evaluation and recommendations

The Commission recommends that the child and family court must be authorised to order the carrying out of an inquiry or further investigation before it decides a matter.³³ It is further recommended that the child and family court should have the power to order the provision of certain services (such as family group conferencing) to the child and its family.³⁴

5.8 Finding a child to be in need of care (section 14(4))

In terms of the Child Care Amendment Act, No. 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. This change is also in line with section 28(2) of the Constitution in terms of which a child's best interest is of paramount importance in every matter concerning a child.

³³ Section 67 of the Bill.

³⁴ Section 59 of the Bill sets out the orders that a child and family court may make.

5.8.1 Comments received

Mr Rothman pointed out that the Commission’s assertion that the current Child Care Act provides for the compulsory removal of the child based on the “child in need of care” criteria is incorrect. He explained that the grounds set out in section 14(4) of the Act must be reasonable to justify removal. Thus, the Act makes the removal discretionary. Mr Rothman mentioned that currently a social worker or a police officer or authorised officer has discretion whether or not to remove a child. He recommended the extension of the grounds under section 14(4)(aB) to cater for those instances where, currently, one *can only rely* on section 14(4)(aB)(i), which stipulates that a child is in need of care if he or she “has been abandoned or is without visible means of support”. He identified the following instances that need to be covered in order to ensure that certain children who are desperately in need of help do not fall through the net: Where the child has not been abandoned but –

- X the parent is very ill, physically or mentally (and sometimes even terminally);
- X the parent is unemployed or not gainfully employed;
- X the parent is serving a prison sentence while the child is being cared for by others, and the child is being supported by those who do not have a legal obligation to support the child and who need assistance to do so;
- X the child has lived with family or friends, apart from the parent, for long periods of time for whatever reason; and support is being provided by those who do not have a legal obligation to do so and are financially stressed, and maintenance from the parents is not possible or meagre.

Mr Rothman explained that, although support in the above-mentioned circumstances is visible, this is limited. Furthermore, these circumstances do not strictly fall within the ambit of section 14(4)(aB)(i). Mr Rothman also proposed the inclusion of a further ground which relates to the situation where a child has been well cared for by someone other than the parent in circumstances where an enquiry might be in the interests of the child, but the child does not fall within the ambit of the provisions of section 14(4). For example, the mother may have never had the child in her care since birth. Potential adoptive parents have cared for the child with the mother’s verbal consent to adoption, but after a few months the mother, a prostitute and drug addict, wishes to have the child

back. It cannot be said that the child has lived in or has been exposed to circumstances which may be detrimental to him/her. Mr Rothman therefore recommended the following provision for inclusion in the new child care legislation:

“The child is in need of care in that the child –

may be at risk if returned to the custody of the parent, guardian or lawful custodian of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously injure the physical, mental or social well-being of the child”.

Having taken cognisance of the Commission’s recommendations with regard to the terms “care”, “custody” and “guardianship”, Mr Rothman proposed the extension of the ground under section 14(4)(a) and 14(4)(aA) to include reference to a person having lawful custody of the child. The following provisions are recommended:

“(a) the child has no parent, guardian, or **other person having lawful custody of the child**; or
 (b) the child has a parent, guardian or **other person having lawful custody of the child** who cannot be traced.”

Mr Rothman further suggested that wherever reference is made to “the person in whose custody the child is”, specific reference should also be made to “the person in whose lawful custody the child is”, as provided for in section 12(2)(a) of the Child Care Act.

The Commission has recommended that all children's court cases be recorded as a separate component of the National Child Protection Register. Responding to this, the **Department of Social Development, Free State** stated that it should be made clear whether the Department of Social Development or the Department of Justice will be responsible for the recording of all children's court cases.

5.8.2 Evaluation and recommendations

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 criteria in terms of which a child may be found to be in need of care as listed in the Child Care Act, 1983, should be retained and supplemented. The general feeling seems to be that section 14(4) of the Child Care Act, 1983 is working well and that its principles

should be retained. The Commission therefore recommends the inclusion in the Children's Bill of a broad provision defining a child in need of care and protection.³⁵ Provision is made for any court to refer to the child and family court the question of whether a child is need of care and protection.³⁶ In this regard the Commission recommends that the deliberate 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. Provision is further made for a child and family court to investigate the question of whether a child is in need of care and protection on the basis of evidence presented to the court by a designated social worker.³⁷

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. Under the new Children's Bill the aim should rather be to support that child and his or her family in order to ensure that the child remains with its family.

The mandatory reporting function, on the other hand, will serve a different purpose and should be tailored accordingly. The cases that involve serious protection issues have been categorised specifically in a section of the new children's statute dealing with reporting and registration.³⁸ The "child in need of care" criteria need to be broad enough to take in many situations, because as they stand they apply to children who never will or should come before the courts. The Commission also recommends that all children's court cases must be recorded as a separate component of the National Child Protection Register.³⁹ Statistics in this regard would be of great value for planning and for allocating resources. It would be important to know both the type of order made, as well as 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.

³⁵ Section 166 of the Bill.

³⁶ Section 168(1) of the Bill.

³⁷ Section 169 of the Bill.

³⁸ Section 167 of the Bill.

³⁹ Section 122 of the Bill.

The Commission agrees with Mr Rothman's proposal that the grounds under section 14(4)(aB) of the current Child Care Act should be extended to include the ground that the child may be at risk if returned to the custody of his or her parent, guardian or care-giver as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously injure the physical, mental or social well-being of the child. This proposal is accordingly adopted.⁴⁰

Where a child in need of care is to be removed, the present range of court options is limited. The children's court can in the first place 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 a last resort, in a school of industries. The Commission, however, is of the opinion 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 22 below.

5.9 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 from receiving 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” ;
- Any person other than the managers of certain specified institutions or certain specified relatives from caring for such a 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 ;
- Any person other than the managers of certain specified institutions or certain specified relatives from receiving any child under the age of 7 years, unless the person 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

⁴⁰ Section 166(c)(vii) of the Bill.

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 all provisions relating to adoption be incorporated under the general adoption provisions.⁴¹

5.10 Ill-treated and abandoned children; children whose parents fail to maintain them properly

Children have the constitutional right to be protected from "maltreatment, abuse, neglect or degradation". It follows that should this right be infringed, appropriate relief should be provided to such children. It also gives justification for criminalizing the acts of those parents or care-givers who wilfully infringe this right. The Commission therefore recommends that the Children's Act should be brought in line with the Constitution and that children should be protected from persons who maltreat, abuse, neglect or degrade them.⁴² 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. 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.⁴³

5.11 Deadlines

⁴¹ Chapter 18 of the Bill – see chapter 17 on adoption below.

⁴² Section 18 of the Bill.

⁴³ Sections 166, 168, 169 and 170 – see discussion on children in need of care above.

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.

5.11.1 Comments received

H. Gerryts, Department of Social Development, Free State mentioned that in practice, commissioners of child welfare do not always know the reasons for the delays in finalising cases. He stated that it is the social worker's responsibility to inform the commissioner on the progress of the investigation and the reasons for any delay.

5.11.2 Evaluation and recommendations

The Commission is mindful of the dangers inherent in imposing deadlines on our severely under-resourced current children's court and social welfare systems. The Commission would therefore 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 to the Magistrates Commission every month, on the basis of information supplied to the child and family court magistrate by the child and family court registrar, the number of unresolved children's court inquiries outstanding and to require reasons from the magistrate for the delays in finalising those cases.⁴⁴ The Magistrates Commission should then in turn in terms of section 7(1)(f) of the Magistrates Act, No. 90 of 1993 report such statistics to the Minister of Justice and Constitutional Development, for the information of Parliament.

5.12 Contribution orders

⁴⁴ Section 105(h)-(i) of the Bill.

Chapter 7 of the Child Care Act, 1983, deals with contributions orders. A contribution order is defined in the Act as an order for the payment or recurrent payment of a sum of money as a contribution towards the maintenance of a child in a place of safety or in any custody in which he or she was placed or towards the maintenance of a pupil.⁴⁵ While in many ways similar to a maintenance order,⁴⁶ it must be clear that a contribution order is a sub species thereof.

No submissions were received on this issue.

The Commission retains the concept of contribution orders in the Children's Bill. Provision is therefore made for the child and family court to make an order instructing a respondent to pay a sum of money or a recurrent sum of money as a contribution towards the maintenance of a child placed in alternative care or temporarily removed by the court from the child's family for treatment, rehabilitation, and counselling or as a short-term emergency contribution towards the maintenance of a child in urgent need.⁴⁷ It is further recommended that a contribution order may direct payment to the registrar of the child and family court or any other person.⁴⁸

⁴⁵ Definition of 'contribution order' in section 1 of the Child Care Act, 1983.

⁴⁶ A contribution order has the effect of a maintenance order in terms of the Reciprocal Enforcement of Maintenance Orders Act, 1963 and the provisions of the section 11 of the Maintenance Act, 1963 (now repealed) apply mutatis mutandis to any person who refuses or fails to make any particular payment in terms of a contribution order: section 44 of the Child Care Act, 1983.

⁴⁷ Section 181(1)(a) of the Bill.

⁴⁸ Section 184 of the Bill.

CHAPTER 6

ESTABLISHING PARENTHOOD AND THE STATUS OF CHILDREN

6.1 Introduction

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.

6.2 Legitimacy of children

As pointed out in the discussion paper,¹ a legitimate² child is one whose parents were married to each other at the time of his or her conception or at the time of his or her birth, or at any time in between these dates.³ Where the parents= marriage, though invalid, fulfils the requirements of a putative marriage, children born of the union are legitimate for all purposes, and will on application be declared so by the court.⁴

At common law, annulment of a voidable marriage rendered children born or conceived of the union retrospectively extra-marital. In modern South African law, however, the status of children born or conceived of a voidable marriage which is subsequently set aside by the court is regulated by the Children=s Status Act 82 of 1987.⁵ In terms of this

¹ Par 7.2.

² Objections have been raised to the use of the terms >legitimate= and >illegitimate= on the grounds that especially the latter term stigmatises the child concerned and may be offensive: see South African Law Commission **Report on the Investigation into the Legal Position of Illegitimate Children** (October 1985), para 6.25.- 6.26. The Commission therefore suggested the use of the term >extra-marital= instead of >illegitimate= in legislation.

³ Section 4 of the Children's Status Act 82 of 1987. See also Van Heerden et al **Boberg=s Law of Persons and the Family** (2nd edition) 327, footnote 3 on the marriage requirement.

⁴ Van Heerden et al **Boberg=s Law of Persons and the Family** (2nd edition) 328. See also the South African Law Commission=s investigations into the Review of the Marriage Act 25 of 1961 (Project 109) and Domestic Partnerships (Project 118).

⁵ In its **Report on the Investigation into the Legal Position of Illegitimate Children**, the Commission proposed legislation to place children born or conceived of a voidable marriage which is subsequently annulled in the same position as children born or conceived of a valid marriage which is subsequently dissolved by divorce. The Children=s Status Act 82 of 1987 arose from the recommendations made by the Commission in this regard.

Act, the annulment of the marriage has no effect on the status of children born or conceived of it;⁶ such children retain their legitimate status and, if minor or dependent at the time of the annulment, are treated as if the marriage had been terminated by a decree of divorce.⁷

Adoption, which is not confined to extra-marital children, is discussed fully in another chapter.⁸ It is, however, important to point out that in terms of section 20(2) of the Child Care Act, 1983, an adopted child >shall for all purposes whatever be deemed in law to be the legitimate child of the adoptive parent, as if he was born of that parent during the existence of a lawful marriage=.

In the past considerable disadvantages attached to being an adulterine child, and the penalties for the fruit of incest were even greater.⁹ Today the notion that it is proper to visit the sins of the parents upon their innocent children has happily passed away, and it makes little difference into what class of illegitimacy a person falls.¹⁰

No submissions were received on this issue.

In line with the Commission's vision to move towards an inclusive, comprehensive, single Act, it is recommended that sections 4, 6 and 7 of the Children's Status Act 82 of 1987 be incorporated in the new Children's Bill.¹¹ These sections deal with situations where the rights of a child are affected by the annulment of the marriage of the parents of such a child. In this regard, the Commission further recommends that where a marriage is annulled, the father is to be regarded as a *divorced* father rather than an *unmarried* father.¹²

⁶ Section 6.

⁷ Section 7.

⁸ See Chapter 18 below.

⁹ The distinctions between the different categories of illegitimate children were relevant particularly in regard to succession rights and to legitimisation by subsequent marriage (for details see Hahlo and Kahn **The Union of South Africa: The Development of its Laws and Constitution** Cape Town: Stevens 1960 356.)

¹⁰ Van Heerden et al **Boberg=s Law of Persons and the Family** (2nd edition) 332.

¹¹ Sections 50 and 51.

¹² Section 51(6) of the Bill.

6.3 Artificial insemination

Since the legitimacy of a child depends on the status of his or her parents at the relevant time, it is necessary to determine who those parents are. As stated above, rapid advances in medical science over the past few decades have made such determination very problematic in certain cases, notably in cases involving so-called >artificial fertilization=¹³ techniques.

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 husband¹⁴ was ordinarily extra-marital even if, in the latter case, the husband was a consenting party.¹⁵

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.¹⁶

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.¹⁷ Section 5 of the Children's Status Act 82 of 1987 also does not apply to an arrangement

¹³ The term >artificial fertilization= is used by the Commission in its **Report on Surrogate Motherhood** (1993) to refer to inter alia the procedures of artificial insemination and *in vitro* fertilisation. See also the Commission's **Report on the Investigation into the Legal Position of Illegitimate Children** (October 1985). For a criticism of the word >artificial= in this context, see Graig Lind >Sexual orientation, family law and the transitional Constitution= (1995) 112 **SALJ** 481 at 490, footnote 48.

¹⁴ The so-called 'heterologous' artificial insemination or AID/DI.

¹⁵ Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 334.

¹⁶ Section 5(1)(b) of the Children's Status Act 82 of 1987.

¹⁷ Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 336.

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.

No submissions were received on this issue.

The Commission affirms its preliminary recommendation in the discussion paper¹⁸ and recommends that section 5 of the Children's Status Act 82 of 1987, as to be amended, be incorporated in the new Children's Bill.¹⁹ The Commission further recommends that the Minister for Social Development requests his colleague, the Minister for Health, to ensure that the definition of 'artificial fertilisation' and the confidentiality provisions in the Human Tissue Act 65 of 1983 be amended in line with the suggestions made in the discussion paper.²⁰

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.²¹ However, the Commission is convinced that children born as a result of artificial insemination procedures have a right to have access to medical and biographical information concerning their genetic

¹⁸ Par 7.3.

¹⁹ Section 52.

²⁰ Par 7.4.

²¹ Section 53(2) of the Bill.

parents.²² 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 medical and biographical information concerning their genetic parents. However, access to biographical information should be limited to children over the age of 18 years.²³ 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.

The Commission therefore recommends that the Minister for Social Development requests his colleague, the Minister for Health, to have the necessary amendments affected to the Human Tissue Act 65 of 1983 to allow children such access.

6.4 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

²² Section 53(1) of the Bill.

²³ This recommendation was supported by Ms R van Zyl.

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 recommended in the discussion paper 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 was recommended that a distinction between full and partial surrogacy be maintained. In the case of *full* surrogacy, the Commission recommended 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) would be entitled to register the child as their child immediately. In the case of *partial* surrogacy, the Commission recommended 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.

The effect of the recommendation is 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 addressing the scope of the investigation the Commission reconsidered its position in regards to its preliminary recommendation to include a mirror provision on the status of children born of surrogacy in the Children's Bill.²⁴ As this provision, in the format suggested, should anyway appear in the envisaged new Surrogacy Act, it was recommended by some respondents²⁵ that it makes little sense to restate the position in the Children's Bill. However, in line with the Commission's vision to present a

²⁴ See Chapter 2 above.

²⁵ E.g. Africa Christian Action.

CHAPTER 7

THE PARENT - CHILD RELATIONSHIP

7.1 Introduction

The move away from the concept of parental authority or power to a focus on parental rights and responsibilities is one of the core principles underlying the Children's Bill. This move will result in a codification of what is currently a large part of our common law on the parent and the child.

7.2 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.¹

In the discussion paper, the Commission recommended 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.²

The Commission further recommended in the discussion paper³ that the 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.

¹ See, in general, John Eekelaar and Thandabantu Nhlapo (eds) **The Changing Family: International Perspectives on the Family and Family Law** (1998); J A Robinson 'An introduction to the international law on the rights of the child relating to the parent-child relationship' (2002) Vol. 13(2) **Stellenbosch LR** 309.

² Par. 8.2.4 of the discussion paper. See also section 13 of the Bill.

³ Par 8.2.4.

7.2.1 Comments received

Pro-life submitted that the traditional family unit, i.e. a married man and woman with their biological or adopted children, must be encouraged and supported. This view is shared with **Africa Christian Action** and **The Right To Live Campaign**, KwaZulu-Natal. With regard to the definition of 'family member' proposed in the discussion paper, **Pro-Life** argued that the definition should be based on the traditional family unit. The respondent thus wanted to restrict family members to persons related by blood or through marriage.

Durban Children's Society stated that the parent/child relationship, different family members and other relationships need to be clearly defined.

CHILDS commended the Commission on its recommendations in relation to a relationship-focussed definition of 'family-member'. The **Consortium** supported the proposal for the inclusion of a section in the new child care legislation expressly prohibiting unfair discrimination against a child on the ground of family status. The Consortium was also in favour of the Commission's proposed definition of a 'family member'.

With reference to the grounds for prohibited unfair discrimination listed in the discussion paper,⁴ **Ms Carrie Kimble** suggested that 'birth' should also be included.

7.2.2 Evaluation and recommendations

The Commission confirms its preliminary recommendation that the diversity of family forms and the parent/child relationship can best be protected by the inclusion of a general unfair discrimination section in the Children's Bill.⁵ The Commission further confirms its recommendation in the discussion paper supporting a relationship-based definition of 'family member'. This definition deliberately goes beyond the traditional concept of the nuclear family to include the primary care-giver of a child, the extended family, and persons with whom the child has developed a significant relationship resembling a family relationship.⁶ Rather than restricting family to persons related by blood or through marriage, it is our contention that the net of

⁴ Par 8.2.4.

⁵ For the formulation of this provision, see section 13 of the Bill.

⁶ Section 1: Definition of 'family member'.

potential care-givers a child should have should be broadened, especially in the light of the HIV/AIDS pandemic. However, the Commission does realise that the definition of 'family member' proposed in the discussion paper and restated in the Children's Bill is a flexible one – the primary care-giver of a child might change in person overnight – but sees this flexibility as its strength in preventing children from becoming 'family-less'.

A relationship-based definition of 'family member' also brings additional challenges. While the principle of casting widely the net of potential care-givers of a child is surely legitimate, practical problems can arise. For instance, should the consent of all family members in this broad sense be required in the case of adoption of a child, then the whole adoption procedure can be jeopardised. Mindful of these practical issues, the Commission used more restrictive definitions such as that of 'parent' and 'foster parent' where appropriate.

7.3 The shift from 'parental power' to 'parental responsibility' and changes in terminology

In the discussion paper, the Commission recommended that the common-law concept of '*parental power*' be replaced with the concept of '*parental responsibility*', while requiring at the same time a balance between the responsibilities of parents and the rights and powers needed to enable parents to fulfil their responsibilities.⁷ The Commission further recommended that the term '>parental responsibility=' be defined to enumerate the components of parental responsibility in a non-exhaustive manner.⁸ The Commission also recommended that the Children's Bill should contain a statement of parental rights, which rights should mirror the components of parental responsibility. In this regard, the Commission expressed its preference for a formulation along the lines of those included in the Scottish legislation, with certain amendments and additions.⁹

The Commission further recommended that the components of parental rights / responsibilities currently encapsulated by the concepts 'custody' and 'care' be redefined as 'care' and 'access' respectively.¹⁰ In the Commission's view, the most appropriate term for a person's responsibility, and corresponding right, to maintain personal relations and direct contact with a child who is living with another person

⁷ Par 8.3.4 of the discussion paper.

⁸ Par 8.4.5.1 of the discussion paper.

⁹ Ibid.

¹⁰ Par 8.4.5.2 of the discussion paper.

appeared to be the term '**contact**'. This term would include both physical contact with the child (i.e. visiting the child or being visited by the child), as also other means of communication with the child (for example, telephonic or e-mail contact).

As regards an appropriate term for the responsibilities, and corresponding rights, vested in a person with whom the child is to live, the Commission considered various options, such as the retention of the term 'custody' or the replacement of the concept of 'custody' with a new concept of 'residence=, >care= or >day-to-day care='. Because of the difference in the legal position of a person who has the *de facto* care of the child, and the legal position of a person who has the *de jure* care of a child, the preferable option would appear to be either to retain the term '**custody**' (as has been done in the Ghanaian Children's Act of 1998 and in the revised draft of the Kenya Children Bill of 1998) or the introduction of the concept of '**residence**' (as in the English, Scottish and Australian legislation).

In the discussion paper¹¹ the Commission recommended, in the context of children caught up in divorce proceedings, a shift to new, less >loaded= terminology to reduce conflict in divorce. In this context, the Commission did recommend that the current Divorce Act 70 of 1979 term >custody= be replaced with the term >care=, as the use of words such as >custody= and >sole custody=, besides their negative connotation with police and prisons, promotes a potentially damaging sense of winners and losers. Given this decision, and to ensure uniformity, the Commission recommended that the concept >custody= be replaced with the concept >care=.

As regards '*guardianship*', the Commission recommended in the discussion paper that this term should be retained, but should be defined so as to encompass the residual aspects of parental responsibility (viz. those not covered by 'care=' and 'contact').¹²

To summarize, in the discussion paper the Commission recommended the following changes in terminology:

>Access=	÷	>Contact=
>Custody=	÷	>Care=
>Guardianship=	=	>Guardianship=

In the discussion paper, the Commission also recommended that these three

¹¹ Par 14.5 of the discussion paper.

¹² Cf. in this regard clause 97 of the revised draft of the Kenya Children Bill.

components of parental rights and responsibilities be clearly defined so as to make it possible for the court to allocate all or some of these components (or sub-components thereof) to one or more persons.¹³

In the light of the foregoing, and to give content to the terms 'care', 'access' and 'guardianship', the following definitions were used in the discussion paper:¹⁴

>**Care**= includes the right and responsibility of a parent to -

- (a) to create, within his or her capabilities and means, a suitable **residence** for the child and living conditions that promote the child's health, welfare and development;
- (b) to safeguard and promote the **well-being** of the child;
- (c) to **protect** the child from ill-treatment, abuse, neglect, exposure, discrimination, exploitation and from any other physical and moral hazards;
- (d) to **safeguard** the child's human rights and fundamental freedoms;
- (e) to guide and **direct** the child's scholastic, religious, cultural, and other education and upbringing in a manner appropriate to the stage of development of the child;
- (f) to guide, **advise** and assist the child in all matters that require decision-making by the child, due regard being had to the child's age and maturity;
- (g) to **guide** (discipline) the child's behaviour in a humane manner; and
- (h) generally to ensure that the **best interest** of the child is the paramount concern in all matters affecting the child.

>**Contact**= includes the right and responsibility of a parent, if the child is not living with him or her, to maintain personal relations with and to have direct access to his or her child on a regular basis.

To act as >**guardian**= means the right and responsibility of a parent to -

- (a) administer and safeguard the child's property;
- (b) to assist and represent the child in contractual, administrative and legal matters, and
- (c) to give or refuse any consent which is legally required in respect of his or her child.

7.3.1 Comments received

Mr Rothman agreed with the proposed shift from parental power to parental responsibility, but cautioned that immense problems will arise in practice should certain terminology be changed without defining it properly. He said that the terms "custody" and "care" have always meant two different things in practice. He suggested that the proposed new terminology relating to responsibilities should be

¹³ Par 8.4.5.1.

¹⁴ Par 8.4.5.2.

built around the terms “custody” and “care”.

The **Consortium** supported the recommendation that the new child care legislation should replace the common law concept of “parental power” with a new concept of “parental responsibility”.

Ms Sally Rowney, Provincial Department of Education: Gauteng, supported defining the term “parental responsibility”. She stated that such a definition could be extended to enhance the responsibilities of parents of children at public schools, in line with existing policies and legislation governing schools as well as the process of enabling greater parental participation in public schools.

CHILDS stated that the Commission has failed to pay sufficient attention to what is now termed inadequate parenting and suggested that this area be addressed in the new child care legislation. For a detailed discussion on the issue, the Commission is referred to Muller and Rencken-Wentzel **Suggested changes to the laws affecting children: Separation and Divorce**.¹⁵ CHILDS further recommended that the Australian Three-Tier Model as outlined in the latter mentioned source be followed in the event of parents who fail to fulfil their parental responsibilities.

7.3.2 Evaluation and recommendations

The Commission sees no need to depart from the preliminary position adopted in the discussion paper. It is therefore recommended that:

- the move from the dated concepts parental power / parental authority to those of parental rights and responsibilities be endorsed;¹⁶
- parental rights and responsibilities be defined in the Children’s Bill;¹⁷
- the components of parental rights and responsibilities – care, access, and guardianship – be clearly defined to allow for the allocation of these components (or parts thereof) to more than one person in respect of the same child;¹⁸
- the change in terminology – ‘care’ for ‘custody’ and ‘contact’ for ‘access’ – for the reasons stated, be accepted.

¹⁵ 23 February 2002 at VI (3) and VII (3)

¹⁶ See Chapter 5 of the Bill.

¹⁷ Definitions: section 1.

¹⁸ Ibid.

These recommendations are given effect to in the Children's Bill.

7.4 The acquisition of parental rights and responsibilities

In the discussion paper,¹⁹ the Commission recommended 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 recommended 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 further recommended 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.²⁰ In this regard, the Commission pointed out in the discussion paper that marriage was 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 ...'.²¹

As for the **unmarried father**, the Commission recommended in the discussion paper²² that the 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 court and satisfying such court that this will be in the best interests of the child concerned.²³

¹⁹ Par. 8.5.2.4.

²⁰ Ibid.

²¹ See also the definition of 'marriage' in the Bill.

²² Par. 8.5.2.4.

²³ See also Julia Sloth-Nielsen and Belinda Van Heerden 'The constitutional family: developments in South African Family Law jurisprudence under the 1996 Constitution' (2002) (unpublished).

The Commission further recommended in the discussion paper²⁴ that certain categories of unmarried fathers should be vested automatically with parental responsibility. These categories included 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 Toit** 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 recommended in the discussion paper 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 further recommended in the discussion paper²⁵ 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. It was recommended that non-biological parents should be unable 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

²⁴ Par. 8.5.2.4.

²⁵ Par. 8.5.3.4.

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.

In the discussion paper,²⁶ the Commission further recommended that a biological parent who, for whatever reason, has no parental responsibility and parental rights, or only limited parental responsibility and rights, should be able to apply to the court 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 court 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 recommended in the discussion paper²⁷ 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 was 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.²⁸

7.4.1 Comments received

CHILDS disagreed with the Commission's recommendation that the mother of a child should in all circumstances have parental rights and responsibilities in respect of her child. The respondent proposed that both parents should in all circumstances have parental rights and responsibilities in respect of their child. The respondent argued that failure to make both parents responsible for the consequences of their actions

²⁶ Par. 8.5.3.4.

²⁷ Par. 8.5.3.4.

²⁸ Par. 8.5.3.4.

would encourage irresponsible conduct on the part of fathers. The respondent stated that given the AIDS pandemic, the government has to take every opportunity to ensure that responsible conduct in its citizens is enforced. In addition, the psychological research into the effects of absent fathers on children is conclusive. Thus, children should not be punished for the sins of their parents. For a detailed discussion on the issue, the Commission is referred to Muller and Rencken-Wentzel: **Suggested changes to the laws affecting children: Separation and Divorce**, 23 February 2002.

In responding to the Commission's preliminary recommendation that 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 person(s) who has parental responsibility in respect of the child's mother should have parental rights and responsibilities in respect of that mother's child, **Ms Julie Todd** stated that this will allow persons other than the biological mother of a child to consent to the adoption of that child.

The **Law Society of the Cape of Good Hope** did not support the Commission's recommendation that certain categories of unmarried fathers should be vested automatically with parental responsibility. The respondent stated that unmarried fathers should be given parental responsibility only on successful application to court or by agreement. The respondent further argued that unmarried fathers are not interested in the lives/upbringing of their children.

CHILDS recommended that no distinction be made between married and unmarried fathers. The respondent proposed that in the case of a child being born to a minor child, the guardianship of that child should be vested jointly in the parents of *both* minor parents. The rights and responsibilities for the child should then automatically vest in the parents of the child when they reach the age of majority. The respondent further suggested that in a case of a child being born where one parent is a minor and the other parent a major, the guardianship of that child be vested in the parent who has reached majority and the parent of the minor parent until such time that the other parent also reaches the age of majority. At such time, guardianship should be vested in both parents jointly regardless of their marital status. However, should one or both parents be mentally disabled, rights and responsibilities for the child should be given to the grandparents of the child, failing that a curator should be appointed on behalf of the mentally disabled parent(s).

Ms R Lombard submitted that the Maintenance Act requires parents to share only financial responsibilities for their children. Furthermore, South African fathers are in the majority of cases not involved in their children's upbringing. Ms Lombard argued that fathers should be required to play a more active role in the development of their children, and getting fathers involved in child-rearing should be a national strategy.

The **Consortium** submitted that if a father has acknowledged paternity of the child and has supported the child within his financial means, this should not be sufficient to vest the unmarried father with automatic parental rights and responsibilities. It suggested that the father must also have either cohabited with the mother and the child or cared for the child on a regular basis, whether or not cohabiting with the mother. The Consortium stated that some unmarried fathers may not wish to have rights and responsibilities in respect of their children automatically conferred upon them simply because they have acknowledged paternity and pay maintenance. This view is contrary to that of CHILDS who argued that all parents should automatically be given rights and responsibilities in respect of their children in order to promote responsible behaviour.

The Consortium suggested that the proposed Office of the Children's Protector (recommended in chapter 24 of the discussion paper) be empowered to register parental responsibility agreements between mothers and unmarried fathers. The proposed Office of the Children Protector should ensure that the agreement is in the best interests of the child. Furthermore, criteria for determining whether an agreement is in the best interests of a child need to be developed in order to ensure equal treatment of all unmarried fathers. The proposed Office of the Children's Protector should also be obliged to refer the matter to the child and family court if in doubt whether an agreement is in the best interests of a child.

Africa Christian Action objected against giving parental responsibilities to persons who are not the biological parents of a child.

With reference to the Commission's recommendation that the legal position of a person who has *de facto* care of a child be spelt out, **Ms Sally Rowney** enquired what the specific implications for teachers are given the status awarded to them (*in loco parentis*) during normal school hours.

The **Consortium** further submitted that the use of a court process, by persons other than the biological parents of the child, to access parental rights and responsibilities may prove inaccessible for children and their caregivers living in rural areas. It

therefore recommended that an alternative mechanism be introduced that will enable caregivers to obtain certain parental rights (especially the right to receive and administer social security grants for children without having to produce proof of express consent from the child's mother) and responsibilities without going through the court process. The Consortium stated that the draft provisions on "Care of a child by person without parental responsibilities or parental rights" in the discussion paper may be an appropriate solution and in effect gives de-facto caregivers the necessary parental rights and responsibilities. However, the following questions are asked: (1) How will caregivers prove that they qualify, e.g. to apply for social security?, (2) How will a health care professional know whether an adult caregiver, other than the parent of the child, has the right/responsibility to give consent to medical treatment on behalf of that child?

Pro-life submitted that same-sex partners in a domestic relationship should not acquire any rights in respect of a child. The respondent believed that allowing same-sex partners to acquire parental rights would encourage the acceptance of an "unnatural relationship" by the child.

7.4.2 Evaluation and recommendations

The different positions adopted by the respondents reflect different moral considerations of what the ideal family should look like: on the one hand, some respondents argue that no unmarried fathers, for instance, should be vested automatically with parental rights and responsibilities in respect of their children, while an organisation such as CHILDS argues that no distinction should be made between married or unmarried fathers or, for that matter, between fathers or mothers. These moral considerations reach their extreme in the case of same-sex partners where, as we have seen, some respondents would see the allocation of parental rights and responsibilities as 'unnatural'.

Given the diversity of ideas as to how the modern family should look, and the objections to 'unnatural' forms of family life, it was to be expected that opinions would differ on the (automatic) allocation of parental rights and responsibilities to mothers who are minors at the time of birth of their children, unmarried fathers, partners in a domestic relationship, and same-sex partners. Without a doubt, these differences of opinion would persist.

The Commission believes its approach in the discussion paper in respect of the

allocation of parental rights and responsibilities is balanced, pragmatic, and legally and constitutionally sound. It takes into account the judgment of the Constitutional Court in **Fraser v Children's Court, Pretoria**²⁹ and the legislation adopted to give effect to this judgement.³⁰ It also takes into account the judgment of the High Court (Transvaal Provincial Division) in **Du Toit v Minister of Welfare and Population Development** which was confirmed by the Constitutional Court.³¹

It is therefore recommended that:

- the biological mother of a child should have full parental rights and responsibilities in respect of her child;³²
- the married father of a child should have full parental rights and responsibilities in respect of his child;³³
- the unmarried father of a child should in certain defined circumstances automatically obtain parental rights and responsibilities in respect of his child. The defined circumstances are where the father has lived with the mother for at least one year after the child's birth; where the father has cared for the child with the mother's consent for at least a year; upon confirmation by a court of a parental rights and responsibility agreement; or where so ordered by the court;³⁴
- where the biological father does not have parental rights and responsibilities in respect of a child, provision is made for the father to obtain parental rights and responsibilities by agreement with the mother or another person who has such rights and responsibilities in respect of the child concerned.³⁵ Other categories of persons such as the partner in a domestic relationship will have to follow the court application route³⁶ and will not be able to simply conclude agreements to this effect with the mother of the child.
- any person having an interest in the care, well-being or development of a child may apply to court for an order assigning to the applicant full or any specific parental responsibilities and rights in respect of the child.³⁷

²⁹ 1997 (2) SA 261 (CC).

³⁰ The Natural Fathers of Children born out of Wedlock Act 86 of 1997.

³¹ Judgment handed down on 10 September 2002.

³² Section 31(1) of the Bill.

³³ Section 32 of the Bill.

³⁴ Section 33 of the Bill.

³⁵ Section 34 of the Bill.

³⁶ Provided for in section 35 of the Bill.

³⁷ Section 35(1) of the Bill.

However, the Commission does note with concern that the present High Court procedure for obtaining guardianship in respect of a child is being misused to circumvent the more rigorous adoption procedure. Persons wishing to adopt South African-born children simply apply to the High Court for appointment as guardians of that child. Once appointed, the guardian(s) applies/apply for a passport for the child, leave(s) South Africa, and adopt(s) the child in his, her or their home-country. Such applications for guardianship are not necessarily accompanied by social worker reports or preceded by the screening of the applicant's background or suitability. In order to discourage persons in future from simply applying for the guardianship component of parental rights and responsibilities in order to circumvent the proper inter-country adoption proceedings, the Commission recommends that where it appears to the court that an application for full parental rights and responsibilities or the guardianship component thereof has been made by a non-South African, such application must be regarded as an inter-country adoption to which the Hague Convention on Intercountry Adoptions and consequently Chapter 19 of the new Children's Bill should apply. To further discourage the potential misuse to which an allocation of parental rights and responsibilities might give rise, the Commission recommends that all applicants applying for full parental rights and responsibilities or exclusive guardianship rights, must state reasons in the application why the adoption route is not being followed. The Commission has also recommended that the court should be able to require a social worker's report³⁸ or have potential guardians screened.

7.5 Parental responsibility and rights agreements

In the discussion paper,³⁹ provision is made for the (unmarried) mother of a child to enter into an agreement with the (unmarried) father of the child in terms of which such father would obtain parental rights and responsibilities in respect of that child. A similar provision was formulated to allow for a partner in a domestic relationship to acquire parental rights and responsibilities in respect of his or her partner's child by agreement with such partner. These agreements were called 'parental responsibility agreements'.

The form of 'parental responsibility agreements', as per the discussion paper, was to be prescribed in the regulations to the children's statute and could only be terminated

³⁸ Section 41(5) read with section 67 of the Bill.

³⁹ Par. 8.5.2.4.

by an order of court. As such, parental responsibility agreements must be distinguished from 'parenting plans', also dealt with in the same chapter of the discussion paper.

The Commission received no submissions on this issue.

However, in reconsidering the issue and in view of the abuse of the existing guardianship provisions to circumvent adoption requirements, the Commission decided not to make it possible for **any** person to acquire parental rights and responsibilities in respect of a child simply by concluding an agreement to this effect with the child's mother. It is therefore recommended that provision be made in the Children's Bill to allow only the father of the child who does not have parental rights and responsibilities to enter into such an agreement with the mother.⁴⁰ Such agreement will have to adhere to a format prescribed by the regulations and will have to be registered with the registrar of the child and family court.⁴¹ Provision is also made for amendments to and terminations of such plans.⁴²

7.6 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

In the discussion paper, the Commission recommended, 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 and 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

⁴⁰ Section 34(1) of the Bill.

⁴¹ As per section 34(3)-(4)(a) of the Bill.

⁴² Section 34(4)(b) of the Bill.

- 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 rights and responsibilities to another, but may arrange for some or all of them to be undertaken by other persons on his or her behalf.⁴³

The Commission further recommended that the consent of all persons who have parental rights and 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.⁴⁴

In terms of these recommendations, it would be possible, for instance, to allocate, in respect of one child, contact rights to the unmarried father and to both sets of grandparents, guardianship to the mother and a trusted uncle, and care to the mother and her sister. In the customary setting, it would be possible to allocate the care component to the unmarried mother and the other wives in the kraal, contact to the unmarried father, and guardianship to mother's father.

7.6.1 Comments received

Africa Christian Action argued that not more than one person should exercise parental responsibilities over a child with the exception of married or divorced couples. Furthermore, the respondent argued that co-adoption should be limited to persons legally married to each other.

The **Law Society of the Cape of Good Hope** supported the Commission's recommendation that more than one person may have parental rights and responsibility, or components thereof, in respect of the same child at the same time; and that where more than one person has parental rights and responsibility in respect of a child, each of them may act alone and without the other(s) in fulfilling

⁴³ Par. 8.4.5.3.

⁴⁴ Ibid.

that responsibility, with certain exceptions where the consent of all persons who have parental rights and responsibilities in respect of a child must be obtained.

CHILDS recommended that the consent of all persons who have parental rights and responsibilities in respect of a child should also be obtained in regard to the following issues: (a) education, (b) both physical and psychological health, and (c) religious upbringing.

7.6.2 Evaluation and recommendations

The Commission sees no need to depart from its preliminary position adopted in the discussion paper. Critical among these recommendations is the one allowing for more than one person to hold parental responsibilities and rights or components thereof in respect of the same child at the same time.⁴⁵ However, to cater for the situations currently regulated by section 1(2) of the Guardianship Act 192 of 1993, the consent of all persons with parental rights and responsibilities would be required where the child is to conclude a marriage, the child is to be adopted, the child is to be removed from the Republic, or where immovable property belonging to the child is to be alienated or encumbered.⁴⁶

In line with the position adopted in the discussion paper, and to prevent individual persons holding parental rights and responsibilities in respect of a child from single-handedly making other major decisions involving that child, the Commission recommends that such person must give due consideration to any views and wishes expressed by the child and any co-holder of parental rights and responsibilities in respect of the child. 'Major decisions involving a child' would include those previously covered by section 1(2) of the Guardianship Act 192 of 1993, aspects relating to contact with the child, the assignment of parental rights and responsibilities to a parent substitute, and decisions 'likely to change significantly, or to have an adverse affect on, the child's living conditions, education, health, personal relations ... or generally, the child's well-being'.⁴⁷

The Commission further recommends that provision be made for the exercise of parental rights and responsibilities by care-givers not holding such rights or responsibilities in certain emergency situations.⁴⁸

⁴⁵ Section 42 of the Bill.

⁴⁶ Section 42(5) of the Bill.

⁴⁷ Section 43(2) of the Bill.

⁴⁸ Section 44 of the Bill.

7.7 Parent-substitutes

In the discussion paper,⁴⁹ the Commission recommended that provision be made in the children's statute for the appointment of testamentary 'parent-substitutes' in the event of a parent's death. The Commission further recommended that provision 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.

7.7.1 Comments received

The **Law Society of the Cape of Good Hope** submitted that there should be no automatic right of a dying parent to appoint a testamentary parent-substitute without first consulting the surviving spouse (if any).

CHILDS commended the Commission on its recommendations in respect of parent-substitutes.

7.7.2 Evaluation and recommendations

The Commission sees no need to divert from its preliminary position adopted in the discussion paper and therefore recommends that provision be made for the assignment of parental rights and responsibilities to parent-substitutes.⁵⁰

However, in revisiting the preliminary recommendation on parent-substitutes, certain concerns were raised. A problem arises, for instance, where the surviving parent only has some components of parental rights and responsibilities, such as, for example, contact (access), and the deceased parent, who had full parental rights and responsibilities, does not leave a will in terms of which either the surviving parent or another person or persons are appointed as parent-substitutes. While provision is made in the Bill for the assignment of parental rights and responsibilities to any suitable person with an interest in the care, well-being or development of the child,⁵¹

⁴⁹ Par. 8.4.5.4.

⁵⁰ Section 38 of the Bill.

⁵¹ Section 35.

the problem highlights the need for awareness-raising campaigns to empower persons at all levels of society to timeously prepare for the eventuality of death.

Ordinarily, however, both the mother and father independently would have full parental rights and responsibilities in respect of their children – the death of one such parent would therefore not leave the children without a parent with full parental rights and responsibilities. In the case where one parent does not have full parental rights and responsibilities the surviving parent can obviously obtain those parental rights and responsibilities which the now deceased parent had by being appointed parent-substitute.

7.8 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 therefore recommended in the discussion paper⁵² that parents must be given the option to develop parenting plans setting out how they as parents plan to raise their children. Provision was also made to register such 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 stated that 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 did not recommend in the discussion paper 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 was defined in the discussion paper as an agreement in writing made between the parents of a child that deals with one or more of the following aspects:

- the care of the child, including decisions as to with whom the child is to live;
- contact between the child and another person or other persons;
- the appointment of a parent-substitute for the child;
- maintenance of a child;
- any other aspect of parental responsibility for the child.

⁵²

Par. 8.6.4.

7.8.1 Comments received

Mr Rothman supported the idea of parenting plans. He, however, stated that written agreements are not enforceable unless they are made orders of court. He proposed that in order to ensure the best interests of the child, all settlement agreements upon the termination of a marriage should be made court orders.

The **Law Society of the Cape of Good Hope** endorsed the idea of parenting plans and the recommendation 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 response to the Commission's recommendation that parents should simply be encouraged to prepare parenting plans, where appropriate *in consultation with the child involved*, the Society submitted that a too heavy burden is placed on the child which may force the child to make decisions/choices against one particular parent.

E.N Maonela, Department of Social Development, Free State, stated that the idea of parenting plans is positive as it will have the effect of decreasing maintenance cases before court.

CHILDS submitted that all parents stand to benefit from parenting plans. The respondent therefore suggested that all parents who do not live together, regardless of their age (assisted by their guardian), marital status or nature of their relationship must submit a parenting plan. The respondent proposed that the following be added to the list of issues that may be dealt with in a parenting plan:

- a dispute resolution mechanism for the parents;
- residential arrangements;
- contact arrangements with the non-residential parent as well as with members of the extended family; and
- to cover the involvement of the non-residential parent in the life of the child in terms of general parenting obligations and related aspects.

CHILDS furthermore recommended that a suggested but not prescribed form covering areas to be included in the parenting plan must be available. The respondent mentioned that it has drafted such a form.

7.8.2 Evaluation and recommendations

As before, the Commission received overwhelming support for its proposals regarding parenting plans. The Commission therefore recommends that provision be made for the co-holders of parental rights and responsibilities in respect of a child jointly to agree to the manner in which those rights and responsibilities are to be exercised. To actively encourage such co-holders to find common agreement, the Commission recommends that they must first seek to agree to a parenting plan before seeking court intervention.⁵³ As to the content and form of a parenting plan, the Commission is of the opinion that the legislation should not be overly prescriptive. However, while such plan, in the absence of a court order, could for instance deal with contact, care and maintenance issues, it should be clear that reaching agreement as to such a plan would not have the effect of suspending, varying or terminating existing court orders. A parenting plan cannot therefore usurp a divorce settlement, although such plan should ideally form part of the divorce settlement.

The Commission further recommends that, given the seriousness of the issues that can be dealt with in such a parenting plan, to facilitate proof and legal certainty, and to ensure that the best interests of the child involved are protected, parenting plans must be in writing and signed by the parties to the agreement.⁵⁴ Provision is also made for the option to register such plans with the registrar of the child and family court or to make such plans an order of court.⁵⁵ It is also recommended that registered parenting plans only be amended or terminated by a court order.⁵⁶

7.9 Termination of parental rights and responsibilities

In the discussion paper, the Commission recommended that the court should have the power to rescind, suspend or vary any order made by it in regard to parental rights and responsibilities.⁵⁷ In this context, the Commission 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, rather than summarily to terminate the parental rights and responsibilities of a person, the Commission decided to recommend the suspension, pending an enquiry, of all parental rights and responsibilities of such a person in relation to such a child. It was accepted, however, that ultimately the court may find it necessary to terminate all or

⁵³ Section 45(1).

⁵⁴ Section 46(1)(a).

⁵⁵ Section 46(1)(b).

⁵⁶ Section 47.

⁵⁷ Par. 8.7.4.

some of the parental rights and responsibilities of a parent.

The Commission further recommended in the discussion paper 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 criterion for finding that child to be in need of care.

7.9.1 Comments received

Mr Rothman asserted that the Commission's recommendation that the wilful failure of a person having parental rights in respect of a child should constitute a ground in terms of section 14(4) for finding a child in need of care, will shift the focus from the child to the parent and criminalise the parent again, a principle that was sought to be avoided when the criteria were changed in 1996. He recommended that the proposed ground could be kept from the ambit of the existing section 14(4) enquiry by broadening the scope of the present section 50 of the Child Care Act, 1983 which criminalises ill-treatment and abuse of children.

Ms R van Zyl supported the Commission's recommendation that a court be able to terminate the parental rights and responsibilities of parents found guilty of trafficking their children for purposes of sexual exploitation.

The **Consortium** recommended that with regard to orphan children, alternative forms of proof of their parents' death, other than death certificates, should be accepted. It mentioned that many parents die at home and are buried without being registered. Thus, a letter from a religious organisation, a traditional leader or healer should suffice as proof of the parents' dead. The Consortium proposed that where parents cannot be found and are presumed death, the child or caregiver should be able to obtain a letter of presumption of death from the social development office. Such a letter should be issued after certain proof as been shown, e.g. the length of time since the person was last seen.

7.9.2 Evaluation and recommendation

In casting the net widely and by allowing more than one person concurrently to exercise parental rights and responsibilities or components thereof in respect of a child, the Commission attempts to extent the range of possible care-givers beyond the traditional nuclear family concept. However, in so doing, it is realised that the

possibility for conflict among these care-givers may increase.⁵⁸ Provision must therefore be made for the termination, suspension or restriction of any such person's parental rights and responsibilities.⁵⁹

The Commission therefore recommends that a co-holder of parental rights and responsibilities, the child, the Family Advocate, or 'any other person having a sufficient interest in the care, well-being or development of the child' may bring an application to court for an order suspending for a period, terminating, restricting or extending any or all of the parental rights and responsibilities a specific person has in respect of the child.⁶⁰

⁵⁸ See also Van der Linde A and Labuschagne J M T 'Strafregtelike aanspreeklikheid weens die skending van 'n omgangsreg van 'n ouer met sy / haar kind deur die ander ouer' (2001) Vol. 22(1) **Obiter** 153.

⁵⁹ Section 39 of the Bill.

⁶⁰ *Ibid.*

CHAPTER 8

PREVENTION AND EARLY INTERVENTION SERVICES FOR CHILDREN AND THEIR FAMILIES

8.1 Introduction

The Commission's recognition that prevention and early intervention services are vitally important components in any future strategy on behalf of children was well received.¹ However, the translation of the recognition into enforceable legal provisions proved more difficult and highlighted the dichotomy between social work practice, from which the concepts stem, and the demands of legal drafting. Another major challenge was to shift the focus to promotion and prevention on the primary level through legislation setting out the necessary structures, systems, and resources required for ensuring and sustaining such a shift.

Prevention and early intervention services are usually focused on the family and not only on the child. Nor is the family or the child necessarily at risk of statutory intervention, as primary prevention by definition would attempt to prevent such family or child from being put at risk in the first place. Given this broad focus of prevention and early intervention services, proper targeting of legislative provisions becomes difficult.

8.2 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'.² 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 ...'.³

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

¹ See the submissions by Ms R Lombard, Christian Lawyers Association of Southern Africa, and the Consortium.

² March 1999, p. 10.

³ Ibid, p. 11.

Primary prevention activities are directed at the general population with the goal of stopping the occurrence of maltreatment and abuse before it starts. 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 Child Care Act, 1983.⁴ The emphasis in the Child Care Act, 1983 is rather 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 in the discussion paper it was recommended that definitions be included in the new children's statute.

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. In the discussion paper, the Commission recommended that a balanced approach, using both the concepts - 'prevention' and 'promotion' - be utilised in the new children's statute. As regards appropriate wording, the Commission supported the Namibian provision where both promotion of children's well-being and prevention services are referred to. It was therefore recommended in the discussion paper 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

⁴ Regulation 2(4)(b) provides that the social worker's report to the court must include a summary of the prevention and early intervention services rendered in respect of the child and his or her parents.

- actively involve and promote the full participation of families in identifying and resolving their own problems.⁵

The Commission confirms the preliminary position adopted in the discussion paper. However, while we recognise the need to provide prevention and early intervention services to society at large, and therefore also to families without children, the Commission limits the definitions of prevention and early intervention services for the purposes of the Children's Bill to families *with children*.⁶

In the discussion paper, the Commission further recommended that a provision along the lines of section 55 of the draft Indian Children's Code Bill 2000 on health, as a preventative measure, be included in the children's statute.⁷ The **Consortium** supported this recommendation, but suggested that the Indian provision be adapted to our particular circumstances. The Consortium suggested the following

⁵ Par. 9.5.

⁶ Sections 158 and 159 of the Bill.

⁷ Par 9.5. Section 55 of the draft Indian Children's Code Bill, 2000 reads as follows:

Preventative measures against diseases and malnutrition

(1) The State Government shall take adequate measures to combat disease and malnutrition affecting children residing in the State.

(2) The main causes for infant mortality in India have been found to be low birth weight, diarrhoea and acute respiratory infections which causes morbidity in children, absence of complementary feeding during six months to eighteen months wherein the infant is most vulnerable to infection, iodine deficiency, affliction of cretinism, mental retardation and motor handicaps, blindness, seasonal food shortages and the last but not the least, continuing gender disparity in intra-familial distribution of food, and steps shall be taken to minimize the recurrence of the above conditions so as to promote the general health of children.

(3) To combat the general prevalence of malnutrition, both the Central and State Governments shall initiate programmes providing for a package of services, comprising supplementary nutrition, immunization, and health and referral services for the children below two years of age, health check-up, immunization and supplementary nutrition for pregnant and lactating women.

(4) The programmes referred to in sub-section (3) shall take the form of assistance being rendered to the non-governmental or other organizations in the local area and the Government shall have a clear obligation to ensure access to proper nutrition and an efficient and adequate public distribution system.

(5) The measures that may be taken to prevent malnutrition may include -

(a) the child's right to colostrum in the first few days of its birth, exclusive breast feeding for four to six months and an adequate supplementation thereof;

(b) nutrition and well-being shall be achieved through delivery of services, capacity building and empowerment, and ensuring the three necessary conditions of food, health and care;

(c) community groups working on local malnutrition problems should approach the local Pnachayats and State Governments for help in the form of money, endorsements, contacts, transportation, or moral support and encouragement and the State should help such community groups;

(d) to conduct all the above activities, the State Government shall adopt a holistic approach towards preventing malnutrition.

formulation:

“For the purposes of increasing the rate of child survival and improving the health status of children, the state shall take adequate measures to ensure:

- (1) the supply of clean water and basic sanitation to children and their families;
- (2) the availability of land and resources for food production and the direct provision of financial support or food to children suffering from malnutrition, hunger or lack of adequate nutrition;
- (3) the financial support of local organisations providing basic services to children and their families, with an emphasis on organisations providing food, shelter, clothing, skills development, child care and health promotion;
- (4) the availability of housing/shelter for children and their families;
- (5) the provision of comprehensive and adequate primary health care services to children and pregnant women; and
- (6) a comprehensive social security system for children living in poverty and children with special needs.

There is merit in this proposal and the Commission has made provision in section 232 of the Children’s Bill for the Minister to include in the national policy framework strategies aimed at combating malnutrition among children and to provide children at risk of malnutrition access to sufficient and appropriate food, etc.

8.3 Promotion, prevention and early intervention: An inter-sectoral responsibility

As pointed out in the discussion paper,⁸ the abuse, neglect and maltreatment of children are complex phenomena that reflect underlying problems in the family, community and society. In order to address the problems effectively and to promote the welfare of all children, it is necessary that an inter-sectoral approach be adopted. In addition, inter-departmental co-operation aimed at promoting the welfare of children is needed.

In this regard, the National Committee on Child Abuse and Neglect states that >Government departments at all levels, in partnership with the broader public, must plan inter-sectoral preventive strategies which are designed to strengthen family and community life and to promote homes, schools, neighbourhoods and communities which are safe for children and which promote their full and healthy development=.⁹ The Committee further states that >[k]ey role players for this purpose include structures responsible for education (including pre-school care) and primary health

⁸ Par. 9.6.

⁹ National Committee on Child Abuse and Neglect **Proposed National Strategy on Child Abuse and Neglect** Pretoria: Department of Welfare, 1996.

care; NGO=s and community-based organisations, religious and cultural groupings and traditional authority structures; employers, and the media=.¹⁰ The National Strategy on Child Abuse and Neglect provides for local government to play a central role in inter-sectoral planning for the development of neighbourhoods which are safe and healthy for children, and in the provision of accessible venues from which a range of supportive and preventive services can be delivered on an inter-sectoral, one-stop basis. It further states that categories of children who are particularly vulnerable to abuse and neglect, including disabled children, and adults and juveniles who are known or potential perpetrators, should be targeted for specifically designed preventive strategies.¹¹

In the discussion paper, 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 to prevention and early intervention.

Most respondents who commented upon these proposals supported the Commission's approach.

To complement the prevention and early intervention services on offer, the Commission recommended in the discussion paper that the public school fees of children in residential care, foster care and those in subsidized adoption placements be paid by the Department of Education for the duration of that placement. The Commission also recommended that free basic health care be provided to such children by the Department of Health.¹²

In its submission, the **Consortium** gave the following legislative content to the above recommendations:

“Free and subsidised state services for children

- (1) Children in residential care, foster care or subsidised adoptions, and children who are unable to afford to pay for state services due to socio-economic status are entitled to:
- (a) free basic education;
 - (b) subsidised school uniforms, shoes and stationery;
 - (c) free basic health care;
 - (d) subsidised and free public transport;
 - (e) free minimum level of water, sanitation and electricity services; and
 - (f) exemption from having to pay fees when making application for Home

¹⁰ Ibid.

¹¹ Ibid.

¹² Par. 9.6

Affairs documents.

(2) The Government Departments responsible for providing such services must design exemption processes which are accessible to children and their families and shall take steps to make families aware of their right to apply for free and subsidised services and shall assist children and their families to apply.”

The **Consortium** submitted that in order to ensure that the Minister for Social Development is empowered to perform an inter-sectoral co-ordinating function, the new child care legislation must provide for monitoring and reporting functions for the various Departments and government bodies. Furthermore, it was said that the monitoring and reporting process must be informed by clear performance indicators and must be done in a prescribed format. The Consortium suggested the following legislative provisions:

“(1) Each Government Department shall draft a plan detailing how they intend to fulfil their mandate of promoting the rights and well-being of children and providing for prevention and early intervention services.

(a) the plan must be submitted to the Minister for Social Development, the Joint Monitoring Committee on Children, Youth and Persons with Disabilities, and the Office of the Children's Protector; and

(b) the plan must be reviewed and submitted annually.

(2) Each Government Department must draft a report detailing the steps that they have taken to implement their plan, their successes and failures.

(a) the report must be submitted to the Minister for Social Development, the Joint Monitoring Committee on Children, Youth and Persons with Disabilities, and the Office of the Children Protector; and

(b) the report must be submitted annually.

(3) Plans and reports must follow a format prescribed by the Minister for Social Development and must be guided by the use of clear performance indicators.

(4) The Minister for Social Development may request opportunities to discuss plans and reports with the Departments concerned and may make recommendations that certain actions be taken in order to ensure that children's well-being is adequately promoted.

(5) Departments shall be required to give due consideration to the Minister's recommendations and to respond in writing if so requested.”

8.3.1 Evaluation and recommendations

As stated in the discussion paper, the Commission is convinced that prevention and early intervention services can only be delivered effectively as part of an integrated, inter-sectoral and inter-departmental framework. To achieve this aim, the Commission recommends that the national policy framework meant to guide the implementation and administration of this Act¹³ must specifically include a comprehensive national strategy aimed at securing the provision of prevention and

¹³ See section 5 of the Bill.

early intervention services to families, care-givers and children.¹⁴ The Commission believes the suggestions put forward by the Consortium immediately above could be dealt with adequately in such a comprehensive national strategy.

The Commission further affirms its preliminary position adopted in the discussion paper that children in alternative care should receive free basic education and basic health care. The proposal submitted by the Consortium in this regard is a helpful start. Provision is therefore made for children in alternative care to receive free basic education, subsidised school uniforms, free basic health care, subsidised public transport to and from schools, etc. Unlike the Consortium, however, the Commission would not extent this provision beyond the category of children in alternative care, where the State has a clear constitutional obligation in the light of the **Grootboom** decision, to 'all children unable to pay for state services due to socio-economic status'.

While the current regulations to the Child Care Act, 1983, provides that the report of the investigating social worker should contain a summary of prevention and early intervention services rendered in respect of the child and his or her family,¹⁵ and while this requirement is generally complied with,¹⁶ the Commission is of the opinion that the provision should be included in the principal statute and not the subordinate legislation. This is accordingly recommended.¹⁷

8.4 The role of local government

The Commission sees a specific role for local government in the provision of prevention and early intervention services for children and their families. In the discussion paper, the Commission therefore recommended that the Children's Bill 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, the Commission

¹⁴ Section 161 of the Bill.

¹⁵ Regulation 2(4)(b).

¹⁶ See the submission by Mr Rothman.

¹⁷ Section 165.

recommended in the discussion paper that each local authority should be obliged, in terms of the new Act, to:

- X Safeguard and promote the welfare of children within its area.
- X Ensure integrated development planning in respect of child care facilities within its area.
- X 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.
- X Undertake a needs analysis of children in order to determine the existing needs of children in its 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.
- X 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.
- X Maintain a database of all available child care facilities in their area of jurisdiction.
- X Provide and maintain sufficient and appropriate recreational facilities for the children in its area of jurisdiction.
- X Ensure the environmental safety of the children in its area of jurisdiction.
- X 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.
- X Provide for home visiting services to all new-born babies.

The Commission recommended in the discussion paper that all of the above services may be provided directly by employees of the local authority and/or delegated to non-employees or non-governmental organisations. The Commission also suggested

that registered non-profit organisations that provide services to children and families be exempted from paying property rates. In addition, it was recommended that local authorities be accorded 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 was regarded as a legitimate factor to be taken into account in considering such applications.

8.4.1 Comments received

In its response to the above recommendations, the **Law Society of the Cape of Good Hope** suggested that, as circumstances differ from province to province, from rural area to urban area etc., aside from uniform guidelines and national regulations, provincial regulations peculiar to each area are needed.

The **Consortium** and **Ms R van Zyl** supported the Commission's recommendations made in respect of the role of local government. The **Consortium** proposed, however, that the phrase "child care facilities" be defined to make it clear what facilities are referred to. In its opinion, child care facilities should include ECD centres, creches and children's homes. The Consortium suggested that the protection of children from accidental trauma injuries should also be a clear function of local government. It submitted that many children die and are injured in motor vehicle accidents, drowning, burns and falls. Thus, local government can be made responsible for addressing some of the underlying problems causing these injuries, e.g. putting speed bumps on busy roads and near schools.

The **Consortium** agreed further that local authorities must be enabled to develop "one-stop centres" for child and family services in their areas of jurisdiction. It recommended that these centres should include service points that enable caregivers to register their children, obtain birth certificates and identity documents and apply for social security.

The **Consortium** recommended that a specific budget be allocated for purposes of primary prevention at national, provincial and local government level. This could be done at national level through calling primary prevention a "programme" which would make it possible to monitor the amount of money allocated to the function in the Department's income statements. Furthermore, it was said that as far as local government is concerned, resources dedicated to primary prevention activities that

focus on children should be ring-fenced to ensure that children are prioritised. Also, any function delegated to local government should be followed by the necessary resources.

The Criminal Justice Initiative, Open Society Foundation of South Africa argued that schools can play a major role in respect of prevention due to their access to children and families. The respondent submitted that the South African Schools Act does not address the various ways that schools could contribute to prevention. Also, very little responsibility is placed on educators or other government departments or service providers to ensure that children are protected from victimisation when in their care. The respondent stated that the range of opportunities for prevention and protection that are afforded during the school-going years of children can be placed into the following broad categories:

- Schools can play a role in identifying children and families who are in need and intervene early to ensure that these children have access to services aimed at addressing the problem.
- Schools can engage in proactive prevention initiatives, located in the school and possibly also radiating out into the surrounding community, aimed at promoting development or preventing crime.

The respondent thus recommended that the new child care legislation should give specific attention to the proactive role that schools can play in relation to prevention. Furthermore, the new child care legislation should make specific reference to the responsibility of the Department of Education to take decisive action, if necessary through the courts, to protect children in its care.

The Children's Rights Project and Local Government Project (Community Law Centre, UWC) submitted that the Commission's recommendations in respect of local government fail to distinguish between Schedule 4B and Schedule 5B matters and the assignment of additional duties to local government. The respondent also points out that the Commission has failed to take full cognisance of the latest legal developments and especially the recently enacted Local Government: Municipal Systems Act 32 of 2000.¹⁸ This failure complicates the implementation of the Commission's recommendations. The respondents stated that it is essential that the recommendations distinguish between the regulation of child care facilities as a Schedule 4B matter and assigning additional matters to local government. The respondent also provided a detailed outline of the legal framework for regulating

¹⁸ The Act commenced on 1 March 2001.

Schedule 4B matters and the legal framework for assigning additional matters to local government.

In essence, the **Children’s Rights Project and Local Government Project** submits that obligations placed on local government (to keep registers of children in its area, for instance) fall outside the functional area of concurrent national and provincial legislative competence covered by “child care facilities” in Schedule 4B of the Constitution. As a result, an assignment in terms of section 99 or 126 of the Constitution, coupled with appropriate funding and capacity building where needed, would be necessary. The respondent maintains that the mere formulation in national legislation of such a duty on local government is unconstitutional and not in keeping with the system of intergovernmental relations.¹⁹

The respondent’s analysis and division of the different tasks assigned to local government proved useful. For ease of reference, this analysis is presented in table form.

Functions assigned to local government	Constitutional competence
a. Ensure integrated development planning	Schedule 4B
b. Keep a register of all children	Unconstitutional - assignment needed
c. Undertake a needs analysis of children	Unconstitutional - assignment needed
d. Keep records of the number of lost or abandoned children, children living on the street, and disabled children	Unconstitutional - assignment needed
e. Maintain a database of all available child care facilities	Schedule 4B
f. Provide and maintain recreational facilities for children	Schedule 5B
g. Ensure the environmental safety of children	Already covered
h. Conduct inspections of child care facilities	Schedule 4B
i. Provide home visiting services to newborn babies	Unconstitutional - assignment needed

¹⁹ This is also the submission of the **Criminal Justice Initiative, Open Society Foundation for South Africa**

With regard to some of the recommendations (such as h for example), the respondent stated that this could be a case of regulating child care facilities that exceed the limits of what is constitutionally permitted. The respondent submitted that local government must regulate child care facilities in their bylaws. The legal framework established in each bylaw would include inspection. National legislation can set minimum standards for child care facilities, but cannot prescribe the content of local government bylaws on child care facilities. A general obligation to conduct inspections would still pass muster, but the content of the single national standard would determine whether it is too prescriptive or not.

Further, with regard to the Local Government: Municipal Systems Act 32 of 2000, the **Children's Rights Project and Local Government Project** stated that, while Integrated Development Planning (IDP) took place at local government level prior to this Act, the Act now determines a new and far-reaching legal framework for the IDP process. This legal framework makes specific provision for local government to incorporate national and provincial planning requirements. The respondent therefore suggested that the Commission's proposed obligation on local government could be articulated more effectively if it is linked to IDP.

The respondent said that the remark in the discussion paper²⁰ that the omission of child care facilities from the list of district functions in section 84(1) of the Local Government: Municipal Structures Act has as a consequence that resources are not shared at district level is incorrect. The respondent stated that the primary function of a district municipality is to effect redistribution and to co-ordinate the activities of the local municipalities in the district. As such, the sharing of resources (even pertaining to functions that are not listed in section 84(1)) is critical in the district municipalities' activities. For example, through funding, joint planning and co-ordination by the district, the local municipalities' efforts and resources on child care facilities can be shared equitably amongst the local municipalities.

8.4.2 Evaluation and recommendation

The Commission notes with appreciation the constructive suggestions. However, it needs to be pointed out that, while prevention and early intervention services may be offered at 'child care facilities', this need not be the case. The Commission further takes cognisance of the fact that 'child care facilities', as a Schedule 4B competence of local government, form part of the matters in respect of which the legislative

²⁰

Par. 9.7.2.

competences of Parliament and the provincial legislatures are limited. The Commission is aware of the fact that municipalities have, in terms of section 156(1) of the Constitution, 'executive authority in respect of, and the right to administer', such child care facilities. The Commission is further cognisant of the fact that 'any other matter' may be assigned to local government by national or provincial legislation.²¹ In our opinion, this includes the power to assign to local government the duty to determine and keep statistics in respect of children, to submit those at regular intervals, and to undertake a needs analysis of children in its area.

We concur with the Children's Rights and Local Government Projects that an assignment of functions to municipalities in terms of section 99 or 126 of the Constitution, 1996, coupled with appropriate funding and capacity building where needed, would be necessary. However, we wish to point out that the power or function is to be derived from 'an Act of Parliament'.²² The link to funding and capacity building is provided by the Local Government: Municipal Systems Act 32 of 2000,²³ and not the Constitution directly.

The Commission therefore does not agree with the assessment by the Children's Rights and Local Government Projects that the formulation in national legislation of functions falling outside the ambit of Schedule 4B or 5B of the Constitution on local authorities is *per se* unconstitutional. If a narrow approach is adopted and the matters referred to above are seen to fall under 'welfare services' as a Schedule 4A competence, then such functions must be assigned to a municipality, 'by agreement and subject to any conditions,' if that matter would most effectively be administered locally, and provided that the municipality has the capacity to administer it.²⁴ If a broader approach is adopted and the matters referred to are not seen as a Schedule 4A or 5A matter, then such matters can be assigned to local government in terms of section 156(1)(b) of the Constitution, 1996. Obviously, where such municipalities do not have the necessary capacity to exercise their powers and to perform their functions, national and provincial government must step in and support and strengthen that capacity.²⁵

²¹ Section 156(1)(b) of the Constitution, 1996.

²² Sections 99 and 126 of the Constitution, 1996.

²³ Section 9(3).

²⁴ Section 156(4) of the Constitution, 1996.

²⁵ Section 154(1) of the Constitution, 1996.

As far as imposing a duty on municipalities to provide for home visits of new-born babies is concerned, the Commission envisages that such visits be conducted by health care professions, as was the custom in some areas in the past. In our opinion, the imposition of such a function on local government would be constitutional – not because it falls under local government’s functional competence under ‘child care facilities’, but because it is covered by ‘municipal health services’ in Schedule 4B of the Constitution.

The Commission therefore recommends that the Minister for Social Development may from money appropriated by Parliament provide or fund prevention and early intervention services to families, parents, care-givers and their children.²⁶ The Commission further sees a specific role for local government in the provision of prevention and early intervention services. In this regard, it is recommended that local government must keep certain statistics on children in its area, submit those statistics to appropriate organs as prescribed, undertake a needs analysis of children at regular intervals, and apply those statistics and the needs analysis for purposes of budgeting.²⁷ As was suggested in the discussion paper and discussed above, provision is also made for home visits to new-born babies.²⁸ It has already been indicated that the imposition of such duties on local government, in our opinion, is not unconstitutional.

The question of whether children’s homes should be regarded as “child care facilities” and therefore be a Schedule 4B local authority competency is discussed in Chapter 18 below.

8.5 The role of traditional leaders in the delivery of prevention and early intervention services and in safeguarding and promoting the welfare of children.

As stated in the discussion paper,²⁹ the Commission is of the opinion that traditional authorities, through their leaders, have a very important role to play in protecting and promoting the welfare of children living within 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

²⁶ Section 160 of the Bill.

²⁷ Section 162(2) of the Bill.

²⁸ Section 162(2)(f) of the Bill.

²⁹ Par. 9.8.

Government: Municipal Structures Act 117 of 1998.

As far as local government level is concerned, traditional authorities will obviously exert their influence through the local government structures and the recommendations regarding local government made above will therefore also apply to traditional authorities where applicable. The Commission provides for this possibility through section 163 of the Children's Bill which provides that a municipality may, by agreement with a traditional authority in its area, designate aspects of the functions assigned to municipalities to the traditional authority.

8.6 Court-instigated services

As in the discussion paper,³⁰ 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 three months (the amount of the grant will be set in the regulations);³¹ and / or
- Refer the child and / or named family members to an approved family preservation programme.³²

To give effect to this recommendation, the Commission proposes the inclusion of a provision in the Children's Bill giving the child and family court the competency to order the (provincial) Department of Social Development or any organ of state to provide early intervention services³³ in respect of a child and the family or care-giver of the child in appropriate circumstances.³⁴ Such an emergency court grant will be of limited duration (maximum six months) and it is aimed at preventing the removal of

³⁰ Par. 9.9.

³¹ Section 345 of the Bill.

³² Section 59(1)(f)(ii).

³³ In these circumstances it makes little sense to speak of prevention services as court intervention has already been sought.

³⁴ Section 164.

children from the family environment.

CHAPTER 9

CHILD PROTECTION

9.1 Introduction

Formal measures for the protection of children from harmful actions and from negligence, especially by those immediately responsible for their care, are arguably the central focus of the Child Care Act of 1983. While the proposed Children's Bill is much broader in its reach, protective measures remain a crucial component.

9.2 Circumstances in which protective intervention may be required

As pointed out in the discussion paper,¹ 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.

Neglect and abuse may emanate from a number of sources and it is not always easy to pinpoint the primary perpetrator as multiple combinations of perpetrators may be involved. Many children also experience combinations of physical, sexual and or emotional abuse and or neglect. These may take on patterns which are deeply embedded in the child's socio-economic circumstances and/or the surrounding culture. Widespread poverty in South Africa is perhaps the most prevailing of these circumstances.

9.2.1 Comments received

From the submissions received, the need for clarity as to the terms 'abuse' and 'neglect' became very convincing. **CHILDS** submitted that the definitions of "neglect" and "abuse" are too vague and need to go beyond the gross and obvious. The respondent proposed

¹ Par. 10.2.2.

that these definitions should include emotional and verbal abuse as well as the alienation from or abandonment by a parent.

Ms R Lombard stated that it is almost impossible to process complaints of psychological abuse in practice, despite the provisions of the Prevention of Family Violence Act (Domestic Violence Act). She also said court officials seem to be unable to deal with cases of psychological abuse, not only in terms of content, but also in terms of identifying abusive processes/patterns and how the course of events can change meaning. She suggested that the Department of Justice must appoint experienced persons to deal with cases of psychological abuse. She proposed that the new child care legislation should deal with the issue of psychological abuse under children in need of special protection and should make provision for legal action against those subjecting children to psychological abuse.

9.2.2 Evaluation and recommendation

In the light of the submissions received, the Commission recommends that the terms 'neglect' and 'abuse' be defined for the purposes of the Children's Bill.² 'Abuse' is defined broadly to cover any form of harm or ill-treatment deliberately inflicted on a child. It includes assault, commercial sexual exploitation, exploitative labour practices and the exposure of a child to behaviour that may psychologically harm the child. 'Neglect' is also defined broadly as a failure in the exercise of parental responsibilities to provide in the child's basic physical, intellectual, emotional or social needs.

9.3 The Commission's broad approach to the protection of children

In the discussion paper³ it was pointed out that is one thing to agree that children's needs must be met and that they must be protected from abuse and neglect, and another to decide whether, when and how the state should intervene to ensure that this happens.⁴ Legally sanctioned interventions, designed specifically to safeguard children

² Section 1 of the Bill: Definitions of 'abuse' and 'neglect'.

³ Par. 10.2.3.

⁴ Dingwall >Labelling children as abused or neglected= in Stainton Rogers et al (ed) **Child Abuse and Neglect - Facing the Challenge** London: Open University 1989, 164 points out that there is an important distinction between discourses about types of behaviour towards children, moral formulations in this regard, and the question of whether or not specific types of conduct should be policed.

who are in specified forms of danger, are only one component of any society's arrangements for protecting its children. A multiplicity of measures and processes, mandated by law or operating informally, help to meet the fundamental needs of children and ensure their normal growth and development, as part and parcel of the normal functioning of society. Others may be established specifically to prevent certain types of harmful situation from developing, or for purposes of intervening when problems are apparent but can be managed without the use of state authority.

The nature and emphasis of state intervention will depend in part on how a given society assigns the responsibility for the wellbeing of its children, and where it believes the risks to children are primarily located. Societies differ in the extent to which they lay the burden of responsibility with the biological parents on the one hand, or view the nurturing of children as a responsibility shared by the extended family, the community and the state on the other. Even where specific, identifiable individuals such as parents or caregivers pose an immediate danger to a child, abuse and neglect tend to be generated or at least aggravated by broader societal issues. High stress levels and a lack of support for parents and caregivers are factors widely believed to promote abuse of children. Poverty and a lack of basic resources are prime generators of stress and disorganisation, as well as limiting the ability of parents and other caregivers to meet the needs of children. It is thus no accident that incidences of child abuse and neglect are markedly higher among poor families.⁵

A number of writers and practitioners caution against an approach to child abuse which is over-preoccupied with ideas of personal or family pathology. Child abuse can be seen *inter alia* as a manifestation of underlying social problems, with families who are caught up in these becoming >agents of structural violence=.⁶The view that child abuse is basically a matter of >sick= behaviour within families enables society both to avoid engaging with the broader social causes, and to relegate the task of protecting children from the resulting harm to designated professionals, regardless of whether they have the necessary resources.⁷

⁵ Corby >Alternative Theory Bases in Child Abuse and Neglect= in Stainton Rogers *et al* (ed) **Child Abuse and Neglect - Facing the Challenge** London: Open University 1989, 30-39; Faller, K **Child Sexual Abuse - an Interdisciplinary Manual for Diagnosis, Case Management and Treatment** London: Macmillan 1989, 23; National Coalition for Child Protection Reform, 2000: **Issue Paper 6** - "Child Abuse and Poverty", <http://www.ncccpr.org/newissues.html>.

⁶ Parton N **The Politics of Child Abuse** London: MacMillan 1985, 167.

⁷ Loney, M >Child Abuse in a Social Context= in Stainton Rogers *et al* (ed) **Child Abuse and Neglect -Facing the Challenge** London: Open University 1989, 88-96.

If society as a whole has responsibilities for the protection and nurturing of children, and the causes of neglect and abuse are not located only in individuals or families, it follows that the types of statutory intervention for which provision is made should not be focussed only at the level of the individual child and family, and should not be predominantly of a controlling or punitive nature.

The body of legislation which serves to protect children should include at least the following components:

(a) *Provision for mechanisms which are geared towards the broad population and which support parenting, family life and child wellbeing generally, thereby lowering the risk of abuse and neglect and reducing their effects;*

(b) *Provision for mechanisms through which help is offered on a voluntary basis to individual children and families who are experiencing stress or believed to be at risk;*

(c) *Provision for mandatory measures which are exercised with or without the consent of those concerned, in which state authority is exercised to protect and provide care for the individual child who is deemed to be in danger in his or her own home or immediate environment;*

(d) *Criminal justice measures aimed at dealing with perpetrators of offences against children.*

It can be argued that a sound balance between these components, in legislation as well as in policy frameworks and in resourcing, is essential for a society which wishes to protect its children effectively. It would appear, from the overwhelming weight of information supplied to the Commission, that in South Africa all these components are inadequate and in urgent need of strengthening. In efforts to reinforce them, the optimum possible balance should be sought.

The focus of the present chapter is on formal child protective services (CPS) which carry state authority, i.e. interventions contemplated in (c) and, insofar as they impact directly on the child, also (d) above. However it is necessary when designing CPS measures to ensure that they are linked to, and in proper balance with, other approaches. It becomes

extraordinarily difficult, apart from being prohibitively expensive, to deal effectively with abuse and neglect through case-by-case protective intervention by state agents when essential social mechanisms required to ensure the wellbeing of children are weak or absent.

9.4 Existing situation in South Africa

Much of South Africa's child protection system is based on models developed in the First World, particularly Britain and North America. Formal child protection responsibilities are shared between a number of government sectors (e.g. welfare, police, justice, health) and various civil society organisations, particularly child and family welfare organisations. Child abuse is designated both as a crime and as a situation necessitating protection, care and treatment.

Removal of a child who has been abused or is at risk of abuse is provided for in section 11 of the Child Care Act 74 of 1983. In a situation of urgency a child may be removed by a police officer, social worker or >authorised officer= who must complete the required Form 4⁸ and bring the removal to the attention of the court within 48 hours. A children's court inquiry is then held in terms of sections 13 and 14, and a finding is made as to whether the child is >in need of care=. The grounds for such a finding are found in section 14(4).⁹

Options open to the court for dealing with a child found to be >in need of care= are supplied in section 15(1). These include supervision within the home, or placement of the child in foster care, a children's home or a school of industries. No distinction is spelled out as to the type of situation which would merit each option - any can be used at the discretion of the court.

The Child Care Act also provides for ongoing monitoring of the care arrangements of, and ongoing planning for, children who have been placed in substitute care by the court.¹⁰ In addition the Act sets out conditions for and processes involved in adoptive placements for children who are unable to reside within their own families.¹¹ The Act

⁸ Regulation 9(2)(a).

⁹ For the wording see Par. 6.4.3 of the discussion paper.

¹⁰ Sections 15(2)-(5), section 16 and Chapter 6.

¹¹ Sections 7 – 27.

further provides for the setting up of places of safety, children's homes, and secure care facilities for children awaiting trial or sentence.¹² Provision is also made for the registration and inspection of shelters, children's homes and other residential facilities for children.¹³

Parental rights may be terminated and children may be adopted where this is considered to be in their best interests.¹⁴ Recent amendments to the Regulations have strengthened an already implicit emphasis in the Act on achieving stability for each child in substitute care through permanent placement, preferably within the child's own family or community, as soon as possible. This principle is strongly supported by the current policy framework as set out by the Inter-ministerial Committee on Youth at Risk (IMC).¹⁵

The Domestic Violence Act 116 of 1998 makes it possible for a court to exclude a known or alleged perpetrator of domestic violence from a child's home or restrict other forms of access by him or her. The court may issue an >interim protection order= followed by a >protection order= against such a person, if satisfied that the child (or anyone else in the household) is at risk of domestic violence from him or her. The Act also provides for the setting of conditions to which contact with the child by an alleged perpetrator must be subject.¹⁶ Domestic violence is very broadly defined in section 1 of this Act, and includes e.g. physical, sexual, emotional and verbal abuse as well as intimidation and >controlling or abusive behaviour=. A child may approach the court directly for a protection order without adult assistance, or a concerned adult may make such an approach on behalf of the child.¹⁷

In addition to the direct protective actions which are provided for by these Acts, other forms of statutory provision are in place which are designed to prevent children from becoming vulnerable to neglect and abuse, and/or to facilitate informal intervention in

¹² Sections 28 – 29.

¹³ Sections 30 – 31.

¹⁴ Section 19.

¹⁵ See **IMC Minimum Standards B South African Child and Youth Care System** 1998, 5; also Department of Welfare **Project Go - Programme of Action** December, 1998. A central principle in making alternative care arrangements for children in terms of the Child Care Act, and of achieving permanency for them thereafter, is that of selecting the 'least restrictive and most empowering' option which is commensurate with each child's needs.

¹⁶ Sections 7(1) and (6).

¹⁷ Sections 4(3) and (4).

situations where children are seen to be vulnerable. Some measures are specifically intended to protect certain children from the worst extremes of poverty. The Maintenance Act 99 of 1998 provides machinery intended to ensure the financial support of children by those who have responsibility for them. The Social Assistance Act 59 of 1992 provides for limited state assistance to certain categories of children in impoverished families, in the form of the Care Dependency Grant for children with severe disabilities, and the Child Support Grant for children under seven years. The state Old Age Pension and the Disability Grant, while not primarily directed to children, are in fact used to assist with the support of large numbers of the country's poorest children.¹⁸ Section 5 of the Social Assistance Act 59 of 1992 provides for the payment of grants to NGO=s by provincial welfare departments. These organisations between them carry out a range of supportive and preventive services.¹⁹ The Act may undergo change in the future arising from the work of the Committee of Inquiry which was appointed by the Minister in March 2000 to conduct a comprehensive investigation with a view to presenting options for >an integrated and comprehensive social security system=.²⁰

Some additional provisions which are intended or have the potential to prevent the abuse and neglect of children are as follows:

- The Mediation in Certain Divorce Matters Act 24 of 1987 enables a court to call on the Family Advocate's Office to assist in the reaching of decisions, where possible through mediation, regarding custody and access in contested divorces and also in disputes arising after divorce.²¹
- Section 10 of the Child Care Act 73 of 1984 provides that children under seven years who are living by informal arrangement in the care of persons who are not members of their immediate or extended families must be brought to the

¹⁸ **Report of the Lund Committee on Child and Family Support**, Department of Welfare, 1996, 6-7.

¹⁹ Formal protective services by NGO's are also subsidized in terms of this provision.

²⁰ See statement by Dr Zola Skweyiya, Minister for Social Development, on the appointment of a ministerial Committee of Inquiry into Social Security. The Minister for Social Development has mooted the idea of a Basic Income Grant for impoverished persons. Such a measure would hold vast potential for the strengthening of families, and the amelioration of conditions which place children at risk of neglect and abuse. It would also facilitate reunification in cases where children at present cannot be returned home from statutory care due to their families being destitute.

²¹ The Family Advocate=s functions have since been expanded to include assistance to the High Court in disputes in matters where an unmarried father applies for custody, access or guardianship in terms of the Rights of Natural Fathers of Children Born Out of Wedlock Act 86 of 1997.

- attention of the commissioner of child welfare, and that his or her permission is required for such arrangements to continue. The intention here is, in part, to prevent trafficking of young children and undesirable adoptive placements.
- Section 30 of the same Act requires that >places of care= B i.e. formal and informal preschool, afternoon and holiday care facilities catering for more than six children - be registered with the Department of Social Development, and makes them subject to inspection and other controls. Shelters for children in especially difficult circumstances, which usually provide voluntary rather than court-ordered care for children on the streets, are also covered by section 30.
 - The Northern Province Initiation Schools Act 6 of 1996 requires those holding circumcision schools, for either male or female initiates, to obtain permits and adhere to whatever conditions may be specified. The Act also empowers the Premier to issue regulations governing the operations of such schools, and every SA Police Service member is authorised to rescue a person who has been abducted or forcefully taken to a school.²²
 - The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 prohibits unfair discrimination on the ground of gender. Section 8 designates *inter alia* the following as forms of such discrimination: >(a) gender-based violence; (b) female genital mutilation; Y. (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the dignity and well-being of the girl child; . . . (f) discrimination on the grounds of pregnancy=. The Act creates an >equality court= to which complaints of infringements must be directed, and details a large number of options open to this court if discrimination is deemed to have taken place. These include e.g. restraining orders; orders of compliance; orders of payment for loss, damages or suffering; and referral of matters to the Director of Public Prosecutions.²³ In terms of section 28 the State is obliged, *inter alia*, to audit laws, enact appropriate laws and develop action

²² See also the Application of Health Standards in Traditional Circumcision Act, 2001 (Eastern Cape) which provides that there must be proof in the form of a birth certificate that the prospective initiate is at least 18 years old (Annexure A of the Schedule) and requires parental consent of a prospective initiate who is under 21 years of age or who has not acquired adulthood (section 7(1)).

²³ Sections 16 and 21.

plans with the aim of eliminating discrimination on the grounds of race, gender and disability.

There is extensive provision for the prosecution of perpetrators of child abuse via the criminal justice system. Many forms of child abuse amount to common law crimes, e.g. murder, assault, indecent assault, rape and incest. A range of statutes also prohibit specific abusive practices. In terms of section 50 of the Child Care Act, ill-treatment, or the permitting of ill-treatment, and abandonment of a child by a parent or guardian are criminal offences. Section 50A criminalises anyone involved in the commercial sexual exploitation of a child, including persons who own, occupy or manage property on which this takes place.

Certain other forms of sexual behaviour with children are crimes in terms of the Sexual Offences Act 23 of 1957. This Act also defines the legal age of consent to sex, i.e. 16 for heterosexual and 19 for homosexual acts.²⁴ The Film and Publications Act 65 of 1996 prohibits the production, possession and distribution of pornographic material involving children, and the exposure of children to pornographic material. Section 45 of the Liquor Act 27 of 1989 prevents the sale of alcohol to persons under eighteen years and obliges holders of licences to exclude children from certain areas where liquor is being sold. Section 4 of the Tobacco Products Control Act 83 of 1993, as recently amended, prevents the sale or supply of any tobacco product to a person aged less than 16 years.²⁵ Section 43(1) of the Basic Conditions of Employment Act prohibits the employment of children under the age of 15, subject to the possibility of regulated work in terms of a sectoral determination, which may be negotiated for purposes of allowing children to be employed in advertising, sports, artistic or cultural activities.²⁶ Section 53(2) prohibits the employment of children of any age in work which places their normal development at risk.

The Criminal Procedure Act 51 of 1977 sets out criminal justice processes to be

²⁴ This discriminatory situation is being addressed by the SA Law Commission Project Committee on Sexual Offences

²⁵ As of 1 October 2000 persons selling tobacco products to children under sixteen years will be liable to a fine of R10 000.

²⁶ Sectoral determinations for any other type of employment are excluded by section 55(6) of the Basic Conditions of Employment Act. However, this limitation will fall away if the controversial Basic Conditions of Employment Amendment Bill is passed in the form as gazetted on 27 July 2000.

conducted in cases of alleged abuse of children. The amended section 153 of the Act provides for various protective mechanisms to reduce trauma for child witnesses in criminal court proceedings. Children's court proceedings aimed at the protection of the child may be initiated independently of, or in tandem with, criminal justice processes.

Both the criminal law and the Child Care Act (in the case of offences by family members) allow for activities designed to promote the rehabilitation of offenders and abused children, although these are not clearly spelled out in either case, and there is a dearth of legal mechanisms to monitor treatment which is carried out in terms of a court order. Recent policy initiatives, including the Victim Empowerment Programme (VEP) within the National Crime Prevention Strategy (NCPS), and the National Strategy on Child Abuse and Neglect (NSCAN), have helped to promote inter-sectoral cooperation in bringing together criminal justice, medico-legal, educational, social service and corrective approaches in dealing with crimes against children.

9.5 Setting broad principles for child protection measures

As pointed out in the discussion paper,²⁷ internationally most interventions provided for in protective legislation seem to fall into one or other of the following categories:

- Reinforcement of the protective potential within the family or neighbourhood
- Statutory protection of the child within the home
- Removal of the offender
- Placement of the child in substitute care, either through a court order or by voluntary agreement
- Combinations of criminal justice and protective measures.

Legislation should include adequate provision for the range of options likely to be needed and the options chosen would depend *inter alia* on the severity and context of the problem and the resources available. In this context, the Commission pointed out, for example, that if family support services can be intensively applied it may be possible to avoid more drastic interventions, even where a serious problem exists.²⁸ However, such services will offer no protection to the child if they are superficial or inconsistent.

²⁷ Par. 10.2.4.

²⁸ Par. 10.2.5.2.

Indeed, such interventions may be harmful in their own right and cause secondary abuse.

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 Children's Bill should be designed accordingly, without detracting from other essential forms of provision for children.

After highlighting the deficiencies in the present child protection system in the discussion paper,²⁹ the Commission proposed a system which included 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 8 above.
- An expanded range of protective options, designed to improve and expand on those currently available and make them more flexible. Innovations include provision for:
 - time-limited, voluntary foster care placement agreements between parents / caregivers and structures providing foster care services;

²⁹ Par. 10.2.11.

- 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;
 - 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;
 - 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;
 - orders by the children's court for children with special needs who are found to be 'in need of care' to be placed in facilities registered by the Departments of Health and Education, where such facilities are the best available resources for the meeting of their needs;
 - measures specifically designed to address the protection needs of children 'in especially difficult circumstances' or 'in need of protection'. These would include, e.g. requirements for making protective processes accessible to children with disabilities;
-
- Codes of Good Practice, for inclusion in the Regulations, in which the 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.

9.5.1 Comments received

Ms R Lombard expressed her concern over the removal of children by untrained officials who fail to make a proper assessment before removing a child. She submitted that an uninformed decision to remove a child often results in trauma for the child and his or her family. She recommended that the new child care legislation should include provisions in terms of which action can be taken against Departmental officials and other professionals who abuse their powers and behave in an unethical way resulting in harm to children and their families.

The **Department of Health, Pretoria**, submitted that traditional circumcision schools

must be regulated with special emphasis on hygienic practices, water supply, food preparation, availability of sanitation facilities and general safety measures.

Ms Sally Rowney said that although it is important to address issues such as virginity testing, female genital mutilation and unhygienic or traumatic circumcision practices, it is also essential to deal with these issues in a culturally sensitive, yet responsive and an educative manner, to ensure that silence and secrecy do not continue to enshroud these issues.

In the discussion paper it is suggested that facilities in which children with special needs are placed should be registered by the Departments of Health *and* Education. In its submission, the **Department of Education** points out the difficulties such a dual registration approach would entail and suggests that the word 'and' be substituted for 'or'.

With reference to an earlier version of section 172 of the Bill (Other children in need of care and protection) the **Department of Correctional Services** submitted that the Commissioner for Correctional Services should also have the authority to bring the matter of children in prison to the child and family court registrar for referral to the child and family court. This would give children in prison the opportunity to be transferred from prison, as a most restrictive and least empowering facility, to a less restrictive and more empowering facility under the management of the Department of Social Development.

The response to the Commission's preliminary position on corporal punishment in the home is dealt with separately immediately below.³⁰

9.5.2 Evaluation and recommendations

It is an unfortunate reality that the formal child protection system will not be properly resourced, coordinated or managed in the short term. Indeed, in the absence of substantial additional funding, the existing system is bound to fail more and more children in need of care and protection. Given this reality, the Commission recommends

³⁰ See 9.7 below.

that the national policy framework³¹ must include a comprehensive national strategy aimed at securing a properly resourced, coordinated and managed child protection system.³² The national strategy must include inter-sectoral mechanisms for the planning, development and implementation of designated child protection services focused primarily on children who are at risk of immediate harm; strategies for expanding the range of child protection mechanisms; criteria for the selection and designation of child protection organizations to assist in the provision of designated child protection services; measures to implement quality control over designated child protection services provided by organs of state and designated child protection organizations; mechanisms to ensure impartiality in the provision of designated child protection services, including in performing investigations and assessments and in making recommendations; and measures to ensure that budgetary requirements and procedures are complied with to secure adequate funds for the provision of designated child protection services.³³

This recommendation (to prepare a national strategy as part of the national policy framework) also accommodates some of the other preliminary recommendations made in this regard by the Commission in the discussion paper. Such national strategy therefore would provide for an inter-sectoral coordinating mechanism, clarification as to roles and functions of the various actors offering child protection services; and proper budgeting based on reliable data.

As for providing an expanded range of protective options as described in the discussion paper, the Commission recommends that:

- Time-limited, voluntary placement agreements between parents / care-givers and structures providing such services be provided for;³⁴
- Hospitals 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;³⁵

³¹ Referred to in section 5 of the Bill.

³² Section 113(1) of the Bill.

³³ Ibid.

³⁴ Termed 'voluntary temporary safe care' in the Bill. See section 171 of the Bill.

³⁵ Section 59(1)(g)(v) of the Bill.

- The child and family court may order the removal of an alleged or confirmed perpetrator from the child's home, or to restrict or prohibit that person's access to the child;³⁶
- The child and family court may order for a family group conference to be arranged and that decisions made in such conferences be made orders of court and be monitored, subject to appropriate programmes being in place, and to specified conditions being observed to ensure that family solutions include proper protection of the child;³⁷
- The child and family court may order that children with special needs who are found to be 'in need of care' be placed in facilities registered by the Departments of Health and Education, where such facilities are the best available resources for the meeting their needs;³⁸
- Measures specifically designed to address the protection needs of children 'in especially difficult circumstances' be adopted.³⁹ These would include, e.g. requirements for making protective processes accessible to children with disabilities;

It will be recalled that the Commission has made recommendations on the 'child in need of care'-criteria, removals and the reporting obligation in Chapter 5 above. These recommendations form crucial components of the child protection system and are summarised here for the benefit of the reader.

The Commission did not receive input to indicate that the current 'child in need of care'-criterion is causing problems in practice. Indeed, the general feeling seems to be that section 14(4) of the Child Care Act, 1983 is working well and that its principles should be retained. The Commission therefore recommends the inclusion in the Children's Bill of a broad provision defining a child in need of care and protection.⁴⁰ Provision is made for any court to refer to the child and family court the question of whether a child is need of care and protection.⁴¹ A novel introduction in this regard is the requirement that where

³⁶ Section 59(1)(g)(ix) of the Bill.

³⁷ Section 59(1)(g)(iii) of the Bill.

³⁸ Section 175(1)(h) of the Bill.

³⁹ See Chapter 16 of the Bill.

⁴⁰ Section 166 of the Bill.

⁴¹ Section 168 of the Bill.

allegations of child abuse and neglect are made in divorce matters and proceedings in terms of the Domestic Violence Act 116 of 1998, such (divorce or domestic violence) court may stand down the divorce or protection order application pending the child and family court's enquiry into the alleged child abuse.⁴² Provision is further made for a child and family court to investigate the question of whether a child is in need of care and protection on the basis of evidence presented to the court by a designated social worker.⁴³ This position is currently regulated by section 11 of the Child Care Act, 1983.

Section 12 of the Child Care Act, 1983 is also restated in the Children's Bill.⁴⁴ This provision allows for the placement of a child in temporary safe care without a warrant in certain limited circumstances. Only police officers, designated social workers or an authorised officer may use this emergency power and abuse of this process would constitute misconduct.⁴⁵ The Commission further recommends that where there is a reasonable suspicion that the siblings of a child placed in temporary safe care might also be in need of care and protection, such siblings may be brought before the child and family court by a referral process.⁴⁶

The Commission prescribes the court process to be followed when a decision is to be made whether a child is in need of care and protection.⁴⁷ Where the child and family court finds a child in need of care and protection, the court may make any one of a number of possible orders.⁴⁸ These orders include orders confirming control over a child, returning a child to the control of the person under whose control such child was before the placement in temporary safe care, placement of the child in partial care or alternative care, payment of the emergency court grant, treatment orders, and interdicts aimed at preventing the continuation of abuse of a child.⁴⁹ The Commission further recommends that before a court makes an order involving the removal of the child from the care of the care-giver of that child, it must consider a social worker's report which report must include an assessment of the needs of the child, details of family

⁴² Section 168(2) of the Bill.

⁴³ Section 169(1) of the Bill.

⁴⁴ Section 170.

⁴⁵ Section 170(3) of the Bill.

⁴⁶ Section 172.

⁴⁷ Section 174.

⁴⁸ Section 175.

⁴⁹ Section 175(1) of the Bill.

preservation attempts made or attempted, and a documented plan aimed at achieving stability in the child's life. The court must in the light of this report find the best way of securing stability in the child's life.⁵⁰

While the Children's Bill does recognise that children may be placed by the court in child and youth care centres, such placement is to be considered only if no other option is appropriate.⁵¹ This is to give effect to the IMC strategy to prevent the transfer of children deeper into the system.⁵²

9.6 Harmful cultural practices

The Commission paid specific attention to harmful or potentially harmful cultural practices relating to children in the discussion paper.⁵³ In this regard it was recommended that harmful or potentially harmful cultural practices be prohibited, that male circumcision be regulated, that female genital mutilation be prohibited, that an educative and criminal law approach to virginity testing be adopted, and expansion of the grounds for refugee status to include the threat of female genital mutilation. The Commission also recommended the inclusion of a prohibition on child betrothals and suggested that a standard minimum age for marriage be set.

The Commission received no submissions on these preliminary proposals.

The Commission therefore confirms its preliminary position and recommends the inclusion in the Children's Bill of provisions to this effect.⁵⁴

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

In the discussion paper, the Commission adopted a dual approach in respect of corporal

⁵⁰ Section 176(1) of the Bill.

⁵¹ Section 177(1) of the Bill.

⁵² See further Chapter 18 on residential care below.

⁵³ See Par. 10.2.11 and Chapter 21 of the discussion paper.

⁵⁴ Section 19 of the Bill for instance provides that every (male) child has the right to refuse to be circumcised; that every (female) child has the right to refuse to be subjected to a virginity test as part of a cultural practice.

punishment in the home. On the one hand, the Commission recommended the adoption of an educative and awareness-raising approach in respect of corporal punishment. The aim of such an approach would be to educate parents and care-givers about the harmful effects of corporal punishment and to empower such parents or care-givers to use successfully alternative forms of discipline in the home. To support this educative approach, the Commission also adopts a criminal law approach which will in effect facilitate the possibility of prosecuting parents in the criminal courts on charges of assault or assault with the intent to cause grievous bodily harm for inflicting corporal punishment upon a child. To facilitate the criminal prosecution, the Commission recommended the repeal of the common-law defence that a parent may raise that the physical punishment was justified on the grounds of the rights of parents to impose reasonable chastisement upon their children.

The Commission therefore proposed 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. This is not to say that parents who impose corporal punishment on their children will in all cases end up facing criminal prosecution, as prosecutors do have a discretion whether to prosecute or not. However, where such prosecutions are instituted, parents would not be able to escape conviction on the basis of the common law defence available to parents.

9.7.1 Comments received

The Commission's preliminary recommendations on the right of parents to inflict corporal punishment in the home were debated extensively in the media, at workshops, and by the respondents. The opinions covered the whole range: On the one end, the Commission was criticised for not being brave enough to ban with criminal sanction any form of physical discipline of a child by his or her parent, while on the other end it was argued that the Commission's recommendation would limit God-given and constitutional rights of parents to raise their children. The fervour of the debate matched that associated with the morality of the death penalty and in this investigation was on par with the debates surrounding the Commission's recommendations on providing condoms for children. It again highlights the difficulties law-makers face when an attempt is made to regulate issues of morality in the private law sphere.

The following are selected comments received from some of the respondents:

Doctors For Life submitted that appropriate disciplinary physical punishment must be distinguished from abusive and harmful forms of corporal punishment. The respondent argued that appropriate disciplinary physical punishment can play an important role in optimal child development, and has been found in prospective studies to be a part of the parenting style associated with the best outcomes.

Christian Lawyers Association of Southern Africa stated that the common law position regarding corporal punishment by parents should be left unaltered, but greater emphasis should be placed on the reporting and investigating of injuries to children.

The Children's Rights Project and Local Government Project (Community Law Centre, UWC) agreed that the defence of reasonable chastisement be removed. However, the respondents submitted that the new child care legislation should specifically stipulate that corporal punishment in the home is prohibited. Furthermore, it was said that there is no danger that a statement in the new child care legislation prohibiting corporal punishment will lead to a duplication of offences. The respondent suggested that the prohibition be inserted in the new child care legislation which should provide that if there is any contravention of the prohibition, the offender be prosecuted in terms of the common law crime of assault or related offences.

Ms Carol Bower of RAPCAN⁵⁵ is of the opinion that the Commission did not go far enough in the discussion paper and argued for outright ban of corporal punishment by parents of their children. She said that the arguments for the use of corporal punishment against children have no foundation and that the imposition of corporal punishment by parents is counter-productive and engenders behaviours which are inappropriate and dangerous. Ms Bower further argued that corporal punishment is a human and child rights violation and advanced the notion that a revolution in parenting, which should include a total ban on corporal punishment, would assist in creating a society more at harmony with itself, and more appropriate for the 21st century.

The **Department of Education** argues that the Commission's recommendation to remove the common law defence of reasonable chastisement implies that reasonable

⁵⁵ Resources Aimed at the Prevention of Child Abuse and Neglect.

chastisement is prohibited. The question is then posed how the law can prohibit what is reasonable. The Department concludes by saying that abuse of children must be distinguished from what is reasonable chastisement.

A national workshop on corporal punishment hosted by the South African Human Rights Commission and Wits EPU was held on 20 - 21 February 2002. One of the principal objects of this workshop was to consider the implications of the Commission's proposals in respect of corporal punishment. Delegates at this workshop were unanimous that the new child care legislation should ban outright all forms of corporal punishment of children in all contexts. However, there should not be a separate criminal provision for the elimination of physical punishment. If criminal sanctions are required, this should be instituted in terms of the common law, i.e. assault, assault with the intention to do grievous bodily harm etc. Furthermore, the Department of Education should be tasked with the inclusion of parenting courses in their life skills programmes - senior primary as well as high schools should be targeted.

Some of the speakers at the workshop argued that the Commission's proposal to simply remove the common law defence, while it may technically remove the inequality of protection suffered by children, may not send out a very clear message. It was therefore argued that is necessary, in addition to removing any existing defences like reasonable chastisement, to explicitly prohibit corporal punishment in the home in the new child care legislation.⁵⁶

9.7.2 Evaluation and recommendation

Parental use of corporal punishment is one of the most controversial and emotionally charged topics in the parent-child relationship.⁵⁷ No other child-rearing topic has elicited as much attention or heated debate as whether parents should engage in the practice. Conflict on the topic is pervasive at multiple levels: Paediatricians hold divergent attitudes, husbands and wives disagree over its use, communities dispute it, global

⁵⁶ Ms Mali Nilsson, Programme Officer on Corporal Punishment, Save the Children (Sweden); Ms Carol Bower, RAPCAN.

⁵⁷ Gugu Nkosi "Corporal punishment at schools in perspective" (2002) Vol XXXXII (2) **Codicillus** 28; **Final Report of the Goldstone Commission of inquiry regarding the prevention of public violence and intimidation** 27 October 1994.

initiatives have been launched to end all corporal punishment of children,⁵⁸ and even countries debate whether to outlaw the practice.⁵⁹

Research has also found it difficult to find causal links between corporal punishment and child outcomes. In one such recent study, Gershoff found that, except for an association with immediate compliance to parental demands, corporal punishment is associated with negative or undesirable behaviours (e.g. aggression, lower levels of moral internalisation and mental health).⁶⁰ She argues that just because some other disciplining techniques are worse than corporal punishment, that does not make corporal punishment any better. She concludes by saying that until positive effects are linked with corporal punishment, it should not be routinely recommended as a method for controlling children.

In 1979, Sweden became the first country to ban all corporal punishment of children, including that by parents. The Swedish ban has been particularly effective in changing attitudes about corporal punishment – such that 15 years after the ban only 11% of the public supported the use of corporal punishment – and in orienting social service intervention towards support and prevention.⁶¹ Prosecution of parents for assault and abuse against children has remained steady in the years since the ban, belying fears that the ban would lead to a rash of parents being prosecuted.⁶² In addition, contrary to fears that a ban on corporal punishment would lead to increases in youth violence and criminal behaviour, rates of youth involvement in crime, alcohol and drug use, rape, and

⁵⁸ See e.g. www.endcorporalpunishment.org

⁵⁹ For a broad overview of the debates surrounding corporal punishment in the home, see Save the Children, Sweden **Ending corporal punishment of children – Making it happen** (2001).

⁶⁰ Gershoff ET 'Corporal punishment by parents and associated child behaviors and experiences: A meta-analytical and theoretical review' (2002) 128(4) **Psychological Bulletin** 539 – 579, 'Corporal punishment, physical abuse, and the burden of proof: Reply to Baumrind, Larzelere, and Cowan (2002), Holden (2002), and Parke (2002)' (2002) 128(4) **Psychological Bulletin** 602 – 611. See also Parke R D 'Punishment revisited – Science, values, and the right question: Comment on Gershoff (2002)' (2002) 128(4) **Psychological Bulletin** 596 – 601; Holden G W 'Perspectives on the effects of corporal punishment: Comment on Gershoff (2002)' (2002) 128(4) **Psychological Bulletin** 590 – 595; Baumrind D, R E Larzelere and P A Cowan 'Ordinary physical punishment: Is it harmful? Comment on Gershoff (2002)' (2002) 128(4) **Psychological Bulletin** 580 – 589.

⁶¹ Ministry of Health and Social Affairs, Sweden **Ending corporal punishment: Swedish experience of efforts to prevent all forms of violence against children – and the results** (2001); _rjan Bartholdson **Corporal punishment of children and change of attitudes – a cross cultural study** (2001); Durrant J E 'Evaluating the success of Sweden's corporal punishment ban' (1999) 23 **Child Abuse and Neglect** 435 – 448.

⁶² Ibid.

suicide decreased in the period after the ban compared with the period before the ban.⁶³

In addition to Sweden, ten countries have banned the use of corporal punishment by parents: Austria, Croatia, Cyprus, Denmark, Finland, Germany, Israel, Italy, Latvia, and Norway.⁶⁴ However, in each case the wording of the laws or court rulings indicates that the intent of the lawmakers was to change public attitudes about corporal punishment more than to prosecute parents for using corporal punishment.⁶⁵ It is further important to note that both Sweden and Finland accompanied their rulings with extensive national campaigns educating adults and children about discipline techniques that are more effective than and preferable to corporal punishment.⁶⁶ Prohibitions of parental corporal punishment are also being considered by other countries, including Belgium, Canada,⁶⁷ New Zealand, and the United Kingdom.⁶⁸

The Commission believes its dual approach regarding corporal punishment in the home is a pragmatic and balanced one. A complete ban on corporal punishment in the home without equipping parents with alternatives to corporal punishment⁶⁹ and a fundamental shift in public opinion supporting such a shift would be meaningless. However, given the high levels of violence in society, it would be reckless not to address parental violence in the home. Rather than to advocate for an outright ban, the Commission recommends, as it did in the discussion paper, that the common law defence of reasonable chastisement available to a parent facing a charge of assault or assault with the intention

⁶³ Durrant J E 'Trends in youth crime and well-being since the abolition of corporal punishment in Sweden' (1999) 31 **Youth and Society** 437 – 455.

⁶⁴ Bitensky SH 'Spare the rod, embrace our humanity: Toward a new legal regime prohibiting corporal punishment of children' (1998) 31 **University of Michigan Journal of Law Reform** 353 – 474; EPOCH-USA 'Legal reforms: Corporal punishment of children in the family' (2000) Internet <http://www.stophitting.com/legalreform.php> .

⁶⁵ Bitensky (1998) 31 **University of Michigan Journal of Law Reform** 378.

⁶⁶ Ibid.

⁶⁷ See, however, the decision of the Ontario Court of Appeal in **Canadian Foundation for Children, Youth and the Law and the Attorney General v The Canadian Teachers' Federation, the Coalition for Family Autonomy and the Ontario Association of Children's Aid Societies**, case no C34794/2002 on reasonable chastisement by persons *in loco parentis*.

⁶⁸ Gershoff E T 'Corporal punishment by parents and associated child behaviors and experiences: A meta-analytical and theoretical review' (2002) 128(4) **Psychological Bulletin** 539 -579 at 564.

⁶⁹ The publication by Kimberley Porteus, Salim Vally and Tamar Ruth **Alternatives to corporal punishment – Growing discipline and respect in our classrooms**, Wits Education Policy Unit (2001) is an useful indication of what would need to be done; **Final Report of the Goldstone Commission of inquiry regarding the prevention of public violence and intimidation** 27 October 1994.

to cause grievous bodily harm be revoked and that an educational and awareness programme be developed to equip parents with alternative forms of discipline.⁷⁰

9.8 Assessment and treatment / therapeutic services

A proper understanding of the needs and situation of each child entering protective services and his or her family is clearly essential as a basis for appropriate planning and action. Practitioners emphasise the need for skilled interdisciplinary assessments which are undertaken on a planned and fully co-ordinated basis.⁷¹ Assessment is needed at the point of referral, to decide whether protective intervention is necessary and, if so, in what form. Thereafter, if a child is to be placed in care or under official supervision, assessment should guide the choice of care arrangement and the plan for subsequent services, including any form of treatment⁷² which may be required.

A crucial dimension of assessment in cases of alleged child abuse is risk analysis. A process of weighing up the risks of various forms of intervention, and also of refraining from intervening, has to be undertaken for every child referred for protective services.⁷³ Protective intervention and the processes which follow are in themselves potentially hazardous for children, given the possibilities for secondary abuse.⁷⁴ Where a report is considered sufficiently serious to warrant a social work investigation, it is necessary in the first place to establish whether any risk to the child can be dealt with by the use of enabling or empowering approaches.⁷⁵ Such approaches, calling for voluntary involvement of the family in secondary preventive strategies, will be the first choice unless they are inadequate to prevent harm to the child.

⁷⁰ Section 142 of the Bill.

⁷¹ NCCAN **National Strategy on Child Abuse and Neglect**, 1996, p. 34.

⁷² The term 'treatment' may be problematic in some quarters at present due to moves away from the 'medical model' by many in the social work and child and youth care fields. However the term continues to be used to cover many therapeutic activities designed to promote emotional and social health and development and to overcome past problems.

⁷³ Cooper, DM and Ball, D **Social Work and Child Abuse** London: BASW 1987; see also NCCAN **National Strategy on Child Abuse and Neglect**, 1996, 25-6.

⁷⁴ See Par. 10.2.5.3 of the discussion paper.

⁷⁵ These may include counselling, drawing in support from the extended family or neighbourhood, education in child development and parenting skills, linking of the family with available resources or with a development programme, etc. Regulation 2(4)(b) to the Child Care Act as amended in 1996 requires that >a summary of prevention and early intervention services rendered in respect of the child and his or her family ...= be supplied to the court in the social worker's report for every children's court enquiry.

Section 14 of the Child Care Act, 1983, which provide for psychological assessments of the child during children's court inquiries, and its deficiencies have been highlighted in the discussion paper.⁷⁶

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 has made recommendations in the discussion paper for the inclusion of provisions dealing with:

- 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.

No submissions were received on these issues and the Commission confirms its

⁷⁶ See Par. 10.3.3.

preliminary position.⁷⁷

9.9 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.

In the discussion paper,⁷⁸ 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 alternative 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

⁷⁷ See e.g Part 2 of Chapter 11 of the Bill in this regard.

⁷⁸ Par. 10.4.8.

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 has subjected a sibling of the child to such assaults, or has caused the death of a sibling.
- Provision for very young children who have, on balance of probabilities, been intentionally abandoned, to be released for adoption with the minimum possible delay.
- Provision, in cases of apparent abandonment, for clear procedures to enable a finding to be made within the shortest possible time as to whether or not a child has been abandoned.
- Provision for children to be freed for adoption without the consent of the parents, where this can be considered to be in their best interests on the basis of a clearly specified set of principles. More specifically, it is recommended that the department or organisation managing the child's case be empowered to make an application to the children's court for the termination of all or certain parental rights and responsibilities over a child who at the time of placement
 - was aged seven years or more, and has been in foster or residential care for at least two years;
 - was aged three to six years, and has been in foster or residential care for at least a year; or
 - was aged less than three years, and has been in foster or residential care for at least six months.
- It is further recommended that the children's court should be in a position to terminate all parental rights and responsibilities only if -
 - there are clear indications that the termination of parental rights and responsibilities would be in the best interests of the child;
 - reasonable efforts have been made to reunify the child with his or her family and these have not succeeded, or the parents have refused to involve themselves in such efforts or have been untraceable, and there is

- a poor prognosis for the child's return to parental care within a time frame suited to his or her developmental needs; and
 - o 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) child 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.

9.9.1 Comments received

Africa Christian Action, and the **Dutch Reformed Church, Pretoria**, endorsed the Commission's recommendations with regard to permanency planning for children.

Mr Rothman submitted that the approach to permanency planning was radically improved upon in the 1998 regulations. Furthermore, most of the Commission's recommendations in respect of permanency planning are already contained in these regulations. Mr Rothman suggested that the current Child Care Act and the regulations be "fine-tooth combed" in order to determine perceived omissions.

9.9.2 Evaluation and recommendations

Mr Rothman is of course right when he said that the approach to permanency planning improved dramatically when the regulations to the Child Care Act, 1983 were amended in 1998. However, the Commission believes the inclusion of substantive provisions on permanency planning in the Children's Bill will improve the position even more. The Commission therefore recommends the adoption of a provision requiring court orders to be aimed at securing stability in the child's life.⁷⁹ This provision requires the court to consider a social worker's report which, based on an assessment of the needs of the child, must include details of family preservation considered or attempted and contain a documented plan aimed at achieving stability in the child's life. In considering the best way of securing stability in the child's life, the court may waive the requirement for efforts to be made to reunify the child with parents who have seriously assaulted the child by terminating the parental rights and responsibilities of those parents.⁸⁰ In the case of abandoned infants, the court may release such infant for adoption with the minimum possible delay if that is considered the best way of securing stability in the child's life.⁸¹

In line with the position adopted in the discussion paper, the Commission further recommends that the Department for Social Development or a designated child protection organisation may apply to the court for an order suspending for a period, or terminating any or all of the parental rights and responsibilities which a specific person

⁷⁹ Section 176 of the Bill.

⁸⁰ Section 261(1)(c) of the Bill.

⁸¹ Section 176(2) read with section 261(1)(b) of the Bill.

has in respect of a child.⁸² In order to facilitate stability in the life of the child, time spent in alternative care and the age of the child are used as criteria: the younger the child, the less time spent in alternative care is required for parental consent to be dispensed with.⁸³ As was suggested in the discussion paper, provision is made for permanent forms of foster or kinship care,⁸⁴ but not for the conversion of long-term foster care to subsidised adoptions. As far as the latter is concerned, those foster parents who wish to adopt the child in their foster care will have to follow the usual adoption process.⁸⁵ Should the adoption subsidy be equal to the foster care grant, foster parents will have no financial incentive to foster children long-term, given the need for renewals, follow-up reports, etc.

The Commission provides for limited continued support, over a bridging period, to persons who turn 18 years while in alternative care to enable them to complete their schooling or training.⁸⁶ Provision is further made for a person placed as a child in alternative care to remain in that care until the end of the year in which that person reaches the age of 21 years of age if the care-giver is willing and able to care for that person.⁸⁷

9.10 Reporting and registration of reported cases

Mandatory reporting of child abuse, sometimes associated with provision for an associated register of abused children and/or of offenders, is legislated for in many countries for purposes which include ensuring help for abused children, monitoring the safety and progress of such children, and gathering data for planning of prevention programmes and intervention services. These approaches initially gained currency in the 1970's and are well established in a number of first world countries. However they have become increasingly controversial. The relevant debates are covered in the Discussion Paper.⁸⁸

⁸² Section 141(1) read with section 39(1) of the Bill.

⁸³ Section 141(2) of the Bill.

⁸⁴ Section 198 of the Bill.

⁸⁵ See also section 141 on applications to terminate parental rights and responsibilities.

⁸⁶ Section 196(1) of the Bill.

⁸⁷ Section 196(2) of the Bill. See also the discussion on lowering the age of majority in Chapter 4 above.

⁸⁸ Par. 10.5.

A particular danger which has become apparent is that of entrenching an imbalance in the overall system of provision for children by artificially loading it towards reporting and investigation.⁸⁹ In North America and Britain there have been complaints that limited child protection resources have become disproportionately swallowed up in reporting and associated investigative processes, at the expense of preventive and promotive services and also of longer-term care and treatment for abused children. In addition there has been widespread concern over the excessive numbers of unsubstantiated cases generated by mandatory reporting laws – estimated at two-thirds of all reports investigated in 1993 in the United States.⁹⁰ Investigations of such cases create massive costs, at the expense of other essential tasks, and substantial harm can be caused to the families investigated, including job loss and social stigma.⁹¹ It has also been noted that there has been a swing away from the initial emphasis of reporting systems on bringing help to vulnerable children and families, to a focus on criminal justice processes which may not always promote the wellbeing of the children concerned. Compulsion to report is, in addition, in tension with the confidentiality ethics of a number of professions, some of whose members hold that such compulsion can undermine the interests of children. There have been calls for professionals to be allowed to use some discretion, at least in cases where they are themselves in a position to deliver the necessary services to prevent further abuse. Furthermore, compliance with mandatory reporting laws has been found to be far from consistent; for example, in the USA the race, socio-economic status, age and gender of the child and other extraneous factors have been found to influence the likelihood that abuse of that child will be reported.⁹²

An extensive survey by the Australian Law Reform Commission (ALRC) and the Human Rights and Equal Opportunity Commission into Children and the Legal Process reported both strong support for and serious concerns regarding mandatory reporting. Critics point out that abusers are less likely to seek help if professional persons are required to report them, and that children themselves may be more reluctant to seek help in such a context (e.g. if the perpetrator is a family member). Mandatory reporting may also deny

⁸⁹ Hutchison January 1993, **Social Work**, 38(1), 57.

⁹⁰ Lynch M, 2000: Keynote address, ISPCAN Congress, Durban.

⁹¹ Deisz et al 1996 20(4) **Child Abuse and Neglect** 276; Pollak and Levy 1998 13 **Child Abuse and Neglect** 515-22.

⁹² See for example Warner J and Hansen D 'The identification and reporting of physical abuse by physicians: a review and implications for research' 1994(18) **Child Abuse and Neglect** 11-25;

children and families the opportunity of finding other ways to deal with the abuse. A central concern in the Australian report is that mandatory reporting is often instituted without adequate resources for its proper implementation and may siphon off resources needed for prevention and treatment. Child Protection services in Victoria, for instance, found themselves less able to effectively protect children after the introduction of mandatory reporting than before. The Australian Capital Territory's Law Reform Committee recommended against the immediate introduction of mandatory reporting stating that "it would be grossly irresponsible to introduce a system of mandatory reporting without at the same time ensuring that the whole child welfare system can cope with the new measures".⁹³ The ALRC recommended a phased approach, based initially on voluntary reporting encouraged by targeted education. New Zealand, after intensive deliberation and study of the impacts of mandatory reporting systems elsewhere in the world, has decided against such a system, and instead provides for public education and voluntary reporting protocols.⁹⁴

In South Africa, while there is strong support for mandatory reporting and registration, concerns have been raised that these approaches have been imported from contexts in which the basic survival needs of children are met and where highly developed service infrastructure is in place. Superimposing such approaches where vastly different social conditions apply and without proper backup provision can set children up for secondary abuse. The point is made that mandatory reporting is only useful to the extent that it gives rise to effective services, both immediate and ongoing, to the children concerned, and/or provides data for planning and policy development. It is noted that in South Africa the range of persons required to report has been steadily increased, but there has been no simultaneous attention to the needs of the under-resourced system which is expected to respond to the reports in question.⁹⁵

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

⁹³ ALRC 84, 1997:435, 82, 84.

⁹⁴ Dept of Social Welfare 1996: "Strategic Directions" (post-election briefing paper), Wellington.

⁹⁵ NCANN 1996: National Strategy on Child Abuse and Neglect, Department of Social Welfare.

dentists, medical practitioners, nurses, social workers, teachers, and persons employed by or managing children's homes, places of care and shelters. The obligation to report applies when any such person 'examines, attends or deals with any child in circumstances giving rise to the suspicion that the child has been ill-treated, or suffers from any injury ... the cause of which probably might have been deliberate, or suffers from a nutritional deficiency disease'.

Persons mandated to report in terms of the Child Care Act, 1983, must send notifications of cases of suspected abuse to the Director-General of the Department of Social Development on Form 25, as supplied in the Regulations as amended in 1988. The Director-General is then required to request a police officer, social worker or authorised officer to take appropriate steps, and to call for an investigation into the circumstances of the case and a report on these circumstances and on action taken, within 30 days. The Director-General may in certain cases instruct that the alleged perpetrator be removed from direct contact with children (presumably where such a person is employed in a registered or government-operated children's facility), and that the matter be referred to the SAPS for possible prosecution.⁹⁶

A similar obligation to report the ill-treatment of children is provided for in section 4 of the Prevention of Family Violence Act 133 of 1993. Unlike the reporting obligation in terms of the Child Care Act, 1983, however, this provision applies to 'any person who examines, treats, attends to, advises, instructs or cares for any child in circumstances which ought to give rise to the reasonable suspicion that such child has been ill-treated, or suffers from any injury the probable cause of which was deliberate'. The Act requires the report to be made to a police official, a commissioner of child welfare, or a social worker.

The concept of a register based on mandated reporting of child abuse was introduced in South African law in April 1998, in new Regulations under the Child Care Act. The purpose of this register is the protection of children, and it will capture information obtained from three sources: criminal court convictions, children's court findings, and notifications received in terms of section 42(1) of the Act. Some uncertainty arises from the wording of Regulations 39B(2)(e) and (f). In terms of the former, identifying details of a perpetrator are to be included after conviction by a criminal court. But in terms of the

⁹⁶ Regulations 39A (2) and (3).

latter, >details of the relationship between the child and the perpetrator= must be revealed even where an alleged perpetrator has not been convicted. Such details may serve to identify the person and thus circumvent the protection provided to unconvicted persons by Regulation 39B(2)(e). As pointed out in the discussion paper,⁹⁷ the constitutionality of Regulation 39B(2)(e) may be at issue.

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. In the discussion paper,⁹⁸ the Commission therefore recommended 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 was 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 was 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.

In the discussion paper,⁹⁹ the Commission stated that 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 was 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 was 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, it was recommended that a mechanism should be included whereby a report can be registered for statistical purposes only, if the Director General is

⁹⁷ Par. 10.5.2.

⁹⁸ Par. 10.5.7.

⁹⁹ Par. 10.5.7.

satisfied that the person reporting the case is in a position to undertake the action necessary to protect the child. The Commission further recommended that immunity be provided for any person, whether or not mandated to report, from legal action after making a *bona fide* report, and that the anonymity of informants specifically be 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, was considered advisable for South Africa, as a means of keeping serial offenders out of children's services. It was stated that 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. The Commission recognised that it would 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 was further recommended that severe criminal penalties should apply to malicious reporting. The Commission further recommended 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 was regarded as the least invasive way of applying this protective measure.

9.10.1 Comments received

Ms Krystyna Smith recommended that all religious leaders should be added to the list of specified mandatory reporters of suspected or alleged cases of child abuse. She submitted that religious leaders engender deep trust and for this reason may often be the first people to hear about reports of child abuse in their communities. In addition, religious leaders usually have pastoral, teaching, social outreach roles and responsibilities in their communities. This brings them into constant professional contact with children and adults. Ms Smith mentioned that media and other reports have

indicated that there is a problem across a wide spectrum of religions regarding sexual offences committed by religious leaders. Furthermore: most of these cases are not reported to the relevant civil authorities, but are treated as a problem of internal discipline, and these crimes may often be covered up. The matter is thus not taken beyond the religious community, for fear of scandal caused to the religious community or damage to the image of the religious authority. Ms Smith questioned a religious authority's ability to punish an offender appropriately, and to protect the victim and community from further harm. She stated that a religious authority that finds a religious leader guilty may insist that he should undergo rehabilitative treatment and can also remove him from the ministry, but cannot sentence or imprison the offender, even if dangerous, e.g. a paedophile. Furthermore, she said the offender will have no criminal record and there will be no reliable restraint on the offender continuing the criminal behaviour. Ms Smith thus proposed that internal discipline hearings by religious authorities should not be regarded as a substitute for the criminal justice system.

Africa Christian Action submitted that all child care organisations should have access to the proposed register of offenders.

The Commission has recommended that the new children's statute should make it clear that a reporting obligation exists where there are reasonable grounds to suspect sexual abuse despite the confidentiality provision in the Choice on Termination of Pregnancy Act 92 of 1996.¹⁰⁰ Responding to this, **Ms Dellene Clark** stated that the obligation to report will automatically include all pregnant children under the age of 12, who in terms of the proposed definition of rape contained in the Discussion Paper on Sexual Offences, are not capable in law of appreciating the nature of an act of sexual penetration. This also applies to mentally impaired children younger than 16 years. Ms Clark mentioned that there is an irrebuttable presumption at common law that a female person under the age of 12 years is incapable of consenting to sexual intercourse. Based on this, Ms Clark submitted that a medical practitioner is not only obliged to report all cases where a child under the age of 12 requests a termination of pregnancy (such children are per definitions victims of sexual abuse) in terms of section 7 of the Choice

¹⁰⁰ The confidentiality relates to the identity of the woman (name and address) who has requested or obtained a termination of pregnancy - section 7(5) read with section 7(3). The medical practitioner or midwife who has performed the termination must record the prescribed information and give notice to the person in charge of the facility – sections 7(1) and (2). The person in charge of the facility must then notify the Director-General: Health who must keep proper records – sections 7(3) and (4).

on Termination of Pregnancy Act 92 of 1996 and section 42 of the Child Care Act, 1983 or section 4 of the Prevention of Family Violence Act 133 of 1993, but is required to retain the aborted baby as evidence of the crime. (Obviously, reporting of sexual abuse of children over the age of 12 by medical practitioners in terms of the relevant section of the Child Care Act, 1983 or the Prevention of Family Violence Act 133 of 1993, should depend on whether there are reasonable grounds to suspect sexual abuse.)

9.10.2 Evaluation and recommendations

Early in 2002, the world was shocked by the disclosures of child sexual abuse by priests, especially in the Roman Catholic Church. The Church itself came in for severe criticism for the manner in which such errant priests were dealt with and several law suits were instituted. A recurring theme linked to the disclosures was the imputed obligation on priests and the Church to report cases of sexual abuse in their midst to the relevant authorities. In the South African context, calls were also made for the extension to priests and religious leaders of the mandatory reporting obligation in section 42 of the Child Care Act, 1983, as the submission of Ms Smith above attests.

Seen from a broader context, the problems the Church faces highlight the difficulties associated with mandatory reporting alluded to in the discussion paper.¹⁰¹ These problems also raise issues such as confidentiality, accountability (in the context of reports made in good faith), and affordability. Clear guidance is needed on questions such as who should do the reporting, what should be reported, to whom and for what purpose.

In South Africa the reporting of cases of suspected child abuse is complicated by the fact that two legal provisions apply: Section 4 of the Prevention of Family Violence Act 133 of 1993 and section 42 of the Child Care Act, 1983. While the reporting obligation is common, the two sections differ fundamentally as to who should report (any person versus a closed category of professionals), as to what should be reported (ill-treatment or injury the probable cause of which was deliberate versus injuries and nutritional deficiencies), and the consequences of failure to report (no sanction versus criminal sanction). As recommended in the discussion paper, the Commission therefore recommends that the provision in the Prevention of Family Violence Act 133 of 1993 be

¹⁰¹ Par. 10.5.7.

repealed.

The decision to repeal section 4 of the Prevention of Family Violence Act 133 of 1993 called for a reconsideration of the question concerning to whom the reporting obligation should apply. In this regard, the Commission recommends that a duty be imposed on teachers, medical practitioners, nurses and other persons involved with a child in a professional capacity and who on personal observation conclude that a child has been ill-treated or is being deliberately maltreated, abused or neglected to report that conclusion to a social worker, police officer or the child and family court registrar.¹⁰² The Commission affords any other person who believes that a child is being ill-treated or deliberately being maltreated, abused or neglected the discretion to report such belief to a social worker, police officer or the child and family court registrar.¹⁰³ The person making the report may be asked to substantiate the conclusion or belief with facts.¹⁰⁴

Once the report has been made to the social worker, police officer or the registrar, that official must make an initial assessment of the report, investigate the truthfulness of the report, and if the report is substantiated by such investigation, immediately take steps to ensure the safety and well-being of the child concerned, initiate care and protection proceedings, and submit particulars concerning the matter to the Director-General for inclusion in the National Child Protection Register.¹⁰⁵

In drafting the reporting provision, care was taken to not to link the circumstances requiring a person to report to the broader child in need of care and protection criteria. As stated in the discussion paper,¹⁰⁶ the Commission is of the opinion that mandated reporting be limited and be followed by appropriate action aimed at protecting the child. The Commission's proposals in this regard are action driven in an attempt to address the needs of the child in need of care and protection at a local level. It is not the primary purpose of the Commission's proposal to serve as a statistical record of the number of reported cases, though it should also serve this function.

¹⁰² Section 167(1) of the Bill.

¹⁰³ Section 167(2) of the Bill.

¹⁰⁴ Section 167(3) of the Bill.

¹⁰⁵ Section 167(5) of the Bill.

¹⁰⁶ Par. 10.5.7.

However, the Commission maintains the linkage of the reporting obligation to the existing national child protection register. Provision is therefore made for a national child protection register to be kept and maintained by the Director-General: Social Development.¹⁰⁷ In terms of the Commission's recommendations, Part A of the register is to be a record of all incidents of reported child abuse and ill-treatment, all convictions of parents, care-givers, or family members of children on charges involving the abuse or deliberate neglect of the child, and all determinations by the child and family court that a child is in need of care and protection because of the abuse or deliberate neglect of the child.¹⁰⁸ It is a combined child protection and (convicted) offender register. The purpose of this part of the register is to have a record of abuse and deliberate neglect inflicted upon specific children and to use the information on the register to protect these children from further abuse and neglect. The Bill prescribes what must be recorded in this part of the register and regulates access to and disclosure of information contained in it.¹⁰⁹

The purpose of Part B of the register is to establish a record of persons unsuitable to work with children in order to protect children in general from these persons.¹¹⁰ In line with the British approach described above, the Commission prescribes procedures in terms of which findings can be made that a particular person is unfit to work with children.¹¹¹ Such findings are reported to the Director-General: Social Development.¹¹² No person whose name appears in Part B of the register may manage or operate a child and youth care centre, a partial care facility, a shelter or a drop-in centre or even assist in the management thereof; work with children at such facilities, either as an employee, volunteer or in any other capacity; or act as a foster parent, kinship care-giver or adoptive parent; or work in any unit of the South African Police Service tasked with child protection.¹¹³ Before a person is allowed to work with children at a child and youth care centre, a partial care facility, a shelter or a drop-in centre, or in a unit of the SAPS tasked with child protection, the manager of such facility or the SAPS must establish whether or not that prospective employee's name appears in Part B of the register.¹¹⁴ Given the

¹⁰⁷ Section 120(1) of the Bill.

¹⁰⁸ Section 122(1) of the Bill.

¹⁰⁹ Sections 122(2), 123 and 124 of the Bill.

¹¹⁰ Section 125 of the Bill.

¹¹¹ Section 127 of the Bill.

¹¹² Section 129 of the Bill.

¹¹³ Section 130(1) of the Bill.

¹¹⁴ Sections 132(1)(a) and (c) of the Bill.

serious legal consequences to being find a person unsuitable to work with children, provision is made for a dispute resolution mechanism,¹¹⁵ access to the register,¹¹⁶ and the removal of names from the register.¹¹⁷ Disclosure of names in Part B of the register is prohibited.¹¹⁸

As far as the confidentiality provision in the Choice on Termination of Pregnancy Act, 1996, is concerned, the Commission is of the opinion that the problem is not so much related to the lack of reporting by health practitioners, even though this is a concern, but rather the absence of any clear linkage to reporting provisions in other legislation. To overcome this problem, the Commission provides for a supremacy clause in terms of which a medical practitioner or a registered midwife will be obliged to report to a social worker, police officer or the child and family court registrar the fact that a girl under the age of 12 years was pregnant and had her pregnancy terminated if that pregnancy was due to the sexual abuse of that girl.¹¹⁹

¹¹⁵ Section 128 of the Bill.

¹¹⁶ Section 131 of the Bill.

¹¹⁷ Section 134 of the Bill.

¹¹⁸ Section 133 of the Bill.

¹¹⁹ Section 167(4) of the Bill.

CHAPTER 10

THE PROTECTION OF THE HEALTH RIGHTS OF CHILDREN

10.1 Introduction

This chapter examines how children's health rights can be promoted and protected through legislation and policy. As such, it covers aspects such as the right of children to basic health care services, consent to medical treatment and/or surgical intervention, HIV testing, confidentiality of information relating to the HIV status of children, access to contraceptives, access to termination of pregnancy services and the right to refuse medical treatment.

10.2 Children's right to basic health care services

10.2.1 Overview of the proposals in Discussion Paper 103

Section 28(1)(c) of the Constitution¹ states that every child has a right to basic health care services. It is, however, not clear what this 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 right to basic health care services is debatable. The Commission accordingly recommended that children's right to basic health care services be confirmed in both the new Children's Bill and the National Health Bill. Furthermore, 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.²

10.2.2 Comments received

¹ Constitution of the Republic of South Africa, Act 108 of 1996.

² Par. 11.3.4 of the discussion paper.

There was wide spread support for the Commission's recommendations amongst the respondents who commented on this section. Some of the respondents also made additional suggestions. For instance, the **Department of Health**, Pretoria, proposed that both the new Children's Bill and the National Health Bill must contain core minimum requirements for the state in providing for the health care of all children, irrespective of any special needs they may have. This proposal is shared with **Ms Sanet Van Moerkerken** who also suggested that the State should provide basic health care services to all children under the age of 18 who are not able to pay for such services.

10.2.3 Evaluation and recommendations

In view of the support received for the Commission's recommendations made in the discussion paper, the Commission reaffirms its preliminary recommendations. In addition to these recommendations and in line with the Department of Health's suggestion, the Children's Bill sets out certain requirements for the state in providing for the health of all children, including those with additional health care needs.³

10.3 Consent to medical treatment and/or surgical intervention

10.3.1 Overview of the proposals in Discussion Paper 103

The Commission recommended 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.⁴ In order to provide for a simpler procedure to obtain consent to medical treatment or an operation, the Commission recommended 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. Furthermore, 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.⁵ The

³ Sections 232(1)(a)(iv) and (xiv) - (xv) of the Bill.

⁴ Par. 11.4.5 of the discussion paper. Consent to medical treatment or an operation in terms of the proposed child care legislation would be subject to the provisions of the Choice on Termination of Pregnancy Act (Act 92 of 1996) which require only the consent of a pregnant woman, including a minor.

⁵ Ibid.

procedure set out in section 39(1) of the Child Care Act⁶ which requires a medical practitioner to apply to the Minister for consent (in instances where a parent or guardian refuses to give 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 recommended that the children's court, instead of the Minister, be approached to obtain the necessary consent.⁷ The Commission further recommended that the new children's statute should explicitly provide that no child may be submitted to any medical treatment and/or surgical intervention without consent.⁸ 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.

10.3.2 Comments received

There was widespread support for the Commission's recommendations. However, **Africa Christian Action** disagreed with the recommendation that the age at which children may consent to medical treatment be lowered to 12. The respondent argued that a child as young as 12 lacks the maturity to consent to medical treatment. This view is shared with **Jimmy and Lizelle Meyer**. A contrary view was expressed by **Manamela Damons Mbanjwa inc.** (attorneys) who stated that 12 as the age at which children may consent to medical treatment is still too high. The respondent argued that a child of any age should be able to give informed consent to his or her own medical treatment regardless of the urgency of the situation. In order to substantiate its view point, the respondent stated that if a girl child chooses to terminate a pregnancy without her parents' consent or knowledge, such child should be able to consent to any medical treatment or operation (without parental consent) which may be needed to rectify or treat a condition resulting from the termination of the pregnancy. Furthermore, if a child chooses to undergo treatment for a sexually transmitted disease (without his or her parents' knowledge) and such treatment requires a medical intervention not directly related to the treatment for the sexually transmitted disease, then such a child should be able to give consent to that medical intervention without parental consent.

Children's Rights Project and Local Government Project (Community Law

⁶ 74 of 1983.

⁷ Ibid.

⁸ Ibid.

Center, UWC) asserted that the proposed age of 12 at which children may consent to medical treatment without parental consent is somewhat arbitrary and contrived. The respondents stated that by making use of the requirement that a child must be capable of forming his or her own views, the Convention on the Rights of the Child is allowing a greater number of children to participate in decisions as a child's capacity varies according to his or her individual development, and events in question are not necessary dependent on his or her age. The respondents therefore recommended that a child, who by his/her age or maturity is capable to do so, should be able to consent to medical treatment without his or her parents' assistance.

Manamela Damons Mbanjwa inc. (attorneys) recommended that children's constitutional right to information regarding their own health care, privacy and bodily integrity should be acknowledged. Furthermore, medical practitioners should be required to inform and advise a child of any age, on the basis of the prudent or individual patient, on any proposed medical interventions. The respondent stated that the reasoning that children would not understand is negated by studies done in the United Kingdom by Alderson (Alderson 1990, 1993). The respondent argued that there is no reason why children may not be informed, in a manner they can understand, of an intended medical procedure.

This respondent also stated that currently, no provision is made for children under the age of 14 who are parents to consent to medical interventions in respect of their children. The respondent mentioned that some States in the USA have overcome this obstacle in that parenthood automatically emancipates a person. The respondent thus recommended that parenthood should emancipate minors in order to enhance their chance of survival and that of their offspring.

Department of Health, Pretoria, agreed that the procedure in section 39(1) of the Child Care Act is impractical. The respondent therefore suggested that the medical superintendent of a hospital or, in remote areas where some hospitals may not have full-time superintendents the children's court, be approached for consent to medical treatment or surgical intervention in the absence of such consent by the parent or guardian. **E.N Maonela, Department of Social Development**, Free State agreed that section 39(1) of the Child Care Act be amended to provide that the children's court, instead of the Minister, be approached to obtain the necessary consent for medical treatment of or an operation on a child. This view is shared with **Ms R van Zyl**. A contrary view was expressed by **Mr Des Rothman**. He stated that many, if not most, instances where a child may require medical treatment or an operation

relate to children who are not subject to current children's court enquiries. He said that it will be impractical to expect commissioners of child welfare, who represent the judiciary, to handle matters affecting the health of all children. He recommended that the Minister for Social Development must delegate this function to responsible senior representatives within the provinces.

The Department of Health, Pretoria, agreed that the age at which a child should be able to consent to medical treatment and/or surgical intervention should be synchronised through the new child care legislation. The respondent stated that this will facilitate uniformity of application by the various sectors, i.e. government, private and non-governmental organisations.

The **Consortium** suggested that the head of a health facility should be allowed to consent to certain basic medical treatment for children living in child-headed households as the procedure recommended by the Commission, i.e. that the child and family court be approached, may prove to be cumbersome for these categories of children. Also, medical treatment should be defined to include mental health care services such as psychology sessions and counselling, and dental services.

10.3.3 Evaluation and recommendations

The Commission is mindful of the fact that children's capacity to understand the full implications of medical treatment varies according to their individual development and maturity. However, there are no indicators for determining maturity. Thus, a provision that a child (of any age) who is of sufficient maturity may consent to medical treatment could be abused where a parent or primary caregiver is not readily available. The Commission therefore reaffirms its preliminary recommendation that the age at which children may consent to medical treatment be lowered to 12.⁹ In addition, the Commission recommends that before a child 12 years of age can give consent to medical treatment, he or she should also have the mental capacity to understand the benefits, risks and social implications of such treatment.¹⁰

The Commission does not agree with Manamela Damons Mbanjwa's proposal that parenthood should automatically emancipate minors. Given the high rate of teenage pregnancies in South Africa, such a provision would not be in the best interests of many children (most from disadvantaged communities) as they would be deprived

⁹ Section 135(2)(a)(i) of the Bill.

¹⁰ Section 135(2)(a)(ii) of the Bill,

from the protections enjoyed by children.

The Commission has given due consideration to Mr Rothman's view that the child and family court should not be burdened by requiring it to give consent to medical treatment or an operation for certain children. The Commission wants to highlight that the proposed provision that the child and family court may consent to medical treatment of or an operation on a child would not overburden the court for the following reasons. The Commission recommends that the superintendent of a hospital may consent to medical treatment of or an operation on a child in emergency situations.¹¹ A person who is not a holder of parental responsibilities and rights in respect of a child, but who cares for that child may consent to medical treatment of that child if such consent cannot reasonably be obtained from the parent or primary care-giver of that child.¹² A relative caring for a child in terms of an informal kinship care arrangement may consent to the medical treatment of or an operation on that child.¹³ Furthermore, the superintendent of a hospital may consent to any medical treatment of or an operation on a street child or a child in a child-headed household under the age of 12 years or where such child is over the age of 12 years, assist him or her to consent to an operation.¹⁴ Thus, applications to the child and family court for consent to medical treatment or an operation would be minimal. The Commission reaffirms its preliminary recommendation that the child and family court, instead of the Minister, be approached for consent to medical treatment or an operation in certain instances.¹⁵

10.4 HIV testing in relation to placement of children in need of care

10.4.1 Overview of the proposals in Discussion Paper 103

As stated in the discussion paper, an HIV test may often not be in the best interests of a child because it can be used to discriminate against a child.¹⁶ The Commission therefore recommended that no child may be tested for HIV without consent and HIV testing may only take place where this is in the best interests of the child. The Commission further recommended that, where appropriate, a child should receive

¹¹ Section 135(4) of the Bill.

¹² Section 44(2) of the Bill.

¹³ Section 207(1)(b) and (3) of the Bill.

¹⁴ Section 237 of the Bill. This is in line with the Consortium's suggestion that the head of a hospital, instead of the child and family court, be approached for consent to medical treatment of or surgical intervention on children in child-headed households.

¹⁵ Section 135(5) of the Bill.

¹⁶ Par. 11.5.5

pre- and post-test counseling. The Commission also recommended as follows:¹⁷

- 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 has taken 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 recommended 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.¹⁸

10.4.2 Comments received

¹⁷ Ibid.

¹⁸ Ibid.

Manamela Damons Mbanjwa inc. (attorneys) submitted that an HIV-test should be considered as a medical intervention based on the child's right to privacy, bodily integrity and the right not to be discriminated against. Furthermore, as HIV/AIDS is a sexually transmitted disease, all children should have free access to compulsory counselling, particularly after being informed about the test result whether the test result was negative or positive.

Responding to the Commission's recommendation that a child under the age of 12 years who is of sufficient maturity to understand the benefits, risks and possible social implications of an HIV test may consent to such a test, **Christian Lawyers Association of Southern Africa** submitted that this recommendation does not place the responsibility to make the decision regarding the child's maturity with the parent or guardian of such a child. This view is shared by Justice Edwin Cameron who submitted that a statutory provision to this effect could easily be abused if a parent or substitute decision-maker is not readily available. Christian Lawyers Association of Southern Africa further suggested that the consent of the parent or guardian should be obtained before any child is tested for HIV/AIDS. Furthermore, pre- and post-test counselling must be provided to parents in order to enable them to assist the child in dealing with the results of an HIV/AIDS test.

H. Gerryts, Department of Social Development, Free State stated that "when a child is of sufficient maturity" to understand the benefits, risks and possible social implications of an HIV test needs to be defined.

The **Dutch Reformed Church**, Pretoria, stated that it is difficult to determine when a child is mature enough to make difficult choices and to know what is in his or her best interest. The respondent proposed that a professional assessment of the child's maturity should be made before he or she is allowed to give consent for an HIV test.

E.N Maonela, Department of Social Development, Free State, supported the Commission's recommendation that the PCR test be made available to babies for purposes of permanency planning. **Ms R van Zyl** was also in favour of this recommendation.

Justice Edwin Cameron submitted that, instead of testing children for HIV for purposes of adoption at state cost, consideration should be given to the alternative of having such testing done at the cost of the prospective adoptive parents. This, in his view, would be preferable to a situation where a test is not done at all (because the

state might not be able to afford testing) and the placement is cancelled at a later stage.

The **Consortium** supported the Commission's recommendation that no child may be tested for HIV without consent and that HIV testing may only take place where this is in the best interests of the child. The Consortium suggested that a list of criteria which must be considered when applying the best interests principle in relation to HIV testing should be developed. Criteria should include consideration of whether the benefit in testing is outweighed by the stigma the child is likely to face when returning home, whether the child has received counselling, whether post-test counselling is available, and whether appropriate care and treatment are available. The Consortium was also in favour of the Commission's recommendation with regard to the PCR-test.

Ms Annette van Loggerenberg agreed with the Commission's recommendations.

10.4.3 Evaluation and recommendations

The Commission has given due regard to the concerns raised as to when a child under the age of 12 would be of sufficient maturity to understand the benefits, risks and social implications of an HIV test. The Commission wants to point out that a person who conducts an HIV test on a child must have a reasonable belief that the child is of sufficient maturity to understand the implications of an HIV test before testing the child for HIV. Furthermore, the 'reasonable man' principle is well established in our law and does not need to be explicitly stipulated in legislation. Thus, if the maturity of a child is in dispute, the court would be able to determine whether the person who has conducted an HIV test on a child had, in light of the circumstances, a reasonable belief that the child was of sufficient maturity to understand the benefits, risks and social implications of an HIV test.

The Commission sees merit in Justice Cameron's proposal that testing children for HIV for purposes of adoption should be done at the cost of the adoptive parents. However, testing children for HIV, particularly babies, for purposes of recruiting appropriate adoptive or foster parents is often necessary, even before adoptive or foster parents for the child have been found. The Commission therefore recommends that HIV testing on children younger than three years of age for foster or adoption purposes must be done at state expense.¹⁹

¹⁹ Section 137 of the Bill.

The Commission retains its preliminary recommendation that pre- and post-test HIV counselling should be provided to a child where applicable.²⁰ The Commission further agrees with Christian Lawyers Association of Southern Africa's recommendation that pre- and post-test counselling should also be provided to the parents of a child who is to be tested for HIV. This is important as the results of an HIV test will undoubtedly have profound implications for the entire family. However, care should be taken that the child's right to confidentiality is not infringed when counselling is provided to a family member other than the child.²¹

In view of the support received for the Commission's recommendations regarding the PCR test, these recommendations have been retained.

The Commission has taken note of the National Policy on testing for HIV which sets out the circumstances in which HIV testing may be conducted without consent. The Commission is mindful of the fact that compulsory HIV testing curtails a person's right to privacy and bodily integrity and that any infringement of these rights should not be greater than what is necessary. In order to ensure the minimum infringement of the rights of a child, the Commission recommends that a child may only be tested for HIV without consent if the test is necessary in order to establish whether a health care worker may have contracted HIV due to contact in the course of a medical procedure with any substance from the child's body that may transmit HIV. However, where a person, other than a health care worker, has come in contact with any substance from the child's body that may transmit HIV, the Commission considers it necessary that an order of court must be obtained before a child can be subjected to an HIV test without consent.²²

10.5 Confidentiality of information relating to the HIV status of children

10.5.1 Overview of the proposals in Discussion Paper 103

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

²⁰ Pre- and post-test counselling will not be necessary if the child concerned is not of sufficient maturity to understand the implications of an HIV test.

²¹ Section 138 of the Bill.

²² Section 136(1)(b) of the Bill.

reason, the Commission recommended as follows:²³

- A child of 12 years of age and older 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 invited comment in this regard.
- 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.

10.5.2 Comments received

Christian Lawyers Association of Southern Africa submitted that even if a child understands the benefits, risks and social implications of an HIV/AIDS test, no information regarding his or her HIV/AIDS status should be disclosed unless the consent of the parent or guardian is obtained.

The **Consortium** supported the Commission's recommendations regarding confidentiality and disclosure of the outcome of a child's HIV test. With regard to the recommendation that 'All practitioners ... should have a legal duty to consider the possible consequences of disclosure of information ... before providing this information to third parties', the respondent suggested that the words 'parents and caregivers' be inserted before the words 'third parties'. The Consortium submitted that health personnel must take into account the harm the child or the child's mother

²³ Par. 11.6.5 of the discussion paper.

is likely to suffer if the result of an HIV test is disclosed to a certain person, for instance, the child's father. The Consortium stated that many women are blamed for having HIV and suffer violence from their partners when their partners find out about their HIV status. Pre-disclosure counselling of the father is vital in such cases.

10.5.3 Evaluation and recommendations

The Commission takes note of the Consortium's concern that many women suffer violence from their partners should it become known that their children are HIV positive. However, it would be difficult to deny a father access to information on his child's HIV status, particularly where the father has given consent to and paid for the HIV test. The problem can therefore not be addressed through legislation. As no other adverse comments were received, the Commission retains the rest of its preliminary recommendations made in the discussion paper. In addition to these recommendations, the Children's Bill also provides for the disclosure of a child's HIV status in certain circumstances by a designated child protection organisation, the head of a hospital or a child and family court.²⁴

10.6 Access to contraceptives

10.6.1 Overview of the proposals in Discussion Paper 103

In order for young persons to make informed choices regarding the age of initiating sexual activity and protecting themselves against unwanted pregnancies and sexually transmitted diseases, they need access to appropriate family planning services. The Commission therefore recommended that confidential access to contraceptives should be provided to all sexually active persons regardless of age. The Commission further recommended that access to contraceptives and information on contraceptives should be at state expense where necessary and should not be linked to medical treatment.²⁵ Furthermore, any child should be able to obtain treatment for sexually transmitted diseases regardless of age.²⁶

10.6.2 Comments received

²⁴ Section 139 of the Bill.

²⁵ Par. 11.7.5 of the discussion paper.

²⁶ Par. 11.4.5 of the discussion paper.

A substantial number of the respondents to the discussion paper did not support the recommendation that confidential access to contraceptives should be provided to all sexually active persons regardless of age. They argued, from a biblical point of view, that no child under the age of 18 should be provided with access to contraceptives and that children should be taught to abstain from sex before marriage. Those respondents who were in favour of the Commission's recommendation suggested that confidential access to contraceptives should only be provided to children over the age of 12 years. The following are selected comments from some of the respondents.

With reference to recent scientific research, **Doctors For Life** submitted that oral or injectable contraceptive users have a 50% greater risk of cervical cancer than non-users. Also, women starting the pill at an earlier age are at an increased risk of developing cervical cancer. The respondent further submitted that, given the risks involved in oral or injectable contraceptives, the unreliability of barrier methods and the inability of children to make choices based on future consequences, it is not logical to allow children confidential access to contraceptives.

Ms Dellene Clark stated that the Commission's recommendation does not take cognisance of the fact that, in terms of the current law and as proposed in the Sexual Offences Discussion Paper, children below the age of 12 and in certain circumstances below the age of 16 years are not capable of consenting to sexual intercourse. In her view, children should not be given access to oral contraceptives without their parents' consent. Furthermore, condoms should not be made available to children who are legally not capable of consenting to sexual intercourse.

Christian Lawyers Association of Southern Africa stated that children should be given sex education only with the consent of their care-givers. The respondent proposed that a parent committee be elected at each school which should decide on the nature of sex education provided to the children at that school. The respondent suggested that only children who may legally consent to sex should be allowed to have access to contraceptives provided that the consent of their care-givers has been obtained. The respondent argued that it is not natural for a child to be sexually active and this is often an indication that such a child may be in need of care. The respondent therefore recommended that all children who are found to be sexually active should be counselled with the view to investigate whether there are any underlying problems. **Ms Susan Mogadima** stated that information on contraceptives should be made available to children on a case by case basis taking

into account the maturity and age of a child.

Jimmy and Lizelle Meyer submitted that children should not be provided with confidential access to contraceptives and that parental consent should be required for the treatment of sexually transmitted diseases. The respondents further stated that children under the age of 12 requiring contraceptives are being abused and suggested that the circumstances of such children be investigated. **Africa Christian Action** also did not support the recommendation that any child should be able to obtain treatment (without parental consent) for sexually transmitted diseases. The respondent submitted that parents should be able to monitor the child's use of the medication. Furthermore, if parental consent is needed for the treatment of sexually transmitted diseases, parents will be able to address the situation which has caused the transmission of the disease. **Ms Beena Chiba** agreed, however, that any child should be able to obtain treatment for sexually transmitted diseases regardless of age.

The **Children's Rights Project and Local Government Project** (Community Law Centre, UWC) supported the Commission's recommendation that children of any age should obtain information on and access to contraceptives. The respondent mentioned that studies have found that the lack of family counselling and services causes irreparable physical and social damage to adolescents, particularly girls. The respondent is thus of the view that the implications of not having access to contraceptives without parental consent far outweigh any arguments relating to the exercise of parental responsibility. Furthermore, the Commission's recommendation is a reasonable and justifiable limitation of parental responsibility.

N E Phonyana submitted that children should also be provided with sexuality and HIV/AIDS education.

Ms Sanet Van Moerkerken agreed that access to and information on contraceptives should be at state expense where necessary and should not be linked to medical treatment.

Johannesburg Child Welfare submitted that the provision of contraceptives to children should be determined by their maturity and that counselling and support be provided to children who request contraceptives.

10.6.3 Evaluation and recommendations

In light of the criticisms received, the Commission has reconsidered its recommendation regarding confidential access to contraceptives. The Commission accordingly recommends that all children should be provided with confidential access to condoms and that no person may refuse to sell condoms to a child or to provide a child with condoms that are available free of charge.²⁷ The Commission realises that this recommendation is in conflict with the fact that children under the age of 16 are not legally capable of consenting to sexual intercourse. However, the Commission cannot lose sight of the fact that children are sexually active from a very young age. This is confirmed by recent media reports.²⁸ Furthermore, given the increase of HIV/AIDS, especially amongst teenagers, it would be unwise to deny children access to condoms.²⁹

The Commission has taken cognisance of the fact that oral and injectable contraceptives can have side effects, some of a severe nature. Furthermore, the only benefit of taking these contraceptives is that it may prevent pregnancy. It does not protect the user from sexually transmitted diseases such as HIV/AIDS. The Commission therefore recommends that confidential access to contraceptives other than condoms should be restricted to children over the age of 12 years. However, proper medical advice must be given to the child and a medical examination must be carried out on the child to determine whether there are any medical reasons why a specific contraceptive should not be provided to the child.³⁰

The Commission agrees with Christian Lawyers Association of Southern Africa's view that a child who is sexually active may be a child in need of care. It is thus important that a medical practitioner or nurse who provides a child with

²⁷ Section 140(1) of the Bill.

²⁸ Legalbrief News Diary 'Five school children appeared in the Johannesburg Regional Court in connection with the rape of a 13-year-old girl' 8 November 2002; Legalbrief News Diary 'A 10-year-old Bloemfontein boy, suspected of having raped a baby, has been ordered to be held in the cells of the Juvenile Court' 28 October 2002; Legalbrief News Diary '14-year-old youth charged with the murder and raped of a toddler' 25 September 2002; Keshni Odayan 'Teen jailed for 5 years for statutory rape' The Mercury 18 September 2002. A research study on HIV/AIDS by the Human Sciences Research Council (2002) found that the HIV prevalence rate for children 2-14 was unexpectedly high at 5.6%. The study draws no conclusion on how these children were infected, but states that possible factors to be investigated are sexual abuse and exposure to unsterile needles.

²⁹ A research study on HIV/AIDS by the Human Science Research Council (2002) estimates the overall HIV prevalence in the South African Population (over the age of two) to be 11.4% and that the HIV prevalence among those aged 15-49 was 15.6%. The study also found that condom use amongst sexually active youth aged 15-24 is high, with 57.1% of males and 46.1% of females having used a condom at last sexual intercourse. This is supported by high levels of perceived access to condoms – with over 90% of youth and adults reporting that they could obtain a condom if they needed one.

³⁰ Section 140(2) of the Bill.

contraceptives and who concludes that that child is in need of care and protection, reports that conclusion to a designated child protection organisation, police officer or child and family court registrar.³¹

The Commission is of the view that confidential access to contraceptives should go hand in hand with appropriate sex education. The Commission therefore recommends that the Department of Education should ensure that sex and HIV/AIDS education form part of the school curriculum.

The Commission retains its preliminary recommendations that children should have confidential access (without parental consent) to treatment for sexually transmitted diseases regardless of age and that access to contraceptives and information on contraceptives should be provided, where necessary, at state expense. In addition, the Commission recommends that a medical examination before providing a child with oral or injectable contraceptives should be provided, where necessary, at state expense.

10.7 Access to termination of pregnancy services

10.7.1 Overview of the proposals in Discussion Paper 103

The Choice on Termination of Pregnancy Act (Act 92 of 1996) provides a girl child of any age with the right to choose to terminate a pregnancy without parental consent. The Commission accepted in the discussion paper 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.³²

10.7.2 Comments received

Some respondents to the discussion paper submitted that it is the right and duty of parents to guide their children with regard to a decision to terminate a pregnancy. The argument seems to be that the Children's Bill should override the Choice on Termination of Pregnancy Act by requiring parental consent for the termination of a pregnancy. The following are selected comments received from some of the

³¹ Section 167(1) of the Bill.

³² Par. 11.8.3.

respondents.

Doctors for Life submitted that consent to an abortion involves an exercise of choice, and in order to make good choices, an adolescent must be able to anticipate long-term effects and weigh the risks and benefits of each available option. The respondent contended that adolescents lack this ability. The respondent brought to the Commission's attention the results of recent scientific and medical research into the effects of an abortion on a child undergoing an abortion and new evidence applying to anyone having an abortion.

Manamela Damons Mbanjwa inc. (attorneys) recommended that pre-termination of pregnancy counselling should be made compulsory for a girl child regardless of age. The respondent suggested that all women, including minors, should be warned about the dangers of multiple abortions. **Department of Social Development**, Free State, also submitted that the right to have access to termination of pregnancy services should include pre- and post abortion counselling.

Christian Lawyers Association of Southern Africa proposed that the State should allocate money towards advocating the alternatives to abortions by, for instance, promoting abstinence, faithfulness in marriage, adoptions, help to unwed mothers to be able to keep their babies and creating an effective way of enforcing maintenance orders. Furthermore, girls who request an abortion should be given mandatory counselling before and after the abortion and their parents must be informed. Also, the need for intervention must be investigated as the child may be a victim of sexual abuse.

10.7.3 Evaluation and recommendations

The Commission takes cognisance of the concerns raised in respect of the termination of a pregnancy without parental consent. It has come to the Commission's attention that the Christian Lawyers Association has instituted action in the High Court of Pretoria against the Minister of Health, the Premier and MEC for Health of Gauteng to challenge section 5 of the Choice on Termination of Pregnancy Act which allows termination of pregnancy without parental consent. Pending the outcome of this case, the Commission decides to keep in abeyance any recommendations on the issue of termination of pregnancy without parental consent.

The Commission is mindful of the fact that a girl requesting a termination of pregnancy may be a victim of sexual abuse. Furthermore, the sexual abuse of a girl may be concealed as the Choice on Termination of Pregnancy Act provides that the identity of a woman who has requested or obtained a termination of pregnancy must remain confidential at all times unless she herself chooses to disclose that information.³³ The Commission therefore recommends that a medical practitioner or a registered midwife performing a termination of pregnancy on a girl must, despite any provisions of the Choice on Termination of Pregnancy Act requiring confidentiality, report the case if the pregnancy was due to sexual abuse of the child.³⁴

The Commission recommends that the Choice on Termination of Pregnancy Act (Act No. 92 of 1996) be amended by requiring that pre- and post-termination of pregnancy counselling be made compulsory for children. Furthermore, if it comes to light during the pre-termination of pregnancy counselling of the child that a sexual offence has been committed against the child, the necessary steps must be taken to ensure the protection of the child.

10.8 Right to refuse medical treatment

10.8.1 Overview of the proposals in Discussion Paper 103

As a refusal of medical treatment may lead to a child's death or permanent damage, the Commission recommended that every child above the age 12 of sound mind and *assisted by his or her parent or guardian*, should be 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. Furthermore, 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 a medically accepted alternative choice.³⁵

³³ Section 7(5) of the Choice on Termination of Pregnancy Act 92 of 1996.

³⁴ Section 167(1) read with section 167(4) of the Bill.

³⁵ Par. 11.9.5 of the discussion paper.

10.8.2 Comments received

Pro-life did not support the Commission's recommendations.

Manamela Damons Mbanjwa inc. (attorneys) argued that the right to give consent to medical treatment includes the right to refuse medical treatment. The respondent recommended that all children be given the right to refuse medical treatment and that the High Court as upper guardian of all minors should be approached to review such refusal. Furthermore, the child's voice must be heard and his or her age must not be a criteria to overrule a refusal to medical treatment, but the ability of a child to understand the consequences of his or her refusal and to make an informed decision should be the determining factor.

Ms R van Zyl did not agree that children, even with the assistance of their parents, be able to refuse medical treatment.

10.8.3 Evaluation and recommendations

Although the right to refuse medical treatment has been addressed in the discussion paper, the Commission sees no need to include specific provisions relating to the right to refuse medical treatment in the Children's Bill as the Children's Bill already provides that no child may be submitted to medical treatment without consent. The Commission reaffirms its preliminary recommendation that no child may be deprived of medical treatment by reason only of religious or other beliefs, unless the person who refuses to give consent can show that there is a medically accepted alternative choice. In addition, the Commission proposes that this recommendation be extended to cover a medical operation. This recommendation has been incorporated in the Children's Bill.³⁶

³⁶

Section 135(6) of the Bill.

CHAPTER 11

THE PROTECTION OF CHILDREN AS CONSUMERS

11.1 Introduction

Children are significant consumers of goods and services. Markets in toys, fast food, entertainment and clothes are directed explicitly at children.¹ In addition, children have an indirect effect on the marketplace through the influence they have on the way their parents and other adults spend money. This Chapter considers the appropriateness and effectiveness of the legal process in protecting children as consumers.

11.2 Overview of the proposals in Discussion Paper 103

11.2.1 Protecting and informing children as consumers

In order to educate children on their consumer rights, the Commission recommended that national child consumer education strategies should be developed for implementation in all primary and secondary schools by the Department of Education in consultation with the Department of Trade and Industry.²

11.2.2 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 recommended 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.³

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

¹ Shirley Fairall 'Who's the boss?', **Fair Lady** 25 April 2001, p. 71.

² Par. 12.3 of the discussion paper.

³ Par.12.6 of the discussion paper.

requirements before being placed on the market. The European Union system is one of presumed compliance. It involves manufacturers certifying that their products comply 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. The Commission 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.⁴

11.2.3 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.⁵ Also, given the practical difficulties in defining harmful substances, the Commission did not recommend the enactment of a provision in the new children's statute prohibiting the sale of harmful substances to children.⁶

The Commission supported 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 condemned the sale of these to children and adults alike.⁷

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 license 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

⁴ Ibid.

⁵ See also Copeland P 'Recommendation: Ban on solvents to minors' Legal Resource Centre.

⁶ Par.12.7.3 of the discussion paper.

⁷ Ibid.

reform schools to treatment centres. The Commission regarded 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 did not recommend the inclusion of such provisions in the new children's statute.⁸

As stated in the discussion paper, legislation alone 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.⁹ The Commission therefore supported the Health Promoting Schools Initiative and the National Drug Prevention Strategy.

11.2.4 Safety at places of entertainment

In some of the newer legislation, provisions are found which protect the safety of children at places of entertainment. One such example is section 271 of the Ireland Children Bill, 1999.¹⁰ It reads as follows:

- (1) Where -
- (a) an entertainment for children or any entertainment at which the majority of the persons attending are children is provided,
 - (b) the number of children who attend the entertainment exceeds one hundred, and
 - (c) access to any part of the building in which children are accommodated is by stairs, escalators, lift or other mechanical means,

it shall be the duty of the person who provides the entertainment -

- (i) to station and keep stationed wherever necessary a sufficient number of adult attendants, properly instructed as to their duties, so as to prevent more children or other persons being admitted to any such part of the building than that part can properly accommodate,
- (ii) to control the movement of the children and other persons admitted to any such part while entering and leaving, and
- (iii) to take all other reasonable precautions for the safety of the

⁸ Ibid.

⁹ See also **Research highlights of the latest MRC Annual Report (19 September 2002)**, Medical Research Council of South Africa.

¹⁰ See also section 19 of the Lesotho Children's Protection Act 6 of 1980.

children.

(2) Where the occupier of a building permits, for hire or reward, the building to be used for the purpose of an entertainment, he or she shall take all reasonable steps to ensure that the provisions of this section are complied with.

(3) If any person on whom any obligation is imposed by this section fails to fulfill it, he or she shall be liable, on summary conviction, in the case of a first offence, to a fine not exceeding £500 or imprisonment for a term not exceeding 6 months or both and, in the case of a second or subsequent offence, to a fine not exceeding £1,500 or imprisonment for a term not exceeding 12 months or both.

(4) A member of the Garda Síochána may enter any building in which he or she has reason to believe that such an entertainment as aforesaid is being, or is about to be, provided with a view to seeing whether the provisions of this section are complied with.

(5) This section shall not apply to any entertainment given in a private residence.

Section 114 of the draft Namibia Children's Act is similar to the Ireland provision, with one addition. Sections 114(3) and (4) of the draft Act provide that, in addition to the possibility of a fine and or imprisonment as punishment for violation of the section, a court may cancel any license issued under any law for the operation of the premises for performances, entertainment, or events to a convicted person who has also been convicted within the last five years of an offence under this section. Such cancellation of a license shall also disqualify the person in question from obtaining any license for a place of entertainment for five years from the date of that person's latest conviction.

The Commission recommended that a provision similar to the Namibian provision be included in the new children's statute.¹¹

11.2.5 Media regulation

11.2.5.1 Television broadcast

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

¹¹ Par. 12.8 of the discussion paper.

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 recommended 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.¹²

11.2.5.2 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.

11.2.5.3 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

¹² Par. 12.9.1 of the discussion paper.

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.

11.2.5.4 Printed material

Although the Films and Publications Act 65 of 1996 as amended sets out certain conditions for the advertising 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.

As stated in the discussion paper, the Commission will be considering all aspects relating to child pornography in its investigation into sexual offences.¹³ The Commission, however, recommended that as an interim measure the Department of Home Affairs, as the Department responsible for the administration of the Films and Publications Act 65 of 1996 should 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 recommended 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.¹⁴

11.2.5.6 Advertising

The Commission recommended 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. Furthermore, the Departments of Communications, Home Affairs, Trade and Industry, the Independent Communications Authority of South Africa and the Advertising Standards Authority of

¹³ Par. 12.9.4.

¹⁴ Par. 12.9.4 of the discussion paper.

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.¹⁵

11.3 Comments received

The **Department of Health**, Pretoria, admitted that it is difficult to enforce the prohibition on the sale of harmful substances to children. The respondent, however, submitted that not legislating on the issue will open a bigger and more serious ‘can of worms’. The respondent suggested that a multi-sectoral ad-hoc committee should be established to define harmful substances, and through community involvement, a list of what harmful substances are could be developed.

11.4 Evaluation and recommendations

In view of the Department of Health’s comments, the Commission is of the view that the issue of the sale of harmful substances to children should be addressed in a separate investigation. The purpose of such an investigation should be to define harmful substances and to determine what legislative and/or non-legislative provisions can be introduced to regulate the sale of harmful substances to children. As no other adverse comments were received, the Commission reaffirms its preliminary recommendations. The Commission has included in the Children’s Bill provisions with regard to child safety and places of entertainment.¹⁶ Furthermore, the Commission urges the various Departments and institutions referred to above to take positive steps which will give effect to the Commission’s recommendations.

¹⁵ Par. 12.10 of the discussion paper.

¹⁶ See section 143 of the Bill.

CHAPTER 12

CHILDREN IN ESPECIALLY DIFFICULT CIRCUMSTANCES

12.1 Introduction

The term 'children in need of special protection' (CINSP) has been used in the discussion paper.¹ The Commission, however, decided to revert back to the term 'children in especially difficult circumstances' as this term better highlights the dilemma of the children discussed in this chapter.

The discussion paper dealt with the following commonly recognised categories of children in especially difficult circumstances:

- children living in severe poverty;
- children affected by HIV/AIDS, including orphaned children;
- children with disabilities and chronic illnesses;
- child labourers;
- children living or working on the streets;
- commercial sexually exploited children; and
- child refugees and undocumented immigrant children.

Child refugees and undocumented immigrant children are not discussed in this chapter, but are dealt with in detail in the context of the international issues facing children in chapter 21 below.

As pointed out in the discussion paper, the Commission does not suggest that children in especially difficult circumstances be dealt with as a distinct group apart from other children.² However, there is a need to examine each category of children in especially difficult circumstances in order to ensure that their special circumstances are addressed in legislation.

The children who are at issue in this chapter are those whose lives are lived daily in circumstances which place their survival, development and protection at risk. Many, if

¹ This term appears to be replacing the old term 'children in especially difficult circumstances' in modern literature.

² Par. 13.1.

not most, children in especially difficult circumstances could be considered to be in need of care in terms of section 14(4) of the Child Care Act³ and would qualify in theory for protection via the conventional children's court processes. However, such children are caught up in mass-based socio-economic situations which case-by-case interventions on their own cannot satisfactorily address. Broader structural interventions are thus needed which will address the underlying causes of these children's problems and bring them within the reach of needed services.

After examination of the plight of the above identified categories of children in especially difficult circumstances, the Commission proposed certain broad-based interventions to address problems common to the vast majority of these children.⁴ These proposals have been incorporated in the new Children's Bill.⁵ With specific reference to children living in poverty, the Commission also recommended the inclusion of a provision on preventative measures against diseases and malnutrition (similar to section 55 of the draft Indian Children's Code Bill, 2000⁶) in the new Children's Bill.⁷ Furthermore, the Commission recommends that the Minister for Social Development should urge his colleague the Minister for Education to amend the Regulations to the South African Schools Act, 1996 to include all categories of care-givers and children from child-headed households for purposes of exemption from school fees.

12.2 Children affected by HIV/AIDS, including orphaned children

12.2.1 Overview of the proposal in Discussion Paper 103

This section in general deals with the impact of HIV/AIDS on the ability of children to grow up in an environment which can meet their basic physical, emotional, social and educational needs and fulfill 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.

³ 74 of 1983.

⁴ Par. 13.1.4.

⁵ Section 232(1)(a)(xiv) – (xvi), 341, and 345.

⁶ See chapter 11 of the discussion paper at p.457.

⁷ Section 233 of the Bill.

In the discussion paper, the Commission recommended 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 care-givers in the community. As social assistance for sick children is a key form of provision to promote family-based care, the Commission recommended that family care-givers 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.⁸

As children who are HIV-positive are subjected to discrimination in a variety of contexts, the Commission recommended that the Children's Bill 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. The Commission also recommended that the South African Schools Act, 1996 be amended to include the provisions of the National Policy on HIV/AIDS for Learners and Educators in Public Schools, and Students and Educators in further Education and Training Institutions as far as these relate to children. Furthermore, 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.⁹

The Commission took into account 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 was 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 recommended 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.¹⁰

As stated in the discussion paper, the options for formal placement of children in

⁸ Par. 13.3.7 of the discussion paper.

⁹ Ibid.

¹⁰ Ibid.

need of care and protection are inadequate to cater for the massive numbers of children who will be affected by the AIDS pandemic. For this reason, the Commission recommended that the Children's Bill should empower the Minister for Social Development to make regulations to allow for in-home support of families affected by AIDS.¹¹ This will discourage children from abandoning their education to care for dying parents and from taking on other adult responsibilities.

The discussion paper also pointed out that child-headed households will become a familiar phenomenon owing to the increase of HIV/AIDS infected adults. The Commission therefore recommended 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 also recommended that¹²

- 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 child-headed household without consulting the child at the head of the household and without giving due weight to the opinions of the siblings as appropriate to their age, maturity and stage of development;
- the proposed 'household mentor' be able to access grants and other social benefits on behalf of the child-headed household; and
- the proposed 'household mentor' be accountable to the Department of Social Development or a recognised NGO or the court.

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 recommended that schools be required to identify children who are absent owing to AIDS and to refer such children to the Department of Social Development or link them to community support structures.

¹¹ Ibid.

¹² Ibid.

12.2.2 Comments received

Ms Beena Chiba submitted that child-headed households should be monitored by social workers in order to ensure that the children are not exploited by the proposed adult person (household mentor).

Ms Annette van Loggerenberg objected against the Commission's recommendation that legal recognition be given to child-headed households as a placement option for orphaned children in need of care. She is of the view that children cannot be given parental responsibilities over younger children.

With regard to the issue of at what age should a child be able to head a household, **Ms Sanet Van Moerkerken** suggested that children from the age of 12 years should be able to head a household. **Ms Beena Chiba** proposed that children from the age of 13 should be able to head a household, provided that the own needs of the child at the head of the household are not neglected. However, **Ms Susan Mogadima** stated that the stage at which a child should be able to head a household should not be determined by his or her age, but should depend on the maturity of the child and whether he or she is able to take on such a responsibility. She added that the availability of supervision services to a prospective child-headed household should also be a determining factor. **N E Phoyana** submitted that a social worker or multi-disciplinary team should assess whether a child is able to head a household.

With regard to the question of what the functions of the proposed household mentor should be, Ms Susan Mogadima proposed that the responsibilities of the proposed household mentor should be outlined in guidelines. Furthermore, the relationship between the children and their household mentor should be checked regularly. Ms Sanet Van Moerkerken said that a household mentor must be a responsible and reliable person and must stay near the child-headed household for which he or she is responsible. A household mentor must also be involved in training programmes. Mrs Beena Chiba submitted that a household mentor must, where practical, be responsible for the safety and protection of the children in the child-headed household for which he or she is responsible. N E Phoyana recommended that relevant training should be provided to household mentors and that social workers should provide continuous support to household mentors. Ms Susan Mogadima suggested that the proposed household mentor should also provide the children in the child headed-household for which he or she is responsible with advice, monitor

their progress in school, ensure that their basic needs are fulfilled, and determine whether the children's living environment is safe.

Ms Susan Mogadima did not support the recommendation that schools should be required to identify children who are absentees owing to AIDS for purposes of referring such children to the Department of Social Development or to link them with community support structures. She argued that this recommendation may isolate (stigmatise) children whose families are affected by HIV/AIDS. She proposed that a 'mentor teacher' should visit the homes of children whose families are affected by HIV/AIDS. Furthermore, these families can then be referred to the Department of Social Development should they need any assistance. Ms Mogadima emphasised that the family's right to privacy should be kept in mind. **Ms Roslyn Halkett** cautioned that this recommendation may single out children affected by HIV/AIDS. She suggested that where children are absent from school, no matter for what reason, home visits should be conducted, especially in impoverished communities. Furthermore, the Department of Education should develop systems to monitor children who are absent from school and refer them to appropriate resources where necessary.

Responding to the recommendation that a national HIV/AIDS policy for places of care and residential care facilities be developed, **Justice Edwin Cameron** emphasised the need for developing such a policy for children in institutions for mentally and physically disabled children. Justice Cameron did not agree with the recommendation that the National Policy on HIV/AIDS for Learners and Educators in Public Schools be incorporated in the South African Schools Act, 1996. He stated that the policy is currently promulgated under the National Education Policy Act, 1996. Furthermore, he argued that the circumstances surrounding HIV/AIDS develop and change regularly and rapidly. Therefore, a provision requiring that the policy be reviewed regularly and adapted to change circumstances, was specifically included. Justice Cameron submitted that, in its current form, embodied in regulations, the policy can be readily reviewed and adapted. This would not be possible should the policy be included in primary legislation - regular amendment and adaptation would be much more cumbersome and time-consuming because of the parliamentary process to which primary legislation is subject.

12.2.3 Evaluation and recommendations

The Commission sees merit in Ms Chiba's argument that child-headed households

should be monitored by social workers. However, the Commission is of the view that scarce social work resources should rather be concentrated on cases where there is a specific need for support and assistance. Intervention by a social worker is, however, not excluded where children in a child-headed household are being abused or are at risk of abuse.

The Commission has sympathy with Ms Loggerenberg's objection against the legal recognition of child-headed households. The Commission, however, cannot lose sight of the fact that the formal placement options for children in need of care and protection are inadequate to cater for the massive number of children orphaned by AIDS. Child-headed households also have the advantage of keeping siblings together and allow for the continuity of their relationship with the community. The Commission accordingly retains its preliminary recommendation that legal recognition be given to child-headed households.¹³

The Commission agrees with Ms Mogadima's suggestion that the stage at which a child should be able to head a household should not be dependent on his or her age. The Commission is of the view that the question of whether a child is able to head a household should depend on the maturity of the child and the availability of a support structure. The Commission accordingly recommends that the new Children's Bill should provide for the necessary support structure in order to ensure the survival of child-headed households.¹⁴ Furthermore, the new Children's Bill should provide for the monitoring of children in child-headed households.¹⁵ In addition, the Commission recommends that the Department of Social Development should be responsible for developing broad minimum criteria for the selection and training of adult persons for appointment over child-headed households.

In light of the comments received from Ms Mogadima and Ms Halkett, the Commission has reconsidered its proposal regarding the identification of children who are absent from school due to being affected by HIV/AIDS. The Commission accordingly recommends that schools should be required, on a confidential basis, to identify children who are frequently absent from school because of being in need of care and protection.¹⁶ Furthermore, schools should take all reasonable steps to assist these children in returning to school or discourage them from leaving

¹³ Section 234(1) of the Bill.

¹⁴ Section 234(2) – (4).

¹⁵ Sections 235(a)(i) and 235(b) – (e).

¹⁶ Section 236(a) of the Bill.

school.¹⁷ Schools must also submit the names and addresses of these children to the provincial heads of the Department of Social Development.¹⁸ In order to ensure that the HIV status of these children and that of their families remain confidential, the Commission further recommends that every child should have the right to confidentiality regarding his or her health status and the health status of his or her parent, care-giver or family member.¹⁹

The Commission takes cognisance of Justice Cameron's view that there is a need to develop a national HIV/AIDS policy for institutions designated for mentally and physically disabled children. However, most of these facilities are registered with either the Department of Health or the Department of Education. The Commission therefore recommends that the Minister for Social Development should urge his colleagues, the Ministers for Health and for Education, to develop a national HIV/AIDS policy for institutions designated for mentally and physically disabled children registered with their Departments.

In light of Justice Cameron's concern about the Commission's recommendation that the provisions of the National Policy on HIV/AIDS for Learners and Educators in Public Schools, and Students and Educators in further Education and Training Institutions as far as these relate to children be incorporated in the South African Schools Act, 1996, the Commission abandons this recommendation.

As no other adverse comments were received, the Commission retains the rest of its preliminary recommendations made in the discussion paper. These recommendations have been incorporated in the Children's Bill where appropriate.²⁰

12.3 Children with disabilities

12.3.1 Overview of the proposals in Discussion Paper 103

In the discussion paper, the Commission expressed the view that children with disabilities should be enabled to live with their families. The Commission accordingly recommended that parents should be empowered to care for their children at home. This could be achieved by the establishment of rehabilitation and health care

¹⁷ Section 236(b) of the Bill.

¹⁸ Section 236(c) of the Bill.

¹⁹ Section 22(b) of the Bill.

²⁰ Sections 346 and 349 of the Bill.

services within communities, by making schools accessible for children with disabilities, by the provision of assistive devices free of charge or at an affordable cost, and by developing support programmes for parents of children with disabilities. Furthermore, an integrated approach must 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.²¹

As pointed out in the discussion paper, children with disabilities are often 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. Thus, absorbing children with disabilities into residential care facilities can 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 recommended that special programme funding 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. This means that a residential care facility which would be a receiver of the proposed funding will have to progressively adjust its programmes and environment in such a manner that will allow, to the maximum extent possible, the accommodation and care of children with disabilities. It was further recommended that 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.²²

The discussion paper highlighted that in terms of the Child Care Act, 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 therefore recommended 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 or Education where such facilities are the best available resources for the meeting of their needs.²³

²¹ Par.13.4.7 of the discussion paper.

²² Ibid.

²³ Ibid.

As public transport is inaccessible for most children with disabilities, the Commission recommended 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.²⁴

In order to ensure the provision of basic education for children with disabilities in an inclusive environment, the Commission recommended that provisions along the directions set out in the Education White Paper 6 on Special Needs Education²⁵ be included in the South African Schools Act.²⁶

The Commission further recommended as follows:²⁷

- The definition of a ‘care-dependent child’ in the Social Assistance Act²⁸ should be amended to remove the reference to permanent (24-hour) care.
- Social assistance to children with disabilities should be determined by a needs test, which considers the extra needs and cost incurred by or in respect of the child owing to his or her disability;
- 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 new children’s statute 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

²⁴ Ibid.

²⁵ July 2001.

²⁶ Par. 13.4.7 of the discussion paper.

²⁷ Ibid.

²⁸ 59 of 1992.

signs used by the deaf child originate in a different reference framework from the one being used by a deaf adult.

- The Department of Justice, in conjunction with the Department of Social Development, should design appropriate questioning techniques during court and police processes for children with intellectual disabilities.

12.3.2 Comments received

Ms Sally Rowney supported the Commission's recommendation that basic education be provided to children with disabilities in an inclusive environment. The respondent mentioned that there are currently a number of activities taking place which are aimed at the introduction of extensive training for educators to deal with learners who have special educational needs.

The **Consortium** endorsed the Commission's recommendations in respect of children with disabilities. The Consortium proposed that the definition of a 'care-dependent child' be amended to replace the words 'severe disability' with the words 'chronic health condition'. This, in the Consortium's view, will extend the eligibility criteria to children with other disabilities and chronic illnesses such as those with HIV/AIDS.

Durban Children's Society welcomed the recommendation that the children's court be empowered to place children with special needs, who are found to be in need of care, in care facilities registered by the Departments of Health or Education.

12.3.3 Evaluation and recommendations

The Commission is of the view that, in light of limited resources, the provision of social assistance should not be extended to children with mild disabilities. The Commission accordingly recommends that only children with moderate to severe disabilities should be eligible for social assistance.²⁹

The Commission retains the rest of its preliminary recommendations. These recommendations have been incorporated in the new Children's Bill.³⁰ The Commission further recommends that children with chronic illnesses (including those

²⁹ Section 346 of the Bill. The term 'supplementary special needs grant' replaces the term 'care dependency grant' as used in the Social Assistance Act.

³⁰ Sections 25, 175(1)(h), 232(1)(a)(iv) – (v) and 346.

with HIV/AIDS) be provided with access to health care services.³¹ Also, the new Children's Bill should provide for the monitoring of children with disabilities and chronic illnesses.³²

12.4 Child Labour

12.4.1 Overview of the proposals in Discussion Paper 103

As stated in the discussion paper, abusive child labour in South Africa 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.³³

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. Similarly, section 43 of the Basic Conditions of Employment Act (BCEA)³⁴ 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, it would appear that 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 for the protection of 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 recommended as follows:³⁵

- That 'employment' be clearly defined so as to overcome present loopholes in labour legislation as it applies to children, and to avoid blocking survival

³¹ Section 232 (1)(a)(iv) of the Bill.

³² Section 235(a)(iv) and (b) – (e).

³³ Par. 13.5.1.

³⁴ 75 of 1997.

³⁵ Par. 13.5.8 of the discussion paper.

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 co-ordinated 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 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.

12.4.2 Comments received

Several respondents to the discussion paper argued that, although children should be protected against exploitative labour practices, children must be allowed to help with core household duties and to earn extra pocket money by doing light work which will not interfere with their education or hazardously affect their well-being. For example, **Christian Lawyers Association of Southern Africa** submitted that healthy labour opportunities for children exist that are not limited to NGO work. The respondent recommended that the law should allow for healthy situations such as allowing children to earn extra pocket money by putting items in plastic bags at tills in supermarkets during Saturday mornings. These situations can be regulated by restricting the times during which a child may be employed and by limiting the duration of working hours.

12.4.3 Evaluation and recommendations

The Commission takes note of the concerns raised that the Children's Bill should not obstruct children from earning extra pocket money by doing light work. However, the Basic Conditions of Employment Act (Act No. 75 of 1997) does not allow the employment of a child who is under 15 years of age or under the minimum school

leaving age, even if such employment does not place at risk the child's well-being. The Commission, however, recommends that the prohibition on child labour should not prevent the engagement of a child, whether for reward or not, in an advertisement, in sport or in an artistic or cultural event, provided that such engagement does not place the child's well-being, education, physical or mental health, spiritual, moral or social development at risk.³⁶ The Commission realises that its recommendation that the Department of Education be required to identify schools where excessive use is being made of children as a source of labour is impractical as it would be difficult for the provincial heads of education to identify such schools. This recommendation is accordingly abandoned. The Commission retains the rest of its preliminary recommendations made in the discussion paper. These recommendations have been incorporated in the Children's Bill.³⁷

12.5 Children living or working on the streets

12.5.1 Overview of the proposals in Discussion Paper 103

The Commission recommended 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.'³⁸

As the early identification of children at risk is crucial for effective prevention, the Commission recommended that 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.³⁹ Furthermore, Local Government should be accorded the following functions:⁴⁰

³⁶ Section 240(2)(a) of the Bill.

³⁷ Sections 166(a)(ii), 232(1)(a)(vi), 236, 240 and 241. See also section 1 for the definition of 'employ'.

³⁸ Par. 13.6.5 of the discussion paper.

³⁹ Ibid.

⁴⁰ Ibid.

- 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.

The discussion paper stated 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 such children. The Commission accordingly recommended that the South African Schools Act⁴¹ 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. Furthermore, that the Department of Education should budget for the establishment of such structures and should develop criteria for their accreditation or registration.⁴²

The discussion paper also highlighted the fact that street children often find it difficult to gain access to health care services because they do not have adult caregivers to assist them and who can give permission for medical treatment, and also 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 recommended that -⁴³

- 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

⁴¹ 84 of 1996.

⁴² Ibid.

⁴³ Ibid.

found, the superintendent of that hospital or person acting on his or her behalf may give the necessary consent.

- The Provincial Departments of Health should budget for appropriate basic health care programmes for all children, including street children.
- 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, appropriate basic health care programmes should, where necessary, include the use of mobile clinics (vehicle/staff) 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 recommended that a child who is caused or allowed to beg should be listed as a child in need of care. The discussion paper further invited comments as to whether it should be a criminal offence for a non-family member who causes or allows a child to beg.⁴⁴

As pointed out in the discussion paper, 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. 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 accordingly recommended as follows:⁴⁵

- 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.
- Each local government must then furnish these figures to the Department of Social Development.

⁴⁴ Ibid.

⁴⁵ Ibid.

- 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 focussed and does not accommodate other street children interventions. The Commission therefore recommended that regulations governing outreach programmes, drop-in centres, shelters and halfway homes be drafted.⁴⁶

Finally, the Commission recommended 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. Furthermore, a social service inquiry should be conducted to determine why the child left home and to address the issues that have caused the child to leave the family home.⁴⁷

12.5.2 Comments received

The **Consortium** supported the Commission’s recommendations with regard to the definition of a ‘street child’, the call for effective preventative measures and services for street children, access to health and educational facilities, listing a child who begs as a child in need of care, and the proposed functions for local authorities. The Consortium suggested that street children above a certain age, e.g. 12 years should be entitled to receive and administer the proposed universal child grant without adult assistance.⁴⁸ Alternatively, street children shelters should receive it on their behalf.

Ms Susan Mogadima and **N E Phoyana** also supported the Commission’s proposed definition of a street child. **Mrs Beena Chiba** submitted that the word ‘permanently’ be deleted from the proposed definition as reunification services are rendered to street children and some of these children do return to their families.

Ms Annette van Loggerenberg recommended that prevention and early intervention programmes should be a prerequisite for facilities dealing with street

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ See Chapter 24 above for a detailed discussion on the Commission’s recommendation regards a universal child grant.

children. These facilities should also have therapeutic services and family reunification programmes in place. Furthermore, shelters should also consider having in place life skills programmes and job skills training.

Ms Sanet Van Moerkerken, Ms Beena Chiba, and N E Phoyana agreed with the Commission's recommendation that provision be made for the creation of non-formal educational structures to cater for the needs of street children and other out-of-school learners. **Ms Sally Rowney**, however, pointed out that the implementability of this recommendation depends on financial, legislative and structural constraints and needs to be debated with the national Department of Education. She mentioned that from the years 1996-1998, an RDP project, the New Nation School in Johannesburg was established as a pilot school for street children in order to encourage the reintegration of street children back into society. She stated that this school is still operational.

Mrs Beena Chiba and N E Phoyana accepted the recommendation that a child who is caused or allowed to beg should be listed as a child in need of care.

The majority of the respondents to the discussion paper were of the view that it should be a criminal offence for anyone who causes or allows a child to beg. **Christian Lawyers Association of Southern Africa** proposed that allowing or causing a child to beg should be an offence only when suitable NGO or State help is available to parents. On the other hand, the **Department of Social Development, Free State**, suggested that only non-family members who cause children to beg should be guilty of committing an offence. The **Consortium** strongly opposed making it a criminal offence for any parent or guardian who causes or allows a child to beg. The Consortium proposed that the emphasis should rather be placed on government's obligation to improve the circumstances of poor families.

Department of Health, Pretoria, suggested that social workers and primary health care nurses should work as a team to do follow-up home visits in order to assess the child and family interaction post reunification. The respondent stated that the lack of follow-up visits has resulted in secondary traumatising, with some of the children committing suicide to escape recurring problems.

12.5.3 Evaluation and recommendations

The Commission agrees with the suggestion made by Mrs Chiba that the word

'permanently' be deleted from the proposed definition of a street child as reunification services must indeed be rendered to street children where necessary.

The Commission has given due consideration to the proposal that it should be a criminal offence for persons who cause or allow children to beg. Given the fact that poverty often forces parents or care-givers to cause their children to beg, the Commission does not consider it appropriate to make it a criminal offence for any parent or care-giver who causes or allows a child to beg. The Commission is also hesitant to make it a criminal offence for non-family members who cause or allow a child to beg as such acts would often be poverty driven. The Commission therefore agrees with the Consortium's suggestion that the circumstances of poor families should be improved.

As no other adverse comments were received, the Commission retains the rest of its preliminary recommendations made in the discussion paper. These recommendations have been incorporated in the new Children's Bill.⁴⁹ In addition to the recommendations made in the discussion paper, the Children's Bill also contains provisions relating to the operation of shelters and drop-in centres.⁵⁰

12.6 Commercial sexual exploitation of children

12.6.1 Overview of the proposals in Discussion Paper 103

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 purposes, as a category of children in especially difficult circumstances. 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 issue of commercial sexual exploitation in its investigation into Sexual Offences and has decided to incorporate provisions criminalising commercial sexual exploitation in the new sexual offences legislation and not in the new Children's Bill. The Commission has, however, recommended the inclusion, in the new Children's Bill, of a general provision criminalising the trafficking of children. Trafficking for commercial sexual

⁴⁹ Sections 166(c)(iii), 232(1)(a)(viii) - (x) and (xiv), 235(a)(iii) and (b) - (e), 236, 237, and 238. See also section 1 for the definition of a 'street child'.

⁵⁰ Sections 244 - 256.

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.⁵¹ For this reason, the Commission recommended 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 may 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.⁵²

As stated in the discussion paper, the Commission's principal approach to child prostitution is that the child prostitute is not a criminal, but is a child in need of care and protection and should be brought before the children's court. With regard to child pornography, the Commission recommended that an obligation be placed on Internet service providers not to allow child pornography on their servers.⁵³

With regard to rehabilitative programmes, the Commission recommended 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.⁵⁴

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.⁵⁵

The Commission also recommended that children should be sensitised and educated to consciously detect and identify risk factors or situations making them vulnerable to

⁵¹ Molo Songololo **The trafficking of Children for Purposes of Sexual Exploitation – South Africa** August 2000, p.34; Rose Barnes –September, Anne Mayne and Ingrid Brown-Adam (eds) **The National Consultative Conference against the Sexual Exploitation of children** 16 – 18 March 1999, section III.

⁵² Par. 13.7.4 of the discussion paper.

⁵³ Par. 13.7.6.4 of the discussion paper.

⁵⁴ Par 13.7.7 of the discussion paper.

⁵⁵ Ibid.

commercial sexual exploitation. Children should be encouraged to seek help and assistance if they are victims of sexual exploitation and organisations that render services to victims of sexual abuse should be publicised. Furthermore, the public should be educated on the adverse and long-lasting consequences of any form of sexual abuse and exploitation of children.⁵⁶

12.6.2 Comments received

Mrs Beena Chiba, N E Phoyana, Ms Sanet Van Moerkerken and Ms Susan Mogadima agreed with the Commission's recommendations. **Department of Health**, Pretoria, also supported the Commission's recommendations, particularly aspects pertaining to rehabilitation services for children who are victims of commercial sexual exploitation.

SWEAT supported the inclusion of a general provision criminalising the trafficking of children in the new children's statute.

SWEAT also endorsed the Commission's approach to child prostitution, i.e. that a child prostitute is not a criminal, but a child in need of care. The respondent mentioned that there are almost no appropriate or effective services available to child prostitutes. The respondent suggested that in addition to the Commission's recommendation that the Department of Social Development must budget for rehabilitative programmes to address the specific needs of child prostitutes, the Department of Social Development should play a central role in developing models of intervention. The development of these models should be done in consultation with children's rights NGOs and other groups working with children involved in prostitution. These models should cater for the diverse needs of child prostitutes and should take cognisance of the fact that some children are coerced into selling sex, whereas others sell sex of their own initiative. The respondent pointed out that child prostitutes between the ages of 16 and 18 are often already sexually active (outside their prostitution activities). Thus, services should also be developed to cater for the needs of these children. The respondent suggested that the words 'rehabilitative programmes' be replaced with the words 'exit programmes'. Furthermore, exit programmes should be geared towards encouraging voluntary participation in the programme and should ideally provide children with marketable skills. The purpose of exit programmes should be to reintegrate child prostitutes into mainstream society and should not stigmatise or isolate them.

⁵⁶ Ibid.

SWEAT did not support the recommendation that the children's court should have a discretion to order that a child attend a rehabilitative programme. The respondent feared that the court may exercise this discretion too frequently. The respondent thus recommended that where it comes to light that a child is involved in prostitution, the child and his or her family or care-giver should be provided with information on programmes specifically designed for former child prostitutes. The respondent further proposed that persons or organisations providing services to child prostitutes be trained with regards the diverse needs of child prostitutes.

SWEAT applauded the Commission's approach that adult sex workers are not per se unfit parents and that children of adult sex workers are not necessarily children in need of care.⁵⁷ The respondent suggested that social workers and other persons working with children be informed that the fact that a parent is a sex worker, is of itself not a ground to consider the parent as being unfit.

The **Family Violence, Child Protection and Sexual Offences (FCS) Investigation Unit** of the S A Police Services mentioned that it is investigating cases where children are being taken from the Democratic Republic of the Congo and Zimbabwe and are then kept in flats in the Hillbrow and Berea areas until their parents who are illegally in South Africa pay ransom. The respondent added that although these children are removed from the flats, the suspects are, owing to the lack of legislation, only fined on a lesser charge of contravening border control legislation and thus continue with their trade. The respondent also mentioned that children are removed via Form 4 from homes in the Southern suburbs of Johannesburg from which child prostitution is facilitated. However, the perpetrators are later released as these children will not testify against them because they are often emotionally, financially and most often drug-dependant on the so-called pimp. The respondent thus believed that the lack of legislation makes the Form 4 a useless document. In order to address the situation, the respondent recommended that the new child care legislation should include a provision that a person must be able to justify his or her 'possession' of a child, and if a person cannot provide a reasonable explanation for such 'possession', he or she should be guilty of an offence. Furthermore, the following questions could be asked to determine whether a person is rightfully in control of a child:

⁵⁷ Par. 13.7.5.5 of the discussion paper.

- how long have you known this child?;
- where does the child live?;
- whom does the child live with?;
- who is/are the child's parent(s)?

The respondent stated that the following persons would not be found guilty of an offence:

- a person who has signed a Form 4;
- a person who is a parent or guardian;
- a person who has the permission of the child's parent(s) or guardian(s);
- a person transporting a child to the SAPS or to social services.

12.6.3 Evaluation and recommendations

With reference to SWEAT's comments on rehabilitative programmes, the Commission prefers to use the term 'outreach programmes' as this term places the focus on the support and protection of children subject to commercial sexual exploitation. The Commission accordingly recommends that counselling and outreach programmes should be provided to children subject to commercial sexual exploitation.⁵⁸ Obviously, outreach programmes should cater for the diverse needs of children involved in commercial sexual activities.

The Commission appreciates that it is difficult for the South African Police Service to ensure the prosecution of perpetrators who traffic children for purposes of prostitution in instances where children refuse to testify. However, the new Children's Bill deals with the protection of children and does not focus on the prosecution of perpetrators. The Commission therefore recommends that the respondent's concern be addressed in terms of the new sexual offences legislation. The Commission would like to point out that, although it would be difficult to prosecute perpetrators in the absence of a child's testimony, it would not be difficult for the court to find the child as a child in need of care and to make an appropriate order to ensure the child's protection.

The Commission further endorses its preliminary recommendations made in the discussion paper. These recommendations have been incorporated into the new Children's Bill.⁵⁹ The Commission further recommends that municipalities should be

⁵⁸ Section 232(1)(a)(xiii) of the Bill.

⁵⁹ Sections 232(1)(a)(xi), 239 and 317.

responsible for monitoring children subject to commercial sexual exploitation.⁶⁰

⁶⁰ Section 235(a)(v) and (b) – (e) of the Bill.

CHAPTER 13

THE PROTECTION OF CHILDREN CAUGHT UP IN THE DIVORCE / SEPARATION OF THEIR PARENTS

13.1 Introduction

This Chapter focuses on the care and protection of children who are, or who have been, caught up in the conflict surrounding the divorce or separation of their parents, as a category of children in need of special protection.¹ As these children do have parents who sometimes do go to extreme measures to maintain a relationship with a child, this is one area where the Commission feel a little effort can go a long way to diffuse tension in the family home and improve the well-being of the children involved.

13.2 Improving outcomes for children

13.2.1 Hearing children's voices

Section 6(4) of the Divorce Act² 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 stated that it would like to see this provision being used more often. The Commission also recommended that section 6 of the Divorce Act 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.³

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 Act⁴ does not require the Family Advocate or the Family

¹ The **White Paper for Social Welfare** (p.41, para 38 and 39) identifies children of divorced and divorcing parents as a vulnerable group that require special attention.

² 70 of 1979.

³ Par. 14.5 p. 650 of the discussion paper.

⁴ 24 of 1987.

Counselor to hear the views of the child. The Commission stated that 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.⁵

The respondents who commented on this section supported the Commission's recommendations. Some of the respondents also made additional recommendations. Responding to the Commission's recommendation that the court should be empowered 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, the **Law Society of the Cape of Good Hope** recommended that the appointment of an interested third party should not be restricted to family members, but should include other persons such as psychologists. The **Children's Rights Project and Local Government Project** (Community Law Centre, UWC) supported the latter recommendation and added that the third party must be chosen with careful consideration and must be someone to whom the child is close. Such a person should also be made aware of the functions and duties of the staff members in both the Department of Social Development and the children's court, so that should a situation arise which might merit the intervention of a social worker or the children's court, such person would know whom to approach. The Commission agrees that the proposed interested third party to support a child experiencing difficulties during parental separation or divorce should not be restricted to family members. However, the appointment of professionals such as psychologists as interested third parties may have cost implications. An option would be to empower the court to order both or one of the parents to pay the fees of an interested third party appointed in his or her professional capacity.

The **Children's Rights Project and Local Government Project** (Community Law Centre, UWC) pointed out that the courts, probably because of the expense that would result to the parties, seldom make use of section 6(4) of the Divorce Act which provides that the court may appoint a legal practitioner to represent a child at the proceedings. Section 6(4) further stipulates that the court may order one or both of the parents *to pay the costs of the legal representative* appointed for the child. Thus, only children of the wealthy might be able to afford separate legal representation in divorce proceedings. The respondent proposed that in order to ensure that all

⁵ Par. 14.5. p.651 of the discussion paper.

children are given a voice in divorce proceedings or are represented by a legal representative; the State must appoint, at state expense, a legal representative. This, in the respondent's view, will be in accordance with the constitutional right of children in section 28(1)(h) of the Constitution,⁶ and section 8A of the Child Care Act.⁷ Furthermore, guidelines need to be drafted in order to inform the court as to when a child might need separate legal representation. The Commission has given due consideration to the issue of whether children in divorce proceedings should be provided with legal representation at state expense. In light of the comments made by the Children's Rights Project and Local Government Project, the Commission is of the view that the decision whether to appoint a legal representative for a child at divorce proceedings should not be based on whether both or one of the parents can afford to pay for such legal representation, but should be based on whether the court considers the appointment of a legal representative to be in the best interests of the child and whether the lack of legal representation would result in substantial injustice to the child. The Commission accordingly recommends that section 6(4) of the Divorce Act be amended to stipulate that the court may appoint a legal representative for a child at divorce proceedings and may order the parties or any one of them to pay the costs of the representation. However, if the court is satisfied that neither of the parties can afford to pay for such legal representation, the court must appoint a legal representative, at state expense, if substantial injustice would otherwise result. Furthermore, the Commission is of the view that Regulation 4A(1) to the Child Care Act provides adequate guidelines as to when separate legal representation might be needed for a child.

The Commission has stated that the need for legal representation does not end with divorce. Changed circumstances may require changes in the original custody and access arrangements. Without someone to help give the children an opportunity to speak about their needs and voice their concerns, these sometimes dangerous situations are allowed to continue, and children are put at risk. Responding to this, the Children's Rights Project and Local Government Project (Community Law Centre, UWC) submitted that although they agree with this statement, the Commission needs to make recommendations as to how children who find themselves in such situations can access a legal representative and the courts, and how the original custody or access arrangements can be varied.

The **Law Society of the Cape of Good Hope** welcomed the recommendation that

⁶ Constitution of the Republic of South Africa, Act 108 of 1996.

⁷ 74 of 1983.

section 6 of the Divorce Act be used more frequently. The respondent also supported the recommendation that the regulations should provide for the canvassing and recording of the child's views, where appropriate and if the child so wishes.

13.2.2 Reducing conflict

In its attempt to find ways to reduce conflict between divorcing or separating parents, for the benefit of the children, the Commission recommended 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 should be of the same quality post-separation as pre-separation. While not excluding the possibility of joint custody, the Commission stated that it 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.⁸

The use of the words 'custody', 'sole custody', 'guardianship', 'sole guardianship' and 'access' in the Divorce Act promote a potentially damaging sense of winners and losers. The use of more neutral language would help reduce conflict and let both parents focus on their responsibilities rather than their rights. The Commission therefore recommended that the terms 'custody' and 'access' be replaced with the terms 'care' and 'contact' respectively. Furthermore, that the Divorce Act, the Matrimonial Affairs Act,⁹ and the Mediation in Certain Divorce Matters Act be amended to add definitions of 'care' and 'contact' that reflect the meanings ascribed to those terms by the Commission.¹⁰ Responding to the latter recommendation, the **Law Society of the Cape of Good Hope** proposed that the Natural Fathers of Children Born out of Wedlock Act¹¹ and other ancillary Acts such as the General Law Further Amendment Act¹² and the Maintenance Act¹³ be similarly amended. The Commission supports this proposal.

⁸ Par 14.5, p. 652 of the discussion paper.

⁹ Act 37 of 1953.

¹⁰ Par 14.5, p. 653 - 654 of the discussion paper.

¹¹ 86 of 1997.

¹² 93 of 1962.

¹³ 99 of 1998.

13.2.3 Parenting education

The Commission recommended 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 emphasised 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.¹⁴

The **Dutch Reformed Church**, Pretoria, **Ms R van Zyl** and **Africa Christian Action** welcomed the Commission's recommendations. Africa Christian Action recommended that parenting education programmes be operated by family organisations or churches. Some of the respondents who commented on this section were not in favour of the Commission's recommendations. For instance, the **Law Society of the Cape of Good Hope** pointed out that the Commission's recommendations may create practical problems such as further overloading the Family Advocate. The respondent further highlighted the lack of resources to implement the proposed system. **Ms Julie Todd** submitted that the high case load of the Family Advocate will not allow it to coordinate parenting education programmes. The Commission notes these concerns. However, given the expertise of the Family Advocate, it is best positioned to coordinate the proposed parenting education programmes. Furthermore, the concern of overloading the Family Advocate could be addressed by requiring that the Department of Justice must, when preparing its draft budget for a coming financial year, include in the draft budget an amount for the purpose of enabling the Office of the Family Advocate to perform the function of coordinating parenting education programmes.

Christian Lawyers Association of Southern Africa submitted that the Commission's recommendations with regard to parenting education may be impractical in that the courts cannot force people to be good parents and to take a sincere interest in their children's well-being. The respondent argued that requiring

¹⁴ Par 14.5, p. 657 of the discussion paper.

participation in a parenting education programme may be a burden on a single parent who is often overwhelmed with the responsibility of caring for the children - the parent needs more time with the children and should not be required to be away from the children at certain times. The respondent thus recommended that education programmes (such as an advice bureau where parents can be provided with a wide range of advice and assistance) be made available to those who need it, with special support for those who need practical assistance. The Commission is mindful of the fact that requiring parents to participate in an education programme would not instantly convert them into good parents. However, the Commission is of the view that it is in the best interests of children that, for the reasons stated above, parents be required to participate in a parenting education programme before a decree of divorce is granted.

CHILDS submitted that some children and their parents should also be required to attend an education workshop to assist them to deal with the separation and/or divorce. This should be completed on a prescribed form.

13.2.4 Joint custody

As stated in the discussion paper, the Commission is of the view that the law should encourage parents to enter into consensual arrangements for shared parenting (joint custody) in the form of parenting plans. The Commission therefore recommended that section 6 of the Divorce Act, section 5 of the Matrimonial Affairs Act and the Mediation in Certain Divorce Matters Act be amended to require that parties applying to a court for a parenting order must file a proposed parenting plan with the court;¹⁵

Christian Lawyers Association of Southern Africa submitted that this recommendation overlooks the fact that neither parents might have had a divorce before and although they may have an idea how they are going to deal with parenting jointly, it is often required that the plan be flexible and subject to review. Furthermore, making a parenting plan a requirement would place a formalism and rigidity on the order that is undesirable. The Commission disagrees with Christian Lawyers Association of Southern Africa that it is undesirable to make a parenting plan a requirement when applying to the court for a parenting order. In fact, a parenting plan has the advantage of reducing unnecessary litigation over child issues and helps parents to continue with a healthy parental relationship after separation.

¹⁵ The Law Society of the Cape of Good Hope supported this recommendation.

The Commission accordingly endorses its preliminary recommendation.

The Commission recommended that divorcing parents should 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. Furthermore, the relationships of grandparents, siblings and other extended family members with the children should be recognised as significant and provisions for maintaining and fostering such relationships, where they are in the best interests of those children, should be included in parenting plans.¹⁶

The Commission further recommended as follows:¹⁷

- 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. 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

¹⁶ Par. 14.5, p.661 of the discussion paper.

¹⁷ Par. 14.5, p. 655 – 656 of the discussion paper.

the General Law Further Amendment Act 93 of 1962, as then amended, be repealed after having been incorporated in the new children's statute.

Mr Stuard McDonald proposed that joint custody should be the point of departure for all divorcing couples. He suggested that clear and concise guidelines on the content of a parenting plan should be made available to mediators and divorcing parents. Such guidelines could also be gazetted. With regard to information in respect of a child's development, Mr McDonald proposed that the non-custodian parent should be able to obtain such information directly from, e.g. the school, hospital, sports club etc. Thus, the non-custodian parent should not have to wait to be provided with such information by the parent who has the care of the child. The Commission does not agree with Mr McDonald's proposal that joint custody should be the starting point in divorce as joint custody may not always be in the best interests of a child. The Commission agrees with Mr McDonald that guidelines on the content of parenting plans should be readily available to divorcing parents. The Commission also supports Mr McDonald's view that the non-custodian parent's access to information in respect of a child's development should not be dependent on being provided with such information by the custodian parent. Thus, where the custodian parent unreasonably withholds such information from the non custodian parent, the child and family court should be able to order that the non-custodian parent be provided direct access to such information.

CHILDS suggested that the term 'joint custody' be replaced with the term 'shared parental responsibility'.

13.3 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,¹⁸ unless the mother's character or past conduct renders her 'unfit',¹⁹ in the court's view, to have such custody, or unless the father's

¹⁸ See, e.g. **Tabb v Tabb** 1909 TS 1033 at 1034; **Dunsterville v Dunsterville** 1946 NDP 594 at 597; **Napolitano v Commissioner of Child Welfare, Johannesburg** 1965 1 SA 742 (A) at 746C-D; **Schwartz v Schwartz** 1984 4 SA 467 (A) at 480F-G; **Fortune v Fortune** 1995 3 SA 348 (A).

¹⁹ In **Mohaud v Mohaud** 1964 4 SA 348 (T) Vieyra J awarded custody of three young children (two of whom were girls) to the father rather than the mother (who had committed adultery on several occasions) in the light of his findings that the mother was 'a person so immature in character, so emotionally unstable, so lacking in discretion, so confused in her moral ideas that despite the youthfulness of the children, it would not be in their interests to entrust their custody

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 by discriminating between parents on the grounds of gender (although it is submitted that this would in many instances be justified by courts on the basis of the best interests of the child).²⁰ 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 recommended that the common-law ‘tender years doctrine’ or ‘maternal preference rule’ be rejected as a guide for decision-making about parenting.²¹ **Ms R van Zyl** welcomed the Commission’s recommendation. **CHILDS** submitted that the problem of gender bias is far more extensive than in these legal doctrines. The respondent thus recommended that every effort should be made to ensure that the decision-making body is free of gender bias. This can be ensured by, inter alia, basing decisions on established psychological research. Furthermore, decisions should be team-based with equitable representation of male and female.

13.4 Other comments received

Adv. G J Van Zyl pointed out that the Commission has missed a crucial point, i.e. that our adversarial system of justice bedevils the issue of custody of children. Also, when the custody of children is in issue, a lot of allegations and counter-allegations are made which can traumatise children. He therefore suggested that the custody of children should be adjudicated on an inquisitorial basis separately from the divorce proceedings. Furthermore, in custody proceedings, parents should be able to stake their claims without resort to the traditional manner of allegations and counter-allegations. The Commission does recommend that where issues of possible child abuse surface in divorce proceedings, the court be able to order that the divorce matter stand down and a children’s court enquiry be initiated.²² This, in the Commission’s view, will reduce the making of false allegations in divorce proceedings.

Adv. Van Zyl submitted that the enforcement of custody orders is notoriously

to her’

²⁰ See **Van der Linde v Van der Linde** 1996 3 SA 509 (O). See also **V v V** 1998 4 SA 169 (C) at 176F-G and 177B.

²¹ Par. 14.4 of the discussion paper.

²² See par. 13.2.4 above.

inadequate as parents are reluctant to lay criminal charges against a custodian parent for failure to abide by the terms of a custody order. He suggested that the General Law Further Amendment Act should be amended by deleting the word 'sole' where it appears before the word 'custody'. The Commission agrees with this suggestion. Adv. Van Zyl also referred to a letter published in the **De Rebus**,²³ in which he suggested a more innovative approach along the lines of the present Domestic Violence Act. He stated that it is not helpful to criminalise refusal of contact by one parent as the child might feel that he or she has been the cause of sending one parent to jail.

CHILDS recommended that the following section be added to this chapter: 'Irretrievable breakdown of marriage when minor children are involved'. The respondent suggested that both parents be required to prove the irretrievable breakdown of the marriage. Parents have to undergo some form of marital/spousal/relationship counselling. A competent counsellor recognised by the community should be required to fill in a prescribed form declaring that the marriage has broken down irretrievably. Such a requirement must be met before a divorce can be granted. The Commission is of the view that it is not desirable to force parents with children to stay married by requiring that both parents should prove the irretrievable breakdown of the marriage. In fact, the continuation of a marriage may sometimes not be in the best interests of children as children may be caught between continued marital disputes.

Mr Lionel Greenberg, from KID (Kinder In Divorce), submitted that the win-loose scenario is a priority on the agenda of the attorney / advocate. He stated that due consideration should be given to children and that children should be provided with an *advocate ad litem* by default. Mr Greenberg argued that an order granting a divorce should encourage visitation rather than to limit parental involvement in the life of the child. Thus, the order should be a guideline and not be used to obstruct the father's involvement. Further, the order should set a minimum commitment level and not a maximum.

13.5 Conclusion

The Commission is of the view that legislative provisions for the protection of children caught in the separation or divorce of their parents should be provided for in divorce legislation. In light of the research undertaken and the submissions received, the

²³ February 1999, p.8.

Commission is convinced that the legal position of children in divorce or separation proceedings urgently needs reconsideration. The Commission is therefore considering including in its programme an investigation into these aspects. Obviously, such an investigation would have to go beyond the confines of the Divorce Act to also consider the General Law Further Amendment Act, the Matrimonial Affairs Act, and the Mediation in Certain Divorce Matters Act.

CHAPTER 14

EARLY CHILDHOOD DEVELOPMENT

14.1 Introduction

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

14.2 Overview of the proposals in Discussion Paper 103

14.2.1 Defining ECD

The Commission recommended that the following definitions of ECD and of ECD services be included in the new children's statute:¹

'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 organisation where the provider of the service is not the parent or the primary caregiver of the children.

The Commission stated that these definitions should not be premises-based, in order to allow for the facilitation of ECD where a building is not available. The Commission also expressed 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.

14.2.2 Responsibility for providing ECD services

¹ Par. 15.5 of the discussion paper.

The Commission recommended 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 be responsible for the provision of ECD services at all 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.²

14.2.3 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 content of such services also have infinite variations, the Commission did not specify what the minimum content of such ECD services should be.

However, the Commission recommended 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 recommended 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.³

14.2.4 Registration of ECD services

The Commission recommended 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. Furthermore, 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.⁴

The Commission recommended that the adequacy and appropriateness of State-

² Ibid.

³ Par. 15.6 of the discussion paper.

⁴ Ibid.

funded or subsidised ECD services should be assessed by the Department of Social Development.⁵ The Commission further recommended that local authorities should be responsible for environmental and health inspections relevant to registration applications where ECD services are to be premised-based.⁶

14.2.5 Lines and levels of Government responsibility

The Commission stated that the view that ECD is the responsibility of parents and families and not the State is no longer tenable. The Commission therefore recommended 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.⁷ The Commission further recommended that a local authority may support, financially or otherwise, any registered ECD service by:⁸

- making buildings or premises available at no cost to a person or persons who or organisation which proposes to administer such service; and
- 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 for administering or providing ECD services.⁹

14.2.6 Monitoring, inspection and closure of ECD services

The Commission recommended that the (provincial) Departments of Social

⁵ Ibid.

⁶ Par. 15.7 of the discussion paper.

⁷ Ibid.

⁸ Par. 15.8 of the discussion paper.

⁹ Ibid.

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 concern itself in particular with monitoring and closing down of ECD services not offered on school premises.¹⁰

14.3 Comments received

The Criminal Justice Initiative, Open Society Foundation for South Africa submitted that the issue of ECD has been addressed inadequately and without recognition of the value of ECD, particularly in relation to prevention and early intervention services. The respondent argued that it is only through responsibilities clearly allocated to government agencies that ECD programmes will be implemented, and that it is only through legislated standards that these services can be maintained at appropriate levels of quality.

Jimmy and Lizelle Meyer disagreed with the Commission's opinion that the view that ECD is the responsibility of parents and not the State is no longer tenable. However, **Ms R van Zyl** supported the Commission's opinion.

Mr Eric Atmore from the Centre for Early Childhood Development, Kenilworth, complimented the Commission on its recommendations in respect of ECD. Referring to page 678 of the discussion paper, the respondent recommended the inclusion of the words in brackets in the following recommendation of the Commission: The Commission recommends that the adequacy and appropriateness of State-funded or subsidised ECD services should be assessed by the Department of Social Development. Where such ECD services are not registered, State-funded or subsidised, then Government has no right [unless the law is broken or is suspected of being broken] to prescribe to or interfere with the content of such ECD programmes.

The **Sinodale Kommissie vir die Diens van Barmhartigheid** submitted that minimum standards for ECD must be set by the Department of Social Development and not by the Department of Education.

¹⁰ Par 15.7 - 15.8 of the discussion paper.

The **Department of Health**, Pretoria, suggested that the new child care legislation should contain brief legislative guidelines on minimum standards for ECD, whilst the Department of Social Development Guidelines must cover minimum standards for ECD in more detail.

The **Department of Health**, Pretoria recommended that, given the 'mushrooming' of non-state ECD service providers, all ECD centres (formal and informal) must, whether based on school premises or not, be registered with the Department of Social Development. The respondent submitted that the Department of Social Development should keep only one register in respect of ECD service providers. The respondent argued that more than one register will interfere with continuity and quality of monitoring and evaluation techniques. The respondent further proposed that environmental health officers should be guided by local government with regards to how and when to do inspections as well as sanctions for non-compliance.

The **Department of Health**, Pretoria complimented the Commission on its approach with regard to the monitoring and evaluation of ECD centres. However, the respondent pointed out the following challenges:

- the deployment of adequate manpower, especially in remote areas, to assist in the monitoring, evaluating and supervising of services;
- the regulation of private ECD centres and their registration with the Department of Social Development; and
- making the content of Day Care Guidelines congruent with the provisions of the new child care legislation.

In its submission, the **Department of Education**, Pretoria pointed out that private ECD services are registered by the provincial departments of education in terms of section 46 of the South African Schools Act, 1996. Similarly, closure of such centres is performed at provincial level. The Department further opined that, as the South African Schools Act 1996 presently does not apply to children below Grade 1, the imposition of the responsibility on the Department to provide ECD services to children not in school, even where school premises are used, will constitute an unfounded mandate. The Department pointed out that (Education) White Paper 5 provides that the Education Department will eventually, by 2010, be responsible for providing Grade R as part of compulsory education. It is suggested that this be factored into the development of the new child care legislation.

The Department of Education stated that the Departments of Social Development and Education have developed draft guidelines for the registration of ECD services. It said it must be recognised that local government also have responsibilities in this regard and that some local authority structures are not adhering to the minimum standards in some cases.

In response to the Commission's preliminary position that the provision of ECD services should be a state function and not solely that of parents, the Department said that to make a generalised statement that ECD is the responsibility of the state places an unachievable burden on the state and goes against the stance taken in White Paper 5 of poverty-targeting the intervention. However, the Department supported the view that the Departments of Education and Social Services, with local authorities, should work collaboratively towards ensuring that children access ECD services, but said it should be targeted towards the poor. In closure, the Department suggested that the Department of Health also be included when monitoring, inspecting or closing ECD services.

14.4 Evaluation and recommendations

The Commission has revisited its recommendation that ECD programmes should be registered. The Commission abandons this recommendation because it does not appear to be feasible to register ECD programmes. The Commission also abandons its recommendation that a local authority must not levy rates on land which is used by a registered non-profit organisation to administer ECD programmes. This is in view of the fact that the Children's Bill cannot prescribe to local authorities how to manage their finances. Furthermore, the Municipal Systems Act, 2000 does not provide for exemptions from the payment of rates and taxes.

In addition to the recommendations made in the discussion paper, the Commission recommends the inclusion of a provision regarding strategies concerning ECD to be included in a national policy framework.¹¹ The Commission also recommends that ECD services must be provided by a partial care facility providing care to children up to the age of nine years, a child and youth care centre which has in its care children up to the age of nine years or a primary school.¹² The Children's Bill further provides for the issuing of a notice of enforcement to a partial care facility, child and youth care centre or a primary school regarding the provision of ECD services.¹³ Specific

¹¹ Section 106A of the Bill.

¹² Section 107(1) of the Bill.

¹³ Section 109 of the Bill.

provision is also made for the rendering of assistance to a partial care facility, a child and youth care centre or a primary school.¹⁴ In order to ensure the protection of children to whom ECD services are rendered, the Commission recommends that a person unfit to work with children may not provide or assist in the provision of ECD services.¹⁵

¹⁴ Section 110 of the Bill.

¹⁵ Section 108 of the Bill.

CHAPTER 15

PARTIAL CARE

15.1 Introduction

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

15.2 Overview of the proposals in Discussion Paper 103

15.2.1 Defining partial care

The Commission recommended that, 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.¹ The Commission stated that 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 Act² and accordingly recommended the following definitions:³

'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 –

- 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;
- any hospital or medical facility which is maintained or used mainly for the medical treatment of children;
- the statutory placement of a child in substitute family care;

¹ Par. 16.6 of the discussion paper.

² 74 of 1983.

³ Par. 16.6 of the discussion paper.

- ECD services as defined in this Act.

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

15.2.2 Licensing of partial care facilities

The Commission recommended that the existing registration system be replaced with a licensing system.⁴ The Commission expressed the view that 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:⁵

- standards may be set before a person or agency is authorised 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 recommended 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 licensed as a partial care facility with the (provincial) Department of Social Development. As the term partial care facility more accurately reflect the type of facility involved, the Commission accordingly recommended a change in terminology from 'place of care' to 'partial care facility'.

15.2.3 Minimum building standards for partial care facilities (places of care)

The Commission did 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 stated that the present requirement, in the Regulations,⁶ for a certificate to be issued by the local authority to the effect that the premises comply with all structural and health requirements set by the local authority is flexible enough to cater for local and regional differences.⁷

⁴ Par. 16.4.2 of the discussion paper.

⁵ Par. 16.5.2 of the discussion paper.

⁶ Regulation 30A(2)(b).

⁷ Par. 16.4.1 of the discussion paper.

However, the Commission recommended 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.⁸

15.2.4 Assistance to providers of partial care services

The Commission recommended that the (provincial) Department of Social Development, or any local authority may support, financially and otherwise, any licensed partial care facility. Such support, or the continuation of such support, may be made subject to conditions.⁹

15.2.5 Partial care not provided at partial care facilities (places of care)

The Commission recognised 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) and that not all early childhood development (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 realised that some partial care arrangements involving fewer than six children can be very harmful to children. The Commission thus recommended 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 registered¹⁰ or such facility is not licensed. 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

⁸ Ibid.

⁹ Par. 16.5.4, p. 708 of the discussion paper.

¹⁰ See Par. 14.4 above where it is stated that the Commission has abandoned its recommendation that ECD services should be registered.

the operator to register or obtain a license or to cease operation forthwith.¹¹

15.2.6 Monitoring and inspection

The Commission recommended that monitoring provisions be included in the new children's statute which must allow for a power to monitor both the environment and quality of care provided at partial care facilities and the implementation of ECD programmes - by means of inspections or other methods - regardless of the number of children involved.

15.3 Evaluation and recommendations

The Commission has received no comment on the issue of partial care. Notwithstanding the lack of comments on the issue, the Commission revisited some of its recommendations in respect of partial care. With regard to the recommendation that the existing registration system be replaced with a licensing system, the Commission has come to the conclusion that there is no substantive difference between licensing and registration. For this reason, the Commission reverts to the existing system in terms of which partial care facilities are required to register.

The Commission further abandons its initial recommendation that partial care facilities must be registered (or licensed as previously suggested) with the relevant provincial Departments of Social Development. The Commission now recommends that local authorities should be responsible for the registration of partial care facilities.¹² This recommendation is in line with section 156 read with Schedule 4, Part B of the Constitution in terms of which the administration of child care facilities is a local government competency. The Commission is mindful of the fact that local authorities are under-resourced. This is, however, not reason enough to impede on municipalities' right to exercise their powers by vesting the administration of child care facilities in the provincial Departments of Social Development. However, if a local authority fails to fulfill its functions, the relevant provincial executive may take appropriate steps to ensure fulfillment of those functions in terms of section 139 of

¹¹ Par. 16.7 of the discussion paper.

¹² Sections 146(1)(a), 149(1)(a), 150(1) and 152 of the Bill. See also Noel Zaal and Carmel Matthias 'Local government and the provision of child care services: An essential area for legislative reform' (2002) 119:1 **South African Law Journal** 138.

the Constitution.

In line with the Commission's decision to assign the registration of partial care facilities to local authorities, the Commission further recommends that a municipality must maintain a record of all available partial care facilities in its area,¹³ and must conduct regular inspections of partial care facilities in its area.¹⁴ Furthermore, a municipality or the provincial head of social development may issue a notice of enforcement to a person operating a partial care facility.¹⁵

¹³ Section 155(1)(a) of the Bill.

¹⁴ Section 155(1)(b) of the Bill.

¹⁵ Section 148 of the Bill.

CHAPTER 16

FOSTER CARE

16.1 Introduction

Within the formal child care system in South Africa, foster care is normally considered to be the preferred form of substitute care for children who cannot remain with their biological families and who are not available for adoption. Many thousands of South African children have benefited from court-ordered foster care. It is, however, doubtful whether this form of care as provided for in the Child Care Act¹ can adequately deal with the country's changing needs as vast numbers of children are being left parentless owing to AIDS. This chapter therefore examines alternative forms of family care. It also covers aspects such as social and cultural issues when placing children in foster care, parental rights and responsibilities for foster parents, termination of parental rights and responsibilities over children in foster care, reunification services, statutory supervision, duration and extension of foster care orders and social security.

16.2 Conceptualising foster care

16.2.1 Overview of the proposals in Discussion Paper 103

In the discussion paper,² the Commission recommended 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 proposed that a distinction be made between foster care and court-ordered kinship care (care by relatives), and that provision be made for the necessary support of both options. A further distinction is proposed between court-ordered kinship care 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 kinship care (care by relatives) when undertaken by informal arrangement on an indefinite basis. More specifically, the Commission proposed that:

- Legal recognition should be given to court-ordered kinship care as a

¹ 74 of 1983.

² Par. 17.2.5.

placement option for children who come before the court via the formal child protection system, in cases of abuse or neglect.

- Furthermore, 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. The Commission invited comments as to whether such an arrangement should involve an initial once-off investigation, an order by the child and family court, or whether this could be an administrative process.
- A parent or guardian of a child may give written consent to a person caring for that child to give consent to medical treatment for or an operation on the child.
- Any person, including the child him or 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.

16.2.2 Comments received

Durban Children's Society and the **Consortium** were in favour of the Commission's recommendations.

H. Gerryts supported the Commission's recommendation that relatives caring for orphaned or abandoned children should have access to a simple procedure whereby the necessary parental responsibilities can be conferred on them. The respondent suggested that an initial once-off investigation by a social worker should be required.

16.2.3 Evaluation and recommendations

Instead of providing for a procedure whereby the necessary rights and

responsibilities can be conferred on relatives caring for children on an informal basis as recommended in the discussion paper, the Commission recommends that the Children's Bill should set out the rights and responsibilities of such relatives.³ Thus, relatives caring for children on an informal basis would not have to go through a prescribed procedure before they can exercise certain right and responsibilities in respect of the children in their care. The Commission further gives recognition to the fact that a person may also become a foster parent through the administrative transfer of a child by the MEC for social development from a child and youth care centre to foster care⁴ or that a child may be provisionally transferred from a child and youth care centre in order to test the feasibility of a foster care placement.⁵ In view of the positive responses received, the Commission retains the rest of its recommendations. These recommendations have been incorporated in the Children's Bill.⁶

16.3 Cluster foster care

16.3.1 Overview of the proposals in Discussion Paper 103

In addition to statutory foster care, court-ordered kinship care and informal kinship care, the Commission recommended that -⁷

- Legal recognition should be given to both state-funded and privately-funded cluster foster care schemes subject to regulation in terms of the Act.
- '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.
- The court should 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.
- The Minister should be enabled to allocate grants to children in cluster foster care schemes and also to subsidise these schemes as entities.
- In any specific case where it is believed to be appropriate for more than six

³ Section 207.

⁴ Section 191 of the Bill.

⁵ Section 194 of the Bill.

⁶ Sections 198 and 208.

⁷ Par. 17.3.1.5 of the discussion paper.

children to be placed in the foster care of a single caregiver, the court should 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.

16.3.2 Comments received

Durban Children's Society and the **Consortium** supported the Commission's recommendations.

16.3.3 Evaluation and recommendations

As 'cluster foster care' is only one of the forms of care which resort under a collective foster care scheme, the Commission prefers to refer only to the term "collective foster care scheme' in order to cater for the various forms of collective foster care.⁸ The Commission is of the view that its recommendation that one or more additional caregivers be assigned by the children's court where more than six children are placed in the foster care of a single caregiver should be addressed in the Regulations to the Children's Act.

16.4 Specialist or professional foster care

16.4.1 Overview of the proposals in Discussion Paper 103

As pointed out in the discussion paper, the majority of children currently placed in foster care are children with behavioural problems. Thus, many foster parents provide not only care, but also treatment. It is therefore difficult to determine to which categories of children professional foster care should be provided.⁹ 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 recommended that -¹⁰

⁸ See section 1 of the Bill for the definition of 'collective foster care scheme'. See also sections 175(1)(f)(iii) and 202(2) of the Bill for the Commission's recommendations regards the placement of children in collective foster care.

⁹ Par. 17.3.2.4.

¹⁰ Ibid.

- All forms of foster care should be seen as having a professional dimension and that financing of this service should take into account the need for training and support of care-givers.
- In addition to the current foster care grant, an additional allowance should be paid to foster parents caring for children with special needs which have specific cost implications, including those with disabilities and chronic illnesses.
- 'Special needs' should be clearly defined.
- The Minister must be enabled to make regulations for the provision of financial assistance to children with special needs, including those with HIV/AIDS.

16.4.2 Comments received

Durban Children's Society and the **Consortium** supported the Commission's recommendations. **Ms R van Zyl** welcomed the recommendation that an additional allowance be paid to foster parents caring for children with special needs which have specific cost implications.

16.4.3 Evaluation and recommendations

In light of the positive responses received, the Commission reaffirms its preliminary recommendations made in the discussion paper.¹¹

16.5 Selection criteria for prospective foster parents

16.5.1 Overview of the proposals in Discussion Paper 103

The training needs of extended family care-givers and those offering indefinite care differ from those who are, for instance, participating in reunification services. 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 recommended that the Department of Social Development embark on a consultative process of developing broad minimum standards for the

¹¹ Section 346 of the Bill.

selection and training of substitute family care-givers in various categories.¹²

16.5.2 Comments received

Durban Children's Society and the **Consortium** agreed with the Commission's recommendations.

16.5.3 Evaluation and recommendations

As no adverse comments were received, the Commission reaffirms its preliminary recommendations made in the discussion paper.

16.6 Social and cultural issues when placing children in foster care

16.6.1 Overview of the proposal's in Discussion Paper 103

Section 31(1) of the Constitution¹³ guarantees every person belonging to a cultural, religious or linguistic community 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 to 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 care 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 recommended as follows:¹⁴

- 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

¹² Par. 17.4.3 of the discussion paper.

¹³ Constitution of the Republic of South Africa, Act 108 of 1996.

¹⁴ Par. 17.5.5 of the discussion paper.

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.

16.6.2 Comments received

Durban Children's Society, the **Consortium** and **Ms R van Zyl** supported the Commission's recommendations.

16.6.3 Evaluation and recommendations

In view of the positive responses received, the Commission retains its preliminary recommendations made in the discussion paper. These recommendations have been incorporated into the Children's Bill.¹⁵

16.7 Parental rights and responsibilities for foster parents

16.7.1 Overview of the proposals in Discussion Paper 103

As stated in the discussion paper, the rights and responsibilities of foster parents in terms of the Child Care Act are limited. Foster parents have only custody of their foster children 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 medical treatment of or an operation on the child.¹⁶ As the majority of foster placements last until the children reach the age of 18, the Commission recommended as follows:¹⁷

¹⁵ Section 201.

¹⁶ Par. 17.6.2 of the discussion paper.

¹⁷ Par. 17.6.5 of the discussion paper.

- The new children's statute should provide for a procedure whereby a foster parent or a relative who has been appointed by the court to care for a child may, on application to the court by him or herself or by the department or organisation managing the case, acquire specified parental rights and responsibilities in addition to those initially conferred by the court.
- The parties to the proceedings must include the parent(s) of the child, the foster parent(s) or relative(s) and the child where 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 parent(s) 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.

16.7.2 Comments received

Durban Children's Society, Africa Christian Action, the Consortium and Mr

Rothman were in favour of the Commission's recommendations. Mr Rothman mentioned that the presence of foster parent(s) and the biological parent(s) of the child in court could potentially create a hostile atmosphere. In his view, it would not be in the best interests of the child to permit more parties than necessary. He added that the court is empowered to allow persons to be present if it will serve the interests of the child. However, they must apply to do so.

16.7.3 Evaluation and recommendations

After due consideration of Mr Rothman's concern regarding the presence of both the biological and foster parent(s) of a child in court, the Commission recommends that it should be left to the discretion of the court to decide whether both the biological and foster parent(s) should be present when an application for the allocation of parental rights and responsibilities is heard. The court should exercise its discretion based on what is in the best interests of the child concerned. As no adverse comments were received, the Commission retains the rest of its preliminary recommendations made in the discussion paper. These recommendations have been incorporated in the Children's Bill.¹⁸

16.8 Termination of parental rights and responsibilities over certain children in foster care

16.8.1 Overview of the proposals in Discussion Paper 103

Measures to promote permanency for children in all forms of temporary care, including foster care, are discussed in detail in Chapter 9 above.¹⁹ Specifically where children in foster care are concerned, the Commission recommended 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.²⁰

The Commission further recommended that provision be made for subsidised adoption. This would enable long-term caregivers who cannot care for their foster

¹⁸ Sections 205.

¹⁹ Par. 9.9 above.

²⁰ Par. 17.7.4 of the discussion paper.

children without financial aid, to adopt these children.²¹

16.8.2 Comments received

The **Children's Rights Project and Local Government Project** (Community Law Centre, UWC) pointed out that the termination of the parental-child relationship without another similar relationship coming into being may prejudice the child. For example, if the biological parents' rights and responsibilities terminate, this might have negative consequences for inheritances the child might have received. Furthermore, if the child dies intestate, there will be no one on whom the child's estate will devolve.

The Consortium submitted that providing adoptive parents with a care dependency grant if they adopt a child with special needs would greatly encourage adoption of children with special needs. The respondent said that if social security benefits remain means tested and are not made universal, foster and adoptive parents should be excluded from having to pass a means test when applying for the child support grant, foster care grant or the care dependency grant.

The **Durban Children's Society** was in favour of the Commission's recommendations.

16.8.3 Evaluation and recommendations

With regard to Consortium's submission, the Commission does recommend that a supplementary special needs grant²² be payable to children with special needs under certain conditions.²³ The Commission does not agree with the submission of the **Children's Rights Project and Local Government Project** because, in terms of the Intestate Succession Act 81 of 1987, intestate succession is based on blood ties. Thus, if a child's biological parents whose parental rights and responsibilities have been terminated in respect of that child die intestate, the child will still be able to inherit from them. Furthermore, the Commission reaffirms its preliminary recommendations made in the discussion paper.²⁴

²¹ Ibid.

²² The term 'supplementary special needs grant' replaces the term 'care dependency grant' as used in the Social Assistance Act 59 of 1992.

²³ Section 346 of the Bill.

²⁴ Sections 176, 206 and 344 of the Bill.

16.9 Reunification services and statutory supervision

16.9.1 Overview of the proposals in Discussion Paper 103

In addition to the measures outlined in Chapter 9 above, the Commission recommended as follows with regard to family reunification services:²⁵

- 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 reunited with his or her family, whether family reunification is still possible, and what steps will be taken to create stability in the child's life. At this point the court may –
 - authorise the termination of reunification services; or
 - terminate some or all parental rights and responsibilities subject to conditions specified; and/or
 - confer additional parental responsibilities or rights on the foster parents or kinship care-givers should this appear to be in the best interests of the child.

With regard to statutory supervision, the Commission recommended as follows:²⁶

- 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.

²⁵ Par. 17.8.4 of the discussion paper.

²⁶ Ibid.

16.9.2 Comments received

Durban Children's Society supported the Commission's recommendations.

While the Consortium supported the recommendations relating to statutory supervision, it was concerned about the fact that no supervision services will be rendered to children in the care of relatives. The respondent submitted that although most cases do not require supervision, there are cases where orphaned children in the care of relatives are subjected to the 'Cinderella syndrome', i.e. they receive food and resources only after the biological children's needs have been satisfied and are expected to do most, if not all, the household chores. The respondent suggested that children in the care of relatives should be provided with some forum or person to approach if needed. Furthermore, NGOs, CBOs and other child care workers who come across such situations should be equipped to respond and assist the children. An option would be to place the case under supervision.

Ms **R van Zyl** welcomed the recommendation that the court should be able to determine the degree of supervision to be rendered to foster care placements. She submitted that when a court decides to authorise the termination of reunification services, it should be satisfied that reunification with the child's family is unlikely.

16.9.3 Evaluation and recommendations

The Commission has reconsidered its recommendation that where a child has not been reunited with his or her biological family after the expiration of the initial court order, a social worker's report must be submitted to the child and family court explaining why the child was not reunited with his or her biological family. The Commission considers it more appropriate to require that such a report be submitted two months before the expiry of the initial court order.²⁷ In addition to the recommendations regarding family reunification services, the Commission recommends that the child and family court should, after considering the social worker's report, be able to order that the social worker must continue facilitating the reunification of the child with his or her family.²⁸ The Commission further agrees with Ms Van Zyl's proposal that the child and family court should order the termination of

²⁷ Section 204(2) of the Bill.

²⁸ Section 204(3)(a) of the Bill.

reunification services only if it is satisfied that reunification with the child's family is unlikely. This proposal is accordingly adopted.²⁹

With regard to the Consortium's concern that no supervision services will be rendered to children in the care of relatives, the Commission did not totally exclude the rendering of supervision services to such children, but has recommended that supervision services should not be required unless there is a need for such services. The Commission thus agrees with the Consortium that, where the circumstances of a specific case require social work intervention, the case should be placed under supervision. The Children's Bill also provides children placed with relatives with the option of approaching the child and family court³⁰ or the Children's Protector³¹ if the placement is not in the best interests of the children. The Commission accordingly reaffirms its preliminary recommendations with regard to supervision services. These recommendations have been incorporated in the Children's Bill.³²

16.10 Duration and extension of foster care orders

16.10.1 Overview of the proposals in Discussion Paper 103

The Commission recommended that in instances where a child has been abandoned, or his or her parents are deceased, or where there is 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.³³

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 believed that children placed in foster care should be entitled to the same protection as those children placed in a school of industries. Accordingly, the Commission recommended that the Minister may, if he or she deems it necessary, order that a child whose period of placement 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

²⁹ Section 204(3)(b) of the Bill.

³⁰ Section 208(c).

³¹ Section 325(1).

³² Section 175(3).

³³ Par. 17.9.5 of the discussion paper.

beyond the end of the year in which the child turns 21 years. Furthermore, provided that if the child is about to turn or has turned 18, such further placement will be subject to the consent of the child.³⁴

The Commission noted that, should the age of majority be lowered to 18 as recommended in Chapter 4 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 children in schools of industries and those children in foster care and children's homes.³⁵

16.10.2 Comments received

Durban Children's Society agreed with the Commission's recommendations.

Although the **Consortium** endorsed the recommendation that the court be empowered to make a foster care order for a period of more than 2 years, it submitted that this should not become the norm in cases where a child has been abandoned or orphaned. The respondent stated that such placements should be of short duration and assessed for permanency planning after the expiry of a short period.

16.10.3 Evaluation and recommendations

The Commission retains its preliminary recommendation that the children's court be empowered to make a foster care order for a period of more than two years.³⁶ Furthermore, the Commission agrees with the Consortium that priority should be given to creating stability in the child's life when making a placement in foster care. The Commission accordingly recommends that the child and family court may issue a foster care order or kinship care order for more than two years or extend such an order for more than two years provided that consideration is given to the need for creating stability in the child's life.³⁷ The Commission reaffirms its preliminary recommendation that the stay of children in foster care may be extended from time to

³⁴ Ibid.

³⁵ Ibid.

³⁶ Section 203 of the Bill.

³⁷ Section 203 of the Bill.

time until the end of the year in which the child turns 21.³⁸

16.11 Rights of non-South African children to foster care grants

16.11.1 Overview of the proposals in Discussion Paper 103

As pointed out in the discussion paper, 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.³⁹ 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.⁴⁰ In the absence of required documentation, foreign children are denied a basic measure of care and protection. The Commission therefore recommended 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.⁴¹

16.11.2 Comments received

The **Dutch Reformed Church**, Pretoria, submitted that South Africa does not have enough resources to provide for the needs of non-South African children. The respondent is concerned that citizens of neighbouring countries may deliberately send their children to, or abandon their children in South Africa in order for the State of South Africa to take care of their children.

Ms **R van Zyl** was not in favour of providing non-South African children with financial assistance.

16.11.3 Evaluation and recommendations

³⁸ Section 196(2) of the Bill.

³⁹ Par. 17.10.1 of the discussion paper.

⁴⁰ Par. 17.10.2 of the discussion paper.

⁴¹ Par. 17.10.4 of the discussion paper.

The Commission reaffirms its preliminary recommendations made in the discussion paper. However, as also pointed out by the respondents, limited resources do not allow making available to non-South African children all grants to which South African children are entitled. The Commission therefore recommends that financial assistance to non-South African children be restricted to the foster care grant, court-ordered kinship care grant and the emergency court grant.⁴²

16.12. Social security

16.12.1 Overview of the proposals in Discussion Paper 103

The Commission recommended as follows:⁴³

- Kinship care placements not requiring court intervention should be facilitated through a non-means-tested child grant (payable in respect of all children in need who are South African citizens and resident in the Republic) 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 child 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. 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 care-givers as well as the children in their foster care.

⁴² Sections 342(1) and 345 of the Bill.

⁴³ Par. 17.11.4 of the discussion paper.

16.12.2 Comments received

The **Consortium** submitted that a foster parent, appointed by the court, should receive only the foster care grant and not also the proposed child grant. The Consortium stated that providing both grants would not help with efforts to move towards substantive equality in the child care system, specifically with reference to children in urban versus rural settings.

Ms R van Zyl submitted that tax rebates, and free medical services and education for the biological children of care-givers who foster other children is a wonderful idea. She, however, cautioned that this could be abused resulting in persons fostering children for the wrong reasons. The Commission's recommendation is thus not supported.

16.12.3 Evaluation and recommendations

See Chapter 24 below for a detailed discussion on the Commission's recommendations with regard to the various grants payable to children in foster care, court-ordered kinship care and informal kinship care.

CHAPTER 17

ADOPTION AS A FORM OF SUBSTITUTE FAMILY CARE

17.1 Introduction

Adoption, as it is practised today, embodies a deep sense of social purpose - the primary aim of which is the attempt to assuage the need to provide a stable home for a child. This enables a child to profit from an upbringing that he or she would not otherwise enjoy.¹ Adoption can therefore be described as a process by which society provides a substitute family for a child whose natural parents are unable or unwilling to care for the child.² It can therefore be seen primarily as a device for imitating nature in respect of the rearing of a child. This need not be the purpose, or at least the sole purpose, of adoption. It can, in theory at least, also be used simply as a means of altering legal relationships, particularly for the purposes of the law of succession.

The whole issue relating to inter-country adoption is discussed in Chapter 21 below.

17.2 Overview of the current law and the proposals in Discussion Paper 103

The law relating to adoption is contained in Chapter 4 of the Child Care Act, 1983. Its provisions are designed to promote the welfare of the child by admitting him or her to authentic family relationships, while at the same time safeguarding the interests both of the natural and of the adoptive parents.³

17.3 Who may be adopted and by whom?

Adoption in terms of the Child Care Act, 1983 is a formal process by means of which parental power over a child is terminated, and vested in another person or persons, namely the adoptive parent(s).⁴ Section 17 of the Act provides that a child may be

¹ See also Divya Singh 'Adoption of children born out of wedlock' 1996 (29) **De Jure** 305; Anthony Dickey **Family Law** (third edition) Sydney: LBC Information Services 1997 423.

² As was done in the **Final Report** (1997) of the Royal Commission on Human Relationships (Vol 4, par2, p. 98), quoted by Dickey **Family Law** (third edition) 423.

³ Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 437.

⁴ Barnard, Cronjé and Olivier **The South African Law of Persons and Family Law** 279.

adopted by a husband and his wife jointly,⁵ by a widower or widow or unmarried⁶ or divorced person, or by a married person whose spouse is the parent of the child.⁷ 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:⁸

- They must possess adequate means to maintain and educate the child;⁹
- 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 the necessary consent(s) to the adoption must have been given.¹⁰

In considering an application for adoption the children's court is enjoined to 'have regard to' the cultural and religious¹¹ background of the child and of the natural

⁵ Married persons can adopt a child only jointly. See also the wide definition of 'marriage' in section 1 of the Child Care Act, 1983.

⁶ Tshepo Mosikatsana 'Comment on *The Adoption by K and B, Re* (1995) 31 CRR (2D) 151 (Ont Prov Div) 1996 (12) **SAJHR** 582 at 583 - 4 argues that the inclusion in section 17 of an 'unmarried' person as one of the classes of persons qualified to adopt a child clearly includes single gays and lesbians as prospective adoptive parents. See, however, John B 'Prejudice passed off as screening' (February / March 2000) **ChildrenFIRST** 9.

⁷ In terms of the amendments brought about to the Child Care Act, 1983 by the Adoption Matters Amendment Act 56 of 1998, the natural father of a child born out of wedlock can now adopt his child.

⁸ Prescribed by section 18(4) of the Child Care Act, 1983.

⁹ Section 18(4)(a). Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 448, footnote 64, point out that section 18(4)(a) is consistent with the provisions of article 27 of the UN Convention on the Rights of the Child, which recognises every child's right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. 'Though the parents bear the primary responsibility to provide for the child, the state, in terms of article 27(3) of the UN Convention read with section 28(1)(c) of the final Constitution, carries the obligation to assist the parents in meeting the child's needs. This suggests that indigent families should be given assistance in the form of government subsidies and tax breaks to enable them to raise their children'.

¹⁰ See par. 17.4 below.

¹¹ Although the Child Care Act, 1983 lays down no religious requirement as such for an adoptive parent, the **Guide to Adoption Practice** at 61 expresses the view that '[t]he home should provide opportunity for the religious instruction and spiritual development of the child adoption'. If this implies that lack of any religious affiliation is per se a disqualification, Van Heerden et al **Boberg's Law of Persons and the Family** 442, footnote 30 argue that it goes too far: 'There is no warrant at all for the view that the legislature disapproved of atheists or agnostics in the role of adoptive parents. This view is reinforced by s 15 of the final Constitution, which protects believers and atheists alike'. Quite different considerations arise when a child who comes from a certain religious group has to be 'matched' with particular adoptive parents. But even in this context the courts have stressed that religious background is of little or no importance in the

parents, as compared with that of the proposed adoptive parent or parents.¹² This directive constitutes the legal basis for ‘matching’ a particular child to particular adoptive parents, and has been developed into a sophisticated set of criteria by social workers engaged in adoption work.¹³ These considerations are not, however, decisive of whether a particular adoption order should be made. Unlike the issues on which a court must be satisfied, these are merely matters to which it must have regard.¹⁴

There are presently no legal barriers to trans-racial adoptions.¹⁵

17.3.1 Overview of the proposals in Discussion Paper 103

In the discussion paper, the Commission recommended that only **children** may be adopted. As a result, the Commission saw no need to provide for the possibility to adopt persons over the age of 18 years. The Commission conceded, 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 did not regard it necessary to embody this principle in the Children’s Bill as a *legal* principle as this should form the basis of the assessment and permanency planning process.

The Commission saw no reason to limit joint adoptions to married couples. It therefore proposed that married couples, partners in a domestic conjugal life-partnership, or other persons sharing a common household and forming a family

case of a newly born or very young child. See in this regard **C v Commissioner of Child Welfare, Wynberg** 1970 (2) SA 76 (C) at 87D-F, 88 B-H.

¹² Section 18(3), read with section 40, of the Child Care Act, 1983.

¹³ See the **Guide to Adoption Practice** 81, from which it appears that even ‘physical likeness’ of the child to his or her proposed adoptive parents is considered relevant, though not decisive. Other factors are ‘education’ and place of residence.

¹⁴ Van Heerden et al **Boberg’s Law of Persons and the Family** (2nd edition) 449.

¹⁵ The requirement of ‘race matching’ was done away with in 1991 in terms of the Child Care Amendment Act 86 of 1991. For a discussion of the concept of race matching and the practice of trans-racial adoptions, see J Heaton ‘The relevance of race and classification in terms of the Population Registration Act 30 of 1950 for adoption in South Africa’ (1989) 106 **SALJ** 713; D J Joubert ‘Interracial adoptions: Can we learn from the Americans?’ (1993) 110 **SALJ** 726; N Zaal ‘Avoiding the best interests of the child: Race-matching and the Child Care Act 74 of 1983’ (1994) 10 **SAJHR** 372; T Motsikatsana ‘Transracial adoptions: Are we learning the right lessons from the Americans and Canadians? - A reply to Professors Joubert and Zaal’ (1995) 112 **SALJ** 606, ‘Examining class and racial bias in the adoption process and the viability of transracial adoptions as a policy preference: A further reply to Professors Joubert, Pakati and Zaal’ (1997) 13 **SAJHR** 602. Heaton, Joubert and Zaal argue that trans-racial adoptions may meet the child’s best interests, while Motsikatsana is opposed to such adoptions, arguing that they are not in the best interests of the child concerned.

unit¹⁶ may adopt a child jointly. This recommendation, for instance, would allow for the joint adoption of a child by the husband and all his wives (the kraal) in a customary law setting.

The Commission in the discussion paper considered 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 accepted that it is necessary to impose the same threshold upon eligibility for step-parent and relative adoption as for other adoptees and therefore did not recommend the introduction of a parallel system for intra-familial adoptions.

The Commission noted 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, 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 recommended a move away from the adequate means test to a willing and able test (section 18(4)(a)). The Commission further recommended 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 did not recommend the reintroduction of the requirement of age differentials, as was provided for in the 1960 Children's Act. Neither did 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**.¹⁷

While the Commission unfortunately has to concede that racial prejudice is still alive

¹⁶ The Law Society of the Cape of Good Hope expressed concern over the vagueness of this concept and suggested that an element of permanency be attached in order to qualify as a family unit.

¹⁷ 2000 (3) SA 422 (CC).

in South Africa, it stated 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 did not exclude the possibility of trans-racial adoptions, provided it is in the best interests of the child concerned, and recommended that sections 18(3) and 40 of the Child Care Act, 1983 be retained.

17.3.2 Comments received

Respondents did not whole-heartedly support the Commission's recommendation that same-sex partners be able to adopt a child jointly. They argued that it is not in the best interests of a child to be placed in a "same-sex household".¹⁸ Most of these views were expressed from a biblical point of view.

Mr Rothman submitted that before dispensing with the requirement of limiting joint adoptions to married couples, the Commission must assess the full implications of such a step which will have a far-reaching impact on issues relating to parental rights, including familiar terms such as husband and wife; parents; father and mother; biological fathers of children born out of wedlock. Furthermore, he stated that the impact on issues relating to responsibility; access; maintenance; children's court proceedings; transfer of parental right; adoptions; marriages; and passports must be considered.

17.3.3 Evaluation and recommendation

The Commission's preliminary recommendations in respect of who may be adopted (children only) and the qualifications of prospective adoptive parents were not controversial and hardly elicited comment. The Commission therefore confirms its preliminary position.¹⁹ In line with the Commission's position on persons unsuitable to work with children, it is also recommended that persons unsuitable to work with children should not be eligible to adopt a child.²⁰ All prospective adoptive parents will therefore have to be screened and assessed.

¹⁸ Pro-Life; African Christian Action.

¹⁹ Sections 257 and 258(1) of the Bill.

²⁰ Section 258(3) of the Bill.

The Commission's recommendation in respect of joint adoptions proved more controversial. In this regard, we wish to point out that families come in many shapes and sizes. The definition of family also changes as social practices and traditions change. In recognising the importance of the family, care must be taken not to entrench particular forms of family at the expense of other forms. However, our courts have recognised that the institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children.²¹

The celebration of marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function.²²

Section 17 of the Child Care Act, 1983 effectively excludes all those in relationships other than heterosexual marriages from adopting children jointly. In order to make the pool of prospective care-givers in respect of a child larger, that the Commission recommended in the discussion paper that partners in a domestic conjugal life-partnership and persons who share a common household and form a family unit also be allowed to adopt a child jointly. The Constitutional Court in the **Du Toit** case also held that same-sex life partners should be allowed jointly to adopt children where they are found to be suitable parents.²³

Important is also the recent judgment of Madala J in the **Satchwell** case.²⁴ In this case, the Constitutional Court limited the order made to partners in a permanent same-sex life partnership who have 'undertaken and committed themselves to reciprocal duties of support'. In the absence of such reciprocal duties of support, it would appear that the Court would be hesitant to place such partnerships on an equal footing with marriages. By analogy, however, if such partners jointly accept the duty of support in respect of a particular child, which is the logical outcome of a joint adoption application, then the courts should not hesitate to place such

²¹ **Dawood and another v Minister of Home Affairs and others; Shalabi and another v Minister of Home Affairs and others; Thomas and another v Minister of Home Affairs and others** 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC), para 31.

²² Per Ackermann J in **National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others** 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC).

²³ See also Lori Litchman 'Pennsylvania High Court OKs Second-Parent Adoption' (21 August 2002) Internet
<http://www.law.com/servlet/C.../View&c=LawArticle&cid=1029689036632&t=LawArticl>
 Accessed on 26 August 2002.

²⁴ Case CCT 45/01, decided on 25 July 2002.

partnerships on an equal footing with marriage.

In light of the **Du Toit** case, the Commission affirms its preliminary recommendations in this regard.²⁵

17.4 Consent to adoption

In terms of the Child Care Act, 1983 consent to an adoption must be obtained from:

- (a) both parents of a legitimate child;²⁶
- (b) if the child is born out of wedlock, by both the mother and the natural father of the child, 'whether or not such mother or natural father is a minor or married person and whether or not he or she is assisted by his or her parent, guardian or in the case of a married person, spouse, as the case may be: Provided that such natural father has acknowledged himself in writing to be the father of the child and has made his identity and whereabouts known . . .';²⁷
- (c) the child must also consent to the adoption if the child is over 10 years of age and if the child understands the nature and import of such consent;²⁸
- (d) the foster parent where the child is in foster care and the foster parent has not himself or herself made an application for the adoption.²⁹

Consent must be in writing and must, if given in the Republic, be signed by those giving the consent in the presence of a commissioner of child welfare who must attest the consent.³⁰ Before the commissioner attests the consent he must inform the person granting the consent of the legal consequences of the adoption.³¹ The person concerned may withdraw the consent in writing before any commissioner at any time during a period of up to 60 days after having given such consent³² and the

²⁵ Section 258(1)(a)(ii) of the Bill.

²⁶ Section 18(4)(d) of the Child Care Act, 1983.

²⁷ Section 18(4)(d) of the Child Care Act, 1983, as amended following the **Fraser** judgment by the Adoption Matters Amendment Act 56 of 1998.

²⁸ Section 18(4)(e) of the Child Care Act, 1983.

²⁹ Section 18(4)(g) of the Child Care Act, 1983.

³⁰ Section 18(5) of the Child Care Act, 1983.

³¹ Regulation 19(2).

³² Section 18(8) of the Child Care Act, 1983; Regulation 19(2)(b). See also **Re J (an infant)** 1981 2 SA 330 (Z) as to the withdrawal of consent by a father and **Y v Acting Commissioner of Child Welfare, Roodepoort** 1982 4 SA 112 (T) as to the withdrawal of consent by a mother.

children's court cannot make any order of adoption before the expiration of this 60 day period.³³

Previously, in the case of a child born of a South African citizen, the applicants also had to be South African citizens and thus resident in the Republic, or if they were not South African citizens they must have qualified for citizenship and have already made application in this connection.³⁴

In **Fraser v Children's Court, Pretoria North**,³⁵ the Constitutional Court declared section 18(4)(d) of the Child Care Act, 1983, which in its form at that time denied unwed fathers the right to consent to or veto the adoption of their natural children, to be unconstitutional in that it discriminated unfairly against unwed fathers on the basis of their gender and marital status and it also discriminated unfairly against fathers in non-Christian marriages. Parliament was given a period of two years to amend the law to bring it in conformity with the constitutional imperative of equality contained in section 9(3) of the Constitution. The Adoption Matters Amendment Act 56 of 1998, which inter alia amends section 18(4)(d) of the Child Care Act, 1983 so as to require the natural father's consent to his child's adoption in certain instances, takes into account the Constitutional Court's decision in **Fraser**.³⁶

No consent will be required in the case of a child whose parents are dead and for whom no guardian has been appointed;³⁷ nor from any parent who is as a result of mental illness incompetent to give any consent;³⁸ nor from a parent who deserted³⁹

³³ Section 18(9) of the Child Care Act, 1983.

³⁴ This particular requirement was held unconstitutional by the Constitutional Court in **Minister for Welfare and Population Development v Fitzpatrick** 2000 (3) SA 422 (CC).

³⁵ 1997 (2) SA 261 (CC).

³⁶ Ibid. See also T L Motsikatsana 'Is papa a rolling stone? The unwed father and his child in South African law - A comment on *Fraser v Naudé*' (1996) 29 **CILSA** 154 and Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 397 et seq. See further C J Davel and R A Jordaan 'Het die kind se belange uiteindelik geseëvier?' 1997 **De Jure** 330; R A Jordaan and C J Davel 'Die Fraser trilogie' 1997 **De Jure** 394; Carol A Gorenberg 'Fathers' rights vs. children's best interests: Establishing a predictable standard for California adoption disputes' (1997) Vol. 31 No. 2 **Family Law Quarterly** 169.

³⁷ Section 19(a) of the Child Care Act, 1983.

³⁸ Section 19(b)(i) of the Child Care Act, 1983. Prof J C Bekker maintains that this provision is harsh and unreasonable in view of the fact that a mentally ill person 'is not necessarily bereft of all emotion and will'.

³⁹ Luanda Hawthorne 'Children and Young Persons' in Schäfer **Family Law Service** argues that 'desertion' in this context must be given a restrictive meaning more akin to abandonment rather than mere neglect. Thus, a father who has failed to maintain his children in terms of a court order could not be said to have deserted his children: **Van Rooyen v Van Staden** 1984 1 SA 800 (T).

the child **or**⁴⁰ whose whereabouts are unknown;⁴¹ nor from a parent who has assaulted, ill-treated or abused the child or allowed the child to be so assaulted, ill-treated or abused;⁴² nor from a parent who has caused or conduced to the seduction, abduction or sexual exploitation of the child or the commission of immoral acts by the child;⁴³ nor from a parent who is withholding consent unreasonably.⁴⁴

Section 19(b) of the Child Care Act, 1983 was amended by section 5(b) of the Adoption Matters Amendment Act 56 of 1998. In addition to the grounds listed above, no consent to adoption will be required from a parent

(vii) who, in the case of a child born out of wedlock, has failed to acknowledge himself as the father of the child or has, without good cause, failed to discharge his or her parental duties with regard to the child;

(viii) whose child, in the case of a child born out of wedlock, was conceived as a result of an incestuous relationship between himself and the mother of the child; or

(ix) who, in the case of a child born out of wedlock -

(aa) was convicted of the crime of rape or assault of the mother of the child; or

(bb) was, after an enquiry by the children's court following an allegation by the mother of the child, found, on a balance of probabilities, to have raped or assaulted the mother of the child: Provided that such a finding shall not constitute a conviction for the crime of rape or assault, as the case may be; or

(x) who, in the case of a child born out of wedlock, has failed to respond, within 14 days, to a notice served upon him as contemplated in section 19A.⁴⁵

⁴⁰ Before its amendment by the Adoption Matters Amendment Act 56 of 1998, the consent of the parent who deserted the child **and** whose whereabouts were unknown could be dispensed with. These now form two separate criteria for dispensing with consent: the 'and' was changed to an 'or'.

⁴¹ Section 19(b)(ii) of the Child Care Act, 1983.

⁴² Section 19(b)(iii) of the Child Care Act, 1983.

⁴³ Section 19(b)(iv) of the Child Care Act, 1983.

⁴⁴ Section 19(b)(vi) of the Child Care Act, 1983. See also **SW v F** 1997 (1) SA 796 (O). In paragraph 7.2.10 of the First Issue Paper mention is made of the view of some social workers that commissioners in the children's courts are reluctant to use this ground especially if the parent who is withholding consent is represented by a lawyer. See also question 72 posed on page 86 of the First Issue Paper.

⁴⁵ For the procedure that must be followed before a children's court can dispense with a natural parent's consent to the adoption of his or her child on any of the grounds set out in section 19(b) of the Act, see regulations 21(4) - (6).

The Adoption Matters Amendment Act 56 of 1998 also inserted a new section 19A in the Child Care Act, 1983. This new section provides for the natural father of a child to be given notice of consent given by the mother for the adoption of their child born out of wedlock.⁴⁶ It further provides for notification of a parent of consent given by the other parent for the adoption of their child born out of wedlock and affords the natural father the opportunity to acknowledge paternity prior to making an order for adoption of his child born out of wedlock so as to enable him to exercise his rights regarding the adoption of the child.⁴⁷ A person who wishes to acknowledge himself as the father of a child born out of wedlock can now apply to have the registration of the birth of such child amended by the recording of an acknowledgement of paternity and having his particulars entered in terms of section 11 of the Births and Deaths Registration Act, 1992.

Non-disclosure adoptions, that is where the parents of the child are not allowed to know who the prospective adoptive parents are, nor what the child's destination is to be after the adoption, are regulated by section 18(6) of the Act and can only take place if the children's court is satisfied that this will serve the best interests of the child.⁴⁸ To ensure this secrecy, a parent is not allowed to be present during the proceedings of the children's court unless the court is of the opinion that the parent's presence will serve the best interests of the child.⁴⁹

17.4.1 Overview of the proposals in Discussion Paper 103

In the discussion paper, the Commission noted 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 supported the contention that most problems related to consent are averted when proper pre- and post-adoption counselling is provided.

Section 18(4)(e) of the Child Care Act requires the consent to his or her adoption of a child older than 10 years of age. In the Commission's opinion, the views of a child,

⁴⁶ In terms of section 19A(1).

⁴⁷ In terms of section 19A(7).

⁴⁸ In 1981, 25% of all adoptions were of this type: Van der Vyver and Joubert **Persone- en Familiereg** (2nd edition) Cape Town: Juta 1985 604.

⁴⁹ Regulation 21(3).

where a child has the ability to express such views, must always be considered. The Commission therefore recommended in the discussion paper 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 acknowledged this fact and wishes to encourage unmarried fathers to play a far greater role in the upbringing of their children. It was clear, however, that difficulties are being experienced in tracing unmarried fathers and serving notice on such fathers to the effect that the mother has consented to the adoption of their child (in terms of section 19(A)). Again the problem seemed 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 pointed out that section 19A(1) needs amendment as in its present form it 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 recommended the retention of the 60-day cooling off period provided for in sections 18(8) and (9) of the Child Care Act, 1983. This allows the parent of a child who has given consent to the adoption of his or her child the right to withdraw such consent up to 60 days after such consent has been given. In this regard, the Commission was convinced by those respondents who pointed out that proper pre- and post-adoption counselling should prevent any difficulties with parents later wishing to withdraw consent.

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.

17.4.2 Comments received

The **Dutch Reformed Church, Pretoria**, recommended that the 60-day cooling off period in adoptions be reduced to 14 days. The respondent mentioned that a lot of trauma and permanent damage is caused in cases where the biological parent retracts consent. The same argument was adduced by the **Suid-Afrikaanse Vroue Federasie**, North-West Province, who suggested that the 60-day cooling off period in adoptions be reduced to 30 days when children from birth to 5 years are to be adopted. It was said that adoptive parents' bond very quickly with younger children and that withdrawal of consent by the biological parent can cause immense trauma for both the child and adoptive parents.

Mr Rothman asserted that section 19(b)(iv) which deals with dispensing with consent where a parent withholds consent unreasonably is not easy to apply in practice and the regulations do not provide for procedures to be followed. He thus recommended that appropriate regulations be promulgated in order to ensure a uniform approach for adjudicating over these issues.

17.4.3 Evaluation and recommendations

The Commission confirms its preliminary position on consent to adoption as set out in the discussion paper. The consent of both parents of the child, whether they are married or not, or any other person with the guardianship component of parental rights and responsibilities in respect of the child, and the child, being of sufficient maturity to understand the implications of being adopted and giving consent to adoption, is required.⁵⁰ Consent of a parent or person with parental rights and responsibilities in respect of the child to be adopted is not required where that parent or person

- is incompetent to give consent due to mental illness,
- has abandoned the child,
- if the whereabouts of that parent or person is unknown,
- has abused or deliberately neglected the child,
- has consistently failed to fulfil his or her parental responsibilities towards the child during the last 12 months;

⁵⁰ Section 259(1) of the Bill.

- has been divested by court order of the right to consent to the adoption of the child; or
- has failed to respond to a notice of a proposed adoption.⁵¹

The need to obtain the consent of the biological father of the child is excluded in certain specific instances. These include the scenario where the biological father was not married to the mother of the child and has not admitted in the prescribed manner that he is the biological father of the child, where the child was conceived from an incestuous relationship between that person and the mother, and where the father was convicted of rape of the mother.⁵²

The practical problems relating inter alia to dispensing with consent, tracing uninvolved parents to obtain the necessary consent, and the manner in which notice of an impending adoption is to be given, should be dealt with in the regulations to ensure uniformity of approach.

The Commission recommends that the 60 days cooling period be retained. A parent who has consented to the adoption of a child may therefore withdraw the consent within 60 days after having signed the consent form, after which the consent becomes final.⁵³ Partly to address the concerns of respondents such as the Dutch Reformed Church and the Suid-Afrikaanse Vroue Federasie, North-West Province and to provide for those situations where the biological parents clearly have no intention to remain involved with the child pending finalisation of the adoption, the Commission recommends that the Department for Social Development, a designated adoption agency or adoption social worker may apply to the child and family court for an order freeing the biological parents or persons with parental rights and responsibilities from their parental rights and responsibilities in respect of the child pending the adoption.⁵⁴ The court must then authorise a designated child protection organisation or an individual to exercise parental responsibilities and rights in respect of the child pending the adoption. Unless the court orders otherwise, a freeing order relieves the biological parents or persons with parental rights and responsibilities from the duty to contribute towards the maintenance of the child for the duration of the order.⁵⁵

⁵¹ Section 261(1) of the Bill.

⁵² Section 261(2) of the Bill.

⁵³ Section 259(6) of the Bill.

⁵⁴ Section 260(1) of the Bill.

⁵⁵ Section 260(5) of the Bill.

The Commission also envisages an active role in adoption proceedings for the registrar of the child and family court. When a child becomes available for adoption the registrar is tasked to establish the name and address of each person whose consent for the adoption is necessary⁵⁶ and to serve notice on each such person.⁵⁷ The notice must inform the person whose consent is sought of the proposed adoption of the child.

Where a parent or person with parental rights and responsibilities in respect of a child withholds consent unreasonably while the adoption is in the best interests of the child, the court may grant an order for the adoption of the child despite the absence of such consent. In determining whether consent is being withheld unreasonably, the court must take into account factors such as the nature of the relationship between the child and the person withholding consent and the prospects of a sound relationship developing between the child and the person withholding consent in the immediate future.⁵⁸

17.5 Effect of an adoption

An adoption order terminates all the existing rights and obligations between the child and his or her pre-adoption parent(s), and the relatives of the parent(s),⁵⁹ and an adoptive child is for all purposes whatever deemed in law to be the legitimate child of the adoptive parent 'as if he (or she) was born of that parent during the existence of a lawful marriage'.⁶⁰ Even in the interpretation of a will, unless the context otherwise indicates, an adopted child shall be regarded as being born from his or her adoptive parent(s) and, in determining his or her relationship to the testator or another person for the purposes of a will, as the child of his or her adoptive parent(s) and not as the child of his or her natural parent(s) or any previous adoptive parent(s).⁶¹ An adoption

⁵⁶ Section 262(1) of the Bill.

⁵⁷ Section 263(1) of the Bill.

⁵⁸ Section 266(2) of the Bill.

⁵⁹ Section 20(1) of the Child Care Act, 1983, read together with sections 1(4)(e) and (5) of the Intestate Succession Act 81 of 1987. If, however, a child is adopted by a married person whose spouse is the parent of that child (i.e. a stepparent adoption), then the adoption order does not terminate any rights and obligations existing between the child and such parent: section 20(1), read together with section 17(c), and with section 1(4)(e)(ii) of the Intestate Succession Act 81 of 1987.

⁶⁰ Section 20(2) of the Child Care Act, 1983. See also **Venter v Die Meester** 1971 (4) SA 482 (T); **Cohen v Minister for the Interior** 1942 TPD 151 at 153-4.

⁶¹ Except in the case of a natural parent who is also the adoptive parent of the child concerned

order will have retrospective effect and will confer the surname of the adoptive parent on the adopted child.⁶² Adoption does not, however, extinguish any rights the adopted child may have against third parties. Thus, the adopted child can still sue a third party who has caused the child loss by the wrongful killing of his or her natural parent despite the fact of his or her subsequent adoption.⁶³

Adoption can obviously not do away with the legal consequences of blood relationship. Thus section 20(4) of the Child Care Act 1983 provides that 'an order of adoption shall not have the effect of permitting or prohibiting any marriage or carnal intercourse (other than a marriage or carnal intercourse between the adoptive parent and the adopted child) which, but for the adoption, would have been prohibited or permitted'. This means that impediments to marriage based on blood relationship which existed before the adoption of the child, persist in spite of the adoption and also that no further impediments to marriage are created by the adoption of the child, other than that the adoptive parent and the child may not marry one another.⁶⁴

Finally, an adoption order terminates an order by the children's court or a criminal court concerning the custody of the child.⁶⁵

17.5.1 Overview of the proposals in Discussion Paper 103

In the discussion paper, the Commission recommended 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 did recommend 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 also pointed out that its preliminary 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.

and who was married to the adoptive parent of the child concerned at the time of the adoption: Section 2D(1)(a) of the Wills Act 7 of 1953.

⁶² Section 20(3) of the Child Care Act, 1983. However, the opposite can be provided for.

⁶³ **Constantia Versekeringsmaatskappy v Victor** 1986 1 SA 601 (A).

⁶⁴ Barnard, Cronjé and Olivier **The South African Law of Persons and Family Law** 282.

⁶⁵ Section 20(5) of the Child Care Act, 1983.

17.5.2 Comments received

Rev. A W Doyer is of the view that the adoption system should be abolished. He submitted that the adoption system is beyond reform as the focus seems to be on the need of the childless couples instead of the best interests of the child. He further argues that adoption perpetuates the myth of the transferability of parenthood. This myth stands in stark contrast to the stated aim of adoption being "... to support that child and his or her family in order to ensure that the child remains with its family" as well as the presumption that "children are best cared for by their parents". Rather than to reform the adoption laws, Rev. Doyer suggested that the foster care system be developed. In his view, this will form a sound structure for the long term care of children up till the age of 18, effectively replacing adoption.

17.5.3 Evaluation and recommendation

The views expressed by Rev. Doyer merit serious consideration given the drastic effects of an adoption order. Such an order will in the ordinary course of events terminate all parental rights and responsibilities any person, including a parent, had in respect of the child immediately before the adoption and terminate all claims to contact.⁶⁶ The order will confer full parental rights and responsibilities in respect of the adopted child upon the adoptive parent(s) and the surname of the adoptive parent(s) on the adopted child. For all purposes the adopted child will be regarded as the child of the adoptive parent(s).⁶⁷ If the purpose of adoption is to find the best child for the prospective adoptive parents and not to find the best parent(s) for the child, as Rev. Doyer maintains, then we should reconsider the fundamental principles underlying adoption as a system of alternative care.

17.6 Giving or receiving considerations for adoptions

Nobody may, except as prescribed under the Social Work Act, 1978 give, undertake to give, receive or contract to receive any consideration in cash or kind, in respect of the adoption of a child.⁶⁸ Contravention of this provisions constitutes a criminal offence and offenders will be liable to a fine not exceeding R 8 000 or to

⁶⁶ Section 267(1) of the Bill.

⁶⁷ Section 267(3) of the Bill.

⁶⁸ Section 24(1) of the Child Care Act, 1983.

imprisonment for a period of two years or to both the fine and imprisonment.⁶⁹

It was brought to the Commission's attention that the above prohibition 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 such prospective adoptive parents, 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 therefore recommended in the discussion paper that the prohibition against considerations be maintained; also that the Regulations to the children's statute provide clear guidance to adoption practitioners and the courts as to what will constitute a 'consideration'.

No submissions were received on this issue.

The Commission would like to prohibit bartering of children whether directly or indirectly and not place mothers of children being the subject of adoption proceedings in a position where they are financially beholden to the prospective adoptive parents. The Commission therefore confirms its preliminary position and recommends that as a general rule no person may give or receive any consideration for the adoption of a child.⁷⁰ Certain exceptions to this general rule are provided for.⁷¹ The Commission further recommends that details as to what will constitute a 'consideration' should be addressed in the regulations.

The Commission would also like to point out that it is recommended that only certain persons are allowed to provide adoption services⁷² and that these persons be accredited to perform adoption work.⁷³

17.7 Subsidised adoption

In the discussion paper, the Commission expressed its support for the introduction of some form of means-tested State grant for adoptive parents. The Commission

⁶⁹ Section 24(2) of the Child Care Act, 1983.

⁷⁰ Section 276(1) of the Bill.

⁷¹ Section 276(2) of the Bill.

⁷² Section 277(1) of the Bill.

⁷³ Section 278 of the Bill.

stated that this would encourage foster parents to adopt the children in their care and that it would in this manner provide a greater sense of security especially to those children currently in long-term foster care.

The Commission confirms its preliminary recommendation and recommends that an adoption grant be paid to adoptive parents, subject to a means test.⁷⁴

17.8 Access to information

The Commission recommended in the discussion paper that the following persons have access to the information contained in the adoption register:

- X the adopted child from the date on which the child concerned reaches the age of 18 years;
- X the adoptive parent from the date on which the child concerned reaches the age of 18 years;
- X 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;
- X subject to the conditions the Director-General: Social Development may prescribe, by any person for official and bona fide research purposes.

The Commission further supported 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 pointed out that access to information should not be equated with unlimited contact with the child. In this regard, the Commission was of the view that the court must in certain circumstances prescribe or even prohibit contact with the

⁷⁴ Section 344 of the Bill. See also Chapter 24 below.

child.

The Commission confirms its preliminary recommendations.⁷⁵

17.9 Facilitating 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 did conclude in the discussion paper that these are overwhelmed by the undesirability of creating legally enforceable rights in the context of such family relationships. Therefore, the Commission did 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 are:

- X allowing birth parents to participate in the selection of adoptive parents;
- X encouraging adoptive parents and birth parents to meet prior to placement;
and
- X 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.

Rev. Doyer submitted that should adoptions continue, openness should be the norm. He stated that closed adoptions should be the exception and only resorted to in the event of the well-being of the child being threatened by the biological parent/s. He continued:

- Flexibility is needed in order that each mediated agreement meets the needs of its unique circumstances. However, the finalisation of the agreement itself

⁷⁵ Section 275 of the Bill.

which will form part of the adoption order, should be mandatory.

- Under no circumstances should the biological parent/s be coerced, encouraged or advised to relinquish parental rights with a view to closed adoption.
- The alternative approach regarding access to information should be the preferred one.

17.10 Adoption services

The Commission recommended, in the discussion paper, 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 was 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 Children's Bill. 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.

The Commission confirms these preliminary recommendations and provisions to this

effect are included in the Children's Bill.⁷⁶

⁷⁶ Sections 277 and 278 of the Bill.

CHAPTER 18

RESIDENTIAL CARE

18.1 Introduction

Although it is widely recognised that children must be kept in the community as far as possible, residential care is an essential part of the child and youth care system. Unfortunately, even though the placement of children in residential care facilities should be regarded only in appropriate circumstances, too many children still end up in residential care in the current system.

18.1.1 Comments received

Durban Children's Society supported the recommendations made in this chapter.

Ms Lesley du Toit submitted that it is essential that as few children and youth as possible are placed in residential care. She proposed that residential care be fully funded by the State and that the State should be held accountable to an independent body. She is of the view that residential care should exist only for therapeutic and protection purposes and not as an alternative home for the child. Thus, residential care should be only for those who need short term therapeutic support within a managed environment away from their community and family. Ms Du Toit said that residential care should be a resource to young people, families and communities without having to admit/commit children. Furthermore, residential care should be available to young people, families and communities as a self-referral option.

Suid-Afrikaanse Vroue Federasie, Northern Province submitted that although section 15(1)(c) and (d) of the Child Care Act, 1983 provides that a child found to be in need of care can be placed in a children's home or a school of industries, these institutions do not want to admit a child over the age of 15 (school leaving age). This forces social workers to place such children with "hobos" in a shelter. The respondent pointed out that exemption from paying school fees is only applied to a child in residential care until the child reaches the age of 15, which is the end of compulsory school going age. Thereafter donors must be found which is practically impossible.

18.1.2 Evaluation of comments

In response to Ms Du Toit's comments, the question could be asked as to what independent body the State should be held accountable to. The responsibility for child care ultimately resides with the Minister for Social Development, who is accountable to Parliament in terms of the Constitution for the performance of his/her duties.

With regard to residential care: Although the Commission agrees that as few children as possible should be placed in residential care, the contention that residential care should only be for those who need short term therapeutic support within a managed environment away from their community and family cannot be supported. Residential care should be avoided as far as possible, but there are instances where it is the most suitable option for a particular child. In order to ensure that residential care is only used in appropriate circumstances, only the courts should be enabled to place children in residential care.

18.2 Forms of residential care

18.2.1 Comments received

With reference to the chapter on residential care in the discussion paper, **Ms Lesley du Toit** pointed out that "the key role player in the transformation of the child and youth care system" is not "the child and youth care worker". Ms Du Toit proposed that the reference to schools of industry and reform schools and the necessary changes be updated in relation to what the Western Cape Education Department has done and how this has, if any, influenced the national system.

Ms Du Toit submitted that the major problem with schools of industry and reform schools are not the administration of these facilities. She stated that administration is only part of the bigger problem and that the situation is far more complex. In her view, the chapter on residential care fails to highlight the need, e.g. for a continuum of care for each child, which is one of the main reasons why one department should be responsible for the care, protection and development of children from the time they enter the system to the time they leave the system – even if this is merely a monitoring function.

Ms Du Toit pointed out that problems experienced include the absence of therapeutic work with children; absence of child and youth care personnel in view thereof that teachers are primarily used as caregivers against their will and without the necessary skills; absence of transition work and absence of continuity of care for the child. According to Ms Du Toit there is a lack of skills in schools of industry and reform schools to provide developmental programmes, to perform family reunification work and to undertake family preservation services. There is also a tendency amongst children in these facilities to deteriorate in behaviour, whereafter they are transferred deeper into the system due to poor capacity and lack of skilled personnel and not necessarily due to the child's problem with behaviour or emotions. Ms Du Toit submitted that schools of industry should operate as treatment centres and that reform schools should operate as secure treatment centres. She is thus of the view that the new child care legislation should not support the following scenario:

A child is treated in a therapeutic/developmental environment. Should the child's behaviour deteriorate, rendering the child in need of more intensive and skilled therapeutic work, the child is sent to a school of industry, where the focus is on education. Should the child's behaviour deteriorate even more, the child is then sent to a reform school.

18.2.2 Evaluation and recommendations

The Commission recommends that the Minister of Social Development, an MEC responsible for social development in a province, (a municipality), as well as any other person or organisation (provided certain requirements are complied with in the case of any other person or organisation) must be enabled to establish and maintain child and youth care centres.¹ Included in the recommendations is the establishment of a national strategy aimed at securing an appropriate spread of child and youth care centres throughout the Republic.²

The introduction of permanency plans for children is specifically aimed at securing stability in a child's life and to address the lack of continuity of care.³ As advocated by Ms Du Toit, provision is also made for child and youth care centres to provide

¹ Section 212 and 214 of the Bill.

² Section 211 of the Bill.

³ Section 176(1)(a)(iii) of the Bill.

therapeutic programmes designed for the residential care of children outside the family environment. The programmes may include a range of programmes designed for matters such as the reception and safe care of children pending court decisions or to protect children from harm and neglect.⁴ A child and youth care centre may offer more than one programme.

To address the problem with regard to the lack of skills in residential care facilities, it is recommended that the Bill provide for the promulgation of regulations with regard to the minimum qualifications and experience for staff of child and youth care centres.⁵

18.3 Regulation of residential care

The Child Care Act, 1983 requires the Minister to appoint a board of management for a children's home managed by the State. Private children's homes may only function as such if they are registered and managed by an association of persons consisting of at least seven members. Schools of industry are also subject to requirements relating to management structures.

18.3.1 Comments received

With reference to the discussion paper, **Ms Lesley du Toit** supported the view that there should be a connection between a residential care facility and the community, and submitted that a residential care facility should be accountable to the families and children it serves. She also supported the proposal that board members of a residential care facility should not play a direct role in the care, assessment or treatment of children. She however questioned the need for a board of management if it should not be involved in the care, treatment and development of children.

18.3.2 Evaluation and recommendations

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

⁴ Section 210(2) of the Bill.

⁵ Section 230 (p) of the Bill.

members.⁶ The Commission recommends that the powers and duties of management boards should be set out in greater detail in regulations to the Act.⁷ The new children's statute should also include a requirement that the details relating to eligibility, appointment, tenure, duties, responsibilities and termination of office of the members of the management board and matters such as the possibility of co-opting additional members for their expertise will be set out in the regulations to the Act.⁸

18.4 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 people with the required knowledge and skills. There also is broad support for the idea that new child care legislation should include some provisions to ensure that children in residential care are cared for by appropriate people.

After due consideration of the issue of a list of persons deemed unsuitable to work with children, the Commission expressed the view in the discussion paper 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 to be unsuitable to work with children.

18.4.1 Comments received

Christian Lawyers Association of Southern Africa submitted that the proposed register on persons unsuitable to work with children should be made available upon application to anyone who can show a likelihood of abuse and a situation that makes the sharing of the information necessary. The respondent stated that applicants can be compelled to comply with requirements of confidentiality and so forth, and that

⁶ Section 225 of the Bill.

⁷ Section 230(l) of the Bill.

⁸ Section 230 (m), (n) and (o) of the Bill.

updated lists should be available only on application. Furthermore, a process must be created whereby anyone whose name is on the register can apply to have it removed and appeal to a higher authority.

The Commission initially recommended that the task of maintaining and administering a register of persons found to be unsuitable to work with children should vest in the South African Council for Social Service Professions. Responding to this, the **S A Council for Social Service Professions** submitted that section 19 of the Social Service Professions Act, 1978 (Act 110 of 1978) provides only for the keeping of separate registers in respect of social workers, student social workers, social auxiliary workers and persons practising other professions in respect of which professional boards have been established in terms of Act 110 of 1978. The Council therefore has a responsibility to deal only with members from specific professions, i.e. professionals who render services to children. The Council felt that the concept of “persons unsuitable to work with children” is very wide and general and that it can include anybody working with children in any setting. Thus, the keeping of a register of persons unsuitable to work with children falls outside the Council’s functions as statutorily prescribed. Furthermore, the Council has neither the necessary financial resources nor the human resource capacity to accept and execute the proposed function.

18.4.2 Evaluation and recommendations

The Commission recommends that a set of minimum standards for residential care should be included in the regulations to the new children’s statute.⁹ The Commission also supports the establishment of a register of persons found unsuitable to work with children that will form Part B of the National Child Protection Register.¹⁰ The Commission recommends that a child and youth centre, in the appointment of staff or the manager of the centre, must determine whether the name of a prospective employee or manager appears on such register.¹¹ Although it was submitted in the discussion paper that the manager or management committee of a facility should ensure that a prospective employee is registered to practice if required, the Commission does not consider it necessary to include such a provision in children’s

⁹ Section 227 of the Bill.

¹⁰ Section 120 of the Bill.

¹¹ Section 226(3) of the Bill.

legislation. Legislation governing registration of persons practicing certain professions as a rule adequately addresses issues relating to proof of registration.

The Commission originally was of the view that the South African Council for Social Service Professions should be made responsible for the administration and maintenance of the National Child Protection Register. The Commission however is persuaded by the Council's arguments as to the reasons why the Council would not be able to maintain the register. The Commission subsequently recommends that the National Child Protection Register should be the responsibility of the Director-General for Social Development.¹²

Due to the nature of the information contained in the register and the constitutional right of privacy afforded to all citizens, Part B of the Register (containing the record of persons found unsuitable to work with children) will not as such be made available to anyone as called for by the Christian Lawyers Association. Only the Director-General of Social Development and designated officials of that Department, as well as heads of provincial departments of Education on certain conditions will have access to Part B of the Register.¹³ Organisations such as child and youth care centres, partial care facilities, shelters, schools and child protection organisations will only be able to establish whether a person's name appears in Part B of the register on confidential application to the Director-General of Social Welfare.¹⁴

18.5 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.

18.5.1 Comments received

Ms Lesley du Toit suggested that the term "children's home" be replaced with the

¹² Section 120 of the Bill.

¹³ Section 131 of the Bill.

¹⁴ Section 132 of the Bill.

term “child and youth care centre”. In her view, using the latter terminology will allow a centre to run any number of differentiated programmes.

18.5.2 Evaluation and recommendations

The Commission recommends that the current categorisation of facilities should be departed from, and that all facilities be referred to as child and youth care centres. The primary legislation should set out the broad requirements for registration of any facility caring for more than six children.¹⁵ These would include matters such as the appointment of a suitable board of management,¹⁶ the appointment of a suitably qualified manager through an approved interview process, the appointment of sufficient appropriately qualified staff¹⁷ and the provision of programmes in accordance with the minimum standards.¹⁸

The Commission further recommends that all child and youth care centres need to be registered with the Department of Social Development (whether or not they are funded by the Department)¹⁹ 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.

‘Child care facilities’ is listed in Schedule 4B of the Constitution, 1996 as one of the functional areas of local government. In terms of section 156(1) of the Constitution, 1996 municipalities have executive authority in respect of and “the right to administer” these matters. As such the right to administer child care facilities forms part of the matters in respect of which the legislative competence of Parliament and the provincial legislatures is limited.

While the Commission accepted the above constitutional framework, and saw a particular role for local government in the provision and administration of most forms of child care facilities, the Commission questioned the correctness of including residential child and youth care centres such as children’s homes within the constitutional ambit and therefore under the control of municipalities. Indeed, the

¹⁵ Section 217 of the Bill.

¹⁶ Section 225 of the Bill.

¹⁷ Section 226 of the Bill.

¹⁸ Section 210 of the Bill.

¹⁹ Section 214(1) of the Bill.

current practice is that child and youth care centres are administered at provincial and not municipal level. This view of the Commission also reflects the position of the (national) Department of Social Development, which believes the reference to ‘child care facilities’ in Schedule 4B is meant to be a reference to crèches only. The Bill was drafted accordingly.²⁰ The word ‘municipality’ is placed in italics.

The Commission took this particular position (i.e. that child and youth care centres be administered at provincial level) for the following reasons:

- Residential care is expensive. Once established, it practically becomes impossible to curtail costs associated to the upkeep and running of such facilities.
- Residential child and youth care centres are currently administered by provincial government according to guidelines and principles determined at national level. Few municipalities have the experience or capacity required to effectively administer such centres.
- Residential care should always be the placement of last resort. There is a real danger that should municipalities assume administrative functions in this regard, that they will resort to residential options rather than follow the more appropriate community-based child protection models. As somebody rather cynically said, it is far easier for a mayor to point to the conversion of an unused building into a children’s home as proof of services delivery to children than to show the successful reintegration of those children into the community.
- Should the administration of residential child care facilities be at municipal level, then establishment or continued operation of such new and existing facilities may be endangered given local political dynamics. Such political meddling relating to the ‘not in my neighbourhood-argument is less effective at provincial level.

The Commission notes the views expressed by the Project Committee, but points out that the right to administer child care facilities would include the administration of a registration system as provided for in section 217 of the Bill. Section 156(1) of the Constitution must be read with section 155(7), which allows Parliament to “regulate” the exercise by municipalities of their executive authority referred to in section

²⁰ Section 217 of the Bill.

156(1). The vesting of the registration system in the provincial Departments of Social Development goes beyond merely regulating municipal executive power, and in fact impedes a municipality's right to exercise its powers. As such section 217 of the Bill falls within the constitutional constraint on Parliament set out in section 151(4) of the Constitution. To argue that children's homes and other ordinary residential care facilities for children are not child care facilities within the meaning of the Constitution, would be untenable, although it would seem that reform schools, schools of industry and other correctional types of institutions would fall outside the ambit of the term "child care facilities".

To accommodate the Project Committee and should the Department for Social Development take the position that the administration of child and youth care centres should not be a Schedule 4B municipal competence, the Commission's opinion is that a constitutional amendment to Schedule 4B would be required.

The Commission also recommends 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.²¹ In addition to closure, the Minister should be allowed to suspend closure or registration²² on certain terms and conditions, such as ordering a DQA process and instructing the facility to work with officials from the Department of Social Development. This could be done through the issuing of an enforcement notice.²³

18.6 Programmes

South African residential care facilities generally lack programmes designed to meet developmental and therapeutic needs for children. However, a distinction needs to be drawn between a development plan for each individual child and a programme that is to be offered by a particular residential care facility. The current regulations create some confusion with regard to programmes offered by facilities and a plan which is specific to a child. 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.

²¹ Section 216(1) of the Bill.

²² Sections 219 and 221(3) and (4) of the Bill.

²³ Section 216(1) of the Bill.

18.6.1 Comments received

The Commission has recommended that each child admitted to a residential facility must have an individual development plan within seven days of arriving at the facility. Responding to this, the **Dutch Reformed Church, Pretoria** submitted that, due to the necessity for a thorough assessment, the seven-day period should be changed to one month. **Ms R van Zyl** and the **Sinodale Kommissie vir die Diens van Barmhartigheid** also suggested that the seven-day period be changed to one month.

Ms Lesley du Toit submitted that it may not be possible to provide a child with an individual development plan within seven days of his/her arrival at a facility. She said that an individual developmental plan is the end result of a full developmental assessment and should (if done thoroughly) take at least 2 to 3 weeks. In her view, it is essential that an assessment be done as soon as possible and that a care plan be put in place together with an initial plan to support the child through transition and to provide appropriate behaviour management and care.

18.6.2 Evaluation and recommendations

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,²⁴ the details regarding which will be provided for in regulations.²⁵

The Commission further recommends that the new children's statute must also provide that each residential facility should have a programme or programmes.²⁶ The nature of this programme should be included in the registration documents,²⁷ but should be flexible and be able to be changed fairly easily. The programmes should be reviewed as part of the DQA process.²⁸ The new children's statute should include

²⁴ Section 176(1) of the Bill.

²⁵ Section 180 of the Bill.

²⁶ Section 210 of the Bill.

²⁷ Section 219 of the Bill.

²⁸ Section 229 of the Bill.

an open-ended list of possible programmes.²⁹

18.7 Geographical location and size

Under the current children's legislation a child is *inter alia* entitled, as part of the rights of a child in a children's home, to regular contact with parents, family and friends, to involvement of his/her family and significant others in the child's care and development programme, to communicate with and be visited by parents, guardian, custodian, next of kin, social worker, religious counsellor, medical practitioner, psychologist, legal representative, youth and child care worker. To enforce these rights, it is required of the Director-General in so far as is reasonably practicable to designate a children's home or school of industries as close as possible to where the parent, guardian or custodian resides.

18.7.1 Evaluation and recommendations

The Commission recommends the inclusion of a general provision in the proposed legislation stipulating that a child should be placed in a residential care centre as close to his or her family and community as possible.³⁰ The general rule may only be departed from if there is no residential care facility offering the particular programme required by the child within a reasonable distance from the child's family. The legislation should also provide for regulations to regulate the size of the units and the staff-to-children ratio requirements for the particular programme or facility.³¹

It is further recommended that the Minister for Social Development will be required to develop a comprehensive national strategy for residential care, which should include matters pertaining to an appropriate spread of child and youth care centres throughout the Republic providing the required range of residential care programmes in the various regions.³²

18.8 Procedures

18.8.1 Designation

²⁹ Section 210(2) of the Bill.

³⁰ Section 177(4) of the Bill.

³¹ Section 226(4) of the Bill.

³² Section 211 of the Bill.

Where the child and family court orders that a child be sent to a children's home or a school of industries designated by the Director-General, the Director-General has thirty days, in terms of the current legislation, to make such a designation.

18.8.1.1 Comments received

Mr Rothman submitted that the term "designated" is only used in terms of foster care placements and placements within children's homes and schools of industries. He stated that the latter should not be confused with other placements, e.g. places of safety, temporary or secure care facilities. According to Mr Rothman the Commission appears to have confused these concepts.

18.8.1.2 Evaluation and recommendations

The Commission endeavours to use language that is specific, but at the same time as clear and simple as possible. Mr Rothman's concerns with regard to the possible confusion of different concepts are noted.

The Commission recommends that the child and family court should have the power to determine the type of programme, such as a secure care or a treatment programme, which a child should undergo.³³ The Commission further recommends that the decision as to which particular child and youth care centre the child should be placed at should be made by relevant officials of the provincial Department of Social Development, based on the programmes offered by such centre, the developmental assessment needs of the child, the instructions of the court and any other relevant factors.³⁴

18.8.2 Duration of orders

The duration of any court order made under the Child Care Act is usually two years. This period of time is regarded as sufficient for the reunification process. This order

³³ Section 177(2) of the Bill.

³⁴ Section 177(3) of the Bill.

can be extended by the Minister for Social Development or by the Minister of Education in the case of a child placed in a school of industry.

18.8.2.1 Comments received

The Commission has recommended that a children's court should be able to place a child in a residential care programme for longer than two years without reviewing the order. Responding to this, the **Dutch Reformed Church, Pretoria** submitted that residential care orders must be reviewed every two years, otherwise another "project-go" will be needed.

In addition, **Ms Lesley du Toit** submitted that, if developmental assessments are required and children's rights are respected, legislating on how long a child may remain in care makes no sense. She stated that the child (and family) should be able to access programmes for as long as needed and should be able to leave a programme as soon as their developmental and therapeutic goals are met. Furthermore, the child and his/her family should be part of the decision on how long the child should stay and there should be strong DQA work so that children are never left in care for no good reason, or transferred or discharged inappropriately.

With specific reference to section 31(1) read with section 31(4) of the current Child Care Act, **Mr Rothman** submitted that a commissioner of child welfare's primary responsibility is to preside over court proceedings and not to perform administrative functions such as inspecting books. He proposed that reference to the commissioner should be omitted from the section as he or she does not have time to visit residential care facilities.

18.8.2.2 Evaluation and recommendations

Although the Commission expressed the view in the discussion paper 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, the Commission recommends that such an order should be valid for 2 years or a shorter period as determined by the court.³⁵ Thereafter the order may be extended by the court³⁶ or administratively after

³⁵ Section 178(1)(a) of the Bill.

³⁶ Section 178(1)(b) of the Bill.

following the prescribed process³⁷ In spite of Ms Du Toit's contention that no specific period should be linked to a placement order, the Commission is of the opinion that by stipulating the two year period, placement orders will at least be reviewed regularly to ensure that the placement order is still appropriate. The administrative review process lightens the burden of the courts as the court need not review all placement orders, while provision is made for proper consultation and the possibility of appeal. The proposed children's legislation makes specific provision for a child and his or her family's right to participate in the decision-making process and requires that reasons must be given for any decision.³⁸

The discussion paper included a recommendation that the administrative extension of placement orders should be dealt with by a team rather than an individual. The Commission however is satisfied that the procedure followed by provincial departments of social development will allow for sufficient consultation and for team work within the process, therefore it is recommended that the MEC for social development in the relevant province should be the person responsible for the final decision.³⁹

As indicated in the discussion paper, the Commission considers it necessary to leave all court orders, including extension of orders, open to the possibility of periodic review at any time. A court may also order that a case be brought back to court for purposes of review.⁴⁰ 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 any person, including a child, should be able to approach the court.⁴¹ Any party involved in a matter before the child and family court may lodge an appeal against the decision of the court to the High Court.⁴² This would include the possibility of lodging an appeal against a placement order.

With regard to the question whether the children's court has the power to review and amend placement orders, the Commission recognises the court's power to do so in terms of section 15(2) the current Child Care Act. The Commission recommends

³⁷ Section 179(1) of the Bill.

³⁸ Section 179(2) of the Bill.

³⁹ Section 179(1) of the Bill.

⁴⁰ Sections 59(2) and 65 of the Bill.

⁴¹ Section 76 of the Bill.

⁴² Section 68 of the Bill

that this power be reflected in the new children's statute⁴³ and be augmented to include a power for the presiding officer of the court to request any person involved in the matter to appear before him or her again at a particular time.⁴⁴ 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 the orders to some extent.

Mr Rothman's submission that a commissioner of child welfare's primary responsibility is to preside over court proceedings and not to perform administrative functions such as inspecting books is accepted. The Commission accordingly recommends that child and family court magistrates should not be obliged to inspect child and youth care centres, but should be empowered to do so if such magistrates consider it necessary.⁴⁵

18.8.3 Appeals from the children's court

A situational analysis undertaken by the IMC revealed that approximately one-third of children in state-owned and run facilities were considered by the staff to have been inappropriately placed. Due to the lack of a simple procedure to review the children's court decision, the child is usually kept at the facility.

18.8.3.1 Comments received

Mr Rothman did not support the Commission's recommendation that appeals should lie against any residential care placement order or any variation thereof made by the children's court. He pointed out that the children's court is not empowered to vary residential care orders or to refuse to make an order if a child is found to be in need of care. Furthermore, appeals would serve no useful purpose, but could exacerbate matters because of the delays it would cause.

18.8.3.2 Evaluation and recommendations

In response to Mr Rothman's comment, we submit that the child and family court will be specifically empowered to review and vary its orders in terms of the proposed

⁴³ Sections 175(3) and 65 of the Bill.

⁴⁴ Section 90 of the Bill.

⁴⁵ Section 352 of the Bill.

children's legislation.⁴⁶ 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.⁴⁷ These appeals should lie to a higher court.⁴⁸ Application can be made 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.⁴⁹ As indicated below, there are certain instances where it is recommended that children must be provided with legal representation at state expense.⁵⁰

18.8.4 Release of a child at the age of 18 years

Under the current legislation the Minister of Education may order a pupil or former pupil of a school of industries to return to or remain in that school for a further period, provided that the period of retention may not be extended beyond the year in which that pupil attains the age of 21 years. The placement of a child in any other residential care facility may also be extended in order to enable the child to complete his or her education or training.

18.8.4.1 Evaluation and recommendations

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 the child to complete his or her schooling or training.⁵¹ The Commission further recommends that a person may also apply to court for an order to allow that person to stay on at a child and youth care centre until the age of 21 in order to complete his or her education.⁵²

18.8.5 Discharge

⁴⁶ Section 65(1)(c) of the Bill.

⁴⁷ In terms of section 68 of the Bill any party involved in a matter before the child and family court may appeal against a decision of the court to the High Court. This would include an appeal against a residential care placement order.

⁴⁸ In terms of section 61(1)(b) a child and family regional court is a court of appeal or review in respect of any child and family district court within its region. Section 68 provides for an appeal to the High Court.

⁴⁹ Section 77 (2) of the Bill.

⁵⁰ Par. 5.3 above.

⁵¹ Sections 196(1) of the Bill. See discussion in Chapter 4 above.

⁵² Section 196(2) of the Bill.

According to the Child Care Act the Minister may discharge a child from placement in a residential care facility at any time if he or she considers it to be in the interests of the child. However, the discharge of the child must take place within the context of family reunifications services.

18.8.5.1 Comments received

Mr Rothman pointed out that regulation 15 already requires that the discharge of a child be dealt with through full consultations followed by a report and a review by a team consisting of persons from various disciplines.

18.8.5.2 Evaluation and recommendations

The Commission recommends that the power of discharge from a child and youth care centre may remain an administrative one. The discussion paper included a recommendation that administrative discharges should be dealt with by a team rather than an individual. The Commission however is satisfied that the procedure followed by provincial departments of social development will allow for sufficient consultation and for team work within the process, therefore it is recommended that the MEC for social development in the relevant province should be the person responsible for the final decision.⁵³ We further recommended that a notice of discharge should only be issued after the prescribed procedures relating to the assessment of the best interests of the child and the reunification of the child with his or her family have been carried out, reported to and considered by the MEC.⁵⁴

18.8.6 Children who abscond

Under the current South African law, a child who has absconded may be apprehended by a police officer, social worker or authorised officer, whereafter the child must be brought before a commissioner of child welfare as soon as possible. The commissioner must question the child on the reasons why the child absconded before deciding whether to have the child returned to the facility from which the child

⁵³ Section 195 (1) of the Bill.

⁵⁴ Section 195(2) of the Bill.

absconded or not.

18.8.6.1 Comments received

Mr Rothman submitted that, in the event of a child being returned to a placement where there are no serious grounds for interrupting the placement, there should be an investigation into the reasons why the child absconded, which investigation should go beyond simply interrogating the child. If the child is to be removed from the placement after absconding, it is necessary for a social worker to investigate and fully motivate why removal is in the child's best interests as the Commissioner is required to report to the Minister. Mr Rothman contended that it is not advisable to empower the court to change the order with this exercise since it is not a children's court enquiry. It is a less formal hearing where no other appearances are required since it is merely an interrogation by the commissioner.

Ms R van Zyl suggested that a commissioner of child welfare should be able to change a children's home placement to a school of industry, or foster placement, or place the child back with his or her parents.

18.8.6.2 Evaluation and recommendations

The Commission is of the view that the current legislation should be expanded upon. As contended by Mr Rothman, there should be a more detailed investigation into the reasons that led to the child absconding.⁵⁵ Since the court would be performing a more detailed investigation and not merely an inquiry, we recommend that the court should subsequently have the power to change the order where it would be appropriate to do so.⁵⁶

18.8.7 Administrative transfers

There has been a practice in South Africa of transferring children from one residential facility to another through an administrative process. The Minister may transfer a child from a children's home to a school of industries.

⁵⁵ Section 190(3) of the Bill.

⁵⁶ Section 190(5) of the Bill.

18.8.7.1 Comments received

Africa Christian Action objected against the recommendation that “where a child is to be transferred to a more restrictive environment, the matter should be referred back to court”. The respondent proposed that a decision to transfer a child to a more restrictive environment should be made by a team as a referral to court may delay the matter.

Mr Rothman pointed out that regulation 15 provides adequately for the transfer of children at Ministerial level and already provides for a multi-disciplinary approach.

18.8.7.2 Evaluation and recommendations

The Commission recommends that where children are to be moved to a placement which is less or equally restrictive, such a decision can be made administratively. The discussion paper included a recommendation that administrative transfers should be dealt with by a team rather than an individual. The Commission however is satisfied that the procedure followed by provincial departments of social development will allow for sufficient consultation and for team work within the process, therefore it is recommended that the MEC for social development in the relevant province should be the person responsible for the final decision.⁵⁷ Further, where a child is to be transferred to a more restrictive environment, the matter should be referred back to court.⁵⁸

The Commission takes note of the proposal by Africa Christian Action that a decision to transfer a child to a more restrictive environment should be made by a team as a referral to court may delay the matter. However, a decision to transfer a child “deeper into the system” (to a more restrictive placement) holds serious implications for the child and it is thus necessary for such a decision to be scrutinised by the court.

18.9 Right to care and protection in residential care facilities

The protection of children in residential care requires a holistic approach. This

⁵⁷ Section 191(1) of the Bill.

⁵⁸ Section 191(6) of the Bill.

approach translates into the following:

- A process whereby children are made aware of and understand their rights and responsibilities as children, and specifically as children in residential care.
- A process whereby every service provider fully comprehends the rights and responsibilities of every child with whom they are in contact, as well as their own rights and responsibilities.
- Grievance procedures and communication channels must be put in place that are user-friendly for children, their families, the local community and service providers.
- A system of monitoring is required to ensure the effective care, development and protection of children in residential care.

18.9.1 Evaluation and recommendations

The Commission recommended in the discussion paper that children's rights should be set out in the Regulations, as is the case at present. However, children's rights are so important that we recommend the inclusion of a chapter on children's rights in the proposed Bill.⁵⁹ As indicated in the discussion paper, the Commission is also of the opinion that greater emphasis should be placed on the responsibilities of children and therefore proposes that a provision setting out such responsibilities should be included in the children's legislation.⁶⁰

More emphasis should be placed on training of staff in residential care facilities.⁶¹ As indicated on the discussion paper, 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.⁶² The Regulations should include the requirement that children be informed about their rights as well as their responsibilities.

18.10 Minimum standards and quality assurance in residential care

⁵⁹ Chapter 4 of the Bill.

⁶⁰ Section 28 of the Bill.

⁶¹ Section 230(p) of the Bill.

⁶² Section 230(u) of the Bill.

The Child Care Act, 1983 makes provision for the inspection of children's homes, places of care, shelters and places of safety. Review and evaluation of children's homes, places of care, shelters and places of safety focus on two aspects: Firstly, whether the requirements for registration of the relevant facility are met, and secondly, the standard of care, protection or development of children in these institutions.

The Inter-Ministerial Committee on Young People at Risk initiated a process to develop a quality assurance system. A set of minimum standards that was circulated for general comment and discussion formed the basis for a national programme on "Developmental Quality Assurance" (DQA), which is being integrated into the line function of the national and provincial Departments of Social Development. The DQA and the minimum standards are inextricably linked. The DQA requires that:

- The residential facility does an internal assessment;
- An independent team assesses the facility over a period of 3 to 4 days;
- An organisational development plan is established by the facility's team and the DQA team and agreed upon; and
- The DQA team appoints a mentor who continues to support the organisation as they implement the plan.

As a monitoring tool the DQA is intended to ensure that organisations comply with legislation, policy principles and international instruments and that an effective and efficient service is delivered on at least the minimum standards level.

18.10.1 Comments received

The Commission has recommended that the Council for Social Services Professions should keep lists of independent persons who are not in the employ of the Department of Social Development and who are appropriately trained to subject residential care programmes of registered facilities to Developmental Quality Assurance (DQA) processes. Responding to this, the **Council for Social Services Professions** pointed out that it may, in terms of the Social Service Professions Act (Act 110 of 1978), do the following:

- (i) After consultation with the professional board concerned and with the approval of the Minister, make rules relating to any matter which the Council

considers necessary or expedient for the achievement or promotion of its objects or for the exercise of its powers or the performance of its functions (s 27(1)(f)).

- (i) Exercise or perform any power or function conferred or imposed upon it by or under any other act (s 4(1)(i)).
- (iii) Generally, take such other steps and perform such other functions as may be necessary for or conducive to the achievement of the objects of the Council (s4(1)(j)).

The Council submitted that if it should not be possible to confer the proposed function on the Council in terms of (i) and (ii), the new child care legislation could confer the proposed function on the Council, although it is preferable that a matter of this nature be dealt with in terms of the Social Service Professions Act. However, the Council wanted to obtain clarity on the following issues:

- Who should the independent persons be that should serve on the DQA team (persons from professions other than the social service profession)?
- Who would set standards for their training, train them and ensure that they are appropriately trained in DQA?

The Council also brought the following issues relating to costs to the Commission's attention:

- The Council is an autonomous body responsible for generating its own income. In taking on any additional functions, the Council will have to address the issue of staff and the possible need of having to employ additional staff at extra cost in order to execute the proposed function.
- The furnishing of information to prospective employees or interested parties would comprise an extract from the Council's registers and in terms of section 28(1)(v) of Act 110 of 1978 a prescribed fee is payable to the Council on the provision of extracts from any of the Council's registers. Therefore, the required information would be provided to the Department on payment of the prescribed fee.
- Independent persons to serve on the DQA teams will need to pay a registration fee for their names to be entered into the Council's registers.

Ms Lesley du Toit submitted that the distinction between departmental inspections

and the DQA process should be maintained. She proposed that where an inspection is conducted by the Department in a state facility, at least one person on the team conducting the inspection should be a qualified and experienced child and youth care practitioner from outside the public service. According to Ms Du Toit the leadership and the majority of DQA members should be qualified and experienced child and youth care practitioners from various appropriate professions outside the Department. In her opinion only one person from the Department should be on the DQA team.

Ms Du Toit recommended that the DQA team should be mandated by the Director-General for Social Development and should also report back on their activities to the DG. Ms Du Toit proposed the establishment of an independent office for the monitoring and development of residential care for children and youth. She submitted that this office should be tasked with registration, DQA, inspections, mentoring, being an ombudsman for children, education on children's rights for staff and children in care and advocacy for children in care. This office should report directly to the Minister / MECs of Education and Social Development, or to one of these, or to the President's office, or to the offices of the Premiers.

18.10.2 Evaluation and recommendations

The Commission is of the view that the Developmental Quality Assurance (DQA) processes as being currently tested by the Department of Social Development will be a more appropriate monitoring process than the 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.⁶³ Every DQA should be conducted by a team of appropriately trained persons appointed by the Director-General: Social Development. In addition, the DQA process should include a "mentoring" aspect, as follow-up after the quality assurance visit.⁶⁴

As indicated in the discussion paper, the Commission considered the proposal that

⁶³ Section 229 of the Bill.

⁶⁴ Section 230(v) of the Bill.

there should be an ombudsman or other independent figure or body which could, together with the DQA process, provide a protection mechanism for children in residential care. We confirm our views as expressed in the discussion paper and recommend that an independent body called the “children’s protector” should be established outside the Department of Social Development.⁶⁵

18.11 Funding of residential care

The Department of Social Development has for some years been discussing the idea of a shift from a per-capita based funding system to programme based funding. In the discussion paper the point was made that 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.

18.11.1 Comments received

The **Sinodale Kommissie vir die Diens van Barmhartigheid** and **Ms R van Zyl** welcomed the recommendation that the funding of residential care be based on programme and per capita funding.

18.11.2 Evaluation and recommendations

The Commission recommends that the funding principle that the proposed legislation should endorse and by which it should be informed 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 a child in that residential care facility can be met in order to give effect to the State’s constitutional obligation to care for a child placed in statutory care by the State. 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.⁶⁶

⁶⁵ Chapter 22 establishes the office of the children’s protector and sets out the functions, qualifications etc. of the children’s protector.

⁶⁶ See Chapter 24 below with regard to funding.

CHAPTER 19

RELIGIOUS LAWS AFFECTING CHILDREN

19.1 Introduction

As stated previously in Issue Paper 13 and the Discussion Paper, the Commission believes that it is necessary to ensure non-discrimination with regard to different groups of children, addressing especially the cross-cultural conflict of laws that may arise for children subject to one or another religious or customary legal system. The model proposed by the Commission saw a future child law system in which core children's rights and concerns are equally respected and protected, independent of the system of personal law in which a child is raised, while at the same time ensuring that the State honours to the maximum extent the cultural and religious rights of children and families.

19.2 Comments received

Durban Children's Society endorsed the recommendations made in this chapter.

Africa Christian Action submitted that Christians believe that it would be harmful not to discipline their children. Thus, if a practice is commanded by or consistent with the Bible, it should not be considered as being harmful.

Ms R van Zyl submitted that children in foster care placement should not be forced, for practical reasons, to practice the religion of their foster parents.

19.3 Evaluation and recommendations

The Commission confirms the opinion expressed in the discussion paper, namely 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. The Commission is also still of the view that the new Children's Bill 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 the Commission can only recommend

provisions in the new children's statute that would 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. The Commission believes that it has to do so. As indicated in the Discussion Paper, there are several options available on how to deal with the protection of children against possibly harmful cultural and religious practices.

The Commission accordingly recommends the inclusion of a general provision stating the right of every child not to be subjected to harmful social and cultural practices that affect the well-being, health or dignity of the child.¹ Similarly, the right of a child to not be given out in marriage or engagement without his or her consent and below the minimum age set by law for a valid marriage must be recognised in legislation dealing with children.² It is without any hesitation that the Commission recommends the outright prohibition of female genital mutilation and the circumcision of female children.³ The Commission does not recommend the prohibition of the circumcision of male children, but recommends that a male child's right to refuse to be subjected to circumcision should be recognised,⁴ as well as a child's right to refuse to be subjected to virginity testing, including virginity testing as part of a cultural practice.⁵ In addition, a male child's right not to be subjected to unhygienic circumcision should be clearly stated,⁶ as should a child's right not to be subjected to unhygienic virginity testing.⁷

¹ Section 19(1) of the Bill.

² Section 19(2) of the Bill.

³ Section 19(3) of the Bill.

⁴ Section 19(4)(a) of the Bill.

⁵ Section 19 (5)(a) of the Bill.

⁶ Section 19(4)(b) of the Bill.

⁷ Section 19 (5)(b) of the Bill.

CHAPTER 20

CUSTOMARY LAW AFFECTING CHILDREN

20.1 Introduction

There can be no doubt that the South African Constitution recognises the importance of customary law to the majority of South Africans. The Commission also 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 of 1996. Given the fact that the best interest of the child principle in section 28 of the Constitution is paramount 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.

20.2 Overview of the proposals in Discussion Paper 103

In the discussion paper, the Commission has recommended the inclusion of a general non-discrimination clause in the new children's statute. The Commission also took cognisance of the provisions of section 1(1) of the Law of Evidence Amendment Act, No. 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 developments in case law in this regard. For this reason, the Commission saw 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 recommended in the discussion paper 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 against her will, 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.

The Commission further recommended, in addition to removing reliance on customary law practices as a defence to a criminal charge, the introduction of a regulatory approach that combines the 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 recommended the imposition of severe criminal sanctions for persons and parents that force, coerce or allow girl-children to be circumcised. In this regard, the Commission pointed 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 step aimed at preventing this practice from becoming established in South Africa, would support action being taken in other African countries, and would facilitate protective action including refugee status for immigrant children who might be affected.

The Commission also noted in the discussion paper 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 initiation schools. The Commission supported this move to regulate initiation schools under the aegis of the Department of Health and accordingly saw no need to regulate male circumcision in the new children's statute. However, we cautioned against certain forms of virginity testing for girl-children masquerading as a customary practice in the discussion paper. In this regard, the Commission stated that a general provision prohibiting harmful social and customary practices in the new children's statute, coupled with new health care legislation so as to regulate circumcision schools, should adequately address the issue. The Commission also recommends the inclusion of a provision recognising the right of children to refuse to be subjected to virginity testing as indicated in Chapter 19 above.¹

The Commission further argued that the Recognition of Customary Marriages Act

¹ Section 19(5) of the Bill.

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 considered 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 believed 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 recommended that children be protected from harmful social and cultural practices.

20.3 Comments received

Durban Children's Society supported the recommendations made in this regard.

20.4 Evaluation and recommendations

The Commission supports a provision dealing with the best interest of the child standard to augment section 28(2) of the Constitution and to set out the factors to be considered when applying the said standard.² It is evident from the language of the Children's Bill as proposed by the Commission that the new children's statute should apply to all children in South Africa. Chapter 4 of the proposed Bill sets out the rights of children in detail and includes a clause prohibiting unfair discrimination on grounds such as race, gender, sex, etc, as well as ethnic or social origin, religion, conscience, belief and culture.³

The Commission strongly supports the prohibition of female genital mutilation and

² Section 10 of the Bill.

³ Section 13 of the Bill.

the circumcision of female children. The Commission not only recommends the prohibition of these extremely harmful practices, but also recommends that severe criminal sanctions should be imposed for contravening this prohibition.⁴ Although the Commission does not recommend prohibiting male circumcision or virginity testing, the Commission does recommend that a child's right to refuse to be circumcised or to be subjected to virginity testing should be specifically provided for.⁵ In addition, we recommend that a child's right not to be subjected to unhygienic circumcision and unhygienic virginity testing should also be expressly recognised.⁶ The Commission supports the move to regulate initiation schools under the aegis of the Department of Health and through the provincial Departments of Health.

⁴ Section 19(3) read with section 353(1)(a) of the Bill.

⁵ Section 19(4)(a) and (5)(a) of the Bill.

⁶ Section 19(4)(b) and (5)(b) of the Bill. See discussion in Chapter 19 above.

CHAPTER 21

CHILDREN - THE INTERNATIONAL DIMENSIONS

21.1 Introduction

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.

21.2 Inter-country adoptions

Before the Constitutional Court ruling in the **Fitzpatrick** case,¹ 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.

21.2.1 Comments received

¹ Reported as **Minister for Welfare and Population Development v Fitzpatrick and others** 2000 (3) SA 422 (CC).

Durban Children's Society supported the Commission's recommendations in respect of inter-country adoptions.

21.2.2 Evaluations and recommendations

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);²
- 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);³ 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).⁴

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 Inter-country Adoptions to have the force of law in South Africa;⁵ for the establishment of a Central Authority;⁶ for the recognition of Convention adoptions;⁷ termination of pre-existing legal parent-child relationships;⁸ access to information;⁹ the establishment of accredited bodies;¹⁰ etc. Once the relevant provisions have been complied with, recognition of the adoption would follow.¹¹

² Sections 289 and 290 of the Bill.

³ Ibid.

⁴ Section 300 of the Bill.

⁵ Section 282 of the Bill.

⁶ Section 283 of the Bill.

⁷ Section 292 of the Bill.

⁸ Section 293 read with section 267 of the Bill.

⁹ Section 287 read with section 275 of the Bill.

¹⁰ Section 285 of the Bill.

¹¹ Section 292 of the Bill.

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 that recognition of the adoption need not follow automatically.¹² 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.

Inter-country adoptions are still adoptions; therefore all provisions relating to local adoptions will be applicable to inter-country adoptions as well, where relevant.¹³ Naturally, the Commission recommends that South Africa should ratify the 1993 Hague Convention on Inter-country Adoptions.

21.3 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 case of **Sonderup v Tondelli and another**.¹⁴ 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.

21.3.1 Comments received

The **Law Society of the Cape of Good Hope** supported the recommendation that the civil law position be strengthened by introducing additional measures in the new child care legislation criminalising the act of parental abduction.

¹² Section 288 of the Bill.

¹³ Section 282(2) of the Bill.

¹⁴ 2001 (1) SA 1171 (CC).

Durban Children's Society endorsed the recommendations made in this chapter.

21.3.2 Evaluation and recommendations

The Commission recommends that the provisions of the Hague Convention on the Civil Aspects of International Child Abduction Act, No. 72 of 1996 be incorporated in the new children's statute.¹⁵ The Hague Convention on Child Abduction should be incorporated into our domestic law as a schedule to the new children's statute.¹⁶ The Hague Convention on the Civil Aspects of International Child Abduction Act can then be repealed.¹⁷ 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 should be designated as Central Authority.¹⁸ 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.¹⁹

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.²⁰ 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.²¹

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

¹⁵ Section 306 of the Bill.

¹⁶ Schedule 3 of the Bill.

¹⁷ Schedule 5 of the Bill.

¹⁸ Section 307 of the Bill.

¹⁹ Section 310 of the Bill.

²⁰ Section 309(1) and (2) of the Bill.

²¹ Section 309(3) of the Bill.

considered strengthening the civil law position by introducing additional measures in the new children's statute criminalising the act of parental abduction.²² We did this well realising that the criminal law is not the ideal measure to 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 through 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.²³

²² Section 312(1)(a) of the Bill.

²³ Section 313(b) of the Bill.

21.4 Refugee and undocumented immigrant children

21.4.1 Overview of proposals in Discussion Paper 103

As indicated in the discussion paper, 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. Foreign children that do not qualify for refugee status resort under the Aliens Control Act, 96 of 1991. This Act and the Immigration Act, 13 of 2002 which succeeds it, are aimed at getting rid of unwanted people of all ages rather than being founded on the rights of children.

Chapter 5 of the Refugees Act, 130 of 1998 deals with the rights and obligations of refugees, including refugee children. In terms of the Refugees Act, 1998 refugees enjoy full legal protection, which includes, amongst others, the rights set out in the Bill of Rights, the right not to be discriminated against on the basis of nationality, entitlement to the same basic health services and basic primary education which ordinary South Africans receive, *et cetera*. In view of the protection afforded by the Refugees Act, the Commission does not regard it necessary to include similar provisions to this effect in the proposed new children's statute.

Any child that 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. Subject to the understanding 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, a provision guaranteeing that refugee children and children seeking refugee status enjoy the rights set out in chapter 4 of the proposed Children's Bill should be included.

21.4.2 Comments received

No comments were received.

21.4.3 Evaluation and recommendations

The Commission is of the opinion that the Refugees Act adequately addresses the situation of refugee children. The Commission is still of the view that unaccompanied or separated child asylum-seekers are in a more vulnerable position than those accompanied by their parents. The Commission therefore recommends the inclusion of a provision in the children's legislation clearly indicating that refugee children and children seeking refugee status have the rights set out in Chapter 4 of the proposed Children's Bill,²⁴ the right to be reunited with his or her parents or family if the child had been separated from them,²⁵ and the right to receive humanitarian protection and assistance to realise the rights indicated above.²⁶

An unaccompanied or separated refugee child or asylum seeking child can be dealt with as a child in need of care and be referred to social services for an investigation into the child's circumstances.²⁷

As indicated in the discussion paper, 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 recommends that Immigration Act, 2002 be amended to provide 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.

²⁴ Section 24(a) of the Bill.

²⁵ Section 24(b) of the Bill.

²⁶ Section 24(c) of the Bill.

²⁷ Section 166 of the Bill.

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.

21.5 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 Trans-national Organised Crime, 2000. Although South Africa has no specific anti-trafficking legislation, legislation such as the Child Care Act of 1983, the Basic Conditions of Employment Act of 1997, the Domestic Violence Act of 1998, the Prevention of Organised Crime Act of 1998 and the Sexual Offences Act of 1957 can be used at present to prosecute offences relating to the trafficking of persons to provide relief to or to protect the victims of trafficking.

21.5.1 Comments received

No comments were received.

21.5.2 Evaluation and recommendations

The Commission 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 for commercial sexual exploitation, for an exploitative labour practice or for the removal of body parts.²⁸ This is in addition to those provisions criminalising the commercial sexual exploitation of children provided for in the new sexual offences legislation. Obviously children that have been subjected to trafficking are entitled to assistance²⁹ and to all the protection measures provided for in the new children's statute.

The Commission recommends that the provisions of the UN Protocol be incorporated

²⁸ Section 317 of the Bill.

²⁹ Section 316 of the Bill.

in the new children's statute.³⁰ It is further recommended that bilateral or multilateral agreements be concluded with the major countries that are not parties to the Protocol and from which children are being trafficked to South Africa or to which South African children are being trafficked.³¹

³⁰ Sections 314(a) and 315, read with Schedule 4 of the Bill.

³¹ Section 314(b) of the Bill.

CHAPTER 22

A NEW COURT STRUCTURE FOR SERVING THE NEEDS OF CHILDREN

22.1 Introduction

Obviously, our courts have an important role to play in upholding the rights of children. It was therefore necessary for the Commission to look closely at the functions and structure of the courts as part of their task of reviewing legislation which protects children.

22.2 Comments received

Durban Children's Society supported the recommendation that the present children's courts be converted to Level One and Level Two Child and Family Courts.

Mr Rothman submitted that it will be in the interests of a child if the court maintains control over the child's placement until his or her discharge from the system. According to him this is the best way to address the accountability issues and to ensure that the rights of the child and other parties are respected.

Mr Rothman submitted that renaming the court the "Child and Family Court" will cause confusion with the Family Court pilot project. He stated that the name "Family Court" implies that the child is included in the family concept, which is desirable. He accordingly recommended that the name "Family Court" be adopted. He asserted that two-tier courts are impractical and will not be economically viable. Thus, rather than creating a more extensive children's court system, it is more desirable to go ahead with the all-embracing Family Court Division at regional level.

Christian Lawyers Association of South Africa welcomed the Commission's recommendation to broaden the functions of the children's courts. The respondent pointed out the following problems and inconsistencies with regard to the High Court:

- The High Court is inaccessible to anyone who wants to address the issue of custody and the high costs of advocates and attorneys are often prohibitive to anyone wishing to approach the High Court.
- Divorce cases and custody matters seem not to be popular amongst judges

and senior practitioners and these cases are generally regarded as the work for juniors.

- It is inconsistent to have only the High Court and the Divorce Court deal with custody matters, whilst commissioners of child welfare grant adoption orders (which are more far-reaching) on a daily basis.
- The High Court and Divorce Court may attend to interim custody orders, but the commissioners of child welfare can do a placement of a child who is in need of care. This would involve a child who is not the biological child of (for instance) the foster parent, whereas in terms of Rule 43 applications, for example, the child would be placed with one of his/her biological parents. The decision of the commissioner of child welfare regarding the placement of a child in need of care is therefore subject to far more serious considerations and implications.
- The upper guardianship of the High Court over all children is problematic when it comes to the location of the High Court. For poorer communities, which constitute the greater portion of the population, travelling with children by public transport to another city is a daunting task.
- It is difficult for a judge of the High Court (as confirmed by some judges) to adapt from the approach used in commercial and criminal law cases to the fundamentally different approach required to adjudicate family law matters.

Christian Lawyers Association of South Africa recommended that the specialised Family Courts that are to be instituted should be on magistrates' court level and should be situated in each magistrate's court area. The respondent suggested that the Family Courts should be enabled to hear all family law matters which should include divorces, adoptions, custody matters, foster care, placement of children, emancipation, domestic violence, maintenance for spouses, maintenance for children, consent to marriage for minors, children court inquiries and criminal cases relating to the disregard of court orders (maintenance, domestic violence, etc.) involving children. The respondent recommended that judges who indicated that they have an interest in family law, should be utilised to hear reviews and appeals on family matters. Furthermore, the Family Courts should be more inquisitorial with a wide range of powers to enable it to order the rendering of information and assessments on an *impromptu* basis, to prevent delays in matters and to prevent creating prohibitive hardship for the parties involved. The respondent stated that the High Court can still be recognised as the upper guardian of all children, but that the High Court should not be the court of first instance in this regard. Thus, the High

Court should act as a court of first appeal in family law matters.

The **Law Society of the Cape of Good Hope** submitted that mediation should be encouraged at the inception of each action. The respondent proposed that a Family Advocate, or a similar court official, should assist parties prior to their divorce by explaining the procedures and referring them for mediation, counselling or therapy. The respondent also recommended the creation of a dedicated family law centre. Such centres could provide audio-visual material such as tapes and videos to assist and educate the community on family law matters.

The Commission recommended in the discussion paper that the present children's courts, operating at district magistrates' court level, should be converted into Level One Child and Family Courts. In the second phase and as resources become available, a smaller network of Level Two Child and Family Courts should be set up. Responding to this, the **Law Society of the Cape of Good Hope** submitted that there should not be tiers of justice. The respondent feared that Magistrates Court matters (which appear to originate mostly from low socio-economic groups) would come to offer no more than "supermarket or assembly line justice". The respondent recommended that a dedicated Family Court system should be created, from High Court level down to Magistrates Court level.

The respondent also proposed that a judge should be appointed in each province to manage the implementation of the Family Court system, with judges appointed under such a managing judge in each Magistrates Court, reporting back to the managing judge. The respondent contends that these judges would manage the implementation of the Family Court system, maintain quality, control training and manage caseloads. The respondent recommended that family matters at Magistrates Court level should include issues such as maintenance, family violence and simple undefended divorces. More complex matters should be dealt with at High Court level. Consideration may also be given to creating a two-tier system of Regional Courts and High Courts that only deal with family matters. The respondent suggested that presiding officers in Family Court matters should be called judges in order not to minimise their functions. Furthermore, the High Courts and Lower Courts should have concurrent jurisdiction in respect of family matters.

The Law Society of the Cape of Good Hope proposed that a system be developed to make information available to litigants on options and services available, the rights of

children, and rights and responsibilities relevant to family law matters. This information should be available at the point of, and before the institution of, any action.

The Law Society of the Cape of Good Hope agreed that extensive and on-going training should be provided to all presiding officers and supporting staff to sensitise and educate them in family law matters. The respondent is of the opinion that disclosure of information regarding critical issues relating to children's best interests and financial information should be exchanged at an early stage. The respondent stated that shortened procedures as well as shortened appeal procedures should be provided for in order to have matters heard as soon as possible.

CHILDS recommended the following regarding the new decision-making body in matters of divorce and/or parental separation (*It is not clear whether the respondent is proposing that a decision-making body in addition to the court structure recommended by the Commission should be established for purposes of dealing with matters of divorce and/or separation*):

- the decision-making body should not be referred to as a court;
- the inquisitorial and not the adversarial method of investigation and decision-making be used;
- a clear distinction be made between spousal and parental issues;
- the medical model and not the legal model be employed;
- decision-making powers be vested in a team of professionals rather than in a single person;
- the team should consist of a range of professionals including, but not limited to the following: legal practitioners, psychologists, psychiatrists, social workers, educators and religious personnel.
- teams should be gender and culture sensitive;
- children should form an integral part of the process;
- all practitioners should be appropriately trained in both the law and psychology;
- physical setting should have the appearance of a home and not a court;
- only senior personnel should be selected to serve on the decision-making body;
- the focus of the decision-making body should be to assist families and to establish new levels of functioning post-separation and divorce;

- the procedures should be kept simple, inexpensive and accessible; responsible conduct should be encouraged – parents should be required to inform the decision-making body how they intend to solve their own problems in the form of a parenting plan rather than be told how their problems will be solved; and
- all parents and children must appear before the decision-making body and make representations on their own behalf.

The Children's Rights Project and Local Government Project (Community Law Centre, UWC) agreed that the present children's courts need to be transformed in order to bring them in line with children's needs and procedural certainty. The respondent cautioned that the creation of child and family courts will merely result in the proliferation of courts in South Africa. The respondent therefore submitted that the creation of a further court system will continue to fragmentise the court system and may result in more confusion and uncertainty. The respondent suggested that the present children's courts continue to operate, but with certain of the recommended changes.

The Children's Rights Project and Local Government Project agreed that the appointment of presiding officers to the children's courts needs to be revised and that a legally trained and sufficiently experienced judicial officer who has a law degree is the appropriate appointment for a presiding officer in the children's courts. The respondent proposed that, upon the appointment of a presiding officer, certain minimum core requirements must be met, i.e. legal training and motivation to serve as a commissioner. However, training in child development and family matters should be provided by the Department of Justice after appointment.

According to the Children's Rights Project and Local Government Project, an extra-curial lay forum to deal with matters of importance, such as the welfare of children, is inappropriate. The respondents stated that, although the value of community involvement is recognised, child care matters should be dealt with by the courts. Thus, lay forums such as family group conferences should only be used after some type of court order.

The Commission has recommended that a sexual offences court should be empowered to make any order that a child and family court could make if the child is in need of alternative care. Responding to this, the Children's Rights Project and

Local Government Project submitted that the process of deciding whether a child is in need of care and whether he/she should be removed from the home is complex and requires proper investigation. The respondents recommended that, in light of the recommendation that children's court presiding officers must have specific training which is not required of sexual offences court presiding officers, sexual offences courts should not be able to make orders that can be made by child and family courts. Furthermore, owing to the length of some determinations of placements, this will cause delays in the sexual offences courts. The respondents also proposed that both the children's courts and sexual offences courts should record any orders made by the other court in order to ensure that no contradictory orders are made that may affect a particular child victim.

The Commission has recommended that the role of the family advocates be extended and that they be renamed child and family advocates who can legally represent children in care proceedings. Responding to this, the Children's Rights Project and Local Government Project pointed out that the family advocate's role focuses on a welfare approach as opposed to a justice approach. The family advocate does not act in the traditional sense of an attorney or advocate. Private legal counsel takes instructions from his or her client and espouses the instructions over and above any considerations as to what the overall best interests of the client might be. The family advocate has to act in the best interest of the child with whose matter he or she is dealing. The respondent therefore recommended that, should child and family advocates represent children in future, it must be clear that a child and family advocate should represent the child as a legal practitioner acting on the instructions of the child, and not merely acting in the best interests of the child.

The Children's Rights Project and Local Government Project endorsed the Commission's recommendation that only legal practitioners on the family law roster would be eligible to represent children. The respondents pointed out that the Commission in its investigation into juvenile justice has recommended that only legal representatives who have been accredited by a National Office of Child Justice may represent children in the child justice court. The respondents submitted that it would be more efficient to have one accredited list of legal practitioners to represent children, rather than two separate lists, i.e. one for children's courts and one for the child justice courts. This would also make sense in light thereof that the children's court receives referrals from the criminal courts. As pointed out by the respondent, a further implication of this recommendation would be that an accredited child justice

legal representative who is not on the family roster would be unable to present his or her client in the children's court.

Responding to the Commission's recommendation that the children's court should be competent to order delictual damages for children, the Children's Rights Project and Local Government Project cautioned that, given the protracted nature of civil proceedings and rules of civil procedure, this function might overload the children's court and cause unnecessary delays. The respondents therefore proposed that any order made by a children's court in relation to a particular matter involving a child should be considered an order on the merits and that the question of quantum in a delictual matter be referred to the normal civil courts for determination.

The **Consortium** welcomed the Commission's recommendations made in this chapter. The Consortium also recommended the following:

- Adjudicators should be trained in how to communicate with children and listen to children.
- Students training for the various positions in the Child and Family Court should be obliged to study and be conversant in at least three of the official languages spoken in the area in which they want to work.
- Existing court personnel should be required to attend courses to become conversant in the language spoken by the majority of children that appear in their courts.
- The Child and Family Court Protector should be able to deal with the most straightforward cases that do not necessarily require a court hearing. For example, the Child and Family Court Protector could be empowered to register uncontested parenting agreements between a mother and an unmarried father of a child, and to and confer parenting rights responsibilities on family members caring for a child.

In the opinion of the Consortium, Child and Family Protectors, given their workload, will function mainly as reception and screening officers and will struggle to perform effectively other functions such as mediation, giving advice and assisting children and families to prepare for court. The Consortium recommended that a position to be called "Assistant to the Child and Family Protector" be created. This person should mainly be responsible for executing administrative tasks, dealing with less complicated matters and generally acting as a support person. The Consortium

submitted that this could be an intake and training position for persons wanting to work as Child and Family Protectors. Furthermore, law graduates could serve their articles as an Assistant which will serve to increase the pool of lawyers experienced in child and family matters who would later be available for placement on the family law roster.

According to the Consortium the court should have the power to order the Department of Social Development to provide a child or caregiver with temporary social assistance (social relief of distress grant) in addition to ordering the payment of a grant to children out of court funds. Such a child or caregiver should be required to submit the information necessary for the Department's records when approaching the Department of Social Development with the court order, but must be considered to automatically qualify for the grant concerned.

22.3 Evaluation and recommendations

The three main recommendations of the Commission 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.
- (a) That all courts should begin using the more flexible system of parental responsibilities, rather than merely guardianship, custody and access.
- (b) 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 Commission 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 Commission does not feel that the functions of the children's courts should be

reduced in any way. Child and Family Courts should continue, inter alia, to conduct hearings on behalf of children who appear to be in need of alternative care¹ and to decide on appropriate placements for children such as supervised parental care, adoption, foster care or institutional placements.² Children who require alternative care are a vulnerable group and 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.³ 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 appear before the children's court where he/she is experiencing serious problems with his/her placement or where he/she finds that conditions that were imposed by the court are not being fulfilled.⁴ The intention behind this recommendation is to give a more effective voice to a child who, for example, experiences abuse in his/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.⁵

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 section 34 of the Child Care Act) be

¹ Section 58(1)(n) of the Bill.

² Section 59(1)(a) of the Bill.

³ Section 65(1)(c) of the Bill.

⁴ Section 76 of the Bill read with section 59.

⁵ Section 65(1)(c) of the Bill.

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.⁶

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

- X The power to order that a person undergo mediation,⁷ counselling or assessment where this is in the best interests of a particular child.⁸
- X 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 even be used against someone who received a foster care grant but did not use it for the foster child. It could also include the public domain, for example in the event of a corrupt official that refused to pay out a disability grant for a child because he required a bribe.⁹
- X The power to award delictual damages on behalf of a child where this appears appropriate at the end of a care or alternative placement hearing.¹⁰ 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.
- X The 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 or present home into more expensive

⁶ Section 191(1), (2), (5) and (6) of the Bill.

⁷ See also Mohamed Paleker 'Mountains promised, molehills delivered – mediation in the Family Court' (2002) Vol. 10(1) **Juta's Business Law** 13.

⁸ Section 59(1)(g)(iii) of the Bill. See also New Zealand Law Commission **Preliminary Paper 47: Family Court Dispute Resolution** (2002).

⁹ Section 59(1)(h)(vii) of the Bill.

¹⁰ Section 58(1)(w) read with 59(k) of the Bill.

- alternative State care.¹¹
- X The power to arrange for extra-curial and non-adversarial decision-making processes (sometimes involving the extended family) such as mediation, counselling or family group conferences where appropriate.¹²
 - X 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. Applications could, for example, be brought against decisions relating to the setting up or maintenance of child care centres or early childhood development programmes,¹³ or for a person's name to be removed from the national register of child abusers.¹⁴
 - X The court should have the power to sanction, monitor and direct support for in-community placements of children and placements involving child-headed households.¹⁵
 - X The court requires the power to allocate some or all parental responsibilities to any suitable person.¹⁶

Apart from the new tasks recommended above, it is further recommended that divorced or other unmarried parents or caregivers should be granted the power to approach the children's courts where they wish to apply for the allocation or reallocation of any parental responsibility.¹⁷ 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**.¹⁸ It is recommended that the present children's courts, operating at district magistrates' court level, be converted into **Child and Family District Courts**¹⁹ (in the discussion paper referred to as Level One Child and Family Courts). It is further recommended that, in the second phase and as resources can

¹¹ Section 345 of the Bill.

¹² Section 66 of the Bill.

¹³ Section 224 of the Bill.

¹⁴ Section 59(1)(h)(xii) of the Bill.

¹⁵ Sections 59(1)(a) and 90 of the Bill.

¹⁶ Section 59(1)(i)(i) of the Bill.

¹⁷ Section 61(2)(e) read with section 76 of the Bill.

¹⁸ Section 54 of the Bill.

¹⁹ Section 54 of the Bill read with section 60.

be made available, a smaller network of **Child and Family Regional Courts**²⁰ (in the discussion paper referred to as Level Two Child and Family Courts) should be set up. More experienced personnel should staff these Child and Family Regional Courts. Regional Courts should deal with more complex or time-consuming matters.²¹ They should also serve as a Court of Appeal in respect of the District Courts.²²

Mr Rothman expressed the view that the name “Child and Family Court” will cause confusion with the Family Court pilot project and that two-tier courts are impractical and will not be economically viable. The Law Society of the Cape of Good Hope submitted that there should not be tiers of justice and that a dedicated Family Court system should be created, from High Court level down to Magistrates Court level. The Commission would, however, like to point out the underlying principle, which is the eventual linking of child and family courts and the Family Court system, including the all-embracing Family Court Division at regional level.

The Law Society of the Cape of Good Hope also made several recommendations with regard to the functioning, management and administration of Family Courts. Once the Family Court pilot project takes off, further attention can be given to the management, structure and administration of the family courts, as well as the designation of the presiding officers of the Family Courts as included in the proposal of the Law Society of the Cape of Good Hope.²³ The Children’s Rights Project and Local Government Project expressed concern over the use of an extra-curial lay forum to deal with certain matters and is of the view that child care matters should be dealt with by the courts. Thus, lay forums such as family group conferences should only be used after some type of court order. In response, the Commission can state that the proposed Children’s Bill provides for extra-curial forums such as pre-hearing conferences,²⁴ family group conferences²⁵ and other lay forums (e.g. a tribal authority)²⁶ that must attempt to find solutions to problems involving a child, to

²⁰ Section 54 of the Bill read with section 61.

²¹ Section 61(2) of the Bill.

²² Section 61(1)(b) of the Bill.

²³ See also ‘Family Courts: A Cinderella condemned to cinders?’ (2002) 1:7 **Bulletin**, Centre for Applied Legal Studies.

²⁴ Section 96 of the Bill.

²⁵ Section 97 of the Bill.

²⁶ Section 98 of the Bill.

mediate or settle disputes between the parties and to define the issues to be heard by the court. The intention is not to allow these forums to usurp the responsibilities and functions of the child and family court with regard to the welfare of children, but to assist the court.

It will not be possible to enforce by legislation the submission by the Consortium that prospective child and family court personnel should be obliged to be conversant in at least three official languages and that existing court personnel should be required to attend language courses. These issues could rather be dealt with as ongoing training objectives. The child and family court registrar will fulfil the function of assisting the court with matters that do not necessarily require a court hearing,²⁷ while the proposed Children's Bill already confers certain parenting rights and responsibilities on family members and other persons caring for a child.²⁸ The Child and Family Protector, on the other hand, will not be dealing with matters such as the reception and screening of matters, mediation, giving advice and assisting children and families to prepare for court, as understood by the Consortium. These functions will be performed by the child and family court registrar.²⁹

(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.³⁰

(c) More effective training and use of staff

Court work with (often traumatised) children who require consideration for alternative

²⁷ Part 4 of Chapter 6 of the Bill deals with the powers and functions of the child and family court registrar and while Part 3 of Chapter 5 deals with parenting plans.

²⁸ Section 207 of the Bill read with section 44.

²⁹ Sections 94 and 95 of the Bill.

³⁰ Chapter 5 of the Bill.

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 Commission 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.³¹

Family advocates should be legislatively empowered to work in the Child and Family Courts.³² It is also recommended that officers to be called “child and family court registrars” (referred to as “child and family protectors” in the discussion paper) perform screening, reception, advisory, mediation and other services at the Child and Family Courts.³³ The Commission’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 Commission 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.³⁴

³¹ Sections 70, 74 and 93 of the Bill.

³² Section 77(2)(a) of the Bill.

³³ Chapter 6 Part 4 of the Bill.

³⁴ Section 77(2)(b) of the Bill.

CHAPTER 23

MONITORING THE IMPLEMENTATION OF THE NEW CHILD CARE LEGISLATION

23.1 Introduction

This Chapter dealt with the monitoring of the implementation of the new child care legislation.

23.2 Overview of the proposals in Discussion Paper 103

As an effective monitoring structure is needed for the proper protection of children's rights, the Commission recommended the establishment of an independent body to be called the 'Office of the Children's Protector'. The Commission further recommended that the Office of the Children's Protector should operate independently from the Department of Social Development. It was further recommended that the Office of the Children's Protector should prepare an annual report for tabling in Parliament.¹ 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 recommended that the Office of the Children's Protector should, *inter alia*, have the following powers and functions:²

- 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

¹ Par. 24.5 of the discussion paper.

² Ibid.

Protector may, on receiving of a complaint, authorise an inspection of a residential care facility in order to -

- inspect whether that facility is complying with set minimum standards and may make such enquiries as he or she may deem necessary;
 - inspect and make copies of any books or documents kept on the premises;
 - seize any document or any other thing on the premises which in his or her opinion may be relevant to the investigation concerned;
 - observe and interview any child in the facility, or caused such child to be examined by a medical officer, psychologist or psychiatrist.
- The Office of the Children’s Protector should conduct, on a random basis, inspections of drop-in centres to ensure that they comply with minimum standards.
 - The Office of the Children’s Protector may also conduct periodical inspections of 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 recommended 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.³

The Chapter on a New Court Structure for Serving the Needs of Children recommended 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 recommended 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.⁴

23.3 Comments received

The **Consortium** did not support the recommendation that the functions of the proposed Office of the Children Protector be restricted to the monitoring of issues falling within the ambit of the new child care legislation. The Consortium further submitted that in order to ensure adequate resourcing of the proposed monitoring body, outlining its exact composition, structure, staffing needs and an obligation to establish an office in each province would help ensure that the necessary resources are allocated in the budget. The Consortium stated that the Commission for Gender Equality (CGE) and the South African Human Rights Commission (SAHRC)⁵ need to work together with the proposed monitoring body to ensure co-ordination. The Consortium added that this could be achieved by the monitoring body being able to utilise the infrastructure and offices of the CGE and SAHRC.

The **Criminal Justice Initiative, Open Society Foundation of South Africa** argued that it is critical that government structures and NGOs that deliver services to children and their families be required to report on their activities exercised in terms of the new child care legislation, and that additional systems be put in place in order to provide information as to the efficacy of the system.

³ Ibid.

⁴ Ibid.

⁵ See also Matshekga J 'Toothless bulldogs? The Human Rights Commissions of Uganda and South Africa: A comparative study of their independence' (2002) **African Human Rights Law Journal** 68.

Ms R van Zyl supported the Commission's recommendations.

23.4 Evaluation and recommendations

The Commission does not support the Consortium's suggestion that the functions of the Children's Protector be extended beyond the ambit of the Children's Bill. The Commission is of the view that child care issues, if any, which fall outside the ambit of the Children's Bill would not fall through the cracks as these would still be monitored by other bodies concerned with child welfare such as the South African Human Rights Commission.

After consideration of the functions of the Children's Protector as regards the inspection of child care facilities, the Commission concludes that the Children's Protector should not only inspect child care facilities such as child and youth care centres, partial care facilities, shelters or drop-in centres on receipt of a complaint, but should also routinely inspect these facilities whether registered or not.⁶ Furthermore, the Children's Protector should be able to inspect any premises to which a complaint about a matter falling within the ambit of the Children's Bill refers.⁷

In order to ensure that child care facilities are safe for children, the Commission also recommended that, if a child dies on the premises of a partial care facility, shelter, drop-in centre or child and youth care centre, or following an occurrence at the partial care facility, shelter or drop-in centre, the Children's Protector must investigate the circumstances of the child's death if there are indications that the child has died because of abuse or neglect.⁸ The Commission has further made recommendations on the following issues pertaining to the Children's Protector: qualifications, procedure for appointment, term of office and conditions of appointment, removal from office, filling of vacancy, reports after investigations and inspections, employment of staff, delegation of powers and duties, funding and financial accountability.⁹

⁶ Section 326(1)(a) of the Bill.

⁷ Section 326(1)(b) of the Bill.

⁸ Section 325(3) of the Bill.

⁹ Sections 320 - 324, 328, 329, and 331 - 337 of the Bill.

CHAPTER 24

GRANTS AND SOCIAL SECURITY FOR CHILDREN

24.1 Introduction

Throughout the investigation, the Commission repeatedly stated that any proposals made for law reform must be accompanied and supported by the necessary human and financial resources. Further, given the large scale poverty in which the majority of children in South Africa live, the impact of HIV/AIDS, and limited resources, the Commission had no option but to consider social security measures for children. This is the focus of this Chapter.

24.2 Overview of the current law

Grants and social security for children are presently provided for in the Social Assistance Act 59 of 1992 and not in the Child Care Act, 1983. The administration of the Social Assistance Act 59 of 1992 was assigned to the provinces in 1996.¹

With the phasing out of the State Maintenance Grant now complete, the only grants for children that currently exist are: the Child Support Grant (CSG),² introduced by the Welfare Laws Amendment Act 106 of 1997, which commenced on 1 April 1998; the foster child grant (FCG) which has been applied since 31 March 1998 in accordance with the Social Assistance Act 59 of 1992;³ and the so-called Care Dependency Grant (CDG),⁴ also applied since 31 March 1998 in accordance with the Social Assistance Act 59 of 1992.⁵

Presently, the Child Support Grant (CSG) is payable to a primary care-giver of a child

¹ By Proclamation R7 in **Government Gazette** 16992 of 23 February 1996.

² Made in terms of section 2(d) of the Social Assistance Act 59 of 1992.

³ Made in terms of section 2(e) of the Social Assistance Act 59 of 1992.

⁴ Made in terms of section 2(f) of the Social Assistance Act 59 of 1992.

⁵ See, in general, Van Heerden et al **Boberg=s Law of Persons and the Family** 260 -7. The Care Dependency Grant is payable in the amount of R520 per month to a caregiver who remains out of the employment market because of the necessity of caring for a profoundly disabled child on a more or less permanent basis. It is, in other words, an income substitute for the caregiver of the child, to replace what would otherwise have been earned, rather than a child-related grant targeting the caregivers of special needs children whose costs in respect of such children are higher than is ordinarily the case. See further 'Social security and grants' supra 10-15.

who is under the age of seven years. The amount payable is R130 per month,⁶ and the 'take-up rate' has increased from 30 000 children who benefited in 1998, to 1.2 million children by April 2001.⁷ The Department of Social Development expects the take-up rate to exceed the projected target of reaching 3 million children aged below 7 years.⁸

The Foster Care Grant (FCG) is payable to the foster parent. The amount payable is R450 per month.⁹ At March 2001, a total of 52 642 FCG's were being paid,¹⁰ up from approximately 42 000 grants paid in 1995/6.¹¹ The most recent statistics on beneficiaries of this grant suggest that two provinces together account for 42% of all FCG=s. These are the Western Cape and the Eastern Cape. In the North West and Northern Province respectively, fewer than 2000 FCG's were paid in each province as at 31 March 2001.¹² Foster care grants are means tested in the hands of the *child*, the income of the foster parent not being relevant.

The third grant payable in regard to the care of children is the Care Dependency Grant (CDG), which, like the FCG, is payable until the child reaches the age of 18 years. The CDG is payable to a parent or foster parent in respect of a care-dependent child. A 'care-dependent child' is defined as a child between the ages of 1 and 18 years who requires and receives permanent home care due to his or her severe mental or physical disability.¹³ From 1 April 2002, the amount of this grant is R620 per month. After attaining the age of 18 years, a child beneficiary may apply for a disability grant. Problems in regard to the payment of this grant have been identified by non-governmental organizations and service providers, including the lack of clear criteria for the awarding of this grant - these include the lack of a coherent definition of >care dependency= with a consequent lack of uniformity in assessments of care dependent children. The criteria for assessment are also based

⁶ As from 1 April 2002.

⁷ 'Department of Social Development inputs to yearbook 2001/2002= at www.welfare.gov.za [accessed 14 November 2001].

⁸ Ibid.

⁹ As from 1 April 2002.

¹⁰ This does not mean that 50 000 children benefited, as a foster parent may receive a grant for more than one child. Hollamby estimated in 2000 that approximately 100 000 children benefited from the FCG.

¹¹ Department of Welfare (1996) **Report of the Lund Committee of Inquiry on Child and Family Support.**

¹² 'Department of Social Development inputs to Yearbook 2001/2002= at www.welfare.gov.za [accessed 14 November 2001].

¹³ Section 1 of the Social Assistance Act 59 of 1992.

on medical factors, which go against the social model of disability which government would prefer to promote.¹⁴

In terms of the Social Assistance Act 59 of 1992, the Minister for Social Development may make financial awards to welfare organisations which undertake or coordinate organised activities, measures or programmes in the field of developmental social welfare services.¹⁵ In the child protection field, this is fairly common and most services in this regard are carried out on behalf of the State by (child) welfare organisations, the churches and NGO's.

The Director-General: Social Development may make financial awards to persons 'in need of social relief of distress'.¹⁶

24.3 Overview of the proposals in Discussion Paper 103

In the discussion paper, the Commission proposed that the foster care system should be rationalised and its focus altered. Ideally, the Foster Care Grant (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 recommended 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 was suggested that the amount of the grant should possibly be reviewed. The Commission, however, was 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 recommended the introduction of grants aimed at subsidising adoptions, to enable long-term foster care to be converted into the more secure and permanent option of adoption. The Commission also recommended the extension of the Child Support Grant (CSG) to become a more universal social security system, targeting all poor children aged under 18 years. This proposal accorded with

¹⁴ Children with HIV/Aids do not presently qualify for the CDG. The proposals discussed later in this Chapter concerning the payment of a 'top-up' grant for children with special needs must be viewed in relation to amendments /alterations to the CDG, rather than as constituting an altogether new grant. The proposals discussed below are in essence simply a change of name, not a new financial allocation.

¹⁵ Section 5(2)(a) of the Social Assistance Act 59 of 1992.

¹⁶ Section 5(2) of the Social Assistance Act 59 of 1992. 'Social relief of distress' is defined with reference to section 15 of the Fund-raising Act 107 of 1978.

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 supported these proposals, as they would go a long way towards addressing some of the problems with the present system of grants outlined in the discussion paper. The Commission was 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.

In the discussion paper, the Commission expressed 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 proposed 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 stated that it would have liked 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 was 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 recommended in the discussion paper 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 further recommended 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 also recommended 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 recommended in the discussion paper that enabling provisions 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' situation is concerned.

24.4 Comments received

The Commission's recommendation that the Child Support Grant (CSG) be extended to target all poor children under the age of 18 was welcomed by the majority of the respondents to the discussion paper as it accords with the lobby for the introduction of a Basic Income Grant (BIG). However, some respondents expressed concern over the possible abuse of a BIG. For example, **Africa Christian Action** argued that the proposed BIG will encourage people to have more children in order to obtain an extra income, while not committed to the well-being of these children. Other respondents mentioned that the current CSG is already being abused and stated that the Commission could restrict the possible abuse of the proposed BIG by limiting the number of children to whom such grant can be paid within a household.

The **Consortium** supported the Commission's recommendations with regard to social security for children. Concerning the proposed child grant, the Consortium submitted that all children, including refugee children, should be eligible for this grant and that this grant must follow the child irrespective of whom the carer is. It said that children living on their own should be able to access the grant themselves if they are of an age and capacity to manage the money directly. The Consortium agreed with the Commission that the existing child support grant (CSG) be converted to a (universal) child grant which should not be means-tested and should be extended to all children under the age of 18 years. It suggested that it be legislated that the amount of the proposed child grant be linked to inflation with annual increases.

With regard to the foster care grant (FCG), the Consortium submitted that as the FCG and the child grant would serve similar purposes (providing for the child's basic needs), the amount of the child grant should be deducted from the FCG. However, a child with additional needs should be entitled to both the care dependency grant (CDG) and the child grant as the CDG serves a different purpose, namely to provide for the extra needs of the child due to a disability.

The Consortium argued that children with disabilities and chronic illnesses, including those with HIV, which render them in need of special care and material assistance in order to survive and develop must be entitled to social assistance in the form of the existing CDG. The eligibility criteria and assessment for this grant should be according to need due to the chronic health condition, and not solely based on the type or severity of the disability or chronic illness. It stated that further debate is required about the stage at which a HIV positive child should be eligible for the CDG and which chronic illnesses should be automatically eligible for assistance. The Consortium suggested that the Commission propose acceptable, universal definitions of disability and chronic illness.

The Consortium submitted that persons who are court-appointed foster parents should be entitled to a FCG for a limited period of time (2 years) after which the foster placement must be reviewed and subsidised adoption should be considered or full rights and responsibilities should be conferred on the foster parent(s) or the foster placement must be extended if necessary if it is in the best interests of the child to do so. Furthermore, it said that foster parents should also be able to obtain the CDG in addition to the FCG if they foster a child with special needs.

The Consortium proposed that should a child grant for children not be introduced, the present foster care system should be extended to provide for "care with relative" situations, with subsidised adoptions, and efforts to make it more accessible to children in need, especially children affected by HIV.

The Consortium recommended that, in view of the fact that many children are suffering from starvation and that there are long delays in accessing the CSG, a grant for emergency relief be created for families in crisis. This could be in the form of food parcels, transport vouchers and/or a cash grant. The Consortium stated that the new child care legislation should clearly describe the circumstances in which such a grant will be made available. It mentioned that the Social Assistance Act does provide for a social relief of distress grant, but people are not aware of this grant. It further suggested that social workers and child care workers, including NGOs, FBOs, and CBOs, should be entitled to fill in application forms for families in crisis and to submit the forms and to receive and allocate the assistance to the families that they serve. The Consortium submitted that providing caregivers with temporary social assistance would assist them to pay the transport costs to and from the offices of Home Affairs and Social Development which they have to incur in the

application process for permanent grants. Furthermore, it said bar-coded IDs or birth certificates must not be a requirement for access to emergency relief and recipients of emergency relief must be pro-actively assisted by the Department of Social Development to apply for permanent grants.

The Commission was asked to give consideration to the following:

(i) If during a child and family court proceeding, a court considers a child to be in need and to require emergency financial assistance, the court should be able to make an order obliging the Department of Social Development to immediately start paying the child a temporary social relief of distress grant. The court order must suffice as proof that the child is eligible and qualifies for the short-term relief. Uniform measures of need (including financial) will have to be developed by the Department of Social Development, and used by the court, together with the court's obligation to act in the best interests of the child in determining need for emergency relief. The Department may refuse to give the grant only by showing good cause.

(ii) If the situation requires immediate action, the court should be empowered to give the child and family financial assistance or vouchers from its own funds.

(iii) Both methods could be available to the court, e.g. the court could supply a grant for the first week/month to be followed by a social relief of distress grant from the Department of Social Development as ordered by the court.

(iv) When a child is referred by the court to the Department of Social Development for temporary relief, the Department should be obliged to assist the applicant to apply for a permanent grant if they qualify for such.

The Commission has recommended that directives immediately be sent to relevant service providers and the courts to make it clear that relatives should also be entitled to the foster care grant. The Consortium recommended that a similar approach be followed with regard to families in crisis and that the following be implemented immediately: the provision of emergency social relief to families in crisis through using the existing mechanism of social relief of distress grants. This could be facilitated through issuing a directive to all provincial Departments of Social Development informing them of the need to utilise the existing social relief of distress grants to assist families in crisis.

The Consortium proposed that parents who are unable to pay for services for their children such as health care, water, education, home affairs services, public transport, shelter and electricity due to being poor, should be entitled to free or subsidised services. The same principle should apply to family members, foster parents or caregivers who are unable to afford to pay for services that the children in their care need. However, the state should reimburse schools and health services for these “lost fees” so that the quality of the service provided is not affected. The Consortium submitted that children with disabilities and chronic illnesses, including those with HIV, which render them in need of special care must be entitled to subsidised and free services such as free nappies, free or subsidised assistive devices or transport to and from school and health care facilities, and exemption from paying school fees. Furthermore, it said that the Departments of Education, Home Affairs, Health, Water, Transport and Local Government must develop accessible systems that allow people to apply to be exempted from paying for services.

The Consortium stated that the current free basic water application system and the school fee exemption system are not working in the interests of poor children. It said that attention needs to be paid to how the new child care legislation can lay down guiding principles for such exemption systems to ensure that they are accessible to poor families. This could include an obligation on service providers to pro-actively approach poor communities and to assist them to apply for free services.

The **Dutch Reformed Church, Pretoria**, welcomed the Commission's recommendation that a child grant be paid to all children, and specifically that additional grants be paid to children with disabilities.

Durban’s Children’s Society and **Ms R van Zyl** supported the Commission’s preliminary recommendations on grants and social security for children.

24.5 The report of the Committee of Inquiry into a Comprehensive System of Social Security for Children (the Taylor Committee report)

While the Commission was preparing its discussion paper, a Committee of Inquiry was looking at social assistance to children as part of a broader investigation into social security. This Committee (the Taylor Committee) completed its report in March 2002.¹⁷ The report was released in June 2002 for public comment. Due to

¹⁷ Transforming the present – Protecting the future: Draft Consolidated Report of the

the importance of this report and its relevance for this investigation, a summary¹⁸ of the main aspects relating to children is presented below.

The Taylor Committee's recommendations with regards to children are not always clearly expressed. While chapter 7 is specifically dedicated to children's issues, there are other recommendations scattered throughout the report that also relate to children. There is a fair amount of duplication and overlap between chapters, which were written by different authors, causing some inconsistencies and a lack of clarity on some issues.

The Taylor Report states clearly that South Africa's social safety net has its roots in a set of apartheid labour and welfare policies that were racially biased and based on an assumption that everyone is employed or would soon be employed. Ideally, people should be able to earn a living through employment rather than rely on welfare transfers from the state. However, given the size of the unemployment problem in South Africa, the report states that full employment or significant improvements to the unemployment rate and wage levels of the working poor is not at all likely in the short to medium term. Social security policy reform must take cognizance of this reality. Another reality to bear in mind is the impact of HIV/AIDS. The report also takes into account the problems with infrastructure and implementation of social service programmes that have been created since 1994 to provide access to water, electricity, health care, education, housing and land; and mentions that these problems must be taken into account, especially when looking at the short to medium term interventions that are needed to address poverty.

The Taylor Committee's recommendations are based on an analysis of these and other socio-economic realities.

The Taylor Committee examines a range of social security measures that currently exist and that could be introduced, including private insurances (e.g. private pension funds), social insurances (e.g. a national health insurance system) and social assistance (e.g. the Child Support Grant). After considering the evidence, the Taylor Committee proposed that South Africa should create a comprehensive package of 'social protection'.

Committee of Inquiry into a comprehensive system of social security for South Africa, March 2002. The document is also available on the Internet at www.socdev.gov.za.

¹⁸ The summary is based on the summary prepared for ACESS in June 2002.

The purpose of "comprehensive social protection" is defined as follows by the Taylor Committee:

“Comprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development.

The Taylor Committee therefore sees comprehensive social protection as broader than the traditional concept of social security to incorporate developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the state.

The Taylor Committee talks about a *package* of social protection interventions and measures. The notion of a package is emphasised as it is not desirable for a person to have to choose between basic needs. For example, a poor parent should not be expected to have to choose between feeding the family or sending their children to school. Both are basic needs that must be provided for by the package of comprehensive social protection.

When the Taylor Committee talks about income poverty they are referring to a situation where people have no income or insufficient income to meet their basic needs (e.g. food and shelter). To address income poverty, the Taylor Committee recommends three universal¹⁹ cash grants. These are:

- Basic Income Grant (BIG)
- Child Support Grant (CSG)
- State Old Age Pension

The Taylor Report recommends that everyone must get *at least* a certain minimum income transfer to reduce or eradicate destitution and starvation. This would mean that all people would get an income transfer, whether it be through the vehicle of the

¹⁹ Universal means that everyone gets them.

CSG, BIG or State Old Age Pension.

The Taylor Report is not clear on the relationship between the BIG and the CSG. However, other sections of the report appear to indicate that the CSG will remain and will be extended in the next few years to provide a basic income support for all children. The report does not indicate whether children will qualify for both the CSG and the BIG or for only the CSG. However, the report implies in various places that children will only get the CSG and that this will in effect be their income support grant. The bottom line though is that eventually (by 2015) everyone will get basic income support through one of the grants.

The Taylor Committee proposes a package of services to enable everyone to live and function in society. These services will be provided to everyone (universal) or may have eligibility criteria attached to them. The package of services includes:

- Free and adequate public health care
- Free primary and secondary schooling
- Free basic water and sanitation
- Free basic electricity
- Accessible and affordable public transport
- Access to affordable and adequate housing
- Access to jobs and skills training

The Taylor Committee proposes the following to ensure that everyone has access to assets that enable them to generate food and income:

- Access to productive and income-generating assets such as land and credit
- Access to social assets such as community infrastructure

'Special needs' refers to disability and children in compromised home environments who require foster care. The Taylor Committee proposes that the adult disability grant, care dependency grant and the foster child grant should be retained and reformed. All three grants should continue to be targeted grants which would mean that they would continue to have eligibility criteria.

The Taylor Committee proposes a phased-in approach for the Comprehensive Social Protection package. It stresses that first priority must be to address income poverty

by ensuring that poor people have access to a minimum level of income. While the Taylor Committee calls for a Basic Income Grant/Solidarity Grant/Income Support Grant for all South Africans, it found that the conditions for the immediate implementation of a BIG do not currently exist, and therefore calls for a phased-in approach which would allow for the appropriate capacity and institutional arrangements to be put in place over time. The following phasing in time-table is suggested:

- 2002 - 2004: Children first through extending the CSG
- 2005 - 2015: Income Support Grant (solidarity grant/BIG) extended to all South Africans

The income support grant/BIG is meant for people currently not receiving social assistance – those who fall through the social safety net. The Report is not clear on whether people with special needs will get both the BIG and their special needs grant, or only the special needs grant.

As far as the Child Support Grant is concerned, the Taylor Committee recommends that the CSG be extended to all children under 18 (this is the first phase of the BIG). However, the report is not clear as to how this extension will be put into effect. The report does not specify whether the extension will be achieved through (a) scrapping the means test, (b) simplifying the means test, (c) increasing the age limit incrementally, (d) immediately increasing the age limit to 18, or (e) a combination of two of the above.

The Taylor Committee also recommends that the CSG must be supplemented by an appropriate nutrition and child care support programme. It does not provide any further details of this programme. The Taylor Committee recommends that the procedure for accessing the CSG must be simplified, especially for orphaned children and children living in child-headed households. Child-headed households should be assisted by NGOs or CBOs to allow for adult supervision in the application and spending of the grant. Other than the above with regards to child-headed households, the report does not give detail on what aspects must be simplified or how access should be improved.

The Taylor Committee views the Foster Care Grant (FCG) as providing an important support mechanism for children in compromised family environments. The

recommendations include:

- simplify access to the FCG and shorten the process,
- non-South Africans should be entitled to the grant.

The Care Dependency Grant (CDG) is discussed in the report in the section on disability generally, and recommendations are more conceptual and mixed up in the adult Disability Grant (DG) recommendations. The conceptual recommendations are:

- A broad definition of disability should be used for all the various schemes and funds that relate to disability, with each different scheme adapting this to the purpose and scope of the particular scheme;
- Beneficiaries should not be defined according to the disability, but rather the system should measure and respond to their level of need;
- Persons with chronic illnesses, including HIV/AIDS, should also qualify for a disability grant;
- The needs-assessment should consider not only the type and severity of the disability or illness, but also other social, economic, physical and environmental factors;
- The needs-assessment would include a financial analysis of the individual's situation and needs. There should be a threshold of income, which should be determined by the Disability Sector and economists;
- This assessment should be undertaken at regular intervals to identify changes in circumstances and need;
- A sliding scale of benefits to suit the range of presenting needs, which would incorporate cash transfers and other indirect forms of social security;
- The DG and CDG should be maintained and kept at their current level, if not increased.
- Individuals would receive basic income as the first step in the package of benefits; thereafter consideration of their extra needs through 'topping up' in cash and in-kind benefits.

In the short-term, the Taylor Committee's recommends that:

- Amendments to Social Assistance Act and Regulations and administrative structures be affected;

- the 'permanent home care' clause be removed from the definition of a care dependent child
- the CDG be extended to children with moderate disabilities and to those in special schools or day-care centres;
- the current medical assessment forms be revamped;
- a multi-disciplinary panel for assessments be utilized;
- clear eligibility criteria and guidelines for assessors be developed;
- the criteria of proving spouse's income be removed from the means-test;
- free public health services be provided to persons with disabilities;
- processes be reviewed at regular intervals;
- an appeal mechanism be established;
- the processing time for applications be shortened; and
- the public be educated on social security available to them.

The Taylor Committee's final recommendations are that:

- Existing disability benefits should remain until such time as income support measures are universally implemented;
- Cash benefits and in-kind benefits should be de-linked so that those not eligible for a grant may still qualify for other free services / support;
- Definitions should be amended to reflect an interactive approach that takes into account both medical condition and social and environmental factors, and broadened to include physical, mental, sensory and intellectual disabilities;
- Definition should identify need and appropriate range and level of benefits
- Provision for the purchasing of essential assistive devices should be made;
- Administrative procedures should be simplified;
- Quantitative indicators and benchmarks should be developed;
- Officials should be aware of the obligations of the state and the rights of the applicants;
- Discriminatory elements in the provisioning of grants and insurance should be removed; and
- The citizenship restriction for entitlement be removed.

The Taylor Committee's short-term measures pertaining to orphans and child-headed households are:

- extension of the Child Support Grant (CSG) to all children 0-18 years;

- simplify access to the CSG, with child-headed households being assisted by NGOs or CBOs to allow for adult supervision in the application and spending of the grant;
- develop skills training and vocational training for these children

Long-term measures would include:

- projects aimed at prevention and integration of these children into society
- encouragement of home- or community-based care
- simplify foster and adoption processes, where informal carers can access the grants
- involve CBOs and NGOs in the identification, assessment and care of vulnerable children
- set up childcare centres to increase their learning opportunities and psychological skills.

As far as children with HIV/AIDS are concerned, the Taylor Committee again calls for the extension of the CSG to all children up to 18 years of age. It also calls for free health services for *all* children, for simplification of the foster process, and AIDS awareness projects.

In the disability chapter, the Taylor Committee recommends that people with HIV be entitled to a disability grant. The disability chapter addresses the care dependency grant but mixes it up with the adult disability grant and it is not always clear as to whether the recommendations also apply to children. Thus, it is not clear as to whether the report recommends that children with HIV be entitled to the CDG. In this same chapter, the Taylor Committee recommends that people with chronic illnesses should be entitled to access a disability grant. Again, it is not totally clear if this recommendation also applies to children.

The Taylor Report looks at the problems under the current Maintenance Act and its administration and makes several recommendations to improve the system so that caregiving parents can access maintenance from the child's other parent who refuses to pay for maintenance. These include:

- increased personnel to deal with the lengthy delays that ultimately discourage caregiving parents from following through with the process

- employment of specialised tracers to track down defaulting parents
- a campaign to instill a culture of responsibility of parents towards their children
- clear policy guidelines for those involved in maintenance claims.

The Taylor Committee looks at the problems with the current adoption system, and mentions that the Commission proposes an adoption subsidy. The Taylor Committee does not support or reject the Commission's proposal, but states that the relevance of such a subsidy becomes less apparent if a universal child grant is introduced. The Report further lists possible negative implications of an adoption subsidy. As ACESS points out, it is not clear what the Taylor Committee is recommending with regards to the adoption subsidy.²⁰

On the question of means testing, the Taylor Committee "believes the most efficient, developmentally most effective and fairest way forward is to abolish all means tests and to recover the costs through increases in tax". However, if means tests are to be retained, then the Committee recommends some rationalization, fairness and efficiency in the system, and that "the information as to which elements of the social security package a person is entitled should ultimately be captured on their identity documents".

However, with the exception of the foster care grant, all the existing grants are currently means-tested in the hands of the receiver.²¹ The Taylor Report is not clear on what grants should remain means-tested and which will be universal. Some sections of the report mention retaining aspects of the means test for the special needs grants, eg the disability grant and the care dependency grant.

The simulations provided of the costs of the Taylor Committee's recommendations estimated that an additional 2.3% of the GDP will be required to be spent on social security if the Committee's recommendations are accepted. In this regard, the Committee concludes that:

"The reform path (as suggested by the Committee) is affordable when seen from a long-term perspective, as all improvements in the social security

²⁰ Policy summary of the Report of the Committee of Inquiry into a Comprehensive Social Security System for South Africa' compiled for ACESS by the Children's Institute, UCT, June 2002, p. 10.

²¹ The foster care grant is means tested in the hands of the child, not the foster parents.

system occur broadly within the current macroeconomic constraints.... In particular, the implementation of a universal system of social assistance grant in key areas becomes both feasible and affordable”.

24.6 Evaluation and recommendations

In the chapter on protecting children,²² the Taylor Committee concludes that the chapter does not purport to provide a comprehensive package of social security for children as it is envisaged that the Commission would make provision for such a system in the new Child Care Statute. This placed the Commission in a rather invidious position as we were expecting the Taylor Committee to provide such guidance, especially as to affordability, given the resources available to the Taylor Committee.

The Commission would have preferred far closer cooperation with the Taylor Committee on the issue of social security for children. In the absence of such cooperation and adequate Departmental input, the Commission found it very difficult to draft provisions on grants and subsidies for children. Given these challenges, the Commission nevertheless makes the following recommendations in respect of a social security system for children:

- When the responsible Departments at national and provincial level prepare their draft budgets in terms of the Public Finance Management Act, the Departments must consider and determine their funding requirements for the implementation of the Children’s Bill and include in their draft budgets an amount for this purpose which they consider appropriate.²³ Municipalities are obliged in the same way.²⁴
- The Director-General: Social Development must establish and administer a social security scheme within the Department’s available financial resources to pay the grants, subsidies and service fees in respect of children.²⁵ All grants, subsidies and fees must be paid from money appropriated annually by Parliament for the purpose of the social security scheme on the vote of the

²² Chapter 7, p. 83 of the report.

²³ Section 338(1) of the Bill.

²⁴ Section 338(2) of the Bill.

²⁵ Section 339(1) of the Bill.

Department.²⁶ The Minister for Social Development is given the power to determine the amount of each subsidy, grant or fee payable, the period for which and the time when such is to be paid, the eligibility criteria, and appropriate accountability requirements to ensure that grants, fees or subsidies are utilised for the purpose for which they are paid.²⁷

- Provision is made for the Director-General: Social Development to assign by agreement aspects of the administration of the social security scheme to the provincial heads of social development or a municipality.²⁸ Provision is also made for the transfer of funds to the provinces or a municipality.
- The administration of the Social Assistance Act 59 of 1992 was assigned to the provinces. Parliament therefore cannot amend the Social Assistance Act 59 of 1992 to regulate provincial involvement in the administration of the social security scheme for children devised by the Commission. To overcome this problem, the Commission recommends that social security for children be regulated by the Children's Bill.²⁹
- While the Commission acknowledges that means testing is not ideal, as the costs involved in conducting the means testing divert away funds from the actual recipients, it was decided to retain means testing for all the grants except the child grant. Sadly, given our resource limitations, all the grants and subsidies should be targeted only at the poorest of the poor to enable those children to survive.

A significant problem facing South African children at present concerns the availability of financial support for children orphaned by HIV/AIDS, and especially those living in child-headed households. Unless they are aged under 7, and living with a primary care-giver who can apply for a Child Support Grant (CSG), or placed in formal foster care in order for the Foster Care Grant (FCG) to be payable, there is no monetary support available. Further, children who themselves are HIV positive or have AIDS are not regarded as able to qualify for the Care Dependency Grant (CDG).

²⁶ Section 339(2) of the Bill.

²⁷ Section 339(3) of the Bill.

²⁸ Section 340(1) of the Bill.

²⁹ Section 340(2) of the Bill.

The Commission therefore recommends the introduction of the following social security scheme for children:³⁰

- A child grant;
- A foster care and court-ordered kinship care grant;
- An informal kinship care grant;
- An adoption grant;
- An emergency court grant;
- A subsidy to enable children with disabilities to obtain assistive devices;
- Subsidies to NGO's contracted to the State to implement programmes and projects giving effect to this Act;
- Fees to NGO's, FBO's and welfare organisations who carry out services on behalf of the State;
- A subsidy to encourage the provision of early childhood development services.

The eligibility requirements of the grants proposed can be presented as follow in table form:

Grant/subsidy	Payable in respect of?	South African citizens and residents only?	Payable to whom?	Payable in addition to other grants?	Means tested?
Child grant	All children	Yes	Primary care-giver	Yes	No
Foster and court-ordered kinship care grant	All children in foster and court-ordered kinship care	Citizen: No Resident: Yes	Foster or kinship care-giver or primary care-giver	Child grant not payable if foster and court-ordered kinship care grant is payable	Foster: No Court-ordered kinship: Yes
Informal kinship care grant	All children in informal kinship care	Yes	Relative of the child who cares for the child	Not payable in addition to child grant	Yes
Adoption grant	All adoptive	Yes	Adoptive	Payable in	Yes

³⁰

Section 339(1) of the Bill.

	children		parent(s)	addition to child grant	
Emergency court grant	Children at risk of being removed into alternative care because of poverty	Yes	Parent / Primary caregiver	No Time limited	Yes
Supplementary special needs grant	Children with moderate to severe disability and chronic illnesses	Yes	Parent / Primary caregiver	In addition to child grant, foster care and court-ordered kinship care grant, adoption grant	Yes

Given the focus of the Basic Income Grant (BIG) and the Commission's recommendation to extend the Child Support Grant (CSG) to all poor children (the child grant), it appears prudent to take this child grant into consideration when the amount of the foster care / court-ordered kinship care, informal kinship care or the adoption grant is to be determined. In an ideal world with unlimited resources the Commission would not have hesitated to recommend that all these grants be paid in addition to the child grant, but that is not feasible at this stage.

The Commission recommends that the amount of the foster care, court-ordered kinship care and the adoption grant be set at the same level. This would remove the current financial incentive to keep children in long-term foster care. There is justification for setting a lower grant amount in the case of informal kinship care as the State on a narrow interpretation has no constitutional obligation to care for children in informal kinship care. This is in stark contrast to foster care and court-ordered kinship care where state intervention has caused the child to be removed and placed in alternative care.

In the case of the supplementary special needs grant, the Commission is of the opinion that this grant should be payable only to children with chronic illnesses, including HIV/AIDS, and children with moderate to severe disabilities. Furthermore, the supplementary special needs grant should be payable only after the degree of the child's chronic illness or disability has been assessed in terms of an objective

prescribed assessment procedure. While the Commission would have preferred to extend the application of this supplementary grant to all children in especially difficult circumstances,³¹ it is realised that it would be impossible to provide a grant, in addition to the child grant, to all children affected by malnutrition in South Africa. In the long-term, and given the constitutional imperative to ensure the progressive realisation of socio-economic rights, we should strive to implement a needs-based supplementary grant for all children in especially difficult circumstances.

Provision is made for a socio-medical assessment of both the extent of the disability and the needs of the particular child: the details to be spelled out in the regulations.

Should the supplementary special needs grant be introduced, the current Care-Dependency Grant can fall away.

The Commission recommends that subsidies be paid to enable children with disabilities to obtain assistive devices such as wheel-chairs. Such subsidies are to be paid on presentation of an invoice substantiating the purchase. A means test will apply.³²

The Commission further recommends that subsidies be paid to designated child protection organisations to promote the implementation of programmes and projects giving effect to the Act.³³ The purpose of this subsidy is to compensate these NGO's for the services delivered to children on behalf of the State. In the Bill, provision is made for per capita and programme funding to cater for both the individual needs of the children involved (per capita element) and to cover the cost relating to the overall functioning of the service centre.³⁴ Obviously, where an NGO, FBO or welfare organisation delivers services to children on behalf of the State in terms of the provisions of the Bill, such organisation is entitled to prompt payment of fees at the agreed rate.

There is also considerable merit in the suggestion made by the Consortium that the existing social relief of distress grant be utilised more extensively. This could be done, as she has suggested, through the issuance of a directive to all provincial Departments of Social Development and the courts recommending its use to assist

³¹ See section 231 of the Bill for the definition of children in especially difficult circumstances.

³² Section 348 of the Bill.

³³ Section 349 of the Bill.

³⁴ Sections 349(2) of the Bill.

families in crisis. Obviously, the directive must be linked to a public awareness campaign informing the public at large of the availability of the social relief of distress grant. The Commission recommends this accordingly.

ANNEXURE A

List of respondents to the Discussion Paper on the Review of the Child Care Act

Note: Respondents who did not make a submission on behalf of a Government Department, organisation or institution are indicated with an asterisk (*).

1. Africa Christian Action : Jeanine McGill, National Co-ordinator and Charl van Wyk, Director
2. Alfred Bart*
3. Association of Advertising Agencies, Nina De Klerk, Executive Director
4. Atmore Eric, Centre for Early Childhood Development, Kenilworth
5. Aylward Gordon*
6. Baumgardt Jacqueline*
7. Beswick C E, Community Worker*
8. Boswell Mr and Mrs N R*
9. Brien M A (Dr)*
10. Burgess S (Mrs)*
11. Cameron Edwin (Judge), Chairperson of the Project Committee on HIV/AIDS, S A Law Commission
12. Carte David*
13. Chapel of Our Lady and St Michael, Father Eldred Leslie
14. Cherry Glen*
15. Chiba Beena, Johannesburg Institute of Social Services
16. Chilcott Alan*
17. Children's Rights Project and Local Government Project, Community Law Centre, University of the Western Cape
18. Children in Legal Disputes (CHILDS) : Alan Müller and Anne-Marie Rencken-wentzel
19. Christian Lawyers Association of Southern Africa : Reg Joubert, Executive Director
20. Clark Dellene*
21. Coetzer Hendrik*
22. Collett R B*
23. Collett Rhona*
24. Consortium: Joint submission by the Children's Institute (UCT), the AIDS Law

- Project (University of Witwatersrand), the Alliance for Children's Entitlement to Social Security (ACCESS) - endorsed by the AIDS Consortium and the AIDS Legal Network
25. Cooper Vanessa*
 26. Corry Mr A D and Mrs G E*
 27. Criminal Justice Initiative (CJI), Open Society Foundation of South Africa
 28. Crompton Terence*
 29. Davies F L*
 30. De Klerk Mr and Mrs A N*
 31. Department of Correctional Services, Pretoria: Ms BJ Matshego, Deputy Director, Youth and Females
 32. Department of Education, Pretoria
 33. Department of Health, Pretoria : Ms D R Mohlabi, Director-General
 34. Department of Social Development, Free State
 35. Derrick Jenny*
 36. Die Gereformeerde Kerk Worcester
 37. Doctors For Life International : Dr A Van Eeden / Dr A B Hyams
 38. Doddard Leslie*
 39. Doyer A W (Rev)*
 40. Drury Brian*
 41. Du Toit L*
 42. Du Toit Lesley (Ms), Director: Child and Youth Care Agency for Development, Pretoria
 43. Du Preez Gert*
 44. Durban Children's Society
 45. Durham Brenda*
 46. Dutch Reformed Church, Pretoria: Dr D F Theron
 47. East Claremont Congregational Church
 48. Eichstadt Karen*
 49. FCS Investigation Unit, S A Police Service
 50. Field Tracy*
 51. Fouche K S (Mrs)*
 52. Fredericksen C M*
 53. Geldard Charles*
 54. Gerryts H, Department of Social Development, Free State
 55. Good News Ministries, Appelcryn K*

56. Goveia Noreen*
57. Grater K L*
58. Greenberg Lionel, Kinder in Divorce (KID)
59. Grout T G (Dr)*
60. Halkett Roslyn, National Programme Manager HIV/AIDS: S A National Council for Child and Family Welfare
61. Harrington Jenny*
62. Harvey Wilhelm*
63. Henning J S M, Director Public Prosecutions
64. Heyes A (Mrs)*
65. Immelman T G (Mrs)*
66. Independent Churches Organisation of South Africa, Mr and Mrs Mogola
67. Johannesburg Child Welfare, Child and Family Unit
68. Jolley Alastair*
69. Kemp Charlotte*
70. Kimble Carrie*
71. King Anthony*
72. Kotzé Erika*
73. Kriessbach Joey*
74. Law Society of the Cape of Good Hope, Family Law Committee
75. Le Mesurier Nick*
76. Leisegang James*
77. Leopold Delia*
78. Leslie Suchilla, SA National Council for Child and Family Welfare
79. Lombard R*
80. Manamela Damons Mbanjwa Inc. Attorneys : C Prinsloo
81. Maonela E.N, Department of Social Development, Free State
82. McDonald Stuard*
83. McGill Andrew*
84. Meintjies Retha, Director of Public Prosecutions
85. Meyer Jimmy and Lizelle*
86. Meyer J C*
87. Mives Catharine*
88. Mogadima Susan, Boka Moso Ba Bana Foster Care Organisation
89. Murray S E*
90. N G Gemeente, Secunda, Goedehoop, Dr A W Knoetze

91. N G Kerk Maatskaplike Dienste, Wes- en Suid-Kaap
92. O'Dowd Kate*
93. Oertle Ernest H, Christian Fellowship, Lakeside
94. Phoyana N E, Thembaletu Lifeskills Center for Girls
95. Presbyterian Church, Abraham L
96. Pro-Life : Margrit Sokolic, Secretary
97. Rathbone Russ and Giz*
98. Rautenbach M*
99. Ritter Delene, S A National Council for Child Welfare
100. Robertson Soul*
101. Rogers Ms E A*
102. Roodbol Marnus*
103. Rothman D S, Commissioner of Child Welfare, Durban
104. Roux Louise*
105. Rowney Sally, Department of Education
106. S A Council for Social Service Professions : Dr J Lombard
107. Saambou M V (Ms)*
108. Sadie R*
109. Scheepers Lina and Carel*
110. Seiler Daphne*
111. Shapiro Sharlene, Greater Benoni Child Welfare Society
112. Shaw Douglas, Global Intelligence Consultancy Solutions
113. Sinodale Kommissie vir Diens van Barmhartigheid, Ms Heidi Joubert, social worker
114. Smith Krystyna*
115. Sparrow Ashton J*
116. Stalling Sylvia*
117. Stalling Sonja*
118. Sturdon Frans*
119. Suid-Afrikaanse Vroue Federasie, North-West Province
120. Suid-Afrikaanse Vroue Federasie, Northern Province
121. SWEAT (Sex Worker Education and Advocacy Taskforce) :Helen Alexander, Legal Advocacy Co-ordinator
122. Symons Mr and Mrs GF*
123. Taggant Mac J H*
124. The Right to Live Campaign, Kwa-Zulu Natal : Rev F R Massimo P Biancalani

125. Theunissen Brendon*
126. Thies Celeste, Edenvale Child and Family Care Society
127. Todd Julie*
128. Unit for Child Witness Research and Training, Vista University: Dr Karen Müller
129. University of Cape Town Christian Medical Fellowship Society
130. Van der Merwe Annalise (social worker), White River Primary School
131. Van der Merwe Janine*
132. Van Loggerenberg Annette, Gauteng Provincial Department of Social Services and Population Development
133. Van Moerkerken Sanet, Springs Kindersorg
134. Van Wyk L*
135. Van Zyl G J, Office of the Family Advocate
136. Van Zyl R, NG Kerk Maatskaplike Dienste (Wes- en Suid-Kaap)
137. Vosloo Leon
138. Watson V F*
139. Watt Candice (Mrs)*
140. Williams Janet*
141. Wolfaardt Wolfie*
142. Wright Irene*
143. Wright P J*

ANNEXURE B

WORKSHOPS, CONFERENCES, CONSULTATIVE MEETINGS, ETC	BRIEFINGS, LECTURES, DISCOURSES, ETC
Department of Social Development Flagship programme: Pretoria, 20 March 2001	Paper presented at Reunite International Conference: Justice College, Pretoria, 25-26 January 2001
SAYSTOP (South African Young Offenders Project) workshop: Cape Town, 23 April 2001	Paper presented at First Pan African Conference on Human Trafficking: Nigeria, 19-23 February 2001
Meeting with CHILDS: Pretoria, 4 May 2001	Researcher presented paper at Social Assistance workshop: Cape Town, 7-8 March 2002
Consultative meetings with officials from the Department of Social Development: Pretoria, 26 June 2001, 13 July 2001	Paper presented at workshop on children affected by HIV/AIDS: Boystown, Johannesburg, 25 July 2001
Workshop on HIV/AIDS, National Children's Forum: Cape Town, 24 August 2001	Paper presented at child legislation workshop: Kopanong, 9-12 October 2001
Workshop on Early Childhood Development (ECD): School of Education, Wits University, 5 September 2001	Researcher presented paper at conference on children in need of special protection: Baragwanath Hospital, 20 February 2002
Second World Congress against Commercial Sexual Exploitation of Children: Yokohama, Japan, 17-20 December 2001	Paper presented at conference on corporal punishment: SAHRC, Kopanong, 20-23 February 2002
Child protection workshop, SA National Council for Child and Family Welfare: Parktown, 7 February 2002	Paper presented at workshop for Commissioners of Child Welfare: Centurion Lake, 6 March 2002
Workshop on "Hearing Children's Voices": ACESS, Cape Town, 19 February 2002	Briefing of the DG: Social Development: Pretoria, 9 April 2001
Consultative meeting on an African –Europe Action Plan on combating trafficking in human beings, especially women and children: Pretoria, 28 February 2002	Briefing of the Portfolio Committee on Social Development: Parliament, 16 May 2001
ECPAT International Conference on Commercial Sexual Exploitation of Children: Johannesburg, 3-6 March 2002	Briefing of the Chairperson of the Portfolio Committee on Social Development: Parliament, 30 August 2001
Miller du Toit Conference on Changing Legal Definitions of the Family: Cape Town, 25 -27 March 2002	Briefing of the DG: Social Development, Cape Town: 26 September 2001
Study visit by the Malawi Law Reform Commission on child rights law reforms, 22 – 26 April 2002	Briefing of the Portfolio Committee on Social Development: Parliament, 11 March 2002
Workshop on the content of the Children's Bill, Willow Park Conference Centre, 18 and 24 September 2002	Briefing of the Unaccompanied Minors Network: Pretoria, 29 January 2002, 28 March 2002
Third Gordon's Bay workshop on the Children's Bill, 29 - 30 October 2002	Briefing of the SA Nasionale Vrouefederasie: Pretoria, 11 February 2002
Workshop on mediation in family Law, Centre for Conflict Resolution, UCT Hidding Hall Campus, 1 November 2002	Briefing of the Portfolio Committee on Social Development, Parliament, 24 April 2002
National Children's Day Conference, Willow Park Conference Centre, Benoni, 2 November 2002	Presentation to the North West Provincial Programme of Action Steering Committee, Potchefstroom, 14 May 2002
	Briefing of the Gauteng Legislature, 27 September 2002