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SOUTH AFRICAN LAW COMMISSION

ISSUE PAPER 13

Project 110

THE REVIEW OF THE CHILD CARE ACT

FIRST ISSUE PAPER

[18 April 1998]

Closing date for comment: **31 July 1998**

ISBN: 0-621-28026-7

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 Mr Justice I Mahomed (Chairman)
The Honourable Mr Justice P J J Olivier (Vice-Chairman)
The Honourable Madam Justice Y Mokgoro
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PREFACE

This issue paper (which reflects information gathered up to the end of March 1998) was prepared by the Project Committee on the Review of the Child Care Act and the research staff of the Commission to disseminate information, both for educational purposes and to elicit comment and suggestions, which will serve as a basis for the Commission's further deliberations. The views, conclusions and recommendations it contains should not be regarded as the Commission's final views. The issue paper is published in full so as to provide persons and bodies wishing to comment or make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

Workshops are an integral part of the working methods of the Commission and therefore it is intended to workshop this issue paper extensively.

The Commission assumes that respondents agree to the Commission's quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may have to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit written comments, representations or requests to the Commission by **31 July 1998** at the address appearing on the previous page.

The project leader responsible for this project is Associate Professor Belinda van Heerden and the researcher, who may be contacted for further information, is Mr Gordon Hollamby.

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BIBLIOGRAPHY

Adoption: The Future (White Paper Cm 2288, November 1993)

'Abd al 'Atī *The Family Structure in Islam* (1977)

Philip Alston 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 *Int J of Law and the Family* 1

Philip Alston & Glen Brennan (eds) *The UN Children's Convention and Australia* (1991)

Philip Alston, Stephen Parker & John Seymour (eds) *Children, Rights and the Law* (1992)

Alice Armstrong *et al* 'Towards a Cultural Understanding of the Interplay between Children's and Women's Rights: An Eastern and Southern African Perspective' (1995) *Int J of Children's Rights* 333

Attorney-General's Department *Australia's Report under the Convention on the Rights of the Child* (1996)

Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission
A Matter of Priority: Children and the Legal Process

Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission
Seen and Heard: Priority for Children in the Legal Process (ALRC 84)

Rebecca Bailey-Harris 'The Family Law Reform Act 1995 (Cth): A New Approach to the Parent/Child Relationship' (1996) 18 *Adel LR* 83

Rebecca Bailey-Harris 'Family Law Reform - Changes Down Under' (1996) *Fam Law* 214

Rebecca Bailey-Harris & John Dewar 'Variations on a Theme - Child Law Reform in Australia' (1997) 9 *Child and Fam LQ* 149

Andrew Bainham *Children - The New Law: The Children Act 1989* (1990)

Andrew Bainham with Stephen Cretney *Children - The Modern Law* (1993)

G E Barlow 'Child Care Bill - Best Interests of the Child?' 1982 *De Rebus* 341

A H Barnard, D S P Cronje and P J J Olivier *The South African Law of Persons and Family Law* 3 ed (1994)

Chris Barton & Gillian Douglas *Law and Parenthood* (1995)

J C Bekker 'Children and Young Persons in Indigenous Law' in J A Robinson (ed) *The Law of Children and Young Persons in South Africa* (1997)

T W Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991)

T W Bennett *Human Rights and African Customary Law under the South African Constitution* (1995)

Jill Black, Jane Bridge and Tina Bond *A Practical Approach to Family Law* 4 ed (1994)

Duncan John Bloy *Child Law* (1996)

P Q R Boberg *The Law of Persons and the Family* (1977)

Tina Bond, Jill Black and Jane Bridge *Family Law: Legal Practice Course Guide* (1997)

E Bonthuys 'Of Biological Bonds, New Fathers and the Best Interests of Children' (1997) 13 *SAJHR* 622

D Bosch and A Gordon *Eliminating Child Labour in South African Commercial Agriculture: Education and Legal Action* (1996)

H M Bosman-Swanepoel and P J Wessels *A Practical Approach to the Child Care Act* (1995)

A Broadbent and R Bentley *Child Abuse and Neglect Australia 1995 -96* (Child Welfare Series 17) (1997)

Sandra Burman and Eleanor Preston-Whyte (eds) *Questionable Issue: Illegitimacy in South Africa* (1992)

Sandra Burman and Pamela Reynolds (eds) *Growing up in a Divided Society: The Contexts of Childhood in South Africa* (1986)

Centre for Statistical Services *October Household Survey* (1994)

Richard Chisholm & Judith Housego *Australian Family Law* (1987, with loose-leaf updates)
Volume 1 - Family Court Legislation

Richard Chisholm & Judith Housego *Australian Family Law* (1987, with looseleaf updates)
State Legislation

Alison Cleland & Elaine E Sutherland *Children's Rights in Scotland* (1996)

Alfred Cockrell 'The Law of Persons and the Bill of Rights' in *Butterworths Bill of Rights Compendium* (1996, with loose-leaf updates)

SM Cretney & JM Masson *Principles of Family Law* 6 ed (1997)

C J Davel and R A Jordaan *Law of Persons Student's Textbook* (1995)

Wouter de Vos 'The Economic and Social Rights of Children and South Africa's Transitional Constitution' (1995) *SAPL* 233

Wouter de Vos 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67

Anthony Dickey *Family Law* (1990)

Anthony Dickey 'Aspects of the New Law on Children' (1996) 70 *Australian LJ* 453

C R M Dhlamini 'Indigenous Law and the Bill of Rights' in Butterworths Bill of Rights Compendium (1996)

John Ekelaar and Peter Sarcevic (eds) *Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century* (1993)

M T El Imairi 'Rights of Children' (1978) 7 *Journal of Islamic and Comparative Law* 1

Family Law - Various issues of this Journal

HA Finlay & RJ Bailey-Harris *Family Law in Australia* 4 ed (1989)

Bob Franklin (ed) *The Handbook of Children's Rights: Comparative Policy and Practice* (1995)

Michael Freeman & Philip Veeman (eds) *The Ideologies of Children's Rights* (1992)

Michael Freeman (ed) *Children's Rights: A Comparative Perspective* (1996)

A A A Fyzee *Outlines of Muhammadan Law* (1974)

N Gravels *Family Law Statutes* 5 ed (1992)

Ghana National Commission on Children *Reforming the Law for Children in Ghana: Proposals for a Children's Code* (1995)

Mary Hayes & Catherine Williams *Family Law: Principles, Policy and Practice* (1995)

Brenda Hoggett *Parents and Children* 4 ed (1993)

B Hoggett, D Pearl, E Cooke and P Bates *The Family, Law and Society: Cases and Materials* 4 ed (1996)

Initial Country Report - South Africa - on the Convention on the Rights of the Child (1997)

Interim Policy Recommendations for the Transformation of the Child and Youth Care System (November 1996)

Mary Ivanek *et al* 'Adoption in the International Year of the Family' in *Rights and Responsibilities* (1994)

I A J Loftus, J P Nel and D J Maartens 'Toestemming deur Minderjariges : Grys Area tussen Operasie en Mediese Behandeling' 1994 *De Rebus* 486

Simon Jolly & R Sandland 'Political Correctness and the Adoption White Paper' [1994] *Fam Law* 30

Richard Jones *Adoption Act Manual* (1988)

D J Joubert 'Interracial adoptions: Can We Learn from the Americas?' (1993) 110 *SALJ* 726

Raylene Keightley (ed) *Children's Rights* (1996)

Winnie Kubayi in Ann Skelton (ed) *Children and the Law in South Africa* (1988, forthcoming)

Maryly La Follette & Robert Purdie *A Guide to the Family Law Act 1996* (1996)

S MacPherson *Five Hundred Million Children - Poverty and Child Welfare in the Third World* (1987)

Carmel Matthias 'New Directions for the Children's Court' in *Law, Practice and Policy: South African Juvenile Justice Today* Publication of the Community Law Centre, UWC (1995)

Carmel Matthias 'Are we Making Progress? The 1996 Child Care Bill and Some Fundamental Aspects of Practice and Procedure in the Children's Court' (1996) 32 No 2 *Social Work / Maatskaplike Werk* 242-247.

Carmel Matthias *Removal of Children and the Right to Family Life: South African Law and Practice* (1997)

Carmel Matthias and Noel Zaal 'Can We Build a Better Children's Court? Some Recommendations for Improving the Processing of Child-Removal Cases' in Raylene Keightley (ed) *Children's Rights* 51

Gabrielle Maxwell *et al Researching Care and Protection* (1995)

Kenneth McKNorrie *Children(Scotland) Act* (1995)

Neil McKerrow and A Verbeek *Models of Care for Children in Distress* (1995)

Fiona McLachlan 'The New Child Care Act - In the Best Interest of Family, Parents or Child' Unpublished paper, UCT (1993)

James McNamara 'Illegitimacy and the Family in Hindu Society' in Sandra Burman and Eleanor Preston-Whyte (eds) *Questionable Issue: Illegitimacy in South Africa* (1992)

Barbara Mitchels *Child Care and Protection* (1989)

Tshepo L Mosikatsana 'Transracial adoptions: Are We Learning the Right Lessons from the Americans and Canadians? - A Reply to Professors Joubert and Zaal' (1995) 112 *SALJ* 606

Tshepo L Mosikatsana 'Gay/Lesbian Adoptions and the Best Interests Standard: A Critical and Analytical Perspective' in Raylene Keightley (ed) *Children's Rights* (1996)

Tshepo L Mosikatsana 'Is Papa a Rolling Stone? The Unwed Father and his Child in South African Law - A Comment on Fraser v Naude' (1996) 29 *CILSA* 152

Tshepo L Mosikatsana '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

Ebrahim Moosa "'The Child belongs to the Bed': Illegitimacy and Islamic Law' In Sandra Burman and Eleanor Preston-Whyte (eds) *Questionable Issue: Illegitimacy in South Africa* (1992) 171

Najma Moosa *A Comparative Study of the South African and Islamic Law of Succession and Matrimonial Property with Especial Attention to the Implications for the Muslim Woman* Unpublished LL M thesis, UWC (1991)

Najma Moosa *An Analysis of the Human Rights and Gender Consequences of the New South African Constitution and Bill of Rights with regard to the Recognition and Implementation of Muslim Personal Law (MPL)* Unpublished LL D dissertation, UWC (1996)

J J Nasir *The Status of Women under Islamic Law* (1994)

National Strategy on Child Abuse and Neglect (1997)

National Institute for Economic Policy (NIEP) *Children, Poverty and Disparity Reduction* (1996)

Charles Ngwena 'Health Care Decision-Making and the Competent Minor : The Limits of Self-Determination' in Raylene Keightley (ed) *Children's Rights* (1996)

Alistair Nicholson 'Advancing Children's Rights and Interests: The Need for Better Inter-Governmental Collaboration' (1996) 26 *Western Australian LR* 249

B B Pande 'The Politics of Children's Rights in Asia: Rhetoric and Reality' in E Verhellen (ed) *Understanding Children's Rights* 508

Stephen Parker, Patrick Parkinson & Juliet Behrens *Australian Family Law in Context: Commentary and Materials* (1994)

John Parry-Williams 'Legal Reform and Children's Rights in Uganda - Some Critical Issues' (1993) 1 *Int J of Children's Rights* 49

Report of the Lund Committee on Child and Family Support (Department of Welfare, 1996)

Report of the Ministerial Review Team to the Minister of Social Welfare on the Review of the Children, Young Persons and their Families Act (1992)

Reforming the Law for Children in Ghana: Proposals for a Children's Code A report by the Ghana National Commission on Children (1995)

Margaret Richards *Adoption* (1989)

Melanie Roberts 'New Zealand's Family Court - Reflections for the Family Law Act of England and Wales' (1997) 11 *Int J of Law, Policy and the Family* 246

J A Robinson 'An Overview of Child Protection Measures in New Zealand with Specific Reference to the Family Group Conference' (1996) 7 *SAJHR* 313

J A Robinson 'Multi-kulturaliteit en die Familiereg: Enkele Gedagtes oor die Posisie in Nieu-Seeland' (1996) 7 *Stell LR* 210



J A Robinson (ed) *The Law of Children and Young Persons* (1997)

I D Schäfer (ed) *Family Law Service* (1987, with looseleaf updates)

I D Schäfer & L Schäfer 'Children, Young Persons, and the Child Care Act' in J A Robinson (ed) *The Law of Children and Young Persons* (1997) 73

P J Schwikkard 'The Abused Child: A few Rules of Evidence Considered' in Raylene Keightley (ed) *Children's Rights* (1996) 148

June D Sinclair assisted by Jacqueline Heaton *The Law of Marriage* Volume 1 (1996)

Julia Sloth-Nielsen 'Chicken Soup or Chainsaws: Some implications of the Constitutionalisation of Children's Rights in South Africa' in Raylene Keightley (ed) *Children's Rights* (1996) 6

Julia Sloth-Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law' (1995) 11 *SAJHR* 67

Julia Sloth-Nielsen & Belinda van Heerden 'The Child Care Amendment Act 1996: Does It Improve Children's Rights in South Africa?' (1996) 12 *SAJHR* 649

Julia Sloth-Nielsen & Belinda van Heerden 'Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa' (1996) 12 *SAJHR* 247

Julia Sloth-Nielsen & Belinda van Heerden 'New Child Care and Protection Legislation for South Africa? Lessons from Africa' (1977) 8 *Stell LR* 261

Julia Sloth-Nielsen & Belinda van Heerden 'Putting Humpty Dumpty Back Together Again: Towards Restructuring Families' and Children's Lives in South Africa' (1998) 115 *SALJ* 156

J S Small 'Transracial placements: Conflicts and contradictions' in S Morgan and P Righton (eds) *Child Care: Concerns and Conflicts* (1989)

Erwin Spiro *Law of Parent and Child* 4 ed (1985)

Erwin Spiro *Recent Extra-Marital Child Legislation Annotated* (1988)

Kate Standley *Cases and Materials on Family Law* (1997)

L Star *Counsel of Perfection: The Family Court of Australia* (1996)

S A Strauss *Doctor, Patient and the Law* 3 ed (1991)

Elaine E Sutherland 'The Unequal Struggle - Fathers and Children in Scots Law: *Brixey v Lynas* and *Sanderson v McManus*' (1997) 9 *Child and Fam LQ* 191

J M Thompson *Family Law in Scotland* 3 ed (1996)

J E Timms *Children's Representation A Practitioner's Guide* (1995)

Towards Redrafting the Child Care Act: Recommendations of a Conference of the Community Law Centre (UWC) and the Portfolio Committee on Welfare and Population Development (September 1996)

Geraldine van Bueren *The International Law on the Rights of the Child* (1994)

Geraldine van Bueren (ed) *International Documents on Children* (1993)

Belinda van Heerden & Brigitte Clark 'Parenthood in South African Law - Equality and Independence? Recent Developments in the Law Relating to Guardianship' (1995) 112 *SALJ* 140

J D van der Vyver & D J Joubert *Persone- en Familiereg* 3 ed (1991)

David van Wyk, John Dugard, Bertus de Villiers and Dennis Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994)

Philip E Veerman *The Rights of the Child and the Changing Image of Childhood* (1991)

Eugene Verhellen (ed) *Understanding Children's Rights* (1996)

Linda Vilakazi-Tselane *A Situational Analysis of the Girl Child: A Research Report for NIPILAR - South Africa* (February 1998)

F N Zaal 'Avoiding the Best Interests of the Child. Race-matching and the Child Care Act 74 of 1983' (1994) 10 *SAJHR* 372

F N Zaal *Do Children Need Lawyers in the Children's Courts?* (1996)

F N Zaal 'When Should Children Be Legally Represented in Care Proceedings? An Application of Section 28(1)(h) of the 1996 Constitution' (1997) 114 *SALJ* 334

F N Zaal 'Children's Courts: An Underrated Resource in a New Constitutional Era' in J A Robinson (ed) *The Law of Children and Young Persons* (1997) 95

TABLE OF CASES

Du Preez v Conradie 1990 (4) SA 46 (BGD)

Ex parte Commissioner of Child Welfare : In re Schmidt 1956 (4) SA 787 (T)

Ex parte D 1958 (2) SA 91 (GW)

Ex parte Kommissaris van Kindersorg: In re Steyn Kinders 1970 (2) SA 27 (NC)

Fraser v Children's Court, Pretoria North and Others [1996] 3 All SA 273 (T), 1997 (2) SA 218(T)

Fraser v Children's Court, Pretoria North and Others 1997 (2) BLCR 153 (CC), 1997 (2) SA 261 (CC)

Gold v Commissioner of Child Welfare, Durban 1978 (2) SA 301 (N)

Hlope v Mahlalela and Another 1998 (1) SA 449 (T)

Jackson v S (Case no 35/97)

Jordan v Evans NO 1953 (2) SA 475 (A)

Malan v Commissioner of Child Welfare, Witbank 1973 (4) SA 508 (T)

President of the Republic of South Africa and Others v Hugo 1997 (6) BCLR 708 (CC), 1997 (4) SA 1 (CC)

Rylands v Edros [1996] 4 All SA 557 (C), 1997 (2) SA 690 (C)

Sati v Kitsile [1998] 1 All SA 530 (E)

S v La Grange 1991 (1) SACR 276 (C)

S v Lekgathe 1982 (3) SA 104 (BSC)

S v Williams 1995 (3) SA 632 (CC), 1995 (7) BCLR 401 (CC)

Weber v Harvey NO 1952 (3) SA 711 (T)

Young v Swanepoel and Others 1990 (2) SA 54 (C)

1. INTRODUCTION

1.1 Introduction

Apartheid policies, deep-rooted poverty and unemployment, poor or non-existent schooling, the breakdown of family life and the strains on a society in transition have left the majority of South African children in an extremely vulnerable position. In particular, children, the voiceless members of society, have suffered directly as result of the unequal application of the fragmented laws affecting them. These factors alone provide compelling justification for the reformulation of all law affecting children in a comprehensive, holistic manner. Furthermore, constitutional imperatives and South Africa's international legal obligations flowing from, inter alia, the ratification¹ of the United Nations Convention on the Rights of the Child (1989) (hereafter referred to as CRC) accentuate the necessity of undertaking a comprehensive review of child legislation.

1.2 Background

Various amendments to the Child Care Act 74 of 1983 have been effected and proposed since the Act came into operation in 1987. From the outset, the Act gave rise to disquiet amongst practitioners, social workers and child and youth care workers with respect to the functioning of, and principles underlying, the legislation. In June 1995, a new draft Bill, with regulations, was released for comment by the Department of Welfare, the stated intention being to effect urgent interim reforms, pending a more comprehensive redraft of child care law. The eventual legislation in this regard, the Child Care Amendment Act 96 of 1996, drew widespread and divergent responses. A key concern was that piecemeal amendments to comply with constitutional imperatives and the ratification of CRC would not resolve deep-seated concerns about the content and application of the current South African child law, nor indeed the relevance of its underlying philosophy to present-day South Africa. Also, reservations were expressed about the process that was followed prior to the adoption of the 1996 Act.² The need for a comprehensive rewrite of the principal Child Care Act, the need to Africanise child care

1 On 16 June 1995.

2 Julia Sloth-Nielsen and Belinda van Heerden 'Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa'

and protection mechanisms and, as is mandated by the ratification of CRC, to review and harmonise all relevant child related law, has since become increasingly clear. The law reform process was further strengthened by the outcome of the Gordon's Bay Conference *Towards Redrafting the Child Care Act*, held on 26 to 28 September 1996.³

Following recommendations from the Minister of Welfare and Population Development, the Minister of Justice requested the South African Law Commission to include a review of child care legislation in the Commission's programme. The Commission decided on 4 April 1997 to include the investigation on its programme and to establish a project committee. Associate Professor Belinda van Heerden was appointed project leader and chairperson. The other members of the project committee are:

Dr Jacqueline Loffell
 Dr Maria Mabetoa
 Mr Mike Masutha
 Dr Carmel Matthias
 Ms Buyi Mbambo
 Mr Mbongeni Mtshali
 Ms Zubeda Seedat
 Ms Ann Skelton
 Ms Julia Sloth-Nielsen
 Ms Helen Starke
 Professor Noel Zaal

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

The members of the committee were appointed in their individual capacities by the Minister of Justice and do not represent any particular organisation.

1.3 **The Commission's working methodology**

(1996) 12 SAJHR 247.

3 *Towards Redrafting the Child Care Act: Recommendations of a Conference of the Community Law Centre (UWC) and the Portfolio Committee on Welfare and Population Development* Community Law Centre Publication (September 1996).

The project is aimed at a comprehensive review of the Child Care Act and all other South African legislation affecting children, together with the common law, the customary law and religious laws relating to children in this country. The aim is to develop recommendations for new, appropriate and far-reaching child legislation, legislation which will take into account not only the present realities, but also the future social, political and economic constraints of the society which it aims to serve. The Departments of Welfare and Population Development and of Justice, through the South African Law Commission, will be responsible for initiating and ultimately drafting legislation to implement the process of reform arising out of the project.

The project is being managed by the project committee established by the South African Law Commission as outlined above. The committee is required to plan the investigation, do or have the necessary research done, and submit reports in the form of issue papers, discussion papers and reports to the Commission. The report(s) with draft legislation will be submitted to the Ministers of Welfare and Population Development and of Justice who may then implement the recommendations proposed by adopting the draft legislation.

It is also important to ensure that all stakeholders, persons affected by the legislation and the community at large are integrally involved in the whole process of law reform. The voice of the community, and especially the voices of children, must therefore be heard. A broad process of consultation will be followed and will involve various state departments, tertiary institutions, local and international experts, various bodies supporting democracy, other relevant NGO's and CBO's, and obviously children.

1.4 Briefing sessions, Pretoria, 5 and 6 March 1998

As an initial step, the committee held a two-day series of briefing sessions prior to the final formulation of this issue paper. The key aim was to inform and educate the members of the committee about the factual position and special needs of various groups of children, such as children in especially difficult circumstances and children affected by customary and religious laws. It was also necessary to gain information about the likely impact of HIV/AIDS on children, families and communities. Many children are not adequately covered by existing

legislation, and often 'fall through the cracks' of legislative and social protection. In particular, the sessions focussed on areas in which the members of the committee required additional expert information, or supplementary perspectives. A list of the topics addressed, and of the experts involved, is attached as Annexure A. Many of the views elicited during these sessions have assisted in the conceptualisation of the issues requiring attention, and have drawn the attention of the committee to previously unidentified gaps, defects and inconsistencies in our law and practice. Where appropriate, reference is made in this issue paper to specific presentations.

1.5 **Conclusion**

This issue paper on the scope of the investigation and the principles which should underpin a new, comprehensive children's code is but the first of three issue papers planned for this year. At this stage, it is envisaged that the other two issue papers will deal with the status of children (including adoption) and children in care proceedings and related matters. These issue papers will be followed by a discussion paper with draft legislation and a report containing final recommendations on the proposed legislation. The committee will adopt a broad, consultative process throughout and will workshop all issues thoroughly at every stage of the investigation.

The inclusive, multi-sectoral, and inter-disciplinary nature of this investigation cannot be over-emphasised. Your input on this issue paper and active participation in this process is therefore extremely important.

2. A VISION FOR COMPREHENSIVE CHILD LEGISLATION FOR THE 21ST CENTURY

2.1 Introduction

Accessible, appropriate, consistent and empowering legislation for the children of South Africa is urgently required and will need to be in harmony with the intersecting framework of international law and the South African Constitution. In particular, the vision the committee proposes for a new children's statute is inspired by CRC, the OAU Charter on the Rights and Welfare of the Child,⁴ and relevant clauses in the Bill of Rights in our Constitution. At the heart of our envisaged model is CRC, which permeates relations between child and family, child and state, child and child, and inter-state obligations towards children. Our framework is further influenced by the four principles which have become international currency in analysis of the articles of CRC: survival, development, protection, and participation of the child.

The interim policy recommendations of the IMC on the transformation of the child care and youth care system⁵ commences with the following background statement:

'The notion that "it takes a whole village to raise a child" is based on Ubuntu - a spirit of humanity which encompasses a principle of people caring for each others' well-being with an attitude of mutual support In pre-colonial and traditional societies South African children were raised in this spirit, and few if any children were homeless or abandoned.'

But, as the Report points out, colonisation, urbanisation and apartheid have left their mark. South Africa's child care legislation, children's residential care facilities, the supporting policy and practices, as well as constraints on the financial resources underpinning the country's aid to children in especially difficult circumstances, have all proved inadequate to meet the needs of children and their families in the 1990's.

4 Signed by South Africa in September 1997, but not yet in force.

5 Inter-Ministerial Committee on Young People at Risk *Interim Policy Recommendations for the Transformation of the Child and Youth Care System* (November 1996) 7.

Although the brief of this committee was initially to examine defects in the present Child Care Act 74 of 1983, it became clear from the outset that a range of intersecting and overlapping laws, principles and policies would require review: the Child Care Act cannot be isolated from other legislation affecting children, nor can it be divorced from the laws regulating the relationships between parents and children and between families and the state.

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

2.2 **Child and family**

In developing the model proposed for a children's code for South Africa, therefore, the committee has proceeded from the starting point of the concentric relationships that affect and protect children. First, their growth and development in a family environment, and the legal relations between child, parent(s) and other members of the extended family or community. The goal here is to respect the responsibilities of parents, families and communities as regards the rearing of the young, and to provide a legislative and policy environment in which the State is supportive of family life. In this endeavour, the committee is aware of the gendered division of labour in our society, resulting in an unequal burden with respect to child care and child rearing falling on women, and the consequent need to further substantive (rather than merely formal) equality.⁶

6 See Ms Beth Goldblatt 'The interface between children's rights and gender issues' (Briefing document to the S A Law Commission Project Committee on the Review of the Child Care Act, Pretoria, 5 March 1998) 4 - 5. See also *President of the Republic of South Africa and Others v Hugo* 1997 (4) SA 1 (CC).

In addition, mindful of the global shift away from concepts of **parental power** towards **parental responsibilities**, and of the practical problems facing society-at-large when parents and care-givers fail (even where they are able) to fulfil their duties towards their children, the committee also conceives of a statute in which the reciprocal relationship of parent and child to each other is clearly spelt out.

Again, explicit recognition in law of the different family forms prevailing in our society, as well as social and biological constructs of parenthood and care-giving in relation to children, will assist to plan a legal system which is sensitive to local experiences in South Africa and which takes into account technological advances in the sphere of assisted reproduction and family formation. In this regard attention will have to be given to surrogate motherhood, issues around alternative modes of conception,⁷ adoptions by same sex couples, and other models of alternative family life.

2.3 **Child and State**

Second, the relations between child and State warrant reflection in a precise legal framework which proceeds from a model of the State's obligation to protect children from 'maltreatment, abuse, neglect and degradation',⁸ yet at the same time respects children's rights to alternative care of a quality which approximates a family environment. This model must support children's rights to procedures, processes and institutions in which they can participate in decisions affecting their lives and requires a system in which the requisite checks and balances over the exercise of administrative and judicial authority are adequately provided for. The essential framework for this model can be derived from CRC, and the comparative law section in Chapter 10 below gives examples in other legal systems showing how legislative flesh has been crafted on the bones of the principles outlined above.

2.4 **Inter-state obligations towards children**

Thirdly, the committee realises that it must bear in mind the relations between the South African State and other states regarding children, especially where international issues may arise: refugee

7 Such as insemination by donor sperm, in vitro fertilisation, embryo transfer, and the like.

8 Section 28(1)(d) of the Constitution.

or displaced non-citizen children in our country, international adoption, international abduction as well as jurisdictional and cross-border issues in private law. Here, the model envisages spelling out the State's duty to protect all children within its borders and to promote the interests of its child citizens and nationals in cross-border issues.

2.5 Children as between each other

Fourthly, the committee believes that it is necessary to ensure non-discrimination with regard to different groups of children, addressing especially the cross-cultural conflict of laws that may arise for children subject to one or another religious or customary legal system. The model proposed by the committee sees a future child law system in which core children's rights and concerns are equally respected and protected, independent of the system of personal law in which a child is raised, while at the same time ensuring that the State honours to the maximum extent the cultural and religious rights of children and families. Further, the committee is cognisant of the fact that children have a gender too,⁹ and that girl children suffer particular discrimination and disadvantage on many levels.

2.6 Children in especially difficult circumstances

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

2.7 The committee's vision

The vision of the committee as described above is represented diagrammatically in Figure 1 below. The model which the committee has in mind must perhaps also address the meaning of childhood and introduce the idea of determining the end of childhood (age of majority) for all children at 18 years in accordance with the CRC and the Constitution.¹⁰

9 Ms Beth Goldblatt *op cit* 5.

10 This would, for example, empower children to conduct their own affairs upon reaching the age of 18 years.

Finally, the committee wishes to provide a legislative framework which is both accessible and understandable to all who will be affected by it. This means avoiding legal jargon and outdated concepts, providing for simplicity and informality of procedure as far as possible, and ensuring the involvement of all stakeholders and society at large in the law reform process.

3. THE FRAMEWORK: INTERNATIONAL INSTRUMENTS AND THE SOUTH AFRICAN CONSTITUTION

3.1 Why international instruments are useful in developing a framework for laws about children

Ratification of or accession to international instruments creates obligations on States Parties to take action to bring domestic policy, law and practice into line with the relevant international instrument. But even those instruments which are not yet officially recognised can be very useful in developing a framework for children's legislation. International instruments on children's issues, by their very nature, represent a common pool of wisdom, and a culmination of efforts to ensure recognition of children's rights.

3.2 The UN Convention on the Rights of the Child, 1989

Article 4 of CRC requires States Parties to 'undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the ... Convention'. Ratification also requires South Africa to report to the United Nations Committee on the Rights of the Child on an ongoing basis. The initial report has already been submitted¹¹ and a report will be expected every five years hereafter.

The Committee on the Rights of the Child has selected four 'general principles' which they see as constituting the basic values of the CRC. The first is that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative

11 In November 1997.

authorities or legislative bodies, the best interests of the child shall be a primary consideration.¹²

Although easy to state in legislation, this is a principle which is very difficult to define decisively, as a person or group of people always has to decide what is in the child's best interests in a particular case and application of the principle may therefore vary from case to case, country to country, or culture to culture. Discretion therefore becomes a key factor and attempts can be made to structure discretion in such a way as to ensure a more evenly applied standard of the child's best interests.

In deciding what is in a child's best interests, the child's own views must be considered where the child is able to express these. Thus the second general principle requires States Parties to 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'.¹³ This principle tends to be viewed somewhat simplistically,¹⁴ and it will be important for any new legislation pertaining to children in South Africa to ensure that ample opportunity is given for children to participate meaningfully in decisions affecting them.

The third general principle is that of the survival and development of the child. 'Survival' is an amplification of the right to life. The term 'development' relates to the individual child and should be interpreted in a broad sense. It adds a qualitative aspect to the right to life and implies that law, policy and administrative action must look beyond the physical survival of the child to issues of cognitive, emotional, social and cultural development.¹⁵

Non-discrimination is the fourth general principle¹⁶ and the new child law will need to ensure equal access for all South African children to the protections and rights offered by the legislation.

12 Article 3.1.

13 Article 12.1.

14 Bob Franklin (ed) *The Handbook of Children's Rights* (1995) 14.

15 Thomas Hammarberg in Bob Franklin (ed) *op cit*, preface.

16 Article 2.1.

Although CRC is a detailed instrument and should be read in its entirety in order to understand its impact fully, a summary¹⁷ (excluding those articles already mentioned) is provided here. The first article of CRC defines a child as 'every human being below the age of eighteen years'¹⁸ unless, under the law applicable to the child, majority is attained earlier.' Article 5 provides that States should respect the responsibilities, rights and duties of parents, extended families and communities to provide, in a manner consistent with the evolving capacity of the child, appropriate direction and guidance to children in the exercise of their rights. This important provision not only emphasises the role of parents, families and communities in children's lives, but requires states to protect this role - a clear message that professionals and service providers should not take over the role of parents, but that service delivery should focus on support to families. This theme is continued in Article 18 which recognises the principle that both parents (or legal guardians) have common responsibilities for the upbringing and development of the child. The State's responsibility is once again identified as being to render appropriate assistance to parents (or legal guardians).

Article 9 centres on the right of the child not to be separated from his or her parents against their will, except where this is considered to be in the best interests of the child. The Article stresses the right of all interested parties to participate in decision-making processes in this regard. Articles 20 and 21 ensure alternative care for children who have to be removed from their families, including foster care, adoption and residential care in a facility. Periodic review of placement is an important protection linked to those forms of placement which do not involve a permanent transfer of guardianship.¹⁹

The fact that some children may have to be removed from the custody of their parents if it is in their best interests links to the need to protect children. Articles 19, 34 and 37 set out the rights of children to be free from abuse, neglect, sexual exploitation and cruel, inhuman or degrading treatment or punishment.

17 Articles 1 - 41 are the substantive articles of the Convention. Articles 42 to 54 deal with mechanisms for reporting and accountability of States Parties.

18 This coincides with the definition contained in the South African Constitution and that in the current Child Care Act.

19 Article 25.

Article 10 promotes the rights of children and their parents to leave or enter any country in order to be re-united as a family, whilst Article 11 requires measures to combat the illicit transfer and non-return of children abroad.²⁰

The responsibility of the State to provide child care, health, education and welfare services is dealt with under Articles 18, 19, 23, 24, 28 and 39. Categories of children needing special protection are also highlighted by the Convention, namely refugee children,²¹ disabled children,²² children of minorities or indigenous peoples,²³ children alleged as, accused of, or recognised as having committed an offence,²⁴ children engaging in work that constitutes a threat to their health, education or development,²⁵ children at risk of or involved with drug abuse,²⁶ and children in armed conflict.²⁷

It is notable that CRC is a comprehensive document dealing with all aspects of children's rights, protection, survival and development.

3.3 The African Charter on the Rights and Welfare of the Child, 1990

This instrument was written by member states of the Organisation of African Unity. It draws strongly on CRC but is considered to be a better reflection of African cultural concerns,²⁸ as it is more collective than individualistic and focusses on responsibilities of children as well as their rights. South Africa became a signatory in October 1997, but is not yet under any obligations in

20 These provisions are given further weight by the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption (UN Resolution 41/85, 1996) and the Hague Convention on the Civil Aspects of International Child Abduction. (South Africa has acceded to the latter instrument which became operative in this country on 1 October 1997.)

21 Article 22.

22 Article 23.

23 Article 30.

24 Article 40.

25 Article 32.

26 Article 33.

27 Article 38.

28 Winnie Kubayi in Ann Skelton (ed) *Children and the Law in South Africa* Lawyers for Human Rights, 1998 (forthcoming).

terms of the Charter, as it has not yet come into operation.²⁹ The Charter is nevertheless useful for determining the framework of South African children's legislation.

The Charter specifically mentions harmful social and cultural practices, particularly those that are prejudicial to the health or life of the child, and those which are discriminatory on the grounds of sex or other status.³⁰ States Parties are required to take all appropriate measures to eliminate these practices. Child marriage and the betrothal of girls and boys are prohibited, and the Charter sets the minimum age of marriage at eighteen years. All marriages should be registered in an official registry.³¹ The Charter also provides special protection for the children of imprisoned mothers.³²

The responsibilities of the child towards his or her family, community and society are stressed. The Charter also refers to the child's duties to his or her country and to African unity.³³

The Charter's provisions on education³⁴ are similar to those in CRC, but with an interesting addition that children who become pregnant before completing their education shall have an opportunity to continue with their education.

3.4 **The Hague Convention on the Civil Aspects of International Child Abduction, 1980**

This Convention has been acceded to by South Africa, and it is now operable in this country.³⁵ It seeks to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures for their prompt return to the State of their habitual

29 To date only seven countries have ratified, whilst fifteen ratifications are required for the Charter to come into operation.

30 Article 21(1).

31 Article 21(2).

32 Article 30. Cf, in this regard, the recent decision of the Constitutional Court in *President of the Republic of South Africa and Others v Hugo* 1997 (4) SA 1 (CC).

33 Article 31.

34 Article 11.

35 In terms of the provisions of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, in operation from 1 October 1997. See also the Regulations issued under section 5 of Act 72 of 1996 (Government Notice R. 1282 in Government Gazette 18322 of 1 October

residence, as well as to secure protection for rights of access. The Convention requires the establishment of a Central Authority in each of the States Parties (in South Africa the Office of the Family Advocate), which is largely responsible for the implementation of the Convention.

3.5 The Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption, 1993

This Convention has not yet been acceded to by South Africa, although legislation to provide for such accession is under discussion.³⁶ It does not aim to create new rights for children, but reinforces the protection of children's rights relating to inter-country adoption, and encourages co-operation between countries in this regard.

3.6 The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The JDL's), 1990

Although normally considered to be part of the group of instruments which deal with children involved in the administration of juvenile justice, the application of this instrument is in fact much broader. The instrument defines deprivation of liberty as any form of detention or imprisonment or the placement of a child in a public or private custodial setting from which this child is not permitted to leave at will.³⁷ Therefore, the rules will obviously also apply to any residential care facility from which a child may not leave at will - such as places of safety and secure care facilities.³⁸

The JDL's are exceptionally comprehensive. The over-riding message is that young people under the age of 18 should not be deprived of their liberty except as a measure of last resort, and that where this does occur, each child should be dealt with as an individual, having his or her needs met as far as is possible.³⁹

1997).

36 See further Chapter 5 below.

37 Rule 11(b).

38 The Inter-Ministerial Committee on Young People at Risk used the JDLs as the basis of their investigation into places of safety, schools of industry and reform schools.

39 Ann Skelton 'Developing a juvenile justice system for South Africa' in Raylene Keightley (ed) *Children's*

In addition to a statement of principles, much of the body of the rules is given over to the management of residential facilities, including their administration, the physical environment and services offered, appropriate disciplinary measures and independent inspection. These details are perhaps more appropriately to be included in regulations⁴⁰ rather than legislation, but the overriding principles and the aims are also important guiding factors for aspects of children's legislation dealing with residential care.

3.7 Other notable international documents

South Africa has ratified⁴¹ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which is of relevance not only to the position of the girl-child, but also may affect substantive issues arising during the course of this investigation (such as equality in marriage and family law, education, access to child care and so on).

South Africa has also ratified the 1951 UN Convention and the 1967 UN Protocol Relating to the Status of Refugees, and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.⁴² Moreover, with respect to child labour, ratification of the ILO Minimum Age Convention, 1973 (No 138) and Recommendation (No 146), and the ILO Equal Remuneration Convention, 1951 (No 100) are reportedly under discussion. South Africa is also participating fully in the development of the forthcoming ILO Convention on the Most Intolerable Forms of Child Labour.

3.8 The Constitution of the Republic of South Africa Act, 1996

Rights (1996) 180 at 191.

40 See the amended and or new Regulations 30, 30A, 31, 31A, 32, 33, 33A, 33B, 34, 34A and 35 under the Child Care Act, 1983 (published as Government Notice R. 416 in Government Gazette 18770 of 31 March 1998 and hereafter referred to as the 1998 Amendments).

41 On 15 December 1995.

42 Jeff Handmaker 'Displaced Children and Children in Exile' (Briefing document to the committee, Pretoria, 5 March 1998) 2 and 5.

Chapter 2 of the Constitution of the Republic of South Africa Act 108 of 1996 contains a bill of rights which guarantees certain fundamental rights and freedoms such as, for example, rights to life, equality, human dignity, and education, to all South Africans. Each section applies to children and adults alike. However, the Constitution goes further in that it demarcates special children's rights which are set out in section 28,⁴³ which rights are in essence a restatement of some of the articles of the CRC. As part of the Constitution, of course, they become enforceable,⁴⁴ even in the absence of enabling legislation; further, any future legislation pertaining to children will have to be interpreted in a manner which is consistent with the Constitution.

A striking feature is the fact that several clauses in the children's rights section incorporate second generation, or socio-economic rights.⁴⁵ While generally the State is bound to realise socio-economic rights progressively within its available resources,⁴⁶ with respect to the socio-

43 Section 28 states that

- (1) Every child has the right-
 - (a) to a name and a nationality from birth;
 - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition, shelter, basic health care services and social services;
 - (d) to be protected from maltreatment, neglect, abuse or degradation;
 - (e) to be protected from exploitative labour practices;
 - (f) not to be required or permitted to perform work or provide services that -
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
 - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time and has the right to be -
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
 - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child's best interests are of paramount importance in every matter concerning the child.
- (3) In this section "child" means a person under the age of 18 years.

44 See section 38 of the Constitution.

45 See Julia Sloth-Nielsen 'Chicken soup or chainsaws: some implications of the constitutionalisation of children's rights in South Africa' in Raylene Keightley (ed) *op cit* 6 at 7.

46 See sections 26 (housing) and 27 (health care, food, water and social security). All rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and

economic rights in the children's rights clause, the State is committed to core obligations (such as basic nutrition, basic health care, etc).⁴⁷ The right to education is set out in a separate section of the Constitution.⁴⁸

Section 28(2) provides for the best interests of the child standard, here described as 'paramount'. This wording is stronger than that of CRC.⁴⁹ The best interests of the child is not a new concept in South Africa, but its application has previously been limited to private law matters of custody, guardianship, access and placement. Its application via the Constitution to **every matter concerning the child** is therefore significant.

3.9 Principles

International instruments and the Constitution embody principles which should guide policy and law making as well as administrative action. There is a growing international trend to include these principles within the body of legislation. With regard to law relating to children there are numerous examples: the New Zealand *Children, Young Persons and Their Families Act, 1989*; the Australian *Family Law Reform Act, 1995*; the Ugandan *Children Statute, 1996* and the Ghanaian Children's Bill.

Setting out principles in the body of the Act (even when they are already stated in the Constitution or an international instrument which has been ratified) has the advantage of making them permeate the legislation itself, giving the Act the appropriate "spirit". The principles provide not only the framework for interpretation by the judiciary, but also set standards to be used in the operation of the Act by practitioners.

Whilst there seems to be growing agreement both internationally and in South Africa that principles should be included in the Act, there are different opinions on how this should be

freedom, taking into account all relevant factors: Section 36(1) of the Constitution.

47 De Vos 'The economic and social rights of children and South Africa's transitional Constitution' (1995) *SAPL* 233; *idem* 'Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67 at 87 - 88.

48 Section 29.

49 Julia Sloth-Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: Some

structured. One option is that there should be a statement of principles at the beginning of the Act. This provides the standard for interpretation of all other sections of the Act.

An enhancement of this approach is to have a statement of broad principles at the outset, but to supplement this by also stating more specific principles at the relevant section. An example of this approach is the New Zealand *Children, Young People and Their Families Act*, which has an initial statement of objectives and principles, and then states more detailed principles at the beginning of the chapter on Care and Protection, and the chapter on Youth Justice.

Another option is to use the wording found within international instruments and the constitution as part of the wording of specific clauses. These different options need not be seen as opposing alternatives, as a combination of approaches is quite workable.⁵⁰

Question 1: How best can the principles relating to children embodied in the various international instruments and the Constitution be incorporated in a comprehensive children's code?

Question 2: Should the 'best interests of the child' principle be defined in proposed legislation? If so, how ?

Question 3: How can new legislation assure to children the right to participate meaningfully in all matters affecting them?

Question 4: Are there other international instruments (besides those mentioned above) which could be of relevance concerning this investigation?

implications for South African law' (1995) 11 *SAJHR* 401 at 418.

50 See further Chapter 10 below.

4. PROBLEM STATEMENT AND SITUATION ANALYSIS

4.1 Problem statement

A criticism of the present Child Care Act has been that it is narrowly focused, with a heavy emphasis on formal legal interventions in individual situations. This does not meet the basic needs of the broad mass of South African children. The Child Care Amendment Act 96 of 1996⁵¹ includes some provisions designed to address this problem, but the need remains for legislation to take into account the broad spectrum of needs and rights of children. What follows is an outline of some major issues affecting children in South Africa, to which, as far as possible, legislation should address itself. Attention is paid in particular to issues relating to children who would be considered to be in 'especially difficult circumstances'.

4.2 Situation analysis

4.2.1 Demographic and economic background

The 1996 census showed that South Africa's population is estimated at 39.7 million people, of whom approximately 55.4% live in urban areas. 15% of the total population is aged 5 years or younger; a further 21% is aged from 6 to 14 years, and children under 18 form nearly half the population.⁵² Income distribution is extremely unequal, with the poorest 40% of households earning less than 6% of the total national income, while the richest 10% earn more than half the national income. About 40% of all South African households live in poverty, with African households and rural households -especially those headed by women - being the most affected.⁵³

4.2.2 Birth rate, infant mortality and nutrition

51 Which came into effect on 1 April 1998.

52 Government of National Unity, South Africa, Initial Country Report on the Convention on the Rights of the Child (1997).

53 Ms Mary Newman 'Early Childhood Development in South Africa: Key Issues' (Briefing document to the committee, Pretoria, 6 March 1998) 4.

It has been estimated that the average population growth rate is in the region of 1,9%, which is significantly lower than that for the rest of sub-Saharan Africa. The population growth rate has dropped in all population groups since 1986. The infant mortality rate shows a disparity between population groups, being highest for African children, and lowest for white children, and has been said to be comparatively high in relation to the country's economic status. Maternal mortality rates show the same trends.

Malnutrition amongst children remains endemic, and in 1990 an estimated 2.3 million South Africans were judged to be nutritionally compromised, with 87% being black children under 12 years, and most of the remainder being pregnant or lactating women.

4.2.3 Family life

The wellbeing of children is largely dependent upon the family environment. Family life is under a great deal of pressure in South Africa due to economic factors, the lack of household food security, unemployment, alcohol and drug abuse, communication and relationship problems, parenting problems, family violence, and a lack of support systems. All these factors, alone or in combination, can put families at risk and lead to family breakdown. Community violence and natural disasters are additional sources of stress and trauma. Most South African families and children live in unhealthy, unsafe communities where overcrowding, a lack of sanitation and recreation facilities and of public transport are features of daily life. Growing numbers live in informal settlements and on the streets.

4.2.4 Early childhood development (ECD)

In South Africa there is a lack of services for very young children. Early childhood is a time both of special potential and particular vulnerability. Most children have no access to ECD facilities. Although about 21% of all children under 6 years are in out-of-home care of some kind, only one in ten black children has access to formalised ECD programmes, compared with one in three white children. Access is particularly limited for children in rural areas, and those who are disabled. There is a lack of minimum standards for services in the ECD phase, such as formal day care centres and other alternatives. There are strong gender equality arguments to be made

for child care provision for working parents, in particular mothers who take primary responsibility for child rearing.⁵⁴ At present the Department of Education does not have any projects involving children under five years of age, but there is a National Interdepartmental Committee and Provincial Interdepartmental Committees for ECD. An Interim Policy for ECD has been developed. The National ECD Pilot Project concerns the proposed reception year for 5-6 year old children. The Department of Education is also not directly involved with day care.⁵⁵

4.2.5 Children in out-of-home care

There are at present about 29 000 children in residential care in South Africa - including places of safety, schools of industry, reform schools and children's homes - and about 74 000 children in foster care. During 1997 about 3000 adoption orders were issued. An unknown but very large number of children live apart from their parents in informal arrangements with surrogate caregivers, having been displaced from their biological families by a range of socio-economic factors (especially the migrant labour system). Following on the investigations conducted by the Inter-Ministerial Committee on Young People at Risk (IMC) in 1995, new interim policy recommendations for the child and youth care system, affecting all children in out-of-home placements, have been developed (see chapter 5 below).

4.2.6 Children with disabilities

While the number of disabled children in South Africa is not known, it has been estimated that about 12% of the South African population is disabled, and that approximately 4 million children experience different forms of disability. The vast majority of disabled children are black, with those in the rural areas being particularly vulnerable. Many disabilities result from poverty and preventable diseases and from community violence.

Lobby groups who are concerned with disability issues have identified many defects in the present legislative environment, including the lack of appropriate interpreter services for children with disabilities in children's court proceedings; the inaccessibility for children with disabilities

54 Ms Beth Goldblatt *op cit* 5.

55 Dr Berene Kramer 'Children in Education: the Role and Responsibilities of the Department of Education' (Briefing document to the Committee, Pretoria, 6 March 1998) 2 - 3.

of the majority of children's homes, places of care, and places of safety (physical inaccessibility, lack of trained staff, shortage of assistive devices); various forms of discrimination against prospective adoptive parents with disabilities, as well as children with disabilities; the vulnerability of such children to sexual, physical and emotional abuse; and the lack of co-ordination of legislation affecting children with disabilities.⁵⁶ Parents or foster parents of disabled children only qualify for care-dependancy grants if the child in question (between the ages of 1 and 18 years) requires permanent home care due to his or her severe mental or physical disability.⁵⁷ Disability grants are payable only from age 18, and free medical care is at present limited to children aged 6 years or under.

Question 5: Should provisions to meet the needs of children with disabilities be incorporated in a general children's statute rather than being dealt with separately by other legislation?

4.2.7 Children affected by chronic diseases and HIV/Aids⁵⁸

Increasing numbers of South African children are born with HIV infection, acquire it later due to sexual abuse, or are affected by AIDS and other chronic diseases which befall family members, particularly caregivers. According to one estimate, as many as 2,5 million children under the age of sixteen years in this country stand to be orphaned by AIDS by the year 2005.⁵⁹ Studies indicate that the period between HIV infection and developing AIDS is 5 - 7 years, and that the period between developing AIDS and death is seven months to two years. This gives some indication of the likely ages at which children might be orphaned by AIDS, based on possible life expectancy of HIV infected mothers.

56 Ms Washeila Sait 'Submission to the South Africa Law Commission on the Child Care Amendment Act 96 of 1996' (Briefing document to the committee, Pretoria, 6 March 1998).

57 See the definition of 'care-dependent child' in section 1 of the Social Assistance Act 59 of 1992, as substituted by section 3 of the Welfare Laws Amendment Act 106 of 1997 (operative from 1 April 1998).

58 Much of the information in this section has been supplied by Dr N McKerrow, Greys Hospital, Pietermaritzburg (Briefing to the committee, Pretoria, 6 March 1998), and by Ms Ann Strode and Ms Catherine Barrett 'Legal and Human Rights Issues Facing Children with HIV/AIDS' (Briefing document to the committee, Pretoria, 6 March 1998).

59 McKerrow and Verbeek *Models of Care for Children in Distress* (Edendale Hospital, 1995).

It is estimated that the incidence of HIV/AIDS in South Africa will peak in the years 2010 -2015 (depending on the respective province), at which time approximately 25% of children (constituting 9 -12% of the total population) will be HIV positive, i.e. some 3.5 to 4.8 million children. The morbidity rate of children with HIV/AIDS is higher than that of adults. In addition, HIV/AIDS in adults will have extremely serious implications for children in causing the incapacitation and death of their caregivers and in the depletion of the ranks of educators, health care staff and other essential service-providers.

The present legal framework is ill-equipped to deal with the HIV/AIDS pandemic. Consent to medical care where children or caregivers are infected is a practical problem at present, as is the thorny question of HIV testing of children. Also, alternative forms of community and cluster care will have to be developed and provided for in legislation in order to ensure non- institutional placement options for children who have been abandoned or orphaned as a result of HIV/AIDS.

Question 6: What are appropriate forms of alternative community and cluster care options that will assist children who might be affected by HIV/AIDS?

Question 7: What legal issues would need to be addressed in developing these options?

Question 8: How should HIV testing, including testing of children in residential care, be approached in legislation?

Question 9: How should present rules on consent to medical treatment be adapted to suit practical reality?

Question 10: Are there any other issues relating to HIV/AIDS and children that should be considered for future legislation?

4.2.8 Child abuse and neglect

Child abuse and neglect are wide-ranging categories which include (i) all direct, non-accidental actions which are harmful to children, such as physical, sexual and emotional assaults, and exploitation, and (ii) failures to meet any of the essential needs of children. Child abandonment, which is rife in South Africa, is an extreme form of the latter. Much child neglect in South Africa is the result of poverty and lack of resources, rather than negligence by immediate

caregivers. Lack of adequate provision for children may amount to abuse or neglect of children by the State.

In 1997 the SAPS Child Protection Units dealt with approximately 35 000 cases of child abuse. Statistics from other sectors responsible for intervening in child abuse are lacking at this stage. The real extent of child abuse is unknown due to under-reporting, lack of research, uncoordinated record-keeping and (until very recently) the lack of a central register.⁶⁰

4.2.9 Street children

Two categories of street children are generally identified, those 'on the street' who are there to earn money but maintain family and community ties, and those 'of the street' who have for a range of reasons become alienated from their families and communities. Such children, unless assisted, are largely unsupervised and unprotected and depend on each other for survival. In 1993 the number of street children in South Africa was estimated to be about 10 000. Although the 1996 Child Care Amendment Act recognises (for the first time) the category of children living on the street, through new provisions governing the registration and inspection of shelters, many other problems faced by these children (such as access to appropriate educational and social services programmes) cannot be regarded as having been holistically addressed.

Question 11: How can legislation best provide for the situation of, and problems faced by, children living on the street? In particular, in what way can legislation protect the rights of street children to, for example, education and protection against exploitation?

⁶⁰ See the National Strategy on Child Abuse and Neglect for further discussion in this regard. It is important to note that, with effect from 1 April 1998, provision is made for a National Child Protection Register in which must be entered, inter alia, all notifications of possible ill-treatment of or deliberate injury to children in terms of section 42(1) of the Child Care Act: see new regulation 39B, as inserted in the Regulations under the Child Care Act by the 1998 Amendments.

4.2.10 Child labour

In terms of the Basic Conditions of Employment Act 75 of 1997, the employment of children under the age of 15 years is prohibited.⁶¹ It is also a criminal offence to employ a child in employment that is inappropriate for a person of that age or that places at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.⁶² According to data from the October Household Survey conducted by the Centre for Statistical Services in 1994, about 200 000 South African children aged 10-14 years and a similar number aged 15-17 years were working at that stage. Commercial agriculture appears to be the industry most affected. Children are, however, also working in a range of other sectors, formal and informal, urban and rural. Working children are vulnerable to many forms of abuse, and are, in addition, liable to be wholly or partially deprived of education and become trapped in a cycle of poverty and underdevelopment. The Child Labour Action Programme, developed by the Child Labour Intersectoral Group (CLIG), has proposed that detailed legislation regulating child labour should remain in dedicated labour legislation, but that protective mechanisms should, in addition, be incorporated in a comprehensive children's statute. The proposed ratification of important ILO Conventions in this sphere has been mentioned above.

Question 12: If detailed child labour provisions remain in dedicated labour legislation, what protective mechanisms should the proposed children's statute contain with regard to child labour?

4.2.11 Child health and substance abuse

61 Section 43(1) (operative from 21 March 1998). This prohibition is also contained in section 52A of the Child Care Act, but is subject to the possibility of wide-ranging Ministerial exemptions being granted to categories of employment, particular employers or categories of employers. So, for example, in 1994, the advertising industry was exempted by the Minister from the provisions of this section. The Basic Conditions of Employment Act 1997 provides (in section 50 - at the time of writing not yet in operation) for special Ministerial determinations allowing for the employment of children below the age of 15 years, subject to whatever conditions may be specified, **only** in the case of advertising, sports, artistic or cultural activities.

62 Section 43(2) (also operative from 21 March 1998). These sections echo to a large extent the child labour provisions contained in both the Constitution and CRC.

Although a range of public health legislation affects children, it has been said that the law falls short of providing a legislative framework for addressing children's health issues in a holistic manner.⁶³ Child health issues already arise in a number of situations relevant to the present Child Care Act (such as consent to medical treatment) and, as previously stated, are particularly relevant to groups of children in especially difficult circumstances such as children with disabilities and children who are chronically ill. In addition, there are a number of obvious gaps where child health legislation needs to be investigated, such as issues relating to toy safety, medicine packaging, child restraint systems, health issues (sanitation etc) in day-care centres and so forth.

Question 13: Should children's health issues be protected through health legislation? Or is it more appropriate to locate them in this investigation? Alternatively, should some health matters continue to be regarded as part of a children's statute, whilst others are more appropriately dealt with in health legislation? If so, which issues/matters should fall where?

Although accurate statistics are not available, abuse of alcohol and other drugs is reported to be rising sharply among school children of increasingly young ages. Large numbers of street children abuse inhalants, which are uncontrolled by law and easily obtainable. Children are also severely affected by abuse of drugs and alcohol by their parents and other family members, as such behavior often leads to social dysfunction including child abuse and neglect, unemployment, the loss of housing and the loss of dignity and self-esteem. Children whose parents abuse substances are vulnerable to becoming involved in such behaviour themselves.

4.2.12 Children of divorcing parents

All children involved in disruptions of family relationships can be considered to be vulnerable and in need of special support. The introduction of an interim system of 'Family Courts' (initially in six pilot project areas) will see the Justice system building on the Office of the Family

63 Prof Marion Jacobs 'Child Health Legislation: Summary of the Main Areas for Consideration' (Briefing document to the committee, Pretoria, 5 March 1998).

Advocate in order to provide some social work services in regard to children whose parents are divorcing.⁶⁴

4.2.13 Displaced children

Legally, it would appear that children who are displaced or who require political asylum find themselves in a conceptual 'grey area'. Although it has been argued that the present Child Care Act extends not only to South African children, but also to foreign nationals, in practice little use has been made of the child and youth care system in addressing the problems of 'illegal aliens', prohibited persons or refugee children. Children who either themselves are suspected of being illegally in the country, or who are arrested with their parents, are incarcerated in police cells or in repatriation centres, often for long periods of time, and without access to schooling. Children have reportedly been refused access to hospitals if they are foreign and cannot prove ability to pay. It has been argued that unaccompanied children from foreign countries should be considered to be children in need of care, and thus subject to the jurisdiction of the Child Care Act.⁶⁵

Question 14: Should displaced foreign children fall under a future children's statute or should immigration legislation apply to them? If they are to be included in this investigation, should all foreign children ('illegal aliens' and refugees) be included, or only those who are unaccompanied by parents?

4.3 The current situation of welfare models and welfare services available in South Africa

Welfare programmes addressing all the issues mentioned above are in short supply, tend to be fragmented between a wide range of service providers and are of variable standard. The spread of the problems, and also the quality and accessibility of services, show substantial imbalances,

64 Prof Cheryl Loots 'Family Court Pilot Project' Concept document discussed at the briefing of the committee, Pretoria, 6 March 1998; Adv Barbara Hechter 'Memorandum on Amendment of Child Care Act' (Briefing document to the committee, Pretoria, 5 March 1998).

65 By Mr Jeff Handmaker in 'Displaced Children and Children In Exile' (Briefing document to the committee, Pretoria, 5 March 1998). Much of the information in this section is also derived from this document.

many of them inherited from the past dispensation. Access to services is particularly poor for rural children and their families.

An unusual feature of the South African welfare system is the degree to which responsibility for the implementation of social legislation has been delegated to voluntary welfare organisations. This has resulted from a policy, dating back to the 1930's, to the effect that government's role in welfare should be limited, and that responsibility should rest in the first place with the individual and then with the family and the community.

In accordance with this policy, the South African Government has, where possible, subsidised community groups to undertake approved social services rather than providing them directly. Under apartheid, the subsidy structure was used to promote the racial separation of social services, and the division of such services according to religion and culture was also actively encouraged. Hence an extraordinarily fragmented social service system developed, as the availability of services was dependent upon community initiative from and for particular groups, and whether or not they could manage to obtain state and/or private sector support, rather than being based on any plan to ensure that everyone had access to the necessary services. Levels of state financing varied enormously according to the race of those served, and the result has been a proliferation of very unevenly spread and unequally resourced organisations, managed according to different principles and belief systems, which share with government and between themselves the responsibility for the implementation, *inter alia*, of the laws affecting children. Social services relating to child witnesses in the criminal courts, and to children coming before the children's courts, into substitute care, into the juvenile justice system, into statutory drug rehabilitation programmes, and into any form of statutory provision for the physically or mentally disabled, are split among a vast array of voluntary as well as state structures. In recent years, these bodies have by and large been striving to do away with racial divisions and to balance out inequalities. However, this process is very far from complete.

While the White Paper on Welfare contains an indication that the Government recognises its responsibility fully to fund statutory social services, this is at present not being implemented, and services are being delivered according to the resources, competency levels and philosophies of each of the many structures concerned. There has been discussion about the introduction of

tenders and contracts to replace subsidies. This would radically change the nature of the relationship between the partners, and could provide a basis for the implementation of agreed standards of practice. Such a shift would, however, require a large injection of funds from the Treasury.

The National Department of Welfare and Population Development maintains overall responsibility for control of statutory social services. Each provincial Department has monitoring mechanisms for this purpose, including procedures for 'canalisation' of certain reports. The provincial Departments are responsible for e.g. receiving reports from welfare organisations concerning the progress of children in statutory care and their families. The Departments consider these organisations' recommendations as to whether the children in question should return home, remain in their placements, or be transferred elsewhere, and then issue the relevant orders in terms of the Child Care Act. Once the initial enquiry has been completed, the original function of the Children's Courts is thus for the most part taken over by officials of the Department of Welfare, and exercised in partnership with the relevant welfare organisations and the caregivers in question. There has been a call in some quarters for the court to be the authority which conducts periodic reviews and decides if and when care arrangements will change.⁶⁶ To be practicable, this would necessitate a major reorientation of and shift of resources into the children's courts.

Question 15: How far, and in what ways, can the following be improved by legislation:

- (a) the fragmentation of legislation affecting children in especially difficult circumstances;**
- (b) the fragmentation, uneven nature and quality of social service delivery;**
- (c) the partnership and relationship between the state and subsidised and private welfare organisations;**
- (d) the fundamental relationship between social services and the children's court;**
- (e) the allocation of financial resources in the welfare sector, and particularly those that will be required to give practical meaning to new legislation;**
- (f) redressing the balance as regards the 'coverage' of previously disadvantaged children and families, especially in rural areas?**

66 See Chapter 7 below.

5. OVERVIEW OF EXISTING POLICY INITIATIVES

5.1 Introduction

In this chapter, a number of recent South African policy initiatives and documents are surveyed, with particular reference to their impact on children.

5.2 White Paper on Social Welfare

The White Paper on Social Welfare, developed through a consultative process, promotes a developmental approach to social welfare. The goal is a humane, peaceful, just and caring society which will uphold welfare rights, facilitate the meeting of basic human needs, release people's creative energies, help them to achieve their aspirations, build human capacity and self-reliance, and assist them to participate fully in all spheres of social, economic and political life. The challenge facing the welfare system is to devise appropriate and integrated strategies to address the alienation and the economic and social marginalisation of vast sectors of the population who are living in poverty, are vulnerable, and have special needs. An inter-sectoral response is needed within Government, and between Government and civil society, adequately to address welfare needs. The implementation strategy is to continue existing services whilst at the same time re-orientating such services towards developmental approaches.

The document is structured in two parts. The first part (chapters 2 to 6) provides the overall framework and the instruments needed to deliver effective and appropriate services. The substantive issues in the first part are: a national strategy; institutional arrangements; human resource development; legislation; and finance and budgeting.

The second part (chapters 7 and 8) focuses on the actual restructuring of the social service delivery system, that is, on social security and welfare services, to enhance social integration. These chapters set out the proposed programmes, guidelines and recommendations for future action. Section 1 in chapter 8 focuses on the family and the life cycle: families, children, youth and ageing. There are guidelines for strategies regarding families and children, pre-school and

school-going children, adoption, foster care, children in residential care, children of divorcing parents, maintenance, child offenders, child labour, street children and substance abuse.

5.3 National Programme of Action (NPA) for Children

The implementation mechanism for CRC is the NPA, which provides a framework within which to monitor the profile of families and children in terms of their survival, development, protection and participation. In 1995 Government established a core Committee of seven Ministers with a mandate to develop and oversee a NPA for South Africa, review reports and ratify plans for implementation. A Steering Committee, comprising the Directors-General of the seven Ministries, the National Committee for Children's Rights (NCRC) and the United Nations Children's Fund (UNICEF) was established.

The policy priorities outlined in the NPA are nutrition, child health, water and sanitation, early childhood development and basic education, social welfare development, leisure and cultural activities, and child protection measures.

Provincial steering committees have also developed Provincial Plans of Action (PPA's).

5.4 Interim Policy Recommendations by the Inter-Ministerial Committee (IMC) for the Transformation of the Child and Youth Care System

The IMC was established in May 1995 in order to attempt to resolve problems that arose out of the uncoordinated release of awaiting trial children on 8 May 1995. It is chaired by the Minister of Welfare and Population Development and involves the Ministers of Justice, Education, Safety and Security, Public Works and Correctional Services. The mission of the IMC was to design and enable the implementation of an integrated child and youth care system based on a developmental and ecological perspective. The policy recommendations named above were released at the end of 1996, the Chairperson of the IMC indicating at that stage that those aspects not requiring legislative change should immediately be implemented as far as possible.

The vision for the transformation of the child and youth care system is described as follows: 'Children and youth are our most treasured asset: they and their families are valued and capable and contribute to a caring and healthy society'. This vision places children in the context of family and ultimately, of the community. The principles underpinning the transformation of the child and youth care system are: accountability, empowerment, participation, child and family centredness, continuity of care, normalisation, effectiveness and efficiency, appropriateness, family preservation and permanency planning.

The child and youth care system is defined as that system which provides residential and/or community care services to young people and to the families of young people who are at risk of placement away from home, who have been placed in any form of residential care or who may be in trouble with the law. Young people enter the process of service delivery through the processes of reception, engagement, assessment and referral, which should be rooted within the community, should involve the 'significant others' in the child's life, and ensure the child's participation. A framework for services within this system is described, and consists of four levels: Prevention, early intervention, statutory process and the continuum of care.

Prevention programmes are aimed at preventing the occurrence of problems which may negatively impact on the development of or place at risk the young person, family or community. Prevention could be achieved through a range of strategies including formal education, school-based child and youth development programmes which supplement formal education programmes, such as life-skills, sex-education, leadership training, mentor programmes, parenting, job training and preparation. Because prevention does not feature prominently in existing child care laws, it is recommended that a period of transition occurs to ensure that state departments and service providers move away from remedial modes of intervention to prevention and early intervention.

Early intervention strategies include school-based support services, diversion programmes, parent support programmes, intensive family preservation services, early childhood education, differentiated foster care programmes and programmes aimed at enhancing community participation in matters relating to protection and development of children.

As regards statutory process, the children's court is identified as central, but in need of reform, *inter alia*, with respect to training and capacity of personnel, more effective partnerships between justice and welfare, and possible community participation in children's court matters.

The continuum of care implies a managed strategy of care for children removed from their families and placed in residential care facilities, including group homes, correctional facilities, secure care facilities, shelters, places of safety, reform schools, children's homes and schools of industry. The IMC developed a number of basic principles of residential child and youth care, the following being especially relevant to this investigation:

- Each young person should have a developmentally appropriate plan and programme of care, education and treatment (where necessary);
- Each young person should have contact with family and friends unless such contact is deemed inappropriate;
- Each young person shall be protected from abuse, exploitation and discrimination;
- Each young person should be given the opportunity to participate in sport, cultural and recreational activities;
- No young person should be refused admission to the facility on the basis of religion, race, or sexual orientation, and provision should be made for an appropriate staff team who can understand and communicate with each young person.⁶⁷

Where a child has been removed from his/her family, a process of after-care and re-integration should be **supported**, rather than being left to chance. It is proposed that the current term '**reconstruction**' be replaced by the concept '**family reunification**', which is a process of planned return of a child to the family or community of origin.⁶⁸

Finally the IMC recommends that the transformation of the child and youth care system should be supported by appropriate human and financial resources, and quality assurance.

Question 16: How can legislation enable the transition from remedial modes of intervention towards prevention?

67 Many of the basic principles of residential child and youth care developed by the IMC have now been incorporated into the Regulations under the Child Care Act 1983 by the 1998 Amendments: see especially new Regulations 30A, 31A and substituted Regulation 32.

68 See the new definition of 'family reunification services' in Regulation 1 of the Regulations promulgated in terms of the Child Care Act 1983 (as inserted by the 1998 Amendments), as well as the provisions governing the rendering of family reunification services contained in Regulation 15.

5.5 Lund Committee Report and related policy issues

In mid-1995 the MINMEC (committee of ministers and provincial MEC's) for Welfare and Population Development was poised to do away with the State Maintenance Grant (SMG), due to a concern that this grant was in the long term not affordable. A final decision as to the fate of the SMG was deferred pending the report of an enquiry undertaken by the Lund Committee. This report was submitted in August 1996. Major recommendations of the Committee were accepted: the SMG will be phased out over a three year period, and a new Child Support Grant (CSG) was introduced on 1 April 1998.⁶⁹

The SMG was previously mainly directed to mothers caring for children on their own. Under apartheid it was fairly readily available to white, coloured and Indian women who met certain criteria, but due to discriminatory means tests and the erection of other administrative barriers, it was virtually impossible for black women to gain access to it. The Lund Committee sought to design a benefit which would end racial discrepancies, be accessible and flexible, and reach as many children as possible. It was argued that the new measure should not be introduced to the detriment of other forms of support for children, specifically the foster care grant, and the care dependency grant for children with severe disabilities. Ultimately, Cabinet decided that the CSG would be payable for children under the age of seven years in an amount of R75 per month. After much lobbying from NGO's, this amount was increased to R100. The CSG will be means tested (the test being based on the household income of the household of which the primary care-giver is a member), will be payable to the primary care-giver, and will target children in rural areas and in informal settlements particularly.⁷⁰ The eventual intention is that the CSG will target some 3 million of South Africa's poorest children.

69 See Welfare Laws Amendment Act 106 of 1997: the provisions of this Act relating to the phasing out of the SMG came into operation on 19 December 1997 while those relating to the administration of the CSG came into operation on 1 April 1998. See also the Regulations regarding the phasing out of maintenance grants in terms of the Social Assistance Act, 1992 (Government Notice R. 417 in Government Gazette 18771 of 31 March 1998) and the Regulations regarding grants and financial awards to welfare organisations and to persons in need of social relief of distress in terms of the Social Assistance Act, 1992 (Government Notice R. 418 in Government Gazette 18771 of 31 March 1998).

70 See the financial criteria for the CSG in Regulation 16 of the Regulations published by Government Notice R. 418 in Government Gazette 18771 of 31 March 1998, as also the provisions regarding eligibility for the CSG in, respectively, Regulations 3 and 20 of these Regulations.

The Lund Committee also proposed extensive reforms to the present private maintenance system, the ineffectiveness of which has been one reason why many families have sought state support.

The CSG is widely recognised as having significant positive qualities, in particular in that it is designed to eliminate racial discrepancies and target the poorest of the country's children in their vulnerable earliest years. But critics of the new measures raise the point that state financial support will kick in only after serious problems have developed and the child has become the subject of expensive tertiary interventions. Whereas there is legal provision for state aid for the support of a child in a children's home or in foster care, there is no provision to assist parents to care for children of seven years and older (other than children who qualify for the care dependency grant, or who are for the time being beneficiaries of the SMG), unless new forms of assistance are developed. Another group of children at risk who are not provided for are those under the age of seven years whose caregivers do not qualify for the SMG in terms of the household means test, although such children may well be in dire need of state assistance. Critics warn that this pulls the rug out from under the many policy commitments towards prevention of family breakdown, towards care of children within their own families, and against child labour, including commercial sexual exploitation.

5.6 The National Strategy on Child Abuse and Neglect

The National Strategy on Child Abuse and Neglect (NSCAN) was developed by the National Committee on Child Abuse and Neglect (NCCAN) - an inter-sectoral body including both government and NGO representatives, convened by the national Department of Welfare. The NSCAN seeks to address the current child protection crisis, in terms of which rates of reported child abuse and neglect are spiralling, while our child protection system is largely in disarray. Many children in critical circumstances are without access to help, and, of those who do enter the child protection system, many are at high risk of secondary abuse because of inadequacies and lack of coordination. The NSCAN consists of a series of tasks and processes which are designed to draw together the fragmented components of the child protection system and to put in place a coherent legal and policy framework and broad preventive strategies, together with properly designed and locally appropriate intervention measures to deal with reported cases of child abuse and neglect.

Work is already under way in all provinces, with financial backing from a private foundation, on a key component of the NSCAN - the development of inter-sectoral protocols for intervention in reported cases of child abuse.

The strategy document questions the suitability of the adversarial system in use in our criminal courts which generates much of the secondary abuse for child victims, and proposes investigating the adoption of a more inquisitorial approach. This would substantially change the nature and functioning of courts dealing with offences against children. Possibilities regarding types of cases which could be dealt with by family courts rather than criminal courts are also mentioned in the document.

The NSCAN includes a series of recommendations relating to policy and legislation,⁷¹ prevention, child protective service management, and structural provisions. The recommendations relating to policy and legislation include a 'comprehensive process of reform of all legislation relevant to child rights and specifically to child protection', with specific attention to identified problem areas.⁷²

5.7 Action Plan to Prevent and Combat the Commercial Sexual Exploitation of Children

The following objectives have been identified by the Department of Welfare as critical factors which need to be addressed with regard to the prevention and combatting of commercial sexual exploitation of children: the establishment of international and national co-operation; the development of prevention strategies and identification of children at high risk; provision of early intervention; enhancement of protection through policy, legislation and programmes, advocacy, community mobilisation and monitoring, as well as the creation of specialised units or personnel, and safe shelters for children. Recovery and reintegration of children should be

71 These issues have also been extensively canvassed by the South African Law Commission Project Committee on Sexual Offences against Children (Project 108), Issue Paper 10. The issue paper draws heavily on the NSCAN document.

72 The intersection of the various South African Law Commission project committees affecting children's issues is discussed in Chapter 11 below.

enhanced through the provision of comprehensive counselling and support services and facilities to child victims and their families.

Question 17: How should this investigation approach the legislative issue of commercial sexual exploitation of children?

5.8 National Crime Prevention Strategy (NCPS)

Levels of crime have been of dire concern to the Government of National Unity since 1994. In recognition of this, in 1995 the Cabinet initiated a process for the development of a National Crime Prevention Strategy (NCPS). This process has been managed by an inter-departmental committee consisting of the Ministers for Safety and Security, Justice, Correctional Services and Defence.

Crimes against children are of serious concern; child victims are often left with lasting physical and psychological injuries, which may entail a burden of dependency on households and/or the state. Frequently symptomatic of deep-rooted social problems, such crimes are barriers to human development. The NCPS addresses this through a national victim empowerment strategy.

Since 1995 it has been accepted that children should, as far as possible, not be imprisoned. Under the NCPS, one programme provides for secure care of children accused of committing serious and violent offences, and funding in the amount of R33 million for the construction of facilities has been allocated, to be managed by the IMC. Substantial progress towards acquiring the necessary resources and physical infrastructures has been made, although delays in construction and staffing issues have slowed progress in this regard.

The NCPS highlights the necessity for a national programme for school education regarding crime prevention with the aim of providing skills which reduce the incidence of crime, of creating viable alternatives to violence, contributing to the development of responsible citizenship and increasing respect for the rule of law and human rights.

Question 18: How can legislation provide for the 'tracking' of children under 18 years of age who have entered the criminal justice system in a manner that respects their right to privacy?

5.9 National Policies on Disability

5.9.1 White Paper on an Integrated National Disability Strategy, November 1997

Some of the achievements of the advocacy programme of the Disability Rights Movement in South Africa are the express prohibition of discrimination against persons with disabilities in the Constitution and in other legislation such as the new Labour Relations Act 66 of 1995, the establishment of the Office of the Status of Disabled Persons in the Deputy President's Office and the development of the White Paper on an Integrated National Disability Strategy, published by the Deputy President in November 1997. The White Paper provides a new philosophical basis on which government policy on disability is based, namely, a shift from the out-moded 'medical model' to the new 'social model' of disability, and a shift from regarding disability as a predominantly health and welfare issue, to the view that the circumstances of people with disabilities and the discrimination they face are socially created phenomena that have little to do with the impairments of disabled people.⁷³ The social model therefore emphasises two things: the shortcomings of society in respect of disability, and the abilities and capabilities of people with disabilities. A human rights and development approach to disability focuses on the removal of barriers to equal participation and the elimination of discrimination based on disability.

5.9.2 Report on Special Needs in Education

The National Commission on Special Needs in Education and Training (NCSNET) and the National Committee for Education Support Services (NCESS) were appointed by the Minister and Department of Education, respectively, to investigate and make recommendations on all aspects of 'special needs and support services' in education and training in South Africa. Key strategies include: transforming all aspects of the education system; developing an integrated system of education; infusing 'special needs and support services' throughout the system;

⁷³ Thus, for example, it is the stairs leading into a building that disable the wheelchair user rather than the wheelchair.

pursuing the holistic development of centres of learning to ensure a barrier-free physical environment and a supportive and inclusive psycho-social learning environment; developing a flexible curriculum to ensure access for all learners; promoting the rights and responsibilities of parents, teachers and learners; providing effective development programmes for educators, support personnel, and other relevant human resources; fostering holistic and integrated support (inter-sectoral collaboration); developing a community-based support system which includes a preventative and developmental approach to support; and developing funding strategies that ensure redress, sustainability, and - ultimately - access to education for all learners.

5.10 **Refugee children**

The law relating to refugees and matters of immigration is likely to change significantly in the near future: a recent Green Paper produced by the Department of Home Affairs proposes new legislation with regard to refugees. The Green Paper supports the Department of Home Affairs' view that there should be a separate, free standing piece of legislation on refugee law. The Green Paper makes no specific mention of children, however, and the particular needs of immigrant, migrant or refugee children do not appear to have been canvassed.⁷⁴

5.11 **Prevention of Family Violence Discussion Paper**

The Prevention of Family Violence Act 133 of 1993 deals with the procedure by which interdicts in relation to family violence can be obtained and also contains a provision requiring persons in various positions of responsibility to report the ill-treatment of children.⁷⁵ This Act had been in existence for a period short of three years when further investigation into legislation on family violence was deemed warranted. The South African Law Commission released an issue paper in July 1996, followed by a discussion paper, the content of which has been extensively canvassed with women's rights organisations, legal practitioners, other NGO's and the public in general. A final report is at an advanced stage of preparation.

74 See further Chapter 4 above.

75 Reporting provisions also appear in section 42 of the Child Care Act 74 of 1983 (see further Chapter 7 below).

The discussion paper recommends an expanded definition of violence as 'including, but not limited to physical abuse or threat of physical abuse, sexual abuse or threat of sexual abuse, intimidation, harassment, or destruction of property.' Amendments are proposed in order to allow for the exclusion of the respondent from the family home, but with the proviso that orders of this nature 'may only be made if it appears likely that the applicant or any relevant child **will suffer significant harm** if an order is not made and that **such harm will be greater than the harm which the respondent will suffer if the order is made**'.

The discussion paper points out that economic dependence is the single most common reason why women remain with or return to abusers, and that 'children often become the contact point through which a batterer can retain control over women, by asserting his rights to custody and reasonable access'. The solutions advocated in the discussion paper include empowering the court to grant, together with the interdict, maintenance, custody, and access orders, but such orders should be temporary in nature. It appears that provisions regarding the reporting of ill-treatment of children will remain in legislation on domestic violence.

Question 19: Is it not more appropriate that provisions relating to mandatory reporting of child abuse and neglect be contained in a comprehensive children's statute?

Question 20: How can there be effective liaison between domestic violence courts, other courts dealing with maintenance, custody and access issues, and children's courts dealing with child abuse and neglect?

5.12 Draft policy statements by the Department of Welfare and Population Development

The National Department of Welfare and Population Development has drafted policy documents for discussion on adoption,⁷⁶ foster care⁷⁷ and street children.⁷⁸

As regards adoption, the following needs have been identified: that services to prospective adoptive and adoptive parents, as well as to birth parents, be standardized and minimum norms

76 Draft Paper on the Transformation of Adoption Practice in South Africa.

77 Draft Paper on the Transformation of Foster Care Practice in South Africa.

78 Draft Policy and Strategic Guidelines on Street Children in South Africa.

and standards developed; that life skills programmes for prospective adoptive, adoptive and birth parents be developed, implemented and co-ordinated; that liaison between the Department, provincial departments and relevant non-governmental organizations be facilitated; that subsidized adoptions be considered; that awareness campaigns to promote adoption be promoted and launched; that the Hague Convention on the Protection of Children in Respect of Inter-country Adoption be ratified and a Central Authority to co-ordinate all inter-country adoptions be established together with procedures, minimum criteria, and standards of accreditation of agencies to deal with inter-country adoptions; and that mechanisms to monitor the transformation of the adoption system in South Africa be developed and implemented, as well as indicators for the collection of quantitative and qualitative statistical data on the transformed adoption system.

With respect to foster care policy, it is proposed that each foster child have a future plan of care within which the principle of permanency planning is taken into consideration;⁷⁹ that each foster child be reunited, where possible, with his or her parent within a limited period of time, failing which alternative arrangements for his or her permanent care should come into effect; and that any disputes between the natural parents and the foster parents be resolved in the Children's Court.

With respect to street children, the Department aims to ensure uniform national standards for services rendered to street children throughout South Africa (whilst recognising local and regional variations). Although the importance of shelters is recognised, these resources should be utilized selectively and in accordance with the emphasis on de-institutionalisation of children and moves towards community-based programmes. It is envisaged that the delivery of 'one stop services' within the communities of origin (whereby the empowerment and strengthening of families receive attention) will reduce the numbers of street children in need of shelters/children's homes.

5.13 Department of Justice draft discussion paper: 'Gender policy considerations'

⁷⁹ In this regard, reference may be made to the new requirements for the report of a social worker which must be furnished to the children's court in the course of child removal and placement (including foster care placement) proceedings. Such a report must now include 'the proposed plan to facilitate the reunification of the child and his or her family and the ultimate restoration of the child to his or her community, where applicable': Regulation 2(4)(f) of the Regulations under the Child Care Act 1983, as inserted by the 1998 Amendments.

The Department of Justice Draft Discussion Paper entitled 'Gender Policy Considerations' was released for public consultation on 20 June 1997, and reflects a number of strategies aiming at making explicit the role of women and children as 'consumers of justice' and as fully-fledged participants in the legal profession and in the Department itself.⁸⁰ Of importance is the policy which 'seeks to improve women's experiences in the justice system by creating a culture of service delivery and gender sensitivity' (such as improving court facilities by, for example, providing child care and areas for feeding and changing babies). The document address issues and contains recommendations that will affect the lives of South African children, touching on such matters as family violence, sexual offences, the enforcement of private maintenance obligations, the distribution of property after the breakdown of relationships or the death of the male partner in a manner better designed to meet the needs of women and dependent children, the harmonisation of religious and customary family law with the common law and family law reform in general.

5.14 The Report of the Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court (the Hoexter Commission Report)

In its report, the Hoexter Commission recommends the establishment in South Africa of a specialist Family Court of comprehensive jurisdiction having the status of a High Court. This Family Court will have concurrent jurisdiction with the High Court

- (a) to hear those matters which are at present heard in the divorce court of the High Court and which, in addition to divorce itself, will include all matters ancillary to divorce such as the division of matrimonial assets, maintenance for a spouse and minor children, custody of and access to minor children, guardianship of minor children, applications *pendente lite* for a contribution towards the costs of a divorce action, for interim maintenance and for interim custody of and access to children, applications for maintenance as between parent and child and grandparent and grandchild, and applications for interdicts in matrimonial matters;

80 See Julia Sloth-Nielsen and Belinda van Heerden 'Putting Humpty Dumpty back together again: Towards restructuring families and children's lives in South Africa' (1998) 114 *SALJ* 156 at 169.

- (b) to hear the matters at present heard by the High Court under the Age of Majority Act, 1972;
- (c) to grant consent to the marriage of a minor if such minor's parent or guardian refuses such consent, which power is at present exercised by a judge of the High Court under section 25(4) of the Marriage Act, 1961; and
- (d) to hear cases in which paternity is sought to be determined and which affect the status of a woman or child.

A further recommendation is that the Family Court should have jurisdiction to hear matters involving disputes between a man and a woman arising from an existing or previous spousal union between them, where this union is recognised by their own customs or religious beliefs but not by the civil marriage laws.

The Hoexter Commission also recommends that the Family Court should also have concurrent jurisdiction with the Magistrates' Court to hear the matters at present heard by the Commissioner of Child Welfare under the Child Care Act, 1983; to hear the matters at present heard in the Maintenance Court under the Maintenance Act, 1963; to carry out the duties and exercise the powers assigned to magistrates in terms of Chapter 3 of the Mental Health Act, 1973; to investigate the accommodation or care of aged or debilitated persons under section 6 of the Aged Persons Act, 1967 and to carry out the duties under sections 5(3) and 5(4) of this Act; to hold enquiries under the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, 1971, and to commit persons to rehabilitation centres. The Hoexter Commission Report does not assign any criminal jurisdiction to the Family Court.

The Report proposes the repeal of the Mediation in Certain Divorce Matters Act, 1987, and its replacement by a new statute to be called the 'Family Advocate and Family Counselling Service Act', grants the Family Advocate greater powers in all divorce matters, and gives the Family Advocate the power to inquire into and to report to the Family Court in connection with any child. It also proposes the establishment, as part of the Family Advocate's office, of a Family

Counselling Service to provide experienced social welfare workers to the Family Advocate's office on a regular and reliable basis.

The Hoexter Commission further recommends housing the Family Court separately from other courts, and where this is not possible, that the Family Court should at least have its own separate entrance. The lay-out and appointments of the Family Court should be such as to create a relaxed and informal atmosphere with cheerful waiting rooms equipped with playthings for children, comfortable offices, and adequate child care facilities for infants.

6. BROAD OVERVIEW OF CURRENT SOUTH AFRICAN COMMON AND STATUTORY LAW RELATING TO CHILDREN

6.1 Introduction

Both the laws and the institutions affecting children are in a process of transition. There are several reasons for this state of flux: the new emphasis on children's rights that flow from CRC; the human rights provisions (including special children's rights) enshrined in the Constitution; the move away from 'western' legal notions as a result of the recognition of different cultural and religious interests in South African society; a political awareness of the needs of children in especially difficult circumstances; and the need to develop legislation which provides for changing technology, for example, in the field of reproductive techniques.

6.2 Background

The present South African position on legal rules affecting children involves a blend of Roman-Dutch principles which, with appropriate judicial interpretation, comprise the common law body of rules generally known as the 'law of parent and child', together with numerous statutory provisions. Chief amongst the latter of these is the Child Care Act 74 of 1983, which is dealt with independently in Chapter 7. However, the relations between child and parent, and between child and state, are also covered in the numerous other statutes.⁸¹ It has become increasingly clear that tracking statutory provisions affecting children is difficult as a result of the fragmentation of present South African statute law. A further observation is that the legal position is at times difficult to establish because of the intersection between common law and statute law. Also, some conflicts between statutory provisions have developed as a result of recent law reforms, where changes are incomplete.

81 The Age of Majority Act 57 of 1972, the Marriage Act 25 of 1961, the Children's Status Act 82 of 1987, the Guardianship Act 192 of 1993, the Divorce Act 70 of 1979, the Mediation in Certain Divorce Matters Act 24 of 1987, the Maintenance Act 23 of 1963, the Prevention of Family Violence Act 133 of 1993, the Domicile Act 3 of 1992, the South African Schools Act 84 of 1996, the Births and Deaths Registration Act 51 of 1992 (amended in 1996 to give effect to the constitutional requirement that pro forma discrimination between the registration of the birth of children out of wedlock and of children born in wedlock be eliminated), the Mental Health Act 18 of 1973, the Wills Act 7 of 1953, the Choice on Termination of Pregnancy Act 92 of 1996, the Welfare Laws Amendment Act 106 of 1997. These are but examples, and this does not purport to be a complete list.

An example may illustrate the difficulties associated with the current position. At present under common law, parents have a right to reasonable chastisement of their child.⁸² This position derives from Roman Dutch law, and has not altered with recent Constitutional Court pronouncements on the question of judicially imposed corporal punishment. The common law position is still, too, that the parental powers in this regard may be delegated to a person acting in the parent's stead. But corporal punishment has recently been prohibited as a disciplinary measure in schools,⁸³ and the parental power to delegate the common law right of reasonable chastisement has, to this extent, changed through statute. The extensive amendments recently made to the regulations under the Child Care Act have prohibited corporal punishment as a form of discipline by foster parents and in children's care facilities.⁸⁴ And in 1997, consequent upon the Constitutional Court decision in *S v Williams*,⁸⁵ Parliament passed the Abolition of Corporal Punishment Act 33 of 1997. This legislation⁸⁶ repeals 'any law which authorises corporal punishment by a court of law, including a court of traditional leaders'. Therefore, ascertaining the present legal position on corporal punishment of children requires the study of at least three statutes, several reported court decisions,⁸⁷ and, in addition, aspects of the common law of parent and child.

82 A number of European countries have abolished this right, and the continued existence of this right in South Africa is currently under debate.

83 See section 10 of the South African Schools Act 84 of 1996 (operative from 1 January 1997).

84 See new Regulations 30A(1)(d), 30A(2)(m), 31A(m) and 32(3)(d) of the Regulations under the Child Care Act, as inserted by the 1998 Amendments.

85 1995 (3) SA 632 (CC).

86 Operative from 5 September 1997.

87 For example, reported criminal cases where the defence of reasonable chastisement was explored. See, for instance, *S v Lekgathe* 1982 (3) SA 104 (BSC) cited in J A Robinson (ed) *The Law of Children and Young Persons in South Africa* (1997) 53. See also *Du Preez v Conradie* 1990 (4) SA 46 (BGD) on the parental common law right of reasonable chastisement.

6.3 Common law⁸⁸

In this section, a distinction is drawn between rules that empower children, rules that protect children and, in general, rules affecting children.⁸⁹

6.3.1 Common law rules that empower children

At common law, every human being is recognised as a legal subject, irrespective of age or mental or physical capabilities. This means that every person can enjoy legal rights, be subject to legal duties, and has legal capacity to do or be held responsible for different things. Thus, a child is a legal subject from birth, and can, for example, be the bearer of rights and obligations, such those related to ownership of property.

Common law divides childhood into three categories: the infant, who is below the age of 7 years and whose capacities are very limited; the pre-pubescent phase (set at 12 years for girls and 14 years for boys), which distinction still finds some echoes in our law today, and the person under the age of 21 years (the minor), whose capacities, although limited, are greater than those of the younger groups. Capacity is usually divided into the capacity to perform legal acts, the capacity to litigate, and the capacity to be held liable for wrongdoing.

As a general proposition, the rules of common law are concerned with the protection rather than the empowerment of minors. Until the age of 21 years (the present age of majority unless it is attained earlier),⁹⁰ the minor falls under the parental power of his or her parents or guardian, save for certain specific exceptions provided for in relevant statutes or developed in common law

88 See, in general, P Q R Boberg *The Law of Persons and the Family* (1977); A H Barnard, D S P Cronje and P J J Olivier *The South African Law of Persons and Family Law* 3 ed (1994); C J Davel and R A Jordaan *Law of Persons Student's Textbook* (1995); I D Schafer (ed) *Family Law Service* (1987, with looseleaf updates); J A Robinson (ed) *The Law of Children and Young Persons in South Africa* (1997); E Spiro *Law of Parent and Child* 4 ed (1985); J D van der Vyver and D J Joubert *Persone- en Familiereg* 3 ed (1991).

89 This categorisation is not necessarily based on any *legal* distinction between empowerment, protection and laws affecting children: rather, it is a convenient tool with which to order and describe the present situation, and through which comparisons with existing statute law can be made.

90 By, for example, a court order under the Age of Majority Act, 1972, or by the conclusion of a valid

(discussed in 6.3.2 below). 'The modern South African law regards majority as the gateway to full legal capacity. The status of minority carries with it certain disabilities in the form of restrictions on private law capacities as well as various immunities and special privileges'.⁹¹

One example of a common law rule which can be regarded as empowering children relates to competence to testify in court; however, the child's ability to testify is not linked to a specific age limit, and depends on the child's maturity and understanding of what it means to tell the truth.

6.3.2. Common law rules regarding the protection of children

As mentioned above, common laws rules concerning the status of the infant and the minor are chiefly aimed at the protection of children by reason of immaturity. The common law rules are based on motives of paternalism in order to protect minors against themselves.⁹²

Therefore, a child under the age of seven years cannot conclude any juristic acts, and a guardian must act for and on behalf of the infant. Such child also cannot be held responsible for criminal or delictual acts.

At the age of seven, a person ceases to be an infant and acquires limited capacity to act. At this age a child can be held liable for criminal offences or delicts, although a rebuttable presumption of incapacity applies to a child between the ages of seven and fourteen years. The rebuttable presumption of incapacity for criminal or delictual acts falls away at 14 years⁹³ for both girls and boys. A minor under the age of 21 years lacks the capacity to undertake contractual obligations or to sue or be sued on his or her own, and will ordinarily be assisted by a parent or legal guardian in this regard.

marriage.

91 Alfred Cockrell 'The Law of Persons and the Bill of Rights' in *Butterworths Bill of Rights Compendium* (1996) para 3 E 8.

92 Alfred Cockrell *op cit* para 3 E 22.

93 The South African Law Commission's Project Committee on Juvenile Justice (Project 106) has raised the question of criminal capacity of children in Issue Paper 9, including both the age limits that currently apply, as well as the suitability of the presumption.

At present, a man who has sexual intercourse with a girl below the age of 12 years can be convicted of rape, as below this age, girls are legally incompetent to consent. This rule dates from Roman times.⁹⁴

It has been argued that it would better accord with social reality if the age of majority were reduced to 18 years, and that the paternalistic approach of common law is over inclusive, as it sweeps in many minors who are in fact possessed of the necessary competence to make assessments of what qualifies as their best interests.⁹⁵

From the discussion thus far, it is clear that other project committees of the South African Law Commission are also currently dealing with legislative reform in specific areas affecting children, the project committee on juvenile justice and that on sexual offences against children in particular. The way forward with regard to the process of integrating the different efforts is touched on in Chapter 11, and no questions are therefore raised for discussion here in regard to issues which overlap with those investigations.

Question 21: Should the age of transition from minority to majority remain at 21 years for the purposes of private law capacities, or should it be lowered to 18 years in accordance with the Constitution and CRC? If yes, should this be for all purposes, or should there be certain exceptions, where parental assistance is still required until the age of 21 years?

6.3.3 Common law rules affecting children

Only parental power, the best interests standard and children's status will here be addressed in detail. However, the common laws rules of evidence, which can affect the weight given to children's testimony (particularly in sexual abuse cases), may be relevant to this investigation. So for example, the cautionary rule of evidence⁹⁶ applicable to child witnesses,⁹⁷ derived from

94 See also the South African Law Commission's Issue Paper 10: Sexual Offences against Children (Project 107).

95 Alfred Cockrell *op cit* para 3 E 22 who nevertheless maintains that the present fixing of the age of majority at 21 years cannot be said to amount to an unconstitutional violation of the rights enshrined in Chapter 2 of the Constitution, 1996. For a contrary view, see J D van der Vyver in Robinson (ed) *op cit* 296.

96 Recent amendments to the Criminal Procedure Act 51 of 1977 have addressed the manner in which a child may testify in criminal cases. So, in terms of section 170A (inserted by section 3 of the Criminal

common law, has been called into question by experts, who have argued this rule has a discriminatory effect against children.⁹⁸

Question 22: Should the investigation include a review of the common law cautionary rule relating to child witnesses, or any other aspect of children's testimony?

° Parental Power

The most significant common law rule pertaining to children is arguably the concept of parental power (also known as parental authority) which is the 'collective term for the sum total of rights and obligations which a parent enjoys in relation to his child, the child's estate and administration thereof, and includes assisting the child in legal proceedings'.⁹⁹ It encompasses the power of reasonable chastisement, as mentioned above, as well as a host of matters pertaining to the child's day to day life, including control over a child's social interactions. Access,¹⁰⁰ custody and guardianship (in the narrow sense) are all separate incidents of parental power. It has been noted that the Constitution does not protect a right on the part of parents to family life, as the

Law Amendment Act 135 of 1991), a witness under the age of 18 years may give evidence through an intermediary, if necessary in a different room from the courtroom through, for example, audio-visual link-up. There is also the possibility for a child witness to testify by using signs or dolls to show what happened. However, special courts which are equipped for children to give evidence in these ways are not available in many areas, especially rural areas, and there is a strong lobby for more of these specially equipped courts to be set up. The cautionary rule that may affect the weight of the evidence, has, however, not been affected by the legislative amendments to the Criminal Procedure Act, 1977.

97 Who may also be single witnesses, and complainants in sexual offences cases, thus bringing into play two further cautionary rules. The Supreme Court of Appeal has very recently rejected the last mentioned cautionary rule, concluding that it 'is based on an irrational and outdated perception' and that it 'unjustly stereotypes complainants in sexual assault cases (overwhelming women) as particularly unreliable' : per Olivier JA in *Jackson v S* (Case no 35/97).

98 See P J Schwikkard 'The abused child: A few rules of evidence considered' in Raylene Keightley (ed) *Children's Rights* (1996) 148.

99 F J Bosman and G J van Zyl in J A Robinson (ed) *op cit* 52.

100 Although access is ordinarily regarded as an incident of parental power, it has been recommended by the South African Law Commission that legislation be passed to provide for access to a child by his or her grandparents or by any other person with whom the child has a special relationship, provided that this is in the best interests of the child: see *Report on Access to Minor Children by Interested Persons* (Project 100), June 1996. The envisaged Child Visitation Rights Bill (attached to the Report as Annexure A) is, however, still couched in the language of access rights to children, rather than emphasising the rights of the **child** to family contact. The recommendations of the Law Commission in this regard have not yet been incorporated in legislation.

applicable section provides for the child's right to 'family care or parental care', which 'in no way entrenches the parental power as a constitutional right on the part of parents'.¹⁰¹

Generally, parental authority is obtained automatically, upon the birth of a child, although parental power is also conferred by adoption. It terminates when the child becomes a major, or when a parent is deprived of parental authority by order of court. The High Court, which at common law is the 'upper guardian of all minors', can overrule any decision taken by parents in consequence of their parental authority if this is in the best interests of the child. In addition, sometimes the assistance of the parent or guardian is regarded as insufficient protection for the child, and the High Court, as upper guardian, is then empowered to grant consent.¹⁰²

Professor June Sinclair, amongst other commentators, has argued that the idea of parental power is out of step in a modern era characterised by children's rights and parental responsibilities, and that the South African law in this regard is still in need of urgent reform.¹⁰³ It should more properly be described as an office of trust, concerned more with duties than powers.¹⁰⁴

Question 23: Should future child legislation amend the common law notion of parental power, and if so, how?

With the impending advent of the Family Court as an institution for the furtherance of the interests of children and families, and the notion that all child related judicial issues be centred in

101 Alfred Cockrell *op cit* para 3 E 12 and 3 E 21.

102 For example, when a minor wants to sell land or take out a mortgage bond, the Master's office is assigned this function where the value of the property is less than R 100 000: see section 80 of the Administration of Estates Act 66 of 1965.

103 In D van Wyk, B de Villiers, J Dugard and J Davies (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 538.

104 Alfred Cockrell *op cit* para 3 E 21; Boberg *op cit* 458.

this court or the attached children's court, it may be necessary to amend the rules, both statutory and those derived from common law, so as to transfer the functions of the High Court regarding children to this forum.

Question 24: Should the High Court remain the upper guardian of all minors? Should the functions presently exercised by the High Court not be transferred to the envisaged new Family Court or to another forum, such as the children's court?

◦ **The status of children born in and out of wedlock**

The existence of past legal discrimination in law against children born out of wedlock is by now well known, as illegitimacy was at common law an important factor affecting status, especially vis a vis the child's father and third parties. However, the common law rules regarding the differing status of children born in and out of wedlock have been and are increasingly being altered by legislation.¹⁰⁵ Thus the fact that a child is born out of wedlock is no longer of consequence when it comes to determining domicile,¹⁰⁶ capacity to inherit on intestacy¹⁰⁷ or relationship to another for the purposes of interpretation of a will.¹⁰⁸

At common law, the mother of a child born out of wedlock is the guardian of that child¹⁰⁹ and custody too vests in her. Although the father has no inherent right of guardianship, access or custody, the natural father does incur liability for the maintenance of the child (but this may not be reciprocal: it is arguable that the child born out of wedlock has no duty of support vis a vis its natural father).

105 A recent amendment to the Births and Registration Act 51 of 1992 is an example in point of legislation eliminating formal discrimination against children born out of wedlock (notably children born of customary unions and marriages by religious rites) by allowing them to be registered at birth as legitimate. Similarly, the discriminatory rules concerning the capacity of the extra-marital child to inherit from its natural father and paternal relations were altered by the Intestate Succession Act 81 of 1987. Since the advent of this Act and of the 1992 amendments to the Wills Act 7 of 1953, it has been concluded that in regard to both testate and intestate succession, there is in principle no difference between intra- and extra-marital children.

106 Section 2(3) of the Domicile Act 3 of 1992.

107 Section 1(2) of the Intestate Succession Act 81 of 1987.

108 Section 2D(1)(b) of the Wills Act 7 of 1953.

109 Unless she herself is a minor, in which case her guardian assumes guardianship of her child until such time as she attains majority: section 3(1) of the Children's Status Act 82 of 1987.

Legislation¹¹⁰ on the powers of natural fathers of children born out of wedlock was passed in late 1997, and regulates the right of the father to apply to court for rights of guardianship, custody and access in regard to his child. There are, however, arguments to the effect that this legislation does not go far enough in eliminating differences in treatment of children born in or out of wedlock, as it still displays undue maternal preference. It is unclear whether further legislative endeavours in this area are warranted or necessary.

Question 25: Should this investigation revisit the position of fathers of children born out of wedlock, and if so, should this be general, or confined to specific issues?

Other vestiges of the common law distinction between children born in and out of wedlock may remain, particularly in regard to common law rules relating to the reciprocal duty of support by and of children born out of wedlock in relation to blood relations of their father. It has been suggested that these residual provisions of common law which continue to provide for differential treatment on the basis of birth status violate the Constitution¹¹¹ and CRC.

Question 26: To the extent that there is still differentiation in law between children born in and out of wedlock, should this be addressed by the new children's statute, either in general, or with respect to particular issues?

°

The 'best interests' rule

110 Natural Fathers of Children Born out of Wedlock Act 86 of 1997.

111 Alfred Cockrell *op cit* para 3 E 24.

That the best interests of the child should be the determining factor in decisions relating to guardianship, access and custody of children is well established in our private law, and the rule has also been entrenched in the Constitution. It forms one of the four pillars of CRC too. In the interim Constitution, the wording of the clause implied that the paramountcy of the best interest standard was limited to proceedings regulated by the then section 30,¹¹² but the 1996 Constitution makes it clear that the field of application of the best interests standard is not restricted to proceedings under the children's rights clause in section 28. Several questions are raised in Chapters 8 and 9 about the intersection between the best interest standard and customary and religious law. Many of the problems highlighted there are also features of South African common law and judicial practice, in particular, the concern that the standard is notoriously vague and indeterminate,¹¹³ and also subject to individual interpretation in specific situations and with reference to particular cultural and religious settings.

Question 27: Should guidelines be provided to direct decision makers in the implementation of the constitutional injunction that the best interest of the child is the paramount consideration in all matters affecting children, or is the incorporation of key principles (as outlined in Chapters 3 and 10) sufficient?

6.4 Statute law

Because legislation governing the rights of children, duties and powers in respect of children, their care and protection, their education, incarceration, health and welfare is spread through a large number of statutes, administration and implementation of child law is shared by a number of Ministries and Departments.¹¹⁴ The possible inter-sectoral nature of a children's statute, and the questions this may pose in regard to responsibility for implementation of different aspects of the legislation is raised in Chapter 11 below. Comparable models and structures for overseeing

112 Julia Sloth-Nielsen 'Ratification of the United Nations Convention on the rights of the Child: Some implications for South African law' (1995) 11 *SAJHR* 401 at 417.

113 See also E Bonthuys 'Of Biological Bonds, New Fathers and the Best Interests of Children' (1997) 13 *SAJHR* 622.

114 A fact that is recognised in the increasing multi-disciplinary composition of relevant government committees, such as the NPA Steering Committee and the IMC.

child law and its implementation through different Ministries or Departments in other jurisdictions are referred to in Chapter 10 below.

In the overview of legislation below, necessarily truncated for the purposes of this Issue Paper, attention has been paid especially to areas and issues which are of concern to the project committee, or which link to questions already brought to the fore in the prior part of this Chapter.

6.4.1 Legislation that empowers children

There are many examples of specific legislative enactments empowering children to perform or undertake specific acts, despite the general common law stance that they should, by reason of their immaturity, be protected, especially as far as commercial dealings (where obligations might be incurred) are concerned.¹¹⁵ Interestingly, many examples where lower ages than the normal age of majority have been set by legislation, grant to a minor the ability to conduct what can be described as actions which imply entry into the commercial world.

The above is illustrated by the following examples: A person of 16 years or older can make a will¹¹⁶ while the minimum age for being a witness to a will is 14 years.¹¹⁷ At 16 years, a minor can open a building society or bank account.¹¹⁸ Similarly, a person of 16 may apply for a license to own a firearm.¹¹⁹

In 1985, in its *Report on the Investigation into the Advancement of the Age of Majority* (Project 43), the South African Law Commission concluded that there was no real need at that stage for the age of majority to be lowered. In view of the definition of child in both the Constitution and

115 As noted above, the law has been less concerned with the protection of the child against the consequences of his or her immaturity where delictual or criminal responsibility is at stake. The fact that a child of seven years can be arrested, charged and convicted of a criminal offence, but that a nineteen year old youth cannot conduct his or her own affairs without parental assistance is striking, and shows some bias in the common law towards a conception of the parents' role as encompassing powers over matters which affect the estate of the child.

116 Section 4 of the Wills Act 7 of 1953.

117 Section 1 of the Wills Act 7 of 1953.

118 Section 88(1) of the Mutual Banks Act 124 of 1993 and section 87(1) of the Banks Act 94 of 1990.

119 Section 3(1) of the Arms and Ammunition Act 75 of 1969.

CRC, and bearing in mind the changed political, social and economic circumstances in South Africa, it is arguable that this conclusion needs to be revisited.¹²⁰

Question 28: How would commerce be affected if the age of majority for all purposes were to be lowered to eighteen years? Do any further age limits require attention during this investigation?¹²¹

Question 29: Should the current legislative provisions governing matters such as the ownership of firearms, the sale of solvents, liquor and tobacco to children, and related matters be revisited in order to better protect children?

The Choice on Termination of Pregnancy Act 92 of 1996 aims to promote 'reproductive rights and ... freedom of choice' of women, and provides for termination of pregnancy during the first 12 weeks upon the woman's request. It also provides for termination up to the 20th week on certain grounds, such as where the pregnancy resulted from rape or incest, or where the pregnancy would significantly affect the social or economic circumstances of the woman concerned. Even after the 20th week of pregnancy, legal termination is possible where there is severe malformation of or a risk of injury to the foetus, or where the woman's life is in danger. In most cases, no consent is required other than the informed consent of the woman, even if she is still a minor (of whatever age) and even if her parents are opposed to the abortion.

The generally applicable rules on the topic of consent to medical treatment are dealt with in Chapter 7 below. The rules for termination of pregnancy (often involving a surgical procedure) are, however, now different from those generally applicable to medical and surgical treatment.

6.4.2 Legislation protecting children

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Marriage

120 See note 15 above and the corresponding text.

121 For example, should the age at which a minor can open a bank account be lowered to 15 years, which is the age set in the Schools Act for the end of compulsory schooling?

The Marriage Act 25 of 1961 provides that minors under the age of 21 years require consent of both parents or of a guardian in order to marry. If this is not possible, the consent can be obtained from the local commissioner of child welfare. If any of the parties mentioned refuse consent, the minor will have to apply to the High Court for consent. The Act further provides that if a boy below the age of 18 wants to marry, or a girl below the age of 15, the consent of the Minister of Home Affairs is required (except if a High Court has already consented). Without this consent, the marriage is invalid. No girl below the age of 12 years or boy below the age of 14 years may marry. If a person below 21 years **does** marry without the necessary consent the marriage is not necessarily invalid, but it can be dissolved by the High Court if this is in the interests of the minor concerned. A child below 21 years who marries becomes a major for all legal purposes.

Question 30: Is it appropriate to re-examine the age at which persons can marry without consent if the age of majority is lowered from 21 to 18 years? Are there any other age thresholds in regard to marriage which should be examined?

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Divorce

Divorce affects children legally in that decisions are made about guardianship, custody, access and maintenance. At present, attempts are made to protect the interests of children in divorce proceedings through the involvement of the Office of the Family Advocate and in the provision in the Divorce Act 70 of 1979¹²² to the effect that the divorce decree should not be made final unless the court is satisfied that adequate provisions have been made for the welfare of the minor or dependent children of the marriage. Generally, decisions are made taking into account the 'best interests of the child'. Usually both parents will keep guardianship, but custody is still frequently awarded to the mother, especially where young children are involved. In rare cases, courts have awarded joint custody of children to the divorcing parents.

As will be discussed below in Chapters 7 and 10 below, the international trend, in an attempt to move away from a 'winner takes all' situation between divorcing parents, is to replace notions of guardianship, custody and access with more flexible forms of order: thus 'contact orders', 'residence orders' and such like have changed not only the provisions of divorce law, but have profoundly altered the concepts underpinning the law of parent and child. Thus while a **parent** 'has custody over a child', a residence order simply determines where the **child** resides. And, while a **parent** has 'a right of access to a child', a contact order spells out whom the **child** has contact with. The introduction of similar reforms in relation to children in the child and youth care system is presaged by the IMC report which envisages replacing terms such as 'institutional care' with the more neutral 'residential' care.

In accordance with article 3 of CRC, provision has also been made in recent legislation in other countries for taking the child's views into consideration upon the divorce of his or her parents.¹²³ In line with the recommendations of the IMC relating to children placed in alternative care,¹²⁴ it should perhaps be considered whether divorcing parents should be legally obliged to formulate a proper **plan** for the welfare and well being of their children after divorce.

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| <p>Question 31: To what extent should the orders available upon divorce in respect of children be modernised? Is the appropriate place to do this a children's statute, or should it be done in new divorce legislation?</p> <p>Question 32: What are appropriate terms for South Africa for different aspects of what are now called 'guardianship', 'custody' and 'access'?</p> <p>Question 33: Should divorcing parents be legally obliged to formulate a proper plan for the welfare / well-being of their children after divorce, and, if so, should this obligation be imposed on parents in terms of a children's statute?</p> <p>Question 34: What is the best way of providing for the views of children themselves to be taken properly into consideration when orders concerning them are made upon the divorce of their parents?</p> |
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Sexual offences against children

123 See further Chapter 10 below.

124 See Chapter 5 above.

At present both the common law and the Sexual Offences Act 23 of 1957 affect the related questions of age and sexual offending. A review of both is presented in the South African Law Commission Issue Paper 10 on Sexual Offences (Project 107). The way forward with regard to the process of integrating matters already addressed by the project committee on Sexual Offences against Children will be discussed in Chapter 11. In summary, however, the following observations are pertinent to this review: there are gaps, flaws and inconsistencies in the relevant legislation, as well as a discrepancy between the age of consent for boys (19) and girls (16); questions are raised about rules of evidence, which are specific to sexual abuse cases, and to children's evidence in such cases.

6.4.3 Legislation affecting children

◦ **Birth**

In terms of the Births and Deaths Registration Act 51 of 1992, notice of the child's birth must be given to an official in the Department of Home Affairs within thirty days of a child's birth. The child must have a name and surname in order to be registered. If one of the parents is not able to register the child, they can request someone else to do it for them, or the person in charge of the child can do this. (This would apply to people who have in their care babies who have been abandoned). There have been numerous practical problems with registration of births in the past due to the fact that many children's births were not, and are still not, registered by parents. Home Affairs offices are sometimes far away from where people live, and people are also unaware of the need to register the births of their children.

Question 35: In view of the constitutional right of a child to a name and nationality from birth, should provisions governing the registration of births be included in a comprehensive children's code?

◦ **Status**

A child born to a man and woman who were married at the time of conception, birth, or any time in between, enjoys legitimate status under the common law. As regards legislation, the Children's Status Act 82 of 1987 provides¹²⁵ for the legitimate status of a child where that child was conceived as a result of artificial insemination with the gametes of a third party, provided that both husband and wife have consented to the artificial insemination.¹²⁶ Surrogacy arrangements are not adequately covered by the provisions of the Act, and the specific problems arising from these arrangements, which were the subject of a Law Commission investigation in 1993, are currently being addressed by a Parliamentary portfolio committee.¹²⁷

Question 36: Should a children's statute include reference to the consequences and regulation of alternative reproductive techniques and surrogacy arrangements?

° **Domicile**

Domicile is regulated by the Domicile Act 3 of 1992, which has simplified the law and removed major objectionable features of the common law. In particular, minors over the age of 18 may acquire a domicile of choice independently of their parents, and the place with which the child is most closely connected (usually the home of the parent or parents with whom the child lives) is now its domicile.¹²⁸

° **Guardianship**

In terms of the common law, although the parental power over legitimate minor children was shared by both parents, the father's authority was superior to that of the mother, the mother being confined to participation with the father in the custody of the child's person and the care and control of the child's daily life. In the event of a difference of opinion between the parents, the father's word was decisive. This position was altered by the Guardianship Act 192 of 1993, in terms of which parents of a child born in wedlock now have *equal* guardianship of the child, and are entitled to exercise their rights and powers and carry out their duties arising from

125 In section 5(1)(a).

126 Section 5(1)(b) creates a rebuttable presumption that the consent of the parties has been obtained. See further J M Kruger and J A Robinson in J A Robinson (ed) *op cit* 41.

127 Julia Sloth-Nielsen and Belinda van Heerden *op cit* (1998) 115 *SALJ* 156 at 164 - 165.

128 Previously the child's domicile was arbitrarily determined by the father's domicile.

guardianship independently of each other.¹²⁹ This equal, but independent, guardianship is subject to the requirement that the consent of both parents be obtained for certain specified acts, including the marriage of the child, the adoption of the child by third party, the removal of the child from South Africa by one of the parents or a third party and the alienation of immovable property or any right to immovable property belonging to the child.¹³⁰

Question 37: To what extent should the existing provisions of the Guardianship Act be incorporated in a general children's statute?

Question 38: Should there be some duty on parents to consult each other before taking decisions materially affecting the child's life, such as those relating to education, religious upbringing, elective surgery and the like?

Question 39: How best can the child's right to participate in decisions affecting his or her welfare be grafted onto the present law of guardianship?

Education

The Schools Act 84 of 1996 is a comprehensive enactment dealing with compulsory school education from 7 years up to age 15 years, and provides for the norms and standards of the formal school system. The duty to educate a child is a common law responsibility of a parent, which is re-iterated in section 3 of the Act.

Question 40: Bearing in mind the comprehensive nature of the Schools Act and other recent legislation in this area, to what extent, if any, should matters relating to school education, be covered in a children's statute?

Question 41: Are there residual matters (such as safety in schools, or minimum standards) that could or should be addressed?¹³¹

The present position with respect to day care and ECD is discussed in Chapter 4.

¹²⁹ See sections 1(1) and (2) of Act 192 of 1993.

¹³⁰ See section 1(2) of Act 192 of 1993 and further Belinda van Heerden and Brigitte Clark 'Parenthood in South African law - Equality and Independence? Recent developments in the law relating to Guardianship' (1995) 112 *SALJ* 140.

¹³¹ The Committee is indebted to Ms Shereen Motala for her thoughts on this (Briefing to the Committee, Pretoria, 5 March 1998).

7. THE CHILD CARE ACT 74 OF 1983: DEFICIENCIES IN FORMULATION AND PROBLEMS WHICH HAVE EMERGED IN PRACTICE

7.1 Introduction

The Child Care Act 74 of 1983 contains numerous civil law provisions and some criminal law provisions designed to protect children from ill-treatment or neglect.¹³² In particular, much of the Child Care Act (hereafter the Act) is concerned with assisting children who may be in need of substitute parental care or alternatives to this, either in the short term or in the longer term. Alternative care at present may take the form of temporary foster care, referral to the residential care system, or adoption. The children's courts have the task of deciding whether any particular child requires such alternative care, and are therefore directly tasked with implementing the Constitutional right of every child 'to family care or parental care, or to appropriate alternative care when removed from the family environment'.¹³³

This chapter contains a discussion of aspects of the Act which have proved to be problematic in practice or which appear to be outdated in the light of modern international developments. Due to space constraints and the need to focus upon problematic aspects which have been brought to the attention of the committee, not all sections of the Act are discussed. Generally, the sequence of sections in the Act is followed except where a grouping together of sections clarifies the discussion of a particular problem.

7.2 Discussion of problematic sections of the Act

7.2.1 Children's courts

132 See, generally, H M Bosman - Swanepoel and P J Wessels *A Practical Guide to the Child Care Act* (1995); I D Schäfer and L Schäfer 'Children, Young Persons, and the Child Care Act' in Robinson (ed) *op cit* 73- 95; F N Zaal 'Children's Courts: An Underrated Resource in a New Constitutional Era' in Robinson (ed) *op cit* 95-117; Erwin Spiro *Law of Parent and Child* 4 ed (1985) Chapter 5; Fiona McLachlan 'The New Child Care Act - In the Best Interest of Family, Parents or Child' Unpublished paper, University of Cape Town (1983).

133 Section 28(1)(b) of the Constitution.

Under section 5(1) of the Act, every magistrate's court is automatically a children's court for its district. This provides the advantage of complete territorial coverage at no extra cost because the existing magisterial structure is being used. But, except in a few major urban districts where full-time children's courts exist, children's courts are not really as specialised as their name suggests.¹³⁴

Question 42: Do we need truly specialised courts in every magisterial district to hold inquiries where children may be in need of alternative care? Or should we have a smaller network of children's courts, each serving several magisterial districts?

Question 43: Do we need courts that specialise only in matters relating to alternative care, or should the court undertake a wider range of functions, such as hearing less serious criminal cases involving accused children, applications for maintenance from private or state sources, domestic violence inquiries where children are affected, and deciding upon the allocation of guardianship, custody, and access in divorce matters?

Question 44: How should the children's court interface with the proposed family courts?

7.2.2 Commissioners of child welfare

Every magistrate is automatically a commissioner of child welfare when he or she adjudicates at a children's court inquiry. At present, magistrates receive no specialised training for children's court work, which leads to numerous problems in practice. In the worst cases, there are many districts (particularly in the former TBVC states) where children's courts do not function at all because sufficient expertise is not available. Generally, many commissioners deal with only a few cases a year and are concerned that they do not have sufficient knowledge and experience. For example, their lack of understanding of social work methodologies sometimes leads to insufficient grasp of the role of investigative social workers in child care cases.

134 See F N Zaal *Do Children Need Lawyers in the Children's Courts?* Publication of the Children's Rights Project, Community Law Centre, University of the Western Cape (1996); F N Zaal in Robinson (ed) *op cit* 102 - 103, Carmel Matthias and Noel Zaal 'Can We Build a Better Children's Court: Some Recommendations for Improving the Processing of Child Removal Cases' in Rayene Keightley (ed) *op cit* 51ff.

Question 45: Should all magistrates continue to be commissioners of child welfare by virtue of their office?

Question 46: Should commissioners receive specialised training, and if so, in what fields should commissioners be trained, and to what level - e.g. are university qualifications required?

Question 47: Should judicial officers adjudicating childcare matters be only legally qualified, or are other qualifications (such as child psychology and social work) either equally appropriate or required in addition to legal qualifications?

Question 48: What rank should the commissioner/adjudicating officer hold - equivalent to a High Court judge, a magistrate, or between these two?

Question 49: How best can the community be involved in child care and protection inquiries? Should lay persons sit with adjudicating officers as assessors?

An additional or alternative consideration is the experience that should be required of those who adjudicate child-care matters. Issues that arise include whether experience should be a requirement and if so, what type of experience should be required. A further possibility is that persons who have served as lay assessors for a certain number of cases could eventually become eligible to be appointed as commissioners / adjudicators with lower qualification requirements. Furthermore, consideration should perhaps be given to the creation of a testing methodology in order to assess whether prospective adjudicators are sufficiently child-oriented and capable in interpersonal skills. An important consideration is the language-proficiency of adjudicators and, possibly, of assessors. Where the child's and adjudicator's first-language differ, it may not be sufficient to utilise an interpreter or lay assessor with a similar language proficiency and cultural background to that of the child.¹³⁵ Even if a general policy is established in regard to the official languages to be used in civil and criminal court cases involving adults, there may be scope for the development of different rules in regard to child care inquiries.

135 Cf. the new Regulations 4A(1)(g) and (h) inserted into the Regulations under the Child Care Act by the 1998 Amendments, which provides that, in children's court proceedings, where the child concerned 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 relevant languages must be provided for the child or, where this is not possible, alternative arrangements (including the provision of an interpreter for the child) must be made. Regulation 4A was not, however, in operation at the time of writing and will only come into effect on the date of commencement of the new section 8A of the Child Care Act (as inserted by section 2 of Act 96 of 1996).

7.2.3 The child's right to express her or himself

Neither section 8 of the Act (entitled 'Procedure in Children's Courts') nor section 14 ('Holding of Inquiries') specify that children who are capable have a right to give evidence during a children's court hearing. Clearly, the child is the central party who often has most at stake. On the other hand, it is important to avoid children being put under pressure to express views - for example, it would surely be wrong for a child to be asked to give evidence showing a favouring of one parent against the other, thus forcing the child to make a choice of loyalties where the child is not comfortable to do so.

Question 50: Should the proposed Act specify that the child, if capable, has the right to give evidence and express views? Should it provide that the person presiding at the hearing must take into account and give due weight to such evidence or views? How can a balance be struck between encouraging but not pressuring children to give evidence and express their views?

7.2.4 Representation

◦ Who should represent children?

In the field of child care law, the child is obviously the most important party. Often, the child will have a great deal at stake. For example, at an inquiry, a decision may have to be made about whether the child must be removed from his or her parents and placed in the residential care system. An adjudicator at such an inquiry thus needs as much information about the child's situation as possible, but children are often not in a position to present enough information (the child may be too young, disabled or afflicted to be able to speak). In addition the child may feel intimidated and thus not dare to speak out fully.

These problems were recognised in the Act through the creation¹³⁶ of an officer called the 'children's court assistant'. The various duties of this officer were to include eliciting evidence from the child (where this was possible) at inquiries held by the children's courts. However, children's court assistants were only appointed to a few children's courts, and most of those that

136 In section 7.

were appointed were withdrawn in 1992.¹³⁷ Because of the real and pressing need to have someone represent the child in more problematic cases, at some children's court inquiries the court clerk is now used to undertake the duties of the assistant. Other alternatives in practice have included using prosecutors from the criminal courts or even using the investigative social worker who has prepared a report on the case. A fourth alternative is to use private lawyers - attorneys or advocates - to represent children.

The basic question which thus emerges is who should ideally represent children in child care cases. Options would appear to include utilising social workers (but not the same social worker who prepares the investigation report for the case), especially as this might be conducive to a less adversarial environment at the inquiry; utilising other available court staff - clerks and or prosecutors; utilising private lawyers - attorneys or advocates - thus assuring maximum independence of representation; returning full-time assistants to the children's courts, which would promote specialisation and allow for a range of other supportive services to assist the courts to function better. Other options include expansion of the duties of the existing network of Family Advocates who already appear on behalf of children in certain divorce matters, although it should be noted that their current work in divorce matters is very different to that which would be required in children's court cases, inter alia in that the child himself or herself would often be present.¹³⁸

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| Question 51: Who should represent children in child care matters? |
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◦ **Training**

As with adjudicators in children's court inquiries, so too with persons who represent children the question of suitable training, qualifications, experience and orientation arises. A child-care inquiry requires a child - and family - friendly atmosphere. However, the decision reached must be both in the child's best interests and fairly based on all relevant evidence, with observance of the fundamental rules of a fair inquiry, such as ensuring that it is possible to test disputed

137 See Carmel Matthias 'New Directions for the Children's Court' in *Law, Practice and Policy: South African Juvenile Justice Today* Publication of the Community Law Centre, University of the Western Cape (1995) 33.

138 See F N Zaal *op cit* (1996) Chapters 4 - 8.

evidence through cross-examination. Field research in South Africa has shown that persons with a purely social work background sometimes encounter difficulty if required to advocate for a child in children's courts. On the other hand, prosecutors and private lawyers also (with a few exceptions) lack the specialised knowledge and approach required to represent children in these courts.

Aside from a need to be child-oriented, it would appear that, in order to be effective, child representatives require a mixture of training and experience. There is, however, a danger of making requirements so difficult that no one qualifies.

Question 52: Should legal qualifications be required for child representatives? If so, what should these qualifications be? Should some formal social work training be required and, if so, what should the form and content of this training be?

Question 53: Should full-time or part-time representatives be used?

It is possible that child representatives could be drawn from the ranks of both social workers and lawyers, but with a requirement that the person has spent a certain number of hours observing at a full-time children's court. An alternative would be to use social workers in undisputed cases and lawyers in disputed matters where cross-examination may be required.¹³⁹

◦ **When should a child be provided with representation?**

Writing from an English law perspective, Judith Timms states that '[f]or the many thousands of children who are disadvantaged, dispossessed, alone, unhappy and ill-treated, rights are their only hope and effective representation the only way of making their voice heard'.¹⁴⁰

The need for children to have representation in at least some situations has also been recognised in our Constitution.¹⁴¹ To predict beforehand whether 'substantial injustice' would result from

139 See further F N Zaal op cit (1996) 58 - 65.

140 Judith E Timms *Children's Representation: A Practitioner's Guide* (1995) 445.

141 Section 28 (1)(h) states that 'every child has the right...to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result...'

the lack of legal representation for the child in a particular children's court case is often very difficult. Hence, the Child Care Amendment Act 96 of 1996 introduces a new section 8A into the Child Care Act. Under the new section 8A,¹⁴² a child who is subject to a children's court hearing has the right to request representation by a lawyer if 'capable of understanding' this right.¹⁴³ Also, the commissioner is given the power to order that legal representation be provided for the child at state expense if she or she decides that this 'is in the best interest of the child'.¹⁴⁴ One basic question which arises is whether the 'best interest' criterion for appointment of a representative is a sufficient guide? It is certainly broad and encompassing, but it is arguable that more specific grounds should be added or substituted.

In terms of the new Regulation 4A of the Regulations under the Child Care Act,¹⁴⁵ legal representation at the expense of the State must be provided for a child who is involved in any proceedings under the Act in the following circumstances:

- (a) where it is requested by the child who is capable of understanding;
- (b) where it is recommended in a report by a social worker or an accredited social worker;
- (c) where any other party besides the child will be legally represented in the proceedings;
- (d) where it appears or is alleged that the child has been physically, emotionally or sexually assaulted, ill-treated or abused;
- (e) where the child, a parent or guardian, a person in whose custody the child was immediately before the commencement of the proceedings, a foster parent or proposed foster parent, an adoptive or proposed adoptive parent contests the placement recommendation of a social worker or of an accredited social worker who has furnished a report to the court in terms of the Act;
- (f) where two or more persons are each contesting in separate applications for the placement of the child in their custody;

142 It is important to note that section 8A is not yet in operation, although the rest of Act 96 of 1996 is in force from 1 April 1998.

143 Section 8A(2).

144 For a critical discussion of the new section 8A, see Julia Sloth-Nielsen and Belinda van Heerden 'The Child Care Amendment Act 1996: Does It Improve Children's Rights in South Africa?' (1996) 12 *SAJHR* 649 - 651.

145 As inserted by the 1988 Amendments. As pointed out above, Regulation 4A will only come into operation on the date of commencement of the new section 8A.

- (g) where the child is capable of understanding the nature and content of the proceedings, but differences in languages used by the court and the child prevent direct communication between the court and the child; in such a case a representative who speaks both the relevant languages must, subject to paragraph (h), be provided;
- (h) where a legal representative contemplated in paragraph (g) can not be provided, an alternative arrangement should be made, including the provision of an interpreter for the child;
- (i) where there is reason to believe that any party to the proceedings or any witness intends to give false evidence or to withhold the truth from the court;
- (j) in any other situation where it appears that the child will benefit substantially from representation either as regards the proceedings themselves or as regards achieving in the proceedings the best possible outcome for the child.¹⁴⁶

Question 54: Do these new provision adequately cover the circumstances in which legal representation should be provided at State expense to a child in children's court proceedings? Should these grounds, or any others, be incorporated in a new children's statute?

◦ **Representation for other parties besides the child**

Along with proposals in regard to increased provision for representation of children (see above) and with further proposals that child-removal grounds become child- rather than parent-centered (see discussion of section 14 below), a question which arises is whether adult parties may not be prejudiced unless specific provision is made in the Act for them also to be represented.¹⁴⁷

Question 55: Should adult parties, or parents in particular, have the right to legal representation in the children's courts at state expense if they cannot afford it themselves? And should specific grounds for entitlement by a parent or other adult party to a legal aid representative be spelt out?

¹⁴⁶ Many of the provisions contained in the new Regulation 4A are based on suggestions made by F N Zaal 'When should Children be Legally Represented in Care Proceedings? An Application of Section 28(1)(h) of the 1996 Constitution' (1996) 114 *SALJ* 334 at 343.

7.2.5 Fathers of extramarital children¹⁴⁸

Generally, the position of unmarried fathers poses some difficult questions concerning what the law should be in regard to their parenting role, and it has been asked whether the fact that the father of a child is not married to the mother should be used in our law to limit the parental responsibilities and rights of such a father.¹⁴⁹ A specific point of concern is the rights of the unmarried father where the mother proposes to give the child up for adoption. In the case of a legitimate child, both parents must consent to the adoption of that child. But if the child concerned is an extramarital child, then only the consent of the child's mother (and **not** that of the father) is required for the child's adoption.¹⁵⁰ This provision was recently declared to be unconstitutional,¹⁵¹ as it discriminates unfairly against the fathers of certain children on the basis of gender and marital status.

Subsequent to the judgment of the Constitutional Court in the *Fraser* case, the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 was promulgated.¹⁵² Section 6 of this Act provides that a children's court considering an application for the adoption of an extra-marital child shall not grant that application '*unless it is satisfied that the father of the child concerned has been given reasonable written notice of the intended adoption*'.¹⁵³ This notice may, however, be dispensed with by the children's court if it is satisfied that the father cannot be identified or cannot be found, despite reasonable efforts to do so, or that the child was born of an incestuous relationship or as a result of rape, or that '*it is in the best interests of the child that the requirement of notification be dispensed with*'.¹⁵⁴ The purpose of supplying such notice would be to allow the father to use his other power under the 1997 Act, namely, to apply to the High Court for guardianship or custody of or access to the child. It is also important to note that in the

147 See F N Zaal *op cit* (1996) Chapters 9 and 13.

148 See, on the status of extra-marital children generally, Chapter 6 above.

149 See also E Bonthuys 'Of Biological Bonds, New Fathers and the Best Interests of Children' 1997 (13) *SAJHR* 624 *et seq.*

150 Section 18(4)(d).

151 *Fraser v Children's Court, Pretoria North and Others* 1997 (2) BLCR 153 (CC).

152 This Act was, at the time of writing, not yet in operation.

153 Section 6(1) of Act 86 of 1997.

154 Section 6(2).

case of *Fraser v Children's Court, Pretoria North and Others*,¹⁵⁵ Preiss J held, in the context of an adoption hearing, that the father of an extramarital child is a parent within the meaning of Regulation 4(1), and, as such, can be a party to proceedings in the children's court. Thus an unmarried father who is informed of an adoption application presumably has the power to oppose it in the children's court as an alternative to going to the High Court. This would generally be much less expensive than conducting proceedings in the High Court.

Question 56: Is a children's court or other forum more appropriate than the High Court for the consideration of applications by unmarried fathers for guardianship, custody or access?

Question 57: Is the fundamental assumption underlying the 1997 Act correct, namely, that unmarried fathers must go to court in order to be authorised to exercise any parental rights and responsibilities other than the duty to pay maintenance?

7.2.6 Children privately placed for more than fourteen days

In terms of section 10 of the Act (as amended by section 3 of Act 96 of 1996 and by section 1 of the Welfare Laws Amendment Act 106 of 1997), no person other than the managers of certain specified institutions or certain specified relatives may receive any child under the age of 7 years or any child 'for the purpose of adopting him or her or causing him or her to be adopted' and care for such child apart from his or her parents or custodian for longer than 14 days unless such person has applied for the adoption of the child concerned or, in the case of the first-mentioned category of child, has obtained the consent in writing of the commissioner of child welfare of the district in which the child was residing immediately before he or she was received. In considering an application for such consent, the commissioner must have regard to the religious and cultural background of the child concerned as against that of the applicant.¹⁵⁶ In practice, children under 7 years are often privately placed - for example, with a grandparent while the parents are away - for more than 14 days, without the consent of the commissioner of child welfare being obtained. As will be discussed further in Chapter 8 below, this is particularly so in

¹⁵⁵ [1996] 3 All SA 273 (T).

¹⁵⁶ Section 10(2), read with section 40.

an African context today, where informal fostering is prevalent. It has been held, however, that as section 10 does not provide for a penalty for the contravention of the provisions thereof, such contravention does not constitute an offence, but it remains a ground for removal of a child in terms of section 14.

Question 58: Does the fundamental underlying protective purpose of section 10 justify its continued existence or should it be replaced? If section 10 is to be retained, should it be limited to situations where the child is placed for adoption purposes? And is it appropriate to include sanctions, other than providing that care of a child in contravention of this provision is a ground for removal?

7.2.7 Grounds for removing children

In terms of the Child Care Amendment Act 96 of 1996, the primary ground for removing a child is now that the child is '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 the amendment of section 14, the legislature has moved care proceedings from a predominantly fault or parent-based approach to a predominantly child-centred approach. This dramatic shift may be defended as being in line with section 28(2) of the Constitution, in terms of which, a 'child's best interest is of paramount importance in every matter concerning the child'.

It has, however, been questioned whether children's best interests might not most efficiently be served by a more balanced set of removal grounds.¹⁵⁷ The fear has been expressed that, by shifting attention almost entirely away from the parents, the new section 14 of the Act may become a licence for parental irresponsibility and that there are cases in which the best results are achieved by requiring parents to confront and deal with their own responsibility for harm or neglect which they have inflicted on the child.¹⁵⁸

Question 59: Should both child and parent-centred approaches be allowed for in the formulation of the grounds for removing a child? If so, how should this best be done?

157 See Carmel Matthias *Removal of Children and the Right to Family Life: South African Law and Practice* Publication of the Children's Rights Project, Community Law Centre, University of the Western Cape (1997) 12 - 16.

158 See Carmel Matthias *op cit* (1997) 12-16, 23-26; F N Zaal in Robinson (ed) *op cit* 97 - 98.

7.2.8 Placement options

Once the children's court has found that a child is indeed in need of alternative care, there are various options open to it: to designate a parent or guardian who will have custody, subject to conditions imposed by the court; to place the child in foster care; to place the child in the residential care system, e.g. in a children's home, or in a school of industries.

Question 60: Is this range of options too limited? If so, what other options can be considered?¹⁵⁹

Question 61: In the case of intra-familial child abuse, should children's courts be given the power to order the removal of the abusing adult, rather than of the child-victim, from the family home?

Question 62: To what extent should the children's court have the power to make anti-harassment orders prohibiting a named individual from interfering in specified ways with a particular child?

Although poverty of parents is not a ground for removal of their child, it is often a background factor. There is already legislation to award a 'child support grant' to persons who care for needy children,¹⁶⁰ and it might be appropriate to provide that the children's court has the power to allocate such grants or similar grants where these could help ensure that a child will not have to be removed from his or her family.

Question 63: In addition to the existing possibility of foster child grants, should children's courts be given powers to award grants to assist parents or other care-givers to provide for the needs of children in their care?

7.2.9 Duration of placement orders

159 Possibilities in this regard may include placement of the child with other relatives besides parents (kinship care), or in a community care centre (for example a private residence in the child's neighbourhood where specified people are designated to care for a group of local children), or in community cluster care. Referral of children to reform schools, currently a sentence under the Criminal Procedure Act 51 of 1977, may also be considered for inclusion in this range.

160 See further Chapter 5 above.

Under the Act,¹⁶¹ the maximum period for which a children's court order for can remain in effect is two years. In practice, most children's court orders get renewed for further two-year periods. This may have a negative impact on permanency planning for the child and on family reunification services.¹⁶² The power to renew placement orders is currently vested in the Minister, and may be delegated, but it has been argued that all renewals should be heard in the children's court, as the system of renewals falling under Ministerial control has not been working properly in the best interests of the children concerned.¹⁶³ It has also been suggested that greater flexibility is required in order to allow a child's situation to be reviewed and, if necessary, changed whenever this is in the best interests of the child.

Question 64: To what extent must children's court be given greater powers to monitor, review and amend their own placement orders?

Question 65: Should the Minister's powers to renew and amend children's court orders be altered, and if so, in what way?

Question 66: Should a maximum period be set for the duration of children's court orders, or should a court, in appropriate cases, be able to issue an order that will last, for example, until the child is 18 years old or until the order is amended?

Question 67: Should a child who has been placed have the right to request a children's court hearing during the currency of the placement, and if so, what should be the grounds for such a request?

Although social workers are expected to implement permanency plans for children, children's courts often do not recognise either these plans or the service contracts drawn up with biological parents for their implementation. In many foreign systems, permanency planning for the child implies either adoption, subsidised adoption or long-term foster care. At present, foster parents who are financially needy can receive a state foster child grant, but adoptive parents who have the same financial problems are not eligible. This may prevent foster parents from applying to

161 Section 16.

162 See now the new Regulation 15 of the Regulations promulgated under the Child Care Act, as substituted by the 1998 Amendments, which contains provisions designed to ameliorate problems currently caused by Ministerial renewals of children's court placement orders.

163 See F N Zaal in Robinson (ed) *op cit* 113-114. See too, in general, *In Whose Best Interests?* IMC Report on Places of Safety, Schools of Industry and Reform Schools (1996).

adopt the child in their care and thus impact also negatively on permanency planning for the child.¹⁶⁴

Question 68: Should subsidised adoption (i.e. state grants payable to impoverished adoptive parents) become an option in South Africa?¹⁶⁵

In regard to foster parents, it should be noted that, at present, a lack of legal provisions limits their decision-making capabilities and exposes them to interference from the parents of the child.

Question 69: What should the responsibilities and legal rights of a foster parent be as compared to those of a parent?

Both the Constitution and the Act define a child as a person under 18 years of age. It is therefore arguable that all types of placement order should cease at this age.¹⁶⁶ By contrast, a protective and supportive capability to allow placements of certain young persons to continue until they are 21 years old with their consent,¹⁶⁷ might be desirable for practical and educational purposes. In terms of section 33(3) of the Act, it is possible for the Minister to approve that a child remain in the custody of a foster parent, children's home, school of industries or reform school after reaching the age of 18 years, or after the lapse of the relevant children's court placement order, in order to complete his or her education. However, the consent of both the child and, if they can be traced, of his or her parents, is required. But, where the child is in foster care or a children's home, this does not involve the extension of the relevant court order as can be carried out in terms of section 16(3) for a young person in a school of industries or a reform school. Social workers have argued that this makes some young people vulnerable to being prevented by their parents from completing their schooling. In addition, in the absence of an extended court order, the continuation of the grant needed for the support of the young person by foster parents or a

164 See Chapter 5.11 above concerning draft policy initiatives by the Department of Welfare and Population Development in this regard.

165 The consideration of subsidised adoptions has been recommended by the Department of Welfare and Population Development in its draft policy document on adoptions. See further Chapter 5 above.

166 Ms Lesley du Toit Briefing presentation to the committee, Pretoria, 6 March 1998.

167 Or if they are incapable of consenting (e.g. due to a disability), perhaps with the consent of the children's court.

children's home is subject to the discretion of officials and withdrawal of the grant can lead to the collapse of the placement. Mental health workers have made the point that, in cases of mental disability in either the child or the parent, there are specific problems with the section 33(3) consent requirements. Where a person is mentally affected, it may not be possible to obtain legally valid consent from him or her.

Question 70: Should a provision along the lines of section 33(3) be retained in a new children's statute? If so, should it be changed so that only the consent of the child him or herself is required? Should the children's court have the power to supply consent where the child is unable to do so, or should this power be exercised by the child's guardian or another body? Are there exceptional situations in which the consent of the child should not be required. If so, please give examples? Should a provision along the lines of section 16(3) (which allows for the period of protection of a young person by a children's court order to be extended beyond the age of eighteen years) be retained in a new children's statute? If so, in what circumstances should it apply?

7.2.10 Adoptions

◦ Non-citizen and international adoptions

Section 18(4)(f) of the Act severely restricts the possibilities for adoptions of South African children if the proposed adoptive parent does not qualify to be a South African citizen. Cases have occurred where children have bonded with foreign adults (as substitute parent figures) and then have had to be placed in institutions when the adults had to return to their countries of origin, purely because it was not possible for such adults to adopt the children concerned.

Question 71: Should the requirements for adoptions by non-citizens be made the same as by a citizen? Aside from the question of adoptions taking place within South African territory, should South African law be amended to permit taking children to another country in order to be adopted there in situations (such as close-relative adoptions), where this would be in the best interests of the child?¹⁶⁸

¹⁶⁸ On draft policy initiatives by the Department of Welfare and Population Development in the area of, *inter alia*, inter-country adoption, see Chapter 5 above.

◦ **Dispensing with parental consent to adoption**

The normal right of parents to consent before their child can be adopted has been discussed in the section above on the rights of unmarried fathers. Under section 19 a children's court is provided with a list of grounds that allow it to dispense with the parental consent. One of the grounds for dispensing with consent is that a parent 'is withholding his consent unreasonably'.¹⁶⁹

In the view of some social workers, children's court commissioners tend to be reluctant to use this ground, especially where the parent who is withholding consent is represented by a lawyer. Such reluctance can be most unfortunate for the child where the parent is clearly unfit¹⁷⁰ to rear the child. In such a situation, from the point of view of a secure future for the child, the child may need to be 'freed' for adoption.

Question 72: Should section 19(b)(vi) of the Act be amended to identify situations in which refusal of parental consent may be regarded as 'unreasonable,' or should the ground be changed to allow for dispensing with parental consent when this is 'in the best interests of the child'?

7.2.11 **Adoption and fostering: Race, culture and alternative lifestyles**

The decision about whether to place a child in the care of foster parents or to approve an adoption application may sometimes be particularly difficult for the children's court in two situations. First, where the child is of a different racial appearance from the proposed foster or adoptive parent or couple, and second, where a prospective foster or adoptive parent or couple is homosexual.

Currently, section 40¹⁷¹ requires the children's court, in making foster placements or in considering applications for adoption, to have regard to 'the religious and cultural background of the child concerned and of his parents as against that of the person in or to whose custody he is to

169 Section 19(b)(vi).

170 See Ms Beth Goldblatt *op cit* as regards the tendency to stereotype the 'ideal mother', a relevant consideration where dispensing with parental consent to adoption is under discussion.

171 Read with section 18(3).

be placed or transferred.' The matching up approach promoted by this provision has been the subject of heated debate.¹⁷² One view is that this approach is an unfortunate perpetuation of apartheid thinking, another is that it is a correct approach to transcultural and transracial placements. The phrase 'have regard to' is rather vague, and it may be that there should be more specific information in the Act on when the court should treat a difference in cultural, religious, racial, or linguistic backgrounds as a sufficiently significant factor to justify refusing the adoption application.

Another criticism is that, by encouraging racial and cultural matching of children and prospective adoptive or foster parents, section 40 shows insufficient appreciation of the harm to children, in the form of separation anxiety, which results when residential care is preferred as a placement destination to familial groups who are different from the child in cultural or religious background or physical appearance. On the other hand, it has been submitted that section 40 is an entirely appropriate form of protection of a child's right to be raised within his or her own culture.

A major problem in South Africa is that, because of economic discrimination in the recent past, it would appear that there are relatively few black families which can afford to adopt children. This results in what Small, writing from a British perspective (where the same problem exists) aptly describes as 'a one-way traffic of black children into white families.'¹⁷³ The concern in such situations is whether a child growing up in an adoptive family of persons who are different from him or her in cultural background and/or physical appearance will still be able to develop a positive self identity, for example, as a black or white person?

Question 73: Should there not be more guidance in the law concerning in what situations trans-racial or transcultural placements should be encouraged, and when they should generally be avoided?

172 See D J Joubert 'Interracial Adoptions: Can We learn from the Americans?' (1993) 110 *SALJ* 726; Noel Zaal 'Avoiding the Best Interests of the Child. Race- Matching and the Child Care Act 74 of 1983' (1994) 10 *SAJHR* 372; Tshepo Motsikatsana 'Transracial Adoptions: Are We Learning the Right Lessons from the Americans and Canadians?- A Reply to Professors Joubert and Zaal' (1995) 112 *SALJ* 606; *idem* 'Examining Class and Racial Bias in the Adoption Process and the Viability of Transracial Adoptions as a Policy Preference: A Further Reply to Professors Joubert, Pakati and Zaal' (1997) 13 *SAJHR* 602.

173 See J S Small 'Transracial Placements: Conflicts and Contradictions' in S Morgan and P Righton (eds) *Child Care: Concerns and Conflicts* (1989) 52.

Although it is theoretically possible for a homosexual person (but **not** a homosexual couple) to adopt a child, such adoptions are not very frequently allowed in this country.¹⁷⁴ It would also appear to be the case that fostering of children by homosexual persons and couples has in the past occurred relatively infrequently. If new legislation validating homosexual marriages is passed in South Africa,¹⁷⁵ then the present legal obstacle to adoption of children by homosexual couples will be removed. There are, however, a range of **social** prejudices and misconceptions surrounding adoption and fostering of children by homosexual persons or couples which will still need to be addressed.¹⁷⁶

Question 74: Should there be more specific guidance in the law on the adoption or fostering of children by homosexual persons and couples?

Question 75: Is the current approach of providing no legal guidance and leaving the matter entirely to the discretion of the children's court commissioner sensible, or is it an avoidance of a governmental responsibility to provide legislation?

7.2.12 Appeals

No appeal lies against a children's court finding that a child is in need of care or against any placement order made by a children's court. An aggrieved party or the commissioner himself or herself may, however, bring the matter before the High Court on review. In a situation of review, the High Court will not interfere with the commissioner's decision upon the merits, but may set it aside if there was such irregularity in the proceedings that the applicant or the child may possibly be prejudiced thereby. In practice, it is not usually easy for a party to prove that a children's court has perpetrated an irregularity of this kind, and so the remedy of a review has not been of help to many parties.

Whereas a review is based on a challenge to correctness of procedure followed, the legal remedy of an appeal takes the form of a direct challenge to the correctness of the court order itself.

174 See Tshepo Motsikatsana 'Gay/Lesbian Adoptions and the Best Interests Standard: A Critical and Analytical Perspective' in Raylene Keightley (ed) *op cit* 114.

175 The ANC announced at its Mafikeng conference in December 1997 that such legislation should be investigated as a matter of some urgency.

176 See Tsepo Motsikatsana in Raylene Keightley (ed) *op cit* 114.

Under section 22, it is possible to appeal to the High Court against an adoption order, an order rescinding (cancelling) an adoption order, or a court's refusal to rescind an existing adoption order. Furthermore, section 48 provides for appeals in the context of contribution orders made by a children's court. No grounds for any such appeals are, however, listed in the Act. It has been submitted that it is inappropriate that appeals lie in the above-mentioned instances, but not against other types of children's court orders.¹⁷⁷

Question 76: Should provision be made for appeals against all orders made by a children's court? Should appeals be facilitated by a broad ground that the order appealed against was not in the best interest of the child concerned? To which court should any appeal lie?

7.2.13 Inspection of children's residential care facilities

Under section 31, a person authorised by the Director-General of Welfare can inspect certain residential child care facilities. The person so authorised will require a certificate signed by the Director-General.¹⁷⁸ The inspection may extend to any books of the facility concerned and may include an assessment of any child in the facility. In terms of the 1996 amendments to the Act, state-run children's homes and places of care (previously excluded from the inspection provisions of the Act and limited to private children's homes and places of care), together with all children's shelters and places of safety, also become subject to such inspections.¹⁷⁹

Question 77: Do these extensions to inspection powers go far enough? Will child-care facilities be sufficiently subjected to inspections to protect the children in such facilities and

177 See Fiona McLachlan *op cit* 12 - 13; G E Barlow 'Child Care Bill - Best Interests of the Child?' 1982 *De Rebus* 341 at 342.

178 Section 31(2).

179 See Julia Sloth-Nielsen and Belinda van Heerden *op cit* (1996) 12 *SAJHR* 649 at 652 - 653. See also the new Regulation 34A (entitled 'Review and evaluation of children's homes, places of safety, places of care and shelters') of the Regulations under the Child Care Act, as inserted by the 1988 Amendments. Regulation 34A(3) provides that 'all children's homes, places of care, shelters and places of safety, including facilities maintained and controlled by the State, shall be subject to a quality assurance review every 24 months with respect to the minimum standards for residential care: Provided that such review will result in a report and developmental programme and shall be undertaken by the Director-General.'

advance their best interests? Should commissioners of child welfare or children's courts have a role to play in this regard - for example, through visits or monitoring hearings?

7.2.14 Temporary placements of children

Once a child has been removed after a children's court inquiry and then placed, it may sometimes be appropriate to vary the placement for a short period in order to test out the viability of another type of placement, for example, to move a child from a residential care facility to prospective foster parents, or even back to his or her biological parents if the situation at home has improved. The Act does not cater efficiently for such temporary, trial placement variations. The only relevant section is that dealing with transfers of children from one custody or residential care placement to another, which section appears to have been drafted with longer-term variations in mind and thus involves a cumbersome procedure requiring Ministerial consent. Because of the difficulties in using this section for short-term placement variations, the section dealing with 'leave of absence'¹⁸⁰ has ended up as being the standard way of testing the viability of a move of a child from residential care into foster care, or back into the care of the parents, before recommending an order of transfer. This latter section was, however, actually intended to cover not variation of placement, but rather short periods of 'leave' (for example, a holiday of the child spent with biological parents) from where a child has been placed by a court order or Ministerial extension.¹⁸¹

In the repealed 1960 Children's Act, the equivalent need for temporary variations of placements was served by the issuing of a special 'licence'. The licence could also immediately be used, particularly in the case of a trial foster-care placement, to apply for a temporary state grant for the trial foster parents. Leave of absence as it now stands is an arrangement which does not qualify for state aid. Only when a section 34 transfer order comes through can the foster parent apply for a foster child grant, which takes months to obtain.

180 Section 35.

181 See in this regard Regulation 14 of the Regulations under the Child Care Act, as substituted by the 1998 Amendments. In terms of this Regulation, no leave of absence may be granted to a child or foster child for a period exceeding 6 weeks at a time or for consecutive periods which, in total, exceed 6 months, unless approved by the Minister.

Question 78: Should the issuing of a 'licence' to permit payment of state grants in trial placements be reintroduced, and if so, for what length of time? Since Ministerial-controlled processes have proved to be slow and administratively cumbersome, should the children's court be given the power to issue a 'licence' and, if necessary, an accompanying grant?

An additional problem with the current practice of using the leave of absence provision is that under section 35(1)(b), a foster parent must agree to any period of leave of absence for a child under the care of that parent. The foster parent can thus deny the child the opportunity of spending a holiday with the biological parents.

Question 79: Should the leave of absence provisions in the Act be amended, and if so, in what way?

7.2.15 Ministerial termination of children's court orders

Amongst the extensive Ministerial powers created by the Act is a capacity¹⁸² for the Minister, 'if he considers it desirable in the interest of any pupil or foster child', to 'discharge' (terminate) any order made by a children's court under the Act. The same power is conferred for an order made by a criminal court under which a child was sent to a reform school. Where the child has been placed in a school of industries or reform school, it is the Minister of Education who has the power to terminate the placement. Where the court has placed the child with foster parents or in a children's home, it is the Minister of Welfare who has this power.

Question 80: Should any Minister have the power to terminate the effects of a court order? If there appear to be grounds for such a termination, will the child not be better protected if there is a proper hearing before the same court that issued the order? Is a Ministerial power to overrule a court order not also bad in principle, given the role of courts in a democratic society?

182 Under section 37.

7.2.16 **Consent to medical treatment or surgical intervention**

In terms of section 39(4) of the Child Care Act (as substituted by section 14 of Act 86 of 1991), a child who has reached the age of 18 years is competent to consent, without the assistance of his or her parent or guardian, to the performance of any operation upon him- or herself, while a child over the age of 14 years is competent to consent, without such assistance, to the performance of any medical treatment of him- or herself or of his or her child. The concepts 'operation' and 'medical treatment' are not, however, defined in the Act.

Question 81: Do the concepts 'operation' and 'medical treatment' need to be defined? In particular, should the dispensing of different forms of contraception (including the insertion of inter-uterine devices) be regarded as medical treatment? Should the definitions be such that there is no overlap in meaning between the two concepts? Are there medically-related interventions that are neither 'operations' nor any form of 'medical treatment' and which need to be catered for? Are the arbitrary age limits set in this regard appropriate?¹⁸³

7.2.17 **Reporting of suspected instances of ill-treatment, abuse or undernourishment of children**

This provision was an innovation of the Child Care Act. Although the duty to report initially rested only on medical and dental personnel (i.e. dentists, medical practitioners and nurses), the legislature subsequently decided to add social workers, teachers and any persons employed by or managing children's homes, places of care or shelters to the list of obligated reporters. Section 42(1) imposes a duty on any such person who examines, attends or deals with a child in circumstances giving rise to the suspicion that the child has been ill-treated or deliberately injured or suffers from a nutritional deficiency disease, immediately to notify the Director-General or any officer designated by him or her for this purpose, of those circumstances.¹⁸⁴ The Director-General or the designated officer may then order the removal of the child concerned to

183 For a discussion of the consent requirements in the Choice on Termination of Pregnancy Act 92 of 1996, see Chapter 6 above; for a discussion of consent and HIV testing, see Chapter 4 above.

184 See in this regard the new Regulation 39A of the Regulations under the Child Care Act, as inserted by

a hospital or a place of safety,¹⁸⁵ and must thereafter arrange that the child and his or her parents receive such treatment as may be determined by the Director-General or the said officer.¹⁸⁶ Although failure to comply with these reporting obligations constitutes an offence (punishable upon conviction by a fine not exceeding R4 000,00 or imprisonment for a period not exceeding one year or both),¹⁸⁷ the classes of obligated reporters are exempt from all liability (both civil and criminal) in respect of any notification given in good faith in accordance with section 42.¹⁸⁸

The National Committee on Child Abuse and Neglect (NCCAN)¹⁸⁹ makes the point that legal compulsion to report child abuse is a controversial approach, not universally favoured by child protection workers elsewhere in the world. It argues that reporting serves no useful purpose in its own right, and in the absence of prompt and skilfully managed protective services it may even increase the vulnerability of the child. The NCCAN, while calling for the establishment of a centralised child protection register and data base, also recommends a thorough investigation of the experience of mandatory reporting internationally, an examination of the debates about the effectiveness of this and other approaches, an examination of the ethical issues involved for the relevant professions, an examination of the issues surrounding access to information contained in the child protection register, and the question of which structure should operate such a register. The NCCAN also raises the controversial issue of a subregister of perpetrators as a matter requiring further debate.

Question 82: What, if any, are the difficulties with the present provisions for the reporting of child abuse?¹⁹⁰ What kind of system should be in place to deal with reports of child abuse? What particular issues should be taken into account in future legislation in this regard?

7.2.18 **Child labour**

the 1998 Amendments.

185 Section 42(2).

186 Section 42(3).

187 Section 42(5), read with section 58.

188 Section 42(6).

189 Section 4.10, pages 40 - 42.

190 See Chapter 5 above.

Child labour is a serious problem in South Africa. South African children have rights under both the Constitution and CRC to be protected against harmful or inappropriate labour. In terms of both section 52A of the Child Care Act (as inserted by section 19 of Act 86 of 1991) and section 43 of the Basic Conditions of Employment Act 75 of 1997, it is a criminal offence to employ a child under the age of 15 years. Section 43 of the latter Act also makes it a criminal offence to employ a child in employment '(a) that is inappropriate for a person of that age; (b) that places at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development'. However, in terms of section 50¹⁹¹ of the Basic Conditions of Employment Act, the Minister of Labour may make determinations allowing for the employment of children below the age of 15 years in respect of categories of employees or of employers or particular employers or employees. Such determinations are, however, only possible in respect of 'the employment of children in the performance of advertising, sports, artistic or cultural activities'.¹⁹² Subject to the South African Constitution, all forced labour is prohibited and a person who, for his or her own benefit or for the benefit of someone else, causes, demands or imposes forced labour commits an offence.¹⁹³ As far as the Child Care Act is concerned, the Minister of Welfare may, on conditions determined by him or her, by notice in the Gazette exclude any employment or any work from the provisions of section 52A(1). Exemption from the provisions of s52A(1) may also be granted by the Minister to 'any particular person, or persons generally'.

Questions in relation to child labour are posed in Chapter 4 above.

7.2.19 **Deadlines**

Field research has shown that there are great disparities in the time periods between different phases of children's court hearings. Generally, lengthy delays tend to occur in many jurisdictions and these may have a more negative impact on children than they would on adults. Such delays may thus be characterised as a form of secondary abuse of the children concerned.

191 At the time of writing not yet in operation.

192 Section 50(2)(b) of the Basic Conditions of Employment Act 75 of 1997.

193 Section 48 of Act 75 of 1997.

Question 83: Should the Act therefore be amended to include more and shorter deadline periods? Which provisions require time-limits, and what should the time limits be? Should there be sanctions for failing to meet a deadline and if so, what should the sanctions be? Are there more problematic areas of work where there should perhaps not be a statutory deadline, but the person adjudicating a children's court inquiry should have a discretion to impose a time limit? What are the implications of shorter deadline periods as regards the provision of resources and infrastructure?

7.3 Conclusion

The problematic aspects discussed above are those which have been brought to the attention of members of the Commission. There may be other aspects of the Act which have given rise to difficulties experienced in practice, and the Commission would welcome comment on these also.

8. CUSTOMARY LAW AFFECTING CHILDREN

8.1 Introduction

The South African Law Commission Project Committee on the Harmonisation of the Common Law and the Indigenous Law (Project 90) (hereafter the Harmonisation Committee) has already explored the position of children in customary law in South Africa with the aim of highlighting matters for discussion concerning the need for legal reform in this sphere. The Harmonisation Committee was aware of the necessity of considering customary law affecting children in the context of the shift from a small-scale, largely rural and communal society to an urban, industrialised and individualistic society. This shift in the social order has been accompanied by the dislocation of the extended family and corresponding shrinkage of the network of kin available for the care and protection of a child to the biological parents or, in a large number of cases, to the mother alone.¹⁹⁴

In view of the holistic nature of the investigation by the Committee on the Review of the Child Care Act, there is now a possibility that the Harmonisation Committee will leave the question of the extent to which customary law affecting children should be reformed and/or incorporated in a comprehensive children's statute to be explored by the Child Care Act project committee. Much of what follows in this chapter is, however, based on the work already undertaken by the Harmonisation Committee.¹⁹⁵

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

194 See T W Bennett *Human Rights and African Customary Law under the South African Constitution* (1995) 97 -98; C R M Dhlamini 'Indigenous Law and the Bill of Rights' in *Butterworths Bill of Rights Compendium* (1996) para 6A11.

195 Many of the issues below were canvassed extensively by Prof T W Bennett, a member of the Harmonisation Committee, in his briefing presentation to the Child Care Act project committee on 5 March 1998.

8.2 The Bill of Rights in the South African Constitution, CRC and the customary law affecting children

Both the Bill of Rights in the Constitution and CRC recognise the right of indigenous populations to practise their own culture.¹⁹⁶ It is, however, clear that this recognition does not derogate from the fundamental rights enshrined in these instruments and that customary law will in future have to be measured against norms laid down in both CRC and the Constitution. Of importance in this regard is the argument that human rights (including specifically children's rights) are not entirely universal, but must to a certain extent be interpreted in the context of different cultural perspectives.¹⁹⁷ Furthermore, as discussed above, the 'best interests of the child' principle is notoriously vague and indeterminate - thus, the way in which the principle will be interpreted and applied may well be influenced by cultural norms and by the social and economic circumstances in which the particular child lives.¹⁹⁸ Nevertheless, 'because the rule is worded in relative terms, it performs the vital function of ranking conflicting claims and norms'.¹⁹⁹

It is also important to note that CRC impliedly proceeds from the idea of the child as an individual with enforceable rights against the State, the community and the family. This is in potential conflict with the traditional African world view and value system, which focusses on the interests of the family group or household, and treats the child as a member of that

196 See, for example, sections 15 (freedom of religion, belief and opinion), 30 (language and culture) and 31 (cultural, religious and linguistic communities) of the Constitution and article 30 of CRC.

197 Philip Alston 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 *Int J of Law and the Family* 1 at 19 -20. So, for example, it has been pointed out that the concept of 'family' or the meaning of the word 'parental' is not defined in CRC, thereby opening the way for a broader interpretation of these concepts to include members of the extended African family, rather than only the narrowly defined nuclear family unit: see Julia Sloth Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South Africa' (1995) 11 *SAJHR* 401 at 406; T W Bennett *op cit* (1995) 101; C R M Dhlamini *op cit* para 6A11.2.1. Cf Alice Armstrong *et al* 'Towards a Cultural Understanding of the Interplay between Children's and Women's Rights: An Eastern and Southern African Perspective'(1995) *Int J of Children's Rights* 333 at 341 -343.

198 See, for example, Philip Alston *op cit* 2-5, 10 ff; and further, the various contributions on the best interests of the child principle in (1994) 8 *Int J of Law and the Fam.*

199 T W Bennett *op cit* (1995) 100.

household, the individual child's interests often being subsumed under those of the family or household as an integral societal structure.²⁰⁰

Question 85: How can the 'best interests of the individual child', as set out in the Constitution and CRC, best be rendered compatible with traditional African values, bearing in mind the increasing impact of the ideology of individualism on traditional societies?

8.3 Status of a child in customary law

8.3.1 The concept of a child: minority in customary law

Customary law does not have a clear definition of a child or precise rules as to when childhood ends and adulthood commences. Whereas the Constitution and CRC provide that a child is any person under the age of 18 years, the progression from childhood to adulthood in customary law is not dependent on chronological age, but is rather determined in phases, not only by physical and intellectual maturity, but also by initiation, marriage, and the formation of a separate household.²⁰¹ And, while an African male reaches full maturity under customary law to manage his own affairs and to participate in the political life of his community only when he gets married and establishes his own family home, African women are deemed to be perpetual minors in customary law.

Although, as rites of passage performed to mark a change in status and position, initiation ceremonies are not in principle objectionable, such ceremonies may nevertheless have adverse effects upon children. Firstly, the time spent on the ceremony may interfere with a child's

200 Alice Armstrong et al *op cit* 363-365. But changes in societal structures in South Africa and other African countries have meant that the ideology of individualism has increasingly influenced the traditional African value system: see T W Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) 345 - 350.

201 T W Bennett *op cit* (1995) 101 -102; T W Bennett *op cit* (1991) 339 - 345; C R M Dhlamini *op cit* para 6A11.2; J C Bekker 'Children and young persons in indigenous law' in J A Robinson (ed) *The Law of Children and Young Persons in South Africa* (1997) 191 -192; Alice Armstrong et al *op cit* 337 -341.

education and secondly, the physical effects of initiation procedures may be harmful to a child's health or even fatal.²⁰²

Question 86: Should initiation ceremonies in customary law be regulated by legislation so as to eradicate their potentially harmful effects on children, particularly as insofar as children's rights to bodily integrity may be violated during the course of some ceremonies?

Question 87: Should the common law and /or legislation be amended (whether or not in a comprehensive children's statute) so as to embrace African children living under customary law to a greater extent than at present? For instance, should it be spelt out that the determination of the age of majority (whether this is set at 18 years or otherwise) applies to all persons, including those subject to customary law?²⁰³

8.3.2 Birth in and out of wedlock - 'legitimacy' of children in customary law

In general terms, the position of a mother determines the position of a child in the family group. A child is born to the mother's house and the child's status remains the same, irrespective of subsequent changes to the mother's status (eg divorce, widowhood, separation from her husband etc). Thus, where the mother is married in a monogamous customary union, as she belongs to the father's house, so too is her eldest son normally the heir and successor to his father; in a polygamous household, the first wife is usually the chief wife and her eldest son the general heir and successor. Adulterine children born to a woman married by customary law 'belong' to her husband, and the natural father has no rights to the child. Children born to a widow of an *ukungena* relationship with one of her late husband's heirs 'belong' to her house and thus to her late husband's heir. Children of an unmarried woman are members of their mother's family group and are subject to the family head of that group (they become members of their maternal grandfather's family house). An illegitimate son cannot inherit from either his natural father or

202 Linda Vilakazi-Tselane *A Situational Analysis of the Girl Child: A Research Report for NIPILAR - South Africa* (February 1998) 18, 23 -25.

203 T W Bennett *op cit* (1991) 336 is of the opinion that it is uncertain whether the Age of Majority Act 57 of 1972 currently applies to persons subject to customary law. For a contrary opinion, see J C Bekker *op cit* 190.

from his mother and, in the maternal grandfather's family home, he will only succeed if there are no other male successors at all.

Therefore, although adulterine and 'illegitimate' children are not discriminated against in customary law in respect of maintenance and the provision of bridewealth, distinctions **do** remain in the field of succession. It can be argued that these distinctions infringe the child's right to equality and non-discrimination entrenched in both the Constitution²⁰⁴ and CRC.²⁰⁵

Question 88: Should legislation attempt to alter customary law so as to remove the remaining distinctions between different classes of children (classified according to the circumstances of their birth) in the field of intestate succession?

8.3.3 'Guardianship' and 'custody' of children under customary law

Provided bridewealth has been paid, the husband and his family group have full parental rights to any children born to a wife during marriage. The courts proceed from the assumption that, upon divorce, fathers will retain their children (or using common law terminology, that guardianship of a child will remain vested in his or her father). The allocation of custody of a child upon divorce is determined by the best interests of the child.²⁰⁶ Except in cases involving young children, where mothers are assumed by the courts to be better suited to be custodians, it appears that any person who alleges that it would be in the child's interests **not** to remain in the father's custody bears the onus of proving that the father is not a fit and proper person. These rules are not in all respects consistent with the paramountcy of the 'best interests of the child principle' in **all** matters concerning children, as required by the Constitution and CRC.

Question 89: What is the best way of ensuring that the 'best interests of the child principle' is extended to cover all aspects of the parent-child relationship under customary law?

204 Section 9.

205 Article 2.

206 See the recent cases of *Hlope v Mahlalela and another* 1998 (1) SA 449 (T) and *Sati v Kitsile* [1998] 1 All SA 530 (E). Cf Alice Armstong *et al op cit* 348 - 350.

8.4 Transfer of parental 'rights' over children under customary law

8.4.1 Adoption

In customary law 'adoption' is a private arrangement involving only the two families concerned and is usually resorted to in order to provide an heir for a family head who has no male progeny.²⁰⁷ The child in question is usually the offspring of a kinsman. Nevertheless, children given in adoption do for all intents and purposes become the child of the adoptive parent, provided that the customary law formalities are observed.

Payment is sometimes made to compensate the natural parents for rearing the child, raising the question whether customary adoption infringes the common law (and statutory)²⁰⁸ prohibition on trafficking in children. Secondly, the private nature of customary adoption does not adhere to the common law policy (also entrenched in statute)²⁰⁹ that adoption must take place under state supervision. It has, however, been argued that, in view of the recognition in the Constitution of customary law as a system of law,²¹⁰ there is no reason why recognition should not be given to an adoption under customary law.

Question 90: Should the customary law relating to 'adoption' of children be adapted to put the child's interests first, in accordance with the dictates of the Child Care Act, the Constitution and CRC? If so, how best can this be done?

8.4.2 Fostering

Fostering of children is common in African countries - children are placed in the care of persons other than their biological parents for a variety of reasons. In all these cases, there is the

207 There is no true equivalent in customary law of the common law concept of adoption and the institution of an heir for an otherwise heirless house is a practice not conceived first and foremost to serve the interests of the child: T W Bennett *op cit* (1995) 107, *idem* (1991) 375 - 378.

208 See section 24 of the Child Care Act, 1983.

209 Section 18(1)(a) of the Child Care Act, 1983 provides that the 'adoption of a child shall be effected by an order of the children's court of the district in which the child concerned resides'. Furthermore, for purposes of the Act, 'marriage' is defined as including 'any marriage which is recognised in terms of South African law or customary law' - section 1, as amended by section 1(d) of the Child Care Amendment Act, 1996.

210 See, for e.g., section 211 of the Constitution.

intention that the child will eventually return to his or her own parents, so there is no severing of relationships with the biological family. The child retains his or her original legal status, family name and rights and duties acquired at birth, and acquires no legal rights in the home of the foster parent. Conversely, the foster parent has no legal rights or duties towards the child under customary law. This is quite different from the consequences of a foster care placement in terms of the Child Care Act, 1983.

Question 91: Is legislative intervention necessary to ensure that the interests and rights of children in customary law fostering arrangements are protected?

8.4.3 *Isondlo*

The customary law giving of *isondlo* must not be confused with maintenance. *Isondlo* denotes the giving of a beast to compensate the recipient for the rearing of a child. An unmarried woman's guardian may claim a fine for her first and second pregnancies from the child's natural father. Once he has paid this fine, the natural father may claim parental rights to the child and, if he pays a further beast as *isondlo*, he is entitled to custody.

The payment of *isondlo* thus results in a transfer of parental rights. However, in at least one case, the court has extended the scope of *isondlo* to include monthly payments of maintenance, thus making the relationship of this customary law institution to maintenance uncertain. It has also been argued that the giving of *isondlo* amounts to the buying of children.

Question 92: What are the current social implications of *isondlo* and is legislative intervention in this regard necessary to protect children and their mothers?

8.5 Capacity to own and administer property

Children, i.e. all persons who are not yet deemed to be independent heads of households, have no capacity under customary law to own and administer property. The family head holds property for the benefit of the members of the family group - all property (including the earnings of minor inmates and whatever property they may acquire) goes into the communal pool and is

administered by the family head in the interests of the members. The family head's 'right' to property thus imposes on him an obligation to care for the whole family and to provide bridewealth for his sons.

While the customary law idea of property is suited to a rural, subsistence economy, the family head's control over property may, in the modern market economy, operate to the detriment of economically active children. It must, however, be remembered that **all** minors are denied full control of property - the difference is that at common law this is justified by the idea that minors are lacking in judgment and in need of protection, while in customary law a minor's property is pooled for his or her own benefit and that of the family group. It is therefore not a foregone conclusion that proprietary incapacity of minors under customary law **necessarily** violates the equality principle in the Constitution.

Question 93: To what extent does the minor's lack of property rights under customary law violate his or her basic human rights?

Question 94: Does the customary rule of proprietary incapacity go against the child's best interests and, if so, would a child's interests be better served by enabling him or her to own property in his or her own right or rather by making better provision for the administration of family estates?

8.6 Contractual capacity and capacity to litigate

A child's lack of proprietary capacity is complemented by a corresponding lack of contractual capacity and capacity to litigate. This may work to the disadvantage of children if they are incapacitated beyond a reasonable period of time. This could be solved by making it clear that any fixed age for the termination of minority (presently contained in the Age of Majority Act, 1972) applies to persons subject to customary law. Moreover, in terms of section 11(3) of the Black Administration Act 38 of 1927, children subject to customary law have common law capacities to contract and to litigate in respect of rights or obligations arising out of the common

law. The effect of this provision is to subject children to customary law incapacity only for purposes of typically customary transactions, such as bridewealth.

8.7 **Maintenance**

Under traditional customary law, the rule is that all children belonging to a family group are guaranteed support within the group and by all its members acting jointly. The duty to support a child is not seen in an abstract sense and a family head might thus find it difficult to accept that he has to make cash payments to support a child who is not living with him. Therefore, although the Maintenance Act 23 of 1963 is applicable to persons subject to customary law, it is notoriously difficult to enforce in a customary law context. The enforcement of maintenance obligations and reform in this sphere of the law is the subject of another South African Law Commission investigation (Project 100).

9. RELIGIOUS LAWS AFFECTING CHILDREN

9.1 Introduction

A variety of religious laws and practices affect children in South Africa. Some of these laws and practices are discussed.

9.2 Hindu law²¹¹

In terms of religion, the majority of South African Indians identify themselves as Hindu.²¹² The historical and political situation in South Africa caused many of the traditional bases of Hindu belief and practice - especially with regard to the family - to be distorted right from the start. In consequence, Hindus in South Africa came to identify themselves in ways other than by caste in their attempts to adapt, and it has been alleged that language is now the main identifying factor among the Hindu community in South Africa.²¹³

Modern Hinduism in South Africa, as in India, is faced with a growing emphasis on individualism, and the greater preponderance of nuclear families. Unlike India, South Africa does not have a system of caste councils to give authoritative guidance and judgement on caste matters, and South African Hinduism lacks this crucial means of reaching community consensus. However, the Hindu tradition is well-known for its diversity and flexibility in terms of doctrine and practice.

There is little evidence of South African Hindus practising Hinduism according to any particular school. By and large, Hindus here follow the civil law of the land and do not feel bound by Hindu law - one exception, however, is that most Hindu couples do go through a traditional

211 Unfortunately, due to time constraints and the relative inaccessibility of relevant sources, the committee has not been able to investigate the position of children in Hindu law in sufficient depth. Input on issues arising in this context would be welcomed.

212 In the 1980 Census for South Africa, 62 per cent of the 820 000 people of Indian descent identified themselves as Hindu, 19 per cent as Muslim and 19 per cent as Christian.

213 James McNamara 'Illegitimacy and the family in Hindu society' in Sandra Burman and Eleanor Preston-Whyte (eds) *Questionable Issue: Illegitimacy in South Africa* (1992) 105 at 106. Much of what follows in this section has been drawn directly from this source.

marriage ceremony. Although there is reference to polygamy in the scriptures, saints and scholars have long frowned on the practice and it would seem that monogamy is the norm among Hindus in South Africa.²¹⁴

For most Hindus, the marriage ceremony, bestowing as it does the duties and responsibilities of procreation, is seen as the central religious event of a person's life. Marriages are often still arranged, but there is now more consultation with the young people involved, who can usually veto a proposed union. The birth of a child is likewise a highly ritualised event. As in India, the child is born into the extended family, and there are specific roles after the birth for the various members of that family. The child's status and 'location' at birth are not determined by chance. In the causal system of karma and reincarnation, one is born into a certain family, at a certain time and place, and equipped with particular physical and psychological characteristics, because of one's actions in previous lives. If, for example, a child is born to an unmarried mother, or into a poor family, or has a disability, these conditions are the result of his or her 'karmic' residue from past lives. This unfortunate situation, and any resulting stigma and disadvantage, has serious implications for illegitimate children.

It would appear that in traditional Hindu cultures, beliefs and practices regarding 'proper' marriage and childbearing are intimately interwoven with considerations of caste, the most important dimensions relating to eligible marriage partners, the preparation and sharing of food, and occupation. Ideally, in the Hindu tradition, the birth of a child is both a result of a carefully planned and negotiated union within a caste, and a factor determining the subsequent degree of purity of the caste as a whole. A disadvantageous union, while legal, is highly objectionable to all members of the caste, whose status is thereby prejudiced. There are thus explicitly religious consequences for illegitimacy.

Failure to produce children was considered to be a family calamity in traditional Hindu cultures. One response of the Hindu tradition was to sanction polygamy in cases where a man's 'first wife' had not borne him a son. The reverse instance of polyandry was far less common. Divorce was traditionally prohibited but is now commonly granted by law courts and caste councils throughout the Hindu world. One of the Sanskrit scriptures, the *Dharma Sastras*, allows for a

214 Ms Pat Moodley Briefing document to the committee, Pretoria, 6 March 1998.

number of different strategies to acquire children. In modern times adoption has become the preferred option for many childless couples or widows.

Question 95: How does the caste system affect children in South Africa?

Question 96: Are there Hindu practices in South Africa concerning children that conflict with CRC and the Constitution? How best can these conflicts, if any, be addressed?

9.3 Muslim law²¹⁵

Muslim personal law is a religiously based private law covering such areas as marriage and divorce. It has its origin in the *Qur'an* which was revealed during the seventh century of the Christian era and which is a religious text considered by Muslims to be the literal word of God. The *Qur'an* and the *Sunna*²¹⁶ of Prophet Muhammad are the primary sources of Islam. Approximately 80 verses of the *Qur'an* deal with legal matters, most of which pertain to personal laws of family and inheritance. The term 'Muslim personal law'²¹⁷ has been coined by various Muslim countries and jurists because it pertains to, among others, marriage, divorce, inheritance, polygyny, custody and guardianship. Minor reforms were introduced in the twentieth century when these verses were transformed into codes of MPL. These reforms have remained relatively conservative when compared with the liberal adoption of secular commercial and criminal codes in many Muslim countries.

The *Qur'an* is separated from the classical formulation of Islamic law or *Shari'a* by a process of legal development lasting more than two centuries. During this period the *Qur'anic* norms underwent considerable dilution to the detriment of women and children. It is common for Islamic law, which is the conservative interpretation and application of the primary sources

215 The following discussion of Muslim personal law is based on the presentation of Dr Najma Moosa of the Department of Comparative and Public International Law, University of the Western Cape, to the committee at the briefing on 5 March 1998. We are indebted to Dr Moosa for her thorough and extensive paper.

216 The *Sunna* (tradition) of Muhammad is the received customs associated with him and embodied after his death in book form called *Hadith*. The *Sunna* is therefore explanatory of and complementary to the *Qur'anic* text.

217 Hereinafter abbreviated to MPL.

(*Qur'an* and *Sunna*) by early Muslim jurists like Imam Abu Hanifa and Imam Shafi,²¹⁸ to be confused with Islam itself. There is in fact a difference between Islam (original) and Islamic law (interpretations of original).

Apart from these two primary sources of Islam, there is another source called *ijtihad* (independent reasoning). Reasoned interpretation of the *Qur'an* and *Sunna* as primary sources was allowed for four centuries after Muhammad's death. The 'door of *ijtihad*' was formally closed in the tenth century. This (closure) meant that there was no further need to interpret the *Qur'an* and *Sunna* and recourse could only be had to the interpretations of the earliest scholars whose opinions were not subject to any alterations. Notwithstanding the spirit of equality implicit in Islam, closure rendered jurisprudence ineffective and unable to provide answers to emerging and contentious issues. This ended the classical period of Islam. Closure allowed for the codification of Islamic law. This is still the position today although there is a call for these doors to be reopened.²¹⁹

9.3.1 The general position of children in Islam

218 In the eighth century the four major Islamic schools of law were established and named after its founders namely, *Hanafi*, *Maliki*, *Shafi'i* and *Hanbali*. These together comprise the *Sunni* (traditionalist) schools.

219 Dr Najma Moosa *An analysis of the human rights and gender consequences of the new South African Constitution and Bill of Rights with regard to the recognition and implementation of Muslim Personal Law (MPL)*, unpublished LL D dissertation, University of the Western Cape (1996) 18.

Children in Islam are ideally seen as the fruits of marriage - for mothers as home-makers to love and nurture and fathers to provide for materially, presumably without any distinction between male and female children. However, sons are specifically perceived as part of the wealth of men.

There is a Prophetic tradition to the effect that all children are considered to be born as Muslim. Conversion from Islam, although subject to conflicting opinions, is considered to be a capital crime punishable by death. Apostasy by one of the spouses normally terminates an Islamic marriage and, as indicated below, an apostate would be denied any right to an inheritance.²²⁰ Although Article 14(1) of CRC assures to children a choice in religion, many Islamic states have shown disagreement in the form of reservations. They maintain that a child has the right to practise but not choose or change his/her religion which should accord with that of the father.

Like South Africa, most Islamic countries have either signed or ratified CRC. However, the majority of Islamic countries did so subject to the reservation that its provisions /obligations be compatible with principles of Islamic law. Pakistan, being a typical example, ratified the CRC in 1990 subject to the reservation that 'provisions of CRC shall be interpreted in the light of Islamic laws and values'.²²¹ Even though provision is made in the South African Constitution for the possible recognition and implementation of MPL (but not any other aspect of Islamic law), it must conform to the Bill of Rights enshrined therein, once it is so recognised. The **right** to have MPL recognised is therefore not constitutionalised, and South Africa did not record any reservations when it ratified CRC.

Dr Moosa argues that, notwithstanding the possibility that MPL will not be recognised in South Africa in the near future, the fact remains that Muslim children are being, and will continue to be, disadvantaged if no consideration is given to their status in any new legislation in South Africa.²²² Non-recognition of MPL causes problems, including abuses of certain 'privileges', relating to polygyny, divorce, maintenance and custody of children in Muslim family relationships.

220 N Moosa *op cit* (1996) 137 - 141.

221 B B Pande 'The politics of children's rights in Asia: Rhetoric and reality' in E Verhellen (ed) *Understanding Children's Rights* 508.

222 Dr Najma Moosa 'Muslim personal laws affecting children: Diversity, practice and implications for a new children's code in South Africa' (Briefing document to committee, Pretoria, 5 March 1998) 7.

9.3.2 Parental powers and duties, custody and guardianship

Parental power constitutes the sum total of rights and duties of parents with regard to their children, for example custody and guardianship. Islam, however, stresses that the roles of parent and child are complementary and advocates that there should be a balance between parental powers and duties and the rights and obligations of children.²²³ Eventually there is a reversal of roles in that the child becomes a parent and the parent becomes a 'child' because of old age. While parents have many important rights over children, for example, the right to chastise them, these rights do not necessarily take precedence over the rights of children. Umar, the second caliph of Islam, even goes so far as to say that the rights of children can in certain instances precede those of parents. Religious authorities, parents and guardians of Muslim children are thus obliged to ensure that the rights of these children are not 'sabotaged' under the guise of religion. Under normal circumstances children, as long as they are minors incapable of taking care of themselves, have the right to be reared jointly by both parents in a caring environment.

Custody is seen as one of three forms of guardianship and is also called 'guardianship' of the infant or person of the minor. The other two forms are guardianship of education and property and both of these are entrusted to men (including the father). Although the terms 'guardianship' and 'custody' are used interchangeably, it is clear that the custody of the mother is separate from the (sole/natural/legal) guardianship of the father. Islamic jurisprudence recognises the father alone as the natural guardian of his minor children and hence he has to maintain the children even if he is separated (divorced) from the mother or if they live elsewhere or are in the custody of another person (including the mother). This has deprived women of the right of bringing up their children as an equal parent.²²⁴

223 'Abd al 'Aṭī *The Family Structure in Islam* (1977) 182, 203.

224 In an analysis of various Pakistani judgements from 1947-1992 which investigated the attitude of the superior courts towards women as parties in custody and guardianship cases, Sardar Ali and Azam (1993-35) concluded that these cases reflect '...a clearly discernible shift away from rules of traditional Islamic law. In deciding these cases, emphasis is laid on *welfare of the child* which *is considered of prime importance* at times even overriding express provisions of law...' (emphasis added). Judges have exercised independent reasoning, or *ijtihad* as a tool and source of Islamic law, in order to achieve this, especially where there was no *Qur'anic* guidance or where the schools of law had divergent views on the topic.

Custody is usually, but not necessarily, entrusted to the mother (irrespective of her religion).²²⁵ Islamic law defines custody as the caring for the infant during the early years of life. The *Qur'an* is not clear as to which parent gets custody of the children in the event of a divorce. However, it accepts the father's perpetual right of guardianship and this has led jurists to assume that, after a limited period of time (custody) with their mothers, children of divorced or widowed women pass into the care of the father, or nearest male agnate relative in the event of the father's death. According to the *Sunni* schools of law, a mother's limited right to custody is lost if she is unable, for whatever reason, to take care of her children. These rules have been relaxed in most Muslim countries, with the welfare of the child being the decisive factor. A mother is normally only allowed custody of her child up to a certain age according to the sex of the child. This age differs from school to school. In terms of, for example, the *Hanafi* school of law she has custody over her son from birth up to seven years of age and her daughter from birth until puberty (usually nine years). Some Muslim countries have reformed their laws to make this nine and eleven years respectively for sons and daughters. If the mother is dead or disqualified, her mother (although the schools differ widely on this point) would possibly step into her shoes.

In terms of Islamic law and as is expressly legislated in some Muslim countries, parents, regardless of who may have custody, may not prevent each other from seeing their children. They are bound to give each other access.

9.3.3 Abortion

Muslim children have an inalienable right to life.²²⁶ Because God grants life to both parent and child, abortion is a contentious issue. Islam prohibited infanticide, a pre-Islamic pagan practice, whereby infants were killed for fear of shame and want. It must be noted that there are no *Qur'anic* verses which relate directly to the issue of abortion and it seems as if the *Qur'anic* verses relating to infanticide²²⁷ have been misread as applying to abortion.

225 If the schools of law are not unanimous that apostasy (of the mother) should necessarily be a ground for disqualifying her from her right to custody: J J Nasir *The Status of Women under Islamic Law* (1994) 115 - 137.

226 'Abd al 'Afi *op cit* (1977) 184.

227 Q.6:137; Q.6:140; Q.6:151; Q.17:31; Q.16:58-9.

It is accepted by Muslim jurists that, in terms of a Prophetic tradition (*Hadith*), the foetus is ensouled at four months (120 days) and there can therefore be no question of abortion beyond this period, although it is permissible in exceptional circumstances prior to this period. It appears that abortion is only allowed at any stage (before and after four months) if a woman's life is endangered, on the basis that preserving the life of the mother is considered to be the lesser of two evils.

9.3.4 Establishing parentage

Establishing the identity of the natural/biological father and mother of a child is a fundamental (second) right of the child in Islamic law. It confers on the child the status of legitimacy and is established through marriage, acknowledgement and evidence.²²⁸ The adopted child also has the right to know who its biological parents are and hence adoption, as understood in South African law, although permitted in early Islam, was prohibited by *Qur'anic* injunction and this is still considered to be the position today. According to the *Qur'an* if the concerned child's real parents are unknown, the child shall be called a 'brother in faith' or 'client' of his fellow Muslims. Instead of adoption, Islam encourages fostering where the real identity of a child is known. While adoption has been expressly prohibited in Morocco and Algeria, there are some Muslim countries which, contrary to classical Islamic law, practise adoption today. Turkey, where Islamic law has been completely secularised, and Tunisia, are two such countries. Adopted children may inherit up to one-third of the estate of the adoptive parent by bequest.

9.3.5 Non-recognition of Muslim marriages and effect on status of children

Non-recognition of MPL in South Africa means that marriages solemnized according to Islamic law are not recognized by the State. Consequently, children born of such marriages (who are legitimate in terms of Islamic law) are accorded the status of illegitimate children.²²⁹

228 A A A Fyzee *Outlines of Muhammadan Law* (1974) 189; J J Nasir *The Status of Women under Islamic Law* (1994) 115; M T El Imairi 'Rights of Children' (1978) 7 *Journal of Islamic and Comparative Law* 1.

229 In terms of the Births and Deaths Registration Amendment Act 40 of 1996 'marriage' includes a 'marriage solemnised or concluded according to the tenets of any religion...'. For formal purposes, therefore, the birth of a child from a marriage by Muslim rites can be registered as a legitimate birth. Section 1(d) of the Child Care Amendment Act 96 of 1996 redefines 'marriage' for the purposes of that

The Cape Supreme Court in the test case of *Ryland v Edros*²³⁰ gave limited recognition to the Muslim marriage contract, provided that it was a monogamous union. It remains, however, to be seen whether such recognition will extend to other areas of MPL such as custody and guardianship.

Furthermore, Muslim children born out of wedlock still suffer severe legal and social discrimination because of traditional (but popular) interpretations of Islamic law to their detriment.²³¹ Such a child cannot be legitimated by the subsequent marriage of its parents. Islamic law recognises no ties of maintenance between an illegitimate child and its putative father, but leaves this burden on the mother as the child is considered to be related to her.²³²

Another form of discrimination is illustrated as follows: In terms of South African law, illegitimate children have the same rights as legitimate children to inherit on intestacy as well as in terms of a will (unless the context of the will indicates otherwise).²³³ In Islamic law, illegitimate children are the intestate heirs of their mothers and mother's relatives and vice versa, but not of the father or his relatives and vice versa. They may, as is the case with adopted children, inherit via a one third bequest if the father so wishes.²³⁴

9.3.6 Majority

Act to include '... any marriage...which was concluded in accordance with a system of religious law subject to specified procedures, *and* any reference to a husband, wife, widower, widow, divorced person, married person or spouse shall be construed accordingly...' (emphasis added). These are but first steps towards the full recognition of a reformed MPL.

230 [1996] 4 All SA 557 (C), 1997 (2) SA 690 (C).

231 Van Bueren *The International Law on the Rights of the Child* (1994) 45 highlights that although Islamic states did not argue (during the drafting of the Children's Convention) that a distinction between children born in and out of wedlock is in the child's best interests, they maintain that such children are unequal on the basis of Islamic law.

232 Abd al 'Atī *op cit* 192.

233 See section 1(2) of the Intestate Succession Act 81 of 1987 and section 2D(1)(b) of the Wills Act 7 of 1953 (as inserted by section 4 of the Law of Succession Amendment Act 43 of 1992).

234 For an alternative Islamic perspective on the issue of children born out of wedlock see Ebrahim Moosa 'The child belongs to the bed': Illegitimacy and Islamic law' in Burman and Preston-Whyte (eds) *Questionable Issue: Illegitimacy in South Africa* (1992) 171-184. This view is more in line with the human rights culture now prevailing in South Africa and the true Islamic spirit of justice and equality.

The age of 'majority' (maturity) for a Muslim child, and when he/she becomes accountable, is usually marked by puberty. This is deemed by most to be reached at fifteen years but can extend to eighteen years. Minors having reached puberty may, for example, enter into valid and binding marriages. Legal capacity as it applies to marriage is, however, not always the same as full civil legal capacity, both of which vary from country to country. In South Africa, the Marriage Act 25 of 1961 also sets its own age limits for marriage. Furthermore, while majority is deemed to be attained at 21 years in terms of the Age of Majority Act 57 of 1972, a child is generally defined for the purposes of the Child Care Act, the Constitution and CRC as a person below the age of 18 years. Article 1 of CRC goes further and adds '... unless, under the law applicable to the child, majority is attained earlier.' This makes it easier for Muslim countries with divergent provisions who have either signed or ratified this instrument, to comply with its provisions.

9.3.7 Maintenance

The mother is under no obligation to contribute to the maintenance of her family.²³⁵ However, if the father cannot afford to maintain the children, the mother is bound to do so in spite of the clear *Qur'anic* injunction to the contrary.²³⁶ Maintenance is defined as providing children with basic necessities such as food, clothing and lodging. The schools (of law) also agree that the child too has a duty to maintain the parents.

9.3.8 Succession

As far as succession is concerned, children are given a fixed share in what can be likened to 'intestate' succession.²³⁷ However, although *Islam* (as opposed to Islamic law) makes the female

235 Q.4:34.

236 According to Islamic law women, married or single, are allowed to own property or to dispose of it as they wish, to retain their separate estates, to remain owners of their dowries and inheritances, gifts, fruits of their own labour and investments: `Abd al `Aṭī *op cit* 165.

237 In Islamic law the heirs of the deceased are determined at the time of his death. Voluntary freedom of testation by will is limited in that the deceased may only dispose of one third of his net assets, normally in favour of a non intestate heir. The rest (two thirds) is automatically devolved in accordance with the fixed shares prescribed in terms of the compulsory *Qur'anic* rules of 'intestate' succession: N Moosa *A Comparative Study of the South African and Islamic Law of Succession and Matrimonial Property with especial attention to the implications for the Muslim Woman*, unpublished LL M thesis, University of the Western Cape (1991) 38-52,152-168.

a co-sharer with the male,²³⁸ her share is always half that of the male. This inequality can, however, be overcome by the effective use of alternative tools like dower, dowry and gift.²³⁹ Jurists have identified apostasy and homicide as the two conditions which permit parents to exclude children from their estates.

9.3.9 Adjudicating fora in MPL

Because of non-recognition of MPL in South Africa, decisions by *Ulama* (religious authorities) are only binding on the conscience of Muslims. Secular courts and *Shari'a* (Islamic) tribunals would obviously sometimes reach different decisions in matters relating to custody, maintenance and inheritance, to name but a few examples. If creative use is not made of tools within Islam then people are ultimately going to resort to secular courts to obtain more equitable results and protection,²⁴⁰ as is already happening in the sphere of marriage and succession.

Question 97: What aspects of MPL need to be reformed in order to accord with constitutional and international imperatives?

Question 98: Should MPL be codified and or should the fundamental principles underpinning a new children's statute be made sensitive to and compatible with MPL affecting children? If so, how?

238 Q. 4:7.

239 Dower is an important ingredient of a Muslim marriage. It is a sum of money or other property which becomes payable by the husband to the wife as an effect of marriage. It becomes the exclusive property of the bride. Dowry consists mainly of property items such as clothing, money and jewellery. It is a well-established custom and an obligation of the husband's family in some (not all) Muslim societies. It does not have its origin in Islamic law and is therefore not obligatory. In terms of Islamic law gift is a disposition of property during one's lifetime. There is no limitation on the amount of property transferred by gift: N Moosa *op cit* (1991) 9, 29-30, 153-155, 159.

240 Moosa *op cit* (1996) 429.

10. COMPARATIVE REVIEW

10.1 Introduction

The comparative review that follows draws on firstly, recent law reform initiatives in child care and protection in both developed and developing countries. In the main, the selection has been determined by accessibility of material, the probable relevance of the particular country to aspects of the South African context, and the fact that all of the examples of law reform given post-date the UN Convention on the Rights of the Child. Common themes are: the best interests of the child as paramount consideration; the shift from parental rights to the modern concept of parental responsibility; the entrenchment of children's rights (e.g. the right to legal representation and the right to have a child's views taken into account); the principle of minimum intervention and of delay being prejudicial to the interests of the child; and the criterion of significant harm as a ground for the removal of children into state care. Importantly, all determine the end of childhood at 18 (or, in the case of New Zealand, 17) years, in accordance with the UN Convention.

10.2 African countries

10.2.1 Introduction and status of legislation

Four African countries engaged in comparable law reform are highlighted for comment. All have ratified the UN Convention on the Rights of the Child and all have constitutions containing children's rights provisions. Uganda has proceeded the furthest - the Ugandan Children Statute was enacted in April 1996, came into operation in 1997, and is currently in the process of being implemented.²⁴¹ In Kenya, a Bill was put to parliament in 1994, and then withdrawn; NGO objections to the Bill are now being considered. The Ghanaian Children's Bill and the Criminal Code (Amendment) Bill are presently before Parliament and the Criminal Procedure Code (Amendment) bill will be considered by Parliament later this year.²⁴² It is widely expected that

241 See Julia Sloth-Nielsen and Belinda van Heerden 'New Child Care and Protection Legislation for South Africa? Lessons from Africa' (1997) 8 *Stell LR* 261.

242 All three bills emanate from the prior (1995) Report by the Ghana National Commission on Children *Reforming the Law for Children in Ghana: Proposals for a Children's Code* (hereafter Report).

draft child care and protection legislation will be presented to the Namibian parliament some time in 1998.

In Uganda, the new statute will be introduced in a largely traditional and patriarchal society, characterised by ethnic and religious differences.²⁴³ As regards Kenya, there are 42 Kenyan tribes, whose interests and customary practices have to be balanced in new child care and protection legislation, and at least 66 existing statutes dealing with or affecting children.²⁴⁴ Namibia is of special interest to us, as upon independence, the country inherited the South African Children Act 33 of 1960, which has not been not amended since it became applicable in Namibia in 1977.

10.2.2 Objects of the legislation and draft legislation

In Uganda, the object of the statute was to reform and to consolidate the laws relating to children. Having inherited colonial legislation, the focus of which was primarily on social control, rather than the best interests of the child, and faced with problematic areas which were not satisfactorily dealt with in legislation (such as the consequences of HIV/Aids, and the aftermath of civil war), it was deemed necessary to develop a comprehensive statute for the modern era. In Ghana, according to the Memorandum to the 1997 Children's Bill, the object is 'to reform and consolidate the law relating to children to provide for the rights of the child, maintenance and adoption, child labour, and day care centres'. Notably, separate criminal and criminal procedure amendment bills incorporate the proposals of the Report concerning juvenile justice. Now, not only will such matters as the age of criminal responsibility appear in a different statute, but the court structure dealing with child offenders will apparently not be the same as that dealing with child care and protection, contrary to the recommendations of the Report. Thus, the initial expectation that all laws concerning children would be codified in one legislative instrument has apparently not been met.²⁴⁵

243 See the Uganda Country Report on the Implementation of the UN Convention on the Rights of the Child (May 1995) 3.

244 Julia Sloth-Nielsen and Belinda van Heerden *op cit* (1997) 266 - 7.

245 See Report 6. See too the consequent assumption in Sloth-Nielsen and Van Heerden *op cit* (1997) 275 and the South African Law Commission Issue Paper on Juvenile Justice (Project 106) 46.

While the overall goal of the Kenyan Bill is to amend and consolidate the law relating to children, more general objectives are set out in a special clause. These include promoting the well being of children, implementing the provisions of the UN Convention, promoting the welfare of the family and assisting parents to discharge their parental responsibilities.

10.2.3 Scope of and principles underpinning the legislation and draft legislation

The Ugandan statute covers the following areas: children's rights; affiliation proceedings and parentage issues; custody and guardianship of and access to children; adoption; foster care placements; care, protection and maintenance of children; local authority support for children; the establishment of a family and children court and enforcement, appeals and review procedures; juvenile justice in its entirety; children's institutions; and various other matters.

The legislation includes principles in three different ways. First, in a separate chapter after the definitions section, including both specific rights, as well as a general statement of principles (which refers to the welfare principle and the children's rights set out in the First Schedule as the guiding principles in the making of any decision concerning children). Secondly, the First Schedule refers to: the child's welfare as paramount consideration; the principle of delay as prejudicial to the child's welfare; the obligation to have regard to, *inter alia*, the views of the child (considered in the light of his or her age and understanding); the child's right to, *inter alia*, participation in positive sporting, cultural and artistic activities, and to social resources available in situations of conflict or disaster; the child's right to exercise all the rights set out in CRC and the OAU Charter on the Rights and Welfare of the Child, with appropriate modifications to suit the circumstances in Uganda.²⁴⁶ Thus the rights in these international documents, referred to in the First Schedule, become applicable to the domestic legislation.

246 There is a striking resemblance between the wording of this schedule and section 1 of the United Kingdom Children Act 1989, but the last two paragraphs are unique to the Ugandan statute.

In addition, the remainder of Part II illustrates the third method of legislating for principles and rights, with specific clauses detailing children's rights and corresponding duties. The most important of these are the following:

- A child is entitled to live with his or her parents or guardian, but when separated from them by a competent authority in the child's best interests, 'the best substitute care available' has to be provided for the child;²⁴⁷
- It is unlawful to subject a child to social or customary practices that are harmful to his or her health;²⁴⁸
- Special mention is made of the rights of children with disabilities to, amongst other things, appropriate treatment, facilities for rehabilitation and equal opportunities to education, with both the state and parents under the duty to ensure fulfilment of these rights.

The Kenyan Bill represents an ambitious attempt to consolidate all legal issues affecting children: it deals with affiliation proceedings; adoption; foster care; the maintenance, custody and guardianship of children; children in need of protection and discipline; and children's courts and institutions. Juvenile justice is included under the provisions relating to children in need of discipline. The provisions of the Bill demonstrate considerable sensitivity to the religious differences that prevail in Kenya. However, there does not appear to be explicit incorporation in the Bill of references to prevailing customary law provisions and practices and, while recognising the paramountcy of the best interests of the child, the Bill does not contain a statement which could be regarded as incorporating what are generally termed children's rights

247 Section 5.

248 Section 8.

(in the international law sense). However, broad objectives, as mentioned above, are provided for.²⁴⁹

In Ghana, apart from juvenile justice which will now form part of separate legislation, there are also provisions in the proposed Criminal Code (Amendment) Bill dealing with various issues relating to what have here been termed 'sexual offences by and against children'. These include: the age of sexual responsibility, sexual abuse and sexual exploitation of children and certain sexual offences against children.

It therefore now appears that, rather than consolidating all legislation concerning children in one bill, the Ghanaian approach will be to amend existing statutes which have a bearing on the issues addressed in the Report, and then to include other issues, or incorporate other existing statutes, in a separate code. To illustrate, the Bill will amend the Intestate Succession Law of 1985, the Wills Act 360 of 1971, the Social Security Law of 1991, the Marriage Ordinance Cap 127 (to lower the age of marriage from 21 to 18 years), and will repeal the provisions in the Labour Decree 1967 dealing with the employment of children and child labour. Examples of proposed re-enactment, with changes, of existing legislation, are the provision for Family Tribunals, currently operating by virtue of the Maintenance of Children Decree 1977, the provisions of the Adoption Act 104 of 1962 and those of the Day Care Centres Decree 1978.

249 For a discussion of the differing effects of the inclusion of underpinning principles, as opposed to a statement of objectives, see Sloth-Nielsen and Van Heerden *op cit* (1997) 271 - 2.

The remainder of the new code will introduce legislation on matters previously unregulated, such as foster care, apprenticeship in the informal sector, and residential children's homes; will introduce entirely new topics (such as children's rights) and will substantially replace and reform areas of child care and protection, child labour, parentage, custody, access and maintenance.²⁵⁰

A number of widely accepted international principles on children's rights and on care and protection issues have been incorporated in the Ghanaian Bill, not as a statement of principles at the outset of the Bill, but rather within the applicable sections. Examples are the principle of the best interests of the child as paramount consideration in all matters concerning children, the principles of non-discrimination and minimum intervention and the concept of significant harm as removal criterion. The children's rights explicitly provided for in Sub-Part I and in other clauses of the Bill²⁵¹ appear to encompass all of the rights contained in the Ghanaian Constitution, and many of the rights in the UN Convention, including socio-economic rights.²⁵²

Namibia proposes to divide legislation on children's issues into two Acts: The first (the draft Children's Status Act) resembles the present South African Children's Status Act 82 of 1987 in scope. The second (the draft Child Care and Protection Act) is destined to cover prevention of child abuse and neglect; protection and care of children; adoption; children's courts; foster care and children's institutions; liability for maintenance; contribution orders; and will replace the Children's Act of 1960. Juvenile justice is not dealt with at all, but the transfer mechanism from the juvenile court to the children's court remains intact. The apparent reason why two acts have been proposed is the length and nature of the subject matter. Apart from a provision regulating public performances and exhibitions by children under the age of 16 years,²⁵³ child labour does

250 Novel is the inclusion of regulation concerning all day care centres, irrespective of the number of children attending such centres. At present in South Africa only 'places of care' (facilities providing for the temporary or partial care of more than 6 children apart from their parents) and 'shelters' are included in the ambit of national legislation (see Julia Sloth-Nielsen and Belinda van Heerden 'The Child Care Amendment Act 1996: Does it improve Children's Rights in South Africa?' (1996) 12 *SAJHR* 649 at 653.

251 Such as clause 38 dealing with the right of the child in proceedings before a Family Tribunal, which clause provides for the child's rights to privacy, to legal representation and to express his or her views in such proceedings.

252 Sloth-Nielsen and Van Heerden *op cit* (1997) 270 - 1 refer to the fact that some of the rights are of particular interest, such as the right to refuse to be betrothed or to be married, and the right not to be subjected to cultural practices which dehumanise the child or are injurious to its physical and mental well-being.

253 Clause 116; there was an equivalent provision in the 1960 Children's Act.

not appear to be included. In addition, no reference to the age of majority or the age of marriage is made.

The Namibian draft legislation provides a statement of purposes (clause 2). From a list of 10 purposes, the following can be highlighted: to prevent, remedy or assist in solving problems which may place children in need of care and protection; to actively involve families in resolving problems which may be detrimental to the well-being of the children in the family; as a last resort, to intervene to protect children in need of care or protection; to restore children to their families as soon as a child's safety and well-being permit; and to implement the UN Convention on the Rights of the Child. The purposes spelt out in this clause are explicitly intended to be used in construing the Act. Additionally, the best interests principle is specifically included²⁵⁴ to underpin the implementation of the Act and the exercise of any power under it. There is no explicit charter of children's rights in the proposed legislation, nor any explicit reference to the principle of minimum intervention, or of delay being necessarily prejudicial to the interests of the child.

Clause 2 of the proposed Children's Status Act is titled 'objectives and interpretation'. The objectives are 'to promote and protect the best interests of the child and to ensure that no child suffers any discrimination or disadvantage because of the marital status of his or her parents.' This is also to be used as a general principle in the interpretation of the entire Act.

10.2.4 Noteworthy features with reference to the content of the statutes

° **Uganda**

The statute provides for extensive devolution of powers and functions concerning children to local authority level. After parents, responsibility for safeguarding the welfare of children rests with local government councils from village to district level. They have to mediate in any situation where the rights of the child are infringed, to provide assistance and accommodation to children within their area where the child has been lost, or abandoned, or is seeking refuge, make all efforts to trace parents or relatives of lost or abandoned children, and keep a register of

disabled children and assist them wherever possible. This local authority does not act as a court in any way.

Second, every local government council must designate one of its members to be the 'Secretary for Children's Affairs', who is responsible for channelling cases to higher levels, for receiving reports²⁵⁵ of instances of child abuse or neglect or other infringements of children's rights, for issuing summons in regard to the person against whom such a report was made, and deciding the issue in the best interests of the child. The appointee does not seem to have powers of enforcement of his or her decisions: the Secretary must refer problems of non-compliance to the 'Village Resistance Committee Court' for adjudication. The 'Resistance Committee Courts' form the next tier. Staffed by elected members, they have powers to try civil cases of a lesser nature, customary law matters and cases arising from infringements of bye-laws. As regards civil matters concerning children, this court really only deals with certain child care and protection issues, such as reports of abuse and neglect. Jurisdiction for the remaining issues rests with a range of higher tier judicial authorities. The statute creates a Family and Children Court in every district (which is the level of local governance above county level). This court has jurisdiction in all criminal charges against children which fall beyond the jurisdiction of village resistance courts, and civil jurisdiction in respect of care and supervision orders (including foster placements), authorising removals, making contribution and maintenance orders, variations of custody orders and declarations of parentage.

Proceedings at the level of the Family and Children court appear to be relatively more formal than those in structures at the lower level. It is, however, spelt out that proceedings in the Family and Children Court must be as informal as possible, and by inquiry rather than by adversarial procedures. Adoption proceedings are the domain of the Chief magistrates court, where both the child and the applicant are citizens of Uganda, and of the high court whether either is not a citizen of Uganda. Matrimonial issues such as divorce, matrimonial property, and custody, guardianship and access in divorce and separation will continue to be dealt with by higher courts, and covered in separate legislation.

254 As clause 3.

255 The duty to make these reports rests on every member of the community, rather than on designated professionals.

Considerable emphasis in the legislation is placed on diversion and non-institutionalisation in care matters. There must be an annual review of every care order; the maximum period of a care order is fixed at 3 years or until a child reaches 18; and the object of a care order is not merely to remove a child from a harmful situation, but also to assist the child and those with whom he or she was living or wishes to live to examine the circumstances underlying the order and to take steps to **resolve or ameliorate** the problem so as to ensure the child's return to the community. Reunification services are stressed, and the duty is imposed to provide child and family counseling and to involve the community in the 'process of resolving the problems' which lead to the making of the care order. Care has been taken throughout the statute to refer to the necessity of consulting with the child concerned. A key reform has been to grant shared parental responsibility, to replace the previous legal position where the father's paternal power gave him the right to remove the child from the mother at the age of 7 years.

There are some notable innovations in the choice of language in the act, which set the tone for a child rights imbued statute. An example is the reference throughout to 'substitute family care' in the place of 'institutional care or alternative care'.

Legal representation for the child in the Family and Children Court is a right granted in section 17 (1)(e) of the Statute. There is also an obligation on the court to explain to the child his or her right of appeal.

° **Kenya**

The Bill provides for the establishment of Children's Courts, apparently at magistrates court level. Apart from matters that would, in present day South Africa, fall under the jurisdiction of our children's court, a range of issues that we would regard as 'family law'²⁵⁶ matters are also covered extensively in the Children Bill, such as adoption orders, orders relating to custody, care and control of and right of access to children, the administration of a child's property,²⁵⁷ maintenance orders and the variation thereof.

256 Excluding dissolution of marriage.

257 Many of these functions in South African are currently the domain of the High Court and the Master. A

Appeals from the children's court lie to the High Court, and the child (in addition to a parent or guardian) has an independent right of appeal against a placement order. Where a child is unrepresented, the court may order that the child be granted legal representation at state expense.

The best interest of the child is only the paramount consideration to the extent that this is consistent with adopting a course of action calculated to conserve or promote, as far as possible, a satisfactory relationship between the child and other persons, whether within his family, his domestic environment or the community at large. The Bill makes provision for specific duties of parents, such as the obligation to maintain a child whether or not the child is in the custody of the parent.

The Bill also covers non-judicial (executive) matters, by providing for the creation of a National Council of Children's Services. Further, the Minister, in consultation with the Council, may appoint a Director of Children's Services, whose powers and functions can be delegated to what are termed 'children's officers'. Municipal or country councils may be appointed as 'local authorities' for the purposes of the Bill by the Director of Children's Services (clause 42). Such 'local authorities' have the power to provide 'welfare schemes' for a variety of specified purposes.

Local authorities have the power to incur expenditure in relation to 'welfare schemes', but there does not appear to be any explicit provision conferring enforcement powers on local authorities, nor is there any reference to the powers of local authorities to enact subordinate legislation that may have a bearing on children. Overall, despite the above references to local authority involvement, the impression gained is of a more centralised system of control over children's affairs than the decentralised system envisaged in the Ugandan code.

° **Ghana**

further example of powers granted by the Bill to the children's court that in South Africa are exercised by the High Court, is the power to grant interdicts restraining the removal of children from Kenya by any person, with the corresponding power to authorise such removal (clause 87).

The Ghanaian Bill emphasises the decentralisation of child care and protection. This will be achieved through the establishment of Child Panels, at district level, whose object will be to mediate in civil cases and non-serious criminal cases involving children's interests. The child panel will include the district social worker, the chairperson of the Social Services Sub-committee of the District Assembly, representatives from a women's organisation, the Traditional Council and the Justice and Security Sub-committee of the District Assembly, as also people from the community. No additional powers, beyond mediation and reconciliation, are available to the panel in care and protection matters. Community Tribunals have been renamed Family Tribunals and their powers extended to include matters pertaining to children generally, such as parentage, custody, access, maintenance, adoption, care and supervision orders, placing a child in an approved residential home, or with an approved 'fit' person, or at the home of parents, guardians or relatives under the supervision of a probation officer.

The Bill gives both parents parental responsibility irrespective of whether or not a child was born in wedlock. Neither divorce nor separation affects this responsibility, and a list of particular parental duties, such as the duty to ensure a child's survival and development, is provided. An interesting further provision places a duty on a temporarily absent parent to ensure that a child is only cared for a competent person with the requisite skills. A child under 18 months may not be cared for by a person below 15 years of age.

° **Namibia**

The Bill proposes a Child Welfare Advisory Council comprising 13 members of whom at least 5 shall be women. The proposed body will have a complaints recording function, a research function, a liaison function, as well as a role in conceiving and proposing programmes and legal amendments. It is obliged to consult with NGO's and communities.

There are independent definitions of a child in need of **care** (an abandoned child, a neglected child, a child without adequate supervision and a child whose needs are otherwise not being met) and a child in need of **protection** (a child at risk of abuse). It is clearly stated that involuntary poverty alone does not constitute abuse or neglect. Notably, there is no reference to children in need of discipline, or uncontrollable children. And, unless he or she is at substantial risk of

significant physical, emotional, or psychological harm, a child cannot be **characterised** as neglected, inadequately supervised, etc.

Children's court procedures are substantially revamped: all procedures in the children's court must be designed and implemented to minimise fear, intimidation or distress in the children concerned, there is provision for appeal against and review of removal decisions, as also for appeal against children's court orders and making of domestic violence orders.

Extensive provision is made for monitoring of placements by social workers and for periodic review by the court of such placements. Reviews must take place no later than 3 months after the initial placement, and at least once every 6 months thereafter for two years. Inspections of children's institutions must take place at least once a year; in all instances, written reports of the inspection are obligatory. There is no specific list of parental duties, apart from a new reference to the parental duty (including a stepparent) to maintain children.

The Draft Children's Status Act eliminates all discrimination between marital and extra-marital children in the field of succession and as regards the duty of mutual support between such children and their paternal and maternal blood relations. The draft provides for a right of reasonable access to the child by the non-custodian parent of an extra-marital child (except a child conceived as a result of the rape of the mother) and parents of an extra-marital child will have equal guardianship of such child (although the custody of the child will continue to vest in the mother).

10.3 **Non-African countries**

10.3.1 **Introduction and status of legislation**

The United Kingdom Children Act of 1989, which came into force in 1991, has moved English and Welsh law in the direction of a general children's code by combining both public law and private law aspects of care of children in one statute. The private law aspects have mainly to do with the allocation of parental responsibilities between private individuals. On the public law

side, it is possible to obtain under English law 'care orders', 'supervision orders', and 'emergency protection orders' in respect of children at risk of significant harm.²⁵⁸

Noteworthy changes pertain to terminology in an attempt to move away from the outdated concept of parents' rights over children: 'Residence orders' replace custody awards, and 'contact orders' replace access awards. The legislation is very well developed, although concerns have been expressed about implementation, especially on the public law side.

Scotland provides an example of a developed system which has recently undergone substantial revision. The Children (Scotland) Act 1995 (in force from 1996) was promulgated in order to align Scottish law with the modern shift from parental rights to children's rights and to harmonise child care law with CRC.

Consideration of the Australian position is determined by the federal nature of the country: the Family Law Reform Act of 1995 (in force from 1996), a commonwealth statute, governs only private law provisions on children, while legislation governing all public law aspects (e.g. child care and protection) fall to the states and territories.²⁵⁹ The discussion below in relation to this country focuses only on the 1975 Family Law Act (as extensively amended in 1995) because other relevant statutory provisions differ amongst the states.

Federal, State and Territory governments allocate significant resources (services, programs and initiatives) to children's issues in accordance with their various jurisdictional responsibilities, such as the family payment (\$6 428 million in 1997 - 98), sole parent pensions and allowances (\$2 176 million in 1997 - 98), the parenting allowance (\$1 647 million in 1997 - 98), family tax payments (\$573 million in 1997 - 98), and the maternity allowance (\$183.7 million in 1997 - 98). Families of children with disabilities and people caring for children whose parents are deceased

258 An interesting concept is that of a 'family assistance order', the idea of which is to provide extra support for an adult caregiver, such as a parent, so that that person will not have to give up a child into alternative care. Under a family assistance order, a social worker will be ordered by the court to work closely with a particular family over a short period of time, focusing on the ability of the care giver/family to care for a particular child. The order can only be made with the consent of the adult care giver/s concerned.

259 Indigenous children, a minority group, are nevertheless over-represented in child care and protection proceedings and the juvenile justice system throughout Australia.

also receive extra financial assistance. The Commonwealth also funds child care and sets and monitors quality assurance standards for day care centres. Access is prioritised, with preference for low income families, indigenous families, etc.

In addition to CRC and CEDAW, Australia has ratified particular international children's rights instruments covering guardianship, foster placement and adoption,²⁶⁰ child abduction,²⁶¹ discrimination in education,²⁶² minimum employment age²⁶³ and the employment of children in night work.²⁶⁴ Australia has not incorporated CRC in its entirety into domestic law, and therefore its provisions are not directly enforceable in law.

The New Zealand Children, Young Persons and their Families Act 24 of 1989 is a composite piece of legislation which covers care and protection of children and young persons, youth justice (children and young people in trouble with the law), and children and young persons placed away from home. It defines the term 'child' as 'a boy or girl under 14 years' and 'young person' as 'a boy or girl of or over the age of 14 years but under 17 years, but does not include a person who is or who has been married'.²⁶⁵ The Act is sensitive to Maori issues,²⁶⁶ making special reference to Maori family and clan structures. The Act also provides for a Commissioner for Children, similar to a children's ombuds. The Act has been widely hailed in New Zealand and throughout the world since implementation.

10.3.2 Objects of the legislation

260 UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, 1986. Negotiations are under way regarding ratification of the Hague Convention on the Protection of Children and Co-operation in respect of Inter-country Adoption.

261 The Hague Convention on the Civil Aspects of International Child Abduction.

262 The UNESCO Convention against Discrimination in Education, 1960.

263 ILO Convention No 138 concerning Minimum Age for Admission to Employment, 1973.

264 ILO Conventions No 79 and No 90 on Night Work of Young Persons (Non-Industrial and Industrial Occupations), 1946 and 1948 respectively.

265 Henceforth, references to 'child' will include both concepts, unless otherwise indicated.

266 See also JA Robinson 'An Overview of Child Protection Measures in New Zealand with Specific Reference to the Family Group Conference' (1996) 7 *SAJHR* 313 and *idem* 'Multi-kulturaliteit en die Familiereg: Enkele Gedagtes oor die Posisie in Nieu-Seeland' (1996) 7 *Stell LR* 210.

The aim of the 1989 UK Act is to move away from the concept of final orders and to aim towards a more flexible situation: for example 'custody and access orders' were dropped and replaced by 'residence and contact orders' because it was felt that the former orders encouraged the parent who got such an order to take the view that he or she had 'won' the case in a final way.²⁶⁷ Now, where circumstances change fresh orders can be obtained to meet the current needs of the child. Also, the idea behind the defined concept of 'parental responsibility' is to move away from the traditional concept of parental rights over children and to convey that care givers have responsibilities rather than rights. Another underlying aim is to avoid the necessity for several sets of court proceedings to run concurrently. For example, at any time where the occupation of the matrimonial home is at issue - for example in divorce or domestic violence proceedings - the court could make an order excluding one adult from the home, or transferring ownership to one adult - but it could also at the same time make a 'residence order' in favour of the parent who remains in the home and a 'contact order' in favour of the other parent.

The Scottish Act replaces the common law as regards notions of guardianship, custody and access, as also preceding child care and protection legislation. Confusion and ambiguity which would otherwise have resulted between age limits set down in statutory and common law as regards who in fact is a 'child' was thereby avoided. The Act not only starts from a foundation of parental responsibilities, but also incorporates definitions of child from the point of view of parental responsibilities. It has been argued that it is not possible to effectively advance the rights of children without starting from a clearly defined foundation of parental responsibilities. A further purpose was to link up with Scottish criminal law (Child Abduction Act 1984) and the Hague Convention on the Civil Aspects of International Child Abduction.

The Australian Family Reform Act of 1995 was enacted, according to Bailey-Harris and Dewar,²⁶⁸ to reflect 'both a growing recognition that Australia's contemporary legal culture should reflect the wider origins of an increasingly diverse society, and a greater readiness to acknowledge the framework of international instruments and Australia's obligations thereunder'. The Act therefore inserted a new declaration of general principles and objectives into that part

267 See further in this regard Chapter 6 above.

268 See Rebecca Bailey-Harris and John Dewar 'Variations on a theme - Child law reform in Australia' (1997) 9 *Child and Family Law Quarterly* 149.

of the 1975 Act which specifically deals with children. Drawing heavily on the 1989 UK statute, the Australian Act also replaces the old concepts of guardianship, custody and access with those of parental responsibility, and parenting orders for residence, contact and specific issues. The stated objective of the new part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

The object of the New Zealand Act is to promote the well-being of children, and their families and family groups by establishing and promoting services and facilities in the community that will advance this and that are, *inter alia*, culturally appropriate, and accessible to children and their families.

10.3.3 Scope of and principles underpinning the legislation

Although the Children Act of 1989 has consolidated much of English child law, certain issues are still covered in other statutes, notably, the Adoption Act of 1976, the Matrimonial Homes Act of 1983, and the Family Law Act 1996. In addition, most procedural rules are contained in specialist procedural directives such as the Family Proceedings Court (Children Act 1989) Rules 1991, the Family Proceedings (Allocation to Judiciary) Order 1991, and the Family Proceedings (Allocation to Judiciary) Directions 1993. The provision of detailed procedural rules specifically geared to different types of child care actions is in contrast to our Child Care Act, which merely requires children's court commissioners to adapt existing magistrate's court rules in regard to procedure at children's court hearings.

Question 99: Should a South African children's code with regulations cover procedural aspects, or should courts continue to rely on aspects of other legislation such as the Magistrates' Court Act?

The 1989 Act requires that the child's welfare shall be a court's paramount consideration in any question with respect to the upbringing of a child or the administration of a child's property.²⁶⁹

²⁶⁹ This principle has not yet been extended to the Adoption Act of 1976.

Prominent also is 'the ascertainable wishes and feelings of the child concerned'... 'considered in the light of his age and understanding'. The notion of 'parental responsibility' has also allowed for the beginning of a harmonisation of public and private law as regards the allocation (or reallocation) of parental or substitute 'parental responsibility', in that the same principles are applicable to both types of proceedings. These principles are contained in a 'check list' and include: the wishes of the child, 'any harm which the child suffered or is at risk of suffering', how capable each of the child's parents or any other relevant person is of meeting the child's needs.²⁷⁰

Other important principles are those of minimum intervention (the so-called 'no-order' principle) and of any delay being likely to prejudice the welfare of the child. There is, however, no explicit reference to children's rights.

With the exception of aspects of adoption, the Children (Scotland) Act 1995 includes that part of Scottish law most nearly analogous to the our Child Care Act. The four parts of the Act deal with the allocation and exercise of certain parental responsibilities by private individuals; the allocation and exercise of certain parental responsibilities by the State or its welfare agencies; aspects of adoption law; and supplementary provisions. There are three overarching fundamental principles which direct the application of all aspects of the Act: the welfare of the child as paramount consideration; the views of the child; and the principle that no order must be made in regard to a child unless the authority making the order is persuaded that to make the order is better for the child than making no order at all. Aside from the three over-arching philosophical principles which always apply, when dealing with the removal of children, local authorities are under a legal duty to 'take such steps to promote, on a regular basis, personal relations and direct contact between the child and any person' who may appear to be appropriate to have contact with the child. State authorities must also always take into account, in any decision made whilst caring for the child, 'the child's religious persuasion, racial origin and cultural and linguistic background'.

Because of the stigma attached to the terminology of children 'in care', the Scottish Act replaces this terminology by the notion of children being 'looked after' or 'accommodated'.

270 The checklist applies to contact and residence orders, specific issue orders, prohibited steps orders and care and care and supervision orders, but not to emergency protection orders.

Parental responsibility require parents 'insofar as is practicable and in the interests of the child' to 'safe-guard and promote the child's health, and welfare' and to provide guidance and direction in a manner appropriate to the child's developmental stage.²⁷¹ The responsibility of providing direction ends when the child is 16, but the other responsibilities last until the child is 18. A parent is also required to 'act as the child's legal representative', in Scotland a synonym for the older term of guardianship. Another section is headed 'Parental Rights', but the rights which it purports to afford parents are not the traditional ones, i.e. based on parental control, but are those needed to fulfil the parental responsibilities, i.e. to regulate the child's residence, direct or guide the child's development and upbringing, maintain personal relations and contact with the child, and to act as the child's legal representative.²⁷²

In terms of a separate section headed 'views of children', parents or others with parental responsibilities are required to weigh the view of the child 'in reaching any major decision' affecting the child. A weakness is the absence of a sanction. There is also a presumption that a child of twelve years or above is of sufficient age and maturity to form a view. A further point which has been catered for is that children must not be pressured into expressing an opinion where they are not comfortable to do so.

The Australian Family Law Act of 1975, as amended, addresses private law issues such as children's status, children's interests upon divorce and separation, child maintenance, family violence and proof of parentage. Child protection, adoption, and child welfare are not covered. But, as pointed out earlier, answering the question of the scope of the Act is determined not just by the content of the federal statute, but also by the fact of concurrent state and territory jurisdiction. Over 230 pieces of federal, State and Territory legislation dealing with issues relevant to children have been identified.²⁷³ The administration of these laws is beset by inconsistencies in policy, duplication of services and gaps in services. In its draft paper *A matter of priority: Children and the legal process*, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission proposed an extended cross-vesting scheme

271 Section 1 of the Act.

272 Much of this terminology derives directly from CRC.

273 Attorney-General's Department *Australia's Report under the Convention on the Rights of the Child* Canberra: Attorney-General's Department 1996, xxiv - xxviii.

to deal with these problems.²⁷⁴ Under this scheme, the Family Court would be empowered to deal with care and protection issues under State or Territory legislation whenever they are relevant to matters already before it. State and Territory children's courts would be empowered reciprocally to deal with relevant family law matters when considering care and protection applications. In this way, all relevant issues could be dealt with in the one forum and in the one set of proceedings. This scheme and other options are further developed in the report *Seen and heard: Priority for children in the legal process*.²⁷⁵

The fundamental principle in Australian law is that all decisions made and actions taken should be in a child's 'best interests' (cf section 43(c)). The 1995 amendments introduce further, more specific principles underlying the general object, namely (except where it is or would be contrary to a child's best interests), the child's right to know and be cared for by both parents regardless of their marital status, the child's right of regular contact with both parents and with other people significant to his or her care, welfare and development, the concept of equal parental responsibility, and the promotion of private ordering in matters concerning the parent/child relationship, which necessarily entails a commitment to parental autonomy.²⁷⁶

Strangely, the 1989 New Zealand Act does not cover adoption, which is dealt with by the New Zealand Adoption Act 1955. This Act is out of step with the spirit of the Children, Young Persons and their Families Act, and it does not contain a clause which makes the best interests of the child paramount.²⁷⁷

The New Zealand Act contains a number of general principles to be applied in the exercise of powers conferred by the Act: the child's family (or family group) should participate in making decisions, and regard should be given to the family's views; wherever possible the relationship between a child and his or her family (or family group) should be maintained and strengthened; consideration must always be given to how a decision will affect a child and the stability of the child's family (or family group); the wishes of the child should be given appropriate weight, with

274 Recommendation 6.1.

275 ALRC 84, para. 15.29 *et seq.*

276 For an interesting comparison with the 1989 English Act, see Bailey-Harris and Dewar *op cit* 152 ff.

277 Mary Iwanek *et al* 'Adoption in the International Year of the Family' in *Rights and Responsibilities* (1994) 202.

due regard for the child's age, maturity and culture; the support of the child and the parents should be sought in relation to the exercise of any powers; decisions affecting a child should, where practicable, be made and implemented within a time frame appropriate to his or her sense of time. The best interests principle is entrenched in the Act as decisive.

In addition, there are also specific detailed principles set out at the beginning of Part II, dealing with care and protection, and at the beginning of Part IV, dealing with youth justice. The former focus on the centrality of the family and family group, and state that assistance should be given to families struggling to cope with their children. After removal, a child should be returned to the family or family group as soon as possible, and be kept in a family-like setting close to the locality of the family. Where return is not possible, children should be placed in a family-like setting. In child placement, preference should *inter alia* be given to the child's Hapu (clan) or Iwi (tribe).

10.3.4 Noteworthy features with reference to the content of the legislation

° **England**

The English legislation appears to have served as a model for child law reform in all parts of the world in the 1990's. Also, there is considerable literature available. It was the first statute to shift the terminology and emphasis in defining the parent / child relationship, and was a pioneering attempt to bridge the public / private law divide in the sphere of child legislation. Thus, many of the innovations, or interesting features, ascribed to other nations' legislation in the discussion below, actually originate in the English statute. Unlike the Australian legislation, though, unmarried fathers do not have automatic parental responsibility but can acquire this either by court order or by agreement with the mother.²⁷⁸

Private law aspects of the Act will usually arise as a result of divorce proceedings, and will be heard in an English county court. Most of the work which in South Africa would be done by a children's court will commence in the family proceedings courts which are staffed by

278 This has been followed in Scotland, despite recommendations of the Scottish Law Commission to the contrary.

magistrates. Points worth noting from a South African perspective are the use of specialised courts for care proceedings and the readiness to move more serious or more difficult matters up to a higher court in the structure. Another relevant factor is the need to consolidate cases with other proceedings that are pending affecting the same child. In other words, if the child's parents are in the process of getting divorced and the child is also subject to a care enquiry, consideration will be given to deciding the allocation of parental responsibilities in one rather than several cases. This is worth considering from a South African point of view where divorce and care matters are fragmented.

As regards the nature of proceedings, the English judicial officers have been encouraged to take a much more inquisitorial role in child care matters in recent years. No part-time judicial officials can be used for **public** law family proceedings (heard by mainly part-time commissioners in South Africa). Also, if the family proceedings court is hearing a public law case under the Children Act of 1989, this will usually be heard by not just one magistrate, but a panel of magistrates. Two distinctive features of proceedings under the 1989 Act are the duty to reduce evidence to written form beforehand and the duty to play 'open cards' with any opposing or other party.

The 1989 Act allows generally for appeals against all types of orders under the Act. In order to prevent too technical an approach, where the order granted is merely an interim care order, it ought not be appealed against unless there are the very strongest grounds available. Of course, in current South African legislation, such interim orders are not possible (although a matter in the children's court may be postponed for 14 days at a time). A 1996 amendment to the 1989 Act²⁷⁹ enables the court to make an ouster order, when making an emergency protection or interim care order, to permit the removal of a suspected child abuser from the home, instead of having to remove the child.

Question 100: Is there a need for interim orders in child care and protection legislation? Does the possibility of postponement have the same effect?

279 The Family Law Act 1996.

Both a guardian *ad litem* and a lawyer will usually be available for a child where this is in his or her interests; the 1989 Act provides almost a presumption in favour of legal representation, requiring the court in public law care matters - care orders, supervision orders and emergency protection orders - to appoint a guardian *ad litem* for the child 'unless it is satisfied that it is not necessary to do so in order to safeguard his interests'. The duties of the guardian *ad litem* are specified, and include attending all hearings; helping to overcome any time delay obstacles; deciding whether a solicitor should represent the child; advising the court on whether any other person might have an interest in becoming a party or making representations and on the degree of understanding of the child for such purposes as consenting to medical or psychiatric assessment; further advising the court of the wishes of the child and of outcome options available to the court.

In regard to removal and placement of children, any decisions made must take into account the wishes of the child and the child's parents/person with parental responsibility, and also the child's religious persuasion, racial origin and cultural and linguistic background. With regard to the aforementioned removal criterion of significant harm, English law adds that not only must the child in question be suffering, or likely to suffer, significant harm, but also 'the harm or likelihood of harm must be attributable to the care given to the child, or likely to be given to him if the order is not made, not being what it would be reasonable to expect a parent to give to him', i.e. the criterion of significant harm is tested against the standard of the reasonable parent, which then renders this criterion a specifically parent focused one.

A care or supervision order invests the local welfare authority with parental responsibility for the child, but removes such responsibility from anyone who received it by virtue of a prior residence, contact or specific issue order. However, other persons having parental responsibility (i.e. parents) will not be divested of it and will 'share' it with the local authority. There is an express presumption that the authority must allow the child to have contact with parents and other connected persons.

° **Scotland**

In contrast to the New Zealand and Ugandan approach, the Scottish Act places the locus of implementation of many aspects upon local welfare authorities. They must: provide a range of services on behalf of children in order to prevent the necessity for removing these children partially or fully into state care; provide for children in need and children affected by a disability (either their own or that of a family member which affects them); provide accommodation for what would in South Africa be referred to as 'street children'; and provide day care for pre-school and certain other children. The wording of these provisions emphasises the need to provide support for children and their families prior to considering the possibility of removal.

The Act also sets up places of short-term (7 and in some cases 14 days) refuge for children at risk of harm, in order to provide an easy place of escape without formal procedures. A requirement is that the child must request the accommodation (either in an institution or in an approved household).

An unusual and very significant feature of Scottish law is the conducting of child care hearings, not by a court or judicial officer, but by means of 'a hearing' conducted by a children's panel. This system had been used with apparent success for many years prior to the promulgation of the 1995 Act. The whole purpose is to avoid formality and to allow for free and informal discussion with the child and his or her family as to how the child's future placement and situation should be resolved.²⁸⁰ The children's panel consists of three members (with a knowledge of or interest in children, appointed by the Secretary of State) and must include both male and female panelists. In order to assist the panel, there is a network of officers known as Children's Reporters, who present information at the children's hearings. One of the important preliminary tasks of the hearings is to decide in every instance whether it is necessary to appoint a person to safeguard the interests of the child in the proceedings. Such person would in effect be a representative or advocate for the child, but is referred to in Scottish terminology as a 'safe-guarder'. The concept of a safe-guarder allows for persons other than lawyers to assist and / or represent a child at a children's hearing.

280 There is, however, a fear in Scotland that the children's panels may be subject to attack as not being 'judicial' enough to satisfy the due process requirements of the European Convention on Human Rights.

It is also possible to transfer criminal cases involving children²⁸¹ to a hearing by the children's panel, the Reporter undertaking the administrative arrangements involved. It is envisaged that the majority of less serious offences committed by children will be addressed by means of a children's panel hearing, rather than a criminal trial. In instances where the matter proceeds to a criminal trial (serious offences, multiple charges, etc.), the children's hearing may nevertheless still have a role to play after conviction as the criminal court may still (and in some instances must) refer the matter for a children's hearing for the purpose of providing advice to the criminal court on how the child is to be sentenced or dealt with.²⁸² There is a sophisticated set of machinery for appeals and further appeals against a panel decision. The child or a relevant person may appeal, provided they do so within a period of three weeks. The appeal will be to the local Sheriff (equivalent to a South African magistrate) and further appeals lie to the principal sheriff or the court of session.²⁸³

Removal criteria are predominantly child-centred, but do include the fact that the child is likely to suffer unnecessarily or be impaired 'due to a lack of parental care', as also commission of an offence by the child,²⁸⁴ the misuse of drugs, alcohol or volatile substances,²⁸⁵ failing to attend school regularly without reasonable excuse, to name a few of interest. Another feature is the possibility of a hearing simply because the child is a member of a household containing a person who has committed an offence against the child or another child who has been a victim of abuse for which that person has been convicted.

One of the problems which often faces child care agencies is that they may well have suspicions of abuse or neglect of a child, but be unable to provide the necessary evidence without a medical examination or other assessment of the child, which would have to be authorised by the person exercising parental responsibility over the child who may well be the perpetrator. Therefore, in Scotland (as in England), a special 'child assessment order' may be obtained by application of a

281 Where the child is aged under sixteen and pleads guilty or is found guilty.

282 This creates a role for children's hearings not envisaged for South African children's courts at this stage.

283 These further appeals are possible only on a point of law or in respect of any irregularity in the conduct of the case; a court of session is usually appealed to only on a particularly difficult or contentious point of law, or a significant matter of principle.

284 Despite transfer provisions in section 254 of the Criminal Procedure of 1977, the commission of an offence by a child is not explicitly a ground for opening a children court inquiry in South Africa.

285 E.g. inhaling glue fumes.

local authority to the sheriff if he or she is satisfied that there is 'reasonable cause to suspect that the child in respect of whom the order is sought is ... so treated (or neglected) that he is suffering, or is likely to suffer, significant harm.' The order (a more judicial approach) will allow for such an assessment to be made and even for the child to be kept at a specified place for as long as is necessary for the assessment to be performed, but an assessment cannot be forcibly carried out upon a child who is of sufficient maturity to understand its nature and refuses to submit to it.

The judicial rather than children's panel approach is also evident where immediate, short-term protection of children who are in imminent danger of harm is sought. Any person may approach the sheriff for 'a child protection order' by providing reasonable grounds to show that a 'a child is being so-treated (or neglected) that he is suffering significant harm or will suffer such harm if he is not removed to or kept in a place of safety'. Child protection orders are subject to very strict time limits, and cease to be of effect if not implemented within 24 hours of having been granted. They are also subject to speedy challenge by any person.

Throughout the 1995 Act time limits are tight and are constantly imposed in order to guard against the well-known danger of children languishing whilst their cases are not promptly attended to. Unlike the South African situation, where the welfare authorities under the Minister may change or disregard a children's court order, in Scotland the authorities are expressly required to 'give effect to the decision reached' and, in the case of children in residential care, 'from time to time to investigate whether, while the child is so resident, any conditions imposed by the supervision requirement (order issued at the hearing) are being fulfilled'. The decision reached at the hearing in regard to residential care, may be changed by the local authority only in a 'case of urgent necessity, where it is in the interests of ... the child ... or other children in that establishment or accommodation'. If this is done, it is peremptory that the case must be reviewed by a children's panel within seven days.

° **Australia**

The new Australian legislation contains no direct equivalent of the 'no order' principle in the English statute; the welfare 'checklist'²⁸⁶ contained in section 68F merely directs the court to consider 'whether it would be preferable to make the order that will be least likely to lead to the institution of further proceedings'.²⁸⁷ However, the Act contains counterbalancing provisions designed to encourage parents to reach argument about their children's futures rather than resorting to court orders: namely the possibility of 'parenting plans' being registered,²⁸⁸ which can deal with residence, contact, maintenance or any other aspect of parental responsibility.

Only a small proportion of children in child removal cases become subjects of care and protection orders,²⁸⁹ and most of these are not institutionalised. On 30 June 1996 there were 13 241 children under care and protection orders, with around 10 500 children in supported alternative care placements, such as foster care or residential care. Children can also be placed in alternative care voluntarily and most children are placed in a home-based setting.²⁹⁰

The Australian Family Court, established in 1976, has a high international profile. Being a federal court with power to make decisions about matters relating to marriage, divorce, spousal maintenance and parental responsibility for children²⁹¹ it has modified the traditional adversarial model in matters involving children, and has developed alternative dispute resolution processes such as counselling and mediation. Although there has been recognition recently of the need for the wishes of children to be heard,²⁹² the focus of family law litigation remains on the parental contest and often does not serve the needs or interests of children or allow their effective

286 An innovation in the checklist is the reference to any family violence involving the child's family, irrespective of whether the child witnessed it, as a relevant factor in making decisions relating to children.

287 See Rebecca Bailey-Harris 'Family Law Reform - Changes Down Under' (1996) *Fam Law* 214.

288 After which such a plan operates as a court order.

289 In 1995 - 96, of the more than 25 000 children subjects of substantiated abuse and neglect allegations in Australia, 4 123 were placed on new care and protection orders: A Broadbent and R Bentley *Child Abuse and Neglect Australia 1995 - 96* (Child Welfare Series 17) Canberra: Australian Institute of Health and Welfare (1997) 18.

290 ALRC 84, para 2. 66 and 2. 67.

291 For the history of the Family Court, see L Star *Counsel of Perfection: The Family Court of Australia* Melbourne: Oxford University Press 1996.

292 Particularly with the introduction of the Family Law Reform Act, 1995.

participation. Unfortunately, these observations also apply to State and Territory generalist magistrates' courts empowered to deal with family law matters.²⁹³

The *Family Law Act, 1975* allows children to commence proceedings in the Family Court²⁹⁴ and allows the court to appoint a 'next friend' where it is satisfied the child does not understand the nature and possible consequences of the proceedings or is not capable of conducting the proceedings directly. In practice, children rarely litigate in family law matters either directly or by a next friend.²⁹⁵ More commonly, children are separately represented by a child's representative,²⁹⁶ if they are represented at all. Representatives are required to advocate in accordance with **their** assessment of the child's best interest and do not act upon the child's instructions or advocate the child's wishes.²⁹⁷ In the States and Territories differing models of representation, usually by legal practitioners acting either in terms of the direct instructions model or the abovementioned best interests model, apply in care and protection systems.

The federal Child Care Act, 1972, although rather limited in scope, is of special interest, providing for assistance by the Commonwealth in respect of child care centres for those under school age. The Act prescribes the conditions for eligibility as a child care centre, provides guidelines for eligible child care centres, and deals with the financial aspects related to the establishment and running of child care centres. Most States and Territories have similar legislation.

Closely related is the Childcare Rebate Act, 1993 which establishes a childcare rebate and how it can be claimed. The rebate is available on a wide definition of family, being a 'group of people that is made up of (a) a person and any dependent children of the person; and (b) the partner (if any) of the person and any dependent children of the partner'. 'Partner' is defined broadly with a

293 ALRC 84, para 16.3.

294 Section 69C.

295 ALRC 84, para 13.22. In the United Kingdom, the Family Proceedings Rules allow a child to be independently represented if the court is satisfied that the child is mature enough to provide instructions.

296 The Family Court can appoint a child's representative wherever it appears to the court that the child ought to be separately represented.

297 See ALRC 84, para 13.33 *ff* for a detailed discussion of the role and function of best interest representatives in the Australian Family Court.

result that the term 'family' assumes a very wide meaning. The definition of parent does not limit parenthood to biological parents: it is simply the person who is legally responsible for the day-to-day care of, and actually has, the care of the child.

° **New Zealand**

New Zealand has made a unique contribution to the development of child care and protection systems by introducing family group conferencing, which gives the child and family primary responsibility for making decisions after being given appropriate information and advice by the Care and Protection co-ordinator. By also giving practical meaning to participation of the child and of the community in decision making, this forum is compatible with a Maori model of extended family decision making. Since the New Zealand legislation has been enacted, experiments with family group conferencing within the care and protection system have occurred in various countries in the world, including Australia, Canada, USA and England.²⁹⁸

Judicial authority under the Act is vested in the Family Court,²⁹⁹ which, before making orders in respect of services, support, custody, and guardianship, must consider a plan for the child. This plan must specify the objectives sought to be achieved for the child, contain details of the assistance to be provided for him or her, and of the responsibilities of the child, parents and guardians, the personal objectives of the child and family members, and other relevant matters.

Common to the systems of both care and protection and youth justice³⁰⁰ is the issue of residential care. Time limits are placed on detention in secure care - a child may not be held for longer than 72 hours continuously or 3 consecutive days before being brought before the court which may authorise continued detention for at most 14 days. Thereafter the Director General may apply to the Youth Court, Family Court or District Court to apply for approval for continued detention. The decision of the court is reviewable on application by the child or parent, guardian or legal representative.

298 Gabrielle Maxwell *et al Researching Care and Protection*, Office for the Commissioner for Children and Social Policy Agency, Ropu Here Kaupapa (1995) 1.

299 See Melanie Roberts 'New Zealand's Family Court- Reflections for the Family Law Act of England and Wales' (1997) 11 *Int J of Law, Policy and the Family* 246.

300 Which are run by different directorates within the Department of Social Welfare.

The Act appoints a Commissioner for Children, whose functions include investigating any decision or recommendation under the Act, monitoring the policies and practices of the Social Welfare Department, increasing public awareness of matters relating to the welfare of children and advising the Minister on any matter relating to the administration of this Act.

There is no mandatory reporting of abuse, ill-treatment or neglect, but reporting in good faith is protected from legal action. The Act provides for a care and protection resource panel which must be consulted upon receipt of a report of abuse, ill-treatment or neglect and which provides a multi-disciplinary team approach to these issues.³⁰¹

301 An apparent lack of definition as to the roles and responsibilities of the panel hampered its work early on: see the Report of the Ministerial Review Team to the Minister of Social Welfare, Review of the Children, Young Persons and Their Families Act, Wellington (1992) 51.

11. THE WAY FORWARD

11.1 Scope of legislation

The central theme that spans the preceding 10 chapters is the diversity of legal arrangements currently affecting children in South Africa, as well as the plurality of statutes involved in implementing children's rights, providing access to services and fulfilling children's needs. Thus, in addition to the more specific questions that have arisen during the course of individual chapters, a central concern of the committee is to identify the scope and reach of proposed new children's legislation. The committee sees its brief, not simply as redrafting the present Child Care Act, but to consider the question: **What should child protection legislation in fact encompass?** It seems that the entire vision and thrust of child legislation warrants consideration in the new constitutional and human rights era. As the first step, therefore, consensus as to the ideal scope of proposed legislation has to be widely sought.

The committee has already stated (in Chapter 1) its intention to consult widely with all stakeholders and to promote a multi-disciplinary and inter-sectoral approach. We also encourage active participation in all stages of the investigation and would therefore welcome submissions, suggestions, and comments on this issue paper and other relevant issues. Please address these to the Commission at the address appearing in the Introduction.

In the interim, however, the committee has identified the need for two further issue papers in 1998, both of which arise out of already identified defects in the present legal framework. One of these will examine children's courts and removal proceedings, presently dealt with in the Child Care Act but also recently the subject of substantial legislative change.³⁰² The other issue paper will investigate the broad question of children's status, including adoption, the relationship between parent and child, the position of extra-marital children and related matters. The committee is of the opinion that these matters fall necessarily within the assigned brief, and it therefore proposes to prepare issue papers on these areas as soon as possible. However, as

302 See the Child Care Amendment Act 96 of 1996, in operation from 1 April 1998, which shifts the criteria for removal of children from proof that parents are unfit or unable to care for children, to proof that the child is in need of care; the legislation further provides various grounds which may indicate that a child is in need of care.

regards the development of detailed proposals with respect to the many other issues which could conceivably form part of comprehensive legislation as discussed in the previous chapters, the committee awaits the guidance of the public at large, stakeholders and those who participate in the consultative process following the publication and dissemination of this issue paper.

11.2 **Implementation and State support for a new legal system for children**

The committee is aware of the fact that two further factors may have a significant bearing on the outcome of the present investigation. The first is the inter-sectoral nature of implementation of children's laws, which is referred to in the situational analysis in Chapter 4, and which arises repeatedly in many of the remaining chapters too. The fact that national and provincial ministries, local government authorities, private and subsidized welfare organisations, education providers (both formal and informal), health, development and other organisations all play a role in delivering services to children and attending to their growth, protection and development, may raise some difficulties in defining the scope of **workable** children's legislation. Fears have been expressed that if legislation were to encompass too broad a reach, its effectiveness might be diminished due to the practical difficulties of co-ordinating implementation through a range of Departments and role players. A contrary view, though, is to aim for the broadest possible framework, as this is arguably in children's best interests, and to provide adequate legislative provision for multi-sectoral implementation. The committee desires particular consideration of this issue in response to the central theme of this issue paper, i.e. what the scope of proposed child legislation should be?

Second, participants at the briefing sessions held by the committee on 5 and 6 March were at pains to point out that, unless sufficient resources (both human resources and financial resources) are allocated to underpin a new child law, particularly as regards children in especially difficult circumstances, the legislation will not in and of itself improve children's lives. It has been suggested in NGO circles that government spending on children has in fact decreased in real terms over the past four years, with seriously detrimental effects for poor children and those in the most marginal circumstances. The committee is therefore alert to the need for a commitment from government to allocate sufficient resources (within available means) to underpin the proposed children's statute. The children's court, as an obvious example, is currently the central

judicial safety net for the protection of children in need of care and is in urgent need of resources to enable it to fulfil its potential: without a commitment to the injection of skills, physical equipment, infrastructure and the like, it becomes very difficult to motivate that legislation should encompass provisions which point to an increased role for this forum.

11.3 Integration of work of other project committees of the S A Law Commission

Reference has been made throughout the issue paper to the fact that there are, at present, at least three investigations of the South African law commission affecting children's issues and law reform.³⁰³ The three project committees are in regular contact, and, in addition, there are members of this committee who serve on the juvenile justice project committee. However, whilst this committee is now producing the first of at least three issue papers, the other two project committees have already consulted widely on their issue papers, and are shortly to produce discussion papers with draft legislation. There is, however, a broad understanding between the three committees that the legislation developed by the project committee on juvenile justice, and that developed in regard to sexual offences against children, should proceed from the same framework and principles (the Constitution, CRC, IMC policy, etc) as those identified as being relevant to this investigation. It is also clear to all three committees that the terminology used in, and the style of any new legislation, as well as the conceptualisation of the role of children, parents, families and state should 'match' at the conclusion of the three investigations. The ultimate aim may be to draft a series of enactments that, put together, form chapters in a comprehensive children's statute. The desirability and feasibility of following this route is a matter on which the committee desires specific input and comment.

11.4 Request for suggestions concerning implementation and monitoring mechanisms for new child legislation

303 The other two relate to juvenile justice and to sexual offences against children. There are also other Law Commission investigations which have a bearing on children, such as the Review of the Maintenance System (Project 100), Domestic Violence (Project 100), the Harmonisation of the Common Law and the Indigenous Law (Project 90), Islamic Marriages and Related Matters (Project 59), Aspects of the Law relating to AIDS (Project 85), the Review of the Marriage Act (Project 110), and Alternative Dispute Resolution (Project 94). In addition, as mentioned in Chapter 4 above, there is a pilot project on the establishment of family courts for South Africa. Discussion between the Family Court Task team and the leaders of the various project committees (including this committee, the Juvenile Justice and Sexual Offences committee) have indicated the need for close liaison between the

South Africa does not, for historical reasons, have a Ministry dedicated to children's affairs, nor is there a commission for children, a children's ombud or similar body. The NPA steering committee possibly comes the closest to a monitoring body to oversee the implementation of the rights of children in South Africa,³⁰⁴ whilst the Human Rights Commission has also set up a committee on children's rights. The Office of the Deputy President also has staff dedicated to children's rights. In Chapter 10, comparative examples are given where other countries have established bodies or structures to oversee the implementation of legislation pertaining to children, such as the New Zealand Commissioner for Children, and the Ugandan Secretary for Children's Affairs.

At present in South Africa, limited examples of what could be termed 'monitoring mechanisms' are set out in specific enactments, usually with reference to single issues affecting children: so, for example, inspections of children's residential facilities are covered in section 31 of the present Child Care Act. Another recent development pertains to the establishment of the office of Commissioner for Children in the Western Province Constitution.³⁰⁵ The Commissioner's duties will include 'protecting and promoting the interests of children in the Western Cape, in particular as regards-

- (a) health services
- (b) education
- (c) welfare services
- (d) recreation and amenities; and
- (e) sport'.³⁰⁶

The powers and duties of the Commissioner are spelt out in section 79, and include monitoring, investigating, researching, educating, lobbying, advising, and reporting on matters pertaining to children within the sphere of provincial competency.³⁰⁷

Task team and the existing Law Commission project committees, especially this committee.

304 See Chapter 5.

305 The Constitution of the Western Cape Act 1 of 1988.

306 See section 78.

307 A similar proposal is contained in a draft bill currently before the KwaZulu/Natal legislature.

Bearing in the mind the inter-sectoral nature of much child legislation, as well as the different levels of government responsible for its implementation (national, provincial, and local), the committee is concerned to ensure that the development of future legislation not be seen as the end-goal of this endeavour. Our vision stretches beyond the formal promulgation of new legislation to ensuring that such legislation is effectively and adequately implemented. To this end, it is suggested that proper mechanisms for future control of the implementation of its principles and provisions be put in place in the principle legislation itself. For example, the warning signals that the 1983 Child Care Act (in operation from 1987) was not having the expected consequences in practice were evident as early as 1990, when the Department of Welfare and Population Development initially took steps to draw together a committee to revisit the Act. The Child Care Amendment Act 86 of 1991 addressed some (but by no means all) of the concerns which had been raised, while further (limited) amending legislation was passed in 1996.³⁰⁸ As is evident from Chapter 7 above, many of the identified deficiencies in the formulation and operation of the Act remain. As delays in this regard are harmful to children, the committee would like to see the inclusion of possible structures to underpin the application of the envisaged legislation, and seeks detailed proposals from the public and stakeholders in this regard. In particular, attention is directed to questions such as how such a body/ structure would interface with line function departments, whether it should be national, provincial or local or all of these, and what the nature and ambit of functions should be.

11.5 Jurisdiction in matters affecting children and the role of the judiciary

Throughout the issue paper, references have been made to the plurality of courts dealing with children's issues, which include divorce courts, criminal courts (e.g. where sexual offences against children are prosecuted), the proposed family court, and the children's court (a civil court, the character of which has been described as unique). The children's court, in addition, provides for a special blend of justice and welfare approaches, although prior reference has been made to the possible need to provide for further 'due process' provisions in legislation, such as the right to appeal against the finding of a children's court in care proceedings. The position of the High Court as upper guardian of minors has also been mentioned.

In considering the way forward, important events may influence the course of the investigation in regard to the future role of the above mentioned structures, bringing about clarity which is at present lacking because, amongst other things, the proposed family court and its possible scope of jurisdiction is still under discussion. The committee is anxious that the interplay between the justice and welfare departments in relation to children in the judicial process, as well as the future role of the family court, children's court, juvenile court and so forth, be considered by stakeholders in their responses to the issues raised in this issue paper.

11.6 Possible constraints of the envisaged legislation

Without detracting in any way from the potential significance and likely benefits to children of a new legislative framework in keeping with constitutional and human rights principles, the reservation has been expressed that (independent of the difficulties associated with the ensuring the commitment of the resources required to underpin an effective child care and protection system), there are some aspects which legislation alone cannot achieve. For example, it cannot alone produce well-trained, committed and motivated personnel who will bear responsibility for implementation of core provisions of the legislation, nor can it singlehandedly change social, religious and cultural attitudes towards children. Social and economic upliftment, too, are ultimately developments which occur outside of the usual domain of legislative drafters, although much **can** be done in a legislative framework to ensure redress, equity, and support for children in the most marginal situations. It is with this realistic appraisal of the ultimate benefits of legislation to the children of South Africa, that the committee's vision (spelt out in Chapter 2) nevertheless seeks to proceed to develop a model for legislation that empowers children and families, yet provides the best possible protection for all children, and particularly those in especially difficult circumstances.