

**SUBMISSION TO THE DEPARTMENT OF
SOCIAL DEVELOPMENT ON THE
CHILDREN'S BILL
(AS DATED 12 AUGUST 2003)**

**SUBMITTED BY THE CHILDREN'S RIGHTS PROJECT AT
THE COMMUNITY LAW CENTRE, UNIVERSITY OF THE
WESTERN CAPE**

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INTRODUCTION

This submission relates to specific sections of the Children's Bill (section numbers refer to the 12 August 2003 version of the Bill). The submission is divided into four sections with specific submissions on the following provisions in the Bill:

1. Children's Courts

Sections 45 and 46 (Matters the Children's Courts can adjudicate on and orders that can be made)

Section 48(e) (Costs)

Section 49 and 71 (Lay forum hearings)

Section 50 (Investigations)

Section 55 (Legal representation of children)

Evidential matters

Training of magistrates and clerks of courts

2. Corporal punishment

Section 139

3. Inter-country adoptions

Non-Covention country adoptions

Public policy

Termination of legal relationship

Prior approval

4. Parental responsibilities and rights

Section 21

Section 23

Section 24

Section 26

5. Local government

Section 88 (Partial care)

Section 102 (Early Childhood Development)

Section 147 (Prevention and Early intervention Services)

Section 225 (Shelters and Drop-in Centres)

BACKGROUND OF ORGANISATION

The Children's Rights Project was established in 1990. It is based at the Community Law Centre, a human rights research institute attached to the Faculty of Law, University of the Western Cape. Other programmes at the Centre focus on socio-economic rights, gender issues and women's rights, and local government and democracy. The Children's Rights Project augments its capacity and improves the impact of its research by linking with other projects at the Centre to concentrate expertise in areas of mutual interest. The Children's Rights Project has in the decade of its existence played an important and influential role in securing the legal development of children's rights in South Africa in accordance with the UN Convention on the Rights of the Child (CRC). The Project contributed to constitutional drafting of a children's rights clause, to law reform specific to children through involvement with two projects of the SA Law Commission, it has assisted Parliament with drafting legislation to protect children in especially difficult circumstances, and assisted in many other respects to further the implementation of the rights contained in CRC, such as through the production of publications, through evaluations of research reports and by advocacy.

The research function of all of the Centre's projects seeks to ensure that advocacy, lobbying, drafting and interpretation of the implications of law are based on a thorough understanding of international, constitutional and domestic law requirements, on prevailing socio- economic conditions, and the real position of children and vulnerable people living in South Africa.

1. CHILDREN'S COURTS

Matters the Children's Courts can adjudicate on and orders that can be made - sections 45 and 46

It is argued that the increased powers of the children's courts are a priority and must be protected and preserved at all costs. The present jurisdiction over matters is extremely limited and does not afford the majority of South African children who require judicial interventions access thereto. This difficulty stems from the fact that the High Court, which has the widest jurisdiction over matters pertaining to children, is practically inaccessible. Not only are High Court proceedings very expensive but their location, divided along provincial lines, makes bringing matters before them very problematic, particularly for children in rural areas across the vast geographical space that South Africa occupies.

Although the Legal Aid Board theoretically could assist children financially in access the superior courts, the fact of the matter is that children mostly require assistance when their parents, guardians or care-givers are the cause of the issue necessary of determination. In these instances the persons who would ordinarily be the vehicle through which the child's matter is brought to the attention of the courts or application for legal aid is made, are the very reason why the child needs assistance and do not act on behalf of the child in accessing legal representation or access to court. The consequent result is that children are disempowered in accessing judicial determinations.

The children's courts, on the other hand, are perfectly situated to provide such access as they are situated in every magisterial district. In addition, the costs involved are much less than those occasioned by the superior courts. The wide range of powers that the Children's Bill provides for, will finally allow children an accessible forum before which far-reaching issues can be determined.

It is disappointing, however, that the provisions dealing with the power to decide on parental rights and responsibilities, guardianship, age of majority, contractual and legal capacity of the child, parent substitutes and the removal, departure and

abduction of a child from the Republic have been removed from the present Bill. Many of these provisions will provide increased access to justice for children all around South Africa and our present children's courts are or can be equipped to deal with these issues. In this regard training of staff at children's courts is important and this will be dealt with later in the submission.

It should be noted that the Community Law Centre is presently undertaking a study of the current situation in children's court (which is still ongoing), and the preliminary indications are that various commissioners of child welfare are of the opinion that it would be suitable for them to deal with issues such as custody and access as well as issues relating to the departure or removal of children from the Republic.

It is therefore submitted that the above provisions, as contained in the original South African Law Commission's Draft Bill be reinstated in the present Bill.

Costs - section 48(e)

The power to make a costs order in the Children's Court is a double-edged sword. It can be to the benefit of a child or parent where there has been an unnecessary or *male fide* application to the court. However, we are concerned that once costs order are introduced, these may muddy the waters and detract from the issues at hand, mostly the protection and well-being of children. From a children's perspective, it will be highly unlikely that a child will be able to pay a costs order and if the department persists in retaining this section, definitive guidelines should be included in the regulations to determine when a costs order would be "appropriate".

Lay forum hearings – section 49 and 71

While the intention of this section is laudable, namely to create an alternative and efficient procedure whereby a matter can be finalized without having to resort to formal court processes, It is important for there to be a provision in the section that allows a children's court, when making such an order for a lay forum, to set out conditions that protect the child, for instance to ensure that the child's participation is

ensured, who may attend the forum or that the child's identity and issues relating to the case are not divulged by any participant in the forum.

This can be achieved by the inclusion of a clause that empowers the court to set conditions when a lay forum is convened.

Investigations – Section 50

While this provision is similar to the present provisions in the Child Care Act, it is submitted that children can be highly traumatized when being removed from a parent or care-giver, even where this is necessary. Therefore we are of the opinion that there needs to be a provision in this section setting out that a social worker or police official should be mindful of the child's presence and vulnerability in exercising their power of removal or entry into the premises by force and should exercise their power in such manner that takes the child's state of mind into account.

Legal representation of children – section 55

In the process of drafting the present Bill, there was a proposal made by the South African Law Commission's Project Committee on the Review of the Child Care Act, for the 1996 Amendment Act, which was eventually enacted, providing for the legal representation of children in the children's courts. This proposal not only caters for South Africa's obligations under Article 12 of the CRC and its constitutional obligation under section 28, but also for situations where there exists a conflict of interests between the parent(s) and the child. Section 8A was further amended by section 8A(5), (6) and (7) of the Adoption Matters Amendment Act 56 of 1998 relating to the appointment of legal practitioners and legal aid.

Accordingly section 8A of the Child Care Amendment Act 96 of 1996 and , *inter alia*, states:

- “ (1) A child may have legal representation at any stage of a proceeding under this Act.
- (2) A children’s court shall inform a child who is capable of understanding, at the commencement of any proceeding, that he or she has the right to request legal representation at any stage of the proceeding.
- (3) A children’s court may approve that a parent may appoint a legal practitioner for his or her child for any proceeding under this Act, should the children’s court consider it to be in the best interest of the child.
- (4) A children’s court may, at the commencement of a proceeding or at any stage of the proceeding, order that legal representation be provided for a child at the expense of the State, should the children’s court consider it to be in the best interest of such child.

Although this provision goes a long way to afford the child the right to be heard in children’s court proceedings, it has been said that it does not go far enough¹. The reason being that the Commissioner of Child Welfare is merely given a discretion to decide whether a child should be assisted to acquire legal representation and is not obliged to consider the issue. It is argued that Commissioners should be compelled to consider the issue in light of Constitutional and policy considerations².

A further problem with the section relates to the qualification in sections 8A (3) and (4) requiring legal representation only if it is “ in the best interest of the child”.

It is argued that this qualification is as broad as the constitutional rider of “substantial injustice”. However, the Child Care Regulations, in section 4A(1), provide detailed situations where a child should get legal representation at state expense. These include situations where it is requested by a child who is capable of understanding, where it is recommended by a social worker, where any other party is legally represented, where there is more than one party contesting custody of the child and where the child would substantially benefit from legal representation. Section 4A(2)

¹ Sloth-Nielsen, J and Van Heerden, B. “ Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional Law and International Law developments in South Africa”, *South African Journal of Human Rights*, Vol. 12, Part 2, 1996, p. 251

² Sloth-Nielsen and Van Heerden, *op cit*, p. 251

provides an important test in that it requires the Commissioner to record his or her reasons for not providing legal representation at state expense, which allows that decision to be taken on review. However, it is limited as it only relates to decisions made in relation to section 8A(5) and not the other sub-sections of section 8A of the Act.

The problems encountered by section 8A were obviated by the provisions in the South African Law Commission's draft Bill and these were also evident in the 19 June 2003 version of the Bill. They provided a comprehensive set of provisions allowing for children's representation in forums when children have a right to participate and have a constitutional right to representation and are often not in a position to exercise that right. The provisions gave substantive guidelines to presiding officers to allow for such representation.

It is therefore shocking to note that this section has been reduced to what it states at present. If retained, this section will not allow for the constitutional right that is afforded to children and will result in many children not having adequate representation in proceedings that go to the heart of their rights contained in section 28(1)(b) and (d) of the constitution.

Furthermore, representation of children is a special practice of law and it is necessary that practitioners be sensitive to the issues affecting them as well as the manner in which they present as clients. Accordingly it was important that accreditation on a family law roster was included in the Bill. This has been removed as well.

It is submitted that the provisions of the original SALC draft Bill be reinstated.

Evidential matters

It is submitted that the children's courts, while part of the formal court system, are more informal and are aimed at ensuring a type of welfare justice. The child is at the

center of the proceedings and the court is there to ensure that the child is protected and his or her rights ensured.

There are a number of provisions in the Bill that attest to its sui generis informality and the Bill also in places allows for a more inquisitorial role to be played by the presiding officer.

Therefore to remove the provisions relating to hearsay, similar fact evidence and dispensing with the rules of court, runs contrary to the move to make the court more user friendly. These provisions did aim to ensure that at the end of the day, the true state of affairs could be determined by the court. Obviously, the presiding magistrate still has a discretion to allow such evidence and where it is necessary, such evidence could be very helpful in deciding children's court matters.

We submit these provisions be reinstated as well as provisions relating to referrals of questions of law to the High Court or the Constitutional Court.

Training of magistrates and clerks of courts

The South African Law Commission's draft Bill as well as the draft Bill dated 19 June 2003 both contained provisions relating to the training of magistrates and administrative personnel. In fact the 19 June 2003 version was an improvement on the SALC draft as the latter was somewhat contradictory when it dealt with the training of presiding officers.

It is again surprising and illogical that, when the powers of the courts have been increased and a new piece of legislation is being enacted (not to mention that children's courts themselves should be a specialized forum at any given time), the provisions relating to training have been removed.

The preliminary indications of the children's courts study being undertaken by the Community Law Centre confirm that commissioners of child welfare and clerks of the children's courts prioritise the need for specialized training in the children's courts.

It is therefore submitted that the provisions in the 19 June 2003 Bill relating to the training of magistrates and clerks of the court be reinstated.

2. CORPORAL PUNISHMENT

Introduction

South Africa, by ratifying the United Nations Convention on the Rights of the Child in 1995, committed itself to fulfilling all the obligations under the Convention. One such obligation is to protect children from all forms of physical and mental violence as outlined in Article 19³ and this protection extends corporal punishment and what happens in the family. Similarly, provisions of the South African Constitution also aim to protect children from neglect, maltreatment, abuse and degradation,⁴ provides for the right not to be treated or punished in a cruel, inhuman or degrading way,⁵ and provides that everyone has inherent dignity and the right to have their dignity respected and protected.⁶

One of the ways in which the Bill tries to protect children from violence is by including a particular section relating to corporal punishment. This submission will therefore be limited to the extent to which protection against corporal punishment is provided for in section 139 of the Departments' Draft Bill dated 12 August 2003.

³ Article 19 of the UN CRC provides that "States parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian (s) or any other person who has the care of the child."

⁴ Section 28 (1)(d) of the Constitution Act 108 of 1996

⁵ Section 12(1)(e) of Act 108 of 1996

⁶ Section 10 of Act 108 of 1996

Discussion

To date, South Africa has abolished the imposition of corporal punishment as a sentence by the court⁷ and in schools.⁸ The Constitutional Court has also ruled that corporal punishment of children infringes their rights to dignity and their right to be protected from cruel, inhuman and degrading treatment or punishment.

While there is an international move towards abolishing all forms of corporal punishment of children including that which is imposed in the home or by parents, in South Africa, this practice (imposition of corporal punishment by parents) still remains.⁹ This might be attributed to the fact that parents have a (common law) right to reasonably and moderately chastise their children and this includes the imposition of corporal punishment.

Despite the existence of common law crimes such as assault, assault with the intention of causing grievous bodily harm and attempted murder in South Africa, parents charged with these crimes against their children can raise the defence of reasonable chastisement and avoid being held liable for physically punishing their children. Thus, while parents can be criminally charged for physically punishing their children, they can potentially escape being held responsible for their actions by raising the defence of reasonable chastisement as a ground of justification for their actions. The court will then decide whether it is a valid defence in the circumstances. This situation denies children the equal protection of the law and provides parents with the potential to violate their child's bodily and physical integrity and dignity.

⁷ S v Williams 1995 (3) SA 632 (CC).

⁸ Section 10 of the South African Schools Act of 1996

⁹ To date, 11 countries have abolished all forms of corporal punishment of children including the imposition of corporal punishment in the home or by parents. These countries include Austria, Croatia, Cyprus, Denmark, Finland, Latvia, Norway, Sweden (being the first country to abolish this form of corporal punishment as early as 1979), Germany, Italy and Israel. See "Corporal punishment from an international perspective" Paper delivered at a National Workshop on Corporal Punishment in South Africa by Mali Nilsson, 20-21 February 2002.

It is recognized that the debate on this topic is a deeply personal one as it involves issues of parenting and most parents feel that they have the right to bring up their children as they see fit and this view often stems from very strong religious and moral beliefs and various other arguments in favour of the practice.¹⁰ However, the common law rules permitting reasonable chastisement do not protect children from assault. This is because parents have a discretion as to the nature of the punishment they wish to impose and the courts will not lightly interfere with this discretion unless it is exercised improperly. When a parent charged with assault raises the ground of justification of reasonable chastisement, the onus then shifts to the prosecutor to prove that the punishment was excessive or unjustified.

International Law

The United Nations Committee on the Rights of the Child¹¹ has interpreted article 19 of the Convention to extend to protection of children while in the care of their parents and has emphasized that corporal punishment in the family is incompatible with the provisions of the Convention. It has further expressed concern at laws which, while it protects children against serious physical assaults defined as child abuse, it allows for parents or other caregivers to use physical forms of punishment on children provided it is reasonable and moderate. The Committee has therefore recommended and called for a clear prohibition of all corporal punishment and this included that which is imposed by parents. In addition, it has proposed that legal reforms be coupled with education campaigns in positive discipline to support parents, teachers and others.

¹⁰ Some of these arguments include that children learn from smacking to respect their elders; that physical punishment is a necessary part of their upbringing; "it never did us harm", etc

¹¹ See UNICEF, Implementation Handbook for the Convention on the Rights of the Child (Rachel Hodgkin and Peter Newell) 1998; Also see Committee's response to Spain's (Spain, IRCO, Add.28, para 10 and 18) and the United Kingdom's (UK IRCO Add 34, paras 16 and 31) Initial Report- in UNICEF Handbook.

How do the provisions in the SALC (December 2002) version and Departmental Draft Bill address this issue?

While the South African Law Commission's (SALC) version of the Bill did not go so far as to expressly prohibit corporal punishment by parents in the home, it did try to address the situation of corporal punishment by parents by abolishing the common law defence of reasonable chastisement which is currently available to parents. Section 142 of the SALC version of the Bill read as follows:

"142(1) A person who has control of a child, including a person who has parental responsibilities and rights in respect of a child, must respect to the fullest extent possible the child's right to physical integrity as conferred by section 12(1) (c), (d) and (e) of the Constitution.

(2) The common law defence of reasonable chastisement available to persons referred to in subsection (1) in any court proceedings is hereby abolished.

(3) Any legislation and any rule of common or customary law authorizing corporal punishment of a child by a court, including the court of a traditional leader, is hereby repealed to the extent that it authorizes such punishment.

(4) No person may administer corporal punishment to a child at any school; child and youth care centre, partial care facility or shelter or drop-in centre.

(5) The Department must take all reasonable steps to ensure that –

(a) education and awareness-raising programmes concerning the effect of subsections (1), (2), (3) and (4) are implemented across the country, and

(b) programmes promoting appropriate discipline at home and at school are available across the country."

Section 142 (2) had the effect that when parents are charged with assault against their children, they would no longer be able to rely on the defence of reasonable chastisement. The inclusion of this section would therefore prevent a parent charged with assault from escaping liability for physically punishing their child and would also give children equal protection of the law.

The provision in the Department's draft (12 August 2003) has been changed and now reads as follows:

"139(1) A person who has control of a child, including a person who has parental responsibilities and rights in respect of the child, must respect to the fullest extent possible the child's right to physical integrity as conferred by section 12(1) (c), (d) and (e) of the Constitution.

(2) Any legislation and any rule of common or customary law authorizing corporal punishment of a child by a court, including the court of a traditional leader, is hereby repealed to the extent that it authorizes such punishment.

(3) No person may administer corporal punishment to a child at any child and youth care centre, partial care facility or shelter or drop-in centre.

(4) The Department must take all reasonable steps to ensure that –

- a. education and awareness-raising programmes concerning the effect of subsections (1), (2), (3) and (4) are implemented across the country, and*
- b. programmes promoting appropriate discipline at home and at school are available across the country."*

This provision (section 139) has changed to the extent where the subsection abolishing the common law defence of reasonable chastisement has been deleted completely. This means that parents who administer corporal punishment can still rely on the common law defence of reasonable chastisement and use this as a ground of justification in any court proceedings. In addition, reference to "schools" in

section 142 (4) of the SALC version is deleted in the new section 139(3) in the Department's version.

Submission

The Children's Rights Project submits that the clause abolishing the defence of reasonable chastisement (section 142(2)) be reinserted into the Bill as this had the effect of prohibiting corporal punishment by parents. The reinsertion would prevent parents who are charged with assaulting their children from escaping liability for physically punishing their children.

The Children's Rights Project also submits that this provision go further by including an explicit ban on all forms of corporal punishment including that which is imposed by parents. This will be compatible with the provisions of the CRC which South Africa has ratified. In addition, the prohibition should be accompanied with a sanction in terms of the existing common law criminal offences such as assault or assault with intention to inflict grievous bodily harm.

We further submit that an explicit prohibition in the Bill will send out a clear message that physical punishment of children should not be allowed and will encourage everyone to respect the physical integrity and dignity of children. Coupled with the proposed education and awareness campaigns and programmes promoting appropriate discipline at home and schools, an explicit prohibition will begin to change the mindsets of parents and caregivers and will encourage persons to use alternative methods of positive discipline thereby creating a non-violent society.

We also submit that an explicit prohibition of corporal punishment will not lead to a duplication of offences since there already exists the common law offence of assault and assault with the intention to inflict grievous bodily harm.

A further submission is for the reinsertion of the word "school" in section 139(3) of the Departmental draft. This will be in compliance with section 10 of the Schools Act

which already provides that no person may administer corporal punishment at schools.

3. INTERCOUNTRY ADOPTION

Introduction

This submission aims to discuss the Chapter in the Children's Bill on Inter-country adoptions and South Africa's accession to the Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption.

When the Constitutional Court in the Fitzpatrick case¹² declared the citizenship requirement with regard to adoption unconstitutional, it opened the door to intercountry adoptions. Although the court in the Fitzpatrick case implied that sufficient controls to intercountry adoption exist, these types of adoptions are unregulated. There are currently no control mechanisms or safeguards in place to guard against abuses.

South Africa's recent accession to the Hague Convention is to be welcomed and is a major step forward to recognizing that intercountry adoptions may be in the best interests of certain children.

Discussion

The Children's Bill allows for a number of possible scenarios in intercountry adoptions. Of concern is the fact that although South Africa has acceded to the Hague Convention on Intercountry adoptions, the adoption of South African children by persons in non-Convention countries as well as the adoption of children in non-Convention countries by South African citizens are, in terms of the provisions of the Children's Bill, now allowed. There are inherently fewer safeguards in this practice

¹² Minister for Welfare and Population Development v Fitzpatrick and others 200 (3) SA 422 (CC).

and there appears to automatically be less protection for these children. Specific measures aimed at protecting these children have not been included in the Children's Bill.

The recognition of intercountry adoptions that are against public policy taking into account the best interest of the child was expressly prohibited in the South African Law Commission Bill.¹³

(1) A children's court may on application by the Central Authority make an order declaring that an adoption to which section 292 applies or a decision made in terms of article 27 of the Hague Convention on Inter-country Adoption, may not be recognised in the Republic if the adoption or decision is manifestly contrary to public policy in the Republic, taking into account the best interests of the relevant child.

This should be placed back into the Children's Bill.

Provision for the termination of the legal relationship between the child and the parents of the child prior to adoption is not found in the present version of the Bill, although it was expressly stated in the SALC Bill¹⁴. Refugee children were protected in this provision in that it allowed for the preservation of family, cultural and national ties¹⁵.

¹³ Section 296.

¹⁴ Section 295 reads: If the laws of a convention country do not provide that the adoption of a child terminates the legal relationship between the child and the persons who, immediately before the adoption, were the child's parents, a children's court may, on application by any of the parties to an adoption in that convention country, make an order terminating the legal relationship between the child and those persons, if –

(a) the child was or is habitually resident in that convention country;
(b) the child was adopted by a person who is habitually resident in the Republic;
(c) an adoption compliance certificate issued in the convention country is in force for the adoption;
(d) the child is allowed to enter the Republic and to reside permanently in the Republic; and
(e) in the case of a refugee child, sufficient provision is made for the child to retain and foster ties with his or her family, tribe, and country of origin.

¹⁵ Section 295(e).

The South African Law Commission's Bill provided for prior approval both before a South African child is sent out of the Republic and where a child is brought into the Republic for purposes of an intercountry adoption¹⁶.

Before a child not habitually resident in the Republic is brought into the Republic for adoption, the prospective adoptive parents must obtain the approval of the Central Authority.

Before a child habitually resident in the Republic is placed for adoption in another country, the prospective adoptive parent or parents must obtain the approval of the Central Authority or a designated child protection organisation accredited in terms of section 278 to perform inter-country adoption services¹⁷.

These provisions need to be placed back into the Children's Bill.

Submission

The Children's Bill currently allows for intercountry adoptions by persons from non-Convention countries in order to protect the children who are subject to such adoptions. It is submitted that this provision should be revisited as it does not provide the necessary safeguards to the children who are subject to these adoptions.

Further, it is submitted that intercountry adoptions that are contrary to public policy and not in the best interest of a child not be recognized in South Africa.

Provision for the termination of the legal relationship between child and the parents should be made with the appropriate measures regarding refugee children.

Prior approval for the removal of South African children to another country as well as the receiving of children into South Africa for the purposes of intercountry adoption

¹⁶ Section 302(1).

¹⁷ Section 303(1).

are sound mechanisms for the prevention of abuse. These provisions should be incorporated into the Children's Bill.

In conclusion it is submitted that the chapter on intercountry adoptions be closely scrutinized and amended in consultation with experts dealing with intercountry adoptions.

4. PARENTAL RESPONSIBILITIES AND RIGHTS

The inclusion of the chapter on parental rights and responsibilities is supported as it takes into account the reality of the diverse forms of families that exist in our society. It provides mechanisms for those who are not biological parents but who provides the day-to-day care of the child to be recognized by court order as the person holding parental rights and responsibilities over the child.

Discussion

In terms of the proposed Children's Bill, there are various ways in which parental responsibilities and rights may be acquired. The mother of a child automatically acquires full parental rights and responsibilities in respect of her child¹⁸. Where the mother of the child is a child and the father does not have full parental rights, the guardian of the mother will have parental responsibilities over the child in respect of those responsibilities that the guardian has over the mother.¹⁹

Biological fathers have full parental responsibilities and rights in respect of the child if he is married to the child's mother or, married to her at the time of the child's conception, birth or any time between the child's conception or birth.²⁰

¹⁸ s19(1).

¹⁹ s19(2).

²⁰ s20.

Unmarried fathers may acquire parental rights under certain circumstances²¹. These include whether he has lived with the child's mother for certain periods²², whether he has cared for the child with the mother's informed consent²³, by an order of court.²⁴ A father of a child who does not have parental responsibilities and rights towards a child may also enter into an agreement with the mother regarding parental responsibilities and rights.²⁵

Section 21 relates to the manner in which unmarried fathers may acquire parental responsibilities and rights and one provision in particular raises some concerns. Section 21(1) reads that an unmarried father may acquire parental responsibilities and rights where he has²⁶:

At any time after the child's birth he has lived with the child's mother –
(ii) for periods *which together* amount to no less than 12 months

This provision is vague and in no way takes into consideration the time of absence between these periods. For instance, the father may live with the child's mother for one or two months at a time over a period of 5 years. This section could be subject to abuse.

It is submitted that a mechanism for evaluating the situation between gaps must be inserted. This should be put in place to protect both parents. Factors that should be taken into account is the reasons for the periods that he has been absent such as whether he is a migrant worker, has been in prison, etc and be given due consideration. This should be done on a case-by-case analysis.

²¹ s21.

²² S 21 (a) if at any time after the child's birth he has lived with the child's mother –

(i) for a period of no less than 12 months; or

(ii) for periods which together amount to no less than 12 months

²³ s21.

²⁴ s 23.

²⁵ s 22.

²⁶ Section 21(a)(ii).

It is submitted that guidelines be put in place to regulate situations where unmarried fathers claim parental responsibilities and rights in terms of section 21(a)(ii).

We welcome the inclusion of section 26, relating to parent-substitutes especially in the light of many children being orphaned through HIV/Aids. This will allow for orphaned child's needs to be met immediately by a parent-substitute in the event of the parent's death.

The assignment of parental responsibilities and rights to any person having an interest in the care, well-being or development of a child by an order of court is also supported. This provision takes cognizance of the fact that other persons besides the biological parents of a child may, in reality, already bear all the responsibilities in respect of a child's care.

The provision relating to the viewing of certain applications as intercountry adoptions protects against the circumventing of the safeguards in the provisions relating to intercountry adoptions as is to be welcomed.

5. LOCAL GOVERNMENT

(This is a joint submission by the Children's Rights Project and Local Government Project of the Community Law Centre)

The South African Law Reform Commission's Children's Bill saw a particular role for local government within the Bill. The Community Law Centre respectfully submits that the manner in which functions are assigned in the current version of the Children's Bill is more appropriate and in line with both the Constitution and the legislation governing municipalities.

Municipalities will receive greater protection against unfunded mandates in terms of Municipal Systems Amendment Bill (LG:MSAB19) that was approved earlier this month by the Portfolio Committee on Local Government. The Bill aims to ensure that

assignment of functions and powers are done only after proper consideration of the financial implications on municipalities.

The Amendment Bill places an obligation on a Minister or MEC initiating the assignment of a function or power to the municipality to take appropriate steps to ensure that sufficient funding and capacity building initiatives are available for the performance of the function under the following circumstances. These include where the assignment of a function imposes a duty on the municipality that falls outside local government's competencies or functional area. Also, where the assignment is not incidental to its functions and if the performance of that function has financial implications for the municipality. This is similar to the protection currently in the Systems Act

Submission

Functions have been assigned to municipalities in terms of the following sections of the Children's Bill:

- Section 88: Partial care
- Section 102 – Early Childhood Development
- Section 147 – Prevention and Early intervention Services
- Section 225 – Shelters and Drop-in Centres

The Community Law Centre (Children's Rights Project and Local Government Project) supports the manner in which the Children's Bill assigns functions to municipalities. These sections should however be read in light of the Amendment Bill to the Municipal Systems Act.