SOUTH AFRICAN SOCIETY FOR PREVENTION OF CHILD ABUSE AND NEGLECT

CHILDREN'S BILL: SUBMISSION ON CHILD PROTECTION, INCORPORATING PREVENTION AND EARLY INTERVENTION AND CHILDREN IN ESPECIALLY DIFFICULT CIRCUMSTANCES

THIS SUBMISSION IS ENDORSED BY THE *JOHANNESBURG CHILD WELFARE SOCIETY*, *RAPCAN, CHILDREN FIRST* AND THE *NETWORK AGAINST CHILD LABOUR*

1. INTRODUCTION

The extent and severity of the problems of child abuse, neglect and exploitation in South Africa have long been cause for deep public and official concern. In the year 2000 the SA Police Service dealt with 70 636 cases of crime against children, representing probably only a small minority of actual incidents of abuse. The SA Law Reform Commission (SALRC),[1] in the draft Children's Bill which it handed to the Department of Social Development in January 2003, incorporated a far-reaching set of measures to prevent child maltreatment and to address such maltreatment when it did occur. These measures were significantly weakened in the redraft of the Bill which appeared in June 2003. This weakening was greatly compounded in a subsequent draft which was released for public comment in August 2003. The improvements which remain are now piecemeal and are unlikely to take us far in confronting the pervasive and spiralling problem of child maltreatment in our country.

2. BROAD APPROACH ADOPTED BY THE SA LAW REFORM COMMISSION

In its Discussion Paper 103 on the Review of the Child Care Act, the SALRC noted that the right of children to protection from abuse, neglect and exploitation was assured in Section 29(1)(d) to (g) of the Constitution, and numerous international instruments to which South Africa is a party. The Commission recognised child maltreatment as a multifaceted problem in which multiple causative factors were apparent, and accordingly sought to include in the draft Children's Bill a range of measures which would address this phenomenon from different angles and at different levels. The approach which the Commission is understood by the organisations making this submission to have taken, based on a close reading of the Discussion Paper, is examined in some depth in this paper, as it is believed that the extensive problems with the reworked Bill can best be understood in the light of such an examination.

2.1 A multi-level, multi-sectoral approach

The draft Bill prepared by the Commission made provision for:

- ◊ a level of primary preventive and promotive measures, addressed to the broad population of children, with the aim of promoting their wellbeing and reducing their vulnerability to maltreatment;
- ◊ where children become vulnerable in spite of these measures, a second level of early intervention mechanisms aimed at supporting them and their families and preventing the need for statutory interventions; and finally
- ◊ a substantially improved system of formal protective services for those children who, despite action taken at the above levels, are actively maltreated.

[1] Then known as the SA Law Commission.

The draft Bill further envisaged an *intersectoral* approach, involving collaboration between all government structures with core responsibilities towards children, along with civil society, at all three of these levels.

2.2 A balanced approach

The draft Bill reflected an effort to balance a number of elements in its overall approach to child maltreatment. The Commission in its Discussion Paper 103 on the Review of the Child Care Act grappled in some depth with this difficult task.[2] It was recognised, on the one hand, that the formal child protection system, providing for intrusion by the state or its agents into the lives of individual children and families, and, where appropriate, for placement of such children in alternative care, was urgently in need of extensive improvement. This view was adopted because of the very large number of children in South Africa requiring this type of approach, the severity of the forms of abuse involved, and the widespread problem of secondary traumatisation of children by this system because of its fragmented, under-resourced and ill-coordinated state. The Commission took the view that the formal child protection system must be equipped to operate effectively and efficiently and be designed to provide effective protection and healing to children requiring this type of service. At the same time, this component should not be out of proportion with other forms of child and family service provision, as has tended to happen in some countries, with problematic results. The formal child protection system was seen as needing to be focussed on children in the most pressing need of such interventions, and the understanding was that the resources which would need to be set aside for this type of intervention should not be dissipated by being directed to children who would be more appropriately served on the other two levels, through promotive or preventive and early intervention services.[3] It was further recognised that, while criminal legislation focussing on the identification, prosecution and sentencing of offenders was a crucial component of any nation's approach to child abuse, such activities had to be balanced by measures to support and heal children and families, and to rehabilitate those offenders for whom such rehabilitation was possible. The Commission sought to build such measures into the draft Bill.

2.3 Attention to the needs of children in especially difficult circumstances

The Commission also recognised that certain children were not only subject to episodes of abuse, neglect and exploitation, but lived in conditions which created multiple daily violations of their basic human rights. Categories listed in the draft Bill include children who:

- ◊ are affected by malnutrition,
- ◊ are affected by HIV and AIDS,
- ◊ have disabilities and chronic illnesses,
- ◊ are subject to exploitative labour practices,
- ◊ are living or working on the streets,
- ◊ live in child-headed households, or
- ◊ are subject to commercial sexual exploitation.

Such children are eligible for formal protective services, and the Commission recognised that the formal protective system, including the courts, should be able to respond to them in appropriate ways in specific instances. But their plight was seen as being rooted in socio-economic conditions and structural factors which could not be successfully addressed on the necessary scale by individualised protective interventions.

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[2] Discussion Paper 103, chapters 9 and 10, 294-452.
[3] Ibid, 10.2.9.3; 10.2.11.

In all of the above categories, common factors affecting the children were considered to be (a) poverty, and (b) marginalisation from the mainstream of the community. This marginalisation was characterised *inter alia* by a lack of access to essential services such as health care and education, which in turn deepened the cycle of poverty The Commission therefore designed a range of measures in which the aims were:

- ◊ to improve the ability of all children to actualise the rights afforded to them in broad terms in the SA Constitution and the applicable international instruments, by clarifying and interpreting these rights;
- ◊ to prevent absolute poverty among children and thereby prevent them from falling into especially difficult circumstances;
- ◊ to prevent vulnerable children from being pushed to the margins of society by ensuring their continued access to essential services, especially health care and education;
- ◊ To promote early preventive intervention in the lives of these groups of children on a mass basis by creating monitoring and support roles for local government, traditional authorities and the school system.

In addition, a range of specific measures to address particular problems of each of these groups was provided for in chapter 26 of the draft Bill. A group which logically should have been addressed in this chapter were displaced foreign children. Some protection was provided for them in chapter 4 on the rights of children, by including measures to prevent discrimination against them and ensure their access to basic services.

3. SOME SPECIFIC FEATURES OF THE SALRC APPROACH TO FORMAL CHILD PROTECTIVE SERVICES

The formal child protection system is responsible for legally sanctioned interventions which are carried out on behalf of specific children who are alleged or confirmed to be in need of care and protection. They often involve an overriding by the state, or organisations delegated by the state, of the autonomy of caregivers and of the children themselves. While the families in question will sometimes themselves request the relevant services, and while those intervening must try to achieve some degree of mutuality of objectives and a cooperative relationship with them, the fact is that protective services are frequently imposed on people who do not want them. They are potentially intrusive measures which cross the normal boundaries of family privacy. Many of the children caught up in such processes frequently become, for longer or shorter periods, wards of the state. Such measures have potential to harm as well as to protect, and they often have unpredicted outcomes. It is therefore of great importance that they are delivered competently, with the necessary level of intensity, and with the necessary follow-through at every stage of the child's encounter with the system. Appropriate constraints have to be in place, both to ensure that protective actions are properly carried out where needed and are followed through, and to prevent abuses of power and the heightening of children's vulnerability.

The Commission in its Discussion Paper 103 recognises that the formal child protection system as it currently exists is in disarray. It is noted that there has never been a proper analysis of the services required, or the costs of delivering such services effectively; in addition there is no clarity as to who is responsible for them or for their financing. For the system to operate properly there must be close coordination between the social services, the health sector, the police, the courts and the correctional services. Other sectors such as education, labour and local government also have key roles to play. In South Africa the protective service components of all these sectors are under-resourced and poorly coordinated. The state's responsibility for the vital social service component of child protection has to an abnormal extent been delegated to NGOs, without a simultaneous transfer to these bodies of resources adequate for them to carry out this mandate. These organisations are very unevenly spread and resourced, and this unevenness is reflected in the patchy protective service infrastructure available for the protection of children. The rural areas in particular lack the means to ensure the protection of

children from abuse and neglect; however, even in the better supplied urban areas, services are fragmented and all components are, generally speaking, in a more or less dysfunctional state. There is no system in place and no financing set aside to ensure that practitioners are properly trained for the job either at entry level or subsequently, and salaries and working conditions are such that the organisations concerned are unable to retain staff. As a result, children who require skilled and sensitive handling are normally served by new recruits without the necessary training and experience. Workload norms are absent, and most abused children are served on caseloads which make it impossible for them to receive effective protection or attention to their healing. While interdisciplinary protocols for the management of child maltreatment have in recent years been developed in all provinces, these cannot be properly implemented because of the lack of the necessary resources and management systems to put them into practice. There is also no framework or strategy in place either to calculate the costs of an effective service system or to ensure that the services in question are financed on a dependable basis. The Commission notes comments from practitioners to the effect that the problems of the formal child protection system are such that children referred into this system may find themselves worse off than before, given the secondary traumatisation which often accompanies inept, inadequate or excessively delayed services.[4]

The Commission sought to improve the functioning of the formal child protection system by means of:

- ◊ Provision for an intersectoral mechanism to coordinate and manage the child protection system
- ◊ Provision for greater flexibility of and wider powers for the children's court, and for a more child-friendly court environment
- ◊ Provision for thorough permanency planning for children coming into care, and for the reliable implementation of permanency plans
- ◊ Provision for a two-pronged approach to corporal punishment and other harmful cultural practices
- ◊ Provision for a limited and focussed system of reporting of child abuse
- ◊ Provision for a register of offenders against children so as to prevent the employment of such persons in the children's services.

3.1 Provision for an intersectoral mechanism to coordinate and manage the child protection system

This mechanism, intended to be an interdepartmental structure with NGO involvement, was provided for in section 113A of the draft Bill. It was envisaged as having a wide range of functions directed at bringing about and maintaining the effective functioning of the child protection system. It was to be tasked with commissioning appropriate research, with a view to conducting a needs analysis with regard to protective services, and preparing preliminary budget estimates for the operation of each department's child protection responsibilities. It would also be responsible for developing a comprehensive plan for the financing of child protective services as a component of the National Programme of Action for Children. This structure was also intended to see to tasks such as the development of minimum standards for services, workload norms and guidelines for interdisciplinary protocol development, conditions of service for practitioners, and a system for contracting with NGOs to assist in carrying out the state's protective mandate. It was further expected to liaise with educational institutions for curriculum development and the training of personnel in all the relevant sectors. The structure would also be responsible for monitoring the mandatory reporting system. It would in addition have an educative role, in developing awareness campaigns relating to practices such as corporal punishment, virginity testing and unsafe forms of male circumcision.

[4] SA Law Commission 2001: Discussion Paper 103, 349.

3.2 Provision for greater flexibility of and wider powers for the children's court, and for a more child-friendly court environment

The present Child Care Act provides the court with very few options with regard to children alleged to be "in need of care", these being, in essence, to order that a child be placed temporarily in a place of safety, to order a medical or psychological assessment of the child, and in the longer term to return the child to the custody of his or her caregiver subject to conditions, or to order that he or she be placed in foster care, a children's home or a school of industries. The draft Bill provided for a vastly expanded range of options (s59). These included (in addition to the usual substitute care orders) a partial care order and a shared care order allowing for the responsibilities for a child's care to be shared between family members and other care providers; an order for the delivery of early intervention services and/or involvement in family preservation programmes; the imposition of conditions for the return of a child to a caregiver or for contact with a child; an order for an abusive person to leave the home of a child; an order for the child and/or any other person connected with the matter to participate in a professional assessment of any kind – if necessary at state cost; an order for a family to participate in a specified programme, or a problem-solving forum including a family group conference or a mediation process; an order for a person to receive some form of treatment or undergo skills development; an order for a temporary emergency grant for a child who would otherwise have to be separated from his or her family due purely to poverty, and an order to an organ of state to assist a child to gain access to needed services, to name some of the innovations.

The draft Bill further provided for a court which would be considerably more sensitised to and skilled in dealing with children than is often the case at present. The measures provided for were chosen on the basis of extensive comments from a range of sources regarding problems currently experienced with the children's courts.

- ◊ Firstly, the relevant personnel would be properly selected and trained for the sensitive nature of the work in question. Specialised commissioners, assessors and registrars were to be assigned to this work and the Minister of Justice was empowered to set up the required training courses (ss 69-74). Interpreters would also have to be specifically trained or qualified [s75(3)(b)].
- ◊ Secondly, provision was made for the conduct of any lawyer representing one or other party in the court to be regulated so as to ensure a non-adversarial approach throughout the proceedings and to prevent abusive questioning of children [S75(1) 7 (3)]. Lawyers instructed by the Legal Aid Board for cases to be heard in the children's court would be drawn from a Family Law Roster and thus have an appropriate grounding to appear in this court, and would be bound by a code of conduct to guide their behaviour in this setting.
- ◊ Thirdly, provision was made for legal representation for children, at state cost where necessary, and for it to be mandatory for the court to arrange such representation under certain conditions.

3. Provision for thorough permanency planning for children coming into care, and for the reliable implementation of permanency plans

The Commission recognised that large numbers for children were remaining in alternative care for long periods without security in their living arrangements or clarity as to their future, and that this was damaging to their development, and also placed them at risk of placement disruption and repeated moves to new forms of care. Particular risks were involved in the common practice of placing babies and very young children in institutional care, as such children can experience life-long damage to their development and their capacity to form normal relationships unless given opportunities to form close bonds with the minimum of delay.[5]

[5] SALC 2001: Discussion Paper 103, 405.

The approach to permanency planning taken by the Commission included the following features:[6]

- ◊ It would be obligatory to show, before any substitute care arrangement was ordered, what possibilities for family preservation had been considered and why these had been excluded [(s176(1)(a)].
- ◊ The court must be supplied with a documented plan aimed at ensuring stability in the child's life, with priority normally being given to family reunification (which could include permanent placement within the extended family circle). Such a plan must include details of and time frames for the services to be rendered, these time frames to be linked to the age and developmental stage of the child [s176(1)(a)].
- ◊ A finding as to whether a child had been intentionally abandoned should be made with the least possible delay where there was evidence that this had occurred, and such a child should be freed for adoption as quickly as possible - thus avoiding unnecessary institutional or foster placements of abandoned babies which at present often last for several years [s176(2)].
- ◊ Clearer powers were outlined to enable the court to terminate parental responsibilities and rights of a parent in cases where this was believed to be in the best interests of that child (s141). Decisions of this kind would be related to the age of the child and the period of time for which he or she has been in alternative care. In such cases the court would be able to assign increased or full parental responsibilities and rights to the current carer, usually a foster parent or kinship caregiver.
- ◊ The court would be able to order permanent forms of foster or kinship care.
- ◊ There would be provision for successful long-term foster placements to be converted to subsidised adoptions, where the foster families cannot afford to continue caring for the child without state aid.

3.4 Provision for a two-pronged approach to corporal punishment, virginity testing and male circumcision as harmful or potentially harmful practices

There was no call from participants in the Commission's consultative process for an end to male circumcision although there were concerns regarding coercion and unsafe practices. In the case of female virginity testing, and also with regard to corporal punishment, opinion was deeply divided. After in-depth consideration of a range of inputs and in the light of the broad socio-economic and multicultural context in South Africa, it was decided to adopt a phased approach to the issues of corporal punishment and virginity testing of children, and not to bring all instances of such practices within the ambit of mandatory reporting or formal child protection interventions at this stage. In the first place, the common law defence of "reasonable chastisement" would be removed in the case of corporal punishment, so that a court would be called on to adjudicate any case involving assault on a child on its own merits, with no reference to such a defence (s142). In the case of virginity testing and male circumcision a right was spelled out for children to be free from coerced participation in such rituals, irrespective of cultural considerations (s19). In regard to all these forms of conduct, a broad educational approach would be taken with a view to heightening awareness of their potential harmful consequences [s113A(2)(h)], and, in the case of corporal punishment, a campaign would be undertaken to promote appropriate forms of discipline in the home and school settings (s142). In contrast, female genital mutilation, which is not in common practice in this country, was not seen as requiring a phased approach and was prohibited outright in the draft Bill [s19(3)].

3.5 Provision for a limited and focussed system of reporting of child abuse

The Commission's Discussion Paper deals in depth with the various debates regarding mandatory reporting and registration of child maltreatment, which has become increasingly controversial over the years.[7] The Commission notes that a danger of mandatory reporting and registration systems, which

[6] Ibid, 424-5.
[7] Ibid, 425-451.

arose in the 1970's and have been adopted in a number of First World countries, is that they tend to entrench an imbalance in the overall child and family welfare system by disproportionately loading it towards reporting and investigation. In Britain and North America in particular, concerns have been raised to the effect that limited resources available for children's services have been swallowed up by these processes, and that preventive and promotive services, as well as long-term care and treatment for abused children, have been disadvantaged in the process. Also, a system which was originally designed to identify vulnerable children with a view to mobilising support has increasingly become orientated towards criminal justice processes, which often do not meet the needs of the children involved and may merely serve to traumatise them further. An additional problem is that mandatory reporting can bring large numbers of families whose real need is for broader family support strategies into the protection system, leaving too few resources to address the needs of children who are in real danger. Further, mandatory reporting, especially where the range of reportable behaviours is very wide and where suspicions of abuse rather than known incidents must be reported, tends to produce large numbers of reports which are subsequently not substantiated. They nevertheless generate expensive investigative processes and cause harm to many families, given that social stigma, job losses and other negative consequences may arise. In 1993 two-thirds of all cases reported and investigated in the USA were unsubstantiated.[8] Race, gender and other extraneous factors have been found to influence the probability that a particular instance of child maltreatment will or will not be reported. Compulsion to report cuts across the confidentiality ethics of a range of professions, and there is concern among practitioners that the compulsion to report is likely to prevent many people, including victims, from coming forward to ask for help. It is arguable that such inroads into professional ethical codes should be confined to cases in which the benefits of compulsory reporting are likely to outweigh the potential hazards. The point has been made that reporting and registration serve no useful purpose unless they are backed up by an effective service system and generate a response which meets the needs of the children concerned, and/or they are linked with a data-collection system which is used to plan and develop policy for services; also that mandatory reporting which is not linked to effective protection and associated services can in fact increase the vulnerability of children, setting them up for recriminations and secondary abuse.[9] Mandatory reporting requirements have not been the choice of all countries which have explored this approach - New Zealand, for example, has opted for a system which relies on public education and voluntary reporting, as has at least one Australian territory.[10]

In South Africa there has been strong support for the concept of mandatory reporting coupled with registration, perhaps in the mistaken belief that such systems automatically result in greater safety for children. Over the years there have been numerous additions to the list of persons required to report abuse or suspected abuse. The American approach of criminalising failure to report has been adopted. Reporting is compelled in the case of specified categories of personnel dealing with children in s42(1) of the Child Care Act, and more broadly for any person with a direct responsibility for the care of a child in s4 of the Prevention of Family Violence Act. The systems which have been put in place have been uncritically imported from countries in which the most basic needs of most children are met and a sophisticated social service infrastructure is in place. These systems have arguably not been designed to operate in a context in which a majority of children are severely disadvantaged.

The Commission sought to avoid going too much further down the road of mandatory reporting, but nevertheless broadened its scope by adding workers in all child and youth care centres and partial care centres, shelter workers and "any person involved with a child in a professional capacity" to the previous list in s41 of the Child Care Act, which included health workers, social workers, and staff and management members in children's homes, places of care and shelters. It sought to limit the scope of the compulsion to report to cases involving physical injury, sexual abuse and severe,

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[8] SA Law Commission 2002: Report on the Review of the Child Care Act, 128; Lynch, M. 2000: "Children's Rights and Child Protection – Working to Meet New Challenges." Kempe Memorial Lecture, ISPCAN Conference, Durban.

[9] National Committee on Child Abuse and Neglect 1996: op. cit., 41.

[10] SALC 2001: Discussion Paper 103, 438ff.

deliberate neglect, in keeping with the previously mentioned approach of focussing formal protective resources on those children in urgent need thereof. The requirement was also confined to cases involving a conclusion based on the personal observation of the professional concerned, thus excluding mere suspicions and making it clear at what point reporting is required – issues that have caused considerable confusion in the present system. Provision is also made for persons who do not fall in the category of mandatory reporters to make voluntary reports of instances of maltreatment. Reports in both categories could be made to a "designated child protection organisation, police officer or child and family court registrar [s167(1) and (2)] for investigation and, if necessary, protective action. They would thereafter be submitted, if the allegations are substantiated, to the Director General for Social Development for entry into the National Child Protection Registrar (s120-124).

This is of course not to suggest that cases where a lesser degree of certainty is involved should not be reported to an appropriate government department or organisation for services– merely that the compulsion to report and the compiling of the register would be focussed on cases clearly requiring protective intervention. Neglect due to poverty, and mild forms of corporal punishment, for example, are seen as needing to be dealt with via other approaches and therefore not targeted for registration. Information on the register is intended for use in ensuring protection of the children concerned and monitoring cases and services to these children [s121(b) and (c)], and also in identifying patterns and trends in child maltreatment, and "for planning and budgetary purposes to prevent the abuse and deliberate neglect of children and protect children on a national, provincial and municipal level" [s121(e)]. In this way the Commission provided for the mandatory reporting system to become, *inter alia,* a basis for the planning and provisioning of the formal child protection system.

3.6 Provision for a register of offenders against children so as to prevent the employment of such persons in the children's services.

Apart from examining the issue of reporting and registering children found to have been maltreated, the Commission examined the feasibility of registering offenders. It rejected models for such reporting and registering which were based on the idea of making the whereabouts of an offender known so that the local community could protect children against him or her, as such measures had been found to have many unintended damaging consequences for the victims of the abuse and other innocent people.[11] However the Commission saw value in the British approach of developing a register of people deemed "unfit to work with children", as a means of preventing the serial abuse of children by offenders who move from one job or voluntary position in a children's service to another. The Commission provided for a register, to comprise Part B of the National Child Protection Register, which would include the particulars not only of convicted offenders against children but of anyone who, through a statutorily recognised procedure such as a formal disciplinary enquiry conducted by an employer body with regard to an employee, was found to be unsuitable to work with children (s125-127). A requirement was created in the draft Bill for the management of any school, child and youth care centre, or facility serving children to check whether any prospective employee or volunteer has been entered on the register, and, if so, to refrain for engaging that person's services. This register would be strictly confidential and accessible only by persons involved in implementing the Act, or for the purpose of legal proceedings or when so ordered by a court (s133).

4. COMMENTS ON THE REDRAFTED BILL AS AT 12 AUGUST 2003

4.1 Cross-cutting issues

- ◊ Almost all measures aimed at addressing the plight of identified groups of vulnerable and marginalised children and preventing children from falling into these predicaments have been removed. Chapter 16 of the draft Bill dealing with children in especially difficult circumstances has disappeared. Section 232 in that chapter had cross-referenced to s5 in chapter 2, dealing with an intersectoral National Policy Framework which would bind all the

[11] Ibid, 445.

relevant departments to plan and budget for their responsibilities to children in a coordinated manner. Section 232 required that a strategy to address each of the designated categories of children in especially difficult circumstances must be included in this Framework. In the June redraft of the Bill, the concept of a national Policy Framework was done away with, and replaced by s 117 - a greatly weakened provision for the Minister of Social Development to include provision for a strategy "aimed at securing a properly resourced, coordinated and managed child protection system". The strategies intended to address the situation of children affected by poverty and malnutrition, those affected by orphanhood or abandonment, those affected by disability or by HIV/AIDS and other chronic diseases, those on the streets and those in child-headed households were, at least, incorporated into the weakened framework provided by s117. But in the August version of the Bill there is no longer any reference to children in especially difficult circumstances, or to strategies or to measures designed to address their plight. All that is left is one section (136) making some provision for outreach and support to child-headed households, another prohibiting the worst forms of child labour (s141), and some provisions to deal with child trafficking (ss280-284) which, in fairness, are an improvement on the previous provisions dealing with this phenomenon. Measures designed to help children extricate themselves from exploitative labour have been removed. Chapter 4 on children's rights has been reduced largely to a reiteration of section 28 of the Constitution without the detail and interpretation that had been supplied. In this process the rights of child refugees and undocumented foreign children, and of children with disabilities and chronic illnesses have disappeared from the Bill. Educational rights and the right of children to appropriate services if they have been maltreated, and the right to social security are not mentioned. The right to proper administration of a child's property, crucial particularly for the protection of children in child-headed households, has been removed.

Changes to the chapters specifically dealing with prevention, early intervention and protection cannot be seen in isolation. Even where provisions appear to have been left intact, they must now be understood in the light of changes in other chapters. The structural underpinnings and therefore the impact of much of what is contained in the chapters on protection and prevention have been done away with or badly damaged by some of these changes in other sections. For example:

- ◊ The removal of the provision for an intersectoral National Policy Framework (SALRC draft s5) which would be binding on all relevant government structures, and which would require that all of them budget for the relevant tasks, severely dilutes the potential impact of the proposed legislation both for children in general and for those coming into formal protective services because of abuse, neglect and abandonment.
- ◊ The removal of chapter 23 on funding, grants and subsidies destroys much of the primary preventive thrust of the Bill by removing guaranteed social security provisions. It also removes measures to ensure the financial viability of child protective services, which were contained in sections dealing with fees and subsidies for organisations assisting with the implementation of the Act. Thus the current hit-and-miss funding arrangements for child protection are left in place. These are at the heart of the problems of much of the child protection system, with its built-in propensities for secondary abuse of children who have already been traumatised.
- ◊ Changes to the chapter 6 on the child and family court have greatly weakened its protective potential, in the following ways:
    - The proposed registrar of the court has been replaced with a clerk.
    - Provision for commissioners of child welfare and registrars of the court to be properly selected and trained has been removed.[12]
    - Provision for the use of assessors with specific cultural competencies or professional skills relevant to the needs of the child has been done away with.

[12] Ironically, there had been a significant strengthening of these provisions in the June 2003 version of the Bill – one of very few respects in which that draft was an improvement on the original SALRC draft. But in the August version all mention of these issues had disappeared.

- Provision for lawyers acting in the children's court to be drawn from a register of practitioners competent to practise this type of law, and for a code of conduct to compel lawyers to refrain from adversarial conduct and behaviour contrary to the best interests of children has been removed.
- Provisions governing the type of evidence admissible in the children's court which were designed to enhance the inquisitorial nature of this court have been deleted, leaving it bound by rules appropriate to the criminal courts which have a different function. What amounted to an improved framework for the functioning of the children's court has been taken backwards to one which is even less favourable than that which exists at present.
- The child's right to legal representation has been constricted to a lesser level than is currently provided for.
- A provision enabling the court to order a temporary emergency grant in order to prevent a child from coming into statutory care purely for reasons of poverty has been removed.
- The power of the children's court to assign or remove a wide range of parental rights and responsibilities to or from individuals has been removed, greatly reducing the strength of the proposed protective system. This power would in terms of the new version be vested in the High Court, the divorce court and the proposed new family courts, effectively making these options inaccessible to the vast majority of children who come into the formal child protection system. The removal of these options for the children's court cancels out much of its intended ability to ensure the implementation of permanency plans, as will be further discussed below.

Extensive NGO submissions on current problems experienced in the children's courts and proposals for their improvement have in this manner been ignored, and would have been a key structure in an improved protective dispensation for children is no longer designed so that it can serve this purpose.

4.2 Directly applicable chapters

Chapter 8: Protection of Children

◊ The provision previously made for an intersectoral mechanism to see to the proper planning, resourcing and coordination of the child protection system has been omitted *in toto* **(previous 113A)**. All of its tasks (see 3.1 above) are now simply omitted, without any attempt to reassign them. The lack of a secure basis in the law for the financing and carrying out of these tasks creates a situation in which the current disarray in the child protection system, with all the harm it does to children is liable to continue *ad infinitum*.

◊ **Section 122(2),** relating to the proposed Part B of the Register on which persons found unsuitable to work with children would be entered, provides that such a person may not be entered on this register until the time for noting of an appeal or review has expired, or while he/she has an appeal pending. This stipulation was already included in the SALRC version and has been controversial from the start. Given the low rate of conviction for such cases in this country, and the fact that it may take years for an appeal to be finalised, it seems totally unacceptable that even someone found beyond reasonable doubt by a court of law to have abused a child would be able to stay off this register and hence gain fresh employment in a child care setting, by virtue of having lodged an appeal, or simply being entitled to do so. As entry on the register is not limited to cases in which guilt has been proven beyond reasonable doubt ([S120(5)], and as this is a highly confidential register to which no-one except a children's organisation would have access and which could be used for no purpose other than screening staff and volunteers, such a provision seems entirely unreasonable. The way should be opened at least for interim registration in which the pending appeal is noted, and which can be cancelled if this is subsequently indicated.

- ◊ In **s123(1)(a) and (b)**, clubs and associations providing services to children are added to the list of settings in which a person listed on the Register may not work in any capacity. This is a positive addition.
- ◊ In **ss123, 124 and 126**, measures to ensure that prospective employees and volunteers in children's services are excluded if their names appear on the Register cover a wide range of facilities and organisations including "designated child protection organisations"; however the social work services delivered by the Department of Social Development itself have been omitted.
- ◊ Also recognised as problematic in the SALRC draft, and retained in the new draft as **s128(3),** is the provision for a person to be considered to have been rehabilitated and his/her name to be removed after five years. At very least, on the basis of current knowledge, cases involving sexual abuse and severe assault should be excluded from this provision.
- ◊ Payment by the state for HIV testing to facilitate appropriate family placement of children is no longer automatic **(s131).**
- ◊ **Section 135** provides for the termination, suspension or transfer of any or all parental responsibilities and rights of a person by a High Court, or, in divorce-related matters, from the divorce court. This is effect places these measures out of the reach of the vast majority of children needing them, for whom the High Court is inaccessible and in whose lives the divorce courts are not involved. These provisions in the form in which they were set out in the SALRC draft, were intended to be implemented by the child and family court. They were designed to ensure, among other things, that children who have been in foster care, court-ordered kinship care or child and youth care centres for a considerable period, do not "drift in care". If they have not been able to return to their caregivers for a specified period, related to their age and stage of development (being e.g. much shorter in the case of babies), then additional responsibilities and rights can be given to the new caregivers without an adoption having to take place. Adoption is often not possible in the SA context, particularly for financial reasons. But both the child and the caregiver ultimately need the security of knowing that a placement will be permanent. In addition it is sometimes necessary e.g. to exclude a potentially dangerous or highly disruptive parent from visiting a child in a foster home – indeed there are children who are never placed in families because of the risks posed by parental access. Or it may be desirable to give a foster parent the full responsibility for consent to medical care or to school outings etc, which at present require the consent of a guardian. The SALRC draft gave the court the flexibility to tailor a package of orders to the specific needs of each child. The removal of this capacity is a major step backwards for children in the "drifting in care" situation. It also fragments processes affecting children between different courts, thus perpetuating one of the key problems which the SALRC was attempting to overcome. The power to allocate, terminate or transfer parental rights and responsibilities should be reinstated for the children's court **at very least** for children in need of care and protection, and those who are orphaned or destitute and are in informal the informal care or relatives.
- ◊ The clause removing the defence of "reasonable chastisement" in cases of assault of children by their parents has been deleted, thus cancelling out a crucial component of the Commissions phased, two-pronged approach to the eradication of corporal punishment.

CHAPTER 9: PREVENTION AND EARLY INTERVENTION SERVICES

The following issues are of concern:

- ◊ There is no longer any firm requirement that prevention and early intervention services must be provided, as set out in s159 of the Commission's draft. This principle was maintained in the June redraft but has now been dropped. Such services are now merely defined and their content is described in **ss143 and 144**, and they are to be written into the departmental strategic plan mentioned earlier**.** The provincial MECs were, in both the Commission's draft and the June version, obligated to assign funds to such services – this is now a discretionary matter as per **s145.** In this section a clause which was included in the Commission's version, which required efforts to involve children and families in identifying and resolving their problems, has been omitted. On

the positive side, these services were previously narrowly referred to as "social work services" and have now been broadened to "social development services".

◊ Again, the replacement of the envisaged intersectoral National Policy Framework with a departmental strategic plan as the vehicle for these services weakens the intent of the SALRC draft in relation to this chapter (**s146).** Detailed provision for an integrated approach to these services and for the necessary equitable distribution of funds and the building of capacity for such services was retained in the June version of the bill within the ambit of the strategic plan – however these elements have been removed in the August draft.

◊ The provisions for the involvement of local authorities in prevention and early intervention which were in place in the Commission's draft (s162) have been virtually deleted – the new **s147** which merely allows the provincial head of the Department of Social Development to assign prevention and early intervention services to a local authority under certain conditions and by mutual consent does not begin to approach the Commission's recommendations. In the original draft Bill, the local authority would have been required to keep track of the numbers of children in each jurisdiction and the age structure of the child population. There was also a requirement for each authority to carry out a triennial needs analysis and to plan and budget for basic services to address the needs of children in its jurisdiction. Finally, the authority was obliged to provide for home visiting of newborn babies, a measure which has been found to be the single most effective intervention for the prevention of child abuse, as well as having numerous positive and cost-cutting spin-offs. To this must be added the removal of the original s235 which required municipalities to monitor and support children in especially difficult circumstances in their areas. A very narrow view has been taken in the present Bill of the role of local authorities, ignoring the fact that internationally the most successful approaches to prevention of child abuse and neglect seem to depend heavily on local authority involvement. A provision enabling local authorities to pass on certain tasks regarding children to traditional authorities in their areas has also been lost.

Chapter 10: The Child in Need of Care and Protection

The following changes have occurred:

◊ In **s150,** which defines a child in need of care and protection, factors which pertain to the parents or caregivers of the child rather than the child's vulnerability have been removed. This reflects a more child-centred approach which is for the most part welcome. But in this process, an important provision which was made in the SALC draft for situations in which a parent or caregiver has murdered a child, subjected that child to life-threatening injury or sexually abused him or her has been removed. Section s166(a) of the original draft provided that siblings of the abused child would qualify to be considered as children in need of care or protection. The removal of the relevant clauses means that it is not possible to take immediate action to protect other children in the household until they can be proven to also be specifically at risk. This was identified by the Commission as a weakness within the current Child Care Act. Also, provision which existed in the earlier draft for children who are subjected or exposed to trafficking to be considered to be in need of care and protection is no longer explicit. The broader term "exploitation" which remains **[s150(e)]** is arguably too vague.

◊ In **s152(3)(b) and (5)**, mention is made of the role of a designated child protection organisation in the removal of children to temporary safe care. This is primarily a state responsibility which should only be delegated to such organisations by specific arrangement and under the proper conditions. It is in the first place the Department of Social Development and its officials who should be covered in this section.

◊ In **s105(1)** on reporting of children who have been abused or neglected, an attempt has been made to clear up some confusing wording in s167(1) dealing with physical abuse in the Commission's draft. Unfortunately, in this process a carefully considered policy direction taken in that draft after lengthy and careful deliberation, and after a study of the advantages and disadvantages of different reporting and registration systems in many jurisdictions around the world, has been significantly shifted. As discussed in 3.4 above, the original draft Bill sought to pinpoint those

children to whom the compulsion to report and register – as distinct from a more generalised need for a service of some kind - would apply. It was not the intention that every action which could be defined as abusive would qualify for mandatory reporting and registration. Many definitions of abuse are extremely broad and include behaviour which should trigger supportive outreach or education rather than statutory intervention. Hence the reporting and registration requirement was confined to cases of physical injury, sexual abuse and deliberate neglect. The current wording is substantially broader. Given that abuse as defined in the Bill would include emotional abuse (which is probably experienced by most children at some stage), or playground bullying, the implication is that the reporting and registration requirement would grow enormously in proportion to rest of the system, arguably throwing it out of balance.

- ◊ Mention is made in **ss105(1),(5) and (6)** of designated child protection organisations as being the recipients of reports made in terms of this Act, along with clerks of the children's courts and police officials. These organisations must also receive and act on reports initially taken by the police. The effect is to make NGOs responsible for the social work investigation and intervention required in all cases referred to the register – a problem which already existed in the Commission's draft Bill. This wording is unacceptable, given that such interventions are a government responsibility, which should only be outsourced under clear and controlled conditions, including the necessary financing arrangements - provision for which has, incidentally, been deleted in this draft. The Department of Social Development should be the first point of reference here, with designated child protection organisations also being covered.
- ◊ **S153** provides for a police officer to order an alleged offender to leave the child's home or to refrain from contact with the child, prior to a final decision by the children's court in this regard. This is a welcome addition in the current Bill.
- ◊ **S154** provides that the sibling of a child placed in temporary safe care may be brought before the court if that child is believed also to be in need of care and protection, for a decision to be made as to whether or not this is so. This is a superfluous provision as it goes without saying. It seems to be an attempt to rectify the earlier omission of a sibling of a murdered or seriously assaulted child from the definition of a child in need of care and protection, but the new wording fails to provide for pre-emptive action on behalf of such children. In this process another provision seems to have inadvertently been lost. This section as originally formulated in the SALRC draft (s172) provided for a child to be brought before the court for a decision as to whether he/she is in need of care and protection, without first having to be placed in temporary safe care. This was a necessary provision - not every child who needs care and protection in the long term needs first to be placed in a temporary environment. Some can and should remain where they are until a finding is made. It is not clear whether the court in terms of the current draft is without the power to make a final order without the temporary removal phase. If so, this is a serious omission.
- ◊ The range of possible orders where a child is found in need of care and protection has been left more or less intact **(s156).** A sad exception is the deletion of the provision for the court to order a special temporary grant if such a measure would prevent the child from having to be separated from his or her family. It is suggested that placement of a child who is a danger to himself or others in a psychiatric facility be added to this list. There is already provision for placement of a child in a drug or alcohol rehabilitation centre where indicated. It is being found that children who come before the children's courts and who have severe psychiatric conditions are at present often unable to access appropriate in-patient care. **S156(3)(a)** appears to make social work services to a child in foster care and his or her family a discretionary matter for the court to decide. While the Commission's thinking in this regard was that it should be possible to dispense with social work services after a period of early monitoring and attempted reunification services, it was not the intention that any such placements should be left without monitoring and associated services in the beginning phases.
- ◊ There is provision in **s157(1)(b)(iii)** for termination of parental responsibilities and rights; however this seems to be in contradiction to previous clauses which confine this power to the High Court and the family court. It is extremely important that this competency be unambiguously restored to the children's court so as to give children in care access to this option when they need it, and to avoid fragmentation of the judicial processes involved.

◊ The original requirement that very young abandoned children be made available for adoption "with the minimum possible delay" [SALRC draft s176(2)] has been replaced by a reference to "the manner and time prescribed". While there is no objection to this matter being covered in the Regulations, there is concern that the essential principle of avoiding unnecessary delays, with their highly damaging consequences for children at an acutely sensitive stage of development, before placing such children in a permanent family environment, could be lost if this is not spelled out in the Act itself.

Chapter 12: Children in Alternative Care

Most of this chapter has remained intact in the redrafting process. However, the removal of provision for free and subsidised state services for children in statutory care (s188 in the SALRC draft) undermines the financial viability of all forms of care and thus weakens the protective system as a whole. This is aside from the broader argument that all children require such access, and that fewer children would end up in the statutory care system if it were provided.

A minor technical change which would increase the options of the MEC for Social Development in dealing with a child who has absconded from alternative care, would be to add as **clause (e) in s170(8)** the following: "order the provisional transfer of the child to an alternative form of care in terms of s174 of this Act".

5. CONCLUSION

As discussed at length above and in other submissions on this Bill, the redrafting process has inflicted massive damage on the entire fabric of the proposed legislation. While much in the original version which dealt with formal measures for the statutory care and protection of children has remained intact, measures which were intended to ensure that formal child protection system would be properly resourced, coordinated and managed have disappeared. At the same time, a carefully crafted network of measures designed to prevent children coming into the formal care system if promotive, preventive and early intervention approaches would be more appropriate, and to address the needs of large identified categories of vulnerable and marginalised children, have been removed, thereby ensuring that the formal protection system will be the only resort for the broad mass of vulnerable children. The promise that the initial draft Bill held for the children of our country has been in large measure destroyed. We appeal for a thorough reworking of the Bill based on the original vision, which was developed on the basis of the Constitution, the many international child rights instruments to which our nation is a party, a massive research process, and extensive consultation with state departments, organs of civil society and groups of vulnerable children, over a period of more than five years.

We appeal for a full and careful reworking of the Bill on the basis of the above concerns and the many others which are being voiced from many quarters about sections not covered in this submission. The children of South Africa will be done the gravest injustice if this Bill is rushed through in its present form.

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