



# Childline

## SOUTH AFRICA

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## THE CHILDREN'S PROTECTOR

### INTRODUCTION

Writing legislation that is progressive, comprehensive and attends to the holistic needs of children is not sufficient in itself. The implementation of legislation, making legislation a living reality in the lives of South Africa's children, requires the monitoring of implementation of legislation and policy and its impact on effective service delivery to children. According to Discussion Paper 103 of the South African Law Reform Commission monitoring is "a continuous follow-up of the activities of government, non-government organisations (NGO's) and other child related structures to ensure the effective implementation of the Convention of the Rights of the Child and child welfare legislation"<sup>1</sup>.

It is of note that some of the progressive legal and policy provisions that do exist to protect children in South Africa are not implemented. For example the use of the intermediary system and closed circuit television that facilitates a child's giving of evidence in criminal cases of child abuse is only partially implemented, despite the fact that the law providing for this was passed in 1992.

Childline comes across numerous examples of failure to address the needs and rights of children across all sectors of society, including government and civil society.

Appropriate and independent monitoring of the implementation of laws relating to children is essential as it assists in evaluating the gaps in the legislative provisions, gaps in implementation and also what accounts for the gaps in implementation and what can be done to address the issues. Monitoring can also inform legislators as to the need for further law reform – either as a result of the legislation being unworkable or as new problems and challenges arise in the social context that require some legislative intervention.

Monitoring systems need to be independent of the structures that are being monitored. At the Parliamentary Hearings into the sexual abuse of children held in March 2003, it

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<sup>1</sup> South African Law Reform Commission, Discussion Paper 103, December 2001

was clear that government departments and the Non-government sector sometimes had differing perceptions of their own, versus the outside view, of their service provision.

## **INTERNATIONAL COMPARISONS**

The concept of a children's legislation monitoring mechanism or Children's Protector is not unique to South Africa. A number of countries have adopted monitoring mechanisms and structures into their children's legislation in order to ensure meaningful monitoring of the implementation of the legislation and an effective response to problems in implementation.

For example:

- Austria has established a Children's Ombudsman to promote and defend children's rights.
- Canada has established a Children's Commission through the Children's Commission Act in order to ensure that key aspects of government services to children are monitored, the quality of their work assessed and reported on publicly.
- Kenya, through the country's Children's Act of 1998, has established a National Council of Children's Services which exercises general supervision and control over the planning, financing and co-ordination of child welfare activities and to advise government.

In some countries, for example, Sweden and Philippines, children's rights are monitored by NGO or NGO coalitions.

The development of monitoring structures to oversee the implementation and effectiveness of legislation affecting the lives of children is a matter of concern in a number of countries around the world and has been proposed as an issue for debate at the 16<sup>th</sup> International Congress on Child Abuse and Neglect to be held in York, UK, 2006.<sup>2</sup> "..... the role of Ministers for Children and Commissioners or Ombudsmen for Children raises the question of a session which looks broadly at how each country can develop structures which support children's well-being and raise their status in law and policy and in the minds of the people to the point that their abuse becomes less likely and, ideally, unthinkable."

## **THE SOUTH AFRICAN SITUATION**

In South Africa there is no comprehensive and independent monitoring system that focuses exclusively on the rights of children and the implementation of legislation and policies that impact on the lives of children.

Structures that have a partial monitoring function include:

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<sup>2</sup> ISPCAN Listserve communications, 16<sup>th</sup> and 18<sup>th</sup> July 2003.

1. The National Programme of Action Steering Committee, located in the Office on the Rights of the Child. This Committee consists of senior representatives from all government departments that have an impact on children's lives as well as a single representative from the NGO sector. The NPA has established a Data Collection and Monitoring Task Group for the specific purpose of monitoring the implementation of the Convention on the Rights of the Child and the Africa Children Charter.
2. The South African Human Rights Commission, established in terms of the Country's Constitution. A Committee on the Rights of the child has been established within the SA Human Rights Commission. This committee has the functions (inter alia) of advising the SAHRC on child rights issues and on strategic planning for implementing the protection and promotion of the rights of the child and to ensure that violations of children's rights are investigated and dealt with. However the Commission has not established monitoring mechanisms at any level of government.
3. The Parliamentary Joint Monitoring Committee on Children, Youth and Persons with Disabilities. The function of this committee is to monitor and evaluate progress with regard to the improvement in the quality of the life and status of children, youth and disabled persons, with special reference to the Government's commitments in respect of any applicable international instruments and to duties and responsibilities in respect of any applicable legislation. However its monitoring and evaluating role requires further development and the spread of its activities over children, youth and disability issues means that its effectiveness in relation to children will be much diluted.

## **THE SA LAW REFORM COMMISSIONS RECOMMENDATIONS**

The SA Law Reform Commission's Draft Children's Bill contains a Chapter (22) that proposes the Development of an Office of the Children's Protector.<sup>3</sup> This proposal was actively supported by many respondents to the Commission's Discussion Paper 103 of 2001.<sup>4</sup> The draft legislation provides for the establishment of this office as body, operating independently of the Department of Social Development.

The main functions of the Children's Protector as envisaged in the Children's Bill is "without fear, favour or prejudice monitor the implementation of this act by –

- (a) organs of state in all spheres of government
- (b) Persons and non-government organisations involved in the protection and well-being of children"<sup>5</sup>

The powers and functions of the Office of the Children's Protector are summarised as:

- Receiving investigating and resolving complaints regarding any matter relating to the Children's Statute
- Have the power to take legal action on behalf of a child where this is required
- Authorise and/or conduct inspections of children's facilities
- Receive and investigate reports of children's deaths in alternate care.

<sup>3</sup> Report on the Review of the Child Care Act, Part 3 of 3, January 2003, pp 221 – 228.

<sup>4</sup> Report on the Review of the Child Care Act Part 2 of 3, January 2003, pp 313&314

<sup>5</sup> Children's Bill, South African Law Reform Commission Draft, Section 319.

It is clear that the Bill intended for the Children's Protector to monitor both state and civil society in order to ensure implementation of a comprehensive, holistic and children's rights based Children's Act.

It is also clear, that in a society in which the majority of the country's children were historically disadvantaged, and which has no formal mechanism that allows children themselves an effective voice when their rights are violated, some form of monitoring mechanism has to be established.

This submission supports the creation of a Children's Protector to monitor the implementation of the Children's Bill as well as to monitor and bring to government's attention any deficiencies in law, policy and implementation of law and policy that compromises the rights of children as subscribed to in South Africa's commitment to international Conventions and Protocols, the National Constitution and domestic legislation relating to children.

#### RECOMMENDATION

1. That the chapter in the SA Law Reform Commission on the Child Protector be re-inserted into the Bill in its entirety. OR
2. The functions of the Child Protector be assigned to a body with a human and/or child rights monitoring function.