

Joint Submission on the Children's Bill

27 July 2004

to the Portfolio Committee on Social Development

Children's Bill Working Group

- South African Society for Child Abuse and Neglect (SASPCAN)
- Community Law Centre (UWC)
- Children's Institute (UCT)
- Childline SA
- Alliance for Children's Entitlement to Social Security (ACCESS)
- Western Cape Street Children's Forum
- National Alliance for Street Children (NASC)
- Disability Action Research Team (DART)
- Early Learning Resource Unit (ELRU)
- SA Congress for Early Childhood Development
- Lawyers for Human Rights (LHR)
- National Association of Child and Youth Care Workers (NACCW)
- Network Against Child Labour
- Molo Songololo
- Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN)
- ChildrenFirst
- Johannesburg Child Welfare Society
- Southern African Catholic Bishops Conference
- Parliamentary Office (SACBC)
- South African Council of Churches (SACC)
- Disabled Children's Action Group (DICAG)
- South African National Council for Child Welfare
- Naledi
- Pietermaritzburg Child Welfare Society
- Children's HIV/AIDS Network (CHAIN)
- Child Litigation Project (UP)
- Aids Law Project (Wits)
- National Welfare Social Service and Development Forum

The Children's Bill has lost its Soul

The Children's Bill was initially developed by the SA Law Reform Commission (SALRC). It was handed to the Minister of Social Development early in 2003, after being developed in consultation with hundreds of civil society organisations and community groups, including groups of children, as well as various organs of state, over a period of more than five years. While by no means being a perfect document, it was widely welcomed. It reflected the broad vision which had long been sought for children in South Africa, rooted in the full range of internationally recognised child rights. It was intended to bring into effect the commitment of our nation, via the efforts of all relevant structures of government, along with non-governmental partners and the broader community, to give priority to the wellbeing of its children.

A range of preventive measures was set out in the Bill to ensure, in the first place, that children could grow and develop within healthy families and communities. Where these measures failed, various early intervention mechanisms would come into operation and, where this second level did not have the desired effect, an effective protective system would be in place, designed to safeguard children from further harm and, where necessary, ensure their reintegration into the community. Special attention was paid to the needs of children who experience multiple infringements of their basic human rights on a daily basis, such as those living on the streets, those displaced by war and other disasters, those caught up in child prostitution, those exploited for other forms of labour, those marginalised by disability and those in child-headed households or affected in various ways by HIV.

The Bill has undergone many changes since the original version produced by the SALRC, and is now a very pale shadow of its former self. Some of the changes go to the heart of the proposed statute. They remove or significantly weaken the foundations on which the proposed legislation was built, and in doing so threaten the entire structure. Such changes have the effect that even those sections which have been left intact would in many cases no longer have the intended impact, because their foundations have been removed or undermined.

This tendency was already strongly in evidence in a redraft of the Bill dated 19 June 2003. In subsequent drafts produced in August 2003 the destruction is much further advanced. Underlying many but not all of the

changes appears to be an unwillingness to accept any measures which would compel us to fulfil our national obligation to significantly increase resources for the purpose of addressing the needs and rights of children.

Relevant changes include the following:

- ◇ ***Coverage of children's rights has been cut to the bone.*** What is left is mainly a reiteration of section 28 of the Constitution without the vital detail and interpretation that was supplied in earlier drafts. Critical issues which have been sacrificed in this process include the rights of child refugees and undocumented foreign children, and of children with disabilities and chronic illnesses. Educational rights and the right of children to appropriate services if they have been maltreated have gone, likewise the right to social security. The right to proper administration of a child's property, crucial particularly for the protection of children who have been orphaned, is no more.

- ◇ ***The chapter on funding, grants and subsidies has been removed.*** This was another foundational component of the Bill, providing for a range of social security and social assistance measures for children, and for mandatory provision by all relevant state bodies in their budgets for the financing of their responsibilities to children. Fees and subsidies to NGOs undertaking work in terms of the proposed Act were also covered.

The social security provisions are gone altogether, the reasoning apparently being that all such measures should be dealt with exclusively in the Social Assistance Act. But the Social Assistance Act which was recently passed by Parliament does not contain the social security measures which have been removed from the Children's Bill. Also, the thinking underlying the SALRC draft seems to have been ignored - that the basic categories of social security provision for children should be set out in the new comprehensive children's statute, thus setting a minimum standard for what is required, ensuring proper coordination of the relevant measures, and locating them within a child rights framework, linked to the many related provisions in the Bill which depend on them in order to function properly. With the deletion of the social security clauses of the Bill, much of its primary preventive thrust has been destroyed.

The provisions recognising the need for the state to adequately support relatives caring for orphaned children has been deleted. This means that the attempt in the SALRC draft to prevent children from having to come into the formal care and protection system primarily for reasons of poverty have been cancelled out. In the absence of an extended Child Support Grant or an Informal Kinship Care Grant, poor families will still have to go the route of a children's court investigation in order to access a Foster Child Grant or Court-Ordered Kinship Care Grant to enable them to take responsibility for destitute children in their extended family circle.

The overstretched formal foster care system is incapable of dealing with the numbers of children involved; hence only a minority are likely to be assisted. Meanwhile, in the absence of accessible poverty relief, Social Development staff, child protection NGOs and the children's court system will remain overburdened with foster applicants who simply require financial support. As a result, they will remain unable to respond effectively to cases of abuse and neglect. The formal child protection system was envisaged in the SALRC Discussion Paper as needing to be focussed on those children in dire need of intervention due e.g. to serious maltreatment, and not as a mechanism for dealing with mass poverty.

As regards the financing of services, some greatly weakened provisions in this regard have now been added to other chapters. These allow for the discretionary allocation of funds for prevention and early intervention services, for shelters and drop-in centres and for child and youth care centres. There is also provision for the outsourcing of services to NGOs – this appears to be a move away from the subsidy model, which is a potential step forward from the status quo. In all other respects, what is now in the Bill concerning the financing of non-state services to children appears no different in effect from the inadequate and discretionary subsidies already provided for in section 5 of the Social Assistance Act.

The scrapping of key provisions for the financing of services, taken in conjunction with the deletion of provision for an intersectoral mechanism to coordinate the child protection system (see below), has to a large extent done away with measures designed to ensure the financial viability of protective services for abused and neglected children. It is the current hit-and-miss funding arrangements which are at the heart of many of the problems of

the child protection system, with its built-in propensities for secondary abuse of children who have already been traumatised.

- ◇ ***Provision for an intersectoral National Policy Framework which would be binding on all government structures with responsibilities for children, and which would require that all of them plan for these responsibilities, has been removed.*** Also gone is provision for a funding strategy to support these activities. In the place of the National Policy Framework is a requirement that the Minister of Social Development include a range of measures directed to the needs of children in his departmental strategic plan. This change severely dilutes the potential impact of the proposed legislation both for the children in general and for those coming into formal protective services because of abuse, neglect and abandonment. The needs of children are multidimensional and require a fully integrated approach which must be planned, budgeted for and driven from the highest levels of all the relevant departments of government. This cannot be achieved through a single Department's strategic plan.

- ◇ ***Provisions designed to address the situation of children in especially difficult circumstances have been done away with.*** Such children were initially dealt with in a specific chapter in the SALRC version, which was removed early in the redrafting process. However, some provision for certain categories of such children, originally located in the National Policy Framework, was in the June 2003 draft incorporated in the requirements for the Departmental Strategic Plan mentioned above. But in the August 2003 drafts the section setting out the requirements for the content of the departmental strategic plan has been slashed beyond recognition. There is no longer any mention of specific strategies to combat malnourishment in children; to provide in-home support for orphaned, abandoned or impoverished children or those in child-headed households; to prevent children coming onto the street or to address the needs of those already living or working there; to empower children with disabilities or chronic illnesses; or to address the situation of children caught up in commercial sexual exploitation and child labour in general, to name but a few of the groupings which have fallen off the boat.

An earlier section requiring the provincial MECs for Labour and Social Development to conduct annual surveys of the numbers of

children caught up in exploitative labour practices and to plan and allocate resources accordingly, has also been dropped. An associated provision for schools to identify children whose attendance is deteriorating due to their being in especially difficult circumstances, and to take steps to ensure that they receive the necessary assistance and are able to continue their schooling, has disappeared. These deletions must be seen in conjunction with the removal of social security provision as mentioned above, along with the weakening of the preventive role of local government (see below). Lack of attention to the needs of children in these categories was seen as a major weakness of the present Child Care Act and they became a particular focus in the SALRC Bill. This focus has now been destroyed.

- ◇ ***Far-reaching responsibilities for local authorities to monitor the situation of children within their areas and to plan for their needs and undertake prevention and early intervention services have been removed***, except where these are expressly delegated by the Department of Social Development with the consent of the local authorities. What remains takes us very little further than what applies at present. Provision for traditional authorities to be enlisted in prevention and early intervention activities has also vanished.

- ◇ ***Provision for an intersectoral mechanism to see to the proper planning, resourcing and coordination of the child protection system has been omitted***, without any attempt to reassign its tasks. These have to do with putting in place and maintaining the nuts and bolts which are required for a properly functioning child protection system, and which are at present absent from ours. They include attention, in all sectors involved in child protection, to human resources and financing, norms and standards, a system for the outsourcing of protective services to NGOs, the development of curricula for protective service personnel in all disciplines, essential research and data gathering, and the monitoring of the system for mandatory reporting of child abuse, to name a few of the relevant issues. The lack of a secure basis in the law for the financing and carrying out of these functions creates a situation in which the current crisis in the child protection system, with all the harm it does to children, is liable to continue *ad infinitum*.

- ◇ ***Crucial support measures for alternative care for children who are unable to live in their own homes have been removed.*** Provision for free health care, education, transport and documentation for children in foster care, court-ordered kinship care and residential child care has been deleted. The lack of such provision poses a strong disincentive to many families who would otherwise come forward to care for children in need.
- ◇ ***The proposed children's court structure has been significantly downgraded from that originally envisaged.*** Provision for a regional child and family court to deal with more complex cases requiring more highly trained staff has been removed, leaving only the district children's courts in place. Powers which would have been devolved to these courts to decide on a range of issues relating to the responsibilities and rights of parents have been removed, so that people who cannot afford to approach the High Court and do not have a family court in their area are set to remain unable to access key legal processes needed by the children in their care.

The removal of these options for the children's court also does away with important aspects of its envisaged permanency planning role, in that it would be unable in terms of the new draft to terminate or transfer parental responsibilities after a child had spent a significant period in foster home or residential child care centre, so as to make it possible to secure that child's placement with a substitute family.

Provision for legal representation for children at state cost has been greatly weakened. Provision for lawyers appearing in the children's court to be drawn from a Family Law Roster and to be required to abide by a code of conduct has gone, and so has allowance for an approach to the rules of evidence which is in keeping with the court's inquisitorial role. All reference to the personal qualities, qualifications and training of Commissioners of Child Welfare has disappeared. What was originally intended to be a Children's Court Registrar is now a Clerk of the Court, and references to qualifications and training have in this case also been removed. Provision for the proper selection and training of court personnel was significantly strengthened in the June draft.

But in the August version, we are back to less than square one with this vital issue.

- ◇ ***Provision for a Children's Protector to monitor the implementation of the Act has been removed.*** This was envisaged as a means of ensuring that the many parties and structures with responsibilities for children carried out the provisions of the new law. Of course, with so much now missing from the Bill there would be very much less for such an entity to monitor.

In short, the Bill as it stands has lost much of its potential to prevent children from falling into circumstances destructive to their wellbeing and development. And when they then have to depend on formal protective services in an effort to extricate themselves from such circumstances, these services would be likely to continue to fail them. The original SALRC draft, although imperfect, was a visionary document intended to promote the future of our country by ensuring that its children's most urgent needs are met. But the Bill has now lost its soul. Can it be restored?

We appeal to the Portfolio Committee to restore the soul of the Bill and thereby ensure that we can provide a better life for South Africa's children.