SUBMISSION ON THE CHILDREN'S BILL

TO: THE PORTFOLIO COMMITTEE ON SOCIAL DEVELOPMENT

BY: THE COMMUNITY LAW CENTRE, CHILDREN'S RIGHTS PROJECT

AUTHORS: J GALLINETTI, D KASSAN, R BARDAY

PLEASE NOTE THAT THE COMMUMITY LAW CENTRE WISHES TO ADDRESS THE PORTFOLIO COMMITTEE AT ANY PUBLIC HEARINGS THAT MAY OCCUR AND ACCORDINGLY REQUESTS AN OPPORTUNITY TO DO SO.

Background to the Children's Rights Project

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.

This submission consists of a comment on the background and general aspects of the Bill and then specific submissions and recommendations on particular sections contained in the Bill.

PART 1: GENERAL COMMENT ON THE BILL

Introduction

The South African Constitution[1], in section 28, provides specific rights for children in addition to the range of general rights that they enjoy under the provisions of the Bill of Rights. The Bill of Rights provides two categories of rights protection for children:

- Protection of children under the general provisions i.e. the rights that apply to everyone e.g. due process rights of people accused of committing crimes, right to education, right to equality
- Rights applicable only to children under section 28, which constitutes a mini charter of rights for children

- In particular section 28(2) provides that, " A child's best interests are of paramount importance in every matter concerning the child." Our courts

[1] Act 108 of 1996

have pronounced on this principle at length: Goldstone J in *Minister for Welfare and Population Development v Fitzpatrick and Others* [2] stated:

> "Section 28 requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in s 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1)."

There are certain other rights contained in section 28 and other sections of the Constitution that have particular relevance to this submission. These are as follows:

- Section 28(1)(b) – the right to family life. Applied to the state this section expressly provides for appropriate alternative care when a child is removed from the family which must be provided for by the state. The state is obliged not only to provide care but care as appropriate to family or parental care as possible, therefore it must be of a nature that approximates family or parental care. The state must respect existing family or parental care and its interference in such existing care is therefore limited. The circumstances in which a child can be removed from family care are provided for by the Child Care Act. Section 28(1)(b) shows a preference for care in the context of a family and requires the state to respect the institution of the family as the context within which care can be provided.
- Section 28(1)(d) - Right against maltreatment, neglect, abuse or degradation – this imposes a duty on private individuals as well as the state. It requires the state to act positively to prevent abuse etc. This can be in the context of the family by removing children in terms of the Child Care Act. Secondly it requires the state to ensure protection in the

[2] (2000) 7 BCLR 713 (CC) par 18.

context of legislative and policy protection. This encompasses the Child Care Act, Domestic Violence Act and Sexual Offences Act.

- Section 28(1)(h) - the right to legal assistance in civil proceedings. Section 28(1)(h) is an extension of the right of every accused person to have legal representation and accords the child the right to a legal practitioner in civil proceedings. However, there is the rider that this entitlement is subject to the condition that substantial injustice would occur if the child did not have such representation.
- Section 9 – the right to equality.
- Section 12(1)(e) – the right to freedom and security of the person which includes the right not to be treated, or punished in a cruel, inhuman or degrading way.
- Section 12(1)(c) – the right to be free from all forms of violence from either public or private sources
- Section 12(1)(d) – the right not to be tortured in any way
- Section 12 (2)(b) – the right to bodily and psychological integrity
- Section 10 – the right to inherent dignity and to have their dignity respected and protected.

In addition to the applicable Constitutional provisions, South Africa has ratified both the United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child.

The CRC is the most widely ratified human rights document in the world. It covers the full range of rights – civil, political, economic, social and cultural rights. The Convention is concerned with the 4 'P's :

- Participation of children in decisions affecting their lives
- Protection of children from discrimination, torture, cruel, inhuman and degrading treatment and punishment, neglect and exploitation
- Prevention of harm to children

- Provision of assistance for children's basic needs

These points have to be borne in mind when discussing the Children's Bill as they form the core principles on which the Bill is premised.

The Children's Bill represents a complete overhaul of welfare legislation aimed at children and aims to address the current fragmentation of child welfare law in South Africa. However, while it was initially intended to comprise a holistic and comprehensive approach to children and basically result in the codification of most laws pertaining to children, it has been substantially changed since the first draft released by the South African Law Reform Commission. It has undergone severe excisions by the various state departments mandated to examine the draft. It is our submission that these changes detract from the potential far-reaching protective blanket that was hoped would be achieved when the Project Committee was tasked with reviewing the Child Care Act.

Apart from our specific submissions contained hereunder, we strongly advocate that the following be revisited and reinserted in the final piece of legislation:

- National policy framework
- Prevention provisions
- Re-incorporation and strengthening of the children's rights chapter
- Children's Protector concept further explored and an effective monitoring section re-incorporated in the Bill

These will be more fully discussed in other submissions and we will not duplicate the points made therein save to say that we believe that the above aspects are necessary to ensure a comprehensive legislative framework for the protection and well-being of children.

PART 2: SPECIFIC SUBMISSIONS

2.1 Corporal Punishment

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 19[3] and this protection extends to 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 South African Law Reform Commission version of the Bill and the Departmental Versions of the Bill (19 June and 12 August versions) try 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 **not provided** for in the section 75 version of the tabled bill, which it should be.

To date, South Africa has abolished the imposition of corporal punishment as a sentence by the court[7] and in schools.[8] The Constitutional Court has also ruled that corporal punishment of children infringes their rights to dignity and their

---

[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
[7] S v Williams 1995 (3) SA 632 (CC).
[8] Section 10 of the South African Schools Act of 1996

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.

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

[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.

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 possibility exists that such parent will not be held liable for his/her actions if he/she can prove that the physical punishment was reasonable. In addition there are no real guidelines to determine what constitutes reasonableness. As a result there are different interpretations by presiding officers which leads to inconsistency and uncertainty in the law.

2.1.1 International Law

The United Nations Convention on the Rights of the Child was ratified by South Africa in 1995 and there are certain key provisions that relate to protecting children from corporal punishment, particularly article 19 and article 37(a).

Article 19(1) 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.*"

Article 19 provides children with protection beyond what is arbitrarily defined as "abuse" in different societies and also beyond the protection from torture

[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

and cruel, inhuman or degrading treatment or punishment under article 37 as it requires children to be protected from "all forms of physical or mental violence" while in the care of parents or others.[11] It asserts children's equal human right to physical and personal integrity and it is linked to the right to life and to maximum survival and development guaranteed under article 6. It also requires states to take legislative, administrative, social and educational measures to protect children from all forms of violence. Thus, as a country that has ratified the Convention, South Africa is bound to comply with its provisions.

It is important to note that the protection guaranteed under article 19 extends to what happens within the family (including extended family or community)[12] and other caring situations.[13] The Committee on the Rights of the Child has indicated that the CRC requires a review of legislation to ensure that no level of violence is condoned and has particularly emphasized that corporal punishment in the *family (my emphasis)*, school and other institutions, or in the penal system is incompatible with the Convention.[14] The Committee has also criticized and expressed concern at legislation which, while it protects children against serious physical assaults defined as child abuse or child cruelty, it allows for parents or other caregivers to use physical forms of punishment on children often with the stipulation that such punishment must be reasonable and moderate.[15]

---

[11] UNICEF *Implementation handbook for the Convention on the Rights of the Child* (Rachel Hodgkin and Peter Newell) 1998, page 237

[12] Article 5 of the Convention provides a flexible definition of "family" and states that: "states parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present convention".

[13] These include foster care, day care, schools and all institutional settings.

[14] UNICEF, Implementation handbook for the Convention on the Rights of the Child, op cit, page 242

[15] See Committee's responses to Spain's (Spain, IRCO, Add.28, paras 10 and 18) and United Kingdom's (UK IRCO Add 34, paras 16 and 31) Initial Report- UNICEF Implementation handbook for the Convention on the Rights of the Child, op cit, page 243

The Committee has recommended that physical punishment of children within the family be prohibited in light of articles 3[16] and 19 of the CRC.[17] The Committee has called, to many countries,[18] for a clear prohibition of all corporal punishment- in the family, in other forms of care, in schools and in the penal system- and has proposed legal reform should be coupled with education campaigns in positive discipline to support parents, teachers and others.

From the above, it is clear that article 19 seeks to protect children from all forms of corporal punishment and can be used as the basis to prohibit corporal punishment in the home in South Africa.

Article 37 (a) provides that:

"No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."

The right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment guaranteed in article 37(a) of the CRC can be found in many other (international) instruments and this protection has been interpreted to extend to corporal punishment. For example article 7 of the International Covenant on Civil and Political Rights (ICCPR) provides that "*no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*"[19]. In General Comment 20, the Human Rights Committee

[16] Provides that the best interest of a child shall be a primary consideration.
[17] Committee's response to United Kingdom's Initial Report, UNICEF Implementation handbook for the Convention on the Rights of the Child, op cit, page 243
[18] To mention a few, these countries include Zimbabwe, France, Poland, Jamaica, Canada, New Zealand, etc. See UNICEF Implementation handbook for the Convention on the Rights of the Child for a comprehensive list, op cit, page 245.
[19] This covenant was ratified by South Africa on 10 December 1998.

(HRC) notes that the ICCPR does not contain any definitions of the concepts covered by article 7 and states that the distinctions between the different kinds of treatment or punishment depends on the nature, purpose and severity of the treatment applied.[20] The aim of article 7 is to protect both the dignity and the physical and mental integrity of the individual.[21] Further, the HRC's view is that the prohibition in article 7 must extend to corporal punishment including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.[22] The HRC emphasizes that in this regard, article 7 particularly protects children, pupils and patients in teaching and medical institutions.[23] It is said that the HRC's reference to "excessive" chastisement indicates that corporal punishment is not per se a breach of article 7, however, the HRC has since stated, with regard to Cyprus, that corporal punishment is prohibited by the covenant.[24]

The Committee on the Rights of the Child has gone beyond the condemnation of "excessive" chastisement as referred to in the HRC's General Comment 20 by noting in its concluding observations that any corporal punishment of children is incompatible with the Convention (CRC) citing, in particular, article 19. The Committee has criticized attempts by states parties to draw a line between acceptable and unacceptable forms of corporal punishment and has called for a clear prohibition of all corporal punishment including in the family, in other forms of care, in schools and in the penal system.[25]

In light of the above, it is clear that the CRC seeks to protect children against all forms of violence and this includes a prohibition of corporal punishment within the homes and by parents.

---

[20] Joseph S, Schultz J and Castan M "*The International Covenant on Civil and Political Rights: Cases, material and commentary"*2000 page 148
[21] Joseph S et al, op cit, page 148- General Comment 20.
[22] Joseph S et al op cit, page 170- General Comment 20.
[23] Joseph S et al op cit, page 170 -General Comment 20.
[24] See Concluding comments on Cyprus (1998) UN Doc CCPR/C/79/Add.88 para 16 as referred to in Joseph et al, op cit, p 170, ftn 65.
[25]UNICEF Implementation handbook for the Convention on the Rights of the Child, 1998, op cit, page 493

At this point it is important to mention one of the Committee's concluding observations on South Africa's report in 2000 relating to the issue of corporal punishment:

"The Committee recommends that the State party take effective measures to prohibit by law corporal punishment in care institutions. The Committee further recommends that the State party reinforce measures to raise awareness on the negative effects of corporal punishment and change cultural attitudes to ensure that discipline is administered in a manner consistent with the child's dignity and in conformity with the Convention. ***It is also recommended that the State party take effective measures to prohibit by law the use of corporal punishment in the family and, in this context, examine the experience of other countries that have already enacted similar legislation."***[26]

2.1.2 South African Constitution

There are provisions in the South African Constitution[27] that contain similar principles as that embodied in articles 19(1) and article 37(a) of the Convention and which could be interpreted to advance an argument for the prohibition of corporal punishment in the homes or by parents. For example:

Section 28(1)(d) provides that:

"*Every child has the right to be protected from maltreatment, neglect, abuse or degradation*"

[26] Concluding observations of the Committee on the Rights of the Child on South Africa's report. Doc CRC/C/15/Add.122, para 28, dated 23 February 2000. Accessed from www.unhchr.ch/tbs/doc.nsf

[27] Act 108 of 1996

Section 12(1)(e) provides:

"*everyone has the right to freedom and security of the person, which includes the right….not to be treated or punished in a cruel, inhuman or degrading way*".

The Constitution also has a separate section[28] that expressly protects human dignity. In section 10 it is stated that "*everyone has inherent dignity and the right to have their dignity respected and protected*". Other rights which are of relevance to the issue of corporal punishment include the right to be free from all forms of violence from either public or private sources[29], the right not to be tortured in any way[30], the right to bodily and psychological integrity which includes the right to security in and control of their body[31] and the right to equality.[32] In addition, with regard to children, section 28(2) provides that "a child's best interests are of paramount importance in every matter concerning the child" and it is clearly not in a child's best interest to be subjected to corporal punishment.

Accordingly, in *S v Williams*, the constitutional court found that corporal punishment violated the right to dignity and declared judicial corporal punishment unconstitutional on the basis that it was cruel, inhuman and degrading.[33] In the *Christians Education South Africa v The Minister of Education*[34], the applicants sought to have section 10 of the Schools Act[35] (which makes it a criminal offence to administer corporal punishment in schools) declared unconstitutional and invalid to the extent that it was

[28] This is in addition to "human dignity" being expressly mentioned as one of the founding values of the democratic South Africa in section 1(a) of Act 108 of 1996.
[29] Section 12(1)(c) of Act 108 of 1996
[30] Section 12(1)(d) of Act 108 of 1996
[31] Section 12(2)(b) of Act 108 of 1996
[32] Section 9 of Act 108 of 1996
[33] S v Williams 1995 (3) SA 632 (CC)
[34] Christians Education South Africa v the Minister of Education 2000 (4) SA 757 (CC)
[35] South African Schools Act 84 of 1996

applicable to independent schools where parents or guardians had consented to corporal punishment being imposed. In addition, the applicants alleged that this prohibition interfered with their right to freedom of religion. The Constitutional Court held that the prohibition of corporal punishment was a justifiable limitation of the right to freedom of religion. Similarly, the High Court, when this matter was heard before it, held that corporal punishment in schools violated the right to dignity and the protection against cruel, inhuman and degrading treatment or punishment.[36]

A vital issue which remains is whether the right of parents to administer corporal punishment is unlawful by virtue of section 28(1)(d) which protects children from "maltreatment, abuse or degradation".[37] It is important to note that section 39 of the constitution provides that a court must consider international law[38] when interpreting the rights in the Bill of Rights. As mentioned above, South Africa is a signatory to the Convention on the Rights of the Child and this Convention requires signatories to protect children from "all forms of physical and mental violence, injury or abuse" as provided in article 19. The Committee on the Rights of the Child has indicated that the protection afforded to children in article 19 extends to protection from corporal punishment in the family and by parents. Therefore, South Africa has, by ratifying the CRC, undertaken to fulfil the provisions and obligations thereof and this includes taking a step to prohibit corporal punishment in the home or by parents.

However, it must also be noted that the rights in the Bill of Rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human

---

[36] De Waal, Currie and Erasmus *Bill of Rights Handbook* (4th edition) 2001 p 294
[37] Devenish, *A commentary on the South African Bill of Rights,* Butterworths, 1999, page 90
[38] Section 39(1)(b)

dignity, equality and freedom.[39] In addition, all relevant factors need to be taken into account including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose and less restrictive means to achieve the purpose.[40] Therefore, it may still be possible for a person to argue that a parent's right to impose corporal punishment on their child is reasonable and justifiable. However, it is submitted that in the light of the serious inroads and infringement into the child's right to dignity and right to freedom and security of the person (including protection from cruel, inhuman and degrading treatment or punishment), this argument would fail as it has in the *Christian Education* case.

On the other hand it must be recognized that public opinion seems to be in favour of corporal punishment in the home or by parents. To change this opinion and make people aware and create an understanding of why it is not desirable to physically punish their children will require a long-term awareness and information campaign. In addition, the public will need to be informed of alternate disciplinary measures that could be used to discipline their children. These campaigns will require state resources. Hence, any decision to expressly ban corporal punishment and allocate state resources to creating public awareness and educating parents on the issue, will need to be balanced against prioritizing what is currently more drastically needed for children.

However, despite the arguments in favour of corporal punishment, policy considerations and also the question of resources, the imposition of physical punishment on any person, including children, is wrong and should not be tolerated. Therefore, every effort should be made by States, particularly those who have ratified the CRC, to prohibit all forms of corporal punishment and this includes South Africa.

---

[39] Section 36 of Act 108 of 1996. Even the right to life can be limited in terms of section 36-See De Waal, Currie and Erasmus *"Bill of Rights Handbook"* 4th edition, JUTA 2001 page 239.
[40] Section 36(1)(a)-(e)

2.1.3 Underlying reasons for a ban on all forms of corporal punishment

The most common reason supporting a position against corporal punishment of children seems to lie in the principles of human rights encompassing fundamental rights such as the right to physical integrity, human dignity, equal protection under the law and also the right to be protected from cruel, inhuman, degrading and unusual treatment or punishment.[41] Similarly, in South Africa, judicial corporal punishment was declared unconstitutional on the basis of the provisions relating to cruel, inhuman and degrading treatment and to the right to dignity.[42] In *Christian Education South Africa v the Minister of Education* case the constitutional rights at issue were the equality clause[43], the right to human dignity[44], the right to freedom of security of the person[45] (which includes the right not to be treated or punished in a cruel, inhuman or degrading way[46]) and the rights of children to be protected from maltreatment, neglect, abuse or degradation.[47]

Other reasons include, that corporal punishment can be emotionally damaging and irreparable harm can be caused by ongoing physical punishment; that physical punishment of adults (and even cruelty against animals) is not permitted and children should have the same protection and that imposing corporal punishment on children sends them the message that physical violence is an acceptable means of solving problems between people.

---

[41] See Pete S op cit page 449; Also see Newell P "*Ending Corporal Punishment of Children"* in "*Revisiting Children's Rights- 10 Years of the UN Convention on the Rights of the Child*" (ed Deirdre Fottrel) page 115.
[42] S v Williams and others SA 632 (CC) 1995, particularly sections 10 and 11(2) of the Constitution of the Republic of South Africa Act 200 of 1993.
[43] Section 9 of Act 108 of 1996
[44] Section 10 of Act 108 of 1996
[45] Section 12 of Act 108 of 1996
[46] Section 12(1)(e) of Act 108 of 1996
[47] Section 28(1)(d)

2.1.4 Law Reform Proposals thus far

In 1997, the South African Law Reform Commission was tasked to review and investigate the current Child Care Act (Act 74 of 1983) and to make recommendations to the Minister of Social Development for the reform of this particular branch of law and to bring it in line with the principles of the Constitution and also International Law.

During December 2002, the Commission released, along with its Report, a draft Children's Bill. Clause 142 of this version of the Children's Bill (the SALRC version) referred to the issue of corporal punishment. Sub-clause 1 of this provision immediately stated that parents and those persons who had control of a child, had to respect the child's right to integrity as provided for in section 12(1)(c),(d) and (e) of the Constitution.[48] The clause also expressly provided that any legislation, including common law and customary law, which authorized corporal punishment of a child by a court including the court of a traditional leader, was repealed to the extent that it authorized such punishment. The Bill further expressly prohibited the administering of corporal punishment to a child at any school, child and youth care centre, partial care facility, shelter or drop-in centre. In addition, the common law defence of reasonable chastisement available to parents and persons who have control of a child, was also expressly prohibited. This meant that should a charge of assault be brought against a parent, then such a parent would no longer be able to rely on the defence of reasonable chastisement. The SALRC version of the Bill did not contain an outright ban on corporal punishment by parents or in the home but instead only abolished the common law defence of reasonable chastisement which (indirectly) had the effect of banning all forms of corporal punishment. However, the banning of all forms of corporal punishment was not done in an explicit way.

[48] This section provides that "everyone has the right to freedom and security of the person, which includes the right …..to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way."

South African Law Reform Commission's version

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."*

In its Discussion Paper on the Review of the Child Care Act[49], the South African Law Reform Commission raised the issue of corporal punishment. It noted that during its consultative processes, no clear mandate was received to support an outright ban of corporal punishment and that opinion on this issue was divided.[50] In order to influence public opinion on this matter, the Commission recommended that an educative and awareness raising campaign be embarked upon to prevent physical punishment of children as suggested by the Committee on the Rights of the Child.[51]

Further, while the formal protective interventions and criminal justice system would continue to be used in cases of physical assaults on children, the Commission was of the opinion that the common law defence that a parent may raise that physical punishment was justified on the grounds of the rights of parents to impose reasonable chastisement upon their children is overly broad and therefore the common law in this regard should be revisited in order to protect children. The Commission therefore proposed that upon any criminal charge of assault or related offences (such as assault with intent to do grievous bodily harm), it should not be a defence that the accused was a parent, or person designated by a parent to guide the child's behaviour, who was exercising a right to impose reasonable chastisement upon his/her child.[52]

While the Commission did receive a number of submissions supporting an outright ban on corporal punishment in the home, it believed that the approach taken by it was a pragmatic and balanced one for reasons that an outright ban without equipping parents with alternatives to corporal punishment and a

[49] The South African Law Commission had appointed a project committee to investigate and review the Child Care Act 74 of 1983 – Project 110, Discussion paper 103. The discussion paper was released during December 2001
[50] SALC Discussion paper 103, op cit, pages 379 and 388.
[51] SALC Discussion paper 103, op cit, pages 380 and 388.
[52] SALC Discussion paper 103, op cit, page 388

fundamental shift in public opinion supporting such a ban would be meaningless. [53]

The Department of Social Development drafted a new version of the Bill dated 19 June 2003. In this version the clause dealing with corporal punishment was unchanged.

In August 2003, the Department of Social Development, after consulting and gaining input from all the relevant partner-departments, released an amended version of the Bill (the Departmental draft) with the aim of inviting public comment and submissions thereon. Clause 139 of this version of the Bill dealt with the issue of corporal punishment and it was significantly different in that the provision no longer contained the clause that abolished the common law defence of reasonable chastisement. This therefore left the status quo unchanged in that parents still have the right to reasonably chastise their children and still have the right to raise the defence of reasonable chastisement where they are criminally charged.

[53] SALC Review of the Child Care Act Report, December 2002, pages 119-120

The Departmental Draft –12 August 2003

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."*

Advocating from a children's rights perspective, it is clear that this version of the Bill did not comply with international law standards nor did it comply with the Constitutional provisions, among others, relating to human dignity and physical integrity. It left the current situation and common law rights which parents have unchanged at the expense of the rights of children.

Various submissions[54] made to the department on the issue of corporal punishment, including one made by the Children's Rights Project of the Community Law Centre,[55] advocated for and supported an outright ban of all forms of corporal punishment including that which is imposed in the home.

2.1.5 Consultation undertaken by the Children's Rights Project

In light of the fact that the issue of banning corporal punishment in the home or by parents is considered to be quite a controversial one, the Children's Rights Project (Community Law Centre) embarked on a consultation process with relevant role-players. This process entailed the holding of workshops in four different provinces. These included the Western Cape, Eastern Cape, Northern Cape and Free State. The aim of the workshops was to create awareness on the Children's Bill and the forthcoming parliamentary processes but most importantly to gather the views and opinions of the participants on the issue of an outright ban of corporal punishment.[56]

The format of the workshop generally entailed presentations, group discussions and general discussion. The group discussions centered on common themes which emanated from the participants themselves. These by and large included questions exploring alternative positive measures of discipline, ways in which to empower parents and caregivers to enforce positive measures of discipline and whether a clear distinction can be drawn between reasonable chastisement and that which is excessive. The Community Law Centre's position (as outlined above, ie. supporting a ban of all forms of corporal punishment) on the topic of corporal punishment was also presented to the participants. In addition, a questionnaire to be filled in by every participant

[54] These included a submission made by Save the Children Sweden, dated 29 September 2003 and a submission by the Global Initiative to End All Corporal Punishment of Children, dated 26 September 2003.
[55] Dated 5 September 2003.
[56] Other area covered by the workshops included parental rights and responsibilities, international adoptions and international abductions.

was specifically designed for corporal punishment in order to ascertain every single person's views on the issue.

The participants ranged from various governmental departments to child care workers in places of safety and secure care facilities, to non-governmental organizations in the children's rights sector and non-governmental organizations working around parenting skills. One of the workshops held was quite unique from the rest in that there were many children who attended it and it was interesting to hear their views and opinions on the issues at hand.

The views and opinions on the topic of banning all forms of corporal punishment were quite diverse. While some participants favoured an explicit outright ban, others favoured only the removal of the defence of 'reasonable chastisement'. There were also some participants who felt that the current common law position (allowing parents to reasonably chastise their children or use moderate physical punishment) should remain.

Some of the concerns which were raised by the participants should all forms of corporal punishment be abolished included:

a. How would the child protection system deal with such a ban given that it currently lacks the resources to even properly respond to cases involving extreme forms of abuse and that perhaps resources need to be targeted where they are most urgently needed.
b. Is it useful to criminalise parents? Instead there is a need to have far more support structures in place for families and the public educations system needs to be at a far more advanced stage before we start on such a course of action. There is a need for a support orientated rather than a punitive approach.
c. A ban would open the floodgates to prosecution and parents would unnecessarily face charges even for trivial matters.

d. How will the law regulate such a ban and how will it be monitored?
e. Is such a prohibition not going to be creating an undisciplined community?
f. Once a child lays a charge against a parent, how will the damage to the family relationships (between such parent and child) be repaired or addressed? Even if no prosecution follows, laying a charge will result in family conflict.

While most of these concerns are valid ones, the lessons learnt and research undertaken in most of the countries that have to date abolished all forms of corporal punishment show that they can indeed be addressed and that some of them cease to be issues once law reform has happened and the law is changed. Further, most of these concerns can be countered when argued from the perspective that children should also enjoy the same protection from the law as adults do. Arguments in response to some of the above concerns include:

a. Resources

It is clear that greater resources will be needed to investigate the matter once a charge has been laid. This will require more police officials and social workers to carry out investigations. However, claiming that there are no resources to undertake investigations and afford children such protection is no reason to ignore and respect the rights of children. In this era, no one would argue that women should first wait for enough police officials and social workers to be appointed before they can claim protection in domestic violence matters.

b. Criminalising parents

The aim of reforming the law in this regard is not to open parents up to prosecutions or to criminalise them. Instead the aim of such reform in the

civil law arena is to send a clear message that imposing physical punishment on children is wrong and its purpose is to clarify that parental and other assaults in the name of 'correction' or 'discipline' are still assaults that are prosecutable under the criminal law. Such assaults are an infringement of the child's right to dignity and physical integrity. It is also aimed at improving child-rearing practices.[57] Further, it is aimed at affording children equal protection from the law similarly to adults as provided for in criminal law.

c. Floodgates to prosecutions

The experiences in most countries that have undertaken law reform prohibiting corporal punishment has shown that the change in law did not result in an influx of prosecutions of parents. Instead, it brought to the fore the more severe forms of abuse of children that was already occurring. In Sweden, for example, the ban on physical punishment has not led to parents being prosecuted in droves for 'trivial' incidents of assaults.[58] In terms of the Swedish law, prosecutions can only proceed under the terms that define assault for adults and children alike, namely that there must be evidence of bodily injury, illness or pain and prosecutors would not generally pursue a case that would to all extents and purposes be considered petty.[59] Similarly, in South Africa, prosecutors also have the right to exercise prosecutorial discretion and can decline to prosecute petty or trivial incidents of corporal punishment. It is also doubtful whether every act of corporal punishment will result in a charge being laid and a prosecution being undertaken. For example, in Austria, the Austrian Federal Ministry of Justice reported that: "there has been no rush of children reporting their parents to the police for smacking them. State

[57] See *Hitting Children is Wrong- A plea to end corporal punishment* Save the Children Sweden, 2002, p 18.
[58] Rowan Boyson report, op cit, p 20.
[59] Rowan Boyson report, op cit, p 20.

intervention in family life has certainly not increased as a result of the new law, but the public and especially the judges became sensitized to the view that beating children is an evil. There is a greater willingness of people to bring cases of maltreatment of children to the attention of the competent authorities."[60]

Input received from questionnaires

As already mentioned above, questionnaires were designed to access the voices and views of every participant on the issue of banning corporal punishment in the home. The questions basically centered around what the contents of the provision in the Children's Bill should be on corporal punishment in the home and whether they supported or opposed an outright ban of corporal punishment.

A total of 87 completed questionnaires were received reflecting a majority in support of an outright ban. The responses translated into the following:

Retaining the common law situation	*-*	*15*
Removing the defence of reasonable chastisement	*-*	*18*
Explicit outright ban	*-*	*38*
Other (Not clear)	*-*	*16*

From the above it is clear that the majority of the participants supported an outright ban of corporal punishment in the home. It was also clear from the input received from both the discussions and questionnaires, that an extensive education and awareness campaign must be carried out along with the

[60]Quoted and referred to in *Hitting Children is Wrong,* Save the Children, op cit, p 18.

introduction of such a ban. The purpose would be to equip parents and caregivers with alternate measures of positive discipline and also provide them with information on the harmful effects of corporal punishment.

On the other hand, there were also many who preferred that only the defence of reasonable chastisement be removed thereby probably implying a subtle and phased-in approach. This approach of first removing the defence and then including a more explicit provision of the ban was the approach that was taken in most countries which have abolished all forms of corporal punishment. However, this proved to be unsuccessful for reasons that the first stage of removing the defence led to public and professional confusion which ultimately required a complete explicit provision prohibiting physical punishment of children. It is therefore submitted that the most appropriate approach for law reform in South Africa is to abolish the defence of reasonable chastisement and also include an explicit clause prohibiting corporal punishment in the same provision in the Bill. Should this provision be contravened, then the criminal law and sanctions will apply. There would therefore be no duplication of offences and the normal common law offences will apply.

2.1.6 Submission on the incorporation of a prohibition against corporal punishment in the Children's Act

Before Bill 70 of 2003 was tabled as a re-introduced version of the Children's Bill, a certified version of the joint Bill (both section 75 and 76 combined) was introduced. The sections that have been removed from Bill 70 of 2003 will apparently be re-inserted through amendments once the Children's Act has been promulgated. It is highly unfortunate that one of the sections that did not remain in Bill 70 of 2003 was the clause relating to corporal punishment. The reason for this is that the provisions for and implementation of laws relating to corporal punishment are a national competency and should therefore be contained in the Bill before parliament at present.

The Children's Rights Project therefore submits that the clause on corporal punishment as contained in the South African Law Reform Commission version of the Bill 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. The Children's Bill would merely state the prohibition that the corporal punishment of children is not allowed. In addition, the prohibition in the Children's Bill should be accompanied with a sanction in terms of the existing common law offences such as assault or assault with intention to inflict grievous bodily

harm. The wording in the Bill should therefore state that if there is any contravention of the prohibition, the offender will be prosecuted in terms of the common law crimes and that the defence of reasonable chastisement is no longer available. Therefore, if a parent imposes corporal punishment, then such a parent will be charged with these existing common law offences and the existing criminal law would apply.

Therefore it is our submission that a clause be inserted into the Children's Act to read as follows:

(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)(a) No person may administer corporal punishment to a child at any time, including but not limited to, at home, in schools; child and youth care centres, partial care facilities or shelters or drop-in centres.

(b) any person who fails to comply with the provisions of this section

will be guilty of contravening the common law and shall be liable to prosecution in terms of the criminal laws of South Africa relating to assault, assault with intention to commit grievous bodily harm and attempted murder.

(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."

2.2 Children's Courts

This submission will cover certain key aspects on the courts chapter as contained in the Children's Bill.

The concept of the children's court is presently contained in section 5 of the Child Care Act 74 of 1983. The Child Care Act has come under fire by various commentators, having been drafted and enacted at a time when apartheid policies were the forefront of South African legislation and also for being very limited in the scope of its protection for children.[61] The Act has developed in a piecemeal way since coming into operation- having been amended a total of seven times since 1986. It has also been the subject of constitutional challenge on a number of occasions, with certain provisions being declared unconstitutional by the Constitutional Court.[62]

---

[61] 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. 248. See also the South African Law Commission, Project Committee 110, Review of the Child Care Act, Discussion Paper, December 2001 and Report, December 2002.

[62] For instance: *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC); *Minister for Welfare and Population Development v Fitzpatrick* and others 2000 (3) SA 422 (CC).

2.2.1Research undertaken by the Children's Rights Project in relation to children's courts

The Children's Rights Project undertook a study into the present situation of Children's Courts in 2003. This study aimed at identifying problems in the courts system as this could indicate what need to be changed when the court system is revisited in the new Children's Act.

2.2.1.1Methodology of the Study

The study involved the application of a semi-structured questionnaire on commissioners of child welfare, clerks of the children's courts, social workers and some legal representatives and non-governmental organizations. The questionnaire was applied by a researcher in most instances however some questionnaires were self administered by the respondents. The questionnaire was piloted with a legal representative that has lengthy experience in the children's courts in the Western Cape.

The questionnaire was applied in 4 magisterial districts in the Western Cape and 2 in Gauteng. A total of 21 questionnaires were completed and these are broken down as follows:

- 6 Commissioners of Child Welfare
- 7 social workers
- 2 legal representatives
- 3 members of a non-governmental organization
- 3 clerks of the children's court

Unfortunately, the researcher could not access any children who had experienced children's courts procedures.

In addition, two workshops were held in the Western Cape and Gauteng respectively, that focused on the law reform process around the Children's Bill relating to children's courts. Comments were elicited from the participants, which included non-governmental organizations, Legal Aid Board Justice Centres and University Legal Aid Clinics.

Some of the findings are very enlightening if the Child Care Act is going to be replaced by the Children's Bill and the courts chapter reworked. The findings point to some critical problems with the present system that need to be addressed by amendments to the law.

2.2.1.2 Findings

Officials of the Children's Courts

The children's court is presided over by a commissioner of child welfare. Section 6(1) of the Child Care Act specifies that every magistrate shall be a commissioner of child welfare and every additional or assistant magistrate shall be an assistant commissioner of child welfare for the district in which he or she presides. The commissioner of child welfare may only perform those functions assigned to him or her by the Child Care Act or any other law so specifying[63]. By assigning the function of a commissioner of child welfare to magistrates, the legislature has created a broad base of presiding officers who can hear matters relating to child protection and welfare. Unfortunately, only a small number of commissioners have the relevant training in and knowledge of child-care related issues[64].

---

[63] s.6(2)

[64] Zaal, N. and Matthias, C. " The Child in Need of Alternative Care", in Davel, CJ. (Ed.) *An Introduction to Child Law in South Africa*, Juta Law, 2000, p. 118

What the Commissioners said to the question of whether a magistrate is the appropriate person to act as Commissioner of Child Welfare:

"Magistrates are the appropriate officials to be Commissioners of Child Welfare. An enlightened magistrate who has social context training is the right person. He or she needs insight, judicial wisdom and life experience."

"Yes, you have a person who is impartial. Sitting on the bench requires a particular mindset. But you could have a suitably trained person appointed as an external Commissioner."

"Yes, if trained correctly."

"Yes, but additional training is needed to increase the knowledge of Commissioners and to ensure uniformity of practice and procedure."

What the legal representatives said to the question of whether a magistrate is the appropriate person to act as Commissioner of Child Welfare:

"It depends on the magistrate. In principle it is not necessary to have a magistrate act as a Commissioner. What is needed is qualified people with appropriate qualifications and experience."

"Yes, however, extensive and appropriate training should be given. If the court is small then a magistrate (adequately skilled) should go around the various courts – similar to High Court Circuit Courts"

What the social workers said to the question of whether a magistrate is the appropriate person to act as Commissioner of Child Welfare:

"No, frequently they do not have sufficient knowledge or the right disposition to deal with children's cases."

"No. It is essential that Commissioners have specialist knowledge of the Child Care Act."

" Yes if they get specialized training."

"Yes. Provided they are fully trained on the Child Care Act as often officials are brought in who may have worked only in a maintenance court and they are then making decisions about children's lives without having all the knowledge.

"Yes! (Who else would be appropriate?) They just need to be trained well."

"No. I believe that this is a specialized field that requires trained Commissioners of Child welfare who are able to make informed decisions about the best interests of children."

In addition, the Act provides for the appointment of children's courts assistants, who shall perform the functions assigned to them under the Child Care Act and who shall also generally assist the court in performing its functions[65]. These assistants are officers in the employ of the Public Service and are appointed by the Minister of Social Development. However, should no such appointment have been made or the children's court assistant who was appointed be unable to act as such, section 7(3) of the Act empowers the

[65] s. 7(2)

commissioner of child welfare to appoint any competent Public Service officer to act as a children' court assistant for as long as is necessary.

Some of the functions assigned to children's courts assistants include applying for a subpoena for a witness to give evidence or produce a book or document at children's court proceedings[66] and applying for the rescission of an adoption order on certain grounds[67]. The regulations to the Child Care Act[68], also set out what the functions of the children's court assistant should entail. These include attending any sitting of the court[69], examining or cross-examining parties and witnesses[70], requesting further information or reports[71] and, if the assistant is a social worker, canalising of social worker's reports[72]. Prior to the Child Care Amendment Act 96 of 1996, there were proposals to make prosecutors serve as children's court assistants, however this move received critisism[73]. The reason being is that the adversarial function that is usually assigned to prosecutors is ill-equipped to deal with the counselling and advisory role that is assigned to children's court assistants. In addition the function of the children's court assistant is not the same as would be the function of a legal representative who would put the child's case forward and advocate his or her cause. Nevertheless, despite the provision for children's courts assistants in the Act, their physical presence in the courts lacking and it has been noted that Commissioners have to fulfil a dual role in the children's courts because of the lack of a children's court assistant[74]. This dual role encompasses serving as a judicial officer as well as carrying out the functions of the assistant which

---

66 s. 8(4)
67 s. 21(1)
68 made in terms of section 60 of the Act
69 regulation 2(1)(a)
70 regulation 2(1)(b)
71 regulation 2(3)
72 regulation2(2)(a) and (b)
73 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. 250
74 Zaal, F N. *Do Children Need Lawyers in the Children's Courts*? A Community Law Centre Publication, University of the Western Cape, p. 13

include deciding what witnesses should appear at the inquiry and leading evidence – functions certainly not supposed to be carried out by presiding officers.

It has been noted that the idea of equipping children's courts with suitable personnel to assist with the matters, while sound in principle, has failed somewhat in practice[75]. The reason for this, as noted above, is that, at present, there are very few children's courts assistants employed in South Africa.

Of the Commissioners of Child Welfare interviewed, all did not have a children's court assistant as envisaged by the Act. They all had clerks that performed administrative functions. One commissioner noted the following:

> *"The inquiry is inquisitorial and there is no real necessity for an assistant in the inquiry as the magistrate performs the functions. In complicated matters usually the legal representatives play a major role."*

Another said as follows:

> *"The magistrate will perform a dual function and give parties an opportunity to cross-examine. They way I do it I know I am not prejudicing anyone, but it could be abused. So I would prefer an assistant."*

[75] Zaal and Matthias, *op cit*, p. 118

What the Commissioners of Child Welfare said to the question of who do you think is best suited to perform the functions of the children's court assistant:

"A person who is similar to a maintenance court officer who has the ability to negotiate and mediate."

"Someone who is legally trained."

"A specialized prosecutor – someone with a particular interest in family law."

"A legally trained person, e.g. attorney, public prosecutor who has the necessary training in children's court work."

What the clerks of the children's court said to the question of who do you think is best suited to perform the functions of the children's court assistant:

"Clerks can be trained. This is my third year in the children's court and I have never worked with an assistant. I don't believe cases have suffered because of it."

"A fully trained assistant – in legal and social work."

What social workers said to the question of who do you think is best suited to perform the functions of the children's court assistant:

" Trained personnel who have both legal and social work training/experience."

"An appointed 'prosecutor' – who is titled 'Children's Court Assistant'. They need to be as qualified as a prosecutor but specialize in children's court matters."

"A person who is au fait *with all aspects of the Child Care Act, who has the knowledge and expertise to make out orders appropriately without having to be checked more than once by the Commissioner of Child Welfare which is currently the situation."*

"A social worker who has received the required training at a tertiary institution."

Procedure in the Children's Courts

The Child Care Act makes special provisions for the children's courts in order to create an informal atmosphere conducive to the nature of the proceedings that it governs. Due to the normally invasive nature of court proceedings the Act provides that a children's court should sit in a room other than that of a normal court room, unless no such room is available or suitable[76]. This provision mitigates against the usual brutalisation and traumatisation that children have to undergo in court proceedings. Furthermore, the Act provides for children's court proceedings to be held *in camera*, and only in the presence of those persons whose attendance is necessary[77]. The commissioner may, however, grant permission to certain persons to be present at the proceedings, but there

[76] s. 8(1)
[77] s. 8(2)

is no guidance in the Act as to when such permission may be granted and under what circumstances.

In the study, three Commissioners stated that they only allow the parties, social workers and legal representatives to be present. However, the three other Commissioners stated that they also allowed safety mothers, potential foster parents and members of the extended family to attend. Some social workers also mentioned that in the courts in which they operate the child's caregivers (if other than the child's parents) are allowed to be present at proceedings.

This bears out the fact that procedures are inconsistently applied in different courts and that there are insufficient guidelines on certain issues contained in the Child Care Act.

Removing and bringing the child before the children's court

There are three procedures used for placing a child in care pending a children's court inquiry, two of which involve removing the child and bringing him or her before the children's court in the area in which he or she resides.

The first relates to a 'non-urgent-procedure and is contained in section 11 of the Act. This provision allows for a court order to be issued to remove a child, who either has no parent or guardian or where it is in the interests of the safety and welfare of that child, and take the child to a place of safety before bringing the child to the court[78].

The second procedure is contained in section 12 of the Act and relates to 'urgent' removals of children. In terms of section 12(1), any policeman, social worker or authorized officer may remove a child to a place of safety without a

[78] s. 11(1)

warrant if they have reason to believe the child is a child in need of care and the delay in obtaining the warrant will be prejudicial to the safety and welfare of the child. Because of the drastic nature of this section, there are certain requirements that the policeman, social worker or authorized officer must comply with.

The third is contained in section 13(2) where any other child thought to be in need of care may be brought before a children's court by a policeman, social worker, authorized officer or parent, guardian or custodian of the child. This latter provision does not involve the removal of a child to a place of safety and merely entails bringing the child before the children's court. The purpose of bringing the child before the court is in order for the court to open proceedings in order to hold an inquiry to determine whether the child is a child in need of care.

In the study, the respondents where asked which procedure was used most frequently in their children's court. Most Commissioners stated that the section 12 and section 13(2) procedures were those used the most. Two Commissioners had the following to say about section 11(2) procedures:

"I have never done one."

"Have done +- 5 section 11(2) warrants in 8 years!"

What Commissioners of Child Welfare said to the question of whether there have been Form 4 removals where the child is never brought to court:

"Yes, we had difficulties before there were social workers at police stations. The police would issue Form 4's and leave the child there. But now the police are not readily issuing Form 4's. Also unregistered places of safety would not bring the child to court for example where children

were placed with them by hospitals or there were abandoned children placed with them."

"Yes, by social workers and the police."

"No, but instances where there were significant delays."

What social workers said to the question of whether there have been Form 4 removals where the child is never brought to court:

"Yes. On occasion some children have 'fallen through the cracks' and remained in places of safety for more than a year before being brought before the children's court."

"Yes. There is a perception that Form 4 orders lapse."

"I have experienced that twice I all my years of working. It probably does happen more often."

These procedures are drastic of nature and often result in the removal of children from their family environments – a situation that in essence runs contrary to section 28(1)(b) of the Constitution as there has been no judicial determination that it is in the best interests of the child to be separated from his or her family environment. Therefore, these procedures not only have to be the least intrusive and restrictive, but they have to be applied correctly and with the greatest circumspection. Provisions relating to monitoring of these removals and training on when to apply them should be considered.

Parties to the proceedings

The parties to the matter consist of the child, parent(s) and or guardian(s) of the child. In terms of regulation 4(1) of the Act such parties have the same rights and powers as a party to a civil action including those in relation to examining of witnesses, leading evidence and addressing the court. The social worker and prospective foster parents, if any, are mere witnesses.

Regulation 4(2) to the Child Care Act provides that a person, who is not a party to the proceedings, may make application to be joined as a party and if the commissioner considers this to be in the best interests of the child, such an order can be made granting the person the same rights and powers as a party to the proceedings, such as leading evidence and cross-examining witnesses.

It must, however, be stressed that it is the person wishing to join the proceedings that needs to bring the application, it cannot be initiated by the court or the social worker. In addition, the applicant must furnish the court with sufficient reasons to show that it is in the best interests of the child that he or she be admitted as a party. It has been held that an unsuccessful applicant for leave to join the proceedings may have the necessary standing in court to take the commissioner's decision on review to a superior court[79].

From the various respondents replies to the study it appears that the following persons have been allowed to join children's courts proceedings in certain matters:

- A family member who was excluded from a social worker's report
- A biological father who did not marry the child's mother
- Prospective foster parents

[79] *Gold v Commissioner of Child Welfare, Durban* 1978 2 SA 301 (N)

- Step parents who are important role-players in the reunification of the family
- Member of the extended family who has a direct interest in the matter
- A child's longstanding caregiver who is not the parent or guardian

From the replies to the questionnaire, the differences in interpretation of the Child Care Act became evident in relation to this issue. One Commissioner did not interpret "parent" to include a reputed father or father of a child born out of wedlock, while another Commissioner interpreted "parent" widely enough to include fathers of children born out of wedlock.

The difference of interpretation is an issue that needs to be addressed through appropriate training or specific regulations to the Act and forthcoming Children's Act.

Legal representation

As stated above, certain provisions of the Magistrate's Court's Act apply to the children's court and these include the appearance of attorneys and advocates in the court. Section 20 of the Magistrate's Court Act provides that an advocate or attorney of any division of the High Court may appear in any magistrate's court proceedings and therefore any children's court proceedings as well. Rule 52 of the same Act provides that any party to a proceeding may institute or defend a matter in person or represented by a practitioner. So all parties to children's court proceedings may be represented by a legal practitioner. Apart from these provisions, the Child Care Act itself[80] makes provision specifically for the representation of children in order to allow for the child's constitutional right to be heard[81]. The Child Care Act, by the 1996 Amendment

[80] s. 8A
[81] s. 28(1)(h) of Act 108 of 1996

Act, was amended to provide for the legal representation of children in the children's courts. This proposal was not only intended to cater 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.

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 enough[82]. 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 by law to consider the issue in light of Constitutional and policy considerations[83].

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 subsequently enacted Child Care Regulations, in regulation 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. Regulation 4A(2) provides an important test in that it requires the Commissioner to record

---

[82] 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

[83] Sloth-Nielsen and Van Heerden, *op cit*, p. 251

his or her reasons for not providing legal representation at state expense, which allows that decision to be taken on review to a higher court. However, the test 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.

Unfortunately, the Child Care Act provisions, which would go a long way in furthering the child's constitutional protections, have not yet been promulgated and so one can only look to the Magistrate's Court Act for minimal guidance in this area.

In the study, most Commissioners felt that the legal representation for children was adequate and appropriate. It further appeared that the only legal representatives available for children are those from Legal Aid Board Justice Centres and University Legal Aid Clinics. The feeling of two Commissioners was that the Legal Aid Board representatives were not as appropriate to represent children as those from the University clinics are.

Most social workers were of the opinion that legal representatives appearing in the children's court are not adequate or appropriate. One social worker stated the following:

> ***"Representation is essential, however, very few legal practitioners are knowledgeable about the Child Care Act and its purpose and they seem to think they are 'fighting' for something. Specialist legal representatives would be a better idea."***

What the Commissioners of Child Welfare said to the question of whether children should be represented and why:

"Yes because children are normally very scared to talk and I don't always know if they were told not to talk beforehand."

"Not necessarily .If the social worker does her work well then it is not necessary."

"I seldom need a legal representative for the child but sometimes it is necessary in exceptional circumstances."

"Yes, where there are any contentious issues it is very useful to have a legal representative."

"In certain cases yes, e.g. where the parents are legally represented and there is a dispute between the parents and the child. Also in sensitive cases/disputed cases where child does not wish to attend proceedings due to traumatisation."

"Yes, they have the right."

What social workers said to the question of whether children should be represented and why:

"To safeguard their rights and interests."

"Yes! Especially when their parents have lawyers who do not have their interest at heart."

"Yes. Their best interests need to be fought for."

"Yes. They have an equal right as the biological parent to be represented. However, care must be taken that the person representing the child understands the children's court process which is often not the case."

What clerks of the children's court said to the question of whether children should be represented and why:

"Yes. The only report is from the social worker and they can be influenced and they give recommendations not in the interests of the child."

"Yes. They feel intimidated to speak in front of their parents in court."

"No. Because the social worker does what is in the best interests of the child."

Despite some ambiguity in the answers to the question of legal representation of children, it is clear that children need an independent voice in children's court proceedings. Obviously social workers would feel that they are best suited to perform this function, however, it is clear that a person who can neutrally speak for the child and protect his or her interests is needed and that a legal representative should fulfill this task. However, access to such representatives is the issue as well as training and appropriate knowledge of how to represent children is of paramount importance.

The inquiry

The court procedure in the hearing itself, follows quite a unique structure. Section 14 (2) of the Child Care Act provides that the commissioner must request a social worker's report on the circumstances of the child and his or her parent(s), guardian(s) or custodian(s). This written report, in terms of

Regulation 5(1), may be submitted into evidence without any oral evidence and it shall be regarded as constituting *prima facie* evidence of the facts contained therein. This means that if the statements and facts contained therein are not refuted, the court can accept them without further evidence being lead.

At the hearing, the social worker's report is usually admitted into evidence and the social worker merely has to confirm the contents thereof. It is important to note that the children's court is entitled to receive any evidence adduced by, or on behalf of, any party to the proceedings and may even cross-examine any person giving evidence for or on behalf of any party, including the social worker[84]. Then the parties to the proceedings, or their legal representatives, may cross-examine the social worker on the content of the report. This is important, because if the statements contained therein are not refuted as being incorrect, then the report stands and the parties cannot raise the issue again at a later stage. It is therefore essential for the parties to challenge anything in the report that they disagree with.

Notwithstanding, the parties may not wish to contest the report and then it will be admitted into evidence without any challenge to it's content. This does not mean that at a later stage a party might not address the court in argument and maintain that the facts contained in the report do not sustain the recommendations. This goes to the weight of the report and not necessarily whether the contents thereof are correct. It is therefore essential that a well-researched and reasoned report is placed before the court.

Guidelines on the social worker's report

Regulation 2(4) to the Child Care Act provides basic guidelines for the compilation of the social worker's report.

---

[84] regulation 4(5)

This regulation sets out a detailed list of factors and steps to be considered and undertaken in compiling a report. The contents aim to provide a holistic view of the child and family circumstances and by emphasizing empowering and least restrictive orders, reunification and ultimate restoration of the child to the family, the provision adheres to the constitutional right of the child to family or parental care[85].

In the study, all social workers with the exception of one stated that the guidelines were useful and were not in need of improvements. One social worker, however, answered the question of whether the guidelines were helpful as follows:

> *"Yes, helpful, but not adequate. A far more detailed outline would be better."*

The respondent went on to state that the guidelines were too general.

In trying to evaluate the quality of social work practice in the children's court, the study asked whether the quality of service and skill standard across all social work agencies. Two Commissioners indicated that it was while the remainder indicated that there were serious disparities across certain agencies and also indicated a level of concern at the quality of service delivered by the provincial Departments of Social Services.

This is of concern as the social worker's role in child care determination is critical and the issue of skill and service delivery then needs to be urgently addressed through compliancy standards and quality assurance mechanisms.

Establishing whether a child is in need of care

The children's court inquiry centres around establishing whether a child is a child in need of care. This is determined according to the ground set out in section 14(4) of the Child Care Act.

---

[85] s. 28(1)(b) of Act 108 of 1996

Again, because of the child' constitutional right to family or parental care, removal from such care constitutes a serious inroad into this right and so must be made on clear and specific grounds.

Moreover, section 14(4), which was amended in 1996[86], exhibits a child-centered approach to the determination of whether a child is in need of care. This approach has moved away from the parental-fault emphasis of previous years that was regarded as not being fair to parents and possibly detrimental to subsequent family reunification attempts, and has moved the Act in line with international trends as reflected in the United Nations Convention on the Rights of the Child[87].

Nevertheless, criticism has been leveled at section 14(4)(aB)(i), in so far as it relates to the ground of 'without visible means of support'[88]. It is argued that in South Africa's situation where poverty is rife and many parents are not to blame for their poor financial status, the removal of a child from poor but loving parents should be treated with caution and circumspection. In addition, in determining whether a child has been abandoned in terms of section 14(4)(aB)(i), regard can be had of the decision in *Van Rooyen v Van Staden*[89] which, dealing with the Children's Act 33 of 1960, held that neither failure to maintain a child where that child was not in need of maintenance from a parent refusing consent to adoption, nor neglect, would amount to 'deserting the children'. *In Gold v Commissioner of Child Welfare, Durban*[90], the court held that the mere fact that a child's parent had temporarily delegated control of the child to a third person did not, in itself, indicate that the parent had abdicated his or her authority to care for and control the child.

---

86 Child Care Amendment Act 96 of 1996
87 Zaal and Matthias, *op cit*, p. 126
88 Zaal and Mattias, *op cit*, p. 127
89 1984 1 SA 803 (T)
90 1978 2 SA 301 (N)

In relation to section 14(4)(aB)(iv), it has been held that a child is not in need of care simply because the marital relationship between the child's parents may be strained[91]. Furthermore, in relation to section 14(4)(aB)(v), our courts have held that the use of bad language by a parent does not constitute mental neglect[92].

Therefore, the case law indicates the wide range of factual scenarios that occur in children's courts. It is therefore imperative to ensure that the provisions in the Act are clear. In addition, interpretation guidelines should be included in the regulations and commissioners should receive appropriate training on how to interpret the provisions.

The study indicated that most Commissioners and social workers felt that these grounds were adequate and had experienced little problems in practice with them. This notwithstanding, some respondents indicated that there have been cases where the facts had to be manipulated in order to ensure that a child be found in need of care.

One social worker stated the following:

> *"Yes, I don't believe this is necessarily a problem. Sometimes we have to be creative to serve the best interest of the child."*

However, it can be a problem as a finding of a child being in need of care is used to fill lacunas in the law that should be attended to and revised. This is illustrated by the comment of another social worker:

> *"When a sympathizer wants a birth certificate in order for a child to start school, the problem is manipulated to make the child in need of care and place the child in foster care so that the age can*

---

91 *Weber v Harvey NO* 1952 3 SA 711 (T)
92 *Ex parte Kommissaris van Kindersorg: In re Steyn Kinders* 1970 2 SA 27 (NC)

be estimated and the child can get a birth certificate and go to school. This is a common occurrence."

Once the inquiry is completed: powers and orders

At the end of the inquiry, the court may find that the child is not in need of care and then no order is made, the inquiry is closed and the child is returned to his or her parent, guardian, custodian, as the case may be.

However, should the court find that the child is in need of care, then a range of orders can be made in terms of section 15 of the Act.

What Commissioners of Child Welfare said to the question of how placement orders are determined in the children's court in which they work:

"It is done according to the best interests of the child. The social worker must convince the court on a particular placement option and the best possible placement must take place in whatever time period is needed – it mustn't be hurried. No child under 2 years old is placed in a children's home, we look for adoption or foster care in these instances."

"I follow the Act."

"Depends on the recommendation. I try to keep the children with their parents. If this is not possible then placement is with a close family member. Children's homes are the last option."

"It is largely done on the recommendation of a social worker who has investigated the placement. The parent's objections are taken into account."

"I look at the best interests of the child, using the point of departure that the child belongs in a family and his or her own family first."

What social workers said to the question of how placement orders are determined in the children's court in which they work:

"By Commissioners despite social worker's recommendation (or so the social worker's say!) e.g. when no adopters are found for +- 2 years case is not finalized until adopters found if Commissioner wants this."

"Social worker should be recommending most empowering placement option for the child. Sometimes the Commissioners have not accepted recommendations made by the social worker and finalization of the children's court enquiry has been postponed."

"It is mostly determined by the social worker's recommendation."

> *"The orders are determined by the finding that the Commissioner of Child Welfare in terms of whether the child is in need of care. This, in turn, is determined by the evidence presented in court. A placement order that is made is usually one that would best meet the needs of the children concerned."*

Much like the provision on removing a child from his or her family pending the children's court inquiry, placement of a child outside of the family is a drastic step. It seems that quite a bit of emphasis is placed on the recommendation of the social worker and this is of concern given the earlier comments relating to quality of service and skill across social work agencies. The need for legal representation for children ties in with the placement issue as all evidence and recommendations can be properly scrutinized and tested by a knowledgeable representative acting on behalf of the child.

Conclusions to be drawn from the study

While it appears that most of the provisions of the Child Care Act are being adhered to in the practice in children's courts, there are some issues that the study has highlighted that need urgent attention. These can be summarized as follows:

- training and appointment of Commissioners of Child Welfare
- training and appointment of children's court assistants
- quality of service of social workers
- interpretation differences between Commissioners of Child Welfare
- section 11(2) removals and Form 4 removals
- legal representation of children

Part of the study also included some questions relating to the law reform process that has resulted in the draft Children's Bill. The South African Law Commission version of the Children's Bill was the one that formed the basis for the questionnaire. It is interesting to note the comments of Commissioners and social workers as they are very informative for submissions to Parliament on what should be contained in the Bill.

Some of the Commissioner' comments are as follows:

- *The powers and jurisdiction of the present children's courts are insufficient. Upper guardian powers could fit in at our court. To deal with guardianship and parental rights and responsibilities would mean accessibility and cheaper costs. My concerns about implementation relate to staffing and training. I feel children's court should have the power to make decisions about passports and custody and access relating to natural fathers of children born out of wedlock. Some children's courts have the necessary knowledge to make orders that extend beyond the scope of the present court's jurisdiction but not others because they have no opportunity to specialise.*

- *The magisterial district in which I operate can't deal with the increased scope of matters that we have at present. The proposals are mostly implementable, but infrastructure, planning and funds are problematic.*

- *I feel that more distinct powers in terms of custody and access are needed in the children's courts.*

- *The proposals are not an improvement to the present system. They will create absolute chaos and are unimplementable. The Bill* [SA Law

Commission version] *is confusing, disorganized, complicated – an attempt at re-inventing the wheel. I feel that the powers needed for the children's court are all the powers available under the present Act, inter-country adoption orders and some powers to assist parents who have access/custody disputes.*

Some of the social workers comments are as follows:

- *I believe the children's court is best equipped to make decisions regarding the best interests of children, however, there are cases where biological parents make applications at the High Court and due to the fact that the High Court is the upper guardian of the children's court, children's court inquiries are often placed on hold and this, in a way, is a duplication of services and in most cases a waste of time.*

- *I think the powers and jurisdiction of the present children's court are sufficient since they are accorded in terms of the Child Care Act, they are enough to protect the needs and safety of children and give parents the responsibility to protect their children.*

- *I do not think that the magisterial district in which I operate will be able to deal with the increased scope of matters because at present the court does not cope with its present workload. More clerks, Commissioners would be needed for the court to render a more effective, streamlined service. I think that the present children's courts should have increased powers in relation to custody matters. Applying for custody of a child is very costly. Fathers often accuse the other parent of neglect so that the matter is heard in a children's court as they can't afford the costly process of fighting a custody battle in a High Court.*

- *I do not feel that the present personnel involved in the children's courts have the necessary knowledge to make orders that extend beyond the scope of the present court's jurisdiction as they will need training. Some Commissioners are "creative" regarding the present Act, but unfortunately most Commissioners (in my opinion) have quite a shallow interpretation of the present Act.*

- *The present power and jurisdiction of the children's courts are insufficient/inadequate. Many of the findings and recommendations made by Commissioners do not provide for the overall well-being of the child. They can also be reversed by the High Court. Decisions made by other courts or in terms of other Acts may contradict efforts being made to ensure the total well-being of the child.*

- *The children's court does not deal with legislation regarding children holistically – only in a disjointed and uncoordinated way. They can be improved by centralizing the implementation of all legislation pertaining to children in the children's court e.g. maintenance, custody, etc. This would have to entail a retraining of Commissioners and not to allow too many discretionary loopholes! At present some Commissioners do not even implement the Child Care Act correctly. The current system in children's courts is insufficient and ineffective. The structures are bureaucratic and for example Commissioners cannot issue instructions to their clerks. A total restructure would be necessary plus additional resources.*

2.2.2 Submissions on the Courts Chapter – Chapter 5 of Bill 70 of 2003 (Section 75 version)

Reference will be made to the previous versions of the Bill, namely, the South African Law Reform Commission's Draft Bill of December 2002 (SALRC version),

the Department of Social Development's 19 June 2003 version (June version), and the Department of Social Development's 12 August 2003 version (August version).

2.2.2.1 Clause 42

The content of this clause is essentially the same as that of the present Child Care Act relating to children's courts and presiding officers. Although it is essentially the same as clauses 54 and 56 of the SALRC version, it differs significantly from clauses 69 and 70 of the SALRC version insofar as it deals with the appointment of presiding officers. In addition clause 42 is similar to clause 52 of the June version. The June version however had additional clauses, namely clauses 62 and 63 which dealt with the appointment and training of presiding officers and which were a significant improvement of the provisions contained in the SALRC version. The August version is the same as clasue 42 in Bill 70 of 2003.

The SALRC version and June version contained provisions for the qualifications and training of presiding officers in the children's courts. It is highly unfortunate that these provisions are not in clause 42 of Bill 70 of 2003. Furthermore it is 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 indications of the Children's Rights Project's children's courts study confirm that Commissioners of Child Welfare and clerks of the children's courts prioritise the need for specialized training in the children's courts.

Children's courts deal with issues that are critical to the well-being and safety of children. Family law, child development, an intricate knowledge of child

welfare legislation and experience in dealing with children's issues are essential for the proper administration of justice in these courts. It is therefore of paramount importance that children's courts have appropriate and suitable presiding officers.

It is therefore our submission that the provision contained in clauses 62 and 63 of the June version of the bill be re-inserted into the new legislation.

2.2.2.2 Clause 43- Status

The SALRC version proposed that the children court have the status of a magistrate's court which included both district and regional court levels. Clause 43 confines the status of a children's court to that of a magistrate's court at district court level.

It is our submission that a two-tier court approach would not serve the interest of children at this stage. There are numerous reasons for this, cost and the fact that regional court magistrates are traditionally focussed on criminal law being the two foremost. However, this does not mean that we advocate for the powers and jurisdiction of the children's courts to remain as they are under the present Child Care Act. It is our submission that their powers and jurisdiction need to be increased and this will be discussed more fully below.

2.2.2.3 Clauses 44 and 45 – Jurisdiction and matters the Children's Courts can adjudicate on

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.

Clause 58 of the SALRC version listed a wide range of matters that the children's court could adjudicate on. These provisions meant that the children's courts had the power to hear most matters that affected children. The implications of this are that children could access courts within close

proximity to where they live at a very low cost. This however does not mean that a child could not approach the High court for relief, as the High court remains the upper guardian of the child, it simply increases access to justice for one of the most marginalized groups in South Africa.

Although the Children's Rights Project is of the opinion that the majority of the provisions of clause 58 of the SALRC version be incorporated in the new Children's Act, it is argued that clause 58(1)(w) should not be included as it relates to delictual claims and the adjudication of these matters would not only overburden the children's court's roll, but are also more suitably dealt with in the civil courts.

Clause 45 of Bill 70 of 2003 contains many of the provisions of clause 58. However, it fails to contain certain key matters that a children court should have the power to adjudicate on, namely:

- The care or guardianship of or contact with the child
- The assignment, exercise, restriction, suspension or termination of parental responsibilities or rights
- Artificial procreation of a child, excluding a dispute between contraction parties regarding compensation
- Child in need of care and protection or in especially difficult circumstances
- Domestic violence affecting a child
- The departure, abduction or removal of a child from the Republic
- A social security grant to or in respect of a child
- The age of majority or the contractual or legal capacity of a child
- Safeguarding of a child's interest in property

These matters, in terms of the present Bill (with the exception of matters dealing with the child in need of protection), remain within in the jurisdiction of the High Court. We reiterate that these provisions would be best suited for

a children's court in order to increase access to justice. We acknowledge that the Department of Justice regarding the establishment of a Family Court system that will eventually be able to deal with all of these matters. However, this system is still in the pilot phase and it is uncertain if or when this system will be fully implemented. It is no excuse to make children wait in the interim. To use the well-known adage : "children first!" Nevertheless, for this to happen training of presiding officers is crucial and we refer back to our submission in this regard.

We wish to point out that chapter 10 of the 12 August version of the Bill has been removed from Bill 70 of 2003 with the exception of clause 150. This is a critical error as the provisions of chapter 10 deal directly with the functions and responsibilities of the children's courts in relation to children in need of care and protection. Because of this the provision that children's courts are entitled to deal with matters of protection has been removed from the present Bill. This needs to be re-inserted.

In addition, the chapter on children in need of special care and protection has been removed from the present Bill. We will not specifically address this in this submission as we understand other submissions will be made on this point. However, there are two groups of especially vulnerable children that children's courts should have jurisdiction to deal with, namely, children affected and effected by HIV/AIDS and refugee children. Therefore, because of the effects of HIV and AIDS on children, when re-inserting the provision of protection into clause 45, the concept of prevention needs to be elaborated on to ensure that children infected or affected by HIV/AIDS and who are in need of protection are included. This could be effected by including a definition of protection in the definition section to cover such cases as well as to include refugee children as children who are entitled to protection.

Therefore we submit that the provisions of clause 58 of the SALRC version be reinserted in the present bill with the exception of clause 58(1)(w).

2.2.2.4 Clause 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.

2.2.2.5 Legal representation of children

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.

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 enough[93]. 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

[93] 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

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 considerations[94].

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) 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.

[94] Sloth-Nielsen and Van Heerdern, *op cit*, p. 251

It is therefore shocking to note that this clause has been reduced to what it states at present. If retained, this clause 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 SALRC draft Bill be reinstated.

2.2.2.6 Clause 63 - Evidential matters

Clause 86 of the SALRC version provided for the contents of clause 63. However, in addition clause 86(1) allowed for hearsay evidence, evidence of previous similar conduct and the power of the court to dispense with any rule of evidence. This has been removed from Bill 70 of 2003.

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.

It is submitted that the provisions of clause 86(1) of the SALRC version be reinstated.

2.2.2.7 Clause 65 – Monitoring of court orders

This is a very important clause the provisions of which do not appear in the present Child Care Act. It is a vast improvement of the present situation and the Children's Rights Project wholeheartedly endorses its inclusion in the new legislation.

2.2.2.8 Clause 67 – Clerks of children's courts

Clauses 92 and 93 of the SALRC version dealt with the appointment and qualifications of registrars as opposed to clerks. The intention of the use of registrars was to increase the powers of the present clerks of the children's court in a move to try and remove the confusion relating to children's court assistants. Accordingly, registrars were required to have certain skills including an understanding of child development and a knowledge of legal issues relating to the protection of children.

The June version moved from the concept of registrars back to the concept of children's court assistants, however, it also specified the above skills needed by the children's court assistants as specified for registrars in terms of the

SALRC version. In addition, the June version provided comprehensive provisions for the training of children's court assistants.

While the nomenclature is different in these three versions of the Bill, they essentially refer to the fulfillment of the same functions, with the exception of the additional powers given to registrars by the SALRC version.

However, what is essential is that the clerk, assistant or registrar- whatever the case may be- needs to have the proper qualifications and suitable training to operate in children's courts. This emerged quite clearly from the Children's Rights Project's children's courts study.

Therefore it is submitted that the provisions of clauses 81 and 82 of the June version be incorporated into Bill 70 of 2003.

2.2.2.9 Clause 150 – Child in need of care and protection and chapter 10 of 12 August version

The entire contents of chapter 10 of the 12 August version have to do with the responsibilities and functions of the children's court when instituting an inquiry into whether a child is in need of care and protection. As such it is a critical error that clauses 151-156 have been removed from Bill 70 of 2003. It is submitted that these clauses be re-inserted into the present Bill.

Clause 152 in chapter 10 deals with the urgent removals of children without a court order. As stated above, the Children's Rights Project's children's court study determined that there were problems in the practical implementation of these removals and these problems require a far stricter monitoring of such removals. Clause 152 (5) and (6) of the 12 August version provide stricter controls. However it is submitted that because of the drastic nature of removing a child from his/her family, the responsibility of failure to comply

with the correct procedure should ultimately rest with the state and therefore an additional clause should be inserted specifically providing for the civil liability of the state for failure to comply with the correct procedure. Clause 150 only refers to clause 47 of Bill 70 of 2003, namely referral of children to children's courts by other courts. It should also refer to clause 68, namely, referral of matters to the children's court by the clerk of the children's court and clause 46 relating to child protection orders and alternative care orders.

Clause 150 essentially corresponds to the purpose of section 14(4) of the current Child Care Act and the purpose of clause 166 of the SALRC version.

It is submitted that clause 150 continues to subscribe to a child-centered approach in relation to protection that was introduced by section 14(4) of the Child Care Act and in fact goes further and provides for more circumstances in which a child is to be found in need of care and protection.

However, clause 166 of the SALRC version went even further and provided for additional circumstances in which a child could be found in need of care and protection. These included where the person having parental responsibility to care for the child :

- Deliberately fails to fulfil that responsibility in a material respect
- Sexually abuses the child or a sibling of the child
- Has inflicted a life threatening injury on the child or on a sibling of the child
- Has murdered a sibling of the child
- Has disappeared or cannot be traced
- Or where there is no person exercising parental responsibility to care for the child.

As indicated in the Children's Rights Project's study, there have been problems in the interpretation of the Child Care Act. Therefore provisions which allow for greater clarity in determining whether or not a child is in need of care are to be welcomed.

It is submitted that the provisions of clause 166 of the SALRC version be reinstated.

2.2.2.10 Overall cohesion of the children's courts chapter

As states above, there have been a number of versions of the court's chapter drafted. What is contained in chapter 5 at present in Bill 70 of 2003 is a combination of the present provisions of the Child Care Act and some of the provisions of the SALRC version. The SALRC version formed a comprehensive structure for children's courts. The attempt to include some of the provisions therein in a chapter which is essentially the same as the present Child Care Act court system has resulted in poor, illogical and incohesive drafting.

As was clear from the Children's Rights Project's children's court study, the provisions of the court's chapter have to be understood and applied by a number of role-players, particularly presiding officers and social workers. Interpretation is a key issue. This chapter as it stands, it is argued, is not user-friendly and may result in confusion and varying interpretations.

We submit that the issues of content as raised above need to be incorporated but the whole chapter needs to be redrafted so that there is a clear flow, accurate referencing to other related sections and the intended scheme and purpose of children's courts be clearly evident.

2.3 Parental rights and responsibilities

The **Community Law Centre** hosted a series of workshops in various provinces during 2003 on specific aspects of the Children's Bill, including the issue of parental rights and responsibilities as part of awareness-raising of the Bill as well as to solicit public opinion on various issues relating to, *inter alia* parental rights and responsibilities. Participants in these workshops came from varied backgrounds and ranged from individuals working with children in various capacities (such as educators, people working in child care facilities and persons working within child protection services) to child participants themselves.

These workshops highlighted the fact that in the main, there is consensus that the chapter relating to parental rights and responsibilities is very progressive and will make strides towards modernizing South African law relating to the parent-child relationship. The emphasis on mediation rather than conflict as well as the recognition of diverse family forms is to be supported. However, opinion appeared to be unanimous around the fact that there are many issues regarding parental rights and responsibilities that would need further research if the Children's Bill is to succeed in its aim of giving children comprehensive protection. At a further workshop on the issue of parental rights and responsibilities hosted by the Children's Institute, participants agreed that the clauses relating to parental rights and responsibilities impact on a large number of issues that currently is not included in parental rights chapter. These would include: parental rights and responsibilities in relation to child-headed households, children in statutory care, children being cared for through informal arrangements with relatives or others, as well as many issues relating to customary law.

A number of issues relating to parental rights and responsibilities have proved to be contentious and needs to be addressed further. In this regard, the **Community Law Centre** makes the following recommendations:

2.3.1 Parental responsibilities and rights of unmarried fathers (clause 21)

The issue of granting automatic parental responsibilities and rights to unmarried fathers has proven to be controversial. While section 9 of the Constitution of South Africa provides that there may be no unfair discrimination based on *inter alia* marital status, gender or religion, the Constitution also provides in section 28 that the best interest of a child should be of paramount concern in decisions affecting the life of a child. Thus, the question raised here is whether placing a timeframe on when parental rights and responsibilities may be acquired by an unmarried father is in conflict with either the right to non-discrimination or the with best interest of the child. As the Bill affords automatic rights and responsibilities to biological fathers who are or have been married to the child's mother at the time of conception or birth or any time between conception or birth, it is submitted that placing an additional obligation on an unmarried father to live with the child's mother for 12 months or for periods together amounting to 12 months after the child's birth would amount to unfair discrimination.

Where the issue regarding the best interest of the child is concerned, it is submitted that in certain instances it would be in the child's best interest if the unmarried father be given automatic rights and responsibility upon the child's birth. For example, where the biological parents of a child are unmarried and the father dies before he could accumulate the 12 month period, the child could then be left without a guardian or caregiver if prior arrangements have not been made in this regard.

Clause 21 also does not place a limitation on the amount of time that may elapse *after* the accumulation of the 12 month period before the unmarried father may assert his parental rights and responsibilities. For instance, if an unmarried father has lived with either the child (clause 21(2)(b)), or the child's mother (clause 21(1)(b)), for a period of 12 months shortly after the child's birth, this father may, theoretically decide to assert his parental rights and responsibility a number of years down the line when there is something to be gained from the assertion of parental rights (such as claiming the right to a daughter's *lobola* in terms of customary law), notwithstanding the fact that the father has not seen either the child or the child's mother at any stage after the accumulation of the 12 month period until his decision to assert his parental responsibilities and rights. This provision could thus be abused and it is recommended that the entire notion of the accumulation of a 12 month period be deleted.

Furthermore, clause 21 does not require the father to spend any part of this 12 months period with the child nor does it require the father to have any contact with the child prior to asserting his parental rights and responsibilities. Therefore, it is submitted that the 12 month period does not serve any purpose other than placing an unfair burden on the unmarried biological father. It is recommended that as an alternative to the 12 month requirement, parental rights and responsibilities should be granted to the unmarried biological father automatically, with an added provision that should this not be in the best interest of the child, that the child's mother or other interested person be able to approach the children's court for an order preventing the father from acquiring parental rights and responsibilities.

2.3.1.1 The following deletions and insertions are recommended:

21. (1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20,

acquires full parental responsibilities and rights in respect of the child after the child's birth—

[*(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;**]**

[*(b)***] [** if he, regardless of whether he has lived or is living with the mother, has cared for the child with the mother's informed consent—

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

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

(a) the mother of a child whose father acquires parental rights and responsibilities in terms of section 21(1), or any other interested person, may apply to the children's court for an order terminating the father's parental responsibilities and rights if such application is in the best interest of the child.

(2) This section does not affect the duty of a father of a child to contribute towards the maintenance of the child.

2.3.2 Parental responsibilities and rights agreements

The inclusion of parental responsibilities and rights agreements are welcomed although there are a number of alterations to these clauses that should be made. These clauses afford biological fathers, who otherwise would not have been able to exercise parental responsibilities and rights the opportunity of entering into an agreement with the mother of the child or the caregiver in order to acquire certain rights and responsibilities in respect of a child.

However, it is submitted that parental responsibilities and rights agreements should not only be limited to biological fathers, but should also be applied in instances where caregivers other than the biological father seeks to acquire some aspects of parental responsibilities and rights in respect of a child in their

care. This would provide caregivers (such as grandmothers, aunts, uncles or non-relatives) with the opportunity of entering into an agreement with the child's mother regarding the exercise of parental responsibilities and rights. This agreement would then be extremely useful in instances where children are left behind in the care of relatives or friends when the parents seek work elsewhere away from home. It would thus provide these caregivers with the rights needed to adequately provide for the everyday needs of the children in their care including consenting to medical treatment when the biological parents are unavailable or cannot be contacted.

As access to courts is limited in many rural areas, it is submitted that the clauses regarding the fact that the parental responsibilities and rights agreements only take effect when made an order of a High Court, divorce court or children's court should be deleted. The costs involved in accessing a court could also result in many people who would have benefited from implementing a parental responsibilities and rights agreement not opting to enter into such an agreement as it would remain unenforceable until it is either registered with the family advocate's office or made an order of court. Children who would otherwise have been protected through the implementation of a parental rights and responsibilities agreement will therefore remain vulnerable.

2.3.2.1 The following deletions and insertions are recommended:

22. (1) Subject to subsection (2), the biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of either section 20 or 21, or the caregiver of a child, may enter into an agreement with the mother or other person who has parental responsibilities and rights in respect of the child, providing for the acquisition by the father or such caregiver of such parental responsibilities and rights in respect of the child as are set out in the agreement.

(2) The mother or other person who has parental responsibilities and rights in respect of the child may only confer by agreement upon the biological father of the child, or the caregiver of a child, those parental responsibilities and rights which she or that other person has in respect of the child at the time of the conclusion of such agreement.

(3) Only the High Court may confirm a parental responsibilities and rights agreement that relates to the guardianship of a child.

(4) A parental responsibilities and rights agreement must be in the format and contain the particulars prescribed by regulation.

[(5) Subject to subsection (3), a parental responsibilities and rights agreement—

(a) takes effect only if—

(i) registered with the family advocate; or

(ii) made an order of the High Court, a divorce court in a divorce matter or the children's court on application by the parties to the agreement; and

(b) may be amended or terminated only by an order of the High Court, a divorce court or a children's court on application—

(i) by a person having parental responsibilities and rights in respect of the child;

(ii) by the child, acting with leave of the court; or

(iii) in the child's interest by any other person, acting with leave of the court.**]**

2.3.4 Assignment of parental responsibilities and rights to parent-substitutes

The inclusion of the clauses relating to parent-substitutes is supported. The appointment of parent-substitutes will allow parents to plan ahead for the care of the children they leave behind in the event of their death. However, the

appointment of parent-substitutes should not be left until there is only one remaining natural guardian. It is submitted that the assignment of parent-substitutes should also be allowed when both parents are still alive in order for them to make a joint decision. This would protect children whose parents die simultaneously or where the surviving parent dies without having made such an assignment.

The current draft of clause 26 implies that the acceptance of the assignment is only made after the death of the sole natural guardian. Should the parent-substitute decline to accept the assignment after the death of the parents, the children would be left without a guardian. It is submitted that acceptance of the assignment should be made prior to the death of the natural parents to provide certainty as to the status of the children after the parents death as well as to provide the parents with an opportunity to appoint someone else should the parent-substitute decline the assignment.

The assignment by both parents may be revoked by one of the parents after the other's death if it appears that the assigned parent-substitute is no longer suitable to act as the parent-substitute. However, the parent-substitute assigned by both parents and who has accepted the assignment when both parents were alive, may challenge the assignment of the new parent-substitute by the surviving parent in a children's court if it is in the best interest of the child or children concerned.

2.3.4.1 The following deletions and insertions are recommended:

26. (1) A parent who is the sole natural guardian and who has parental responsibilities and rights in respect of a child or both parents jointly, may appoint a suitable person as a parent-substitute and assign to that person his or her parental responsibilities and rights in respect of the child in the event of his or her death.

(2) An appointment in terms of subsection (1)—

(a) must be in writing and signed by the parent or parents jointly;

(b) may form part of the will of the parent or parents;

(c) replaces any previous appointment, including any such appointment in a will, whether made before or after this section took effect; and

(d) may at any time be revoked by the parent or parents by way of a written instrument signed by the parent or parents.

(3) A parent-substitute appointed in terms of subsection (1) acquires parental responsibilities and rights in respect of a child—

(a) after the death of the parent; and

(b) upon the parent-substitute's express or implied acceptance of the appointment.

(4) If two or more persons are appointed as parent-substitutes, any one or more or all of them may accept the appointment except if the appointment provides otherwise.

(5) A parent-substitute acquires only those parental responsibilities and rights—

(a) which the parent had at his or her death; or

(b) if the parent died before the birth of the child, which the parent would have had had the parent lived until the birth of the child.

(6) The assignment of parental responsibilities and rights to a parent-substitute does not affect the parental responsibilities and rights which another person has in respect of the child.

(7) In this section ''parent'' includes a person who has acquired parental responsibilities and rights in respect of a child.

2.3.5 Care of child by persons not holding parental responsibilities and rights

The granting of limited parental responsibilities and rights to persons who voluntarily cares for a child is welcomed. Often children who are in the

voluntary care of a caregiver are in need of medical attention or treatment when a parent cannot be contacted. This provision would assist the caregiver in gaining access to treatment for the child which the caregiver would otherwise not have been able to do. It is submitted however, that problems may arise with the interpretation of the requirement of the medical treatment being 'reasonably necessary' in clause 32(2). The provision is not clear on who makes the decision that the medical treatment is 'reasonable'. This decision should either be left with the medical superintendent of the hospital or with the person in charge of the institution where the child is being taken care of.

2.3.6 The following deletions and insertions are recommended:

32. (1) A person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, including a care-giver who otherwise has no parental responsibilities and rights in respect of a child, must, whilst the child is in that person's care—

(a) safeguard the child's health, well-being and development; and

(b) protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical or mental harm or hazards.

(2) A person referred to in subsection (1) may exercise any parental responsibilities and rights reasonably necessary to comply with subsection (1), including the right to consent to any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or primary care-giver of the child.

<u>() The medical superintendent of the hospital where the child is to be treated may decide whether the proposed medical treatment is reasonable or not.</u>

(3) A court may limit or restrict the parental responsibilities and rights which a person may exercise in terms of subsection (2).

(4) A person referred to in subsection (1) may not—

(a) hold himself or herself out as the biological or adoptive parent of the child; or
(b) deceive the child or any other person into believing that that person is the biological or adoptive parent of the child.

2.3.7 Parenting plans

The emphasis on mediation rather than conflict in the Children's Bill is echoed in the provisions relating to parenting plans. These provisions place an onus on warring parents to first mediate their disputes regarding parenting through the drafting of a parenting plan prior to litigation. It is only once a parenting plan has been drafted or when consensus on the parenting plan cannot be reached that the parties may approach the courts to resolve the issues in dispute. However, some of the formalities for the drafting of the parenting plans appear to be unduly onerous and in some cases will place a heavy burden on already under-resourced family advocates and social workers. Families who have the financial resources may opt to seek the assistance of a private psychologist and will thus be unfairly advantaged.

In the South African Law Reform Commission's (SALRC) draft of the Children's Bill the involvement of social workers, the family advocate or a psychologist was voluntary. In the current draft of the Children's Bill, the parents are obliged to consult a professional when drafting a parenting plan. It is submitted that we revert to the SALRC's version and use the word 'may' as opposed to 'must'.

Further, the provisions relating to parenting plans does not clearly set out the procedure to be followed when a parenting plan has to be amended. If it is done via a court order and the original parenting plan has not been registered, the original parenting plan would first have to be registered before it can be amended.

2.3.7.1 The following deletions and insertions are recommended:

Contents of parenting plans

33. (1) If the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.

(2) A parenting plan may determine any matter in connection with parental responsibilities and rights, including—

(a) where and with whom the child is to live;

(b) the maintenance of the child;

(c) contact between the child and—

(i) any of the parties; and

(ii) any other person; and

(d) the schooling and religious upbringing of the child.

(3) A parenting plan must comply with the best interest of the child standard as set out in section 6.

(4) In preparing a parenting plan the parties **[**must**]** <u>may</u> seek—

(a) the assistance of a family advocate, social worker or psychologist; or

(b) mediation through a social worker or other appropriate person.

Formalities

34. (1) A parenting plan—

(a) must be in writing and signed by the parties to the agreement; and

(b) subject to subsection (2), may be registered with a family advocate or made an order of court.

(2) An application for registration of a parenting plan must—

(a) be in the format and contain the particulars prescribed by regulation; and

(b) be accompanied by—

(i) a copy of the plan; and

(ii) may be accompanied by a statement by—

(aa) a family advocate, social worker or psychologist contemplated in section 33(4)*(a)* that the plan was prepared after consultation with such family advocate, social worker or psychologist; or

(bb) a social worker or other appropriate person contemplated in section 33(4)*(b)* that the plan was prepared after mediation by such social worker or person.

2.3.8 Amendment or termination of registered parenting plans

35. (1) A registered parenting plan may be amended or terminated only by an order of court on application—

(a) by the co-holders of the parental responsibilities and rights;

(b) by the child, acting with leave of the court; or

(c) in the child's interest, by any other person acting with leave of the court.

(2) Section 29 applies to an application in terms of subsection (1).

2.3.9 Rights of children conceived by artificial fertilisation

The Community Law Centre agrees with the provisions relating to the rights of children conceived through assisted conception. However, it is submitted that the terminology 'artificial insemination' be used rather than 'artificial fertilization'.

2.3.9.1 The following deletions and insertions are recommended:

40. (1) *(a)* Whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial **[**fertilisation**]** insemination of one spouse, any child born of that spouse as a result of such artificial **[**fertilisation**]** insemination must for all purposes be regarded to be the child of those spouses as if the gamete or gametes of those spouses were used for such artificial **[**fertilisation**]** insemination.

(b) For the purpose of paragraph *(a)* it must be presumed, until the contrary is proved, that both spouses have granted the relevant consent.

(2) Subject to section 290, whenever the gamete or gametes of any person have been used for the artificial **[**fertilisation**]** insemination of a woman, any child born of that woman as a result of such artificial **[**fertilisation**]** insemination must for all purposes be regarded to be the child of that woman.

(3) No right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial **[**fertilisation**]** insemination and any person whose gamete or gametes have been used for such artificial **[**fertilisation**]** insemination and the blood relations of that person, except when—

(a) that person is the woman who gave birth to that child; or

(b) that person was the husband of such woman at the time of such artificial **[**fertilisation**]** insemination.

Access to information concerning genetic parents

41. (1) A child born as a result of artificial **[**fertilisation**]** insemination or surrogacy is entitled to have access to—

(a) any medical information concerning that child's genetic parents;

(b) any other information concerning the child's genetic parents but not before the child reaches the age of 18 years.

(2) Information disclosed in terms of subsection (1) may not reveal the identity of the person whose gamete or gametes have been used for such artificial **[**fertilisation**]** insemination or the identity of the surrogate mother.

(3) The Director-General for Health or any other person specified by regulation may require a person to receive counselling before any information in terms of subsection (1) is disclosed.

2.3.10 Conclusion

While the current chapter relating to parental rights and responsibilities will have far-reaching implications and afford children with greater protection than that which currently exists, it is submitted that the Bill in its present form does not go far enough to ensure that children receive the best protection humanly possible. The Bill falls short of addressing many crucial issues relating to parental rights and responsibilities and in particular appears to steer clear of addressing issues that could potentially conflict with customary law. An ideal opportunity is therefore lost to ensure that children's rights are not abused under the guise of customary practices. As such, the Bill only touches on those issues that clearly will meet the route of least resistance and should take a firmer stand on addressing issues such as the right to equality in issues such as inheritance.

2.4Intercountry adoptions

The issue of intercountry adoptions has always been emotive. Many people feel that endeavours should first be made to place children within their country of

origin prior to seeking a home for them in a foreign country. This is because it is felt that it is better for a child to be raised in a culture and language familiar to the child and also that the persons who benefit the most from intercountry adoptions are those who facilitate them.

As South Africa has recently acceded to the Hague Convention on Intercountry Adoptions, it is imperative that mechanisms be put in place to give effect to the Hague Convention as a matter of urgency in order to afford those children affected by these types of adoption the necessary protection. For this to be successful, the necessary resources (both human and financial), need to be provided to the Central Authority to ensure the adequate protection of children affected by intercountry adoption.

Furthermore, it is imperative that the processing of intercountry adoptions not be viewed by opportunists as a potentially lucrative trade and the Community Law Centre supports the inclusion of clauses relating to accreditation of persons or organisations processing intercountry adoptions. We submit however, that excluding attorneys from performing intercountry adoptions would result in a vast resource of expertise being lost. Through ensuring the implementation of stringent accreditation requirements as well as enforcing monitoring of fees charged in connection with intercountry adoptions, the best interests of children involved in intercountry adoptions will be protected.

As the requirements for accreditation for child protection organizations are not defined in the Bill, it is recommended that these requirements be clearly spelt out with a similar list of requirements to be applied to applications by attorneys and social workers.

2.4.1 Child trafficking and intercountry adoptions

The South African Law Reform Commission is currently investigating the issue of trafficking in persons. Although there is a lack of research on the issue of children being trafficked for the purpose of adoption, there is a concern that there is an increasing number of children who are traveling abroad unaccompanied.[95]

This increase has particularly been noted in the amount of children traveling to England. The reasons for these children ending up unaccompanied in the destination countries are unclear. Rapid increases in the rate of foreign adoptions, has raised questions about the legitimacy of these adoptions.[96]

The exploitation of poor countries for the purposes of procuring children for wealthier nations has resulted in children becoming a commodity subject to the rules of supply and demand.[97] Among the methods used to procure children for trafficking include the offering of financial incentives to women to bear children for overseas adoption, financial incentives to families in order to procure children for the inter-country adoptions, abduction of children by various means including informing the mother of a newly born child that the child is stillborn, as well as the collusion between the birth mother and the adoptive mother to falsify the registration of the birth.

One of the consequences of child trafficking is the fact that information around the adopted child's family, ethnic origin and medical histories are invariably lost.[98] Traffickers often route a child through a third country prior to his or her adoption and this results in a myriad of problems. The loss of a national identity in cases where a child has been routed through another country, or where mothers have illegally been brought into a country where inter-country

---

[95] Issue Paper 25 Project 131, page 21.
[96] *Ibid.*
[97] Beevers, K *Inter-country adoption of unaccompanied refugee children* in Child and Family Law Quarterly, Vol 9, No2, 1997 p 133.
[98] Innocenti Digest, *Inter-country adoption* Vol 4 1998, UNICEF

adoption procedures are less than desirable, may give rise to unpleasant consequences. As some countries only allow for the acquisition of citizenship after a probationary period,[99] the rescission of adoption orders or the breakdown of the adoption process could leave a child in the untenable situation of being 'nationless'. This also violates the child's right to a name and nationality that all children are guaranteed in terms of the South African Bill of Rights.

It is submitted that the issue of trafficking for the purpose of intercountry adoption should ideally be dealt with in the separate legislation around trafficking in general that would deal with penal sanctions imposed, etc, although the Children's Bill should make it clear that trafficking for the purposes of intercountry adoptions is unlawful and will be subject to the sanctions imposed by the trafficking legislation.

2.4.2 Vulnerability of foreign children

Unaccompanied refugee children[100] may easily be targeted for adoption.[101] Due to their specific vulnerability, a Special Commission of the Hague Conference was convened to deal with the placement of unaccompanied refugee children. Although it is always desirable that a child is placed within a family structure, the placement of refugee children pose added dilemmas. These include the maltreatment of the 'foster' child or the repatriation of placement families where the child has been left behind[102] and also the morale of the rest of the

---

[99] Switzerland has a required probationary period of two years in the case of inter-country adoption.
[100] Beevers, K *Inter-country adoption of unaccompanied refugee children* in Child and Family Law Quarterly, Vol 9, No2, 1997 p 132.Beevers states the in Islam, the practice of adoption is 'completely forbidden'. It is submitted that this view is incorrect as the Mohammad (SAWS) himself had an adopted son.
[101] Unaccompanied refugee children are children who have been separated from their parents or care-givers and who have left there country of origin. Beevers, K *Inter-country adoption of unaccompanied refugee children* in Child and Family Law Quarterly, Vol 9, No2, 1997 p 131.
[102] Beevers, K *Inter-country adoption of unaccompanied refugee children* in Child and Family Law Quarterly, Vol 9, No2, 1997 p 132.

refugee community where unaccompanied minors are taken out of these communities to be placed in a totally alien environment.

Within the debate of inter-country adoption of refugee children, international agencies advocate a 'hierarchical approach' to permanent placement. Inter-country adoptions are seen as a last resort for the long-term placement of a child.[103] Whether a child has been separated from his or her family either voluntarily or involuntarily[104] the consent of the biological parents to the adoption must still be considered.

The UNHCR seeks out unaccompanied minors when conflict situations arise in countries. The families of these minors are then sought out. When the families cannot be traced, the children may only be adopted after a minimum period of time has elapsed after the conflict has been resolved. This time period may be relaxed in some situations.

The question of whether an adoption is in the best interest of an unaccompanied minor must also be viewed in the context of the cultural, religious and ethnic background of the child to be adopted. As far as possible, attempts should be made to place such a child within an environment that is familiar to him or her lest extensive psychological harm result. Placing a child within a family structure with values, norms and cultures alien to this child should be considered only when it is in the best interest of that particular child which should be considered on a case-by-case basis.

Currently, s19(b)(ii) of the Child Care Act allows a Commissioner to approve an adoption order without first ascertaining parental consent.[105] It is submitted

---

[103] Beevers, K *Inter-country adoption of unaccompanied refugee children* in Child and Family Law Quarterly, Vol 9, No2, 1997 p 133.
[104] Beevers, K *Inter-country adoption of unaccompanied refugee children* in Child and Family Law Quarterly, Vol 9, No2, 1997 p 135.
[105] In view of the judgment in the Frazier case, this would apply to intercountry adoptions as well. This implies that where a minor is unaccompanied in South Africa, a court may order his or her adoption

that the Children' s Bill needs to address this issue explicitly by conforming with Article 22(2) of the UNCRC which mandates Contracting States to trace the family members separated by conflict.

Termination of the legal relationship between the child and the biological parents

Although adoption by nature implies that the relationship between the parents and the child is terminated, a previous version of the Children's Bill[106] recommended the inclusion of a provision dealing with situations where the laws of a foreign country does not automatically provide for the termination of the legal relationship between the biological parents and the child.

The SALC recommended in its discussion paper that a clause relating to the termination of a child's legal relationship with its parents be inserted into this chapter that read as follows:

16.(1) If -

(a) a child who was or is habitually resident in a Convention country was adopted in a Convention country; and

(b) the adoption was by a person who is habitually resident in the Republic; and

(c) *the laws of the Convention country do not provide that the adoption of the child terminates the legal relationship between the child and the persons who were, immediately before the adoption, the child's parents, any of the parties to the adoption may apply to the Court for an order that the adoption of the child terminates the legal relationship between the child and the person who were, immediately before the adoption, the child's parents.*

---

without first attempting to acquire parental consent to the adoption. This would be in conflict with international law. Mosikatsana p71.

[106] The version drafted by the South African Law Reform Commission.

These provisions have since been omitted from the latest draft of the Bill. The reasons for the omission are unclear. However, bearing in mind that the Children's Bill also provides for persons other than the biological parents of a child to hold parental rights and responsibilities over a child, it appears that the drafters wanted the option left open for the biological parents to retain some parental rights over the child and to leave room for so-called 'simple' adoptions as opposed to 'full' adoptions where there is a complete break with the biological family of the child. It is submitted that should the legal relationship between the child and the biological parents not be terminated it could lead to legal problems for the adopted child.

2.4.2 The following deletions and insertions are recommended:

CHAPTER 17

INTER-COUNTRY ADOPTIONS

Delegation of functions

257. (1) The Central Authority of the Republic may in terms of section 303 delegate any powers or duties of the Central Authority under the Hague Convention on Inter-country Adoption to an officer <u>of the rank of Director or higher</u> in the Department.

(2) Any powers or duties of the Central Authority in terms of Articles 15 to 21 of the Convention may, to the extent determined by the Central Authority, be performed by –

(a) another organ of state; or

(b) a designated child protection organisation accredited in terms of section 258 to perform inter-country adoption services.

Accreditation of child protection organisations for inter-country adoption

258. (1) The Central Authority may, on application by a designated child protection organisation or attorney–

(a) accredit the organisation or attorney to perform inter-country adoption services; and

(b) approve adoption working agreements contemplated in section 259, provided the prescribed requirements are met.

(2) The Central Authority may accredit a designated child protection organisation or attorney to perform inter-country adoption services for such period and on such conditions as may be prescribed.

(3) A designated child protection organisation or attorney accredited in terms of this section to perform inter-country adoption services –

(a) may receive the prescribed fees and make the necessary payments in respect of inter-country adoptions; and

(b) must annually submit audited financial statements to the Central Authority of fees received and payments made in respect of intercountry adoptions.

Entering into adoption working agreements

259. (1) A designated child protection organisation or attorney accredited in terms of section 258 to perform inter-country adoption services may enter into an adoption working agreement with an accredited adoption agency in **[another]** a prescribed foreign country.

(2) A child protection organisation or attorney referred to in subsection (1) –

(a) must provide the Central Authority with certified copies of all adoption working agreements entered into by that child protection organisation or attorney for approval thereof; and

(b) may not act in terms of any such adoption working agreements before it has been approved by the Central Authority.

Recognition of inter-country adoption of children from non-convention countries

267. (1) The Central Authority may issue a declaration recognising the adoption of a child in a non-convention country if –

(a) the adoption is in accordance with and has not been rescinded under the law of the country in which the adoption order was made;

(b) the adoption in that country has the same effect it would have if the order was made in the Republic.

(2) A children's court may, on application by an interested person, refuse to recognise an adoption to which this section applies if the procedure followed, or the law applied in connection with the adoption-

(a) involved a denial of natural justice or of a person's fundamental human rights; or

(b) did not comply with the requirements of substantial justice.

Effect of recognition of inter-country adoption

268. If the adoption of a child is recognised in terms of section 265 or 267, the adoption has in the Republic the effects as set out in section 240.

Order terminating legal relationship between child and parents

XXX. If the laws of a country do not provide that the adoption of 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 the adoption, make an order terminating the legal relationship between the child and those persons, if-

(a) the child was or is habitually resident in that country
(b) the child was adopted by a person who is habitually resident in the Republic;
(c) an adoption compliance certificate issues in the 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 he case of a refugee child, sufficient provision is made for the child to retain ties with his or her family, tribe, and country of origin.

2.4.3 Conclusion

Unregulated inter-country adoptions could potentially affect all children at risk of being abandoned in the country to which they have been "exported".[107] Although the prevention of abuses of inter-country adoptions is dependant on a sound legislative base,[108] there are other factors at play that also place children at risk.

While South Africa is in the process of redrafting its legislation to ensure the protection of children, it should be borne in mind that it is crucial at this stage to include as many mechanisms as possible to safeguard the well being of children since another opportunity to do so will not easily arise soon. Many other countries have gone through much the same dilemmas around inter-

[107] Innocenti Digest, *Inter-country adoption* Vol 4 1998, UNICEF p 7.
[108] Innocenti Digest, *Inter-country adoption* Vol 4 1998, UNICEF p 8.

country adoptions as South Africa is facing today. South Africa should draw on the examples and practices of those countries in similar circumstances to prevent the abuse of inter-country adoptions. Strict control over inter-country adoptions and compulsory supervision after adoption should be implemented.[109]

It is submitted that the Children's Bill does not ensure the adequate protection of children who are subject to inter-country adoptions as there are still potential loopholes that may be abused.

[109] Mosikatsana (2000)16 SAJHR 69.