

CHAPTER 1

INTRODUCTION

1.1 Introduction

As was shown in the First Issue Paper on the Review of the Child Care Act,¹ apartheid policies, deep-rooted poverty and unemployment, poor or non-existent schooling, the breakdown of family life and the strains on a society in transition have left the majority of South African children in an extremely vulnerable position. In particular, children, the voiceless members of society, have suffered directly as result of the unequal application of the fragmented laws affecting them. These factors alone provide compelling justification for the reformulation of all law affecting children in a comprehensive, holistic manner. Furthermore, constitutional imperatives and South Africa's international legal obligations flowing from, inter alia, the ratification of the UN Convention on the Rights of the Child (hereinafter CRC), accentuate the necessity of undertaking a comprehensive review of child legislation.

1.2 Background

The Child Care Amendment Act, 1996 drew widespread and divergent responses. A key concern was that piece-meal amendments to comply with constitutional imperatives and the ratification of the CRC would not resolve deep-seated concerns about the content and application of the present law, nor indeed the relevance of its underlying philosophy to present day South Africa. The need for a comprehensive rewrite of the Child Care Act, 1983, the need to Africanise child care and protection mechanisms and, as is mandated by the ratification of the CRC, the need to review all relevant child related legislation, have since become increasingly clear.² The concept of a Children's Code was raised at the Gordon's Bay Conference, **Towards Redrafting the Child Care Act**, held on 26 to 28 September 1996.³

Following recommendations from the Minister of Welfare and Population Development, the then

1 Hereinafter 'Issue Paper 13'. The issue paper was released by the South African Law Commission for public comment in May 1998.

2 For a situational analysis, see the **White Paper for Social Welfare**, February 1997, p. 23 et seq.

3 See also **Towards Redrafting the Child Care Act : Recommendations of a Conference of the Community Law Centre (UWC) and the Portfolio Committee on Welfare and Population Development**, Gordon's Bay, 26 - 28 September 1996.

Minister of Justice requested the South African Law Commission to include a review of child care legislation in the Commission's programme. The Commission decided on 4 April 1997 to include the investigation on its programme and to establish a project committee. The first meeting of the project committee (the Committee) was held in Durban on 28 July 1997.

1.3 **First Issue Paper**

Issue Paper 13 was published in May 1998 to wide acclaim. The scope of Issue Paper 13 was extremely wide, including a review of the common law rules and a variety of statutes affecting children, as well as discussion of the position of children under customary law and various religious laws. The document focussed attention on the law as it relates to the many marginalised children in South African society: street children, children infected and affected by HIV / AIDS, children with disabilities, children in residential care, to mention but a few examples. Issue Paper 13 has been circulated widely for comment and input, and numerous people and organisations have availed themselves of this opportunity.

As part of a strategy to involve ordinary people from all walks of life in the implementation of children's rights and the creation of a legal framework to benefit all children in South Africa, the Committee embarked on a series of workshops held between May and August 1998. It would not have been possible to undertake this consultative process without the technical and financial support of the following donors: the Department for International Development in Southern Africa, Rädä Barnen (SA), the Carl & Emily Fuchs Foundation, and UNICEF.

At least two workshops were hosted in each province, in large cities and in rural areas, and vigorous attempts were made to ensure the participation of role-players from all sectors of the community. Such was the interest from the public that, in most instances, far more people than had been anticipated (often nearly double the expected number) arrived to participate in the workshops.

The workshops were attended by representatives of sectors as diverse as educational NGO's and officials, health workers, social workers, justice staff, children's rights activists, disabled persons' interest groups, staff working with children in residential care facilities, religious leaders and service deliverers from religious organisations. Special efforts were made to include the disabled, with sign language interpretation being provided at a number of the venues. Interestingly, it appears that the

workshops in the poorer provinces, and in the more rural areas, were often those that attracted the largest numbers of participants. The workshops were therefore truly multi-sectoral and community-based.

In addition, with donor assistance, the Committee produced user-friendly materials on which to base the workshops. A set of transparencies was developed to assist Committee members in presenting the wide range of issues which needed to be covered at the workshop. A detailed questionnaire was used to capture the feedback from the workshops. These questionnaires have been collected and analysed by a contract researcher. A flier aimed at encouraging child participation was designed and promoted at the workshops, participants being encouraged to hold discussions with children. In addition to the broad-based public workshops, a number of briefings were undertaken of targeted constituencies, including the National Programme of Action for Children Steering Committee, the Portfolio Committees on Welfare and Justice, the Human Rights Commission, the Youth Commission, national NGO's, the NICC, and the Council of Traditional Leaders. In addition to the feedback from workshops and briefings, the committee has received 42 written responses to Issue Paper 13.

Participant feedback from the workshops has been most encouraging. Participants have commented on the amount of information imparted about children's rights in this country, including detail and substance on the Constitution, the CRC, and present South African law as it impacts upon children. The overwhelming feeling was that the workshops were most educative and that the discussions equipped participants better to understand the legal and children's rights ramifications in their own spheres of interest or work. Another comment frequently made concerned the usefulness of the inter-sectoral approach, enabling common ground to be built between different sectors to the long-term benefit of mutual working relationships.

For the Committee, the workshops illustrated the value of involving lay people as well as professionals in the process of law-making. By deepening the Committee's understanding of the overall constitutional and international framework for children's rights, the workshops proved to be an excellent educational opportunity, providing a sound basis for drafting laws that would further the implementation of children's rights. The Committee was greatly assisted by the quality of responses received in answer to the questions taken to the public. There is no doubt, too, of the advocacy aspect of the workshops, as virtual consensus has been recorded to the effect that

children's lives can and will be bettered with appropriate, modern and constitutionally-sound legislation.

It is important at this point to highlight one particular concern relating to resources (or rather the lack thereof) raised over and over again. It was said repeatedly that any proposals made for law reform must be accompanied and supported by the necessary human and financial resources.⁴ This placed the Commission in a rather invidious position: Does it make recommendations within the current resource framework which all accept to be wholly inadequate, even for present purposes, or does it make proposals in the belief that additional resources simply will have to be found? In the end the Commission decided to adopt a pragmatic approach where it attempted to find a balance between the current resources and structures available, their optimal use and application, and the realisation that welfare services and other services to children in South Africa will continue to need massive injections of resources for the foreseeable future in order to fulfil the basic needs of the most vulnerable members of our society.

1.4 **Research papers**

⁴ See also Julia Sloth-Nielsen and Belinda van Heerden "The Political Economy of Child Law Reform: Pie in the Sky?" in Davel (ed) **Children's Rights in a Transitional Society** Pretoria: Protea Book House 1999, p. 107 at 120 et seq.

As was stated in Issue Paper 13,⁵ the original idea was to prepare three issue papers. At that stage, it was envisaged that the other two issue papers would deal with the status of children (including adoption) and children in care proceedings and related matters. This idea was abandoned at the meeting of the Committee held on 1 and 2 October 1998. The Committee determined that, having raised a broad range of issues on which considerable information had been received, it should move to the discussion paper and draft legislation stage which would consolidate the work undertaken and in which a clear direction could already be taken. The Committee agreed further that whilst there were many issues on which the Committee could immediately move to drafting the discussion paper, there were certain areas in which further detailed research and additional consultation were needed. The Committee called this combined approach 'consultative research'.

The plan was that the members of the Committee, or contract researchers, would draft a position paper, called a research paper, for each of the selected issues, as background documents to stimulate debate. A group of people selected for their particular knowledge, experience or interest was then brought together for a consultative meeting regarding each one. They were provided with the research paper prior to the meeting, and the purpose of the meeting was to pose questions, discuss issues and debate solutions.

The Committee identified the following areas as those in which further consultative research was required:

- **'Parent'- child relationship⁶**

This includes issues relating to the definition of 'parent' and 'family', the legal relationship between parents and their children, parental responsibility, surrogate motherhood, assisted reproduction techniques, and the position of unmarried fathers.

- **Categories of children in need of special protection⁷**

5 Paragraph 1.5.

6 Professor Belinda van Heerden (now Judge) drafted the paper. The focus group discussion was held at the Breakwater Lodge, Cape Town on 12 -13 March 1999.

7 On the use of this terminology, see 13.1 below.

(a) Children living with HIV/AIDS⁸

(b) Children living on the street⁹

This placed emphasis on these two groups of particularly vulnerable children and investigated how their needs could best be met in a comprehensive children's statute.

8 The research paper was prepared by Ms Catherine Barrett, Dr Neill McKerrow and Ms Ann Strode. The focus group discussion was held at the Regional Office of the Department of Justice, Durban on 26 March 1999.

9 Mr Miles Ritchie prepared the research paper. The focus group discussion was held at the offices of the South African Law Commission, Pretoria on 8 April 1999.

- **Types of fora and forum orders**¹⁰

This includes an examination of both judicial and administrative systems, the question of lay participation, and also decisions about the status and content of orders made by the forum.

- **Legislating for child protection**¹¹

This includes abuse and neglect, removal criteria, assessment of a child in need of care, family preservation, and preventative assistance.

- **Children in residential care**¹²

This includes an investigation into models of residential care, management of facilities, measures for protection and safety of children, and inspections.

- **Substitute family care**¹³

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- 10 Professor Noel Zaal prepared the research paper. The focus group discussion was held at the offices of the South Africa Law Commission, Pretoria on 15 April 1999.
- 11 Drs Jackie Loffell and Carmel Matthias drafted the paper. The focus group discussion was held at the offices of the South African Law Commission, Pretoria on 29 April 1999.
- 12 The paper was prepared by Dr Sonia Human of the University of Stellenbosch. The focus group discussion was held at the Regional Office of the Department of Justice, Durban on 29 and 30 May 2000.
- 13 The research paper on adoption as substitute family care was prepared by Professor Tshepo Motsikatsana of Wits University; the paper on foster care as substitute family care was prepared by Mrs Petro Brink of Pietermaritzburg. The focus group discussion was held at the President Protea Hotel, Bantry Bay, Cape Town on 27 and 28 June 2000.

This includes adoption, international adoptions, foster care and its variations.

- **Early childhood development (ECD)**¹⁴

Early childhood development is an umbrella term which applies to the processes by which children from birth to at least 9 years grow and thrive physically, mentally, emotionally, spiritually, morally and socially. It covers day-care and pre-school services.

For the benefit of the Committee, research was also commissioned into social security for children,¹⁵ local government and the provision of child care facilities,¹⁶ and monitoring.¹⁷ These research papers were not workshopped.

As was the case with the workshops on Issue Paper 13, the consultative research meetings were very well attended.

1.5 The child participation process

14 Given the availability of well-researched documents such as the Interim Policy for Early Childhood Development by the Department of Education; the draft Guidelines for Day Care by the Department of Welfare; Sindile Tabata **Childcare (pre-school) provision in South Africa** (Nadel research report no. 10), 2000, and submissions made inter alia by the Law Review Project and the Early Learning Resource Unit, the Committee decided not to prepare a specific research paper. The focus group discussion was structured on the basis of a pre-prepared worksheet and it took place at the offices of the South African Law Commission, Pretoria on 30 March 2000.

15 Ms Debbie Budlender undertook the research.

16 The research was conducted by Messrs Tony Loubser and Johann Mettler of the University of the Western Cape,

17 By Ms Louisa Stuurman of the Commission.

The envisaged reform of all child care legislation directly affects children, and it is therefore appropriate that the opinions of children also be heard as is indeed prescribed by Article 12 of the CRC. The Committee was very keen to take the views of children into consideration in the preparation of the draft legislation accompanying the discussion paper and would like to produce a children's perspective report alongside the Commission's report on the Review of the Child Care Act. In this way, children can participate in and impact upon the law-making process.

In order to enable the Committee to consult with children, Professor Belinda van Heerden (the then project leader) and Mr Gordon Hollamby initiated contact during the first part of 1998 with the Southern African office of the Save the Children Fund (SCF). Professor van Heerden followed up this initial contact with the UK branch of SCF while on a study visit in August 1998. As a result of these contacts, Mr John Errington of SCF (UK) visited South Africa in late October early November 1998 to assess the viability of a consultation exercise by holding a series of meetings with partner organisations identified by the Commission with the intention of exploring the characteristics of the child care sector and the potential for transferring experience on consultation with children and young people from the English programme.

The idea of consulting with children in general and on the Review of the Child Care Act in particular received overwhelming support and Mr Errington left South Africa convinced that SCF (UK) should support this consultation process as 'a key part of the implementation of the country strategic plan and as a contribution to the development of a new children's rights structure in South Africa'.

Mr Errington proposed that the consultation should involve children and young people from 5 to 18 years of age from as wide a range of areas and circumstances as possible. He further proposed that the consultation should commence after a training event in early February 1999, and should involve two sessions of group work before April 1999 when the results would be collated and passed to the Committee, with a further group session arranged subsequently to feed back the details of the report on the consultation and to inform the children and young people involved of the outcome of the process.

SCF (UK) offered to prepare the materials to be used for training staff and conducting the consultation. SCF (UK) sent out this material for comment to a small group of research or child

care staff in South Africa to ensure that the material was usable with groups in different social, economic and cultural circumstances. Children with special learning needs were also to be accommodated. Mr Errington was of the view that the most cost-effective method to train the key staff members of each consultation group would be to post out the materials in January 1999 and to run up to six workshops in early February 1999 in key locations across South Africa. This allowed for attendance on a one-day basis from all of the provinces. Mr Errington further proposed that ten groups be established around each of these locations making a possible maximum of sixty reports back to the Committee. Ms Buyi Mbambo, a freelance social work consultant and member of the Committee, undertook to do the selection, administration and support work for the groups in the period leading up to the consultation.

With very generous financial and technical support from Rädä Barnen and Save the Children (UK), it was possible to hold six training sessions in the following key locations throughout South Africa:

◦	Pretoria	3 February 1999
◦	Johannesburg	4 February 1999
◦	Durban	5 February 1999
◦	Port Elizabeth	9 February 1999
◦	Kimberley	10 February 1999
◦	Cape Town	12 February 1999

Interest in the training sessions was overwhelming and far more people attended the sessions than was anticipated.

The structure and content of the child consultation process were based upon three group sessions with adaptations to the materials to make them relevant to different age groups, skills and disabilities. As far as possible, existing groups of children working with staff already known to them were used. This had several advantages: the membership of the groups was easier to identify, they knew each other well enough to work together at once and the exercise did not contribute to tensions within communities in the lead up to the general election. The main function of the first session was to give information on the overall task, the law, children's rights and the use of the information that would be obtained from the exercise. The second session was based on a focus group model and gathered information on a range of topics identified by the Committee, such as the age of majority,

child participation in decision-making, measures needed to protect children in institutions, foster care arrangements etc. The purpose of the third session is to provide feedback on the outcomes of the exercise to the children involved.

In the information-gathering session use was made of a pre-prepared worksheet. Forty completed worksheets were received. The Community Law Centre, University of the Western Cape, was contracted to prepare a report based on this information. This report was used in the drafting process of this discussion paper and draft legislation being proposed. Where appropriate, the input made by the children are reflected in boxes similar to this:

What the children said:

The Committee plans to repeat the child participation process with this discussion paper and accompanying draft legislation as basis. This made it important for us to have an independent evaluation of the child participation process done. Tenders for such an evaluation process were called for and the task of evaluation was awarded to Clacherty and Associates Education Consultants. The Committee is aware of considerable national and international interest in our child participation process and the possibility of preparing a generic blue-print for future child participation processes is being investigated. Obviously, an effective methodology that will inform future child consultation processes will be to the benefit of other legislative reform initiatives designed to empower children.

1.6 **Scope of the investigation**

It became very clear from the outset that a wide range of intersecting and overlapping laws, principles and policies would require review in this investigation. The Child Care Act, 1983 and its 1960 predecessor cannot be isolated from other legislation affecting children, nor can they be divorced from other laws regulating the relationship between parents and children and between families and the State. This was also the overwhelming opinion of those who attended the workshops, made submissions, or participated in the consultative research meetings. There was also tremendous support for the idea of a single comprehensive children's statute bringing together in one 'Children's Code' the currently fragmented laws affecting children.

Exactly how comprehensive such a Children's Code should be was the subject of serious debate and forms the subject matter of Chapter 2.

It is important to point out that this investigation is not the only investigation relating to children on the programme of the Commission. Two sister investigations on the programme deal with youth justice¹⁸ and sexual offences.¹⁹ The Committee has taken cognisance of this fact and has attempted to integrate the work of the other project committees of the Commission into its process and deliberations and in its proposed draft legislation.

1.7 The Commission's working methodology

The project is aimed at a comprehensive review of the Child Care Act, 1983, and related legislation in the light of the Constitution of the Republic of South Africa Act, 1996, and South Africa's international legal obligations in terms of, inter alia, CRC. The Department of Social Development, as the lead department, is responsible for enacting and implementing initiating and ultimately drafting legislation to implement the process of reform arising out of the project.

The project is managed by a project committee established under the auspices of the South African Law Commission. The project committee plans the investigation, does or has the necessary research done, and will submit reports in the form of issue papers, research papers, discussion papers and reports to the Commission. The report(s) with draft legislation will be submitted to the Ministers of Justice and Constitutional Development and of Social Development who may then implement the recommendations proposed by adopting the draft legislation.

Professor Noel Zaal²⁰ is the project leader and chairperson. The other members of the Committee are:

Dr Jacqueline Loffell

18 Project 106: Juvenile justice.

19 Project 107: Sexual offences.

20 Professor Zaal became project leader after Dr Maria Mabetoa resigned. Dr Mabetoa in turn took over the reigns from Professor (now Judge) Belinda van Heerden.

Dr Carmel Matthias
Ms Buyi Mbambo
Mr Mbongeni Mtshali
Ms Zubeda Seedat
Ms Ann Skelton
Professor Julia Sloth-Nielsen

Judge Belinda van Heerden resigned from the Committee on 7 March 2001.

Ms Helen Starke, Mr Mike Masutha, Mr Peter Setou, Dr Maria Mabetoa, Dr Eddie Harvey, Ms Elmarie Swanepoel, and Ms Jacoba Cronje, who represented the then Department of Welfare and Population Development, were replaced or relinquished their positions on the Committee for various reasons.²¹ The representatives of the Department on the Committee at the time of finalising this discussion paper were:

Ms Agness Müller
Ms Lulu Siwisa-Pemba
Mr Ashley Theron

The Committee brings together experts from various disciplines and constituencies - from law and social science - from government, the NGO and the private sector. This reflects the realisation of the need for a multi-disciplinary approach, inter-sectoral co-operation, and the importance of involving all stakeholders in the process of drafting legislation.

21 Ms Starke and Messrs Masutha and Setou resigned from the Department, while Dr Mabetoa and Ms Swanepoel were reassigned within the Department. Dr Harvey and Ms Cronje retired at the end of 2000 and beginning of 2001 respectively.

It is Commission policy to publish first an issue paper and then to consult broadly on the issue paper. After this consultation process a discussion paper is prepared taking into account the submissions made and inputs received. The discussion paper contains the preliminary recommendations of the Commission. These recommendations are usually embodied in the draft legislation that accompany the discussion paper. The discussion paper and draft legislation are subjected to a comprehensive consultation process where particular emphasis is placed on the draft legislation. After taking into account the comments made and submissions received, a report is prepared. The report contains the final recommendations of the Commission. These final recommendations are embodied in the draft legislation which forms part of the report. Once the report is handed to the relevant Minister, the Commission becomes *functus officio*. It remains the prerogative of the Minister to implement the recommendations made by the Law Commission by introducing the draft legislation in Parliament.²² Once introduced in Parliament, another process starts.²³

It is also important to ensure that the community is involved when these processes are taken forward. The voice of the community, and especially the voices of children, must continue to be heard. A broad process of consultation will continue to be followed and will involve various state departments, tertiary institutions, local and international experts, various bodies supporting democracy, other relevant NGO's, FBO's, CBO's, and obviously children. The Commission believes a properly conducted consultation process on the discussion paper and draft legislation will ensure broad support for the eventual legislation introduced in Parliament. Such a consultation process will also bring to light deficiencies and gaps in the draft legislation before the Parliamentary legislative process starts. In our experience, insufficient consultation at draft discussion paper stage can actually delay the eventual passage of the legislation in Parliament.

The Committee is planning to present to the Minister a set of draft regulations to accompany the new comprehensive children's statute as contained in the Commission's report. The absence of draft regulations in an investigation of this nature can delay the implementation of the eventual legislation, especially where such regulations are to be drafted by persons who have had no exposure to the drafting of the principal legislation. However, it will serve no purpose to draft

22 Before the Minister will introduce the legislation as contained in the report in Parliament, the Commission's report is considered by the Department's legal advisers. These legal advisers advise the Minister as to whether the Commission's recommendations (in the form of draft legislation) ought to be implemented.

23 The draft legislation is usually considered by the relevant Portfolio Committee, the legislation is tabled in the two Houses, hearings are held, the Bill is voted on, and certified before it becomes law.

regulations before it is clear what the final legislation will look like. For this reason, the drafting of the regulations to the principal legislation should not commence until after the legislation has been introduced in Parliament.

The Committee likewise is planning to present to the Minister a costing analysis on the envisaged children's statute as part of the Commission's report. Given the serious budgetary implications of the existing legislation, the possible additional resources required, and the reality of limited resources, such a costing of the new comprehensive children's statute is absolutely imperative. Indeed, in order to obtain Cabinet approval for the introduction of any legislation, a costing analysis is required. In order to conduct such a costing analysis in a scientific manner, expertise not available at the Commission or in the Committee will be required.

1.8 **Conclusion**

This discussion paper represents the culmination of a major research initiative involving, inter alia, the workshop process on the issue paper, the focus group discussions on the research papers, and the child participation process. The Commission would like to take this opportunity to thank everybody concerned for their contributions and hard work.