

CHAPTER 2

THE SCOPE OF THE INVESTIGATION

2.1 Introduction

The challenge facing the Commission is to develop a systematic and coherent approach to child law: an approach which is consistent with constitutional and international law obligations of equity, non-discrimination, concern for the best interests of the child, participation of children in decisions affecting their interests and protection of children in vulnerable circumstances. The Commission is also considering how to maximise the State's commitment to the promotion of family and community life, so that removal of children to residential care facilities will be needed in fewer cases. The twin principles of enabling a child's growth and development within a family environment, and protecting children in vulnerable situations, therefore inform the Commission's vision of the new children's statute.

2.2 The Committee's vision for comprehensive child legislation

For ease of reference, the vision of the Committee as depicted diagrammatically in Issue Paper 13 is repeated.¹

¹ This vision is set out in Chapter 2 of Issue Paper 13.

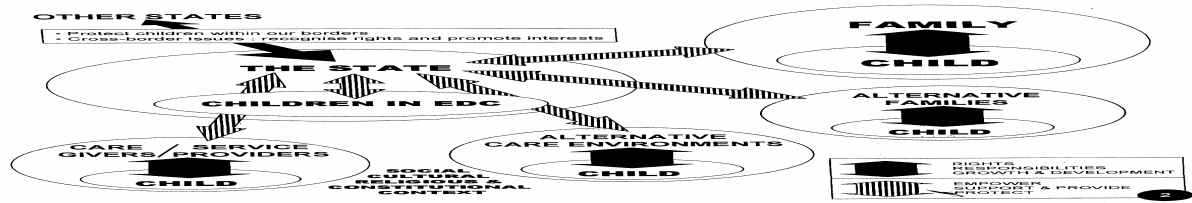


Diagram 1

The Committee has proceeded from the starting point of the concentric relationships that affect and protect children. First, their growth and development in a family environment, and the legal relations between child, parent(s) and other members of the extended family or community. The goal here is to respect the responsibilities of parents, families and communities as regards the rearing of the young, and to provide a legislative and policy environment in which the State is supportive of family life.

Second, the relations between child and State warrant reflection in a precise legal framework which proceeds from a model of the State's obligation to protect children from 'maltreatment, abuse, neglect and degradation',² yet at the same time respects children's rights to alternative care of a quality which approximates a family environment. This model must support children's rights to procedures, processes and institutions in which they can participate in decisions affecting their lives and requires a system in which the requisite checks and balances over the exercise of administrative and judicial authority are adequately provided for.

Thirdly, the Committee realises that it must bear in mind the relations between the South African State and other states regarding children, especially where international issues may arise: refugee or displaced non-citizen children in our country, international adoption, international abduction as well as jurisdictional and cross-border issues in private law. Here, the model envisages spelling out the State's duty to protect all children within its borders and to promote the interests of its child citizens and nationals in cross-border issues.

Fourthly, the Committee believes that it is necessary to ensure non-discrimination with regard to

² Section 28(1)(d) of the Constitution.

different groups of children, addressing especially the cross-cultural conflict of laws that may arise for children subject to one or another religious or customary legal system. The model proposed by the Committee sees a future child law system in which core children's rights and concerns are equally respected and protected, independent of the system of personal law in which a child is raised, while at the same time ensuring that the State honours to the maximum extent the cultural and religious rights of children and families.

Fifth, specific mention will be made throughout the proposed model to children in especially difficult circumstances, such as children living on the street, refugee children, and children with disabilities.

2.3 Testing the vision

At the workshops the vision of the Committee as depicted above received overwhelming support, particularly because of its holistic, all-inclusive and child-friendly approach, which emphasises the best interests of the child. However, while respondents demanded that the new legislation should be accessible and user-friendly, it was pointed out that one comprehensive statute might not be able to deal with all issues affecting children as it could become too cumbersome and inflexible. An alternative suggested was the creation of an interrelationship between the various statutes dealing with children through cross-referencing, and the removal of all inconsistencies. One such possibility suggested involved the drafting of the new Act to follow the pattern of a child's life (conception through to adulthood).

Some respondents argued that the responsibilities of the various organs of State and other organisations involved in this diagram need to be clarified to avoid duplication. Others felt that the relationship between rights and responsibilities should enjoy specific attention in relation to children's issues. Legislation must therefore avoid becoming 'parent-unfriendly'.

2.4 The scope of the existing legislation

In order to comprehend the full extent of the vision to draft a comprehensive children's statute, it is necessary to briefly take stock of what is already covered by the present Child Care Act, 1983 and the regulations issued in terms of this Act. This is done by comparing, in table form, the main elements of the Child Care Act 74 of 1983 with the Children's Act 33 of 1960. Such a comparison

will also highlight another problem faced by the Commission, namely what provisions ideally belong in the principal act and what belongs in the regulations.

Main subject	Child Care Act, 1983	Regulations	Children's Act, 1960
Definitions	Chapter 1		
Children's Courts and Commissioners of Child Welfare	Chapter 2	R 2 - 16	Chapter 1
Protection of children	Chapter 3	R 39A - 39 B	Chapter 2
Adoptions	Chapter 4	R 17 - 28	Chapter 7
Places of safety, children's homes and places of care	Chapter 5	R 30 - 35	Chapter 5
Special provisions regarding pupils, foster children and other children in need of care, including financial assistance	Chapter 6	R 37 - 39	Chapter 4
Contribution orders	Chapter 7	R 29	Chapter 6
Prevention of ill-treatment and unlawful removal of children, and prohibition of employment of certain children	Chapter 8		Chapter 3
General provisions	Chapter 9	R 40	Chapter 8

As this table shows, there is no marked difference in the coverage of the two Acts drafted more than twenty years apart. It also shows how limited the existing Child Care Act is in scope and gives further credence to the calls for a comprehensive review of all legislation affecting children.

2.5 The scope of a new children's statute

Issue Paper 13 pertinently raised the issue of what the appropriate scope of a comprehensive

children's statute for South Africa should be.³ Again the overwhelming majority of respondents at the workshops was supportive of the view that a new children's statute should be all embracing and include all children's issues (child and family; child and State; child and community; child and education; child and child; child and religion, and so forth). It was said that such a statute should be the core law on all aspects of the life of children and should set the minimum standards to which all laws affecting children must conform. It should be the filter through which all other laws relating to children must pass; thus a coordinating piece of legislation revealing an interdisciplinary approach. However, should such an exercise prove impractical, the new Act should at least contain cross-references to the other sources.

Other workshop participants were of the opinion that the scope of the legislation should reveal a developmental approach and should deal with protection, empowerment, and survival of the child as well as the participation of the child in matters affecting him/herself. Some respondents opined that the CRC should serve as a blueprint for determining the issues that are to be contained in a comprehensive children's statute and that the principles contained in the CRC should underpin the new children's statute.

The view was also expressed that the legislation, while inclusive of all elements relating to children, should retain a large measure of flexibility to deal with different groups according to their needs. While all cultures must be accommodated within a children's statute, there would be a need for cross-cultural training. Customary unions should be dealt with according to core constitutional principles and guided by the best interests of the child

This general approach in favour of an inclusive, all embracing children's statute is very evident from the responses to a tick-box grid contained in every worksheet used at the various workshops. This tick-box grid contained a list of issues relevant to the scope of the new legislation and participants

3 See paragraph 11.1 of Issue Paper 13. Several of the 100 questions posed in Issue Paper 13 also deal with this aspect.

were asked to suggest which issues should be fully, partially or not at all be covered in a new children's statute.

ISSUES WHICH SHOULD BE COVERED IN A NEW CHILDREN'S STATUTE AND THE EXTENT TO WHICH THEY SHOULD BE COVERED

(Figures are reflected as a percentage of responses received)

Issues	Fully	Partially	Not at all
Guardianship	91	9	0
Custody	1	12	87
Adoption	90	10	0
Age of majority	79	19	2
Education	64	34	2
Early childhood development	72	26	2
Criminal offences against children	87	10	3
Maintenance	77	21	2
Domestic violence	67	26	7
Social security for children	84	16	0
Health care for children	75	20	5
Juvenile Justice	74	24	2
Protection of children against abuse & neglect	96	3	1
Abandoned children	93	6	1
Children living in severely impoverished situations	87	10	3
Children with disabilities	83	16	1
Children with HIV/AIDS	87	12	1
Street Children	89	10	1
Children exposed to armed conflict	80	18	2
Child labour	87	12	1

The following are some of the specific issues raised by respondents for inclusion in a comprehensive children's statute:

- * Provisions on training for magistrates / prosecutors / court officials.
- * Provisions compelling State intervention and detailing circumstances when this should take

place.

- * Parental responsibility in child rearing.

Participants at the workshops were specifically asked whether a comprehensive children's statute should regulate issues such as day-care (including after-school care), children's rights in health, children's rights in school, and the right of street children to education. The majority view, as summarised the following table, was in favour of all these issues being included in a comprehensive children's statute.

Should a comprehensive children's statute regulate the issues listed below?	Group ⁴ Yes	Group No	Individual ⁵ Yes	Individual No
-day care	56	6	30	
-children's rights in health	49	9	31	
-children's rights in school	39	4	30	1
-street children's right to education	58	4	27	

Respondents who argued for the inclusion of provisions on day care in the new statute were of the opinion that the training of personnel, minimum standards and the licensing of such centres should also be included.

Most respondents had no difficulty with the concept of providing for children's rights to health and children's right to education, in addition to the new children's statute, in health and education specific legislation respectively. Great emphasis was placed, however, on the relevancy of the education to be provided and it was inter alia suggested that life skills training should be implemented.

4 In total 43 individual worksheets and 96 group worksheets were processed.

5 Ibid.

In the discussions on children in need of special protection⁶ at the workshops, participants were asked to what extent the special needs of various categories of children should be covered in a new children's statute. The following categories of children in need of special protection were targeted:

- children with disabilities, including mentally handicapped and deaf children
- abused and neglected children
- abandoned children
- children living with HIV/AIDS
- children in severely impoverished circumstances
- children living on the street
- children displaced by, or recruited for armed conflict
- child labourers
- displaced foreign children ('Illegal aliens' and refugees)
- illiterate children and the school drop-outs
- children as gangsters and young offenders
- children who have been exposed to crime or gangs or to places of detention.

The general consensus at the workshops was that all these categories of children in need of special protection should be offered the protection of a new comprehensive children's statute with the guiding principle being the best interests of the child. This would, it was felt, prevent discrimination and encourage equal access to services for all children. Also, it was felt that emphasis should be placed on children with special needs with the aim being the empowerment⁷ of these children.

6 At the time of the workshops, the phrase 'children in especially difficult circumstances' was still in vogue.

7 Some respondents linked the provision of aid to job creation initiatives for these children to enable them to gainfully enter the labour field once they are ready to do so. This highlights the need to train and empower

As stated before, Issue Paper 13 was focussed primarily on the scope of the new children's statute. Numerous of the 100 questions posed pertinently raised the issue of whether certain aspects need to be covered or be provided for in a new children's statute. The issues ranged from whether the present provisions of the Child Care Act, 1983 (as amended) adequately cover the circumstances in which legal representation should be provided at State expense to a child in children's court proceedings and whether such grounds should be incorporated in the new statute⁸ to whether the new statute should specify that the child, if capable, has the right to give evidence and express views.⁹ Some very specific questions were also asked such as to what extent the existing provisions of the Guardianship Act should be incorporated in a children's statute,¹⁰ whether such a statute should include reference to the consequences and regulation of alternative reproductive techniques and surrogacy arrangements,¹¹ and whether provisions governing the registration of births should be included in the statute.¹²

For present purposes it is not necessary to dwell on these questions, but to concentrate on those dealing with children in need of special protection.

2.5.1 Children with disabilities

In Issue Paper 13 the following question was posed:

Should provisions to meet the needs of children with disabilities be incorporated in a general children's statute rather than being dealt with separately by other legislation?

From the submissions¹³ it appeared that there was overwhelming support for the incorporation of provisions to meet the needs of children with disabilities in a general children's statute rather than their being dealt with separately by other legislation. This tallied with the responses from the

8 Question 54 in Issue Paper 13.

9 Question 50 of Issue Paper 13.

10 Question 37 of Issue Paper 13.

11 Question 36 of Issue Paper 13.

12 Question 35 of Issue Paper 13.

13 Health / Human Watch; S A National Council for Child and Family Welfare; S A Federation for Mental Health; NICC; National Council of Women of South Africa; Departments of Paediatrics and Child Health, UCT; Natal Society of Advocates; Johannesburg Institute of Social Services; the Durban Committee; Disabled People South Africa; ATKV; Mr D S Rothman.

workshops.

2.5.2 **Children living on the street**

In Issue Paper 13, the question was posed as to how legislation can best provide for the situation of, and problems faced by, children living on the street.¹⁴ In particular, it was asked in what way legislation could protect the rights of street children to, for example, education and protection against exploitation.

From the submissions¹⁵ it appeared that the majority of respondents were in favour of some kind of legislative provision to meet the needs of children living on the street in a children's statute. This should include provisions on the management of shelters, education and protection against exploitation. This tallied with the responses from the workshops.

2.5.3 **Children living with HIV/AIDS**

Although not stated directly, the Commission premised its deliberations on children living with HIV/AIDS on the basis that the protection of such children fall squarely within its mandate and therefore need to be addressed in the new children's statute. The questions posed in Issue Paper 13 therefore went beyond merely asking whether the new statute should contain provisions on children living with HIV/AIDS to matters of implementation and practical reality.¹⁶ These questions and the responses thereto are better discussed elsewhere.¹⁷

The Commission also considered the issue of children living with HIV/AIDS of such importance that a special research paper and focus group discussion were dedicated to this topic. Readers are referred to Chapter 13 of this Discussion Paper where this aspect is dealt with extensively.

14 Question 11.

15 S A National Council for Child and Family Welfare; NICC; National Council of Women of South Africa; Natal Society of Advocates; Cape Law Society; Durban Committee; ATKV; Mr D S Rothman.

16 The questions relate to the appropriate forms of alternative community and cluster care options that will assist children affected by HIV/AIDS (Question 6), the legal issues that need to be addressed in developing these options (Question 7), and the HIV testing of children, including children in residential care (Question 8).

17 See 13.3 below.

For present purposes it suffices to say that there seemed to be consensus¹⁸ that the needs of children living with HIV/AIDS should be addressed holistically in the new children's statute.

2.5.4 **Child labour**

Respondents were asked to reply to the following question in Issue Paper 13:

If detailed child labour provisions remain in dedicated labour legislation, what protective mechanisms should the proposed children's statute contain with regard to child labour?

¹⁸ This is also in line with the responses from the workshops where 87% of those who responded were fully in favour of incorporating provisions on children living with HIV/AIDS in the new children's statute.

Child labour was one of the areas where respondents were not unanimous in their approach. Some respondents would have liked to address the problem of child labour through integrative government responses,¹⁹ some regarded the existing situation where child labour is covered in labour legislation as adequate,²⁰ others seemed to be comfortable with cross-references to the relevant labour legislation,²¹ and others would have preferred to incorporate provisions on child labour in the new children's statute.²² This stood in contrast to the workshop response where 87% of respondents were fully in favour of covering child labour in a new children's statute.

2.5.5 Child health

The following question was posed in Issue Paper 13:

Should children's health issues be protected through health legislation? Or is it more appropriate to locate them in this investigation? Alternatively, should some health matters continue to be regarded as part of a children's statute, whilst others are more appropriately dealt with in health legislation? If so, which issues/matters should fall where?

19 NICC; Department of Health. The S A National Council for Child and Family Welfare suggested that the State should provide a maintenance grant and or material assistance to the parents of child labourers, while the Johannesburg Institute of Social Services suggested that special grants be made available to enable children forced to work to continue their education.

20 Natal Society of Advocates; Cape Law Society.

21 Mr D S Rothman; the Durban Committee.

22 National Council of Women of South Africa.

Child health care was yet another area where respondents were not unanimous in their approach. Some regarded the existing provisions regarding consent to medical care and operations as contained in the present Child Care Act, 1983 as adequate,²³ while others wanted more.²⁴ Some seemed to be comfortable with cross-references to the relevant health legislation, others would have preferred to incorporate provisions on child health and the provision of health services in a children's statute,²⁵ while others would not have.²⁶ Others seemed to prefer a dual approach where child health provisions are to be found in both health care and child care legislation.²⁷ At the workshops 75% of respondents were fully in favour of covering health care for children in a new children's statute.²⁸

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- 23 Johannesburg Institute of Social Services argued for the maintaining of the present status quo inter alia because the Department of Social Services cannot cope with its current workload.
- 24 SANCA Pietermaritzburg Alcohol and Drug Centre, for instance, pointed out that the Drug Act 20 of 1992 does not make specific provision for minor children to be committed to rehabilitation centres. The Child Health Unit, UCT was of the opinion that where child health provisions are incorporated is not as important as ensuring that the health rights of children are protected. Disabled People South Africa warned of the danger of treating children with disabilities as a health issue rather than a human rights developmental issue. The Department of Health was in favour of specific legislation targeting the health of children and young people.
- 25 Health / Human Rights; NICC; ATKV; Mr D S Rothman.
- 26 National Council of Women of South Africa; Natal Society of Advocates.
- 27 S A National Council for Child and Family Welfare. The Cape Law Society contended that the focus of the new children's statute should be children in need of care.
- 28 20% of respondents were partially in favour of covering health care for children in a new comprehensive children's statute and 5% were not in favour.

2.5.6 **Displaced foreign children**

The following question was posed in Issue Paper 13:

Should displaced foreign children fall under a future children's statute or should immigration legislation apply to them? If they are to be included in this investigation, should all foreign children ('illegal aliens' and refugees) be included, or only those who are unaccompanied by parents?

Although the majority view²⁹ seemed to be that provisions on displaced foreign children (whether accompanied by their parents or not) should be included in the new children's statute, some organisations such as the Natal Society of Advocates and the Cape Law Society held that displaced children should rather be dealt with in terms of immigration legislation. Regardless of what position one takes, it seems clear that some dovetailing between these two pieces of legislation will be necessary.

2.5.7 **Children as learners in school**

The questions posed in Issue Paper 13 on this issue reads as follows:

Bearing in mind the comprehensive nature of the Schools Act and other recent legislation in this area, to what extent, if any, should matters relating to school education, be covered in a children's statute? Are there residual matters (such as safety in schools, or minimum standards) that could or should be addressed?

Education was another area where there seemed to be no clear mandate for inclusion in a new children's statute.³⁰ There seemed to be general agreement, however, that what must avoided at

29 S A National Council for Child and Family Welfare; NICC; National Council of Women of South Africa; Mr D S Rothman. Contra ATKV. The Johannesburg Institute of Social Services argued that the safety, welfare and care aspects relating to displaced foreign children should be dealt with in terms of child care legislation while issues relating to citizenship, refugee status, and deportation should remain in the immigration legislation. Professor C J Davel shared this latter view provided the children involved are unaccompanied.

30 The Society of Advocates of Natal submitted that it is unnecessary to cover matters relating to school education in a children's statute. This was also the view of the Johannesburg Institute of Social Services, the Cape Law Society, Professor C J Davel, and the Durban Committee.

all cost is inconsistencies where different pieces of legislation deal with the same issue.³¹ This was also reflected in the workshop responses where 64% of respondents were in favour of education being fully covered in a new children's statute, 34% said partially and 2% said not at all.

31 Disabled People South Africa; Mrs J Smith; S A National Council for Child and Family Welfare; NICC; ATKV; Mr D S Rothman.

Amongst the residual (educational) matters identified by respondents for inclusion in the children's statute were the right of parents to 'home-school' their children,³² the exemption of foster children and children in children's homes and institutions from paying school fees,³³ the banning of corporal punishment in schools,³⁴ mandatory reporting of child abuse by school teachers,³⁵ the prohibition of dangerous weapons on school premises,³⁶ measures to combat violence at school,³⁷ the regulation of schools of industries,³⁸ and measures to ensure appropriate education for various categories of children in need of special protection who are at risk of being marginalised.

2.5.8 Children living under customary law

Aspects relating to customary law as it affects children are dealt with below in Chapter 21. For present purposes we need to concentrate on the question of whether customary law affecting children should be incorporated in a new children's statute.

The questions posed on customary law in Issue Paper 13 read as follows:

Question 84: To what extent should customary law affecting children be directly or indirectly incorporated in the proposed new legislation? And, if it is decided not to incorporate detailed customary law provisions in the new children's statute, to what extent should the fundamental principles underpinning such a statute be made sensitive to and compatible with existing principles of customary law?

The majority of respondents were in agreement that there should be basic minimum standards or principles of equality and dignity applicable to all children.³⁹ These 'universal' principles regarding

32 Mrs J Smith.

33 S A National Council for Child and Family Welfare.

34 NICC. Contra Mrs J Smith who called for the reintroduction of corporal punishment in schools. Corporal punishment may not be administered to a learner at a school: section 10(1) of the South African Schools Act 84 of 1996.

35 NICC.

36 Mrs J Smith.

37 S A National Council for Child and Family Welfare. Contra NICC, the Society of Advocates, the Cape Law Society, the Durban Committee, the Johannesburg Institute of Social Services who argued that issues relating to safety in schools and minimum standards should be addressed in the education legislation.

38 Mr D S Rothman.

39 S A National Council for Child and Family Welfare, NICC, Natal Society of Advocates; Johannesburg Institute of Social Services; Cape Law Society, the Durban Committee.

children should transcend customary and religious laws and should be statutorily protected and enforced.⁴⁰ Thus, a children's statute should overrule customary and religious practices in order to effectively protect the child. Some respondents were adamant that this should be the case when customary or religious law practices could harm the child physically or emotionally. Several respondents were of the opinion that the Constitution determines the role of customary and religious law sufficiently.

40 ATKV.

On the other hand, several respondents cautioned that religious and customary practices deserve sensitive treatment and said that these practices and laws should be acknowledged in so far as these are not detrimental to the rights of children.⁴¹ Others wanted more clarity with regard to the areas of conflict between statutory and / or common law and customary law.

2.6 Evaluation and Recommendations

In determining the proper scope of this investigation, the Commission had to reconcile the vision of a single comprehensive new children's statute with the demands that such a new statute be understandable, user friendly and accessible. Unfortunately, comprehensiveness and size are closely related and the more comprehensive the new statute becomes, the bulkier it gets. The right balance therefore needs to be found.

The Commission remains committed to drafting a single comprehensive children's statute.

We see the following advantages in such an approach:⁴²

- The children's statute can serve as an advocacy tool for children's rights;
- Such statute can encourage changes in societal attitudes towards children and enhance recognition of their rights;
- The statute will encourage better treatment for children;
- The statute can make the law relating to children more accessible and understandable, thereby protecting children's rights;
- The statute will give effect to the constitutional protection afforded children in South

41 The Cape Law Society, the Durban Committee, Professor C J Davel, Disabled People South Africa.

42 See also Catarina de Albuquerque "Consultancy on the question of a Mozambican child rights code and other legal reform in favour of children's rights", Maputo, September 2000 for a discussion of a similar process in Mozambique.

Africa;⁴³

- Redrafting provides the opportunity to 'Africanise' the outdated child care legislation inherited from our colonial past;
- As such, the children's statute will address indigenous South African problems such as children living with HIV/AIDS and children living in extreme poverty;
- Reviewing the existing child care legislation gives effect to South Africa's international commitments as embodied in the CRC and the African Charter on the Rights and Welfare of the Child;

The Commission recommends that a new children's statute should contain provisions on the following aspects:

- Definitions
- Principles underlying the legislation
- Status of children
- Children's rights and responsibilities
- Parental rights and responsibilities (including provisions on the rights of fathers of children born out of wedlock, access, custody, and guardianship)
- Children's Courts, the officers of such courts, and the orders such a court can make
- Prevention of ill-treatment and unlawful removal of children, and prohibition of employment of certain children
- Protection measures and care for children
- Substitute family care (adoption and foster care)
- Residential care, places of safety, children's homes and places of care
- Private international law aspects related to the Hague Conventions (inter-country adoptions and child abduction)

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As provided for in section 28 of the Constitution of the Republic of South Africa Act 108 of 1996.

In addition, respondents were fairly unanimous that provision should also be made for various categories of children in need of special protection. These include abandoned children, children living in severely impoverished situations, children with disabilities, children living with or affected by HIV/AIDS, street children, and children exposed to armed conflict. The Commission recognises that each of these categories has unique needs and requires special protection. This issue will be dealt with comprehensively in Chapter 13.

In the light of the submissions made **the Commission also recommends that the following aspects specifically be addressed in the new children's statute:**

- Age of majority
- Early childhood development
- Reporting of child abuse and neglect
- Social security for children.

While it is recommended that the new children's statute should contain provisions dealing with the above aspects, the manner in which this is to be done and the amount of detail required still need to be determined.

The Commission does not recommend, however, that the following Acts be repealed and their provisions be incorporated in the new children's statute:

- The Divorce Act 70 of 1979
- The South African Schools Act 84 of 1996
- The Maintenance Act 99 of 1998
- The Domestic Violence Act 116 of 1998.

As for areas of the law, **the Commission does not recommend the inclusion, save for cross-referencing to the relevant legislation or where a specific aspect relating to children needs to be addressed, provisions on the following in the new children's statute:**

- Children in trouble with the law

- Sexual offences by and against children
- Measures to make it easier for children to give evidence in court
- Child health issues
- Labour.