

## CHAPTER 6

### THE CHILD CARE ACT 74 OF 1983

#### 6.1 Introduction

This Chapter is a foundational and introductory chapter. It is not intended to deal with all aspects relating to the Child Care Act 74 of 1983 in every detail as these form the subject of separate and subsequent chapters of this discussion paper.

The Child Care Act 74 of 1983 came into operation on 1 February 1987, its immediate predecessor being the Children's Act 33 of 1960. According to the Minister of Health and Welfare at the time of promulgation of Act 74 of 1983, the change in name signalled a recognition of 'the general principle that the family is the normal social and biological structure within which the child must grow and develop. The legislation does not, therefore, focus solely on the child, or solely on the child's parents, but on both. The emphasis is, therefore, on the care of the child by his parents or by those entrusted with the custody of the child'.<sup>1</sup>

Several South African writers have, however, questioned whether the Child Care Act, in its original form (particularly the provisions relating to the criteria for the removal of children from parental care and for initiating children's court inquiries), really gave expression to the legislative purpose ostensibly underpinning it, viz. the encouragement and protection of the family unit as 'the natural social structure for the growth and development of the child' by creating a proper balance between parental rights, duties and powers, on the one hand, and children's rights, on the other hand.<sup>2</sup>

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1 House of Assembly Debates (Hansard) of 9 May 1983 6560, as cited by Spiro **Law of Parent and Child** (4th edition) (1985) 350; JA Robinson 'Children' in **LAWSA** Volume 2 (First Reissue 1993) para 176; Fiona McLachlan 'The New Child Care Act - In the Best Interest of Family, Parent or Child' (unpublished paper, University of Cape Town, December 1983) 1-2.

2 See, for example, Graham E Barlow 'Child Care Bill - Best Interests of the Child?' 1982 **De Rebus** 341; Julia Sloth-Nielsen and Belinda van Heerden 'Proposed amendments to the Child Care Act and Regulations in the context of constitutional and international law developments in South Africa' (1996) 12 **SAJHR** 247, 'The Child Care Amendment Act 1996: Does it improve children's rights?' (1996) 12 **SAJHR** 649; F N Zaal 'Child Removal Procedures Under the Child Care Act : Some New Dangers to Contend With' (1988) 105 **SALJ** 224; JA Robinson 'Artikel 12(1) van die Wet op Kindersorg en die Posisie van die Maatskaplike Werker' (1992) 55 **THRHR** 74; Fiona McLachlan (unpublished paper, UCT) 2-3, 8-10.

The Children's Act 33 of 1960 was repealed by the Child Care Act, 1983 except insofar as it (the 1960 Act) related to the appointment of probation officers and the establishment, maintenance and management of schools of industries and reform schools. Section 58 of Act 33 of 1960 (dealing with the appointment and functions of probation officers) was subsequently repealed by section 20 of the Probation Services Act 116 of 1991, while the provisions of the 1960 Act relating to the establishment, maintenance and management of reform schools and schools of industries were repealed by section 113(1) of the Education Affairs Act (House of Assembly) 70 of 1988. Far-reaching amendments were in turn made to the Child Care Act, 1983 in terms of the Child Care Amendment Act 86 of 1991 (date of commencement 19 June 1991),<sup>3</sup> the Child Care Amendment Act 96 of 1996 (date of commencement 1 April 1998 with the exception of section 8A, which is yet to come into operation), and the Child Care Amendment Act 13 of 1999 (date of commencement 1 January 2000).

The Commission had the opportunity to discuss a draft version of this Chapter with the Portfolio Committee on Social Development in Parliament on 6 June 2001. The Commission also had the opportunity of working through the current Child Care Act, 1983 and the Regulations with officials of the Department of Social Development.<sup>4</sup> The Commission benefited greatly from these processes and would like this opportunity to thank all those involved for their inputs and comments.

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3 Despite the comments below (6.4.1) of the 1993-amendments going rather far in the direction of a child-centred approach, it must be stated that a degree of secondary focus upon parental conduct has been retained.

4 The meeting was held at the offices of the (national) Department of Social Development on 26 June 2001. It was attended by Ms Elmarie Swanepoel, Ms Suzette Moss, Ms Mariëka Bloem, Ms Loeloe Siwisa, Dr Jackie Loffell, Professor Noel Zaal, Ms Louisa Stuurman and Mr Gordon Hollamby. Ms Saar Snyman, a commissioner of child welfare, also attended the meeting.

## **6.2 Meaning of 'child' for the purposes of the Child Care Act, 1983**

The Child Care Act, 1983 defines a child as any person under the age of 18 years.<sup>5</sup> In this regard, it is in line with the definition of a child contained in both the South African Constitution<sup>6</sup> and in the CRC.<sup>7</sup> There are, however, circumstances in which certain provisions of the Child Care Act apply to persons over the age of 18 years. So, for example, a children's court may make an order in respect of any person who, at the commencement of the relevant children's court inquiry, was under the age of 18 years, but has attained the age of 18 years before the date of the order.<sup>8</sup>

The Commission has recommended in Chapter 4 above that, for the purposes of the new children's statute, a child be defined as a person under the age of 18 years.

## **6.3 Provisions that empower (or could empower) children**

### **6.3.1 Legal representation for children in children's court proceedings**

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5 Section 1 of the Child Care Act, 1983. See also Chapter 4 above.

6 Section 28(3) of the Constitution, 1996.

7 Article 1.

8 Section 15(4) of the Child Care Act, 1983. As regards the estimation of the age of a person when such age is a relevant fact in any proceedings under the Child Care Act but there is no or insufficient evidence in respect thereof, see section 54.

In an apparent attempt to give substance to the constitutional right of every child to have a legal representative assigned to him or her by the state, and at state expense, in civil proceedings, section 8A(1) of the Child Care Act<sup>9</sup> provides that '[a] child may have legal representation at any stage of a proceeding under this Act'.<sup>10</sup> In terms of this section the children's court must inform a child 'who is capable of understanding, at the commencement of any proceeding, that he or she has the right to request legal representation at any stage of the proceeding'.<sup>11</sup>

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9        Inserted by section 2 of Act 96 of 1996. For a critical analysis of the wording of section 8A, see Julia Sloth-Nielsen and Belinda van Heerden (1996) 12 **SAJHR** 469 at 469 - 470; F N Zaal 'When should children be legally represented in care proceedings? An application of section 28(1)(h) of the 1996 Constitution' (1997) 114 **SALJ** 334 at 335-6.

10       See also Regulation 4A which specifies the circumstances in which the Commissioner for Child Welfare must give consideration to requiring the appointment of a representative for the child.

11       Section 8A(2).

In terms of section 8A(3) of the Child Care Act, 1983 a children's court may be required to approve the appointment by a parent of a legal representative for the child concerned, 'should the children's court consider it to be in the best interest of such child'. According to Sloth-Nielsen and Van Heerden,<sup>12</sup> this interesting addition flies in the face of expressed concerns about the potential for a conflict of interests, where parents (who may be akin to defendants in a removal enquiry) are empowered to appoint a legal representative for the child. Recent research by Professor F N Zaal entitled 'Do children need lawyers in children's courts?' indicates that in 90% of the children's court enquiries in his sample where private lawyers did appear, they defended **parents** in removal proceedings; the same research suggests that in the rare cases where children are represented by private lawyers (1%), these are often paid for by family members other than the parents.

Furthermore, the provision of legal representation for a child at state expense may be ordered by the children's court, at the commencement or at any other stage of the proceeding, the test again being whether or not the court considers this to be in the best interest of the child in question.<sup>13</sup> If legal representation for the child at state expense is indeed ordered, then sections 8A(5) and (6) provide for appointment of the child's legal representative by the Legal Aid Board, followed by a detailed evaluation and report on the matter by the Board - essentially in order to determine whether the cost of the legal representation can be recovered from the parent/s of the child, his or her guardian or any other party to the proceedings.

The overt emphasis on cost considerations evident from sections 8A(5) and (6) creates the danger that the level of legal representation for children in children's court proceedings will not be substantially increased - there is the very real risk that the cost factor will prove to be more compelling than the possibility of 'substantial injustice' to the child.<sup>14</sup>

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12 (1996) 12 **SAJHR** 649 at 650.

13 Section 8A(4). At the meeting with the officials of the Department of Social Development held on 26 June 2001, no agreement could be reached as to what weight the recommendation by a social worker to the court that a child be provided with legal representation at state expense as is provided for in Regulation 4A(1)(b) should carry.

14 See Julia Sloth-Nielsen and Belinda van Heerden 'The Child Care Amendment Act 1996: Does It Improve



**Section 8A is yet to come into operation.** However, these provisions concerning legal representation for children in children's court proceedings are unsatisfactory in several different respects.<sup>15</sup> Perhaps most importantly, it is still not mandatory for the children's court **properly** to consider the issue of legal representation for the child in all such cases. For those commissioners of child welfare who **do** in fact consider the issue, no guidelines are provided by the legislation to assist them in making a decision one way or the other. The meaning of the phrase 'who is capable of understanding' is unacceptably vague; however, it is obvious that many children who are involved in children's court inquiries will not be 'capable of understanding' because of their tender years. It is also unclear what the responsibility of the commissioner is when a child **does** request legal representation - it would seem from section 8A that such a request can simply be denied.<sup>16</sup> Conversely, if a child refuses legal representation (as frequently happens with children in juvenile criminal courts), it would appear that the matter can simply be left there - there is no obligation on the children's court to go further and consider whether the best interests of the child require legal representation notwithstanding such refusal.

In view of the abovementioned shortcomings of section 8A, it would seem that this section, even if it comes into operation now, in many cases will not give adequate protection to the child's constitutionally guaranteed right to legal representation at state expense, in civil proceedings affecting the child.<sup>17</sup> This new section also appears to fall short of the standard set by article 12

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15 See, for instance, D S Rothman 'The need for legal representation for children in children's court proceedings - fact or phobia?' (2001) 4.1 **The Judicial Officer** 4: 'The draconian nature of the legislation on legal representation for the child as provided for in section 8A and regulation 4A, respectfully said, appears to present an unrealistic and almost phobic approach to the matter on the part of well-meaning role-players who regrettably have little insight of how the children's courts work and, indeed, may never even have set foot in one!'

16 In terms of Regulation 4(2), the commissioner is obliged, however, to enter in the minutes of the court proceedings its reasons for the decision not to order that such legal representation be provided for the child.

17 See Constitution of the Republic of South Africa Act 108 of 1996, section 28(1)(h).

of the CRC, which article obliges State Parties to 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters [including any judicial or administrative proceedings] affecting the child, the view of the child being given due weight in accordance with his or her age and maturity'. This participation by the child may be achieved through hearing the child in person or through a representative or an appropriate body.<sup>18</sup>

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18 See Julia Sloth-Nielsen 'Ratification of the United Nations Conventions on the Rights of the Child: Some Implications for South African Law' (1995) 11 **SAJHR** 401 at 410-411; Marie-Françoise Lücker-Babel 'The Right of the Child to Express Views and to be Heard: An Attempt to Interpret Article 12 of the UN Convention on the Rights of the Child' (1995) 3 **International J of Children's Rights** 391.

It must be concluded that, although it represents the latest of a whole series of attempts to draft an appropriate provision, section 8A of the Child Care Act is too disjointed, and uses too broad a ground,<sup>19</sup> to offer sufficient guidance on the important question of when children should have an enforceable right to representation in care proceedings.<sup>20</sup> More specific guidelines are required.

This can be done by incorporating the grounds provided for in the current Regulation 4A(1) of the Child Care Act in the new children's statute. **The Commission accordingly recommends that legal representation, at State expense, must be provided automatically<sup>21</sup> for a child involved in any<sup>22</sup> proceedings under the new children's statute, in the following circumstances, if substantial injustice would otherwise result.<sup>23</sup>**

- (a) where it is requested by the child;<sup>24</sup>
- (b) where it is recommended in a report by a social worker or an accredited social worker;<sup>25</sup>
- (c) where it appears or is alleged that the child has been sexually, physically or emotionally abused;<sup>26</sup>
- (d) where the child, a parent or guardian, a parent-surrogate or would-be adoptive or foster parent contest the placement recommendation of a social worker who has investigated the current circumstances of the child;<sup>27</sup>

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19 In sections 8A(3) and (4) it is stated that such representation 'may' be provided at private or state expense if a presiding commissioner determines that this 'is in the best interest' of the child.

20 For other criticisms, see Julia Sloth Nielsen and Belinda Van Heerden 'The Child Care Amendment Act 1996. Does it Improve Children's Rights in South Africa?' (1996) 12 **SAJHR** 649.

21 Contra D S Rothman (2001) 4.1 **The Judicial Officer** 4 at 8, with particular reference to proceedings relating to abandoned infants.

22 Contra D S Rothman (2001) 4.1 **The Judicial Officer** 4 at 8.

23 Our emphasis. In this regard, the Commission agrees with D S Rothman (2001) 4.1 **The Judicial Officer** 4 at 11 that there is a marked difference between the concepts 'substantial injustice' and 'best interests of the child'.

24 Regulation 4A(1)(a). See also D S Rothman (2001) 4.1 **The Judicial Officer** 4 at 10, who says a child should be left to choose whether to ask for legal representation, regardless of the circumstances listed under regulation 4A(1), where such child is capable and mature enough to understand the implications of the choice made, after this has been carefully explained to him or her.

25 Regulation 4A(1)(b). The Project Committee debated this issue at length. On the one hand, some members of the Committee argued that a social worker, as a non-legal person, should not be able to dictate to the court on what is basically a legal issue. On the other hand, it was pointed out that the social worker makes a **recommendation** to the court. It was also pointed out that there is no incentive for the social worker to make such a recommendation as this will involve more work for him or her. At the same time, the social worker is in a position to have insight into e.g. the power dynamics in an abusive family or any conflicts which are in process with regard to a child. The social worker should therefore be alert to the implications of a lack of legal representation for a child affected by such factors.

26 Regulation 4A(1)(d).

27 Regulation 4A(1)(e). The term 'parent' should be broadly interpreted to include parents of extra-marital or artificially procreated children.

- (e) where two or more adults are contesting in separate applications for placement of the child with them;<sup>28</sup>
- (f) where any other party besides the child will be legally represented at the hearing;<sup>29</sup>
- (g) where it is proposed that a child be trans-racially placed with adoptive parents who differ noticeably from the child in ethnic appearance;

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28 Regulation 4A(1)(f).

29 This point was reiterated at the meeting held on 26 June 2001 with officials from the Department of Social Development. See also Regulation 4A(1)(c).

- (h) in any other situation where it appears that the child will benefit substantially from representation either in regard to the proceedings themselves or in regard to achieving the best possible outcome for the child.<sup>30</sup>

**The Commission recommends that where the above circumstances are present or if substantial injustice would otherwise result, the court must order legal representation, at State expense, for the child. The Commission further recommends that where the court denies the child the right to such legal representation, the court must enter in the minutes of the court proceedings its reasons for its decision not to order that such legal representation be provided for the child.**<sup>31</sup> The proposal to include representation in the case of obviously trans-racial placements is based upon the fact that it has been widely recognised that these sometimes involve difficult decision-making because of the longer-term danger of an identity crisis for the child which has to be balanced against the advantages of the placement.<sup>32</sup>

**The Commission does not recommend that** Regulation 4A(1)(g), which provides that where the child is capable of understanding the nature and content of the proceedings, but differences in languages used by the court and the child prevent direct communication between the court and the child, **a legal representative who speaks both the languages must be provided**, be included in the above list of criteria. Indeed, the Commission sees such a provision as unworkable in practice and could lead to confusion of role of legal representative and of interpreter.<sup>33</sup>

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30 See Regulation 4A(1)(j).

31 See Regulation 4A(2) for the possible wording of such a provision.

32 On the dilemmas involved in transracial placements, see generally: F N Zaal 'Avoiding the Best Interests of the Child. Race-Matching and the Child Care Act 74 of 1983' (1994) 10 **SAJHR** 372; and Tshepo L. Mosikatsana 'Transracial Adoptions: Are We Learning the Right Lessons From the Americans and Canadians: A Reply to Professors Joubert and Zaal' (1995) 112 **SALJ** 606.

33 This is also the view of D S Rothman (2001) 4.1 **The Judicial Officer** 4 at 10. See also Chapter 23 (Courts) below.

### 6.3.2 The Children's Court Assistant

Children's court assistance as envisaged under section 7 and regulation 2 of the Child Care Act used to provide at least some child advocacy services. However, as junior members of the court staff, they tended to lack independence; and an absence of legal training also often further reduced their effectiveness.<sup>34</sup> In 1992, however, the Department of Justice ended the practice of having full-time, professionally qualified assistance, and so ended even this limited resource for children.<sup>35</sup>

References to the duties of the 'children's court assistant' appear in many parts of the Act. For example, assistants are envisaged as involved in administrative matters preliminary to an actual children's court inquiry. Where the court assistant is in attendance at an inquiry, she or he has the right to examine / cross-examine any witness, call witnesses, request for information, reports, documents, or for the appearance of any person as deemed necessary. A proper completion of these tasks will often be vital to an appropriate disposition of a case. The assistant can even be cross-examined, which appears to be a confusion of her role as a court officer.

Although the question of appropriate training needs careful consideration,<sup>36</sup> it may be concluded that the concept of a children's court assistant is essentially a sound one under the Act as presently framed. In English and Scottish law, specialist officers carry out tasks similar to some of those of the children's court assistant.

Because of the basic and vital support that this officer can provide even under the current wording of the Act, involvement of assistants needs to become mandatory in all children's court

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34 It was usually social workers who served as children's court assistants. For a discussion of their role, see C R Matthias 'Are we making progress: The 1996 Child Care Bill and some fundamental aspects of practice and procedure in the children's courts' (1996) 32(3) **Social Work** 242 at 243-4. See also F N Zaal and Ann Skelton 'Providing effective representation for children in a new constitutional era: Lawyers in the criminal and children's courts' (1998) 14 **SAJHR** 539 at 545.

35 See Department of Justice circular 1 /2/2/3/5 of 1992. For criticism of this decision and discussion of its consequences, see C R Matthias and F N Zaal (1996) **Acta Juridica** 51 at 58. See also Zaal and Skelton (1998) 14 **SAJHR** 539 at 546.

36 There is a school of thought which prefers the idea of children's court assistants as being predominantly trained in social work, rather than in law. Ideally, however, the assistant needs dual training or experience in both social work and law - especially court procedure.

proceedings. Their name should be changed to indicate a better status - perhaps to 'Family Law Officer' as recommended by Mr D S Rothman.<sup>37</sup>

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37 As quoted by Matthias and Zaal 'Can we build a better children's court? Some recommendations for improving the processing of child-removal cases' 1996 **Acta Juridica** 51 at 58.

As regards difficulties in practice, these have largely resulted from the decision to remove professionally trained children's court assistants in 1992. This left commissioners in the ethically difficult position of having to serve both as the adjudicator and as the person who conducts each case. This has not been to the advantage of the vulnerable children who appear before them. Many commissioners have resorted to desperate measures such as borrowing criminal court prosecutors to serve as children's court assistants in some of their more complex cases. However, the use of prosecutors as children's court assistants is and has not been successful. The adversarial work style which prosecutors require in order to function effectively in criminal proceedings tends to be destructive when imported to the rather different environment of the children's courts. In the latter, it tends to damage efforts to produce a climate that may be conducive to rebuilding dysfunctional parent-child relationships. An important aim of many children's court cases is thus often compromised if prosecutors are used as children's court assistants.<sup>38</sup> The fact that even investigating social workers have sometimes found themselves pressed into inappropriate duties as child advocates is another consequence of the failure to supply children's courts with a necessary resource in the form of appropriately trained children's court assistants.

What, then, is the solution to the problem of finding a suitable assistant in the children's court? The present situation, in which social workers have been systematically removed from posts as assistants and replaced by clerical staff, is certainly unacceptable. It has severely undermined the standing and efficiency of the children's court, *inter alia*, by placing commissioners in the ethically difficult situation of having to take on many of the tasks of an assistant - such as decisions about what witnesses should appear before them and cross-examination during hearings. What is surely needed is a return of professional children's court assistants to the children's court as originally intended. But what they obviously require by way of preparation is exposure to the skills and methodologies of both social work and the law. Persons who are prepared to have experience and preferably training in both fields should be sought. As a court

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38 Matthias and Zaal 'Can we build a better children's court? Some recommendations for improving the processing of child-removal cases' 1996 **Acta Juridica** 51 at 57: 'The results of our research indicate that the presence of prosecutors as assistants in the children's court has tended to be rather a mixed blessing. The traditional adversarial mode of these officials at a child care hearing is often rather akin to having a bull in a china shop'.

with unique tasks, the children's court requires genuine child advocates with a thorough knowledge of court procedures combined with the sensitivity to know how to avoid destroying the last vestiges of a damaged child-parent relationship.<sup>39</sup>

Thought must also be given to rendering children's court assistants ('family law officers') sufficiently independent of the commissioner that they can carry out their functions properly. Expansion of the existing family advocates' offices to take on the rather different child advocacy functions required in the children's courts is a possible solution which needs consideration. If family courts become a reality, the role of family advocates will, in any case, be inevitably expanded. In converting the Act into the nucleus of a Children's Code, thought needs to be given to new duties which will make the present concept of a children's court assistant more cost-effective.

Another staff member to be found in the children's courts is the clerk of the children's court. As with the commissioners, this officer will in most jurisdictions combine part-time children's court work with clerical duties pertinent to civil and criminal magistrates courts and will thus be expected to be something of a 'Jack of all trades'. In the absence of professionally trained children's court assistants, the clerks of the children's court are often expected to undertake duties such as reading investigating social workers' reports in order to see whether they are ready to be presented at an inquiry. This is not always obvious because clerical staff are now sometimes wrongly referred to as 'children's court assistants'. It is true that they are now compelled to fulfil some of the functions of children's court assistants, but they usually have no special training, expertise or qualifications fit for the position of children's court assistant. It is recommended that clerks should only have to carry out clerical and secretarial tasks, and not those expected of a children's court assistant.

The Commission has provided for an expanded role of 'children's court assistants' in this Discussion Paper. See Chapter 23 (Courts) below.

### 6.3.3            **The right of children to self-expression**

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39        Matthias and Zaal (1996) *Acta Juridica* 51 at 58.

At the stage of the child's first appearance at a court she or he already has a great deal at stake.

The commissioner (as the law presently stands) will now decide whether the child is to be the subject of an inquiry which may drastically affect her or his long term future and, in the short term pending the inquiry, the commissioner may well decide to have the child detained in a place of safety.<sup>40</sup> As the child's liberty is thus often at stake, it is a matter of concern that the Child Care Act does not provide the child with a clear right to express views and wishes if able to do so. Regulation 9(2)(d), which deals with the information on which the commissioner may act at the 'opening', refers to information provided by 'the parent of the child and the children's court assistant or the social worker, police officer, or authorised officer', but does not refer to the child's evidence.

The absence of a clear right to give evidence (if old enough and otherwise able to) by the person most affected is an example of a lack of child-centredness in the Act. Unfortunately, the same criticism applies to other areas such as those provisions dealing with the presentation of evidence at the actual inquiry itself.<sup>41</sup> The Child Care Act thus needs to be amended so as to afford the child a clear right to describe his circumstances and wishes,<sup>42</sup> both at the 'opening' and at the inquiry, and in all other types of appearances, and for due consideration to be given to these by the court. If the child is not able to take advantage of this right due to tender age, illness or other good reason, then this must be recorded as a finding of fact by the commissioner. This reform is necessary both from a due process perspective and because of the problem of powerlessness of children who are the subject of children's court hearings. Children must not, however, be pressured into expressing views they may be uncomfortable with - for example, where they feel unhappy that they may be choosing sides between parents if they express a view on a certain matter.

**Accordingly the Commission recommends that the new children's statute should explicitly allow children to give evidence, if capable of doing so, in any proceedings under this Act. Where the court decides not to allow a child to so testify, the court must record the reasons for its decision not to allow such child to give evidence in the minutes of the court proceedings.**

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40 However, the definition of 'place of safety' in the Child Care Act is broad enough to include the child remaining in the custody of a parent or any other person pending the enquiry.

41 Neither section 8 (entitled, 'Procedure in children's courts') nor section 14, ('Holding of inquiries') specifies that children who are capable have a right to give evidence.

42 See also Sloth-Nielsen and Van Heerden (1996) 12 **SAJHR** 247 at 264.

6.3.4 **Consent to medical treatment or surgical intervention**<sup>43</sup>

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43 See also Chapter 11 below.

In terms of section 39(4) of the Child Care Act, 1983<sup>44</sup> a child who has reached the age of 18 years is competent to consent, without the assistance of his or her parent or guardian, to the performance of any operation upon himself or herself,<sup>45</sup> while a child over the age of 14 years is competent to consent, without such assistance, to the performance of any medical treatment of himself or herself or of his or her child.<sup>46</sup> Unfortunately, the concepts 'operation' and 'medical treatment' are not defined in the Act and this may give rise to difficulties in practice.<sup>47</sup>

In the case of **G v Superintendent, Groote Schuur Hospital and Others**,<sup>48</sup> counsel for all parties accepted that the proposed abortion on a 14-year-old girl should be regarded as 'an operation' and not simply as 'medical treatment'.<sup>49</sup> It is, however, probable that, in South African law, the dispensing of contraception (perhaps with the exception of the insertion of inter-uterine devices) qualifies as 'medical treatment' in terms of section 39(4), so that a child aged 14 years or more can receive such contraception without the consent of a parent or guardian.<sup>50</sup>

The provisions of section 39(4) do not exclude parental rights, but do mean that, in the cases covered by the section, if the child's views regarding medical treatment or surgical intervention differ from those of his or her parent or guardian, the child's views will enjoy priority. Seen from a different perspective, the question may be posed as to whether a child can refuse medical treatment or surgery against the wishes of his or her parents or guardian? One view is that, if the child is of sufficient age and maturity to understand fully the implications of his or her decision and to be capable of making up his or her own mind in an informed manner, then he or she can indeed refuse treatment or surgery in such cases.<sup>51</sup> If, however, the child were to

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44 As substituted by section 14 of Act 86 of 1991.

45 Section 39(4)(a) of the Child Care Act, 1983.

46 Section 39(4)(b). According to the Memorandum on the Objects of the Child Care Amendment Bill, 1991, this provision was introduced, *inter alia*, to enable the supply of birth control services to minors without the knowledge or consent of their parents or guardians, as also to deal with the practical problems arising in the provision of clinic services to an unmarried minor mother and her child in the absence of the minor's parents.

47 See IAJ Loftus, JP Nel and DJ Maartens 'Toestemming deur Minderjariges : Grys Area tussen Operasie en Mediese Behandeling' 1994 **De Rebus** 486; Charles Ngwena 'Health Care Decision-Making and the Competent Minor : The Limits of Self-Determination' in Raylene Keightley (ed) **Children's Rights** (1996) 132 at 139, 143-145; SA Strauss **Doctor, Patient and the Law** (3rd edition) (1991) 7-8.

48 1993 (4) SA 255 (C).

49 At 262 G.

50 See discussion above; see also SA Strauss **Doctor, Patient and the Law** 171-174.

51 See SA Strauss **Doctor, Patient and the Law** 7; Charles Ngwena in Raylene Keightley (ed) **Children's Rights** 136-138; Cf. the English House of Lords decision in **Gillick v West Norfolk and Wisbech Area Health Authority** [1986] 1 AC 112 at 186, 188-189 (per Lord Scarman); Maria Ruegger 'Children's Rights in Relation to Giving and Withholding Their Consent to Treatment' in Deborah J Lockton (ed) **Children and**

refuse surgery or treatment necessary to preserve his or her life or to save him or her from serious and lasting physical injury or disability, then it would appear that the High Court, in its capacity as the upper guardian of all minors, would be able to authorise such treatment or surgery against the child's wishes so as to serve the best interests of the child.

#### **6.4 Provisions that protect (or could protect) children**

##### **6.4.1 The removal of a child to a place of safety pending an enquiry**

In order to provide for a speedy and expeditious means of protecting a child pending an enquiry to determine whether such child is need of care,<sup>52</sup> the Child Care Act, 1983 confers the power to effect the removal of a child to a place of safety on children's courts,<sup>53</sup> commissioners of child welfare,<sup>54</sup> the police, social workers, authorised persons,<sup>55</sup> and the Director-General: Social Development.<sup>56</sup>

◦ **Removals in terms of section 11 of the Child Care Act, 1983**

The children's court may effect the removal of a child to a place of safety on either of two grounds: First, that the child has no parent or guardian, and second, that it is in the interests of

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52 On the way in which children come into care, see F N Zaal and C R Matthias 'The child in need of alternative care' in CJ Davel (ed) **Introduction to Child Law in South Africa** Durban: Juta 2000 116 at 120.

53 Section 11(1) of the Child Care Act, 1983.

54 Section 11(2) of the Child Care Act, 1983.

55 Section 12(1) of the Child Care Act, 1983.

56 Section 42(2) of the Child Care Act, 1983.

the safety and welfare of the child that he or she be taken to a place of safety.<sup>57</sup> The children's court enjoys a wide discretion in this regard, in that its powers may be exercised when it 'appears in the course of proceedings' that either ground exists in relation to 'any child'.<sup>58</sup> In contrast, a commissioner of child welfare may only act on the strength of information given on oath which gives rise to 'reasonable grounds' for believing that either ground exists, and only in relation to 'any child who is within the area of his jurisdiction'.<sup>59</sup>

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57 Sections 11(1) and (2) of the Child Care Act, 1983.

58 Section 11(1).

59 Section 11(2) of the Child Care Act, 1983. See also Schäfer 'Young persons' in Clark (ed) **Family Law Service** Durban: Butterworths, par E114.

Removal by a children's court is effected by order of that court, while a commissioner may effect the removal by issuing a warrant in the form of Form 3.<sup>60</sup> It is not necessary for purposes of the warrant to state the name of the child.<sup>61</sup>

At the meeting with the officials of the Department of Social Development on 26 June 2001, it was recommended that the existing section 11 of the current Child Care Act, 1983 be retained in the new children's statute. **The Commission supports this recommendation.**

° **Removals in terms of section 12 of the Child Care Act, 1983**

The police, a social worker or an authorised officer<sup>62</sup> may, without a warrant from the commissioner, remove a child to a place of safety if such official has reason to believe that the child is need of care and that the delay in obtaining a warrant could be prejudicial to the safety and welfare of the child.<sup>63</sup> Where the police, social worker or authorised officer removes a child without warrant, such official must grant authority, in the form of Form 4, to the place of safety for the detention of the child.<sup>64</sup> The police person, social worker or authorised officer who has so removed a child must as soon as possible thereafter (but within 48 hours)<sup>65</sup>

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60 Regulation 9(1).

61 Section 11(4) of the Child Care Act, 1983.

62 At the meeting with the officials from the Department of Social Development on 26 June 2001, it was recommended that the definition of 'authorised officer' in section 1 of the Child Care Act, 1983 be amended by the deletion of the words 'social worker or policeman'.

63 Section 12(1) of the Child Care Act, 1983.

64 Regulation 9(2)(a).

65 Regulation 9(2)(b)(i). If this period expires on any court day after 4pm, or on any day that is not a court day, the period is deemed to expire at 4pm on the next succeeding court day. If it expires before 4pm on a court day, the period is deemed to expire at 4pm on that day: Regulation 9(2)(b)(iii).

- (a) inform the parent or guardian of the child or person in whose lawful custody the child is of the removal 'if such parent, guardian or person is known to be in the district from where the child was removed and can be traced without undue delay';
- (b) inform the children's court assistant of the reasons for the child's removal; and
- (c) bring the child before the children's court of the district in which is situated the place from where the child was removed.<sup>66</sup>

These notification requirements apply *mutatis mutandis* where a police person, social worker or authorised officer removes a child pursuant to a warrant issued by a commissioner in terms of section 11(5) of the Child Care Act, 1983.

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66 Section 12(2) of the Child Care Act, 1983.

There is concern that the current Form 4 procedure is being abused. As we have seen, this procedure allows for the removal of a child in need of care, without a warrant, 'if the delay in obtaining the warrant will be prejudicial to the safety and welfare of the child'.<sup>67</sup> In practice, the tendency has developed to use the Form 4 in all cases, even in non-emergencies. At the meeting with officials from the Department of Social Development held on 26 June 2001 it was pointed out that social workers in private practice paid by interested parties are making placements as 'authorised officers' and also use the Form 4 procedure.<sup>68</sup> It was further pointed out that some commissioners of child welfare collude in the incorrect use of Form 4.

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67 See also Noel Zaal (1988) 105 **SALJ** 233; Ben van Huyssteen 'Verwydering van Kinders Sonder 'n Lasbrief: a 12 van die Wet op Kindersorg van 1983' (1989) 24 **The Magistrate** 15 at 17-18; AP du Plooy 'Die Prosedure vir die Verwydering van Kinders Ingevolge die Bepalings van die Wet op Kindersorg 74 van 1983' (1991) 26 **The Magistrate** 61 at 62-63; JA Robinson (1992) 55 **THRHR** 75-76.

68 See the definitions of 'accredited social worker' and 'social worker' in section 1 of the Child Care Act, 1983. Section 12 of the Act only provides for the police, 'social workers', and authorised officers to use the Form 4 process.

There also appears to be some confusion as to whether the military police<sup>69</sup> or municipal or metropolitan police officers,<sup>70</sup> on the wrong assumption that they are ‘policemen’, are entitled to remove children without a warrant in terms of section 12 of the Child Care Act, 1983. This prompted the meeting to recommend that the purpose and grounds for Form 4 removals be spelled out in far greater detail. The meeting further recommended that the police, social workers, or authorised officers should be held accountable for removing children in non-emergency cases under a Form 4 by having to explain to the court why it was necessary to use the Form 4 process in that particular instance.<sup>71</sup> The Department of Social Development is also considering linking the Form 4 process with the National Child Protection Register<sup>72</sup> in order to monitor the removals.

**The Commission supports the recommendations made by the meeting with the officials from the Department of Social Development and supports amendments to section 12 of the Child Care Act, 1983 to spell out clearly that removals without a warrant are only to take place in emergency situations and in clearly defined circumstances. The Commission recommends that officials who do remove children without a warrant should be held accountable to the court (and the court should report them to their professional organisations or superiors where appropriate) where children are removed in non-emergency situations under the Form 4 process.** However, the Commission does concede that a major cause of the misuse of the Form 4 procedure relates to the high workloads of some courts, agencies and the Department of Social Development. This is another reason why better resourced children’s courts and welfare services are needed.

**The Commission further recommends that authorised officers, as well as (state) social workers and members of the SAPS, remain the only persons who may remove a child without a warrant to a place of safety in terms of the current section 12.** While there are

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69 In **S v Robinson** 1986 (2) SA 458 (C) the Court held, having regard to the definitions of ‘the force’ and of ‘member of the force’ in section 1 of the Police Act 7 of 1958 (now repealed), that a military policeman was prima facie not a member of the police force. This position has not changed. See now the definition of ‘member’ and section 5(2) of the South African Police Service Act 68 of 1995, read with section 3(4) of the Defence Act 44 of 1957.

70 See, in this regard, sections 5 and 64 of the South African Police Service Act 68 of 1995. Members of the municipal police are also not members of the police force.

71 See also Chapter 23 (Courts) below on the possibility of the court issuing a ‘personal accountability order’ against such person. It has also been suggested that a process similar to the High Court Rule 43 process (sworn affidavits, notice to the other party, right of reply, summary hearing, etc) be adopted in Form 4 removals.

72 As provided for in Regulation 39B.

certainly situations where the court could authorise an interested third party such as a relative to remove a child to a place of safety, the Commission is of the opinion that it would be improper for a social worker in private practice being paid by an interested party to be so authorised. If this practice is continued, any person could simply pay a social worker in private practice to remove, without a warrant, a child to a place of safety. **The Commission therefore recommends that social workers in private practice be specifically excluded from the definition of ‘authorised officer’ in section 1 of the Child Care Act, 1983.**

◦ **Removal to a place of safety by the Director-General: Social Development**

In terms of section 42(2) of the Child Care Act, 1983 the Director-General may issue a warrant for the removal of a child to a place of safety or hospital where the Director-General has received notification from a dentist, medical practitioner, nurse, social worker, teacher or person employed by, or managing, a children’s home, place of care or shelter, of such person’s suspicion that the child he or she has examined, attended to or dealt with has been ill-treated, deliberately injured or is suffering from a nutritional deficiency disease. Upon receipt of the notification, the Director-General must immediately require the police officer, social worker or authorised officer to remove the child to a place of safety and bring him or her before a children’s court.<sup>73</sup> The Director-General must also request a social worker or any other person to conduct a preliminary investigation into the circumstances giving rise to the notification. If this investigation reveals reasonable grounds to believe that the child has been ill-treated or deliberately injured, the Director-General may direct that the perpetrator be removed from direct contact with children, and that the matter be referred to the police with a view to possible prosecution of that person.<sup>74</sup>

**The Commission does not recommend any amendments to section 42(2) of the Child Care Act, 1983.**

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73 Regulation 39A(2)(a).

74 Regulation 39A(3)(a).

#### 6.4.2 Bringing children before the children's court

The Child Care Act 1983 provides for three ways<sup>75</sup> in which a child may be brought before a children's court.<sup>76</sup> First, any child removed to a place of safety by virtue of a children's court order, a warrant issued by the Director-General: Social Development or a commissioner, or authority issued by a policeman, social worker or authorised officer must be brought before the children's court of the district in which he or she was removed.<sup>77</sup> Second, a child may be brought before the children's court of the district in which he or she resides, or happens to be, by any policeman, social worker or authorised officer, or by a parent, guardian or other person having custody of the child, in circumstances where a children's court assistant is of the opinion that the child is need of care.<sup>78</sup> Third, where a child has been placed in the custody of his or her parents, guardian or custodian by order of a children's court order or by virtue of a ministerial transfer, the supervising social worker may bring such child before a children's court if such social worker is of the opinion that the conditions prescribed by the court or the Minister, as the case may be, have not been complied with.<sup>79</sup>

In all cases, the children's court before which a child has been brought is required to conduct an inquiry to determine whether the child is in need of care.<sup>80</sup> The fact that the child is subject to an existing custody order does not preclude the court from conducting a section 13(3) inquiry and from making an appropriate order.<sup>81</sup> The court may not, however, make an interim custody order in terms of section 14(3) during any postponement of an inquiry which conflicts or

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75 Section 254 of the Criminal Procedure Act 51 of 1977 allows a criminal court to refer an accused child to the children's court in lieu of sentencing that child. This causes Matthias and Zaal (1996) **Acta Juridica** 51 at 52 to identify five different legal provisions which may be used to initiate proceedings that may lead to a children's court inquiry into whether a child should be removed.

76 Schäfer 'Young persons' in Clark (ed) **Family Law Service** Durban: Butterworths, par E129.

77 Where a child is removed to a place of safety by virtue of a children's court order, he or she must be brought before the children's court 'as soon as may be thereafter': section 11(1). A child removed by virtue of a warrant issued by a commissioner must remain at the place of safety 'until he can be brought before a children's court': section 11(2). A child removed by a policeman, social worker or authorised officer without a warrant in terms of Form 4, or by virtue of a warrant issued by the Director-General, must be brought before a children's court as soon thereafter as possible: section 12(2)(c) and Regulation 39A(2)(a).

78 Section 13(2) of the Child Care Act, 1983. It is not a jurisdictional prerequisite that the person who removes the child in these circumstances must make a formal allegation that such child is need of care: **Jordaan v Evans NO** 1953 (2) SA 475 (A).

79 Sections 15(2) and 34(1A)(b) of the Child Care Act, 1983. The social worker concerned must furnish the child's parents, guardian or custodian with an original copy of a notice in the form of Form 6A; a true copy must be handed to the children's court assistant.

80 Section 13(3) of the Child Care Act, 1983.

81 **Murphy v Venter** 1967 (4) SA 46 (O).

competes with an existing High Court custody order.<sup>82</sup> Similarly, a children's court does not have jurisdiction to consider whether a child, not presently in need of care, might subsequently become in need of care.<sup>83</sup>

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82 **Raath v Carikas** 1966 (1) SA 757 (W).

83 **Spence-Liversedge v Byrne** 1947 (1) SA 192 (N).

The children's court process in a removal case begins when the child first appears briefly before the court at the so-called 'opening' of the inquiry. At this stage, the child may already have been temporarily removed from his or her previous environment in terms of a Form 4 order. If so, then the commissioner will consider both the validity of the removal of the child and how (or whether) the child should be further detained pending the date of the actual enquiry in the children's court. If the commissioner decides upon an inquiry, then he or she must also ensure that a specific state department or welfare agency has been designated to undertake an investigation into the child's circumstances and to present a report at the inquiry recommending what should happen to the child. If the commissioner confirms detention pending the inquiry, then he or she must also check to see that accommodation in a place of safety has been found for the child.<sup>84</sup>

It has been pointed out that it is a matter of concern that the Child Care Act, 1983 does not provide the child with the clear right to express his or her views should he or she be able to so, even at the stage of the child's first appearance in the children's court.<sup>85</sup> The Commission has accordingly recommended that the new children's statute should be explicit in this regard and allow children the opportunity to express their views freely when able to do so.<sup>86</sup>

Some child commissioners tend to allow a maximum of about eight weeks between the initial appearance or 'opening' and the date set down for the inquiry. The purpose of having a delay between the two dates is to allow the designated social worker to undertake an investigation into the circumstances of the child. However, research conducted by Matthias and Zaal<sup>87</sup> suggests that many commissioners tend not to insist upon an early date for the inquiry and sometimes even allow the social worker to choose the date of the final hearing. This tends to mean that the time period between the opening and finalisation of the inquiry can be anything from about eight weeks to sixteen weeks, and sometimes even longer. Obviously, any delay in finalising children's court inquiries is a matter of great concern, especially while the child 'linguishes in a ... place of safety'.<sup>88</sup>

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84 Matthias and Zaal (1996) *Acta Juridica* 51 at 53. See also Zaal and Matthias 'The child in need of alternative care' in C J Davel (ed) *Introduction to Child Law in South Africa* 116 at 120.

85 Matthias and Zaal (1996) *Acta Juridica* 51 at 53.

86 See 6.3.3 above.

87 (1996) *Acta Juridica* 51 at 54.

88 Ibid. See also Zaal and Matthias 'The child in need of alternative care' in C J Davel (ed) *Introduction to Child Law in South Africa* 116 at 125.

However, Matthias and Zaal also point out how the interim period is sometimes used.<sup>89</sup>

Conscientious social workers try to use the interim period between the opening and finalisation of the children's court inquiry not merely to report on the circumstances of the child, but also to engage in what are termed 'reconstruction services' with the parents or guardian of the child in the hope of being able to recommend the happiest solution of all, namely, return of the child to his family group, rather than placement elsewhere. Even if the latter appears likely, some of the most reputable institutions ... require one-week trial attendance periods or psychological assessment reports which, again, a conscientious social worker will try to achieve during the interim period so that she is in a position to recommend placement in a good institution.

At the meeting with the officials of the Department of Social Development on 26 June 2001, it was recommended that there should always be a formal 'opening' of an enquiry, even in the absence of Form 4. It was further recommended that the children's court, at this initial hearing, should have the power to order the provision of certain services (such as family group conferencing) to the child and or its family, as interim measures. **The Commission supports these recommendations.**

#### 6.4.3 Children 'in need of care'

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89 Ibid 54 - 55. See also Zaal and Matthias 'The child in need of alternative care' in C J Davel (ed) **Introduction to Child Law in South Africa** 116 at 122 et seq.

In terms of the Child Care Amendment Act 96 of 1996, the primary ground for compulsory removal has been changed to the child being 'in need of care,' rather than the previous ground which required that the parents be found 'unfit' or 'unable' to care for the child.<sup>90</sup> With this amendment, the legislature moved care proceedings from a predominantly fault or parent-based approach to a predominantly<sup>91</sup> child-centred approach. This dramatic shift may be defended as being in line with section 28(2) of the Constitution in terms of which a child's best interest is of paramount importance in every matter concerning the child.

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90 The latter provision is to be found in section 14(4)(b) of the Act in its previous form. The alternatives to this were that the child had no parent or guardian (section 14(4)(a)); or the parent or guardian could not be traced (section 14(4)(aA)). See also Sloth-Nielsen and Van Heerden (1996) 12 **SAJHR** 649 at 653.

91 D S Rothman (2001) 4.1 **The Judicial Officer** 4 at 8: 'All but one of the provisions of section 14(4) of the Act are actually "child-friendly", and that is the one that reflects against the child's behaviour in section 14(4)(Ab)(ii), thereby suggesting that the problem may lie with the child'.

However, it is arguable that children's best interests might most efficiently have been served by a balanced set of removal grounds. Both child and parent-centred approaches should have been equally allowed for in the Child Care Act. There is a view that the shift of focus from the 'unfit parent' to the child in need of care might be seen as a charter for parental irresponsibility.<sup>92</sup>

At the same time there was prior to the 1996 amendment a strong body of opinion among social workers that the adversarial scenario which had been created by making the labelling of the parent the central focus of the proceedings was proving to be seriously counter-productive.<sup>93</sup>

Despite the criticisms mentioned above of the new South African legislation as going rather far in the direction of a child-centred approach, it must be conceded that a degree of secondary focus upon parental conduct has been retained in the 1996 amendment. For example, in the situation of child abuse the new section 14(4)(aB)(vi) uses, as an indication of a child being 'in need of care' as required by the Act, the fact that the child:

has been physically, emotionally or sexually abused or ill-treated by his or her parent or guardian or the person in whose custody he or she is;<sup>94</sup>

The question of the extent to which removal grounds should be parent-centred, as opposed to child-centred, is a difficult one.<sup>95</sup> Sammon, writing from a Canadian perspective, appears to favour a parent-centred approach when he states that the 'central issue in protection proceedings' is the question 'are the individuals under scrutiny adequate parents?'<sup>96</sup> English law, on the other hand, is predominantly child-centred. A care order or a supervision order can only be issued in England if the court is satisfied 'that the child concerned is suffering or is likely to suffer, significant harm'.<sup>97</sup> However, English law has achieved a powerful and appropriate

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92 Interview with five social workers from the Durban offices: Department of Social Welfare and Population Development on 10 March, 1995 and corroborated by Matthias **Removal of children and the right to family life: South African law and practice** (Community Law Centre, University of the Western Cape, 28 February 1997), p. 16, 56.

93 J Loffell 'Naming and blaming: Section 14(4)(b) of the Child Care Act' (1992) 5(1) **'Burning Issues': Social Work Practitioner-Researcher** 29 - 31. See also F N Zaal 'Child removal procedures under the Child Care Act: Some new dangers to contend with' (1988) 105 **SALJ** 224.

94 See section 5 of the Child Care Amendment Act 96 of 1996 as published in the Government Gazette vol 377 No 17606 of 22 November 1996.

95 See also Sloth-Nielsen and Van Heerden (1996) 12 **SAJHR** 247 at 258 - 260.

96 Sammon **Advocacy in child welfare cases. A practitioner's guide** (1985) 79.

97 Section 31 of the 1989 Children Act. For further discussion of this ground see Timms **Children's representation: a practitioner's guide** (1995) 143 .

emphasis on parental responsibilities by making them a starting point in the Children Act 1989, and by giving attention to their definition and allocation.<sup>98</sup>

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98 See also section 1 of the Lesotho Children's Protection Act 6 of 1980 for use of the 'child in need of care' provision; section 4 of the Tasmanian Children, Young Persons and their families Act 1997, which uses the concept of a child 'at risk'.

The Children (Scotland) Act 1995 uses a different concept. In Scotland, a child may be in *need of compulsory measures* if one of the following conditions is satisfied with respect to such child:<sup>99</sup>

- the child is beyond the control of any relevant person;
- the child is falling into bad associations or is exposed to moral danger;
- the child is likely to suffer unnecessarily, or is impaired seriously in his or her health or development, due to a lack of parental care;
- any of the offences against children to which special provisions apply has been committed against a child, or the child is likely to become a member of the same household as a child in respect of whom such an offence has been committed, or a person who has committed such an offence;
- the child is, or is likely to become, a member of the same household as a person in respect of whom a specified sexual offence has been committed;
- the child has failed to attend school regularly;
- the child has committed an offence;
- the child has misused alcohol, drugs or inhaled a volatile substance;
- the child is being *looked after*<sup>100</sup> by the local authority and special measures are necessary for the child's adequate supervision in that child's interest or the interest of others.<sup>101</sup>

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99 Section 52 of the Children (Scotland) Act 1995.

100 See section 17(6) of the Children (Scotland) Act 1995 for a definition of this phrase.

101 On a comparative perspective, see further section 31(1) of the New Brunswick Family Services Act, 1983, ('the security or development of a child may be in danger'; section 22(2) of the Nova Scotia Children and Family Services Act, 1990, ('child in need of protective services'); section 37(2) of the Ontario Child and Family Services Act, R.S.O. 1990, c. C-11.

**The Commission, in adopting a child-centred approach, recommends retaining the use of the ‘child in need of care’ primary removal ground.** In this regard, the Commission wishes to point out that a change in formulation to ‘child in need of *alternative care*’<sup>102</sup> would limit section 14(4) to those situations where the child has been removed from the family environment. Such a limitation does not accord with the Commission’s view that State intervention should be focussed on keeping the child within the family rather than to order the removal and placement of the child in alternative care.

If the detention of the child in the place of safety is confirmed, the next step is to bring the child before the children’s court of the district in which the child resides or happens to be for the purposes of an inquiry to determine whether the child is a child ‘in need of care’.<sup>103</sup> Here too the test is an objective one : the children’s court must decide whether the child **is** in fact a child in need of care within the meaning of the Act.

In terms of section 14(4) of the Act,<sup>104</sup> the children’s court holding an inquiry must determine whether the child in question is a child in need of care in that :

- (a) the child has no parent or guardian; or
- (aA) the child has a parent or guardian who cannot be traced; or
- (aB) the child -
  - (i) has been abandoned or is without visible means of support;
  - (ii) displays behaviour which cannot be controlled by his or her parents or the person in whose custody he or she is;
  - (iii) lives in circumstances likely to cause or conduce to his or her seduction, abduction or sexual exploitation;
  - (iv) lives in or is exposed to circumstances which may seriously harm the physical, mental or social wellbeing of the child;

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102 Zaal and Matthias ‘The child in need of alternative care’ in C J Davel (ed) **Introduction to Child Law in South Africa** 116 at 126 argue that the legal designation ‘in need of care’, as used in the Child Care Act, is not ideal as all children are in need of care and they point out that most children do not need statutory intervention in the form of care proceedings. The authors therefore recommend the use of formulation ‘in need of alternative care’ as more appropriate and in accordance with section 28 of the Constitution.

103 Section 13(1).

104 As amended by section 5 of Act 86 of 1991 and by sections 5(b) - (d) of Act 96 of 1996. See further Sloth-Nielsen and Van Heerden (1996) 12 **SAJHR** 649 at 653-4; F N Zaal ‘Child removal procedures under the Child Care Act: Some new dangers to content with’ (1998) 105 **SALJ** 224 et seq.

- (v) is in a state of physical or mental neglect;
- (vi) has been physically, emotionally or sexually abused or ill-treated by his or her parents or guardian or the person in whose custody he or she is; or
- (vii) is being maintained in contravention of section 10.

**The Commission recommends that the criteria in terms of which a child may be found to be in need of care as listed in section 14(4) of the Child Care Act be retained and supplemented. In this regard, the Commission recommends that the wilful failure of a person who has parental rights and responsibilities in respect of a particular child to fulfil his or her parental rights and responsibilities in respect of that child should constitute a criteria for finding a child in need of care.<sup>105</sup> In line with the Commission's recommendation that section 10 of the current Child Care Act, 1983, be repealed and be dealt with under the adoption regime, the Commission also recommends that section 14(4)(aB)(vii) be repealed.**

However, **the Commission wishes to point out that finding a child to be in need of care should not necessary constitute a ground for removal of that child** - indeed, under the new children's statute the aim should rather be to support that child and his or her family in order to ensure that that child remains with its family.

It deserves pointing out that clause 70(2) of the Child Justice Bill in the Commission's **Report on Juvenile Justice**<sup>106</sup> provides for referral of a matter from the child justice court to the children's court when it becomes evident that a child has been assessed on more than one occasion in regard to 'minor offences committed to meet the child's basic need for food and warmth' and is on the present occasion before the child justice court again alleged to have committed or proved to have committed such a (survival) offence. Similarly, the matter must be referred to the children's court where the child does not live at home or in appropriate substitute care and is alleged to have committed a minor offence, the purpose of which was to meet the

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105 See 8.6 below on the suspension and termination of parental rights and responsibilities.

106 Project 106: Juvenile Justice, July 2000.

child's basic need for food and warmth. Obviously, these referrals would require a children's court inquiry into the question of whether that child is a child in need of care.

At the meeting with the officials of the Department of Social Development on 26 June 2001, it was pointed out that the Department of Social Development is envisaging linking the criteria listed in section 14(4)(aB) (the 'child in need of care'-criteria) to the National Child Protection Register.<sup>107</sup> In this regard, it was pointed out that the mandated reporting provision and the registration process be confined to cases involving actual or suspected physical injury, sexual abuse, severe neglect which appears to be intentional, and child labour. The meeting noted that section 14(4)(a) allows for the possibility that a children's court may find a whole family of children, in the child-headed household scenario, in need of care and therefore subject to possible removal. The meeting also recommended that the lack of visible means of support,<sup>108</sup> i.e. poverty, should remain a ground for finding a child in need of care, although in most cases supportive services rather than children's court processes should preferably be used.

**The Commission does not support linking the criteria for reporting, in terms of the mandatory reporting provisions,<sup>109</sup> to the 'child in need of care'-criteria, as these will serve different purposes and need to be tailored accordingly. The idea is specifically to restrict the mandatory reporting function to clearly defined serious protection issues, and these need to be categorised much more specifically in a section of the new children's statute dealing with reporting and registration. The section 14(4) criteria on the other hand, need to be broad enough to take in many situations, hence as they stand they apply to too many children who never will or should come before the courts.<sup>110</sup>**

**The Commission, however, does recommend that all children's court cases be recorded as a separate component of the National Child Protection Register. Statistics in this**

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107 Provided for in Regulation 39B of the regulations to the Child Care Act, 1983. See further 10.5 below.

108 Section 14(4)(aB)(i) of the Child Care Act, 1983.

109 Section 4 of the Prevention of Family Violence Act 133 of 1993; section 42 of the Child Care Act, 1983.

110 Where would one start and stop if every child experiencing physical or mental neglect had to be reported?

regard would be of great value for planning and resourcing - the type of order made would be of important to know in addition to the grounds upon which the order was made. At present no-one knows e.g. how many children are being committed to foster care annually by the courts. This would require an amendment to Regulation 39B of the regulations to the Child Care Act, 1983.

Proper notice of the pending inquiry in the children's court must be given to the parents, guardian or custodian of the child, who are required to attend the inquiry.<sup>111</sup> Failure to give such notice may constitute an irregularity vitiating the proceedings.<sup>112</sup> The inquiry takes place in camera, if possible in a room other than an ordinary court room and the procedure is generally less formal than that followed at a trial.<sup>113</sup> However, as children's courts are courts of law, the ordinary rules of procedure and evidence must be observed, unless departure from such rules is specifically authorised.<sup>114</sup> One notable example of such a departure is the court's power to receive and take action upon the reports of social workers, despite the fact that these reports often contain hearsay statements and opinions.<sup>115</sup> The parents<sup>116</sup> or adoptive parents of the child concerned, the child himself or herself, the respondent and any other person who, in the opinion of the commissioner, 'has a substantial interest in the proceedings' are all parties to the proceedings, having the same rights and powers to examine witnesses, adduce evidence and address the court as a party to an ordinary civil action in a magistrate's court.<sup>117</sup>

If the children's court concludes that the child before it is indeed a child in need of care, it may make one of the following orders :<sup>118</sup>

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111 Sections 13(5)(a) and (b) of the Child Care Act, 1983.

112 See, for example, **Weepner v Warren and Van Niekerk NO** 1948 (1) SA 898 (C); **Philips v Commissioner of Child Welfare, Bellville** 1956 (2) SA 330 (C); **Snyder v Steenkamp** 1974 (4) SA 82 (N); **J and Another v Commissioner of Child Welfare, Durban** 1979 (1) SA 219 (N); **"S" v Kommissaris van Kindersorg, Brakpan** 1984 (3) SA 818 (T).

113 Sections 8 and 9.

114 See **Napolitano v De Wet NO** 1964 (4) SA 337 (T) at 342F, 344A; **Snyder v Steenkamp** 1974 (4) SA 82 (N) at 87 D-H. At inquiries to determine whether a child is in need of care, the child, his or her parent(s) or adoptive parent(s), any respondent and any other person permitted by the commissioner to join the proceedings, have the same rights and powers as a party to a civil action in a magistrate's court in respect of the examination of witnesses, the production of evidence and the right to address the court: Regulation 4(1).

115 See **Napolitano v De Wet NO** 1964 (4) SA 337 (T) at 343-344 and Regulations 5(1) and (2).

116 In the case of **Fraser v Children's Court, Pretoria North and Others** [1996] 3 All SA 273 (T), Preiss J held that the natural father of an extra-marital child is a 'parent' within the meaning of Regulation 4(1) and, as such, vested with the rights and powers of a party to a civil action in a magistrate's court in respect of the examination of witnesses, the production of evidence and of addressing the court (at 283a - 285d).

117 Regulations 4(1) and (2).

118 See also Zaal and Matthias 'The child in need of alternative care' in C J Davel (ed) **Introduction to Child**

- (a) that the child be returned to the custody of his or her parents (or, if the parents are divorced or separated, of the parent designated by the court), guardian or custodian, under the supervision of a social worker and subject to such conditions as the court may impose on the child, parent/s, guardian or custodian;<sup>119</sup>
- (b) that the child be placed in the custody of a suitable foster parent under the supervision of a social worker;<sup>120</sup>
- (c) that the child be sent to a children's home designated by the Director-General; or
- (d) that the child be sent to a school of industries designated by the Director-General.<sup>121</sup>

If the child is to be removed the range of court options is limited. The children's court can order that the child be placed in the custody of any suitable person who is available to serve as a foster parent; secondly, in a children's home, or, as its last resort, in a school of industries.

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**Law in South Africa** 116 at 127et seq.

- 119 If such conditions are not complied with, the social worker may bring the child before the court again and it may vary its order so as to deal with the child in any of these different ways : section 15(2).
- 120 On foster care in general, see Chapter 17 below.
- 121 Section 15(1).

As suggested by numerous respondents and at the meeting with the officials of the Department of Social Development on 26 June 2001, it was agreed that the children's court needs broader powers. In this regard it was suggested that the children's court, in addition to its existing powers, should have the power to make interim orders; to order family group conferences and similar processes; to order the child, parents or other family members to undergo any form of assessment which the court deems necessary and to engage in therapy or treatment or any appropriate form of service;<sup>122</sup> to order the payment of maintenance; to limit the access of a parent or other family member to a child; to order the placement of a child in a facility registered by the Department of Health or Education if this is the best available option (e.g. school for the deaf or for children with cerebral palsy); to order the removal of an abusive parent or other family member from the child's home; and to order temporary emergency relief in the form of a grant in some instances. **The Commission is recommending that the powers of the children's court be extended.**<sup>123</sup>

A designation of a children's home may not be made by the Director-General unless the management of the home in question agrees to admit the child concerned.<sup>124</sup> Once the Director-General has designated a children's home or school of industries, he or she must immediately notify the relevant commissioner of child welfare and social worker of the particulars of the designation.<sup>125</sup> The commissioner of child welfare must then arrange for the child to be taken to the designated children's home or school of industries.<sup>126</sup> If the Director-General cannot make the designation for whatever reason, he or she must without delay furnish the Minister with a report in connection with the child concerned and, after considering this

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122 At present, the children's court can give instructions in regard to a parent or guardian only where the child is to be left with that person. See Regulation 13 of the Child Care Act and Matthias and Zaal (1996) *Acta Juridica* 51 at 59.

123 See Chapter 23 below.

124 Regulation 11(3).

125 Regulation 11(4).

126 Regulation 12(1).

report, the Minister may transfer the child to any other custody or institution or discharge the child from the place of safety where he or she is.<sup>127</sup>

A deficiency in the Act which adversely affects the efficacy of the work of the children's courts is the lack of control that they have over reviewing, changing or even implementing their court orders. Particularly when the children's court orders that the child be placed in an institution, there can be a delay or even failure in implementation of the children's court order because officials who work under the Director-General of Social Development are not answerable to the children's court. Unfortunately, sometimes it takes so long for these officials to find a place for the child that even after two years (which is the longest period that a children's court order can run for) the child is still languishing in a place of safety awaiting placement.

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127 Section 15(5).

The legislature has recognised this problem, but has not effectively solved it. The response of the legislature was to promulgate an amendment to section 15 of the Act in 1991. This amendment permits the Minister to change the type of institutional placement ordered by the children's court without even referring back to the children's court. And further, where there has been a failure to secure a placement for the child before the final day of the children's court order, the amendment to section 15 permits the Minister to release the child.<sup>128</sup> It is submitted that this provision, which allows the Minister to entirely disregard the placement order of a children's court, is unconstitutional. In terms of section 28(1)(b) of the Constitution every child has the right 'to family care, parental care, or *appropriate alternative care when removed from the family environment*'.<sup>129</sup> It would seem that a removed child's constitutional right to 'appropriate alternative care' will not be fulfilled if the officials of the Minister do not place the child in an institution as directed by the children's court, and simply leave him or her to languish in the original place of safety until the effluxion of the children's court order.

However, the fact that section 28(1)(b) of the Constitution may eventually be used to counter this problem is not sufficient. The children's courts must be given far greater powers to review and amend their own placement orders than they currently have. Obviously, a change of circumstances may render a placement no longer appropriate for the child concerned. Also, children, particularly those placed in institutions, often encounter horrendous conditions such as bullying or other forms of abuse in which even their most basic human rights are regularly disregarded. Unfortunately, at present neither the staff of institutions nor the social workers who work with such children nor even the officials who work under the direction of the Minister for Education or Minister for Social Development are really accountable in a practical and effective way.

In view of the problems noted above it would seem necessary to amend the Act in such a way as to achieve both a channel of communication for children in need of care and more accountability for the adults who control them. One way to do this might be to give the courts

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128 Sections 15(5)(a) and (b) of the Act.

129 Our emphasis.

the power or even duty to monitor certain of their child placement orders by having the child brought back to court at regular intervals. The child should also be able to demand to return before the courts on the basis of a prima facie case of a complaint or need for variation. Legislative provisions of this kind will help to give children a real voice, and will subject those adults who deal with them to a valuable and ongoing scrutiny from an authoritative, entirely independent source.

Staff under the authority of the Minister for Education and the Minister for Social Development currently have extensive powers to deal with children. In the case of children who are the subject of children's court orders, these powers should be greatly reduced. Instead, it is the courts which should be given the power to monitor and, if necessary, amend their own orders.<sup>130</sup>

It needs to be enacted that child care orders of the court are mandatory and must be implemented within a stipulated deadline. Consideration could be given to possible sanctions for failure to meet such deadlines.

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130 For a more detailed discussion see Matthias and Zaal 1996 **Acta Juridica** 62-66; Zaal and Matthias 'The child in need of alternative care' in C J Davel (ed) **Introduction to Child Law in South Africa** 116 at 127 et seq.

Subject to the provisions of section 34 (ministerial powers to transfer children from one custody or institution to another), a children's court order lasts for a maximum period of two years or for such shorter period as the court may have determined.<sup>131</sup> The order will then lapse unless the Minister extends it for a further period or periods not exceeding two years at a time - any such extension cannot, however, operate after the day on which the child turns 18.<sup>132</sup> If necessary, the Minister may also order that any former pupil of or pupil in a school of industries whose 'period of retention' therein has expired or is about to expire, return to or remain in that school of industries for such further period as he or she may fix. This period may be extended by the Minister from time to time, but no such order or extension may last beyond the end of the year in which the pupil turns 21 years of age.<sup>133</sup>

In order to enable such a child or pupil to complete his or her education or training, the Minister has the power, on the application of or with the consent of a foster child or former foster child or pupil and his or her parents (if they can be traced) to approve that the foster child or pupil concerned should remain in the custody of the relevant foster parent or institution after he or she has turned 18 years old, or has been discharged by ministerial order, or after the relevant children's court placement order has lapsed without being extended by the Minister.<sup>134</sup>

Section 34 empowers the Minister to transfer children from one custody or institution to another. When the Minister acts under this section to effect such a transfer in the case of a child to whom a children's court order applies, then the court order is deemed to have been varied by the Minister's order.<sup>135</sup> The Minister is also empowered to order, at any time, that a child be discharged from an institution or custody, if he or she 'considers it desirable in the interests of the child' in question.<sup>136</sup> Finally, a commissioner of child welfare who considers it desirable that a child be removed from the institution or custody in which he or she is without delay may order that such child be taken to a place of safety pending the Minister's decision as to his or her future.<sup>137</sup> There is no stated requirement that such decisions must be taken in the best interests

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131 Section 16(1).

132 Section 16(2).

133 Section 16(3). However, see the discussion in 4.5 above in respect of the protection of persons in the age group 18 to 21 years.

134 Section 33(3). See also Chapter 19 (Residential Care) below where it is recommended that the protection be extended **to the end of the year in which the child turns 18** years of age.

135 Section 34(2).

136 Section 37.

137 Section 36(2).

of the child, nor is there any opportunity provided for the child to express an opinion about these decisions. This is quite simply unacceptable, and the provision in the U N Convention on the Rights of the Child<sup>138</sup> for the child's right to express his or her views should be inserted in the new children's code as a matter of principle. In any event, a better proposal developed by Matthias and Zaal,<sup>139</sup> is that the children's court itself should be granted the necessary power to review its decisions after a set period to ensure that the best interests of the child are still being met.

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138 Article 12.

139 (1996) *Acta Juridica* 51 at 62 - 64. See also Sloth-Nielsen and Van Heerden (1996) 12 *SAJHR* 247 at 260.

The effect of a children's court order placing a child in an institution or in the custody of a person other than his or her parent or guardian is to divest the parent or guardian of his or her rights of control over and custody of the child, transferring these rights (including 'the right to punish and to exercise discipline') to the management of the institution or the custodian concerned.<sup>140</sup> A parent retains his or her common-law right of access to the child, however,<sup>141</sup> as also the power to deal with the child's property, the power to consent to the child's marriage and the power to consent to an operation or medical treatment entailing serious danger to life.<sup>142</sup>

Where the children's court places the child in the custody of his or her parent(s) or guardian under the supervision of a social worker, the parent(s) or guardian must exercise his, her or their parental control over the child in accordance with the directions received from the supervising social worker.<sup>143</sup>

Previously no appeal lay against a children's court finding that a child is in need of care or against any placement order made by a children's court.<sup>144</sup> However, section 16A<sup>145</sup> of the Child Care Act, 1983 now allows for an appeal against any order made or any refusal to make such an order to any competent division of the High Court of South Africa.

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140 Section 53(1).

141 See **Van Schoor v Van Schoor** 1976 (2) SA 600 (A).

142 Section 53(3).

143 Section 53(2).

144 See, for example, **Jordan v Evans NO** 1953 (2) SA 475 (A) at 478; **Ex parte Commissioner of Child Welfare : In re Schmidt** 1956 (4) SA 787 (T) at 789 B; **Young v Swanepoel and Others** 1990 (2) SA 54 (C) at 57C-F.

145 This section was inserted by section 2 of Act 13 of 1999.

An aggrieved party or the commissioner himself or herself may also bring the matter before the High Court on review. The High Court will not interfere with the commissioner's decision upon the merits, but may set it aside if there was such irregularity in the proceedings that the applicant or the child may possibly be prejudiced thereby.<sup>146</sup>

#### 6.4.4 Children placed with persons other than their parents or custodian

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146 See, for example, **Weber v Harvey NO** 1952 (3) SA 711 (T); **Jordan v Evans NO** 1953 (2) SA 475 (A); **Ex parte Commissioner of Child Welfare : In re Schmidt** 1956 (4) SA 787 (T); **Ex parte D** 1958 (2) SA 91 (GW); **Ex parte Kommissaris van Kindersorg : In re Steyn Kinders** 1970 (2) SA 27 (NC); **Malan v Commissioner of Child Welfare, Witbank** 1973 (4) SA 508 (T); **Snyder v Steenkamp** (supra); **Gold v Commissioner of Child Welfare, Durban** 1978 (2) SA 301 (N).

The Child Care Act 1983 recognises, in the absence of any evidence to the contrary, that children are best cared for by their parents. To this end, section 10 of the Child Care Act, 1983<sup>147</sup> prohibits any person other than the managers of certain specified institutions<sup>148</sup> or certain specified relatives<sup>149</sup> to receive any child under the age of 7 years or any child 'for the purpose of adopting him or her or causing him or her to be adopted' and care for such child apart from his or her parents or custodian for longer than 14 days unless such person has applied for the adoption of the child concerned or, in the case of the first-mentioned category of child, has obtained the consent in writing of the commissioner of child welfare of the district in which the child was residing immediately before he or she was received. In considering an application for such consent, the commissioner must have regard to the religious and cultural

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147 As amended by section 3 of Act 96 of 1996 and by section 1 of the Welfare Laws Amendment Act 106 of 1997.

148 Namely, maternity homes, hospitals, places of safety or children's homes: section 10(1).

149 Namely, the grandparent, sibling (whether of the full or of the half blood), uncle or aunt of the child in question (provided such relative is over the age of 18 years), as also so-called 'designated relatives' as provided for in section 10(4) : section 10(1)(iii). Section 10(4) provides that the Minister may determine that a person who is a spouse of one of the abovementioned relatives of the child or who *'is related to a child in the third degree of affinity or consanguinity'* is such a 'designated relative' for the purposes of section 10(1)(iii)(b).

background of the child concerned as against that of the applicant.<sup>150</sup> It has been held, however, that, as section 10 does not provide for any penalty for the contravention of the provisions thereof, such contravention does not constitute an offence for the purposes of the Child Care Act.<sup>151</sup>

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150 Section 10(2), read with section 40.

151 See **S v La Grange** 1991 (1) SACR 276 (C) at 278-279.

At the meeting with officials from the Department of Social Development it was said that section 10 should ideally be incorporated with the provisions on adoption. It was said that section 10, outside the adoption sphere, serves little purpose in practice as large numbers of children are living apart from their parents or are being cared for by persons other than the defined category of family members or 'designated relatives' for long periods of time. This is especially the case in the rural areas where children are sometimes left either on their own or with strangers while the parents search for employment. The meeting accordingly recommended that the parts of section 10 dealing with adoption be incorporated under the current section 18 of the Child Care Act, 1983. **The Commission agrees with this proposal and recommends that section 10 be repealed and that the parts of the section relating to adoption be incorporated under the general adoption provisions.**<sup>152</sup>

Comments are invited as to which further legislative amendments can be affected to prevent trafficking in children.

#### 6.4.5 **Ill-treated and abandoned children; children whose parents fail to maintain them properly**

There does not exist an offence called 'child abuse' in South African law. However, provisions in the Child Care Act, 1983, other legislation such as the Sexual Offences Act, 1957, and the common law prohibit various criminal acts such as rape and assault that can be classified under the umbrella term 'child abuse'.

In terms of section 50(1)(a) of the Child Care Act, 1983,<sup>153</sup> for instance, any parent or guardian of a child or any person having the custody of a child who ill-treats that child or allows him or her to be ill-treated, is guilty of an offence. An offence is also committed by 'any other person' who ill-treats a child. 'Ill-treatment' is not defined in the Act and appears to include ill-treatment by omission.<sup>154</sup> The fact that the accused's conduct constitutes the common-law crime of assault does not prevent it from also amounting to a contravention of section 50(1)(a).<sup>155</sup> As regards the offence of 'allowing ill-treatment', this section appears to impose a duty on a parent or guardian

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152 See further 16.4 and 18.6.3 below.

153 As amended by section 18(a) of Act 86 of 1991.

154 See **S v Maree** 1990 (3) SA 365 (C) at 370D-E. Cf **S v B en 'n Ander** 1994 (2) SA 237 (EC).

155 See **S v Lamprecht** 1977 (1) SA 246 (EC) at 248.

of a child or a person having custody of a child to prevent such child from being ill-treated by any other person.<sup>156</sup>

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156 See FFW van Oosten and AL Louw 'Children, Young Persons and the Criminal Law' in JA Robinson (ed) **The Law of Children and Young Persons in South Africa** (1997) 119 at 139-140.

'Abandonment' of a child by a parent or guardian or the person having custody of the child also constitutes an offence.<sup>157</sup> Either a wilful omission<sup>158</sup> or a wilful commission<sup>159</sup> can constitute abandonment. It has, however, been held that it is only in exceptional circumstances that a parent who leaves his or her child with the other parent will be guilty of 'abandonment' in terms of this section.<sup>160</sup>

Any person legally liable to maintain a child who, while able to do so, fails to provide that child with adequate food, clothing, lodging and medical aid, is also guilty of an offence.<sup>161</sup>

The maximum penalties upon conviction for any offence in terms of section 50 are a fine of R20 000,00 or imprisonment for a period of five years or both such fine and such imprisonment.<sup>162</sup>

Children do have the constitutional right to be protected from 'maltreatment, abuse, neglect or degradation'. It therefore follows that should this right be infringed, appropriate relief should be provided to such children. It also gives justification for criminalising the acts of those parents or care-givers who wilfully infringe this right. **The Commission therefore recommends that section 50(1)(a) of the Child Care Act be amended by substituting the word 'ill-treats' with the words 'maltreats, abuses, neglects or degrades'. It is not considered necessary to define the concepts 'maltreatment, abuse, neglect or degradation' in the new children's statute.**<sup>163</sup> Maltreatment is not limited to physical injury but includes emotional and psychological harm and abuse.

It must also be pointed out that the physical, emotional or sexual abuse or maltreatment of a child by a parent or guardian constitutes a ground for finding a child in need of care, and therefore a ground for removal, in terms of section 14(4)(aB)(vi) of the Child Care Act, 1983.<sup>164</sup>

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157 Section 50(1)(b).

158 See, for example, **R v Kruger** 1943 OPD 111 at 112-113.

159 See, for example, **S v Gadebe** 1971 (1) PH H (S) 37 (T); **S v Khumalo** 1995 (2) SACR 660 (W).

160 **S v Mnyankama** 1992 (1) SACR 43 (C).

161 Section 50(2).

162 Section 50(3).

163 See also 10.2.2 below.

164 See 6.4.3 above.

**The Commission recommends that the abuse or maltreatment of a child by a parent or guardian should remain a ground for finding a child in need of care.**

#### **6.4.6 Reporting of suspected instances of ill-treatment, abuse or undernourishment of children**

Both the Prevention of Family Violence Act 133 of 1993 and the Child Care Act, 1983 impose obligations to report the suspected ill-treatment and abuse of children.<sup>165</sup> Section 42(1) of the Child Care Act requires any person who examines, attends or deals with a child in circumstances giving rise to the suspicion that the child has been ill-treated or deliberately injured or suffers from a nutritional deficiency disease, immediately to notify the Director-General or any officer designated by him or her for this purpose, of those circumstances. The Director-General or the designated officer may then order the removal of the child concerned to a hospital or a place of safety,<sup>166</sup> and must thereafter arrange that the child and his or her parents receive such treatment as may be determined by the Director-General or the said officer.<sup>167</sup> Although failure to comply with these reporting obligations constitutes an offence,<sup>168</sup> the classes of obligated reporters are exempt from all liability (both civil and criminal) in respect of any notification given in good faith in accordance with section 42.<sup>169</sup>

In terms of section 4 of the Prevention of Family Violence Act 133 of 1993, any person who examines, treats, attends to, advises, instructs or cares for any child in circumstances which ought to give rise to the reasonable suspicion that such child has been ill-treated, or suffers from injury the probable cause of which was deliberate, must immediately report such circumstances to a police official, a commissioner for child welfare, or a social worker. Failure to comply with

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165 See also section 6A of the Aged Persons Act 81 of 1967 for a reporting obligation in a different context.

166 Section 42(2).

167 Section 42(3).

168 Punishable upon conviction by a fine not exceeding R4 000,00 or imprisonment for a period not exceeding one year or both : section 42(5), read with section 58).

169 Section 42(6).

the reporting obligation constitutes a criminal offence.<sup>170</sup> With the repeal of section 6 (which criminalised the failure to report) of the Prevention of Family Violence Act 133 of 1993 by the Domestic Violence Act 116 of 1998, it would appear that the reporting obligation in the Prevention of Family Violence Act 133 of 1993 was deprived of any teeth. **The Commission therefore has no hesitation in recommending the repeal of section 4 of the Prevention of Family Violence Act 133 of 1993.**

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170 Section 6(2) of the Prevention of Family Violence Act 133 of 1993.

The Commission's discussion paper on **Sexual Offences: Process and Procedure**<sup>171</sup> highlights another anomaly pertaining to the non-reporting of prohibited sexual abuse of girls under 16 years of age which is justified in terms of the confidentiality provision<sup>172</sup> of the Termination of Pregnancy Act 92 of 1996. Some medical practitioners are said to be performing terminations of pregnancy on girls under 16 years of age (who are technically victims of 'statutory rape')<sup>173</sup> and do not report such suspected cases of abuse in terms of the Child Care Act, 1983 on the basis that they are obliged to keep the identity of women seeking terminations of pregnancy in confidence. **The Commission is of the opinion that such instances of suspected sexual abuse must be reported in terms of the current law and would recommend that it be made clear in the new children's statute that this reporting obligation exists where there are reasonable grounds to suspect sexual abuse despite the confidentiality provision in the Termination of Pregnancy Act 92 of 1993.**

Mandatory reporting of child abuse is dealt with comprehensively in Chapter 10 below. It is pointed out there, in a context where there is a serious lack of backup resources, mandatory reporting can increase the vulnerability of children, and set them up for secondary abuse. To date the range of people required to report has been repeatedly expanded, without the necessary attention to the limitations of the child protection system which is supposed to be responding to reports. Further, we have two separate and unco-ordinated laws governing reporting, and a lack of proper procedures associated with either of them. The outcome of this is that confusion abounds, many people are ignoring the law, and the system is not working at all in most of the country.

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171 See 6.9.3. above.

172 Section 7 of the Termination of Pregnancy Act 92 of 1996.

173 As it is defined in section 14(1) of the Sexual Offences Act 23 of 1957.

6.4.7 **Necessary medical operation or treatment of children**<sup>174</sup>

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174 See also Chapter 11 below.

Where an operation or any treatment requiring parental consent is considered necessary for a child, and the parent or guardian refuses to consent, or cannot be found, or is mentally unable to give consent, or is deceased, then the Minister may consent in his or her stead.<sup>175</sup> The Minister acts on the report to this effect of a medical practitioner, provided that the Minister agrees with the opinion of the medical practitioner that the operation or treatment is indeed necessary. In an emergency situation, where the medical superintendent of a hospital (or the medical practitioner acting on his or her behalf) is of the opinion that an operation or medical treatment is necessary to preserve the child's life or to save him or her from serious and lasting injury or disability, and that the need for the operation or treatment is so urgent that it ought not to be deferred to obtain parental consent, such medical superintendent or practitioner may himself or herself supply the necessary consent.<sup>176</sup>

In both the above cases, the person who is obliged to maintain the child is liable for the cost of the operation or treatment.<sup>177</sup>

In terms of section 53(4) of the Child Care Act, 1983, if the head of an institution or the person in whose custody a pupil or child is, has reasonable grounds for believing that the performance of an operation upon or the provision of medical treatment to the pupil or child is necessary to preserve the life of the child or to save such child 'from a serious and lasting physical injury or disability and that the need for the operation or medical treatment is so urgent that it ought not to be deferred for the purpose of consulting the parents or guardian of the pupil or child, or the Minister', the head of the institution or the person concerned may authorise its performance upon or provision to the pupil or child.

#### 6.4.8 **Commercial sexual exploitation**<sup>178</sup>

The aim of section 50A in the Child Care Act, 1983<sup>179</sup> on commercial sexual exploitation is to protect children subject to this form of abuse.<sup>180</sup> 'Commercial sexual exploitation' is defined as the 'procurement of a child to perform a sexual act for a financial or other reward payable to the

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175 Section 39(1).

176 Section 39(2), as substituted by section 14 of Act 96 of 1996.

177 Section 39(3).

178 See also 22.5.4 below in regard to trafficking of children for purposes of commercial sexual exploitation.

179 The section was inserted by means of the Child Care Amendment Act 13 of 1999.

180 See also sections 9 and 20 of the Sexual Offences Act 23 of 1957.

child, the parents or guardian of the child, the procurer or any other person'. The definition is in keeping with the definition agreed upon at the Stockholm World Congress.

The offence of commercial sexual exploitation of children is regulated by a new section 50A. This section reads as follows:

- (1) Any person who participates or is involved in the commercial sexual exploitation of a child shall be guilty of an offence.
- (2) Any person who is an owner, lessor, manager, tenant or occupier of property on which the commercial sexual exploitation of a child occurs and who, within a reasonable time of gaining information of such occurrence fails to report such occurrence at a police station, shall be guilty of an offence.
- (3) Any person who is convicted of an offence in terms of this section, shall be liable to a fine, or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

Two components of the section are intended to strengthen protection for children who are subject to commercial sexual exploitation. The first is by the creation of an offence to criminalise participation in the commercial sexual exploitation of a child. This makes the client's actions subject to criminal sanctions, in sharp contrast to the situation under the Sexual Offences Act 23 of 1957. Secondly, subsection (2) targets the owner, lessor, manager or occupier of property on which child prostitution is taking place who, whilst being aware of such occurrences, fails to report this to the police.

The definition of 'commercial sexual exploitation' is obviously critical. The definition as adopted in the Child Care Act refers to the notion of procurement of a child, a concept which does not appear elsewhere in the Act, but one which echoes the terminology of section 9 of the Sexual Offences Act 23 of 1957. The dictionary definition of procurement is the acquisition or obtainment or getting of something (in this instance a child's sexual services). However, the meaning of procurement in the context of section 9 of the Sexual Offences Act has not yet been the subject of judicial consideration. This may be problematic in interpreting the new definition and offences created by the amendment to the Child Care Act.

The provisions on the commercial sexual exploitation of children in the Child Care Act, 1983 are critically analysed by the Commission in its discussion paper on **Sexual Offences: The Substantive Law**. For present purposes the Commission does not need to go any further save to **recommend that section 50A of and the definition of 'commercial sexual exploitation'**

**in the Child Care Act, 1983 be repealed** as this issue will be comprehensively dealt with in the new sexual offences legislation.<sup>181</sup>

#### 6.4.9 **Unlawful removal of children**

Two sections in the Child Care Act, 1983 have as their focus the protection of children from unlawful removal after they have been placed in statutory care. Sections 51 and 52 of the Act read as follows:

##### 51 **Unlawful removal of children**

Any person who abducts or removes any child or pupil, or directly or indirectly counsels, induces or aids any child or pupil to abscond from any institution, place of safety or custody in which the child or pupil was lawfully placed, or knowingly harbours or conceals a child or pupil who has been so abducted or removed or has so absconded, or prevents him from returning to the institution, place of safety or custody from which he was abducted or removed or has absconded, shall be guilty of an offence.

##### 52 **Unlawful removal of foster child or pupil from Republic**

Any person who without the approval of the Minister removes a foster child or pupil from the Republic shall be guilty of an offence.

**The Commission recommends that these two provisions be retained in the new children's statute.**

#### 6.4.10 **Child labour**

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181 See also **Discussion Paper 85: Sexual Offences: The Substantive Law.**

Child labour is dealt with extensively in Chapter 13 below. For present purposes it suffices to say that despite the fact that child labour is a serious problem in South Africa, the statutory provisions regulating child labour are not very extensive.<sup>182</sup> In terms of both section 52A of the Child Care Act<sup>183</sup> and section 43 of the Basic Conditions of Employment Act 75 of 1997, it is a criminal offence to employ a child under the age of 15 years.<sup>184</sup> Section 43 of the latter Act also makes it a criminal offence to employ a child in employment '(a) that is inappropriate for a person of that age; (b) that places at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development'. Subject to the South African Constitution, all forced labour is prohibited and a person who, for his or her own benefit or for the benefit of someone else, causes, demands or imposes forced labour commits an offence.<sup>185</sup>

As far as the Child Care Act is concerned, the Minister may, on conditions determined by him or her, by notice in the Gazette exclude any employment or any work from the provisions of section 52A(1).<sup>186</sup> Exemption from the provisions of section 52A(1) may also be granted by the Minister to 'any particular person, or persons generally'.<sup>187</sup> In what has been described as a 'laudable attempt to curtail the Minister's discretion',<sup>188</sup> previous attempts at amending the Child Care Act, 1983 removed or curtailed the Minister's power to grant blanket exceptions for categories of work (such as farm labour). However, these attempts came to nought and it has been suggested that the general overriding conditions which are to govern all child labour should be contained in the new children's statute, rather than in the regulations, as was the case with the June 1995 draft Bill. Sloth-Nielsen and Van Heerden<sup>189</sup> argue that these conditions, aimed at ensuring that child employment or work neither exploit the child, nor place at risk his or her well-being, education, health or development, are important as protective mechanisms.

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182 Although extensive new provisions concerning child labour appeared in two draft Bills prior to the adoption of the Child Care Amendment Act 96 of 1996. See further Sloth-Nielsen and Van Heerden (1996) 12 **SAJHR** 247 at 261-2 in this regard.

183 As inserted by section 19 of Act 86 of 1991.

184 Or, in terms of section 43(1)(b) of the latter Act, to employ any child who is under the minimum school-leaving age in terms of any law, if this is 15 years or older (see section 31(1) of the South African Schools Act 84 of 1996 in this regard).

185 Section 48 of the Basic Conditions of Employment Act 75 of 1997.

186 Section 52A(2)(a). So, for example, in 1994, the advertising industry was thus exempted (GN R723 in GG 15639 of 22 April 1994).

187 Section 52A(2)(b). See further Sloth-Nielsen and Van Heerden 'Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Legal Developments in South Africa' (1996) 12 **SAJHR** 247 at 261-262.

188 By Sloth-Nielsen and Van Heerden (1996) 12 **SAJHR** 247 at 261.

189 (1996) 12 **SAJHR** 247 at 262.

#### 6.4.11 Appeals

Appeals on and the review of orders made by the children's court are dealt with extensively in Chapter 23 (Courts) below. For present purposes it is sufficient to refer to the existing appeal provisions in the Child Care Act, 1983 dealing with appeals. Section 16A reads as follows:<sup>190</sup>

An appeal shall lie against any order made or any refusal to make an order in terms of section 11, 15 or 38(2)(a), or against the variation, suspension or rescission of such order, to the competent division of the High Court of South Africa, and if brought, shall be noted and prosecuted as if it were an appeal against a civil judgement of a magistrate's court.

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190 Inserted by the Child Care Amendment Act, 1999.

The remedy of appeal is only available in a few, narrowly defined situations.<sup>191</sup>

Mr D S Rothman pointed out that the right to appeal against the variation, suspension or rescission of orders made in terms of sections 11, 15, or 38(2)(a) of the Child Care Act, 1983 is impossible, given a correct reading, because no provision is made in the Act in the first place for variations, suspensions or rescissions of such orders.<sup>192</sup> Mr Rothman continues:

Only in the case of contribution orders as provided for in section 43(4) is this [an appeal against the variation, suspension or rescission of orders] possible but then provision for appeals has always been made for contribution orders in section 48 of the Act! This is a stupendous insertion and should be deleted.

One cannot but agree with Mr Rothman that it is rather senseless to provide for a right of appeal against something not legally possible. However, this problem can be addressed by **making it possible for commissioners of child welfare to vary, suspend or rescind orders made in terms of sections 11, 15 and 38(2)(a). In addition, the Commission recommends that an appeal should also lie against sections 16, 34, 37 and 38 of the Child Care Act, 1983.**

Orders of adoption or orders rescinding (terminating) adoption orders are subject to an appeal to the High Court. In terms of section 22(2) of the Act, an appeal against the order of adoption of the children's court can be brought by the parent or guardian of the adopted child. In terms of section 22(3), where the children's court has rescinded an order of adoption, an appeal against this termination of the order can be brought by a parent, guardian or adoptive parent who did not apply for the rescission.<sup>193</sup> It is of course possible that the children's court might refuse an

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191 Removal to a place of safety order (section 11); the standard 'section 15' orders; and the return order after abscondment (section 38(2)(a)).

192 'The need for legal representation for children in children's court proceedings - fact or phobia' (2001) 4.1 **The Judicial Officer** 4 at 5.

193 For the circumstances in which the children's court may decide to rescind an order of adoption, see section 21 of the Act.

application to rescind one of its own adoption orders. Such a refusal can also be appealed against to the High Court.<sup>194</sup>

#### 6.4.12 **Deadlines**

Generally, the Child Care Act, 1983 is deficient in that there is a lack of restriction as to how long children's court inquiries can go on for. Cases frequently continue for many months, sometimes years. This often amounts to secondary abuse, especially in cases involving very young children, where time is of the essence for providing them with the bonding opportunities which are crucial for their normal development.

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194 See sections 22(4)-(5) of the Act.

In the consultation processes, the need for speedy processes and for enough time for proper attempts at investigation and reconstruction by the social worker emerged as very significant but inherently conflicting considerations. Balancing these and, in appropriate cases, giving more weight to one or the other, are tasks which will often require great skill and sensitivity to a variety of considerations. The commissioner will also have to decide whether the best interests of the child require the commissioner to adopt a more pro-active or else passive work-style in relation to the efforts of the social worker during the period between the opening and finalisation of the inquiry.<sup>195</sup>

The Commission has earlier recommended that in all matters relating to a child, regard shall be had to the general principle that any delay in determining any question with respect to the upbringing of that child or the administration of that child's property is likely to be prejudicial to the best interests of the child.<sup>196</sup> Obviously the younger the child, the greater the need for speedier resolution of issues regarding the child. It is in this context and as a result of numerous submissions that the Commission has considered the call for strict deadlines in the Act, together with effective sanctions for failure to meet them.

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195 Matthias and Zaal (1996) *Acta Juridica* 51 at 55.

196 See 5.3 above.

The Commission is mindful of the dangers inherent in imposing deadlines on our severely under-resourced current children's court and social welfare systems. **The Commission would therefore rather recommend, on the basis of a proper assessment and the place of the child in the system (criminal justice versus child protection), that commissioners be held accountable to the Magistrates Commission<sup>197</sup> for inordinate delays in finalising children's court inquiries. This can be done by requiring commissioners to report on a monthly basis, on the basis of information supplied to the commissioner by the children's court assistant, to the Magistrates Commission the number of unresolved children's court inquiries outstanding for longer than say four or six months and to require reasons from the commissioners for the delays in finalising those cases. The Magistrates Commission should then in turn in terms of section 7(1)(f) of the Magistrates Act 90 of 1993 report such statistics to the Minister of Justice and Constitutional Development for the information of Parliament.** The Minister of Justice and Constitutional Development should then forward these statistics to the Minister for Social Development for his or her information.

## 6.5 Provisions that affect (or could affect) children

### 6.5.1 Procedure in the children's court

A children's court is a court of law and not merely an administrative tribunal.<sup>198</sup> It is therefore bound to observe the same rules of evidence and procedure, except where a departure is expressly permitted.<sup>199</sup> Unless otherwise provided, the Magistrates' Court Act and its Rules apply *mutatis mutandis* to children's courts in relation to the appointment and functions of officers; the issue and service of processes; the appearance in court of legal counsel; the conduct of proceedings; the execution of judgments; the imposition of penalties for non-compliance with orders of court, contempt of court and obstructing the execution of judgments, etc.

However, it is generally recognised that a children's court may adopt a less formal procedure when, for instance, it deals with an inquiry into whether a child is in need of care than when it

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197 Established in terms of the Magistrates Act 90 of 1993.

198 Schäfer 'Young Persons' in Clark (ed) **Family Law Service**, E87.

199 **Napolitano v De Wet NO** 1964 (4) SA 337 (T).

deals with an adoption inquiry.<sup>200</sup> The High Court also tends to relax its own rules of procedure and evidence when acting in its capacity as upper guardian of children.<sup>201</sup>

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200 **Napolitano v Commissioner for Child Welfare, Johannesburg** 1965 (1) SA 742 (A).

201 See, e.g. **Zorbas v Zorbas** 1987 (3) SA 436 (W), in which Van Schalkwyk AJ (as he then was) held that the court, as upper guardian, should take cognisance of inadmissible evidence in certain circumstances.

A children's court sits in a room other than a room in which any other court ordinarily sits, unless none is suitable and available.<sup>202</sup> No information relating to proceedings in a children's court which reveals or may reveal the identity of any child concerned may be published, unless the Minister or the commissioner who presided authorises the publication of so much information as he or she may deem just and equitable and in the interest of any particular person.<sup>203</sup> Hearings are held in camera and no person, other than those whose presence is necessary for the proceedings and his or her legal representative, may be present.<sup>204</sup>

At the meeting with the officials of the Department of Social Development held on 26 June 2001, it was agreed that it is necessary for the new children's statute to state that the procedure adopted in the children's court must be informal. The Commission deals with the nature of the proceedings in the children's court in more detail in Chapter 23 below.

#### 6.5.2 Maintenance of children in need of care and contribution orders

No person or children's home is obliged to receive or resume the custody of any child under the Child Care Act.<sup>205</sup> However, once a person or the management of a children's home has received or admitted a child placed in the custody of that person or sent to that children's home under the Act, that person or children's home (as the case may be) is deemed to have the custody of the child concerned and is obliged to maintain and care for him or her until

- (a) the child dies; or
- (b) the child is transferred to another custody or institution by order of the Minister; or
- (c) the child is removed from the custody of that person or from that children's home by ministerial order; or
- (d) any financial grant or contribution payable by the Minister towards the maintenance of the child is discontinued.<sup>206</sup> These provisions do not affect any

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202 Section 8(1) of the Child Care Act, 1983.

203 Section 8(3) of the Child Care Act, 1983. Violation of this prohibition is an offence and may, upon conviction, be visited with a fine or imprisonment, or both.

204 Section 8(2).

205 Section 41(1).

206 Sections 42(1) and (2). HM Bosman-Swanepoel and PJ Wessels **A Practical Approach to the Child Care Act** (1995) 73 raise the question as to whether provision should have been included in section 41(2) concerning the discharge of a child from a custody or institution by ministerial order.

obligation imposed by any other law on any person to care for and maintain the child.<sup>207</sup>

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207 Section 42(3).

The Minister may, with the concurrence of the Minister of Finance, out of moneys appropriated by Parliament for this purpose, and on such conditions as may be prescribed, contribute towards the maintenance of any foster child by his or her foster parent,<sup>208</sup> of any pupil in any institution,<sup>209</sup> and of any child in any institution where such child has been admitted with the approval of the Director-General.<sup>210</sup> The Minister may also, with the concurrence of the Minister for Finance, give approval for a grant to be paid to an organisation for the care of children (between the ages of one month and seven years) of *bona fide* working mothers who must of necessity work away from home, or *bona fide* work-seeking mothers.<sup>211</sup> Place of safety grants for children detained in private (non-state) places of safety may be approved by a commissioner of child welfare, the amount of such grants being determined by the Minister with the concurrence of the Minister of Finance.<sup>212</sup>

A contribution order<sup>213</sup> may be made against a parent or other person legally liable to maintain a child.<sup>214</sup> Jurisdiction to make such an order depends on the respondent's residing, carrying on business or being employed within the court's<sup>215</sup> jurisdiction. Where the respondent is outside

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208 See Regulation 36.

209 See Regulation 37 re children's homes.

210 Section 56(1).

211 Regulation 38.

212 Regulation 39.

213 Defined in section 1 as 'an order for the payment or recurrent payment of a sum of money as a contribution towards the maintenance of a child in a place of safety or in any custody wherein he was placed under this Act or the Criminal Procedure Act, 1977'.

214 Section 43 and Regulation 29.

215 Viz. either a children's court in the case of a child brought before that court for the purposes of an inquiry under the Child Care Act or a magistrate's court in the case of '*any child or any pupil*' (section 43(1)).

the court's jurisdiction, but is resident in a 'proclaimed country' within the meaning of section 1 of the Reciprocal Enforcement of Maintenance Orders Act 83 of 1963, a provisional contribution order may be made against him or her, which order then has the effect of a provisional maintenance order under that Act.<sup>216</sup>

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216 Sections 43(2) and 44(1)).

A contribution order may be enforced by ordinary execution, or by a garnishee order requiring the respondent's employer to deduct payments from his or her wages.<sup>217</sup> In addition, a contribution order has the legal effect of a 'maintenance order' under the Maintenance Act 23 of 1963, and failure to comply with it thus constitutes an offence under that Act.<sup>218</sup> Payments under a contribution order are made, not to the person or the institution in whose custody the child is, but to an officer of the court.<sup>219</sup> A contribution order may be varied, suspended, rescinded or reviewed after rescission by any children's court or magistrate's court in whose jurisdiction the respondent resides, carries on business or is employed, after completion of the prescribed inquiry or on application of the respondent.<sup>220</sup> Appeal against the making, variation, rescission or revival of a contribution order lies to the High Court.<sup>221</sup>

### 6.5.3 Permanency Planning

The regulations to the Child Care Act, 1983 define 'permanency planning' as 'giving a child the opportunity to grow up in his or her family and where this is not possible or not to his or her best interests, to have a time-limited plan which works towards life-long relationships in a family or community setting'.<sup>222</sup> Strangely enough, however, the words 'permanency planning' appear nowhere else in the regulations to the Child Care Act, leaving the definition standing in a vacuum.

The main aim of permanency planning is to prevent multiple, temporary placements of children and to give children a sense of permanency.<sup>223</sup> One very serious implication of permanency planning is the termination of parental responsibilities. When actively using the permanency planning approach as currently understood, therefore, the biological family has a limited period of time to rehabilitate before facing the possibility of the loss of all control over the child, for example through his or her adoption. This is in order for the child to have a sense of

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217 Section 46.

218 Section 44.

219 Section 45.

220 Section 43(3). If any court other than the court which issued the contribution order concerned varies, suspends, rescinds or revives the contribution order, the clerk of the first-mentioned court must inform the clerk of the last-mentioned court of such variation, suspension, rescission or revival: section 43(4).

221 Section 48.

222 Regulation 1.

223 C R Matthias **Removal of children and the right to family life: South African law and practice** Bellville: Community Law Centre, UWC 1997, p. 41.

permanency in his or her new situation. Permanency planning is not prescribed by the Child Care Act, 1983 and the words 'permanency planning' are not found in the current Act.

In many foreign systems, permanency for the child implies either adoption or long-term foster-care where the foster family has some aspects of legal guardianship. Substitute family care is dealt with separately below.

Under the Child Care Act the maximum period for which a children's court order can remain in effect is two years.<sup>224</sup> At the end of this two-year period, it seems to have been assumed that the child should normally be able to return home permanently. Failing this, the order could be renewed; however, renewal of the order was, prior to the implementation of the 1996 amendments to the Act, a ground for dispensing with parental consent to adoption.<sup>225</sup> The original intention behind this limited time period was to pressurize the social worker and biological parents to engage in intensive reconstruction work. At the end of this two-year period, it was thought that the social worker and the biological parents should be able to evaluate the child's chances of either returning home or some other permanent plan being made. However, in practice, what seems to happen is that most children's court orders get renewed for multiple two year-periods, without steps being taken toward adoption, and with the social worker being expected to continue to provide reconstruction services to the biological parents for as long as the child is in substitute care, even if there is an ever-decreasing chance of the child returning home.

The maximum two-year duration period of children's court orders has thus failed to achieve its purpose. Different mechanisms are needed to compel sufficient reconstruction services and case monitoring and to ensure permanency planning.<sup>226</sup> The court may need freedom to issue

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224 Section 16(1).

225 The previous section 19(b)(v).

226 See also 10.4 and 23.10.6 below.

orders of, in some cases, longer than 2 years, in order to increase a sense of security for the child.

Although social workers are expected, in terms of current practice, to implement permanency plans for children, children's courts often do not recognise either these plans or the service contracts drawn up with biological parents for their implementation. Later down the line, it often happens that neither the courts nor the relevant officials of the Department of Social Development recognise the need, where services to the family have failed to bear fruit over a specified period, to cease efforts towards rehabilitation and move towards settling the child with an alternative family. This negates the permanency planning orientation underlying the regulations to the Child Care Act and sabotages social work services and the well-being of the child.

What emerges generally from the findings in regard to reconstruction services and permanency planning is a need for reform of the Child Care Act.<sup>227</sup> New provisions must be promulgated which encourage a short, intensive period of reconstruction services, but which in an integrated manner bring the child and his or her family together for such services if this is feasible. If this fails to have the desired effect because of lack of progress and cooperation from the parents, then agencies and courts must become geared to making arrangements for the permanent care of children in alternative settings.

Whilst it is necessary to avoid keeping children in limbo by several times renewing an original care order, it is also necessary to guard against leaving them unprotected because no action was taken at all when the original care order terminated. If the necessary report is not submitted to recommend renewal of an order, the order will then lapse, leaving a child unprotected and without financial support. Under the 1960 Act, once a child had been found 'in need of care', he or she remained under state protection until discharged from the Act.

A further feature of the situation is that there is a high proportion of stable and satisfactory foster care placements which do not warrant serial biennial reports by social workers.<sup>228</sup> The current requirement produces an immense administrative burden for social workers in the post-court phase the central purpose of which, in practice, is to ensure that the foster care grant is

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227 C R Matthias **Removal of children and the right to family life: South African law and practice** Bellville: Community Law Centre, UWC 1997, p. 44.

228 As is required by Regulation 15 read with section 16 of the Child Care Act, 1983.

renewed. It is therefore submitted that, in order to release social workers for tasks that are generally more critical, the Child Care Act should be amended to allow for only one post-court report if a foster care placement is rated as not requiring further direct court monitoring.<sup>229</sup> The children's court, acting on the recommendation of the social worker, should be the forum required to make a ruling about whether a particular foster care placement merits such a single post-hearing report after the period of the initial children's court order. This suggestion must be integrated with the earlier suggestion that in more problematic types of placement and those involving active reunification services there should be much more, and not less, monitoring of the placement.

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229 See Chapter 17 (Foster Care) below.

Section 16(3) (which deals with duration and extension of orders) has also caused problems by creating a distinction between pupils in schools of industries and reform schools on the one hand, and children in foster care or adoption on the other. It is possible to extend the legal protection of pupils in the first two types of placement to enable them to complete their education. This does not apply in the same way to those in residential or foster care - they may remain where they are and have a grant paid for them only if continuation of the placement is with their parents' as well as their own permission.<sup>230</sup> There are cases in which this requirement is disadvantageous to the young person. Mental health workers have also made the point that in cases of mental disability in either the child or the parent there are specific problems with this section.

#### 6.5.4 **Reunification Services**

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<sup>230</sup> By changing the age of majority to 18 years these inequalities will be removed. The need for parental consent would also fall away.

As has been noted above, an important concept in social work is that of reunification services. Where a child has had to be removed from his parents, such services ideally involve regular contact between the social worker and both the child (in his or her institution or foster home) and the parents for the purpose of intensive work aimed at rebuilding both the self-image and dysfunctioning of the family concerned and, ultimately, the parent-child relationship. Overseas studies and local experience have shown that where reunification services are properly and regularly carried out, they can gradually heal the parent-child relationship to the extent that it sometimes becomes possible to return the child to his or her family.<sup>231</sup> One of the original aims of the Child Care Act was to 'galvanise' social workers into providing more consistent and better quality reunification services in situations where children had been removed and placed in care by the state. Unfortunately, as Matthias and Zaal<sup>232</sup> point out, this aim had not been realised and reconstruction services generally tend to remain as erratic and inadequate as they were under the 1960 Children's Act.<sup>233</sup> According to social workers, this is predominantly due to the inability of cash-strapped welfare organisations to employ sufficient social workers to manage the workload involved, and to retain the services of those with skill and experience in this area due to poor working conditions.

In a study of one South African children's home, Michael Gaffley<sup>234</sup> found that 54% of the children had been there for longer than two years. His conclusion was that very few, if any, of these children would ever be reunited with their families, since in many cases all contact with their families had been lost. The fate of these children, as he saw it, would be either staying on at that institution until they turned eighteen, or transfer to a similar institution, school of industry or, in extreme cases, to a reformatory. Both Gaffley's findings and that of Matthias<sup>235</sup> highlight an urgent need for reunification services to become a more important priority in South Africa.

The Child Care Act needs to be amended from the point of view of requiring reunification services in appropriate cases with a view to avoiding or reducing the time span of care placements and a lack of permanency planning. Subsidized adoption must be rendered easily

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231 Matthias and Zaal (1996) **Acta Juridica** 51 at 63. The authors refer to the discussion of the case of **Ricky K** by the judge concerned in P R Kfoury **Children Before the Court: Reflections on Legal Issues Affecting Minors** (2<sup>nd</sup> edition), 1991 4-6 as a striking example of success involving even a mentally disordered child.

232 (1996) **Acta Juridica** 51 at 63.

233 See D Levine et al 'One year later: A critical look at the Child Care Act' (1988) **The Child Care Worker** 11.

234 'Work with children' (1996) 14(6) **Child and Youth Care Worker** 1 at 15.

235 **Removal of children and the right to family life: South African law and practice**, p. 39.

available as an option where poverty is a barrier to a permanent placement.<sup>236</sup> Attention to workload norms in, and the resourcing needs of, the structures carrying out these services is also essential.

Under the Act as presently framed there is a relatively weak emphasis upon the reunification services that are so vital in attempting to return children in care to their families. Only in Regulation 15, under the title of 'Reconstruction', does one find a brief instruction that the relevant Minister must be furnished with a social worker's report concerning 'the possibility or desirability of restoring the child to the care of his parents' not later than three months before the expiry of a court order or an extension thereof. Information obtained during the course of our research indicates that the Minister often alters or extends children's court orders without obtaining a social worker's report at least three months beforehand. Such children are then subsequently dealt with illegally by the Minister concerned.<sup>237</sup>

#### 6.5.5 Adoption of children

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236 C R Matthias **Removal of children and the right to family life: South African law and practice**, p. 44.

237 Matthias and Zaal (1996) **Acta Juridica** 51 at 66.

The adoption of a child obviously has a dramatic effect on his or her legal position. The Child Care Act, 1983 contains numerous provisions on adoption and these are discussed fully elsewhere.<sup>238</sup>

#### 6.5.6 **Leave of Absence from a Placement**

Section 35 of the Child Care Act was intended to cover short periods of leave from custody in which a child has been placed by a court order, as well as Ministerial extension thereof. Subject to specified requirements, it allows for the child to take a holiday with friends or even a biological parent, for example. However, this section has ended up, inappropriately, being the standard way of testing out the viability of a move of a child from an institution into foster care, or back into the care of the parents, before recommending an order of transfer. Even worse, sometimes it is used as a way of 'clearing' institutions to enable the majority of staff to have uninterrupted (Christmas) holidays.

In terms of the 1960 Act, this purpose was served by the issuing of a licence, which was operative for a maximum of two years. The licence could immediately be used, in the case of a foster care placement,<sup>239</sup> to apply for a foster care grant, or in the case of a child's return to the care of a parent, to access the then maintenance grant if the parent was eligible. But leave of absence as it now stands is not an arrangement which qualifies for state aid. The licence under the 1960 Act could be revoked if a serious problem arose and the child could then be speedily returned to the children's home, whereas transfer under the current Act is a slow, bureaucratic process.

**The Commission accordingly recommends that a 'release on licence' provision similar to that in the 1960 Act be included in the new children's statute.**

#### 6.5.7 **Absconder's Inquiries**

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238 See Chapter 18 below.

239 See further Chapter 17 below.

According to section 38 of the Child Care Act, any child who has been placed by either a children's court or a juvenile court in the custody of a person or in any institution - meaning a place of safety, a children's home, a school of industries or a reform school - will be subject to an absconder's hearing if he or she runs away and is subsequently apprehended. Apart from the point (above) that a court should not usually be involved, the absconder's hearing as framed by section 38 of the Act gives rise to some serious points of concern. For one thing, it is laid down that at the hearing the commissioner of child welfare must simply 'interrogate' the child 'as to the reasons why he absconded'.<sup>240</sup> There is no reference to any right of the child, for example, to have legal representation or to have any other person present acting on his or her behalf.<sup>241</sup> It does not appear that the child even has a right to call witnesses who might be able to explain why he or she absconded. Surely, if the matter is serious enough for a court hearing, these basic rights should be specified in legislative form.

Another point of concern with absconder's hearings is the severely limited powers of the children's courts. According to section 38(2)(a) of the Act, the commissioner can do only one of two things after 'interrogating' the child. The commissioner may either order that the child be returned to the custody or institution from which she absconded or, 'if the commissioner is of the opinion that there are good reasons why the pupil or child could not be returned', then the commissioner can only order that the child be kept in a place of safety 'pending any action by the Minister'. This is an example of the restricted powers which show the undeserved, secondary status of the children's courts as almost quasi courts that are unable to protect children from Ministerial bureaucracies. It seems entirely wrong that the children's court, having had its hearing, should not be able to offer a new, positive solution in respect of a child who has been found to have had good reasons for absconding.

It may well be that since the time when the child was originally placed in an institution the situation at home has improved or else some other factor may have arisen which makes a different placement from the original one appropriate. The children's court, surely, should be able to direct a new placement for the child in the light of new circumstances, rather than having

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240 See section 38(2)(a).

241 Legal representation might, however, be possible under the new section 8A of the Act. See the discussion above. However, in order to be of more practical assistance to children, this right should have been specifically included with the sections of the Act dealing with absconder's hearings. If this is not done, the present situation, in which children almost never receive legal representation at absconder's inquiries, is likely to continue.

to incarcerate the child in a place of safety awaiting a new arrangement, perhaps for a very long period of time.