

## CHAPTER 10

### CHILD PROTECTION

#### 10.1 Introduction

Formal measures for the protection of children from harmful actions and from negligence, especially by those immediately responsible for their care, are arguably the central focus of the Child Care Act of 1983. While the proposed new statute is likely to be much broader in its reach, protective measures will remain a crucial component.<sup>1</sup> Child protective measures as addressed in this Chapter are legal provisions and interventions sanctioned by the State, which are designed to deal with situations in which specific children are being harmed, or are at immediate risk of harm, through abuse or neglect. Exploitation and abandonment, being forms of abuse and neglect respectively, are included within the ambit of these protective measures. Preventive and early intervention measures which overlap with or flow from formal protection will be brought into the discussion where appropriate.

#### 10.2 Scope of and guiding principles for child protective legislation

##### 10.2.1 Scope of protective legislation, and needs and rights to be addressed

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<sup>1</sup> Ninety-six per cent of participants who completed a questionnaire after provincial workshops convened by the Project Committee in 1998 viewed 'protection of children against abuse and neglect' as an issue to be addressed by the new children's statute. This was the highest percentage for any of twenty major issues relating to the needs and rights of children which were listed.

In South Africa the underpinnings for child protection measures can be found in sections 28(1)(d) to (g) of the Constitution. These sections spell out the child's right to protection from abuse, neglect, premature or exploitative employment, unnecessary detention and - if detention is unavoidable - exposure to conditions which are unsuitable for children. The constitutional provisions in turn give effect to articles 19, 20 and 32-37 of the CRC, which refer to the right to protection from abuse and neglect and to special protection if deprived of a family environment, as well as protection from child labour and various forms of exploitation, trafficking, 'cruel, inhuman or degrading treatment or punishment',<sup>2</sup> and deprivation of liberty. Articles 15, 16, 21, 25 and 26 are key provisions of the African Charter on the Rights and Welfare of the Child relating to child protection. These refer to the rights of the child to protection from labour, abuse and torture, harmful social and cultural practices and sexual abuse, and the right to special assistance if deprived of a family environment.

#### 10.2.2 **Circumstances in which protective intervention may be required**

Situations where protective measures may come into play generally fall into one or both of the following categories:

- *Neglect*

Here we are dealing with failure to meet the child's basic physical, intellectual, emotional, and social needs. A distinction is often cast between neglect which occurs because caregivers lack the resources to meet the child's needs, and neglect which occurs despite such resources being available. Especially in the latter case, neglect may be regarded as a form of abuse, depending on the type of definition used.

- *Abuse*<sup>3</sup>

Child abuse is typically understood as occurring when some form of harm is actively perpetrated

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— Article 37.

3 Section 3 of the New South Wales Children (Care and Protection) Act, 1987, defines abuse, in relation to a child, as assault (including sexual assault), ill-treatment of a child, or exposure or subjecting a child to behaviour that psychologically harms the child, 'whether or not, in any case, with the consent of the child'. 'Ill-treat', however, is not defined.

against a child. Abuse may be *physical* – involving assault and possible injury; *sexual* – involving the use of a child for the gratification of an older or more powerful person; or *emotional* – involving e.g. constant attacks on the child’s self-esteem, or terrifying threats.

Neglect and abuse may emanate from a number of sources, and it is not always easy to pinpoint who carries the primary responsibility. A combination of perpetrators may be involved. A child may e.g. be neglected or actively abused by family members or others in his or her home or neighbourhood, or by institutions which are responsible for assisting with his or her care and development, such as schools or health care services. State policies or practices may be neglectful or abusive of children, as was highly apparent under apartheid.

#### 10.2.2.1 **Sub-categories and combined forms of abuse and neglect**

Many children experience combinations of physical, sexual and/or emotional abuse and/or neglect. These may take on patterns which are deeply embedded in the child’s socio-economic circumstances and/or the surrounding culture. Categories include:

- *Abandonment*

This involves a complete withdrawal from the child and is therefore sometimes regarded as the most extreme form of neglect. It may or may not involve leaving the child destitute or in life-threatening circumstances.

- *Child labour*<sup>4</sup>

Children who are exploited for their labour are, to varying degrees, denied their right to education, rest and leisure. They are at risk of physical, emotional and sometimes sexual abuse depending on the work environment involved. Such children are often caught up in a cycle of poverty which is repeated in the next generation. *Commercial sexual exploitation* is recognised as a particularly damaging form of child labour.

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4 Child labour in general is discussed in Chapter 13 below.

◦ *Harmful cultural practices*

While children, along with the rest of the population, have a right to respect for their religion and culture, some religious and cultural practices involve physical harm and potential emotional damage.

◦ *Children in need of special protection*

These are children who are continuously exposed to multiple forms of abuse and deprivation, i.e. those 'whose lives are lived daily in circumstances which place their survival, protection and development at risk' or 'those in circumstance which deny them their most basic human rights'.<sup>5</sup> Subcategories would include orphans, those involved in commercial sexual exploitation and child labour generally, children living on the street, children in out-of-home care, children with disabilities, poverty-stricken children, displaced or refugee children, children caught up in violence or armed conflict, children in conflict with the law, and children infected with and affected by HIV/AIDS.<sup>6</sup> Chapter 13 will deal in depth with some of these categories of children.

### 10.2.3 **Broad statutory approaches to the protection of children**

It is one thing to agree that children's needs must be met and that they must be protected from harm, and another to decide whether, when and how the state should intervene to ensure that this happens.<sup>7</sup> Legally sanctioned interventions, designed specifically to safeguard children who are in specified forms of danger, are only one component of any society's arrangements for protecting its children. A multiplicity of measures and processes, mandated by law or operating informally, help to meet the fundamental needs of children and ensure their normal growth and development, as

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— UNICEF/NCRC 'Children and Women in South Africa: a Situation Analysis', pp 6, 75.

6 While any such situation places a child at special risk, access to the appropriate resources may prevent that child from entering especially difficult circumstances – e.g. a child with a disability who has full access to the range of services and supports needed to enable him or her to develop to his or her full potential might not fall into this category; likewise an orphaned child who is fully absorbed into an extended family which has or is supplied with adequate resources to care for that child.

7 Dingwall 'Labelling children as abused or neglected' in Stainton Rogers et al (ed) **Child Abuse and Neglect - Facing the Challenge** London: Open University 1989, 164 points out that there is an important distinction between discourses about types of behaviour towards children, moral formulations in this regard, and the question of whether or not specific types of conduct should be policed.

part and parcel of the normal functioning of society. Others may be established specifically to prevent certain types of harmful situation from developing, or for purposes of intervening when problems are apparent but can be managed without the use of state authority.

The nature and emphasis of state intervention will depend in part on how a given society assigns the responsibility for the wellbeing of its children, and where it believes the risks to children are primarily located. Societies differ in the extent to which they lay the burden of responsibility with the biological parents on the one hand, or view the nurturing of children as a responsibility shared by the extended family, the community and the state on the other. Even where specific, identifiable individuals such as parents or caregivers pose an immediate danger to a child, abuse and neglect tend to be generated or at least aggravated by broader societal issues. High stress levels and a lack of support for parents and caregivers are factors widely believed to promote abuse of children. Poverty and a lack of basic resources are prime generators of stress and disorganisation, as well as limiting the ability of parents and other caregivers to meet the needs of children. It is thus no accident that incidences of child abuse and neglect are markedly higher among poor families.<sup>8</sup> A number of writers and practitioners caution against an approach to child abuse which is over-preoccupied with ideas of personal or family pathology. Child abuse can be seen *inter alia* as a manifestation of underlying social problems, with families who are caught up in these becoming 'agents of structural violence'.<sup>9</sup> The view that child abuse is basically a matter of 'sick' behaviour within families enables society both to avoid engaging with the broader social causes, and to relegate the task of protecting children from the resulting harm to designated professionals, regardless of whether they have the necessary resources.<sup>10</sup>

If society as a whole has responsibilities for the protection and nurturing of children, and the causes of neglect and abuse are not located only in individuals or families, it follows that the types of statutory intervention for which provision is made should not be focussed only at the level of the individual child and family, and should not be predominantly of a controlling or punitive nature.

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— Corby 'Alternative Theory Bases in Child Abuse and Neglect' in Stainton Rogers et al (ed) **Child Abuse and Neglect - Facing the Challenge** London: Open University 1989, 30-39; Faller, K **Child Sexual Abuse - an Interdisciplinary Manual for Diagnosis, Case Management and Treatment** London: Macmillan 1989, 23; National Coalition for Child Protection Reform, 2000: Issue Paper 6 - "Child Abuse and Poverty", <http://www.ncccpr.org/newissues.html>.

— Parton, N **The Politics of Child Abuse** London: Macmillan 1985, 167.

10 Loney, M 'Child Abuse in a Social Context' in Stainton Rogers et al (ed) **Child Abuse and Neglect -Facing the Challenge** London: Open University 1989, 88-96.

The body of legislation which serves to protect children should include at least the following components:

- (a) Provision for mechanisms which are geared towards the broad population and which support parenting, family life and child wellbeing generally, thereby lowering the risk of abuse and neglect and reducing their effects;*
- (b) Provision for mechanisms through which help is offered on a voluntary basis to individual children and families who are experiencing stress or believed to be at risk;*
- (c) Provision for mandatory measures which are exercised with or without the consent of those concerned, in which state authority is exercised to protect and provide care for the individual child who is deemed to be in danger in his or her own home or immediate environment;*
- (d) Criminal justice measures aimed at dealing with perpetrators of offences against children.*

It can be argued that a sound balance between these components, in legislation as well as in policy frameworks and in resourcing, is essential for a society which wishes to protect its children effectively. It would appear, from the overwhelming weight of information supplied to the Project Committee, that in South Africa all these components are inadequate and in urgent need of strengthening. In efforts to reinforce them, the optimum possible balance should be sought.

The focus of the present chapter is on formal child protective services (CPS) which carry state authority, i.e. interventions contemplated in (c) and, insofar as they impact directly on the child, also (d) above. However it is necessary when designing CPS measures to ensure that they are linked to, and in proper balance with, other approaches. It becomes extraordinarily difficult, apart from being prohibitively expensive, to deal effectively with abuse and neglect through case-by-case protective intervention by state agents when essential social mechanisms required to ensure the wellbeing of children are weak or absent.

#### **10.2.4. Protective measures and mechanisms**

When abuse or neglect of a child has occurred, or there seems to be a risk thereof, one or more of

a range of responses may be appropriate for those charged with legal child protection responsibilities. The options chosen will depend *inter alia* on the severity and context of the problem and the resources available. Legislation should include adequate provision for the range of options which are likely to be needed. Internationally, most interventions provided for in protective legislation seem to fall into one or other of the categories outlined below.

#### 10.2.4.1 **Reinforcement of protective potential within the family or neighbourhood**

The extended family, friends, faith communities and neighbourhoods form natural support systems which, when functioning well, help to prevent abuse and neglect from arising. In addition, members of such networks may intervene to offer support where there are signs of stress in a household. A tendency towards social isolation has often been identified as one of the factors tending to be characteristic of abusive families. Conversely, 'children, young people and their families can thrive within a supportive and empowered family environment and within a caring and committed community' states Mbambo.<sup>11</sup>

In seeking to assist children identified as being at risk, child protection agencies often seek to mobilise support from within the extended family or community. The aim is to reduce stress and enhance the coping skills of caregivers, thus reducing or eliminating the risks of abuse and neglect.<sup>12</sup> In some parts of the world, there has been considerable investment in intensive 'family preservation programmes', through which a range of intensive supports and interventions are introduced with the aim of preventing the separation of children from their families. In some countries such programmes have legal status as protective options within the relevant legislation. Linkages with available social security provisions are essential to the functioning of such approaches, as financial support of the child within his or her home provides protection against neglect and abandonment as well as many forms of active abuse, including commercial sexual exploitation and child labour. Legislation providing for family social security is thus a critical component of a family preservation approach.

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– 'Family Preservation: the South African Experience', paper prepared for Project Committee on the Review of the Child Care Act, 1998, p. 4.

– Relatives, neighbours or people from within a faith community may be drawn in to provide support and guidance in child-rearing, or 'time out' for a stressed parent by sharing in child care tasks, or providing short-term care of a child in times of particular stress. In addition or alternatively, agencies may introduce formal supports such as homemaker services, full or partial day care services for children, crisis lines or drop-in services, professional or voluntary counselling, parenting skills training programmes or self-help groups.

#### 10.2.4.2 **Statutory protection of the child within the home**

Where it appears that safeguards can be built into the home environment to protect the child, but that these require the force of law behind them rather than being dependent on the voluntary cooperation of all concerned, a court or some other authority may issue an order which binds those concerned to adhere to certain requirements. For example, parents may be ordered to attend regular counselling and allow free access to a protective agency to visit, or they could be required to refrain from certain types of behaviour, and/or involve themselves in counselling or treatment for an alcohol problem. A process termed 'Family Group Conferencing' has been growing in popularity in some parts of the world as a means of involving the immediate and extended family, and sometimes other members of a child's network, in developing a plan of action and arranging care for a child who is considered to be at risk. This may be due to his or her having come into conflict with the law, or having been abused or neglected, or being destitute.

#### 10.2.4.3 **Removal of an offender**

Where a specific person has been identified as a threat to the wellbeing of a child, the most appropriate way to safeguard that child might be for this person to leave the home. Most typically this is a person who is physically or sexually abusing either his or her adult partner, or the child concerned, or both. Such a person might be arrested and incarcerated, or be formally ordered by a competent authority to stay away from the premises, with the prospect of criminal sanctions if such order is breached.

#### 10.2.4.4 **Placement of the child in substitute care: by order of court or by voluntary agreement**

Where the child's safety cannot be assured through support of the family or removal of a perpetrator, removal of the child in terms of a court order may be the option of choice. Substitute family care - usually foster care - tends to be the preferred option.<sup>13</sup> However, some children need a more structured group care environment provided by a residential care facility, at least in the early

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<sup>13</sup> Where a child has been abandoned, or a parent has consented to such an approach, adoption may occur at the outset. In other cases, however, this option is usually exercised only much further down the line.



stages of placement. Also, substitute family care may not be available and residential care may be the only option.

A less authoritarian option is entry into a voluntary care agreement, as is provided for in e.g. a number of North American jurisdictions. Here the relevant authority enters into a formal agreement with a parent or parents, in which there is a temporary transfer of custody of the child. This is linked with a service plan aimed at family reunification within a specified time.

In some countries, placement of a child is achieved by means of the designated child protection authority assuming legal custody and/or guardianship of the child. In others, such as South Africa, custody is transferred to the relevant substitute caregiver.

#### 10.2.4.5 **Combinations of criminal justice and protective measures**

Care arrangements to ensure the safety of a child may occur in tandem with arrangements to prosecute a person who has committed a crime against the children. Criminal sanctions can be applied in such a way as to promote the rehabilitation of the offender, where possible, as well as the recovery of the child and the family as a whole. The risk of 'secondary abuse'<sup>14</sup> is, however, particularly high in situations of this kind, both because the number of role players increases and because of the particular risks which the criminal justice system involves for children.<sup>15</sup> Special arrangements are needed to coordinate the activities of practitioners from the justice and social service sectors as well as others who may be involved – e.g. practitioners in the health, welfare, education and correctional service fields. Such arrangements may be provided for by statute or set out in policies.

#### 10.2.5 **Basis for selection**

Criteria outlined by Michael Wald have been influential in Britain and the USA in deliberations as to when official intervention to protect a child is justified, and when removal of the child from the home

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– See 10.2.5.3 below.

15 See, for instance, Jolandi le Roux 'Kindermishandeling, die seksueel-mishandelde kind en getuienisaflegging' (2000) **Stellenbosch LR** 480, who emphasises alternative methods of testifying in criminal trials for child victims..

is warranted.

In Wald's view, court involvement would be indicated where:

- a child has suffered, or is likely in the near future to suffer, a non-accidental physical injury which could cause death, disability or other severe physical harm;
- a child has suffered or is likely to suffer serious injuries because of conditions which the parents have failed to correct or because of lack of adequate protection or supervision;
- a child shows symptoms of severe emotional damage and the parents are not willing to provide - despite being in a position to do so - or to allow the necessary help for the child;
- a child has been sexually abused by a member of his or her household;
- a child is in urgent need of medical treatment, without which he or she will suffer severe ill-effects, and the parents are unwilling to ensure that this is done although they are able to do so;
- a child is involved in delinquent behaviour due to the active encouragement of the parents.<sup>16</sup>

According to Wald, the following would constitute grounds for removal of a child from the home rather than other statutory protective options such as court-ordered supervision:

- the child has been physically abused as described above and there is substantial evidence that he/she cannot be protected from further abuse while in the home;
- the child has been endangered in any other of the ways mentioned and there is '*clear and convincing*' evidence that the child cannot be protected from further harm of this type unless removed from his or her home.<sup>17</sup>

Decision-making can also be guided by consideration of the following: the primary location of the source of the abuse, the comparative risks involved in the various options for intervention, and the

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16 From White, R 'Standards of parenting and the law' in Adcock and White (eds) **Good-Enough Parenting**, 33-4.

17 Ibid, 34.

available resources.

#### 10.2.5.1 **Locating the problem**

It is necessary, when selecting appropriate responses to a situation of actual or potential abuse, to examine the sources from which the hazards to the child seem to be emanating. Such factors can be broadly grouped into those associated with the parent(s) or caregiver(s), those associated with the child, those located within the family or household, and those operating in the broader society. Typically no single factor, but a number of pressures in combination, predispose potential perpetrators to abuse, and set children up to become victims.<sup>18</sup> The context in which the abuse occurs and the predominant causative factors will be relevant to the choice of intervention strategy. The choices made for a particular child will differ where, for instance, the abuse seems to arise from:

- a temporary situation of stress in a caregiver or caregivers;
- a violent behaviour pattern or severe, long-term emotional disturbance in a primary caregiver who rejects outside assistance; or
- acute poverty in a family which is able, with help, to provide adequate child care, but who live in an environment where violence and other social problems are rife.

#### 10.2.5.2 **Available resources**

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18 Parents or caregivers may be young and unprepared for parenthood, may be emotionally disturbed or mentally ill, or may have an unresolved history of physical or sexual abuse or other forms of trauma in their own childhood. They may have experienced no healthy parenting in their own lives and may never have had their own childhood needs properly met. They may be dependent on alcohol or other drugs. Poor self image, difficulty in sustaining healthy relationships and limited impulse control are typical features of abusive caregivers. A child may have a feeding disorder, may cry excessively, or may have a disability or some other problem which makes special demands on parents. He or she may have been involved in previous experiences of violence or abuse and may, as a way of acting out the trauma of these experiences, engage in behaviour which puts him or her at risk of further such incidents. Some children will victimise others in their efforts to overcome their own feelings of pain and helplessness. Parents or other adult caregivers may be in conflictual relationships in which anger and frustration may be displaced onto a child who is then subjected to periodic assaults - physical, sexual or emotional. The child may become a scapegoat for the frustrations of siblings as well as parents. The family may be affected by broader social problems of unemployment, inadequate income, poor housing, lawlessness, a breakdown in norms and values and a 'culture of violence'. A child who is relatively safe in his or her own home may be endangered in a neighbourhood where such factors are prevalent. Neglect, or the failure of caregivers to meet a child's basic needs, may result from poverty or a lack of essential services and resources in the community. Poverty is a common denominator of many conditions which predispose children to abuse.

The resources which can be accessed for each form of intervention will also be of relevance to the choices made. For example, if family support services can be intensively applied it may be possible to avoid more drastic interventions, even where a fairly serious problem exists. But such services will offer no protection to the child if they are superficial or inconsistent. Likewise, if the available substitute care facilities are of an extremely poor standard, this will affect the choices to be made.

#### 10.2.5.3 **Comparative risks, including secondary abuse**

Decision-making in child protection work involves a process of weighing up risks. Formal instruments for risk analysis may be used for this purpose, as will be discussed in 10.2.2.1 below. On the one hand, the risk of abuse to the child within his or her daily environment must be considered. On the other, the intervention of an external authority and the events which follow have the potential to be harmful in their own right. Collectively these factors are often termed 'secondary abuse'. In the first place, harm to the child can result from the trauma which may be brought about by e.g. removal from the home, and also from the fracturing of the family which may result, sometimes permanently, from such intervention. Secondly, harm can be caused by the exposure of the child to components of the protective system - e.g. court processes, medico-legal procedures etc., especially where these are inadequately handled. Thirdly, there is the possibility that the child may be physically or sexually abused or neglected by substitute caregivers.

Secondary abuse is also present when the service system fails to follow through with the activities which are supposed to proceed once initial protective intervention has been undertaken. Thus children can be removed from their homes to prevent further abuse, but thereafter be denied the help they need to deal with past traumas and become healthy and integrated persons. They may also become 'lost in the system' due to a lack of permanency planning, and may 'graduate' out of care as young adults who have been denied the experience of family life and may be ill-prepared to become productive adults and competent parents.

#### 10.2.5.4 **Structural implications**

From the discussion thus far, at least the following elements can be identified as being required for a properly functioning child protection system:

- Provision for a range of possible interventions that can effectively address the different types of factors which place children at risk of abuse or neglect.
- Ongoing resourcing for each of these to the extent which is required for their continued availability and reliable functioning.
- Clarity as to the circumstances in which protective intervention backed by state authority is necessary.
- Mechanisms to assure that choices of intervention are made systematically and in such a way as to ensure, as far as possible, the most favourable outcome for the child concerned.
- In cases where a child has been separated from his or her family, provision for ongoing follow-up services and decision-making processes.

## 10.2.6 **Balancing the various dimensions of child protection legislation and practice**

### 10.2.6.1 **Balancing formal child protective services with primary and secondary preventive measures**

Where an overemphasis develops on formal child protective services (CPS) in proportion to other approaches, a number of hazards become evident. While the use of state authority to intervene on behalf of children in their own homes is a crucial component of any modern protective system, such interventions are 'double-edged'. They are in tension with social values such as privacy and respect for family autonomy, and have significant potential to undermine family life, especially where they are ineptly or superficially applied. Also, as previously mentioned, secondary abuse within the child protection system itself is an ever-present possibility.

An excessive focus on case-by-case investigations leads to a misdirecting of resources.<sup>19</sup> Waldfogel identifies one of several factors which are generating an ongoing crisis in American child protective services as being the 'overinclusion' of low-risk families.<sup>20</sup> The latter are dealt with in an unnecessarily adversarial fashion by an overloaded system which then pays inadequate attention to

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— The National Coalition for Child Protection Reform in the USA claims that current definitions of neglect are too broad and that there is a tendency to confuse poverty with neglect. Hence, 'when children known to the system die, it is usually because the system is overwhelmed with children who do not need to be in the system at all' ([www.NCCPR/org/newissues.html](http://www.NCCPR/org/newissues.html)).

— 'Reforming Child Protective Services' (Jan/Feb 2000) Vol. LXXIX no. 1 **Child Welfare** 45-6.

those who are at serious risk. She further comments that the American CPS system has a dual mandate requiring it both to protect children and to preserve families, leading to tensions as to which goal should predominate. She suggests that an attempt has been made to balance the goals by adopting a 'one-size-fits-all' approach, which is in many cases inappropriate.<sup>21</sup>

10.2.6.2      **Balancing and linking preventive and protective approaches with criminal justice approaches**

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—      Ibid.

Duquette remarks: 'Child protection presents an interesting blend of social concern for the welfare of the child and his parents, and imposition of social control. Different countries have struck a different balance between compassion and coercion when it comes to protecting youngsters from harm'.<sup>22</sup>

Physical injury to, sexual acts with, serious and wilful neglect of, and abandonment of children are designated as crimes as well as being cause for protective intervention in many if not most countries. Emotional abuse is also recognised as an offence in some. However, the nature and extent of the criminalisation of these forms of abuse varies between countries and jurisdictions. Forms of abuse which arise directly out of acute poverty, such as abandonment and many forms of child labour, tend to give rise to considerable controversy as regards the appropriateness of a criminal justice approach.<sup>23</sup> Acts which emanate from a particular culture or belief system – e.g. virginity testing and female genital mutilation - are also handled differently from one legal system to another, although the CRC and specifically article 21 of the African Charter on the Rights and Welfare of the Child<sup>24</sup> are giving impetus to new measures to address such issues.

Achieving an appropriate balance between the resources and attention directed to criminal justice procedures on the one hand and educative, supportive and protective processes on the other is a major challenge. Also to be taken into account is the fact that an alleged perpetrator of child abuse is often a caregiver and/or family breadwinner, on whom the child and other family members are dependent for their survival, or with whom they have emotional ties. Hence criminal processes

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22 'Child Protection Legal Process' (1992) 54 **University of Pittsburgh Law Review**, 239 at 248.

– While child labour is overtly condemned in much of the world, there are substantial variations in the extent to which it is legally permitted, regulated or treated as a form of criminal abuse. See UNICEF **The State of the World's Children** New York: Oxford University Press 1997, 58; see also country profiles in Bureau of International Labor Affairs **By the Sweat and Toil of Children – the Use of Child Labor in American Imports**, US Department of Labour, 1994 27ff.

– States Parties are bound to take all appropriate measures to eliminate 'customs and practices prejudicial to the health or life of the child' and 'customs or practices discriminatory to the child in terms of sex or other status' (OAU, Addis Ababa, 1990).

must be handled with particular care, and be balanced by other interventions if they are to protect children and not just increase their trauma. It has been noted with concern, particularly on the basis of British research, that there has over the years been a shift in emphasis from support and assistance to families of 'at risk' children, towards an increasing investment of available resources in coercive and adversarial measures including prosecution.<sup>25</sup>

#### 10.2.6.3 **Balancing punitive with rehabilitative interventions**

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— Lachman, P **Reported Child Abuse in Cape Town** MD Thesis, UCT 1997.



The rehabilitation of perpetrators is a key consideration for the wellbeing of children who stand to be victims in the future. Perpetrators of child sexual abuse who are released after serving their sentences without the necessary treatment are likely to have had their problems deepened, and to present an increased danger.<sup>26</sup> Successful outcomes for children who have been abused within the family are in many cases associated with family reunification, or at least with positive contact with a parent who ceases to be a danger and is able to play a constructive role.

High levels of success have been achieved in the treatment of appropriately selected perpetrators who are court-ordered into well-designed behaviour management/treatment programmes as a condition of suspension of sentence, or are diverted from criminal processes. Success depends on their taking responsibility for their actions and complying in full with the relevant programmes. An opportunity for a parent to formally accept responsibility for his or her actions, and to work within a programme designed to help him or her to end the offending behaviour, can avoid the harm to the child which tends to be associated with adversarial court proceedings, even where protective mechanisms are in place. While only certain offenders can successfully be managed through diversion or similar approaches, experience here and elsewhere has shown that they represent a significant group. For these, the combination of judicial with therapeutic approaches is most positive for the child and the family as a whole, and far less costly to the taxpayer than imprisonment.<sup>27</sup>

Rehabilitation is a particularly pressing concern in relation to the growing numbers of teenage and

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– Jenkins, A **Invitations to Responsibility - the Therapeutic Engagement of Man who are Violent and Abusive** Adelaide: Dulwich Centre Publications 1990; Jones DN et al (ed) **Understanding Child Abuse** London: Macmillan Education 1987.

– SA Law Commission 1997: Issue Paper 10: Sexual Offences Against Children, 70ff; Kempe RS and CH Kempe **The Common Secret - Sexual Abuse of Children and Adolescents** New York, W.H.: Freeman 1985; Giarretto, H **Integrated Treatment of Child Sexual Abuse** Palo Alto: Science and Behavior Books 1982.

younger child offenders, most of whom have been subjected or have witnessed abusive behaviour, and for whom imprisonment is not normally a just, appropriate or practical solution.

Treatment and rehabilitation of sexual offenders, including diversion processes, are extensively discussed in the Discussion Paper **Sexual Offences: Process and Procedure**, prepared by the South African Law Commission's Project Committee on Sexual Offences.

### 10.2.7 Existing situation in South Africa

Much of South Africa's child protection system is based on models developed in the First World, particularly Britain and North America. Formal child protection responsibilities are shared between a number of government sectors (e.g. welfare, police, justice, health) and various civil society organisations, particularly child and family welfare organisations. Child abuse is designated both as a crime and as a situation necessitating protection, care and treatment.

#### 10.2.7.1 Formal protective interventions

Removal of a child who has been abused or is at risk of abuse is provided for in section 11 of the Child Care Act 74 of 1983. In a situation of urgency a child may be removed by a police officer, social worker or 'authorised officer' who must complete the required Form 4<sup>28</sup> and bring the removal to the attention of the court within 48 hours. A children's court inquiry is then held in terms of sections 13 and 14, and a finding is made as to whether the child is 'in need of care'. The grounds for such a finding are found in section 14(4).<sup>29</sup>

Options open to the court for dealing with a child found to be 'in need of care' are supplied in section 15(1). These include supervision within the home, or placement of the child in foster care, a children's home or a school of industries. No distinction is spelled out as to the type of situation which would merit each option - any can be used at the discretion of the court.

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— Regulation 9(2)(a).

29 For the wording see 6.4.3 above.

The Child Care Act also provides for ongoing monitoring of the care arrangements of, and ongoing planning for, children who have been placed in substitute care by the court.<sup>30</sup> In addition the Act sets out conditions for and processes involved in adoptive placements for children who are unable to reside within their own families.<sup>31</sup> The Act further provides for the setting up of places of safety, children's homes, and secure care facilities for children awaiting trial or sentence.<sup>32</sup> Provision is also made for the registration and inspection of shelters, children's homes and other residential facilities for children.<sup>33</sup>

Parental rights may be terminated and children may be adopted where this is considered to be in their best interests.<sup>34</sup> Recent amendments to the Regulations have strengthened an already implicit emphasis in the Act on achieving stability for each child in substitute care through permanent placement, preferably within the child's own family or community, as soon as possible. This principle is strongly supported by the current policy framework as set out by the Inter-ministerial Committee on Youth at Risk (IMC).<sup>35</sup>

The Domestic Violence Act 116 of 1998 makes it possible for a court to exclude a known or alleged perpetrator of domestic violence from a child's home or other forms of access to him or her. The court may issue an 'interim protection order' followed by a 'protection order' against such a person, if satisfied that the child (or anyone else in the household) is at risk of domestic violence from him or her. The Act also provides for the setting of conditions to which contact with the child by an alleged perpetrator must be subject.<sup>36</sup> Domestic violence is very broadly defined in section 1 of this Act, and includes e.g. physical, sexual, emotional and verbal abuse as well as intimidation and 'controlling or abusive behaviour'. A child may approach the court directly for a protection order without adult

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– Sections 15(2)-(5), section 16, and chapter 6.

– Sections 7 - 27.

– Sections 28 - 29.

– Sections 30 - 31.

– Section 19.

– See IMC **Minimum Standards – South African Child and Youth Care System** 1998, 5; also Department of Welfare **Project Go – Programme of Action** December, 1998. A central principle in making alternative care arrangements for children in terms of the Child Care Act, and of achieving permanency for them thereafter, is that of selecting the 'least restrictive and most empowering' option which is commensurate with each child's needs.

– Sections 7(1) and (6).

assistance, or a concerned adult may make such an approach on behalf of the child.<sup>37</sup>

#### 10.2.7.2 **Additional legislation with a protective dimension**

In addition to the direct protective actions which are provided for by these Acts, other forms of statutory provision are in place which are designed to prevent children from becoming vulnerable to neglect and abuse, and/or to facilitate informal intervention in situations where children are seen to be vulnerable.

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— Sections 4(3) and (4).

Some measures are specifically intended to protect certain children from the worst extremes of poverty. The Maintenance Act 99 of 1998 provides machinery intended to ensure the financial support of children by those who have responsibility for them. The Social Assistance Act 59 of 1992 provides for limited state assistance to certain categories of children in impoverished families, in the form of the Care Dependency Grant for children with severe disabilities, and the Child Support Grant for children under seven years. The state Old Age Pension and the Disability Grant, while not primarily directed to children, are in fact used to assist with the support of large numbers of the country's poorest children.<sup>38</sup> Section 5 of the Act provides for the payment of grants to NGO's by provincial welfare departments. These organisations between them carry out a range of supportive and preventive services.<sup>39</sup> The Act may undergo change in the future arising from the work of the Committee of Inquiry which was appointed by the Minister in March 2000 to conduct a comprehensive investigation with a view to presenting options for 'an integrated and comprehensive social security system'.<sup>40</sup>

Some additional provisions which are intended or have the potential to prevent the abuse and neglect of children are as follows:

- The Mediation in Certain Divorce Matters Act 24 of 1987 enables a court to call on the Family Advocate's Office to assist in the reaching of decisions, where possible through mediation, regarding custody and access in contested divorces and also in disputes arising

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— **Report of the Lund Committee on Child and Family Support**, Department of Welfare, 1996, 6-7.

— Formal protective services by NGO's are also subsidised in terms of this provision.

— See statement by Dr Zola Skweyiya, Minister for Social Development, on the appointment of a ministerial Committee of Inquiry into Social Security. The Minister for Social Development has mooted the idea of a Basic Income Grant for impoverished persons. Such a measure would hold vast potential for the strengthening of families, and the amelioration of conditions which place children at risk of neglect and abuse. It would also facilitate reunification in cases where children at present cannot be returned home from statutory care due to their families being destitute.

after divorce.<sup>41</sup>

- Section 10 of the Child Care Act 73 of 1984 provides that children under seven years who are living by informal arrangement in the care of persons who are not members of their immediate or extended families must be brought to the attention of the commissioner of child welfare, and that his or her permission is required for such arrangements to continue. The intention here is, in part, to prevent trafficking of young children and undesirable adoptive placements.
- Section 30 of the same Act requires that 'places of care' – i.e. formal and informal preschool, afternoon and holiday care facilities catering for more than six children - be registered with the Department of Social Development, and makes them subject to inspection and other controls. Shelters for children in especially difficult circumstances, which usually provide voluntary rather than court-ordered care for children on the streets, are also covered by section 30.

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41 The Family Advocate's functions have since been expanded to include assistance to the High Court in disputes in matters where an unmarried father applies for custody, access or guardianship in terms of the Rights of Natural Fathers of Children Born Out of Wedlock Act 86 of 1997.

- The Northern Province Initiation Schools Act 6 of 1996 requires those holding circumcision schools, for either male or female initiates, to obtain permits and adhere to whatever conditions may be specified. The Act also empowers the Premier to issue regulations governing the operations of such schools, and every SA Police Service member is authorised to rescue a person who has been abducted or forcefully taken to a school.<sup>42</sup>

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42 See also the Application of Health Standards in Traditional Circumcision Act, 2001 (Eastern Cape) which provides that there must be proof in the form of a birth certificate that the prospective initiate is at least 18 years old (Annexure A of the Schedule) and requires parental consent of a prospective initiate who is under 21 years of age or who has not acquired adulthood (section 7(1)).

- The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 prohibits unfair discrimination on the ground of gender. Section 8 designates *inter alia* the following as forms of such discrimination: '(a) gender-based violence; (b) female genital mutilation; .... (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the dignity and well-being of the girl child; . . . (f) discrimination on the grounds of pregnancy'. The Act creates an 'equality court' to which complaints of infringements must be directed, and details a large number of options open to this court if discrimination is deemed to have taken place. These include e.g. restraining orders; orders of compliance; orders of payment for loss, damages or suffering; and referral of matters to the Director of Public Prosecutions.<sup>43</sup> In terms of section 28 the State is obliged, *inter alia*, to audit laws, enact appropriate laws and develop action plans with the aim of eliminating discrimination on the grounds of race, gender and disability.
  
- Corporal punishment has been declared unconstitutional in state-controlled and regulated institutions, including schools.<sup>44</sup>

### 10.2.7.3 Criminal justice measures

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– Sections 16 and 21.

44 See the Abolition of Corporal Punishment Act 33 of 1997; section 10 of the South African Schools Act 84 of 1996.



There is extensive provision for the prosecution of perpetrators of child abuse via the criminal justice system. Many forms of child abuse amount to common law crimes, e.g. homicide, assault, indecent assault, rape and incest. A range of statutes also prohibit specific abusive practices. In terms of section 50 of the Child Care Act, ill-treatment, or the permitting of ill-treatment, and abandonment of a child by a parent or guardian are criminal offences. Section 50A criminalises anyone involved in the commercial sexual exploitation of a child, including persons who own, occupy or manage property on which this takes place. Certain other forms of sexual behaviour with children are crimes in terms of the Sexual Offences Act 23 of 1957. This Act also defines the legal age of consent to sex, i.e. 16 for heterosexual and 19 for homosexual acts.<sup>45</sup> The Film and Publications Act 65 of 1996 prohibits the production, possession and distribution of pornographic material involving children, and the exposure of children to pornographic material. Section 45 of the Liquor Act 27 of 1989 prevents the sale of alcohol to persons under eighteen years and obliges holders of licences to exclude children from certain areas where liquor is being sold. Section 4 of the Tobacco Products Control Act 83 of 1993, as recently amended, prevents the sale or supply of any tobacco product to a person aged less than 16 years.<sup>46</sup> Section 43(1) of the Basic Conditions of Employment Act prohibits the employment of children under the age of 15, subject to the possibility of regulated work in terms of a sectoral determination, which may be negotiated for purposes of allowing children to be employed in advertising, sports, artistic or cultural activities.<sup>47</sup> Section 53(2) prohibits the employment of children of any age in work which places their normal development at risk.

The Criminal Procedure Act 51 of 1977 sets out criminal justice processes to be conducted in cases of alleged abuse of children. The amended section 153 of the Act provides for various protective mechanisms to reduce trauma for child witnesses in criminal court proceedings. Children's court proceedings aimed at the protection of the child may be initiated independently of, or in tandem with, criminal justice processes.

#### 10.2.7.4 **Additional and cross-cutting provisions**

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– This discriminatory situation is being addressed by the SA Law Commission Project Committee on Sexual Offences.

– As of 1 October 2000 persons selling tobacco products to children under sixteen years will be liable to a fine of R10 000.

– Sectoral determinations for any other type of employment are excluded by section 55(6) of the Basic Conditions of Employment Act. However, this limitation will fall away if the controversial Basic Conditions of Employment Amendment Bill is passed in the form as gazetted on 27 July 2000.

Both the criminal law and the Child Care Act (in the case of offences by family members) allow for activities designed to promote the rehabilitation of offenders and abused children, although these are not clearly spelled out in either case, and there is a dearth of legal mechanisms to monitor treatment which is carried out in terms of a court order. Recent policy initiatives, including the Victim Empowerment Programme (VEP) within the National Crime Prevention Strategy (NCPS), and the National Strategy on Child Abuse and Neglect (NSCAN), have helped to promote inter-sectoral cooperation in bringing together criminal justice, medico-legal, educational, social service and corrective approaches in dealing with crimes against children.

#### 10.2.7.5 **Associated policy considerations**

The **White Paper for Social Welfare** emphasises strategies which are ‘... family-centred, community-based and developmental’.<sup>48</sup> The ‘family preservation’ approach has been successfully utilised in pilot projects generated by the IMC.<sup>49</sup> ‘Children, youth and families’ make up one of the target groups specifically designated in the Department of Social Development’s **Financing Policy**.<sup>50</sup>

#### 10.2.8 **Deficiencies in the existing system**

From the above it is evident that the current legal system allows for a range of options to be exercised on behalf of children who have been subjected to, or are at risk of, abuse or neglect. All four types of approach mentioned in 10.2.3 above and all the protective mechanisms described in 10.2.4 above are in evidence in our legal system and policy framework, with the exception of the option of voluntary care agreements. However, practitioners, community groups and children canvassed by the Commission have all pointed out inadequacies in the manner in which the different elements of the protective system work in practice, both separately and together.

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– Ministry for Welfare and Population Development **White Paper for Social Welfare**, published as General Notice no. 1108 of 1997 in Government Gazette vol. 396 (18166), 57.

– Mbambo ‘Family preservation: The South African experience’, paper prepared for the Project Committee on the Review of the Child Care Act, 1998.

– Department of Welfare **Financing Policy – Developmental Social Welfare Services**, published as General Notice no. 463 of 1999 in Government Gazette vol. 405 (1988).

Central to the problems currently experienced in the South African CPS system are deficiencies in the following areas:

- scope, relevance and adaptability to specific needs;
- governance and coordination; and
- balance and provisioning.

In addition the Child Care Act, 1983, does not address itself to some specific child protection issues, notably corporal punishment and harmful cultural practices.

#### 10.2.8.1 **Deficiencies in scope, relevance and adaptability to specific needs**

In discussions over the years about the need for reform of legislation dealing with children, the failure of the Child Care Act to address the needs of the broad masses of South African children has been a recurring theme.<sup>51</sup> Legislation has tended to address itself to problems of domestic abuse and neglect in a relatively small proportion of children who have some access to formal protective systems. Children affected by acute poverty and various forms of societal abuse have to a large extent fallen through the net. As will be discussed in more detail in Chapter 13, existing legislation has been found lacking in responsiveness to the problems of most categories of 'children in especially difficult circumstances'.

Problems in the functioning of the courts are addressed in Chapter 23. There have been many calls for an approach which does not fragment measures to protect children between judicial proceedings of different kinds, which minimises secondary trauma and which creates synchronicity between the various civil and criminal processes involved.<sup>52</sup>

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— South Africa's child protection system shares some features which are common in developing countries which have inherited their child welfare systems from past colonial administrations. These systems, applied out of their original First World context, have tended to be unbalanced, emphasising statutory protective measures without effectively addressing the basic needs of children (MacPherson, S **Five Hundred Million Children – Poverty and Child Welfare in the Third World** Brighton: Wheatsheaf Books 1987, 144).

52 For example, the current inability of the children's court to order a perpetrator out of the child's home, to decide on issues of a child's residence or contact with one or other parent, or to issue a maintenance order are impediments to the effective functioning of the system. The lack of provision for an inquisitorial approach towards offenders, especially in intra-familial abuse, tends both to penalise the child and to allow many offenders to evade justice. The incompatibility of the criminal court system with the needs of child victims, and its inability to accommodate to the dynamics of child abuse are further difficulties. Especially in incest, delayed disclosure, conflicting statements and subsequent retraction are typical due to the nature of the pressures which the

Attention has also frequently been called to the lack of adaptability of the courts and the back-up resources used by them, to the needs of young people in different situations. Limited options may result in a 'one size fits all' approach.<sup>53</sup> For example, the use of state places of safety as court-ordered reception centres both for young people charged with violent crimes, and for those who are destitute or require protection from abuse or neglect, is a long-standing source of concern. This practice exposes children both to peer abuse and to criminal influences. While allowing for the considerable overlap which exists between the two groups, many practitioners feel that there is a need for young people charged with crimes of violence to be accommodated in secure care facilities designed specifically for them.

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perpetrator brings to bear: R Summit 'The Child Sexual Abuse Accommodation Syndrome' (1983) **Child Abuse and Neglect** 177-193. The lack of provision for restorative justice is a further defect.

— To paraphrase Waldfogel – see 10.2.6.1 above.

Similarly there is a lack of provision for children who have been abused or neglected and also have special needs, e.g. due to disability.<sup>54</sup> Not only do protective services including the court system tend to be inaccessible to them, but they often fall through the cracks in the system. Conventional care facilities tend to exclude them or to be without the facilities they require, and available forms of specialised care provision may be too costly. There is also no provision for children found to be 'in need of care' to be placed in care options which are licensed in terms of Acts other than the Child Care Act – e.g. facilities providing special care and education for deaf children or those with cerebral palsy.

#### 10.2.8.2 **Deficiencies in governance and coordination**

The National Committee on Child Abuse and Neglect (NCCAN), an inter-sectoral body convened by the national Department of Social Development, in 1996 identified the following problems:

South Africa has no clear strategy (in relation to child abuse and neglect). There has been no analysis of what services are required, what such services cost to deliver effectively, or who should deliver them. In the rural areas in particular there is a lack of the basic resources required to ensure the protection of children. All over the country, existing services are fragmented and under-resourced ... . There is no systematic process for ensuring that practitioners in the various disciplines which must deal with child abuse and neglect are equipped with the necessary skills, and no resource allocation for the required training. There are no workload norms, standard guidelines or management protocols in place for dealing with abused or neglected children and their families or with perpetrators, and hence no guarantee that a child entering the system will be dealt with in terms of acceptable procedures or protected from further harm ... . No strategy is in place for primary prevention .... The child protection system in its present form is so inadequate that many children referred for help are at risk of being worse off after referral than before.<sup>55</sup>

The NCCAN proposed an inter-sectoral National Strategy on Child Abuse and Neglect (NSCAN) as a component of the NPA. The status of the NSCAN remained uncertain for the next few years, but it is now under consideration by state departments with core child protection responsibilities, under the leadership of the Department of Social Development. Meanwhile the NCCAN has, with the aid of sponsorship from various sources, succeeded in facilitating the establishment of provincial child protection coordinating structures and provincial protocols to guide the management of abuse and

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<sup>54</sup> See further 13.5 below.

<sup>55</sup> NCCAN **National Strategy on Child Abuse and Neglect**, 1996, 2.

neglect, and has begun to address some aspects of training and reporting. But the NCCAN emphasises that these efforts are unsustainable without comprehensive attention to all aspects of the CPS system, by all the relevant sectors of government in partnership with civil society.<sup>56</sup>

Some problems in the implementation of child protective legislation have to do with the fragmentation of the protective system, and particularly of the welfare sector, which is charged with many of the essential protective tasks either mandated or facilitated by legislation. It can be argued that formal child protective services, more than many other types of social service, require a measure of centralised planning, standard-setting and control, given that they involve far-reaching and potentially hazardous interventions. In most countries the implementation of formal protective interventions is the responsibility either of government directly, or of a very narrowly defined group of structures licensed and contracted by government for this purpose. In South Africa a host of NGO's and, of late, even some private individuals share in the responsibility for these actions.

In this regard, it must be pointed out that many of the key protective tasks set out in the Child Care Act have to be carried out by a social worker, defined in section 1 of the Act as 'a person registered as a social worker under the Social Work Act, 1978 ... and who ... is in the service of a state department or a provincial administration or a prescribed welfare organisation'. A 'prescribed' welfare organisation has in the past been normally understood to be one which is registered as such with the Department of Social Development. However the question of which bodies qualify to meet this criterion has become unclear in the course of recent amendments to the Child Care Act, and the shift of the registration process from the National Welfare Act of 1978 to the Non-Profit Organisations Act 71 of 1997. Not only NGO's but also social workers in private practice are now being permitted by some courts to initiate Children's Court proceedings, by being granted the status of 'authorised officers' as provided for in section 1. This raises questions as to the impartiality of the relevant investigations, given that fees are paid directly by one or other interested party in the case to the person making key recommendations to the court.

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– NCCAN **Proposed National Strategy on Child Abuse and Neglect**, Introduction to the Revised Version draft as at 19 July 2000).

The NCCAN states as follows:

Investigation of and intervention into situations of child abuse and neglect ... require the backing of the law and the assertion of authority, or at least the possibility of such measures being brought to bear. Such activities often involve the use of sanctions which limit the freedom of the individual and encroach on the privacy of the family and/or other parties. They are hence essentially functions of government. Should government delegate ... these functions to other parties, it remains obligated to ensure that such parties are adequately equipped to carry out the tasks in question, and that the delegated functions remain connected to a coherent and effective overall system.<sup>57</sup>

It has been suggested that the seeds of the current fragmentation in service delivery to children and families, and hence in the implementation of child protective legislation, are to be found in the history of social service development in South Africa. From the 1930's onward, official policy was that the government should play as limited a role in welfare as possible, leaving the individual, the family, religious groups and the community to carry the central responsibility for the wellbeing of people. An early choice was made for government to subsidise approved community groups to undertake services rather than delivering them directly.<sup>58</sup>

The lack of direct accountability by the government for the implementation of child protection laws has created unevenness in service delivery and unpredictability in the nature and quality of the interventions carried out by CPS personnel. While section 28(1) of the Constitution sets out the child's right to protection from abuse, neglect and exploitation, and the Child Care Act and other

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57 NCCAN **National Strategy on Child Abuse and Neglect**, 1996, 8. The Department of Social Welfare in New Zealand makes the same point in listing the following direct social service tasks of government: 'Investigation of serious child abuse and the exercise of powers to remove children from their families (a regulatory and coercive function of government); the management of statutory processes in care and protection and youth justice (a regulatory function); ensuring that guardianship and custody responsibilities of (the) Director-General are carried out and met (a statutory responsibility) ...': **Strategic Directions**, Post-election Briefing Paper, Wellington, 1996, p. 47.

— Under apartheid, the subsidisation of services was used to promote the racial separation of services. Their division according to language, religion and culture was also actively encouraged. 'Hence an extraordinarily fragmented ... system developed, as the availability of services was dependent upon community initiative from and for particular groups, and whether or not they could ... obtain state and/or private sector support, rather than being based on any plan to ensure that everyone had access to the necessary services. Levels of state financing varied enormously according to the race of those served ... the result has been a proliferation of very unevenly spread and unequally resourced organisations, managed according to different principles and belief systems, which share with government and between themselves the responsibility for the implementation, inter alia, of the laws affecting children' (SA Law Commission Issue Paper 13, 49). On the positive side, the NCCAN **National Strategy on Child Abuse and Neglect**, 1996, p. 8 notes that a feature of the present scenario is 'a particular richness of community involvement which should be valued and nurtured'. But services which are needed to make up the range of preventive and protective options in any given region are often missing. There is no form of structural provision to ensure that every child in the country who is in need thereof, has access to CPS.

statutes provide for intervention in cases where this right is being infringed, there is no explicit legal obligation for government to ensure that these provisions are carried out, or to ensure that resources are set aside for this purpose.

The lack of a coherent allocation of responsibilities also makes it difficult to set up effective systems for the operation of CPS. The introduction of standardised risk assessment tools and other assessment procedures, the implementation of permanency planning, the training of practitioners, and the monitoring of norms and standards are only some of the tasks which become difficult if not impossible in an excessively fragmented system. Although provincial and in some cases local protocols have been drawn up to guide multi-disciplinary intervention, these are informal agreements without legal or fiscal backing.

An additional problem for the management and delivery of both preventive and protective services in South Africa has been the lack of clarity as to the role of local government. As shown in the previous Chapter,<sup>59</sup> the Constitution provides the legislative basis for service provision for children by local authorities. However, there is a lack of specific provision for the relevant duties of local authorities in additional legislation. The Child Care Act makes little mention of such duties.<sup>60</sup> In many other parts of the world, as shown elsewhere,<sup>61</sup> local government is required to play a pivotal

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59 See 9.7.2 above.

– Section 56(2) of the Child Care Act provides that ‘a local authority may out of its own funds make grants to any association of persons working in its area for the protection, care or control of children’. Regulation 30(2)(b) requires that any children’s home, place of care or shelter must show that it adheres to the building and health standards of the relevant local authorities as a condition of registration. These are significant but very limited roles.

61 See 9.3 above and 10.2.9.2 below.



role in child protection.

#### 10.2.8.3 **Deficiencies in provisioning for and balancing of components**

While South Africa's child protection laws have followed the interventionist pattern set by Britain and North America, they are not backed by the well-developed human service systems which are in place in those countries; in addition South Africa does not have the benefit of the safety nets against absolute poverty which are in place in the First World. Child abuse both helps to generate and is facilitated by poverty, and the CPS system has to take this into account in order to be effective. All components of CPS are underfinanced, and there have been calls for all the relevant government departments (Social Development, Safety and Security, Justice, Education, Health, and Correctional Services) to budget specifically for their child protection functions.<sup>62</sup> The present high level of dependence on NGO's for delivery of CPS results in very uneven levels of service. Voluntary initiative and expertise, and the level of access which specific voluntary service-providers have to resources, become the deciding factors in service delivery in any given community. There is no assurance of state funding for protective services.

Meanwhile, there has been in recent years been an escalation of cases of reported child abuse. The SAPS specialist units dealing with child abuse alone report having dealt with more than 65000 cases of crime against children in 2000 - a doubling in incidence since 1998. This figure does not account for cases dealt with by non-specialised officers in the SAPS or for those, believed to be the vast majority, which were not reported to the police.

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— NCCAN **National Strategy on Child Abuse and Neglect**, 1996, p. 49.

The **Financing Policy: Developmental Social Welfare**<sup>63</sup> issued by the Department of Social Development designates services to 'children, youth and families' as a target area for financing, and gives priority for funding to prevention and early intervention. The intention is that state financing will be shifted within the next few years to reverse the current situation, in which most funding goes into 'Level 3' services – i.e. statutory interventions and the provision of court-ordered substitute care for children, somewhat less to 'Level 2' or early intervention, and least to 'Level 1', i.e. primary prevention. A concern voiced by NGO's is that none of the levels can be effectively addressed within the very small portion of the social development budget which is allocated to services.<sup>64</sup> Ninety per cent of this budget is spent on social security and 10 per cent on administration and social services. In some provinces expenditure on services is even less - e.g. the Northern Cape in 2000 spent 94, 7% of its social development budget on social security.<sup>65</sup> Hence children can neither be prevented from entering the statutory service and care level, nor be properly protected when they do. It has also been noted that the AIDS pandemic is set to create dependence and destitution on an unprecedented scale, driving more and more people including children into every available form of care.

The **Financing Policy** further provides for the phasing out of the 'per capita' grant for children in children's homes, and for these facilities to be subsidised on the basis of their programmes. This, it has been pointed out, makes these services vulnerable to the prevailing budgetary and political pressures on any given provincial welfare department at any given time, as programme funding is never guaranteed. If a provincial welfare department has the option of refusing to provide a basic level of support to children cared for by court order in a registered children's facility, the risk of

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— Government Gazette vol 405 (19888), Notice 463 of 1999, 26 March 1999.

64 While options which effectively prevent child abuse or provide successful early intervention are indeed less costly than long-term statutory care, their costs should not be underestimated. If too little is invested in them, they will not have the required impact. Indeed, superficial approaches in which corners are cut to keep costs low may heighten the dangers to such children. Mbambo 'Family preservation: The South African experience', p. 8 points out that, while family preservation as emphasised by the IMC makes for substantial savings in the long term, it requires substantial investment in the short term in order to be effective. The Johannesburg Child Welfare Society has expressed the opinion that the Department's financing policy lacks essential anchors, in that there has been no systematic analysis of the actual scope of the responsibilities of the welfare sector; neither has there been any proper costing of the tasks to be carried out, or attention paid to where the necessary funds are to come from. Further, there has been no clarification of the respective responsibilities of state and non-government structures, and there are no systems in place for the formal contracting out of legally mandated social services, including child protection services. At present these are supported, on a purely discretionary basis, with partial funding which is unrelated to the actual expenditure involved in effective delivery.

65 Cassiem et al **Child Poverty and the Budget 2000**, IDASA, 128, 135.

deteriorating and even abusive standards of care in that facility is arguably increased.<sup>66</sup>

In the recent Constitutional Court judgement in the **Grootboom** case,<sup>67</sup> the point was made that where parental care fails, the state has a clear obligation to provide care for children.<sup>68</sup> Hence the question arises as to whether the state can both shift resources away from statutory care and carry out its constitutional obligations, unless there is a significant increase in provisioning for services to families and children at all levels.

As regards the balance between formal protective legislation and other types of legal approach, an issue which is regularly raised is the lack of provision in the Social Assistance Act for financial aid to impoverished children aged seven or more, due to which children enter the protective system unnecessarily. The NCCAN refers *inter alia* to a lack of social service and health care back-up resources for the effective implementation of court orders. This includes provision for the effective delivery of follow-up services aimed at e.g. treatment of traumatised children, family reunification and the rehabilitation of perpetrators. The result is a tendency for CPS activities to be excessively focussed on the initial stages of intervention, rather than on the services which need to follow if intervention is to succeed in the long run.<sup>69</sup> A need for a stronger rehabilitative dimension in criminal justice processes is also raised by many practitioners.

#### 10.2.8.4 **Deficiencies in coverage of harmful or potentially harmful social and cultural**

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– JCWS **Comments on Financing Policy: Developmental Social Welfare Services**, 1999, p. 4.

67 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC).

68 For a discussion of this case, see 3.4 above.

– NCCAN **National Strategy on Child Abuse and Neglect**, 1996, 9-15.

## practices

### ◦ *Harmful social and cultural practices*

The Commission has made specific provision in formulating the rights and responsibilities of children for protecting children from harmful social and cultural practices.<sup>70</sup> As such, it will be recalled, children will have the right to be protected from harmful social and cultural practices which affects the welfare, health or dignity of children. The Commission further recommended that child-marriages and child betrothals and female circumcision be prohibited. It must also be noted that African customary law affecting children is dealt with in detail in Chapter 21 below.

One cultural practice which has recently been giving rise to public concern is (male) circumcision. From media reports there appears to be an upsurge in the number of boys and young men who suffer severe infection, have to undergo drastic and traumatic surgery or die, due to this procedure being carried out ineptly or with unsterile instruments. The Northern Province Circumcision Schools Act of 1996 and the Application of Health Standards in Traditional Circumcision Act, 2001 (Eastern Cape)<sup>71</sup> offer some protection in the provinces in question; however there are no similar provisions in other provinces.

The Northern Province Act covers 'circumcision' of girls as well as boys. However, female genital mutilation bears minimal if any relation to male circumcision, and is a source of extreme, often lifelong, physical and mental health problems for girls women in many parts of the world.<sup>72</sup> There has to date been little evidence of this practice in South Africa, apart from muted rumours about

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70 See 5.4 above.

71 The Act was passed on 25 October 2001. See also the Eastern Cape Provincial Notice 24 of 2001 in ECP Gazette No 761 of 3 July 2001.

— Nahid Toubia **Female Genital Mutilation: A Call for Global Action** 9; A I Ballal **Psychological Effects of Female Circumcision** New York: Vantage Press 1992 4 - 6; S A Law Commission **Discussion Paper 85: Sexual Offences: The Substantive Law**, par. 4.3.

customs among some groups in Northern Province. However, it is liable to become an increasing problem given the influx of immigrants.

Virginity testing appears to be on the increase in some parts of the country. Proponents see this practice as a means of restoring traditional values, and preventing early pregnancy and the spread of HIV. Opponents point out that virginity testing traditionally involved an individualised examination by a close female relative, who was also responsible for providing education regarding sexuality and related matters. This was in marked contrast to the current practice of mass inspections by someone who may be a stranger, with ulterior motives including a desire for financial gain. Also, the condition of the hymen does not reliably indicate sexual virginity. Testing creates the basis for stigmatisation of girls who do not pass, many of whom are likely to be sexual abuse victims. Further, this practice negates preventive messages about the right to body privacy, it can spread infections, and - given the myth that sex with a virgin cures AIDS - it is likely to lead to girls being targeted for abuse.<sup>73</sup>

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 prohibits female genital mutilation, and provides the basis for limited intervention in other gender-based practices.<sup>74</sup> However, it lacks direct provision for criminal sanctions or for specific protective procedures designed to meet the needs of children.

◦ *Child betrothals and child marriages*

In terms of section 26(1) of the Marriage Act 25 of 1961 no boy under the age of 18 years and no girl under the age of 15 years shall be capable of contracting a valid marriage except with the

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– Mkhize, P 'The Price of Chastity', **Sowetan Sunday World**, 20 August 2000; Warby, V 'Virginity testing comes under fire', **The Star**, 24 August 2000.

– See 10.2.7.2 above.

written permission of the Minister (of Home Affairs) or an officer authorised thereto by him or her.<sup>75</sup>  
The Minister or the officer so authorised may grant such permission if he or she considers such marriage desirable.

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75 The S A Law Commission has recommended in its **Report on the Review of the Marriage Act 25 of 1961**, par. 2.20.9 that a uniform minimum age requirement for marriage of 18 years be set for boys and girls.

Section 24(1) of the Marriage Act 25 of 1961 stipulates that no marriage between parties of whom one or both are minors<sup>76</sup> shall be solemnised unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished in writing. However, notwithstanding anything to the contrary contained in any law or the common law a marriage between persons of whom one or both are minors shall not be void merely because the parents or guardian of the minor, or a commissioner for child welfare whose consent is by law required for the entering into of a marriage, did not consent to the marriage. Such marriages are voidable and may be dissolved by a competent court (the High Court) on the ground of want of consent upon application by a parent or guardian or by the minor before attaining majority or within three months thereafter.<sup>77</sup>

The Marriage Act 25 of 1961 also regulates the position when the consent of the parents or guardian cannot be obtained. In such circumstances, and provided the parent or guardian of the minor does not refuse to grant consent to the marriage, the commissioner of child welfare may in his or her discretion grant written consent to a minor to marry a specific person.<sup>78</sup> If the parent, guardian or commissioner refuses to consent to a marriage of a minor, such application may on application be granted by the High Court if the court is of the opinion that such refusal is without adequate reason and contrary to the interests of such minor.<sup>79</sup>

Both parties to an engagement must have the necessary capacity to act and a minor therefore requires the permission of his or her parents to become engaged. Due to the highly personal nature of an engagement the parents or guardian cannot conclude the engagement of a minor on his or her behalf.<sup>80</sup>

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76 A minor would be a person under the age of 21 years. Section 24(2) of the Marriage Act 25 of 1961 states that, for the purposes of section 24(1), a minor does not include a person who is under the age of 21 years and previously contracted a valid marriage which has been dissolved by death or divorce.

77 Section 24A. The court shall not grant an application unless it is satisfied that the dissolution of the marriage is in the interest of the minor. On the proprietary consequences of such marriages, see Van Heerden et al **Boberg's Law of Persons and the Family** (2<sup>nd</sup> edition) 841.

78 Section 25(1) of the Marriage Act 25 of 1961. See also **Ex parte Visick and another** 1968 (1) SA 151 (D &CLD).

79 Section 25(4) of the Marriage Act 25 of 1961. See also **C en 'n Ander v Van T** 1965 (2) SA 240 (O); **Allcock v Allcock and Another** 1969 (1) SA 427 (N); **Kruger v Fourie en 'n Ander** 1969 (4) SA 469 (O); **De Greeff v De Greeff en 'n Ander** 1982 (1) SA 882 (O); **Ward v Ward and Another** 1982 (4) SA 262 (D); **B v B and Another** 1983 (1) SA 496 (N).

80 D S P Cronjé **The South African Law of Persons and Family Law** (third edition) 139.

◦ *Corporal punishment*

South African courts have in recent years made successive rulings outlawing corporal punishment of adults and children in various contexts, with private schools being the most recent category to be brought within the ambit of the prohibition.<sup>81</sup> While moderate physical punishment by parents has traditionally been permitted, it is not clear whether this form of discipline would now stand up to legal challenge.<sup>82</sup> The Child Care Act gives no clarity in this regard.

### 10.2.9 **Comparative review of systems in other countries**

It is difficult to assess child protective systems elsewhere in the world simply by examining the relevant legislation, as the shape of these systems will have at least as much to do with associated policies and resourcing as to the laws in question. Legislation which is impressive on paper may remain unused in practice due to a lack of infrastructure and budgetary commitment. Within these limitations, an attempt is made in the overview which follows to examine different legal approaches for the ways in which they affect the overall structure and emphasis of child protective systems. At stake here are e.g. the degree of state 'protectionism' or 'interventionism' which are reflected in the laws, and the type of balance which appears to have been sought between the elements mentioned in 10.2.3 above. This includes ways in which countries have sought to attend specifically to problems of poverty and to children in especially difficult circumstances in their protective

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– **Christian Education South Africa v Minister of Education** 2000 (4) SA 757 (CC). See also J M T Labuschagne 'Delegasie van ouerlike tugbevoegdheid aan onderwyser: *Christian Education SA v Minister of Education* 1999 4 SA 1092 (SECLD)' 2000 **Obiter** 457, section 10 of the South African Schools Act 84 of 1996 and the Abolition of Corporal Punishment Act 33 of 1997.

82 See also J M T Labuschagne 'Kindermishandeling: 'n Juridiese perspektief' 1976 **De Jure** 189 at 194 - 195; 'Ouerlike geweldsaanwending as skending van die kind se reg op biopsigiese outonomie' 1996 **TSAR** 577; 'Tugtiging van kinders: 'n Strafregtelik-prinsipiële evaluasie' 1999 **De Jure** 23; 'Is lyfstraf in skole bestand teen 'n Akte van Menseregte?' 1993 **Obiter** 190; J Heaton 'Die tugbevoegdheid ten opsigte van kinders' 1987 **THRHR** 398; 'Aspekte rakende lyfstraf wat in skole toegedien word in stryd met die opdrag van 'n ouer' 1987 **SASK** 52.



legislation. Also of interest are the assigning of legal responsibility for child protection to government and other role players, and mechanisms to ensure coordination and effective implementation of services. Of special relevance are mechanisms to ensure or facilitate resourcing.

However, early marriage and betrothal is a practice which affects almost every country in Africa. It has the effect of defeating the population policy programmes of most African countries because of the ultimate effect it has of causing early motherhood. Apart from the African Charter on the Rights and Welfare of the Child and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>83</sup> there is no (international) guidance on this practice. On a comparative perspective, therefore, limited reference in child care legislation is found to child betrothals and marriages.<sup>84</sup>

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83 CEDAW states in clear terms that the 'betrothal and the marriage of a child shall have no legal effect and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory'.

84 Section 14 of Ghana's Children's Act, 1998, for instance, reads as follows: '(1) No person shall force a child - (a) to be betrothed; (b) to be the subject of a dowry transaction; or (c) to be married. (2) The minimum age of marriage of whatever kind shall be eighteen years'. See also Human Rights Watch Kenya: Spare the child: Corporal punishment in Kenyan Schools September 1999, also available at : <http://www.hrw.org/hrw/reports/1999/kenya/index.htm> .

### 10.2.9.1 **Grounds for intervention by the state**

One factor which, in combination with others, points to the level of interventionism of a protective system is the range of situations in which the state is legally empowered to take criminal and/or protective action on behalf of a child.<sup>85</sup>

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– Others would include the level of compulsion to report abuse and, in particular, the level of resourcing which is in place for intervention.

An approach taken by some countries has been to incorporate the rights of children as defined in the CRC and/or other instruments and to make infringements of any of these a basis for action. For example, Brazil's Statute of the Child and Adolescent (1990) defines a wide range of rights of the child or young person.<sup>86</sup> Protective measures then become applicable 'whenever the rights recognised in this law are threatened or violated', whether this is by reason of 'act or omission of society or State', 'fault, omission or abuse on the part of parents or guardian', or the conduct of the children themselves.<sup>87</sup> The 1998 draft of the Kenyan Children Bill similarly outlines the rights of children,<sup>88</sup> including socio-economic rights and rights relating to disability, using both the CRC and the African Charter on the Rights and Welfare of the Child as a basis. Anyone believing that one of the rights of a child is being or is likely to be infringed is entitled to approach the High Court for redress. Persons convicted of infringing any of these rights are liable to imprisonment or a fine or both.<sup>89</sup> In Ghana, in terms of sub-part 1 of the Children's Act of 1998, any person contravening the rights of a child, including a parent who fails to carry out specified duties and responsibilities, is liable to incur criminal sanctions. In Uganda, section 12 of the Children Statute of 1996 provides for limited intervention in any infringement of the rights of a child, or failure of a parent, guardian or custodian to carry out his or her responsibilities, by a local government official or, where this does not succeed, the local Village Resistance Committee Court, with the aim of getting those concerned to provide properly for the child.

Even where all contraventions of child rights are actionable in one or other way, child protective legislation usually also includes a narrower range of grounds for protective intervention leading to the issuing of supervision or care orders.<sup>90</sup> Most countries set out grounds for state intervention to protect individual children which are similar to those set out in section 14(4) of the South African Child Care Act, 1983.<sup>91</sup> The following are examples of criteria introduced in African states to cover situations of poverty, abusive cultural practises or especially difficult circumstances: section 114(1) of the 1998 draft of the Kenyan Children Bill includes being destitute or a vagrant; being found

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– These are grouped under the following headings: the Right to Life and Health; the Right to Freedom, Respect and Dignity; the Right to Family and Community Life; the Right to Education, Culture, Sports Practice and Leisure; and the Right to Vocational Training and Protection at Work.

– Article 98.

– Sections 3-17.

– Sections 18 –19.

– This applies in e.g. the Ghanaian and Ugandan statutes and the Kenyan Bill.

– See 6.4.3 and 10.2.7.1 above.

begging or receiving alms; being the child of a parent who has been imprisoned; being prevented from receiving education; being subjected or likely to be subjected to 'female genital mutilation or early marriage or to customs and practices prejudicial to her life, education and health'; being exposed to domestic violence; being pregnant; being terminally ill or having a terminally ill parent; being disabled and confined or otherwise ill-treated; and being displaced due to 'war, civil disturbances or natural disasters'. In Ghana, section 18(1) of the Children's Act of 1998 further includes being a victim or attempted victim of slave-dealing, acting in a manner indicative of soliciting; being involved in a major criminal offence while under the age of criminal liability, or being 'otherwise exposed to physical or moral danger'.<sup>92</sup>

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92 Section 18(1)(n).

While in several African statutes there is an effort specifically to cover children affected by poverty, in some First World countries there is detailed attention to psychological factors and family relationships. For example, Nova Scotia, Canada, provides for intervention where the child has suffered emotional harm, and a parent or guardian does not provide for appropriate remedial services.<sup>93</sup> New South Wales refers to situations in which the child's basic physical or psychological needs 'are not being met or are at risk of not being met', and where 'a parent or other caregiver has behaved in such a way towards the child or young person that ... (he or she) .... has suffered or is at risk of suffering serious psychological harm'.<sup>94</sup> Emotional abuse is a criminal offence in 24 American states.<sup>95</sup> New Zealand includes the impairment of a child's ability to form an attachment to a caregiver due to frequent periods of being in the charge of someone else, and 'serious differences' between the child and his or her caregivers, or between the caregivers themselves, which are detrimental to the child's wellbeing.<sup>96</sup> The Australian Capital Territory<sup>97</sup> likewise includes relationship breakdown between the child and his or her parent or guardian.

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— Children and Family Services Act, 1996, section 22(2)(f).

— Child and Young Persons (Care and Protection) Act 157 of 1998.

— Such abuse is sometimes very broadly framed. The relevant statute in New Jersey, e.g., refers to '... inflicting upon a child unnecessary suffering or pain, whether mental or physical....'. [N.J. Stat. Ann. 9:6-1 (West Supp.1998)].

— Children, Young Persons and their Families Act, 1989, sections 14(1)(c) & (i), unofficial consolidated version, revised 1995.

97 Children's Services Act, 1986.

There is wide variation in levels of state intervention in the area of corporal punishment. The growing international trend towards the outlawing of corporal punishment began in Sweden in 1979 with an amendment to the Parenthood and Guardianship code in which it is stated: 'Children ... may not be subjected to corporal punishment or any other humiliating treatment'.<sup>98</sup> In the view of the Swedish organisation Rätts Barnen, 'corporal punishment violates the human rights of children to physical integrity and human dignity' and serves to breed violence.<sup>99</sup> This practice is now unlawful throughout Scandinavia and also in Austria and Cyprus.<sup>100</sup> In contrast, in at least nine states in the USA, 'reasonable and moderate' corporal punishment is specifically excluded from definitions of child abuse for reporting purposes.<sup>101</sup> The 1998 draft of Kenya's Children Bill includes the following statement in a section on penalties for cruelty to and neglect of children: 'Nothing in this section shall affect the right of any parent or other person having the lawful control or charge of a child to administer reasonable punishment on him'.<sup>102</sup>

A further issue in terms of which differing legal approaches exist is that of a threshold for intervention. Countries differ in the extent to which they emphasise possibilities of risks of harm to a child, as opposed to actual evidence of harm. For instance, in Nova Scotia, Canada, a wide range of circumstances are listed as criteria for finding a child as being 'in need of protective services'. To each actual form of harm listed, 'substantial risk' of such harm is added as grounds for intervention.<sup>103</sup>

Although many countries use a list of criteria such as provided in section 14(4) of the South African Child Care Act as a basis for use of any of the available protective options, it is not uncommon for more specific conditions to be used to decide whether removal of a child from the home environment is warranted, as per the Wald recommendations mentioned in 10.2.5 above. In Uganda, the Child and Family Court may issue a care or supervision order only 'after all possible

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– Chapter 6, Introductory Provisions, section 1.

– Rätts Barnen 'The first anti-spanking law in the world', paper presented to the UN Committee on the Rights of the Child in Geneva in 1994.

– Freeman, M 'The Next Children's Act?' June 1998 **Family Law** 346.

– NCCANI 'Current Trends in Child Maltreatment Reporting Laws', Issue Paper, Child Abuse and Neglect States Statutes Series, September 1999.

– Section 122(5).

– Section 22(2), of the Children and Family Services Act 1990. See also section 31(1) of the New Brunswick Family Services Act, 1983; section 9, read with section 1 of the Lesotho Children's Protection Act, 1980

alternative methods of assisting the child have been tried without success' and the child is liable to suffer significant harm unless removed from the home, or there is a situation of severe and immediate danger requiring immediate removal.<sup>104</sup> England's Children Act of 1989 provides that an emergency protection order to remove a child or to keep him or her in a designated place can only be made if the court is satisfied that the child would otherwise experience 'significant harm'.<sup>105</sup> In New Zealand, a court may not make a declaration that a child is in need of care of protection 'unless satisfied that it is not practicable or appropriate to provide care or protection for the child or young person by any other means'.<sup>106</sup>

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104 Sections 28(2)(a) and (b).

— Section 44(1).

— Section 73 of the Children, Young Persons and their Families Act 1989, unofficial consolidated version.

The principle that the state should exercise the minimum possible intervention in the care provided by families to their children is a feature of protective legislation in some countries. In England, section 1(5) of the Children Act (1989) states: 'Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all'.<sup>107</sup>

#### 10.2.9.2 **Protective options in other systems**

##### ◦ *Care or supervision orders*

Most legislation internationally seems to provide for court-ordered support and monitoring of children at risk and their families, often termed 'supervision', within the community, and also for various types of *substitute care*, within family and or 'institutional' environments. Substitute care options are examined in depth elsewhere in this Discussion Paper.<sup>108</sup>

##### ◦ *Family Group Conferencing*

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– Similar provisions are set down in section 16(3) of the Children (Scotland) Act, and in section 72(1) of the 1998 draft of the Kenyan Children Bill. The Ugandan committee responsible for developing that country's protective statute opted for a 'non-interventionist' approach. This is designed to limit statutory protective interventions, and especially the removal of children from their homes, to situations in which these are urgently needed (see Parry-Williams, J 'Legal reform and children's rights in Uganda' (1993) *International Journal of Children's Rights*, 1 at 49-69).

108 See Chapters 17 and 18 on foster care and adoption, respectively, below.



Family Group Conferencing (FGC) has been provided for by statute in some jurisdictions.<sup>109</sup> Alternatively it may be incorporated within the framework of more traditional child protection strategies. One approach is for CPS professionals to set 'bottom lines' and parameters within which the family must operate for purposes of their plan.<sup>110</sup> The decision of the FGC may then be incorporated into a court order and made subject to monitoring processes. In New Zealand, except where there is believed to be a serious, immediate threat to the safety of a child, the seeking of a solution within the immediate or extended family is the first line of action. There a family group conference must be held before a court may issue a declaration that the child is in need of care or protection. Immediate and extended family members and other persons who are significant in the life of the child are among those who may be convened by a Care and Protection Coordinator. The latter's duties are clearly spelled out in law, together with those of the participants in the conference.<sup>111</sup> Where agreement is reached on the action to be taken in the interests of the young person concerned, and where the plan is considered by the Director-General of Social Welfare to be in keeping with specified principles relating to the child's wellbeing and safety, including the preservation where possible of the child's family and/or cultural ties, then the decisions of the family group conference are given legal recognition. They must be implemented by the police and other officials where appropriate. Where agreement cannot be reached between family members, or the plan does not receive the sanction of the child protection authorities, the matter is passed back to the referring social worker or police officer for appropriate further action. In Ireland, the Children Bill of 1999 also provides for family group conferencing as a component of the protection process.<sup>112</sup>

◦ *Removal or restraining of an offender/alleged offender*

Provision exists in some jurisdictions for a confirmed or alleged perpetrator of abuse to be restrained from having contact with a child, by the court with core responsibility for the protection of the child.<sup>113</sup> In Canada the provinces of Nova Scotia, New Brunswick, Manitoba, Saskatchewan,

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– See sections 20-38, Children, Young Persons and their Families Act 1989 (New Zealand); also the Children Bill 1999 (Republic of Ireland).

– University of Bath and University of Portsmouth, 'A Survey of Family Group Conferencing Across England and Wales'; Schmid, J, presentation to social workers and child care workers, Johannesburg, 2 February 2000.

– Section 20ff, Children, Young Persons and their Families Act 1989, unofficial consolidated version, revised 1995.

– In this context the term used is 'Family Welfare Conference' – see sections 7-15.

– In South Africa this can only be achieved via a separate judicial process, set out in the Domestic Violence Act 116 of 1998.

Alberta and British Columbia have such provision.<sup>114</sup> In the United Kingdom the relevant person may be excluded from residing with or having contact with the child, as a component of an interim care and protection order.<sup>115</sup>

- *Transfers of custody*

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— FPWGCFSI 'Child Welfare in Canada', Minister of Supply and Services Canada, 1994, 5ff, 53ff.

— Chapter 27, Schedule 6 of the Family Law Act 1996, amending the Children Act 1989.

In some jurisdictions, the relevant protective authority assumes the daily responsibility for the care of the child - e.g. in England the local authority is required to 'look after' specified categories of children in need. The local authority may take a child into its care, in which case it must provide accommodation and also 'maintain him in other respects ...'.<sup>116</sup> Most Canadian provinces have provision for children to be placed in the custody of the child protection authority. In contrast, the approach in Quebec is to 'assume responsibility for the child's situation, not the child'.<sup>117</sup>

◦ *Temporary removal of a child believed to be in immediate danger*

In a number of jurisdictions there is provision for the temporary removal of a child who is believed by welfare authorities to be in immediate danger, with ratification by a court or other judicial structure being required as soon as possible thereafter – e.g. Ghana,<sup>118</sup> Uganda,<sup>119</sup> Quebec.<sup>120</sup> Some require a court order even in this situation – e.g. England<sup>121</sup> and New Zealand.<sup>122</sup> In England, however, a police officer may remove a child for up to 72 hours where there would otherwise be a risk of 'significant harm'.<sup>123</sup> In Western Australia, where a child under six is admitted to hospital and there are grounds to suspect that he or she is in need of care or protection, the senior medical officer may order the detention of the child in the hospital for observation, assessment or treatment.<sup>124</sup>

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– Section 23 (1), Children Act 1989.

117 FPWGCFSI 'Child Welfare in Canada', Minister of Supply and Services Canada, 1994, 5ff. In terms of section 54 of that province's Youth Protection Act, the Director of Youth Protection may recommend a number of measures which the family may undertake voluntarily – e.g. that the child remains at home and the parents report periodically on the measures they have undertaken to correct identified problems; that certain persons refrain from contact with the child or vice versa; that the child be entrusted to other persons, or placed in foster care or a reception centre for a fixed period, that the child follow a course of training outside the school system; or that the child receive specified health care services. A voluntary agreement cannot last beyond a year. If such an agreement cannot be reached, or the year expires and the child is still believed to be at risk, the matter is referred to the Youth Court, which may impose any of the same measures or appoint the Director as permanent guardian.

– Section 19(3) of the Children's Act, 1998.

– Section 38(1) of the Children's Statute, 1996.

– FPWGCFSI 'Child Welfare in Canada', Minister of Supply and Services Canada, 1994, 69ff.

– Section 44 of the Children Act, 1989.

– Section 39 of the Children, Young Persons and their Families Act, 1989.

123 Section 46 of the Children Act, 1989.

– Section 29 of the Child Welfare Act, 1947.

◦ *Voluntary care agreements*

Some laws provide specific recognition for voluntary arrangements. In certain States in the USA and provinces in Canada the option exists of a 'temporary care agreement'. In Nova Scotia, Canada, for example, the care and supervision of the child may be transferred to an agency or the district office of the relevant government authority, with the agreement of the parents, for up to six months, renewable to a total period of not more than a year. This type of arrangement is typically used in cases of neglect rather than active abuse. A similar arrangement may be made in cases where the child has special needs – e.g. in the form of a disability or an emotional or behavioural problem.<sup>125</sup> New Zealand's Children, Young Persons and their Families Act of 1989 likewise provides for 'agreements for temporary care' for periods of up to 28 days, renewable once. With special permission, a care arrangement of this kind can be entered into for up to 6 months in the case of a child under 7 years, and up to a year for any other child.<sup>126</sup>

10.2.9.3 **Balancing between and provisioning of components in other systems**

Examples of legislation which explicitly seeks a balance between different types of approach to child protection have not been easy to locate. One important example is provided by the USA, in which the federal statute governing child protection is the Child Abuse Prevention and Treatment and Adoption Reform Act (CAPTA), which falls within Title 42 of the US Code. Section 5106 provides for the federal government to make grants to every state, based on the population of children in each, to assist the State with comprehensively improving its formal CPS system. All States appear to have made structural and legal adaptations relating to the CAPTA requirements.

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– FPWGCFSI 'Child Welfare in Canada', Minister of Supply and Services, Canada, 1994, 37ff.  
 – Sections 139-140.

Section 5106 focuses primarily on the identification, investigation and management of individual cases of abuse and neglect. However, to be eligible for funding under this provision, a State has to show both that it has a comprehensive plan for child protective services and also that this plan is 'to the maximum extent practicable, ... coordinated with the State plan ... relating to child welfare services and family preservation and family support services ...'.<sup>127</sup> **Family preservation services** as envisaged in this legislation include programs seeking to help return children to families from whom they have been removed, or to place them for adoption, or to provide follow-up care after reunification, or to provide respite care to relieve family caregivers (including foster parents), or to 'promote parenting skills ... with respect to matters such as child development, family budgeting, coping with stress, health and nutrition'. **Family support services** are 'community-based services ... designed to increase the strength and stability of families (including adoptive, foster and extended families), to increase parents' confidence and competence in their parenting abilities, to afford children a stable and supportive family environment, and otherwise to enhance child development'.<sup>128</sup>

An example of Canadian legislation which emphasises family preservation approaches and which obligates government to provide for such approaches is the Child and Family Service Act of Nova Scotia, 1990. Section 13(1) states: 'Where it appears to the Minister or an agency that services are necessary to promote the least intrusive means of intervention and, in particular, to enable a child to remain with the child's parent or guardian or be returned to the child's parent or guardian, the Minister and the agency shall take reasonable measures to provide services to families and children that promote the integrity of the family'.<sup>129</sup>

While North American legislation appears to be intended precisely to strike an appropriate balance between protection and family support and preservation approaches, there are heated debates

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— 42 USC 620 et seq., Part B of Title IV : Child and Family Services. The services in question are provided for under a 1993 amendment to the Social Security Act. This provides for annual financial allocations from the federal government, aimed at 'encouraging and enabling each State to develop and establish, or expand, and to operate a program of family preservation services and community-based family support services' [subpart 2(a)]. The allocations were calculated so as to increase substantially between the fiscal years 1994-1998, and thereafter to be increased according to the inflation rate. A percentage of the annual allocation is reserved for research, training, technical assistance and evaluation processes relating to the programme [subpart 2 (b) and (c)].

— Sections 431(a)(1) and (2).

129 Section 13(2) provides examples of services which may be provided to this end, including improvement of the family's financial or housing situation; improvement of their parenting, child care or home-making skills; counselling, drug or alcohol rehabilitation, or dispute mediation services; and child care provision.

between groups who emphasise one or the other. There has been a backlash in some quarters against the family preservation approach as a result of investigations into deaths of children who have been under protective supervision. These have been regarded by 'protectionists' as resulting from an excessive emphasis on family preservation.<sup>130</sup> There are claims, meanwhile, from within the family preservation lobby in the USA that, while the Family Preservation and Family Support Act does provide support for programmes to strengthen families, States in fact have an incentive to remove children. Far more funding is payable to them if they place children in foster care, given that funding of foster care is a legal entitlement. While family preservation costs less in dollar terms, it is nevertheless cheaper for counties to remove children - e.g. in Pennsylvania they receive an average 86c in the dollar back from the state and federal governments.<sup>131</sup>

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130 An example is provided by the Gove Commission of Enquiry into Child Protection in British Columbia, Canada (1995), which perceived a shift to have occurred from 'child-centred' to 'family-centred' practice, giving rise, in the Gove Commission's view, to family unity being given priority over the safety and welfare of the child. Inquest juries and child fatality review committees have made calls in similar vein.

131 NCCPR Issue Paper 11, "Financial Incentives". Similar concerns have been raised in South Africa as regards the easier availability of state funding for court-ordered foster care and residential care of children in comparison to the assistance available to children in their own homes – see Department of Welfare **Report of the Lund Committee on Child and Family Support**, 1996, p. 83.

In 1988 the National Association of Public Welfare Administrators in the USA called for 'a more narrowly focussed CPS (formal child protective service) component, with an expanded voluntary/preventive family support system, and an adequately funded child well-being system'.<sup>132</sup> Waldfogel calls for a more effective response to a more carefully selected group of children who need specialist protective intervention on the one hand, and a stronger investment in partnerships with community structures and informal helpers to provide support to families on the other.<sup>133</sup>

Uganda has very limited economic resources but strong extended family and community support systems. The committee which spearheaded the child law reform process leading to the Children Statute of 1996 adopted an approach designed to keep authoritarian interventions to the minimum. It sought specifically to institutionalise responsibility for improving child protection within the community, particularly at the village level.<sup>134</sup>

Some of the choices at stake in shaping a child protection system are highlighted in the following statement in a Ministerial Briefing Paper issued by the Department of Social Welfare in New Zealand in 1996:

Jurisdictions in Australia and the United States have responded to the focus on child abuse with heavily child protection orientated strategies: mandatory reporting of child abuse by a wide variety of occupational groups, detailed legislative procedures and a professional focus on family pathology, risk assessment and remedial services.

New Zealand has not followed such a path ... . The Department's advice has generally been against a narrowly defined child protection strategy because it tends to tie up resources in investigations, to reinforce an incident management approach, and to overuse expensive care facilities ... . Achieving the (Department's) vision requires ... a delicate balance between allowing and empowering families to deal with their own problems, in their own way, while not allowing them to be overwhelmed when they do need assistance, or

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– NAPWA, cited by Waldfogel 'Reforming child protective service' (January/February 2000) Vol. LXXIX no. 1 **Child Welfare** 45.  
 – Ibid.  
 – Parry-Williams, J 'Legal reform and children's rights in Uganda' (1993) **International Journal of Children's Rights** 49-69.

where the safety of children is at issue.<sup>135</sup>

#### 10.2.9.4 **Governance, coordination and management in other systems**

- *Responsibility for CPS interventions*

As mentioned earlier, South Africa is unusual in having a multiplicity of NGO's exercising statutory powers to intervene directly in situations of abuse and neglect. Elsewhere the norm, at least in legislation perused by the Commission, is either for this role to be limited to government or for provision to be made for limited delegation to other structures, e.g. in terms of a contractual arrangement.

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– Department of Social Welfare **Social Welfare in New Zealand: Strategic Directions**, Post-Election Briefing Paper, Wellington, 1996, pp. 132-3.



In England the capacity to bring applications to court for care or supervision orders rests only with the local authority and the National Society for Prevention of Cruelty to Children.<sup>136</sup> The formal protective role of other voluntary organisations seems to consist mainly of provision, in cooperation with the local authority, of substitute care for children.<sup>137</sup> Likewise, in Scotland the local authority takes central responsibility for the statutory care and protection of children who are at risk of abuse and neglect. In Uganda, the Secretary for Children's Affairs in the relevant local authority is responsible for investigating allegations of infringements of the rights of children.<sup>138</sup> Where action taken at this level is unsuccessful, the matter is referred to the Local Resistance Court at village level, and where this body has exhausted its options, a Probation and Social Welfare Officer undertakes protective services in association with the Family and Children Court.<sup>139</sup> In Ghana the Local Government Act no. 462 of 1993 gave effect to a policy of decentralisation. The Department of Social Welfare was decentralised to District Assembly level, where it is charged with the delivery of both statutory and non-statutory services, linking up with local Family Tribunals and Juvenile Courts.<sup>140</sup> The Department receives and acts on reports of child abuse and of children in need of care and protection.<sup>141</sup> In Brazil, there is a policy of 'municipalisation' of enforcement of the rights of children.<sup>142</sup> Partnership between local government and NGO's in such enforcement is provided for, on condition that they are registered with the Municipal Council of Child and Adolescent Rights.<sup>143</sup>

In the USA, as mentioned above, each state must operate a comprehensive CPS system in terms of specified conditions in order to qualify for funding in terms of CAPTA. While there are considerable variations among the jurisdictions in that country, formal child protective interventions appear to be largely the responsibility of specialised state or county social service departments. There is in some cases scope for NGO involvement - e.g. Wyoming provides for child protective

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— Section 31(9) of the Children Act, 1989.

— See sections 53-65. However the local authority must itself make provision for the accommodation of children who are received into statutory care, and must pay the 'reasonable expenses' incurred in accommodating such children by voluntary service providers (sections 21(1) and (3)).

— Sections 12(2) and (3) of the Children Statute, 1996.

— Section 13, section 20ff.

— Ghana National Commission on Children: "Reforming the Law for Children in Ghana - Proposals for a Children's Code", 13.

— Children's Act, 1998, section 17, section 19ff.

— Statute of the Child and Adolescent, article 88(1).

— Article 91.

services by licensed child welfare agencies under contract to county departments.<sup>144</sup> In Canada, child protective responsibility rests with the provinces and territories, each of which has a central child and family services division.<sup>145</sup> However in some cases services are delegated to state-funded structures – e.g. in Ontario they are delivered by a large network of autonomous Children’s Aid Societies, mandated and closely supervised by the Children’s Service Branch of the Ministry of Community and Social Services. Responsibility for the financing of services is usually shared between the provincial or territorial and the federal government.<sup>146</sup>

◦ *Interdisciplinary coordination*

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– NCCANI State Statutes Elements: Central Registries/ Reporting Records no. 9 - Establishment and Purpose, as at December 1999, p. 17.

– Each has a central child and family services division which is responsible for the relevant programmes. While legislation differs from one part of the country to the next, each statute recognises that ‘children have ... the right to be protected from abuse and neglect, and that governments have the responsibility to protect children from harm’ (FPWGCFSI ‘Child Welfare in Canada’, Minister of Supply and Services, Canada, 1994, 5ff).

– Ibid, 66, 3.

The *multi-disciplinary child protection protocol* is a widely used instrument for ensuring that the roles of service delivery personnel in each sector are properly defined, and that all structures and persons involved are committed to an agreed process of intervention. The intention is to prevent situations where children are dealt with in terms of conflicting approaches or fall through the service net. While protocols provide a framework for cooperation, coordinating structures are also required to ensure that the relevant sectors plan and develop policy together, and maintain properly functioning linkages. In Scotland, Area Review Committees develop local policy and coordinate the sectors. In England, local government operates Area Child Protection Committees to fulfil the same function. Actual interventions are carried out via Child Protection Conferences, in which the professionals concerned pool information and plan investigations and interventions in specific cases.<sup>147</sup> The government publication 'Working Together' provides an agreed framework for multi-disciplinary cooperation in the implementation of the Children Act of 1989, setting out procedures to be followed by the various professionals. Area Child Protection Committees have their own local procedures, based on the national framework, setting out the responsibilities and step-by-step tasks of the various persons involved.<sup>148</sup>

Protocols and interdisciplinary teams are often provided for in locally developed policy documents rather than in law, but may be provided for by statute. Many States in the USA have legislative provision for multi-disciplinary teams, although they are apparently not always well used in practice.<sup>149</sup> In Canada, government departments in several provinces have developed protocols which guide regional practice.<sup>150</sup> These appear to vary in status from one province to another and to be in the nature of official policy documents or guidelines rather than being part of the legal framework.

◦ *Risk assessment*

Risk assessment frameworks seem to be also a matter of policy rather than directly enshrined in law, although legislation may be designed so as to require their use, as is the case in the USA

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– Duquette 'Child protection legal process' (1992) 54 **University of Pittsburgh LR** 252-3.

– See for example 'Child Protection Policies, Procedures and Guidelines', Rochdale Area Child Protection Committee.

– Duquette 'Child protection legal process' (1992) 54 **University of Pittsburgh LR** 252-3.

– E.g. Newfoundland, Nova Scotia, New Brunswick, Quebec and Ontario – see FPWGCFSI 'Child Welfare in Canada', Minister of Supply and Services, Canada, 1994, 17ff.

under CAPTA (see below). They may also be designed so as to explicitly linked with protective legislation. For example, the Ministry of Community and Social Services (MCSS) in Ontario, Canada, recently updated its risk assessment model to reflect amendments to the Family Court Rules and forthcoming changes to child protection legislation.<sup>151</sup>

- *CPS management*

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– Ontario Child and Family Services Information Project: Bulletin – January 2000. In Ontario, the government child protection authority sets the relevant procedures and also provides for the relevant skills development. The MCSS provides specialised training for different categories of child protection workers and supervisors employed by the Children's Aid Societies. The Ministry has announced its intention of requiring that minimum competencies are demonstrated before newly hired workers will be allowed to engage in child protection work.

In the USA the federal funding system in terms of CAPTA<sup>152</sup> is used as a mechanism for ensuring a properly planned and coordinated approach. Section 5106a(a) provides for the federal government to make grants to every State, based on the population of children in each, to assist the State with comprehensively improving its CPS system in relation to the following:

- (1) the intake, assessment, screening and investigation of reports of abuse and neglect;
- (2) (A) creating and improving the use of multi-disciplinary teams and inter-agency protocols to enhance investigations; and  
(B) improving legal preparation and representation ... ;
- (3) case management and delivery of services provided to children and their families;
- (4) enhancing the general child protective system by improving risk and safety assessment tools and protocols, automation systems that support the program and track reports of child abuse and neglect from intake through final disposition and information referral systems;
- (5) developing, strengthening, and facilitating training opportunities and requirements for individuals overseeing and providing services to children and their families through the child protection system;
- (6) developing and facilitating training protocols for individuals mandated to report child abuse and neglect;
- (7) developing, strengthening and supporting child abuse and neglect prevention, treatment and research programs in the public and private sectors;
- (8) developing, implementing or operating -  
(A) information and education programs or training programs designed to improve the welfare of disabled infants with life-threatening conditions ... ;  
(B) programs to assist in obtaining or coordinating necessary services for families of disabled infants with life-threatening conditions, including ( ... social and health care, financial aid and adoption services);
- (9) developing and enhancing the capacity of community-based programs to ... prevent and treat child abuse and neglect at the neighbourhood level.

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— Child Abuse Prevention and Treatment and Adoption Reform Act.

The eligibility requirements for state funding under this statute are spelled out in detail. They involve initially, and at five-yearly intervals thereafter, submitting a 'State plan' concerning the areas of CPS which the State intends to address with the funding, which must be coordinated with a plan for 'child welfare services and family preservation and support services' as required for support under the Social Security Act.<sup>153</sup> To qualify for funding under Title 42, a State has to be enforcing a State law or operating a state-wide programme which incorporates elements regarded as essential for managing protective services.<sup>154</sup>

States seeking CAPTA funding are also required to supply a description of the services to be offered to individuals, families or communities by means of the funding in question, and the training which is to be provided to line and supervisory personnel with regard to report-taking, screening, assessment, decision-making, and referral for investigation of suspected instance of abuse or neglect.<sup>155</sup>

° *Structural provision*

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– Part B, Title 4, USC 620 et seq.

154 Section 5106a(b)(2) requires *inter alia* that there be: provisions or procedures for the reporting of child abuse and neglect; procedures for the prompt screening, safety assessment, and investigation of reports; procedures for immediate protective action; cooperation of the relevant state structures in investigation, assessment, prosecution and treatment processes; procedures for the appointment of a guardian *ad litem* for the child in any case involving judicial proceedings; the establishment of citizen review panels; and provision to facilitate the termination of parental rights in cases of child abandonment, and to ensure that reunification is not required in cases involving murder of or serious injury to a child by a parent.

155 Section 5106a(b)(2)(C). States which are granted funding must provide annual data with regard *inter alia* to the number of reported cases and the outcome of investigations, the types of intervention made and services delivered, deaths due to abuse or neglect, the number of CPS staff dealing with intake, assessment and investigation, their response time, and the number of family reunifications.

The United States, through CAPTA, has also set in place a number of key federal structures to promote a coordinated response to child abuse and neglect throughout the country. Section 5101 enables the Secretary of Health and Social Services to establish the Office on Child Abuse and Neglect to coordinate child protection functions and activities. In terms of section 5102 the Secretary is empowered to appoint an inter-sectoral Advisory Board on Child Abuse and Neglect, to include representation from the relevant sectors responsible for protective interventions as well as relevant advocacy organisations, to make recommendations to the Secretary and to appropriate committees of Congress. Section 5104 provides for the establishment of the National Clearing House on Child Abuse and Neglect Information (NCCANI), to gather and disseminate information on the incidence of child abuse and neglect in the USA and on relevant programmes to address this problem. NCCANI is also mandated to promote the coordinated collection of data and research findings in this field.

#### 10.2.10 **Options mooted in the consultation processes, and responses received**

##### 10.2.10.1 **Issue Paper 13**

Issue Paper 13 posed a broad question as to how abused and neglected children should be dealt with in a comprehensive children's statute. The following suggestions were put forward in the provincial workshops on the Issue Paper:

- The over-arching principle should be the best interests of the child.
- The recommendations contained in the National Strategy on Child Abuse and Neglect (NSCAN) coordinated by the Department of Welfare, and the child protection protocols arising from the strategy should be legislated for.
- There should be (mandatory) victim empowerment/therapeutic services for children and families.
- A clearer, more specific definition of abuse and neglect is required.
- Legislation should make counselling obligatory.
- There should be no delay in attending to abused children.
- The community must/should be more involved.

In relation to abandonment of children the following suggestions arose:

- Abandonment should be clearly defined.
- Reference should be had to child protection protocol procedures.
- There should be consultation in the drafting process with the National Committee on Child Abuse and Neglect.
- Provision must be made for family reintegration.
- Effective services must be provided.
- There should be appropriate punishment for abandonment of children.

#### 10.2.10.2 **Research paper on legislating for child protection**

Using a research paper<sup>156</sup> and associated worksheet, the Commission conducted a focus group discussion in Pretoria on 29 April 1999, and also invited individuals and groups outside the workshop to offer their opinions on the kind of child protection system which would be appropriate for South Africa. One intention was to gain insight into the types of balance for which the Commission should strive, given the need to use the expanding body of international knowledge and experience of child protection for the benefit of South African children, while bearing in mind the wide range of children's needs to be met in this country, and the scarcity of available resources.

#### 10.2.10.3 **Responses to points raised in the research paper**

In relation to the weighting of different components of legislation aimed at protecting children, the research paper posed the following question:

*Taking into account the fact that resources are finite, how do you believe an appropriate balance can be achieved between: a) addressing the underlying social problems which promote child abuse, and dealing effectively with the individual child who has experienced abuse? b) punitive and rehabilitative approaches with regard to offenders? c) formal protective measures and supportive/preventive services?*

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156 The research paper was entitled 'Legislating for child protection' and was prepared by Dr Jackie Loffell and Dr Carmel Matthias.



As regards the balance between attention to underlying problems which promote abuse, and dealing effectively with individual children who have been abused, there was general agreement on the need to seek such a balance. Groups 1 and 2 in the Pretoria workshop emphasised the need for legislation to be backed up by resources. Group 1 felt that commitment to legislation should be reflected in appropriate budgetary allocations at each of the levels to be addressed. Mr D van Heerden of the Department of Welfare (Northern Cape), along with Group 2 in the Pretoria workshop, emphasised the need for legislation to provide for local government to address root causes of abuse by creating a 'child-friendly environment', and providing and facilitating resources for services to promote their well-being. It was suggested that financing of programmes should be provided for in the children's statute. Group 2 also referred to the need to promote by non-legislative measures the concept of the responsibility for all children being shared by the whole community.

There was consensus on the need for attention to the rehabilitation of offenders.<sup>157</sup> Suggestions included the following: that courts when passing sentence should include provision for rehabilitation; that restorative justice principles should apply, and the perpetrator should take financial responsibility for redressing the harm done to the child; that rehabilitative processes should also be promoted outside the justice system; that abuse within the family should be dealt with by a family court, as the abused child was often detrimentally affected by the adversarial criminal justice system, and that this court should have the power to make any of a range of rehabilitation orders; and that child offenders in particular be kept out of the criminal justice system; and that there be legislated provision for state-funded rehabilitation for offenders, together with harsher sentences.

Several respondents pointed out the need to ensure that priority be given to the safety of the child when dealing with the offender. The UCARC commented that children were being endangered by giving bail to unsuitable candidates, resulting in children losing trust in the system and cases being withdrawn. Participants at the Umtata consultative meeting believed that both bail and sentencing practices were too lenient. The SANCCFW pointed to the need for the law to prevent children from being exposed to serious offenders with a very poor prognosis for rehabilitation - failure to address the reality that such people will pose an ongoing danger can have serious consequences, including

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— Umtata Child Abuse Resource Centre (UCARC); Umtata consultative meeting; SANCCFW; Ms T Odayer, Ms D Ritter and the Grahamstown Child Welfare Society (GCWS); Groups 1 and 2 in the Pretoria workshop.

the death of a child.

The SANCCFW emphasised the need for the strengthening of the family in order to promote the wellbeing of the child, and pointed out that there were many cases in which protective measures as carried out by the children's court, accompanied by intensive work with the family as a whole, were an appropriate means of dealing with child abuse. With appropriate help, in the view of the SANCCFW, most families could learn to provide adequate care for their children. A lack of progress often had to do with a lack of resources - personal, material or psychological - rather than an inability to parent. Respondents called for a range of services involving various sectors, both for preventive purposes and for dealing with abuse and its effects.<sup>158</sup> The National Coalition on Gay and Lesbian Equality (NCGLE) noted that the White Paper on Social Welfare had shown a fundamental shift away from the traditional approach in South Africa of responding to the symptoms of child abuse, by highlighting the need for approaches which provide for financial support and programmes which enable and promote development so as to ensure that people can sustain themselves through times of crisis and vulnerability. On this basis the NCGLE suggested a multi-pronged approach to child abuse which would simultaneously deal with the abused child so as to minimise the effects of abuse; deal effectively with offenders, both in terms of effective sentencing and rehabilitation; and addresses the underlying social problems which promote or fail to prevent child abuse. The NCGLE highlighted the vulnerable position of gay and lesbian youth who, due to current myths and prejudices, were particularly liable to rejection, assault and violence, discrimination at school, and homelessness and street life with all their associated dangers.<sup>159</sup>

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158 These included safe houses, support programmes for abused children and volunteer training programmes (Ms T Odyar, Ms D Ritter and the GCWS); development programmes operated by state departments, NGO's and CBO's, and support groups for young mothers as part of health care provision (UCARC); continuous preventive education programmes and support/counselling programmes in relation to child abuse and children who have been subjected to abuse (Umtata consultative meeting); and targeting of vulnerable mothers and children in the hospital setting, both at the time of birth and subsequently, e.g. through the appointment of hospital social workers ( SANCCFW); and via parenting programmes and support groups (Pretoria workshop Group 2). Ms F Cleaton-Jones cited research results indicating that most abusive parents are under 25 years of age, and that children of very young parents tend to be disadvantaged. She recommended school-based parenting education as being useful both in delaying the onset of parenting and of providing coping skills. The need for inclusion of parenting education in the school curriculum was likewise emphasised by the SANCCFW, who also supported the employment of school social workers as a preventive measure. Group 1 at the Pretoria workshop emphasised the need for inter-sectoral collaboration in preventive strategies.

159 The following priority areas for preventive strategies were identified: training and education of people in positions of authority over children, including police officers, officials within other child protection agencies, and teachers; programmes which foster a non-discriminatory environment in schools; and empowering lesbian and gay youth through the provision of support for programmes focussing on sexuality education ... and specialised physical and mental health information and counselling services.

Further questions raised in the research paper in relation to the scope of protective legislation were as follows:

*Which of the following should be covered in legislation to address child abuse: physical abuse; sexual abuse; emotional abuse; neglect which occurs despite access to resources; neglect which occurs due to unavailability of or lack of access to resources; abandonment; commercial sexual exploitation of children; child labour generally; trafficking in children; failure to protect? (Respondents were also invited to suggest other forms of abuse which should be included.)*

*Should a legal definition include abuse perpetrated by social structures ... as well as abuse by those in the child's immediate environment?*

*Would it be preferable:*

*(a) to use a single broad definition covering all forms of ill-treatment and neglect of children?*

*(b) to define only those forms in which it is intended that legal interventions will be carried out - e.g. non-accidental injuries to children; sexual abuse of children?*

*(c) to use one or more broad definitions with a view to providing enabling clauses in legislation, e.g. to allow for the financing of preventive or therapeutic programmes, while also using narrower definitions to pinpoint specific forms of abusive behaviour in which criminal sanctions and/or statutory protective interventions should take place?*

*(d) Another approach? Please specify.*

Respondents were invited to suggest definitions.

Those who took up this issue were virtually unanimous in the view that all the forms of abuse mentioned should be covered in legislation to address child abuse.<sup>160</sup> Group 2 in the Pretoria workshop suggested that intentionality was an issue in abuse; also that cultural influences should be taken into account. This group recommended that abandonment not be criminalised. The SANCCFW suggested that there be recognition, as in the case of neglect, that child labour, child prostitution and trafficking in some cases arose from a lack of the resources to meet basic survival needs. Group 1 of the Pretoria workshop pointed out a need for context to be taken into account. There was a need to examine where neglect is coming from. Group 1 also felt that there might be a need for a refinement of the approach to child labour so as to prevent rural families from falling into

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Participants in the consultative meeting in Umtata felt that neglect should be treated as abuse unless it were proven that it occurred due to unavailability of or lack of access to resources. This group also felt that cultural and traditional practices which interfered with the rights of children should be added to the list. Ms T Odyar, Ms D Ritter and the GCWS suggested that there should be a legal ban on children being used in a suggestive way in advertising, and that the violation of a child's right to be a child should be covered. Group 1 in the Pretoria workshop raised the issue of child pornography on the Internet, as well as abuses in childminding arrangements, and the use of children in crime and in armed conflict. The UCARC pointed out that there were differences in degree of abuse and that some abuse amounted to a serious crime.

increased poverty. There should be sensitivity to prevailing norms and circumstances; however this should not amount to a condoning of abuse. This group felt that 'minimum care protocols' should be drafted. Ms Fran Cleaton-Jones mentioned the need to take the developmental stage of the child into account so as to place evidence in context.

There was general consensus that abuse should be addressed by protective legislation regardless of the source from whence it came; hence abuse within schools and other child care facilities as well as abuse by the structures of society should be included in a definition of abuse.<sup>161</sup>

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– The UCARC and Project Go: Eastern Cape felt that structural abuse had a lesser effect on children than that which occurred e.g. within the family, but should ideally be included. Group 2 at the Pretoria Workshop listed schools, courts and local authorities as potential agents of structural abuse. The SANCCFW strongly supported the proposal that structural abuse be included as this would enable a range of services and perpetrators to be dealt with by child care legislation. The NCGLE pointed out the need for recognition that all forms of child abuse constituted a serious threat to the future of our country, irrespective of the sexual orientation of either the perpetrators or the children concerned. Abuse to children resulted either where they themselves were stigmatised due to their sexual orientation, or where their parents were deprived of custody of or access to them due to homophobia. The Coalition provided examples of severe systemic abuse which had resulted from prejudice in some judges and social workers towards lesbian mothers. Mention was made of prevailing myths to the effect that gay and lesbian persons were falsely regarded as being intrinsically mentally unbalanced, unable to provide a stable environment for children, or (in the case of men) prone to paedophilia. These myths have caused great injustice and suffering to adults and children who are directly or indirectly affected. The NCGLE's vision is for children to be raised in a climate which actively counteracts prejudice towards people on grounds of race, gender, nationality, sexual orientation etc.

As regards defining abuse in the legislation, most respondents who engaged with this issue were in favour of using both a broad definition which could facilitate enabling measures, and a series of more precise definitions to serve as the basis for enforcement of the law in specific cases.<sup>162</sup>

With regard to the controversial issue of whether corporal punishment should be treated as a form of abuse, the following question was posed:

*What position should the law adopt with regard to physical punishment of children by their parents or caregivers?*

Opinion on this issue was divided. Ms S Leslie on behalf of the SANCCFW said that corporal punishment, among other abusive forms of punishment such as deprivation of food or threats to disown a child, should be prohibited by law. Abuse or neglect of a child could not be countenanced as forms of discipline. Physical punishment could be emotionally damaging and irreparable harm had been caused by ongoing physical punishment of children by teachers, parents and other caregivers. Physical punishment of adults is not permitted and children should have the same protection. The message the child receives is that violence is an acceptable means of solving problems between people. Positive forms of discipline in which children learn through praise and being treated with respect lay down a far better basis for the formation of positive values, according to Ms Leslie. Both she and the UCARC regarded corporal punishment as a means of promoting violence in society.<sup>163</sup>

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— Ms D van Heerden, Department of Welfare, Northern Cape; Ms T Odyar, Ms D Ritter and GCWS; UCARC; SANCCFW: Eastern Cape.

163 In an individual submission dated 21 August 2001, Mr H M Selolo equated parental care without discipline as

Group 4 in the Pretoria workshop noted that the law currently allows for chastisement in a reasonable manner in certain circumstances and suggested that there be criteria to clarify issues of reasonableness, severity and the circumstances warranting punishment. They felt that chastisement by parents was acceptable subject to such limitations, but other caregivers should not be permitted to administer this form of punishment. They proposed that physical punishment be defined and that there be an associated action plan to promote education and understanding. Culture should not be used to sanction abusive forms of physical punishment. Group 3 at the same workshop noted that there was not consensus among them and were unsure as to the wisdom of legislating on this matter, given that views on whether corporal punishment is morally good or bad differ widely from one group to the next. They felt that children's rights should be entrenched and punishment should be addressed through education and counselling. Ms L Vara of the SANCCFW: Eastern Cape felt that a legal approach to corporal punishment must be in line with the definition of abuse used.

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juvenile delinquency. He said that without some form of punishment, children grow up in misery because 'they fear no one'. He consequently argued strongly in favour of some form of corporal punishment being used on children.

The Committee on the Rights of the Child has stated that '[i]n the framework of its mandate, the Committee has paid particular attention to the child's right to physical integrity. In the same spirit, it has stressed that corporal punishment of children is incompatible with the Convention and has often proposed revision of existing legislation, as well as the development of awareness and education campaigns to prevent ...the physical punishment of children'.<sup>164</sup> Both in the light of South Africa's obligation incurred under international law, and also in view of the decisions of the Constitutional Court concerning corporal punishment,<sup>165</sup> it seems that there would be a need to address the matter of parental corporal punishment in the new children's statute. Indeed, **a number of members of the Project Committee would have favoured an approach similar to countries such as Sweden, in which all forms of corporal punishment would be prohibited.**

In relation to the issue of legal backing and provisioning for multi-disciplinary child protection protocols, and associated norms and training, the following questions were asked:

*Should there be a legal requirement that government at all levels ensures that protocols are in place to guide and set standards for the different sectors involved in child protection, and to bring about their coordination, or is this best achieved through policy development and/or other approaches?*

*Who should be responsible for the resourcing required to make protocols work in practice, and what should the role of the law be in this regard?*

*Do we need to render government officials and non-governmental child protection workers more accountable? If so, would protocols in combination with existing professional codes be sufficient or do we need to build in a potential for personal legal liability for those who fail to*

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164 Report of the 7<sup>th</sup> Session, November 1994.

165 See 3.4 above for a more detailed discussion of the reasoning in **Christian Education South Africa v Minister of Education** 2000 (4) SA 757 (CC) and the approach of the European Court of Human Rights in **A v United Kingdom** [1998] 2 FLR 959.

*carry out their duties without good reason? Should government and non-government employers in the child protection services be made more accountable for structuring their services so that acceptable standards of work are possible? If so, how?*

*Should issues such as training of child protection practitioners, conditions of service and caseload norms be dealt with in legislation? If so, How should these be approached?*

The few who addressed themselves to these issues showed support for the idea of child protection protocols being required by law.<sup>166</sup> Respondents emphasised the need for government to act in partnership with NGO's in this regard, and for local government to be actively involved. The SANCCFW suggested that the process of putting protocols in place be driven by national government, which should set minimum standards, and monitor implementation of preventive programmes as well as intervention. Provincial government should ensure that local needs and conditions are taken into account, while local government should monitor the process. There should be clear differentiation of state and NGO roles. Group 2 of the Pretoria consultative workshop also saw the state as being responsible for ensuring that protocols were implemented and monitored, and suggested that resourcing should come in part through local government via NPA processes. Ms T Odyar, Ms D Ritter and the GCWS suggested that the Department of Health should coordinate resourcing. The SANCCFW (Eastern Cape) regarded resourcing as a joint responsibility of state and non-state structures.

In relation to the accountability of officials and child protection workers, there was agreement by most of those who commented that such persons should be held accountable and face sanctions if guilty of negligent or inadequate practice.<sup>167</sup> Some respondents cautioned, however, that accountability had to be dealt with in perspective,<sup>168</sup> given the serious under-resourcing of agencies, and that the roles of all those involved had to be clarified. Urgent attention was required to factors including training, caseload norms and appropriate staff remuneration, to ensure that staff were properly equipped to do their work.<sup>169</sup> The SANCCFW (Eastern Cape) suggested that practitioners

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— Ms T Odyar, Ms D Ritter and the GCWS; UCARC; SANCCFW: Eastern Cape; Group 2 of the Pretoria workshop.

— Ms T Odyar, Ms D Ritter and the GCWS; UCARC, SANCCFW: Eastern Cape; Group 2 of the Pretoria workshop.

— Group 2, Pretoria workshop; SANCCFW.

169 In response to the question of how personnel issues including training, conditions of service and caseload norms should be addressed, the SANCCFW: Eastern Cape suggested that a minimum standard and a code of ethics be set. Ms T Odyar, Ms D Ritter and the GCWS felt that training should be provided for by law; that universities should do more in this regard and that in-service training in the field must also be provided for and that the SA Council for Social Service Professions should give inputs. The SANCCFW regarded training as an essential responsibility of service providers. The UCARC likewise saw training as essential and felt that government



be held accountable via their professional bodies.

The NCCAN called, on the basis of the NSCAN and ongoing internal deliberations, for a legally mandated coordinating structure to pull together the currently fragmented child protection system and make it effective and dependable for children. This structure should include representation at senior level from all state departments with core child protection responsibilities, along with representation from national child protection organisations and persons selected for their specific expertise. The structure would be responsible for:

- commissioning appropriate research for purposes of a national needs analysis and for preparing preliminary child protection budget estimates for each sector;
- setting up a national data base and coordinating the child abuse registration and reporting system;
- setting up and coordinating inter-sectoral task teams to deal with issues such as training and selection of child protection personnel; minimum standards, workload norms and guidelines for protocol development; conditions of service for child protection workers; planning, administration and staff deployment; and contracting and purchase-of-service agreements between government and NGO's for the delivery of child protection services;
- overseeing the selection of an appropriate institution to serve as a clearing house for

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should allocate funding for this purpose. Group 2 of the Pretoria consultative workshop saw a need for minimum standards, but commented that these would be difficult to legislate. Caseload norms could also not in their view be spelled out because of variations in the intensity of services required. They pointed out the importance of accreditation and the need for adequate basic conditions of service such as leave, support and debriefing to be built in for key service providers in the child protection field. The SANCCFW emphasised the need to address salaries and working conditions especially in the non-government sector.

- research and information regarding all aspects of child abuse and neglect, including programmes to address these problems;
- providing guidelines for, assisting and monitoring provincial coordinating structures for child protection;
  - negotiating with training institutions for curriculum development and the training of personnel in all the relevant sectors;
  - developing a comprehensive plan for the financing of child protection services as a component of the NPA – to be undertaken in consultation with the corporate sector and foreign funders.<sup>170</sup>

The NSCAN sets out linkages between the proposed national structure and inter-sectoral structures at the provincial and local levels where responsibility for direct service delivery is located. The NCCAN sees both government and NGO's as acting in partnership at all these levels to address child abuse and neglect, with government carrying full responsibility for the financing of those protective services which are mandated by statute. The NCCAN regards local government, and the health and education sectors at all levels, as having key preventive responsibilities in the primary and secondary prevention of child abuse and neglect.

#### 10.2.10.4 **Consultation with officials of the Department of Social Development**

At a consultative meeting held on 26 June 2001 with officials of the Department of Social Development and a Commissioner of Child Welfare, Pretoria, concern was raised about the use, as a routine measure in the placement of children, of Form 4 authorisations issued in terms of section 12 of the Child Care Act. This section enables a social worker, police officer or 'authorised officer' to remove a child without a warrant. It was designed for emergencies in which children are at immediate risk, and the delay in obtaining a warrant could be prejudicial to their safety and

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— See NCCAN **Draft National Strategy on Child Abuse and Neglect**, updated version (2000); also minutes 1999.

wellbeing. Abuse of section 12 could create a danger of children being too readily removed from their homes, for example by inexperienced personnel. A further problem was the range of people using the forms - e.g. military police. Social workers in private practice are using the forms after being designated 'authorised officers' by some commissioners of child welfare. This is problematic in that private practitioners are being paid by one or other interested party.

It was, however, pointed out that section 12 was being used as a short cut partly because of the present overload on the courts and the relevant social service organisations. It was agreed that the proposed children's statute should take into account these realities while providing safeguards against abuses, and that social workers and police officers should be removed from the definition of an 'authorised officer'. Persons using section 12 in a non-emergency situation should be required to justify their action to the court.

It was also agreed that the term 'prescribed welfare organisation', which has been rendered more or less obsolete by the Nonprofit Organisations Act of 1997,<sup>171</sup> no longer adequately identifies which structures are mandated to carry out tasks set out in the Child Care Act. The Nonprofit Organisations Act is not of any help as it makes no distinction between child protection organisations and any other type of nonprofit structure. This in turn creates problems with the linked definition of a 'social worker'.<sup>172</sup> The meeting recommended that a 'prescribed welfare organisation' be defined as 'an organisation contracted by the Department of Social Development to perform statutory tasks under the Child Care Act'. Certain requirements for such organisations could then be set down in the Regulations.

10.2.10.5 <b>What the children said:</b>
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171      See also 10.2.8.2 above.

172      Ibid.

Participants in the structured consultations with children which formed part of the present Project<sup>173</sup> showed concern in varying degrees with preventive, protective, punitive and rehabilitative approaches. Unfortunately the responses cannot be quantified due to problems in the data-capturing process.

Abuse and neglect, especially by parents, topped the list in responses to the question: 'What things do you need protecting from?' A consciousness of prevention was evident among the many groups who saw a need for adults to be made aware of the rights of children (p23), for the legal responsibilities of children to be defined, and for parents to be educated about these (p34). Education of children themselves regarding their rights, and about sexual abuse and ways to avoid this, was seen as important (p50). There was support for the idea that services be provided whereby families could discuss and resolve their problems (p26). A number of groups thought that the law should provide help to families with problems, e.g. by making social workers and psychologists available or providing treatment for alcoholism. Many saw a need for social workers to provide counselling and support for sexually abused children and their families (p46), and for specialised courts and police to deal with children who had been abused and/or needed out of home placement (pp 37, 46).

At the same time, there was a strong emphasis on punitive measures, with many of the groups concurring that the government must punish people who violated the rights of children. Among those who expressed this view, it was noted that 'increase in severity of sentences was a recurring theme' (p 25). One of the groups consulted called for the death sentence for some crimes against children, and another suggested corporal punishment of offenders. Where there was specific mention of sexual abuse of children, several groups called for severe measures including 'the death penalty, castration, public beatings and public humiliation' (p 49). While many groups thought that sexual offenders against children should always be locked up, there was also a widespread view that they should be treated to help them change their behaviour.

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— See Report on Workshops to Give Effect to Art. 12 of the UN Convention on the Rights of the Child (Children's Participation), prepared by the Community Law Centre, UWC, 1999.

#### 10.2.11 **The Commission's evaluation and recommendations in setting broad principles for child protection legislation**

Given the scarcity of formal child protection resources in South Africa it appears unwise to legislate for a system which depends excessively on authoritarian interventions by the state or its delegates into the lives of children and families. Considerable problems are associated with such approaches even in First World countries with well-developed child protection services (CPS) infrastructure. In South Africa such a system would probably be unaffordable and, given that resources for its implementation would be thinly spread, it could generate high levels of secondary abuse. There is widespread consensus on the need for substantially greater provision for primary and secondary preventive measures than is currently the case.

At the same time, well designed and implemented protective services have important preventive potential in breaking the cycle of abuse and neglect. They also minimise secondary abuse. South Africa has very high levels of severe child abuse and neglect, and this has extremely damaging implications for the present and future wellbeing of the nation. In such a context, a strong and effective CPS system is essential for the realisation of the constitutional right of every child to protection. This cannot be achieved without concerted attention to all components of this system and a systematic approach to its design, resourcing, coordination and functioning. Legislation should be designed accordingly, without detracting from other essential forms of provision for children.

**The Commission therefore proposes a system which includes the following features:**

- **Properly resourced, coordinated and managed CPS measures, focussed primarily on children who are at serious risk of immediate harm.**
- **Careful balancing of these measures with measures designed to support family life, promote child wellbeing and prevent neglect and abuse in the broader population of children, as provided for in Chapter 9 above.**
- **An expanded range of protective options, designed to improve and expand on those currently available and make them more flexible. Innovations include provision for:**

- **time-limited, voluntary, foster care placement agreements between parents / caregivers and structures providing foster care services;**
  - **hospitals to be authorised to retain children with injuries likely to have been caused by abuse for investigation, for a limited period of time, where early release could place them at risk;<sup>174</sup>**
  - **orders by the children’s court to remove an alleged or confirmed perpetrator from the child’s home, or to restrict or prohibit that person’s access to the child;<sup>175</sup>**
  - **the court to have the option of ordering that family group conferences be arranged and of endorsing and monitoring decisions made in such conferences, subject to appropriate programmes being in place, and to specified conditions being observed to ensure that family solutions include proper protection of the child;<sup>176</sup>**
  - **orders by the children’s court for children with special needs who are found to be ‘in need of care’ to be placed in facilities registered by the Departments of Health and Education, where such facilities are the best available resources for the meeting of their needs;**
  - **measures specifically designed to address the protection needs of children ‘in especially difficult circumstances’ or ‘in need of protection’. These would include e.g. requirements for making protective processes accessible to children with disabilities;**
- **Codes of Good Practice, for inclusion in the Regulations, in which the CPS responsibilities of personnel in the Departments of Safety and Security, Justice,**

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174 See further 23.10.4 (hospital retention powers) below.

175 See 23.10.4 (removal powers) below.

176 See 23.10.6 (family group conferences) below.

Correctional Services, Education, Health and Social Development, and relevant NGO's are spelled out separately and jointly. These should be rights-based and linked to the Developmental Quality Assurance (DQA) process being pioneered by the Department of Social Development.

- An inter-sectoral coordinating mechanism, housed in the (national) Department of Social Development, for the overall planning, development and implementation of child protective services, and for ongoing needs-assessment in this area.
- Clarification as regards the structures and categories of social service personnel authorised to perform child protection functions in terms of the Act. This would be achieved in part through the revision of the present definitions of a 'prescribed welfare organisation' and an 'authorised officer'. The aims would be (i) to ensure improved coordination, planning and quality control in these services; and (ii) to preserve the impartiality of processes whereby protective investigations are carried out and recommendations are made to the court or other authorities. It is envisaged that NGOs would be contracted on a planned basis by the Department of Social Services to assist with these functions, and that contracted NGOs would be required to meet criteria as set out in Regulations.
- A requirement for each province to make an annual estimate of the number of children who will require state-funded child protective and associated services, from the social development, justice, education, health, policing, and correctional services sectors, and to budget for these accordingly.
- Provision for protection against other harmful or potentially harmful cultural practices within both the child protection and criminal justice systems, by (a) prohibiting harmful or potentially harmful cultural practices; (b) regulating (male) circumcision schools; (c) prohibiting female genital mutilation; (d) expanding the grounds for refugee status to include the threat of female genital mutilation; and (e) an educative and criminal law approach to virginity testing.<sup>177</sup> As far as the health aspects of virginity testing and male circumcision are concerned, the Commission recommends that the (provincial) Health Departments prepare the necessary legislative enactments.

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177 See 10.2.8.4 above and Chapter 21 below.

- **A prohibition on coercing or forcing children to be betrothed or to be married and providing a minimum age for marriage.<sup>178</sup>**

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178 The Commission should also aim to narrow the gap between marriageable age (18 years recommended) and the age at which a child can lawfully consent to sexual intercourse (16 years recommended). See in this regard, the Commission's investigations into the Review of the Marriage Act 25 of 1961 (Project 109) and Sexual Offences (Project 107).



There was no clear mandate from the respondents and workshop participants to support an outright ban of corporal punishment. **The Commission accordingly recommends that the educative and awareness-raising suggestion of the Committee on the Rights of the Child be followed,<sup>179</sup> in order to influence public opinion on this matter.** Formal protective interventions and the criminal justice system would continue to be used in cases where injuries to, or physical assaults on, children are concerned. **However, the Commission is of the opinion that the common law defence that a parent may raise that physical punishment was justified on the grounds of the rights of parents to impose reasonable chastisement upon their children is overly broad, and that the common law in this regard should be revisited in order to protect children from serious breaches of physical integrity.<sup>180</sup>** Further, the Commission believes that amendments to the common law are required by section 28(1)(d) of the Constitution, in order to ensure that the State obligation to protect children from maltreatment and abuse is given effect in municipal legislation.

**The Commission therefore proposes that upon any criminal charge of assault or related offences (such as assault with intent to do grievous bodily harm), it shall not be a defence that the accused was a parent, or person designated by a parent to guide the child's behaviour, who was exercising a right to impose reasonable chastisement upon his or her child.**

### 10.3 **Assessment and Treatment / Therapeutic Services**

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179 See 10.2.10.3 above.

180 See the discussion of **A v United Kingdom** [1998] FLR 959 in Chapter 3 above.

A proper understanding of the needs and situation of each child entering protective services and his or her family is clearly essential as a basis for appropriate planning and action. Practitioners emphasise the need for skilled interdisciplinary assessments which are undertaken on a planned and fully co-ordinated basis.<sup>181</sup> Assessment is needed at the point of referral, to decide whether protective intervention is necessary and, if so, in what form. Thereafter, if a child is to be placed in care or under official supervision, assessment should guide the choice of care arrangement and the plan for subsequent services, including any form of treatment<sup>182</sup> which may be required. The terms 'treatment', 'therapeutic services' or 'therapeutic support and special services'<sup>183</sup> are used interchangeably in the present Chapter. A question to be addressed by the Commission is whether legislation can help to promote an optimal approach to such services and to assessment.

### 10.3.1 **Types of assessment which may be required for effective protection**

#### 10.3.1.1 **Assessment of the child, family members and the family unit**

At initial referral, assessments of the child, other family members and the family unit are likely to revolve around the current state of the child and his or her position in the home. They will usually be combined with a process of risk analysis (see below) in being geared towards determining whether or not the child can safely remain at home or whether placement in alternative care should be considered, and, if so, in what form. Criminal investigations involving law enforcement processes may be in process simultaneously or in an overlapping period. Multi-disciplinary protective assessments, especially where there is a criminal justice component, have a high potential for secondary abuse, if not properly planned and managed by all concerned. Assessment will also often be required early in the intervention process and possibly thereafter to determine what services are needed by the child and family. Hence examinations by neurologists, psychiatrists, educationists, occupational therapists and others may come into the picture where there is access to such persons.

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– NCCAN **National Strategy on Child Abuse and Neglect**, 1996, p. 34.

– The term 'treatment' may be problematic in some quarters at present due to moves away from the 'medical model' by many in the social work and child and youth care fields. However the term continues to be used to cover many therapeutic activities designed to promote emotional and social health and development and to overcome past problems.

– The IMC refers to 'therapeutic support' and 'special services' to refer to services which tend to be referred to by many practitioners as 'treatment'. The IMC view would be that this is not merely a semantic difference but one which arises from fundamental differences between intervention paradigms.

In the absence of the necessary resources for care and protection and for subsequent service delivery, comprehensive assessment processes may have little meaning. Writing from a British perspective, Scott states: 'Intervention in child welfare often has more to do with the resources that are available than ... the particular needs of the child. It is therefore not surprising that some social workers may see little point in undertaking an elaborate assessment if it does not determine the intervention'.<sup>184</sup> Hence if provision for assessment and treatment is to be built into the law, the resource context must be kept in mind.

#### 10.3.1.2 Risk analysis

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— Scott, D 'A qualitative study of social work assessment in cases of alleged child abuse' (1996) **British Journal of Social Work**, 73-87.

A crucial dimension of assessment in cases of alleged child abuse is risk analysis. A process of weighing up the risks of various forms of intervention, and also of refraining from intervening, has to be undertaken for every child referred for protective services.<sup>185</sup> Protective intervention and the processes which follow are in themselves potentially hazardous for children, given the possibilities for secondary abuse.<sup>186</sup>

Where a report is considered sufficiently serious to warrant a social work investigation, it is necessary in the first place to establish whether any risk to the child can be dealt with by the use of enabling or empowering approaches.<sup>187</sup> Such approaches, calling for voluntary involvement of the family in secondary preventive strategies, will be the first choice unless they are inadequate to prevent harm to the child.

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185 Cooper, DM and Ball, D **Social Work and Child Abuse** London: BASW 1987; see also NCCAN **National Strategy on Child Abuse and Neglect**, 1996, 25-6.

186 See 10.2.5.3 above.

187 These may include counselling, drawing in support from the extended family or neighbourhood, education in child development and parenting skills, linking of the family with available resources or with a development programme, etc. Regulation 2(4)(b) to the Child Care Act as amended in 1996 requires that 'a summary of prevention and early intervention services rendered in respect of the child and his or her family ....' be supplied to the court in the social worker's report for every children's court enquiry.

Numerous risk assessment frameworks have been developed by child protection agencies in different parts of the world including South Africa.<sup>188</sup> Without some basis on which to systematically approach decision-making, arbitrary action may occur which arises from the attitudes and anxieties of particular practitioners rather than the actual implications of the child's situation. At the same time, frameworks of this kind are not infallible, and research findings indicate that individuals have different "thresholds" at which they elect to undertake protective interventions.<sup>189</sup> In addition, risk to a child cannot be evaluated except in relation to his or her total environment, including local norms and support systems, and the available options for intervention. Hence models from elsewhere require modification for use in South Africa, and even from one area to another within the country. Nevertheless they provide some starting points. The research paper 'Legislating for Child Protection' cites several examples of basic frameworks for risk analysis.<sup>190</sup>

In assessing level of risk to a child, it is helpful to identify the predominant causative factors which appear to be generating the abuse. Typically, a combination of such factors is at work in any given case, comprising (a) characteristics of the caregivers (e.g. emotional disturbance, immaturity and/or ignorance about childrearing); (b) characteristics of the child (e.g. feeding problems, incessant crying, a disability or some other feature which the parents find highly stressful to deal with); and (c) socio-economic conditions which generate excessive stress (e.g. poverty, unemployment, overcrowding, lack of basic child care facilities or other essential resources). It has been

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188 Stein, T & Rzepnicki, T **Decision-making at Child Welfare Intake - a Handbook for Practitioners**, C.W.L.A., New York: Wald 1983, cited in White, R 'Standards of parenting and the law' in Adcock, M and White, R (eds) **Good-Enough Parenting** London: BAAF 1985, 33-4; De Panfilis, D and Scannepieco, M 'Assessing the safety of children at risk of maltreatment: decision-making models' (1994) 73(3) **Child Welfare** 239.

See also Child Welfare Society: Cape Town, 1988 'The Management of Child Abuse - An Intake and Field Social Workers' Guide to Abuse Management', (internal document). The NCCAN **National Strategy on Child Abuse and Neglect** 25 gives the following list of factors to be examined in the course of the risk assessment process: impact of the offender's behaviour on the child; severity of abuse or neglect; age and physical or mental abilities of the child; frequency/recentcy of the alleged abuse or neglect; credibility of the reporter; location and access of the perpetrator to the child; parental willingness to protect the child and level of co-operation; parental ability to protect the child; the availability and willingness of others in the child's immediate context to protect the child; and the availability of resources to relieve parental stress, and to provide support and guidance to caregivers who may be predisposed to abuse. The assessment, the NCCAN goes on to say, must also 'take into account the possible consequences of all the available forms of intervention, which must be balanced against each other as well as against the above factors'; hence the trauma likely to be associated with drastic interventions such as removal must be taken into account. 'There is .... no justification for removing a child from one situation where he/she is considered to be at risk without having good reason to believe that the alternative arrangement is less hazardous and more likely to meet the child's needs'.

189 Dagleish, L 'Assessing the situation and deciding to do something: risk, needs and consequences', paper presented at ISPCAN Congress, Durban, 2000.

190 Loffell, J. and Matthias, C., 1999, 38-40.

suggested, e.g., that, if the majority of children living in a given area are at similar risk due primarily to socio-economic conditions, case-by-case investigation and removal of children would not normally be the appropriate form of intervention - rather, a broad developmental approach would be called for. On the other hand, 'if ... the danger is primarily located in the personality and/or behaviour or in the lack of capacity of the parent(s) or other caregivers, perhaps in conjunction with features of the child which trigger an abusive reaction..., removal may be indicated if there is a likelihood of serious harm to the child and there is no way of building in adequate supports and protective factors', states the Johannesburg Child Welfare Society (JCWS).<sup>191</sup>

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191 'Considerations in Child Protection Investigations', internal policy document, 1997.

It is also often recommended that the concept of 'good-enough parenting'<sup>192</sup> rather than some idealised standard, be used when considering whether a child should be moved from his or her home, or be restored to that home after being in statutory care.<sup>193</sup> Socio-economic conditions will of course also play a role in determining to what level parents and caregivers are able to meet such criteria, and cultural factors may also have a bearing. Protective investigations should take account of these aspects.

A further consideration in assessing the relative risks of various courses of action is the issue of available resources, including alternatives for placement. To justify the risks inherent in removing a child from his or her family we must be able to offer a care option which is more likely to meet his or her needs. 'Hence decisions about removal will differ between contexts in which there is a range of care options for the child and those in which such options are absent or severely limited', states the JCWS.<sup>194</sup> These considerations highlight the need to develop the necessary resources for placement of children and for any other form of action which may be deemed to be necessary - e.g. treatment for the child, intensive support for caregivers, family reunification services etc. - to enable practitioners to select the options which have the best chances of ensuring the wellbeing of children.

### 10.3.2 Ongoing services / treatment / therapeutic support

Child abuse tends to arise at least in part from emotional problems in the perpetrators, and to create emotional problems in the child victims. Other family members are also liable to be involved or affected in one way or another. Non-abusive parents who fail to protect their children are often themselves past victims of child abuse who have never overcome their trauma. Other children in the family who are not directly victimised will nevertheless have their socialisation and development affected. The problems involved may be severe and need specialised attention. Abused children

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192 Adcock, M and White, R (ed) **Good-Enough Parenting** London: British Agencies for Adoption and Fostering, 1985.

193 Bentovim and Bingley 'Parenting and parenting failure: Some guidelines for the assessment of the child, his parents and the family' in Adcock and White (eds) **Good-Enough Parenting** 45 state as follows: 'For a child's potential to unfold, parents need to provide an environment in which the child can grow adequately in an atmosphere of security, affection and acceptance, be protected from danger and be nurtured and controlled adequately. The child also needs to be able to play and have sufficient freedom to explore and to learn; parents are also expected to ensure children are educated and attention paid to their medical needs'.

— JCWS 'Considerations in Child Protection Investigations' 4.

or their abusers may have physiological or neurological problems, or physical or intellectual disabilities. These may be congenital, or may arise from illness or accident or from abuse. Abused children and their families often have a range of practical problems which may relate to poverty, unemployment, lack of housing, lack of parenting skills, substance abuse etc. If protective interventions are to succeed in the long term, CPS workers must assist the children and families they serve to overcome their problems, through direct services and/or by linking them to other practitioners within a team approach.

### 10.3.3 Existing system in South Africa and deficiencies

Section 14 of the Child Care Act, after being amended in 1996 to provide for psychological assessments, reads as follows:

14(1) Any children's court holding an inquiry in terms of section 13(3) may at any time during the enquiry order any medical officer or psychologist to examine the child concerned and to report to the court thereon.

(2) The commissioner presiding over a children's court holding such an inquiry shall during that inquiry request any social worker to furnish a report on the circumstances of the child concerned and his or her parents or guardian or the person having custody of the child.

There is a lack of clarity with regard to the legal right of practitioners to undertake assessments for protective purposes, except where this is ordered by the Children's Court once an enquiry has commenced. Medical assessments may be needed as a matter of urgency for purposes of gathering forensic evidence, especially if criminal charges are also being pursued. The case may be prejudiced if there is a delay while an inquiry is opened. Due to uncertainties about their legal position, medical practitioners vary in their willingness to examine children without the consent of a parent, who may also be the alleged offender. Similar problems may arise with regard to arranging social work evaluations. Without entry into the home a social worker may be unable to assess the safety of the child, and may lack evidence to request the opening of an inquiry. Section 12 gives 'any policeman, social worker or authorised officer' the right to 'remove a child from any place to a place of safety without a warrant' if the child is considered to be at immediate risk – however the right of any of the above persons to enter the home in the first place so as to assess the circumstances is not clear. There is no provision for the financing of assessments, or for assessment to be required for a parent or other family member.



Risk analysis frameworks as such are not built into either the Child Care Act or the Domestic Violence Act. In the case of the Child Care Act the initial evaluation process usually rests entirely with the social worker, who may or may not have any support or guidance in this process. The court decides on the final disposition of the child's situation. However, the sudden removal of a child from his or her family in without preparation, as is allowed for by section 12, is a highly traumatic intervention which can have lasting consequences for all concerned. It is arguable that there is a need at least for a rudimentary decision-making framework, to prevent overzealous intervention by inexperienced personnel.

In relation to treatment of the child or any other family member, section 15(a) of the Child Care Act enables the children's court to order that the child 'be returned to or remain in the custody of his parents or ... the parent designated by the court or of his guardian or the custody of the person in whose custody he was before the commencement of the proceedings, under the supervision of a social worker, on condition that the child or his parent or guardian or such person complies ... with such of the prescribed requirements as the court may determine'. Regulation 2 pertaining to the 1996 amendments requires that the social worker's report to the court shall include the proposed plan to reunite the child and the family, where applicable. The definition of 'family reunification services' as supplied in the amended Regulations reads as follows:

A service whereby a social worker ... where applicable in consultation with the child and youth care worker renders a service for the purpose of empowering and supporting parents, the family and children in alternative care, which aims at enabling those children to be reunited with their family and community of origin in the shortest possible period of time, in a manner consistent with the best interests of the child ... .

The Child Care Act thus provides for a range of activities which could incorporate arrangements for specialised treatment, or delivery of services with a treatment orientation. However, there is no explicit provision for the court to require psychotherapy or any form of remediation for the child, or to compel a perpetrator or a family to participate in a therapeutic programme, or to determine how costs are to be covered.

A criminal court has discretion in the sentencing procedure to order a perpetrator to pay for treatment for a child victim, or to engage in treatment him or herself. Enrolment in a treatment programme may be a condition of suspension of sentence, or probation, or placement under correctional supervision. The terms of such arrangements are, however, not spelled out clearly, and

there is no automatic provision for monitoring in cases of suspension of the sentence. There is also a lack of clarity regarding the consequences for defaulters.

◦ *IMC policy on assessment and therapeutic support*

The Inter-Ministerial Committee on Young People at Risk (IMC) has sought to give assessment a far more central role in child and youth care practice than has traditionally been the case, and to change the focus of assessment to fit the strengths-based ethos of the developmental approach. The IMC describes assessment as a process ‘to determine the least restrictive environment and programme suitable to the child’s development needs at any given moment, and/or during the next steps of development and/or in the long term’.<sup>195</sup> It is also recommended by the IMC that assessment not be undertaken as an isolated task, but be firmly located within a methodology which moves through a continuum from engagement, to behaviour management, to developmental care and then to assessment, followed by disengagement. A detailed set of principles is provided.<sup>196</sup>

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– IMC, 1998: Developmental Assessment of Children, Youth and Families – Draft Practice Guidelines for Trainers.

196 In its Interim Policy Recommendations, the IMC set out a number of principles which should apply with regard to assessment:

- Assessment should be undertaken by a multi-disciplinary team, and should be holistic and appropriate to the child’s culture, language and developmental stage.
- Assessment should be undertaken within a developmental approach which places emphasis on the strengths of the child (and family).
- Assessment should always be undertaken within the family home and/or community unless proved not to be in the best interests of the child.
- Assessment should be done with the child and family and not to them. Family conferencing (and/or community conferencing where appropriate) should be included in the process.
- The process should aim to increase insight and competency and should involve shared decision-making with all relevant role-players.
- Assessment should be based on minimum standards and guidelines for practice.
- Assessment should result in an appropriate referral to a programme of intervention which is regularly reviewed together with the child and family.
- Assessment processes and documentation should be of such a nature and standard that they can be used at the point of reception of any level and do not necessarily need to be repeated (only reviewed) within a 12-month period.
- The process and procedure of reception, assessment and referral should not be ad hoc, regardless of circumstances and time constraints. Whether located in a particular centre or not, this process should recognise the critical impact of any referral decision upon the child and family and should be consistent and thorough.
- Observation and assessment is a process and should continue throughout the young person’s participation in the child and youth care system. However, there are particular stages during that period of participation that warrant a comprehensive assessment. For example, at the point of reception, at the point of placement, annually, and at the point of disengagement. A reception/referral interview or an overnight procedure should not be labelled as assessment, but considered to be the first step in a more holistic assessment process.

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- The reception and referral process should be rooted within the community and should actively involve the “significant others” in the child’s life. Where appropriate, consideration should be given to including the community leaders and volunteers within the team decision-making process.

The IMC uses a model of developmental assessment based on the 'Circle of Courage' which includes core concepts of belonging, mastery, independence and generosity. The model assumes that assessment will result in a care plan for each child, to be based on an assessment of the least restrictive, most empowering long-term option for the young person. The care plan is about the long-term arrangements for a child's future and encapsulates the principles of permanency planning and reunification with the family and community. The IMC also refers to 'individual development plans' (IDP's) which are required for all children in care. Within the framework of such plans, 'therapeutic support and/or special services' may be indicated for specific young people.<sup>197</sup> There is an emphasis on therapeutic interventions being voluntary and strengths-based, and on the avoidance of labelling. Therapeutic interventions (e.g. behaviour modification) may, in terms of the IMC approach, not be used as a means of behaviour management. A required outcome in terms of the IMC's draft Minimum Standards is that 'service providers confirm that young people are unconditionally receiving therapeutic support and/or special services as indicated in their IDP and/or as required on a daily basis, or in a particular crisis'.<sup>198</sup>

The IMC guidelines do not differentiate between assessments, development programmes, therapeutic support measures etc. which are implemented in different situations – e.g. where young people are in conflict with the law, are suspected to be in need of protection from abuse or neglect by their caregivers, or are destitute. While there is of course substantial overlap between such categories, it can be argued that, for purposes of protective investigations and follow-up services, some additional specific issues need to be examined and there may need to be a shift in emphasis. Where there is a possibility that a child is in immediate danger of physical or sexual abuse within his or her family, it can be argued that assessment cannot always be of the voluntary and participatory nature advocated by the IMC. Likewise, where therapeutic support and special services for the growing numbers of young perpetrators of child sexual abuse are concerned,

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– IMC, May 1998: draft Minimum Standards, South African Child and Youth Care System, 32, 37-8.

– Ibid, 38.

provision only for services which are voluntary and from which the young person can withdraw at any time, is unlikely to offer sufficient protection to prospective child victims.

The assessment process and the provision of therapeutic support and special services as per the IMC principles have clear resourcing implications. Substantial costs are involved in conducting multi-disciplinary assessments of the child's developmental and therapeutic needs.<sup>199</sup> The same applies to the provision of special services or support 'on a daily basis', or even only in times of crisis. Without adequate resourcing, both the assessment process and the plans to which it gives rise are undermined from the start.<sup>200</sup> Resourcing concerns are of course not restricted to the IMC model – they would apply in any approach to assessment and service delivery.

#### 10.3.4 Comparative review of other systems

##### ◦ *Assessment in other systems*

It seems to be standard practice for child protective legislation to provide at least for medical examination. There is variation as to other forms of assessment which may be provided for, and the ways in which consent by the child and the parents is managed. The Children (Scotland) Act provides for the granting of a 'child assessment order' to enable a local authority to establish whether a child is being ill-treated or neglected to a degree likely to cause significant harm.<sup>201</sup> In England the court may, simultaneously with the issuing of an interim care or supervision order, give directions regarding the 'medical or psychiatric examination or other assessment' of the child.<sup>202</sup> A child who is in a position to make an informed decision may refuse to submit to such a process. One of the options open to the court is to order that there be no examination or assessment.<sup>203</sup>

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– NCCAN **National Strategy on Child Abuse and Neglect**, 1996, 38-9.

– For example, Project Go is a major policy initiative through which the Department of Social Development has sought to ensure appropriate assessment of children entering the Child and Youth Care System, to prevent them from moving deeper into the system, and to enable them to move out of it more quickly. Project Go has, it is argued, not achieved the desired results because it has been an attempt to induce conformity with the required procedures and standards of service by setting up bureaucratic controls, without effectively addressing the underlying human resource problems and service options (Johannesburg Child Welfare Society, Letter to Chief Director, Gauteng Department of Welfare, 20 January 1998; SASPCAN 'Creating new options for the prevention and management of child abuse in a developing country', 1998 Conference proceedings, Johannesburg, 68, 72).

– Section 55 of the Children (Scotland) Act, 1995.

– Sections 38(6) and (7) of the Children Act 1989.

203 New Zealand's Children, Young Persons and their Families Act of 1989 provides that the court may order a medical examination of a child where there is a suspicion of ill-treatment or neglect. A Court may issue a warrant

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authorising a police officer or social worker to search for a child, in which such person is authorised to enter and search a residence and if necessary to remove or detain the child. Where such a warrant has been issued the social worker has the authority to request a medical examination of the child without the consent of a parent, if reasonable efforts have been made to obtain such consent. Examinations on the anus or genital organs may only be carried out where there is suspicion of abuse, and with the consent of the child (sections 49, 39, 53, 55). In Canada, Newfoundland and Prince Edward Island provide that a parent should be asked to consent to medical assessment, failing which this can be authorised by the responsible social worker (FPWGFSI, 1994: 12, 19). The Ugandan Children Statute provides that the court may order a medical examination "if there is any reason to believe that the child is in need of the examination, or for some reason requires a report concerning the child's physical or mental condition [Section 43(1)].

In the USA, federal funding for States under CAPTA is dependent on each State enforcing a law or operating a state-wide programme which includes 'procedures for the immediate screening and safety assessment and prompt investigation' of reports of child abuse. An explicit aim of the law is to 'create and improve the use of multi-disciplinary teams ...to enhance investigations' and to 'improve risk and safety assessment tools and protocols'.<sup>204</sup> In Canada there are various provincial arrangements for coordinated assessment processes carried out by teams. The relevant processes may be mandated by statute, as is the case with e.g. the Youth Protection Act in Quebec.<sup>205</sup> In others they are set out in policies and working agreements.

- *Some specific considerations concerning assessment where a child may be in need of protection*

As mentioned earlier, in South Africa the IMC has emphasised that assessment should be strengths-based and should be carried out in partnership with the young person and his/her family. The draft Minimum Standards for the South African Child and Youth Care System include the following as an underlying principle: 'All services should prioritise the goal to have young people remain within the family and/or community context wherever possible'.<sup>206</sup>

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– Title 42. Section 5106a(a)(2)(A); Section 5106a(a)(4).

– Federal-Provincial Working Group on Child and Family Services Information: 'Child Welfare in Canada', Federal Family Violence Initiative, Minister of Supply and Services Canada, 1994, 53-4.

– IMC Draft Minimum Standards, May 1998, 6.

This approach has been subject to some controversy in recent years, especially in North America, in situations requiring protective intervention. In British Columbia, Canada, the Gove Commission questioned a shift which had occurred from 'child-centred' to 'family-centred' practice, and identified as dangerous a resultant trend towards giving family unity priority over the child's safety and well-being. The Gove Commission also recommended that legislation to make family group conferences standard practice not be proclaimed into law for the present for children at risk of abuse or neglect, and that such conferences be avoided at least in the early phases of contact, as they could compromise the safety of the child. The Gove Commission further found that 'the Ministry's adoption of a strengths-based approach ... is dangerous in child protection situations because it focusses on the parent's potential rather than the child's protection'.<sup>207</sup> In Ontario, arguments have been raised against the emphasis on 'least restrictive' outcomes on the grounds that this has tended to result in children being left in danger and has sometimes led to their deaths. Legislation was changed in 1998 to ensure that the safety of children took precedence over a previous mandate to choose the 'least restrictive or disruptive course of action'.<sup>208</sup>

These concerns reflect part of the debate in North America between supporters of the 'protectionist' and 'family preservationist' positions, as discussed in 10.2.9.1 above, and a balanced approach must be sought for local purposes. The Canadian experience suggests that it may be necessary, in situations involving immediate danger to the child, for the structure and format of child and family assessment approaches to differ in some respects from those used in other scenarios in the child and youth care system.

◦ *Ongoing services / therapeutic support in other systems*

In the USA, in terms of CAPTA and the linked provisions of the Social Security Act, each state has to have a plan for child welfare services, family preservation and family support services.<sup>209</sup> 'Family preservation' as understood in this legislation includes services designed to restore children to their families and to support these placements thereafter. In Canada, any of a range of services designed to address specific needs of a child and his or her family may be offered at the request of

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— Report of the Gove Enquiry into Child Protection in British Columbia: Executive Summary, vols 1 and 2, 1995.

208 **Toronto Star**, 29 October 1998:A32; Office of the Chief Coroner, Ontario, 1996 : 60.

— 42 USC 620 et seq., Part B of Title IV: Child and Family Services.



the family, on the basis of a social worker's recommendation, or in terms of a court order.<sup>210</sup> In New Zealand, a court which has declared a child to be in need of care and protection may make a 'support order' requiring the Director-General of Social Welfare or another party to 'provide support' to the child for a specified period.<sup>211</sup> In England, provision is made for ongoing supportive services through 'supervision orders' issued by the court. The designated supervisor has a broad obligation to 'advise, assist and befriend the child'.<sup>212</sup> In exceptional circumstances, a court hearing a divorce or domestic dispute case can make a similar order where a child appears to be vulnerable, in the form of a 'family assistance order'. This requires a probation officer or local authority to 'advise, assist or befriend' a child, a person who is living with or is obliged to maintain contact with the child, or a parent or guardian of the child. Family assistance orders are subject to the consent of all concerned.

Ongoing services including therapeutic measures are usually structured within a permanency planning process, discussed further in that context in 10.3.3 above.

### 10.3.5 Options mooted in the research paper

Issue Paper 13 did not raise specific questions concerning assessment and treatment. Specific attention was paid to assessment in the research paper. Questions raised and responses received were as follows:

*Should assessment orders be made a more prominent feature of our child care law? If so, which of the following (if any) should be catered for in legislation: medical, psychological,*

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— FPWGCFS op. cit., 5ff.

— Section 91 of the Children, Young Persons and their Families Act 1989, as amended.

— Section 35 of the Children Act 1989.

*social and/or criminological assessments? Any other type?*

*In relation to whom should such assessment orders be issued - the child? the caregiver/s? other family members? an alleged perpetrator?*

*Who should have to give consent to the assessment, and to any resulting treatment? For example, should an incestuous father have the power to withhold consent to medical examination of his child?*

*Who should be empowered to carry out assessments? Who should pay for an assessment?*

*How can the impartiality of such assessments be safeguarded? For example, should it be possible for parents accused of abuse to pay private medical practitioners, psychologists, social workers etc. to carry out assessments and give evidence in court?*

*When should a child or any other person involved in a child protection investigation have the right to refuse to be subject to an assessment?*

*Do the principles of "strengths-based" assessment, the use of family group conferences and the selection of the "most empowering and least restrictive" option require any modification in the case of assessments and intervention in child protection cases? If so, how should these issues be approached?*

*Do you have any other suggestions to raise as regards legal provision for assessments?*

There was general consensus as regards the desirability of extended provision for court-ordered assessments.<sup>213</sup> A group at the Pretoria workshop felt that district surgeons should be properly trained to assess children, since reports tended to be superficial; in addition many such doctors did not know how to establish rapport with children and this led to secondary trauma.

There was agreement that there should be provision for assessment of all parties, or at least all family members. Opinions varied as to the issue of consent, and whether this should be up to the parents (with recourse to the court should they refuse), the child and his or her guardian, or the professionals involved.<sup>214</sup> Most respondents felt that the parents or the perpetrator should pay for

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– The SANCCFW (Eastern Cape); Ms T Odyar, Ms D Ritter and the GCWS; the UCARC and the participants in the Umtata consultative meeting supported such provision. The SANCCFW gave qualified support, suggesting that the results of studies undertaken elsewhere in the world be summarised to provide guidelines which could be made available as an assessment tool. Assessment orders could be considered if it were possible for these to be implemented without delays being created. The SANCCFW (Eastern Cape), the UCARC and participants in the Umtata consultative meeting felt that medical, psychological, social and criminological assessments should be provided for. A group at the Pretoria consultative workshop felt that only medical assessments should be mandatory and others should be called for as deemed necessary, given the limited available resources.

– A group at the Pretoria workshop felt that, where resources were limited, assessment could be limited to the child and the perpetrator. As regards the issue of consent to assessment, Ms T Odyar, Ms D Ritter and the GCWS felt that the assessment team should be in a position to give the necessary consent. In similar vein, participants in the Umtata consultative workshop felt that the relevant professionals should give consent. The UCARC felt that the child and the guardian's consent should be

assessment where possible, with the state assisting where necessary.<sup>215</sup> It is not clear whether respondents believed payment by the parents should be direct to the various practitioners or via some other mechanism so as to protect the impartiality of investigations.

On the subject of whether modifications to the IMC approach, i.e. strengths-based assessment, the choice of the 'most empowering and least restrictive option', and the use of family group conferencing in child protection cases, only two responses were received.<sup>216</sup> Those concerned saw no need for modifications.

The following questions were posed with regard to risk assessment:

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- obtained. The SANCCFW (Eastern Cape) said that consent should rest with the parents/caregivers but, should they refuse, the commissioner of child welfare should be able to consent. Any person refusing assessment would then be in contravention of a court order and liable to prosecution. The Umtata consultative group felt that there should be a right to refuse assessment by someone not dealing with the case, or where the assessment would jeopardise the investigation or was unlawful. They felt that there should where possible be one person managing the case.
  - Ms T Odyar, Ms D Ritter and the GCWS felt that legislation should provide for the appointment of a team, and that parents should pay if possible, failing which the Department of Social Development should carry the costs. The UCARC felt that the parents should pay for the assessment of the child and others concerned for their own assessments, unless the perpetrator agreed to pay, with the state helping where possible. The Umtata consultative meeting and the SANCCFW (Eastern Cape) felt that the parents should pay unless they could not afford to do so.
  - Ms L Vara of the SANCCFW (Eastern Cape); Ms T Odyar, Ms D Ritter and the GCWS.

*Are the provisions of s14(1) of the Child Care Act adequate as a basis for considering a child to be in need of protective intervention?*

*Should a framework for risk assessment be built into a comprehensive children's statute or should this be a task for policy-making and planning?*

*If the former, are the factors to be taken into account in risk assessments as mentioned above, appropriate to the South African context? If not, what adjustments are necessary?*

*Is your organisation using, or do you have suggestions for, a framework which would be useful for child protection decisions, or would you like to suggest a different approach altogether? Please attach any contributions you may wish to make.*

Respondents felt that the present terms of section 14(1) of the Child Care Act as amended in 1996 and 1991 were adequate.<sup>217</sup> Risk assessment was seen as an important aspect of protective intervention. There was support for the idea that a framework be built into the law, although one organisation saw this as a policy and planning issue.<sup>218</sup>

In relation to services needed for the effective implementation of court orders, the following question was posed:

*Could a comprehensive children's statute make more adequate provision than is presently in place, to ensure that appropriate substitute care or other court-ordered services are in place for children and families who need them? If so, what types of provision could be included and how?*

The SANCCFW (Eastern Cape) felt that the present Act was adequate but that there was a need for

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— SANCCFW; Ms T Odayar, Ms D Ritter and the GCWS; UCARC; SANCCFW (Eastern Cape). The SANCCFW emphasised the need for adequate resources for implementation.

— The UCARC regarded risk assessment frameworks as being more a matter for policy-making and planning. The SANCCFW recommended that guidelines be provided in legislation based on the categories cited in the consultation paper. These guidelines should be mandatory and thus binding on the court - this would cut down on unnecessary bureaucracy and costs. Ms T Odayar, Ms D Ritter and the GCWS concurred that a risk assessment framework should be built into the proposed statute. Both they and the SANCCFW saw the considerations for risk assessment as spelled out in the research paper as being appropriate. The UCARC felt adjustments could be necessary to take into account conditions in areas with minimal resources.

trained and committed personnel to implement it. The SANCCFW favoured statutory provision for adequate care resources and court-ordered services and also advocated regular court reviews of each child's situation. The UCARC felt that more state Places of Safety could be built, while T Odyar, D Ritter and the GCWS recommended that legislation provide for safe-houses in the community.

#### 10.3.6 **Evaluation and recommendations regarding assessment and treatment / therapeutic services**

The Commission has sought an approach to assessment, ongoing services and therapeutic support which is realistic in terms of the limitations on resources for these purposes in South Africa; provides adequately for a decision-making process which is based on sound information; ensures that services which are essential for positive outcomes will be carried out; and is sufficiently flexible to allow for different conditions and resourcing priorities in different parts of the country, while also being equitable.

#### **The Commission recommends provision for:**

- **greater clarity as to the right of CPS practitioners in various disciplines to undertake routine investigations in response to allegations of abuse and neglect, before a case comes to court;**
- **court orders for additional investigations and assessments where these are indicated, if necessary, at state cost;**
- **appropriate provision for consent to examination and assessment by the child concerned;**
- **a mechanism to ensure the impartiality of the assessment process, whether this is undertaken by a state facility or a professional in private practice;**
- **a Code of Good Practice to guide assessments of children referred for protective services, based on the IMC guidelines with the addition of specific considerations where protective investigations are involved;**
- **a broad risk assessment framework, adaptable to different local conditions, to guide decision-making;**

- **provision for Family Group Conferencing outcomes to be incorporated into court orders, where the necessary programmes exist and where outcomes comply with requirements to ensure the safety of the child;**
- **court orders which incorporate necessary and available services, which may be practical, supportive, educative and/or therapeutic.**

#### 10.4 **Permanency Planning and Associated Services and Mechanisms**

##### 10.4.1 **Philosophy and introductory remarks**<sup>219</sup>

The basis for permanency planning is the premise that every child, in order to enjoy healthy growth and development, needs secure and meaningful relationships with parents and other significant persons. This in turn requires continuity and stability in these relationships. The parental home is the natural and generally the best environment for a child to experience this. The first premise in a permanency planning approach is to avoid removal from the family where possible, through timely preventive services.

Should separation from the family be inevitable, permanency planning must start before such a step is taken. Failing this, a child could spend years in alternative care without a goal-directed plan for his or her future. He or she may become a victim of 'drift in care' and never experience any security.<sup>220</sup> This situation arises where a child remains in substitute care for an indeterminate period. Such children are unable to put down roots or develop a clear sense of who they are. Repeated separations, as occur when children are moved between a succession of placements, can severely affect their ability to trust others, to form normal relationships, and ultimately to become competent parents for their own children.

The dangers of a lack of permanency planning are particularly acute in the case of infants and very young children. While there are extensive debates about the precise effects of separation in early life, there is a general consensus that severe ill-effects can occur 'especially where separation is not followed by consistently good physical and emotional care and opportunities for one-to-one

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219 Certain permanency issues specific to foster and residential care are discussed in Chapters 17 and 19 below.

220 Department of Health Services and Welfare, Administration: House of Assembly, January 1990. Report of the Committee of Enquiry into the Foster Care of Children.

bonding'.<sup>202</sup> Without opportunities to form an attachment to one or at most a few consistent parent figures, a child's ability to form normal attachments in later childhood or in adulthood may be severely impaired.

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3      Johannesburg Child Welfare Society, Policy Document relating to Permanency Planning, 1995.

Permanency planning can be described as 'the systematic process of carrying out, within a brief time-limited period, a set of goal-directed activities designed to help children live in families that offer continuity of relationships with nurturing parents or caretakers and the opportunity to establish lifetime relationships'.<sup>203</sup> 'Permanency planning offers considerable promise for generating constructive programmes that are truly in the best interest of the child, and end the problem of many children's gradual drift into the limbo of temporary placements. However, the movement must be guided so that a rush toward placing children in inadequate but nevertheless permanent placements does not result. Permanency programmes must result in more continuous placements that help children feel psychologically secure' states Rooney.<sup>204</sup> Permanency planning holds out special challenges in a multicultural society such as South Africa, requiring the development of diversity competence in child welfare processes.<sup>205</sup>

#### 10.4.2 Components

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- 203 Maluccio, AN, Fein, E & Olmstead, KA **Permanency Planning for Children: Concepts and Methods** New York: Tavistock Publications 1986.
- 204 Rooney, RH **Permanency Planning: Boom for All Children?** New York: Social Work 1982 27, 157.
- 205 Anderson, GR, Shen, A, & Leashore, BR 'The challenge of permanency planning in a multicultural society' (1998) 33(132) **Adolescence** 957; Pinderhughes, E 'Developing diversity competence in child welfare and permanency planning' (1994) 5(1/2) **Journal of Multicultural Social Work** 19-38; Williams, CW 'Personal reflections on permanency planning and cultural competence' (1997) 5(1/2) **Journal of Multicultural Social Work** 9-18.



◦ *Service plans and contracts*

When developing a permanency plan, the child, the parent or guardian, the social workers and other significant role players should participate. Such a plan must include goal-directed time-frames, and be implementable. Often such a plan is incorporated in what is termed a 'service contract' which sets out the responsibilities of the parents, the social service agency or state department responsible for protective services, the substitute caregiver and, where age and capacity permit, the child. The reasons for the child's placement in substitute care must be clearly stated, and likewise the conditions which must be fulfilled in order for him or her to return home. The consequences if reunification is not achieved within a specified period should be spelled out – e.g. the possibilities of long-term substitute care, adoption etc.<sup>206</sup> An undertaking by the caregivers to facilitate contact between the parents and the child should be part of the contract unless there are compelling reasons to the contrary – e.g. a real threat to the safety and wellbeing of the child or the caregivers from a violent or severely disturbed parent. As far as possible the plan should be agreed upon by all concerned. Exceptions to the latter requirement would be situations where, despite appropriate efforts by service providers, the parents are unwilling or unable to acknowledge serious problems which have led to the removal of the child, such as physical or sexual abuse or severe neglect, and refuse to engage with the necessary services. The plan may then have to be drawn up without their cooperation, but will nevertheless in most cases include contact between them and their child and continuing efforts to assist them, at least in the early stages of placement. The service plan should be documented and, where possible, signed by all parties.

If the return of the child to the custody of the parent(s) cannot be achieved within a specified period, then the child's right to alternative permanent placement takes precedence over the rights of the parents. A state of limbo must then be avoided through a permanent placement. 'A child's future and best interests cannot be held to ransom by indecisive parents'.<sup>207</sup> The social worker's obligation to provide reunification services will then terminate.

◦ *Services to the child, the family and the caregivers*

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3 Johannesburg Child Welfare Society, Policy Document Relating to Permanency Planning, 1995.

207 Department of Welfare, 1998: Information Guide, p 23.

Where a child has to be removed from his or her parent to appropriate alternative care, every effort must be made to return him or her to the parent as soon as possible, unless there are highly exceptional reasons to the contrary. This is to be achieved through services designed to help overcome the difficulties which have led to placement. If this is not possible, contact with other significant persons in the child's life such as grandparents, other relatives and friends, should be maintained if this is in the best interests of the child. The child's personal history including his or her social and cultural background, must be respected.<sup>208</sup>

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208 L Stuurman, 2000: Child Protection Comparative Research: Children in Need of Care or at Risk of Harm., SA Law Commission, 40.

Services to the family of a child who is placed in out-of-home care should be delivered with a high level of intensity before, during, and after placement. If a partnership of trust and cooperation can be established between parents and social service workers by the time the child moves into care, which is usually a highly painful phase for all concerned, the prospects for successful reunification services are greatly increased. In Britain it has been estimated that about 90% of children in care at some stage return to live with their parents or in their home communities.<sup>209</sup> Thorburn cites research which indicates considerable success in achieving family reunification where adequate services, including financial and material help are delivered.<sup>210</sup> There are also research findings to the effect that children for whom family rehabilitation has been tried are able to settle more effectively, even if they are eventually placed in permanent substitute family care.<sup>211</sup>

The specific service needs of each child and family should as far as possible be defined in the course of a thorough assessment process, and should be spelled out in the service plan. For example, a parent may need specific help with developing parenting skills, achieving impulse control, or overcoming a drinking problem. A couple may require help in stress management or conflict resolution. A child is likely to need considerable help in dealing with past traumas and learning new life skills in order to settle either in his or her own family or in a permanent new home. Especially in cases of in-family child sexual abuse and of severe physical abuse, there will be a need for clarity as to the prognosis of the offender for rehabilitation, the types of services to be offered, and the consequences of non-compliance with treatment. This may involve work within the framework of an order issued by a criminal court.

Services to the child will in the nature of the situation involve support for and assistance to the

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209 Thorburn J **Child Placement: Principles and Practice** (second edition) Aldershot: Arena 1994, 73.

3 Ibid.

3 Ibid 75.

caregivers, especially where foster care is involved. Intensive services may be required depending on the level of training and experience of the substitute parents, the willingness and ability of the biological parents to work cooperatively with them, and the specific problems of the child. The caregiver is expected to play a key role in facilitating contact between the child and his or her parents and other significant family members and promoting positive relationships between them, as well as playing an educative role by helping them e.g. to increase their parenting skills, understanding of child development and so forth. Caregivers may experience considerable inner conflict in playing these roles, in which case the support of social service personnel will be particularly important. The nurturing of the parents' efforts to develop their relationship with their child is a key aspect of working for permanency – these efforts may either help achieve reunification or, conversely, help all concerned to realise that reunification is not possible.

- *Reviews*

Regular reviews are essential to ensure that the permanency plan is on track and to take corrective action if this is not the case. All the relevant role players should, where possible, be active in the review process. In many jurisdictions, the time-frame for review processes is set out in law or may be determined by the court ordering a particular course of action for the child. The age of the child may be a factor in setting review dates; e.g. a shorter deadline may be set in cases involving infants and very young children.

- *Transitional phase and aftercare*

The transition from a statutory placement to being reunited with the parent or guardian or a significant other person, should be dealt with in a supportive and sensitive manner and all parties concerned should be heard. Preparation for the transition is vital to ensure that such a transition will be as smooth as possible, and to promote the child's chances for a successful reunification as well as his or her reintegration into the community. A transitional care plan should be drawn up to support the re-entry of the child or young person into the biological family, or a new permanent family, or independent living. Aftercare services are then advisable to assist all concerned to successfully deal with the ongoing reintegration process.

#### 10.4.3 **Possible outcomes**

- *Family reunification*

The first placement option to be explored is the possibility of family reunification.<sup>212</sup> Only if this is ruled out can another permanent plan be considered. Within the ambit of family reunification various possibilities exist including long-term 'kinship care', i.e. care by relatives.

- *Long-term foster care or kinship care with full or partial termination of parental responsibility*

Where it appears that the child's best interests will be best served by remaining in the care of a substitute family, whether or not they are related to him or her, there may be a need to give some form of official security to this placement and create a sense of permanence both for the child and the caregivers. This may be achieved by transferring full, or at least an added measure of, parental responsibility from the biological parents to the substitute caregivers. Various legal possibilities for achieving this outcome will be discussed in the Chapter on Foster Care.

- *Adoption*

Adoption tends to be the placement of choice where parents voluntarily request this option for their child, or are deceased or untraceable over a protracted period, or where the prognosis for the return of the child (within a period consistent with the meeting of his or her developmental needs) seems negligible. Many countries have legislative provision for termination of parental rights for purposes of adoption as a means of achieving permanency for a child who would otherwise remain indefinitely in foster or residential care.

The CRC upholds the principle that the State shall respect the responsibilities, rights and duties of parents and extended family members. The child is entitled to know and be cared for by his or her parents and has the right to preservation of his or her family relationships without unlawful interference. Circumstances nevertheless arise in which the termination of parental responsibilities is required in order to enable a child to achieve permanence, usually in a substitute family. Complex legal and philosophical problems arise in deciding the circumstances under which parental

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3 See Information Guide, Department of Welfare, 1998.

responsibility should be terminated.

- *Permanent residential care*

Although most current service models emphasise the short-term nature of residential care, in practice it has been found that certain young people remain in long-term residential care.<sup>213</sup> In addition, at least one care model, contrary to the prevailing orthodoxy, is based on the concept of permanent residential care – namely the SOS Children’s Village system which operates in a number of countries. Permanent residential care, like permanent foster care, must involve preparation for independent living and emancipation.

- *Preparation for emancipation, release into and support in independent living arrangements*

A significant number of children, due to inadequate service delivery, or despite intensive efforts at family reunification and/or the recruitment of substitute families, remain in care until they are able to function independently in the community. Where it becomes apparent that this will be the likely outcome for a young person, the caregivers and the responsible professionals must ensure that he or she is equipped with the necessary skills to function independently. Young people in alternative care are particularly vulnerable where they have attained the age of eighteen years and their biological parents are untraceable, deceased or unable to support them; or they have foster parents who have died or are unwilling to continue to assist them.

Where a young person is set to enter an independent living arrangement without any support from his or her erstwhile caregivers or family, there is likely to be a substantial need for support over a transitional period. This process could be assisted by the appointment of a significant other person in this child’s life, to assist and guide him or her towards independent living up to the age of 21

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3 See Thorburn, J **Child Placement: Principles and Practice** 127-132. Such a child may e.g. have had bad experiences in foster care and not want to join another family, or have been so badly abused that he/she cannot adapt to placement in another family, or have significant ties with the biological family who nevertheless remain unable to meet his or her needs. A child in the latter category has often entered care in adolescence and the family may e.g. now include a step-parent, creating re-entry problems.

years or less, depending on his or her level of maturity.

#### 10.4.4 Existing South African system

Provision for permanency planning was not initially spelled out in the Child Care Act 74 of 1983 but has always been implicit. Where a child is placed either in his or her own home under supervision, or in any form of substitute care, in terms of section 15 of the Act, the relevant order is valid for a maximum of two years. Thereafter it will lapse, thereby effectively restoring the child to the normal custody of the parent(s), unless the Minister of Social Development extends its validity for a further period not exceeding two years, or parental responsibilities are terminated through adoption. Initially, the fact that an order for substitute care of a child had been extended in terms of s16 constituted grounds to dispense with the parent's consent to adoption.<sup>214</sup>

Amendments to the Regulations which came into effect in April 1998 introduced far more explicit provision for permanency planning than had existed in the past. Regulations 2(4)(b) and (f) require that details of efforts at early intervention and prevention of the need for placement, as well as a plan for family reunification where applicable, be included in the social worker's report supplied to the court in terms of section 14. Regulation 13(1) requires that the child's caregiver should have access to a range of services. Regulation 15 provides for reports aimed either at the discharge or transfer of a child or the extension of the existing order to be based on a developmental assessment of the child and to 'reflect the existing and future developmental programme for the child and family as well as services provided to the child and family to meet developmental goals ...'.<sup>215</sup> These changes to the Regulations reflect the IMC's commitment to developmental assessment, planning and services with an emphasis on achieving permanency.

In terms of section 19(b) of the Act, consent by a parent to the adoption of a child may be dispensed with by the court, after a proper hearing, in order to promote and secure a permanent placement in the interests of a child where there is a poor prognosis for his or her return to parental care. This applies to the parent or guardian:

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3 Previously section 19(b)(v), repealed in 1996.

3 Regulations 15(2), (4).

- who as a result of mental illness is incompetent to give any consent; or
- who has deserted the child and whose whereabouts are unknown; or
- who has physically, emotionally or sexually assaulted, ill-treated or abused the child or allowed him or her to be so assaulted, ill-treated or abused; or
- who has caused or conduced to the seduction, abduction or sexual exploitation of the child or the commission by the child of immoral acts; or
- who is withholding his or her consent unreasonably; or
- who, in the case of a child born out of wedlock, has failed to acknowledge himself as the father of the child or who has, without good cause, failed to discharge his or her parental duties with regard to the child; or
- whose child, in the case of a child born out of wedlock, was conceived as a result of an incestuous relationship between himself and the mother of the child; or
- who, in the case of a child born out of wedlock-
  - (aa) was convicted of the crime of rape or assault of the mother of the child; or
  - (bb) was, after an enquiry by the children's court following an allegation by the mother of the child, found, on the balance of probabilities, to have raped or assaulted the mother of the child ... ; or
  - (cc) who, in the case of a child born out of wedlock, has failed to respond, within 14 days, to a notice served upon him as contemplated in section 19A.

#### 10.4.5 **Deficiencies in the existing system**

In practice, many children in South Africa remain in substitute care arrangements for many years. For some, their entire childhood is spent in foster care, residential care or various combinations thereof. Such children may thereafter be discharged from care without any support systems being in place, and without being ready to function independently. The following appear to be significant issues to be addressed in this regard:

- Permanency planning and the associated mechanisms are often not adequately understood by social workers and child care workers. The necessary training and supervision are often not in place.
- Resources within the child protection system are insufficient for permanency planning and



the associated services, which are intensive and time-consuming. Such resources as are available tend to be concentrated at the level of initial referral and protective intervention, which are highly crisis-driven, leaving very limited provision for ongoing services.<sup>216</sup>

- The lack of provision for subsidised adoption for children who have special needs, or whose caregivers cannot support them without financial aid, results in many children remaining permanently in foster care. This does not offer the same sense of security as adoption and has a higher risk of breakdown.
- There is a lack of legal guidelines to assist the court in determining the circumstances under which parental responsibilities should be terminated.

- There is no distinction, for purposes of termination of rights, between mild and severe forms of abuse, and no provision for termination with respect to one child in a family when another has been grossly abused or even killed by a parent.<sup>217</sup>
- There is no clear definition of and no guidelines associated with, abandonment. Commissioners as a result set their own procedures for the management of such cases. These are at times incompatible with the developmental needs of the children – e.g. some commissioners refuse to free abandoned infants for adoption until a lengthy (and in practice usually fictional) ‘police search’ has been carried out for the parents. By the time this is over, the child’s development has been compromised and the chances of adoption may be reduced. This, in conjunction with a lack of a permanency orientation among social workers, may result in infants being institutionalised and ‘drifting in care’ for years.
- In combination with the lack of guidelines for the court, a lack of appropriate training for justice personnel has the effect that many commissioners of child welfare do not understand key aspects of child development, including children’s need for permanency. It has been the experience of many social workers that some commissioners are extremely unwilling to use the existing provisions for termination of parental rights, even where the most compelling reasons exist.
- There is no provision for termination of parental responsibilities other than for purposes of adoption by a specific person or couple. This is a problem where a parent is habitually violent or very disturbed and disruptive. Children of such parents whose needs would best be met in a family environment may grow up in institutional care, because prospective foster or adoptive families, along with the children concerned, would be endangered or subjected to intolerable stress if placement were attempted.
- Financial and legal provision for children in foster or residential care ceases at age eighteen or soon afterwards. The needs of children who ‘graduate’ from care without having adequate support systems are not catered for, and they are at risk of becoming destitute, involving themselves in crime, etc.

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3 Hence a parent may be in jail for murder of one child, but be able to refuse consent to the adoption of another.

#### 10.4.6 **Comparative review of other systems**

The principle of a planned approach to placement, intended to settle a child in a permanent environment as soon as possible, is widely reflected in modern child protection legislation. The aim, first and foremost, of promoting reunification of the child with the biological family, unless compelling reasons exist against this approach, is clearly embodied in the laws of many countries. Circumstances in which reunification services are not required are sometimes spelled out. Where efforts at reunification are unsuccessful, there is usually provision for parental rights and obligations to be terminated. In some jurisdictions, termination is linked specifically with adoption, while in others it can be used as a means of freeing a child for adoption without prospective adopters as yet having been identified. Laws in some countries recognise the significance of the developmental stages of children for purposes of attachment to substitute parent figures, and make differentiated provision for termination of parental rights based on the age of the child. Legislation may or may not make specific provision for continued relationships with parents and/or other significant persons after termination.

Several countries have detailed legal requirements concerning the development and documenting of plans for children who come to the attention of the courts, especially where separation from the family is involved. For example, in New Zealand, before a court issues an order that a child be placed in alternative care, it must be in possession of a plan for the child, prepared by designated persons in accordance with specific requirements.<sup>218</sup> This plan must:

- (a) Specify the objectives sought to be achieved for that child or young person, and the period within which those objectives should be achieved;
- (b) Contain details of the services and assistance to be provided for that child or young person, and the period within which those objectives should be achieved;
- (c) Specify the persons or organisations who will provide such services and assistance;
- (d) State the responsibilities of the child or young person, and of any parent or guardian or

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3 Section 128 of the Children, Young Persons and their Families Act 1989.

- other person having the care of the child or young person;
- (e) Contain such matters relating to the education, employment, recreation, and welfare of the child or young person as are relevant.<sup>219</sup>

The plan which has been put in place for the child as described above must be reviewed after no more than six months in the case of a child who is under seven years at the time of the issuing of the court order, and no more than twelve months thereafter in any other case.<sup>220</sup> Kentucky also provides for a detailed placement plan.<sup>221</sup>

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3 Section 130.

3 Ibid, section 134. In New Zealand, permanency planning is wherever possible undertaken within the context of the Family Group Conferencing approach as described earlier in this chapter.

221 In terms of sections 20-7-764 of the Child Protection Reform Act 1996, the plan must: include the participation of the parents, guardian *ad litem*, and the child if possible; include the specific reasons for the removal and the specific changes that must be made before the child is returned home; include a statement regarding the time frames for the parents to accomplish those objectives and a measurement of those objectives; have objectives which relate to the reasons for the removal; include the parents' financial responsibility if any; address issues

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relating to visits by the parents, allowing for as much contact as is possible between the child, parents, siblings and other relatives with a close involvement, and as is consistent with the child's best interests; provide for placement as close to the child's home as possible; give preference for kinship placement; include provision for supportive and social services to all concerned, including the minimum frequency of contacts with the child (who must be seen at least monthly); and include a statement regarding the parent's participation or nonparticipation in developing the plan.

In the USA, all States provide for the termination of the legal parent-child relationship. There appears to be pressure on child protection authorities to apply for termination of parental rights if 'reasonable efforts' at family reunification have not succeeded within a specified period.<sup>222</sup> The Adoption and Safe Families Act (ASFA) was passed in 1997. Among its purposes was to clarify the requirement in the Adoption Assistance and Child Welfare Act (CWA) of 1990<sup>223</sup> that 'reasonable efforts' be made to preserve the family before a child was removed from his/her home; and that, where a child was removed from the home, 'reasonable efforts' be made to reunify the family before termination of parental rights could be ordered by a court. The failure of State statutes to clarify this requirement had created the possibility of children being left in dangerous households, because agencies could not prove that they had been sufficiently diligent in their efforts to preserve the family. Later down the line, children were being trapped in temporary care situations because overburdened agencies could not prove to the court that they had tried hard enough to restore them to their families. On the other hand, some courts were simply rubber-stamping agencies' unsubstantiated claims to have made the required efforts.<sup>224</sup>

ASFA removes the 'reasonable efforts' requirement where parents have subjected the child to defined 'aggravated circumstances', or committed or planned a crime of violence against the child or another child of the parents, or there has been involuntary termination of the rights of a parent with respect to a sibling of the child concerned. ASFA lays down as a condition for receipt of federal funding that state agencies must seek termination of parental rights if:

A child has been in foster care for 15 of the most recent 22 months;

A court has determined:

- a child to be an abandoned infant;

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222 NCCANI **Grounds for Termination of Parental Rights. Statutes at a Glance Series**, 1999. A common pattern is for grounds to be defined which serve as the basis for termination of the rights of the parents, and for these to come into effect when 'reasonable efforts' to prevent placement of the child in care, or to reunify the family after such placement, are unsuccessful. Grounds for termination frequently include severe or chronic abuse or neglect; abuse or neglect of other children in the household; abandonment; long-term mental illness or retardation in the parent(s); long-term parental alcohol- or drug-induced incapacity; failure to support or maintain contact with the child; conviction of the parent(s) for a violent crime against the child or another family member; or a conviction where the sentence is so long as to negatively affect a child who has been placed in care.

3 94 Stat. 500; 42 U.S.C.

3 Herring, DJ 'Inclusion of the reasonable efforts requirement in termination of parental rights statutes: punishing the child for the failures of the state child welfare system' (1992) 54(129) **University of Pittsburgh LR** 139-209.

- that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired or solicited to commit such a murder or ... voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent.<sup>225</sup>

'Reasonable efforts' at family preservation prior to placement, and at family reunification after placement, are made subject, in terms of ASFA, to the consideration that 'the child's health and safety shall be the paramount concern'.<sup>226</sup> Some States specify shorter time limits than the 15 out of 22 months as set out by ASFA, especially for very young children.<sup>227</sup>

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225 NCCANI **Grounds for Termination of Parental Rights. Statutes at a Glance Series**, 1999.

3 Section 101(a)(A).

3 NCCANI **Grounds for Termination of Parental Rights. Statutes at a Glance Series**, 1999.

Meanwhile, criticisms against the provisions of the CWA have not been confined to its potential to keep children in care for long periods. There have also been criticisms that it has too readily allowed for termination of parental rights. An intention of the Act was to reduce the financial incentives for states to place children in foster care and to keep them there, by requiring them to 'provide preventive and reunification services geared to keeping families together before and after state intrusion'.<sup>228</sup> But Guggenheim, for example, suggests that 'in an increasing number of cases, states are destroying the legal relationship between parents and children for no good purpose and that, as a result, a record number of children have become legal orphans'.<sup>229</sup> The writer suggests that part of the problem has been an over-reliance on theory emphasising the importance of a consistent 'psychological parent' figure to the exclusion of other considerations, e.g. the quality of substitute care received, and the need of children to know their biological parents.<sup>230</sup>

Canadian law has an emphasis on permanency planning similar to that in the USA. The aim appears, in general, to be to return the child home after the period set down in a voluntary placement agreements, which are generally of six months' or one year's duration, with limited options for renewal under specified conditions. If such an agreement is not adequate to protect the child, or if the services under such an agreement do not succeed in resolving the problems in question, a temporary protection order or supervision order may be issued by the court. Where such measures are also not adequate or fail to produce the required results, there is provision for the court to order permanent wardship of the child. Parental custody and guardianship are then terminated, and the provincial authority or a designated agency takes on these functions until the

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3 Guggenheim, M 'The effects of recent trends to accelerate the termination of parental rights of children in foster care - an empirical analysis in two states' (1995) 29(1) **Family Law Quarterly** 121-140. In similar vein Tamilia, P 'A response to elimination of the reasonable efforts required prior to termination of parental rights status' (1992) 54(129) **University of Pittsburgh LR** 217-8 advises against termination of parental rights where there is no prospective adoptive parent available, due to the danger of a child being left in 'legal and psychological limbo'.

3 Guggenheim (1995) 29(1) **Family Law Quarterly** 121-2.

3 Guggenheim (1995) 29(1) **Family Law Quarterly** 124.



child is adopted, or has become independent, or the order is terminated by the court.<sup>231</sup>

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3 FPWGCFS, 1994: op. cit., 5ff; 17ff; 27ff; 53ff.

Nova Scotia sets out age-based time limits for achieving permanency, in that an 'order for care and custody', in combination with any other official orders, may not exceed twelve months in the case of a child who was under six at the time of the initial order, or eighteen months where the child was under twelve.<sup>232</sup> One of the options available to the court from the outset is to place the child in the permanent care and custody of the protective service agency.<sup>233</sup> The court may make an order for parental access, a condition being that 'permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for such placements'.<sup>234</sup> There are safeguards to ensure that this is not the option of first choice.<sup>235</sup> In Ghana, section 26 of the Children's Act 1998 provides that 'a child under a care order whose parent, guardian or relative does not show any interest in the welfare of the child within a period stipulated by a Family Tribunal may be put up for adoption'. In Uganda, section 48(2) of the Children's Statute enables the court to dispense with the consent of parents who are 'incapable of giving it'.

In both England and Scotland conditions are set out in terms of which a parent's consent to adoption can be dispensed with in order to provide permanent alternative family care for a child.<sup>236</sup>

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3 Section 45(1) of the Children and Family Services Act, 1990.

3 Section 42(1)(f).

234 Section 47(1)(a).

235 Section 42(2) provides that removal of the child can only be ordered if the court is satisfied that services to strengthen the family and other 'less intrusive' alternatives have failed, have been refused by the parent, or will be inadequate to protect the child. Nova Scotia also places a legal requirement on the Minister of Community Services, and agencies set up in terms of the child protection statute, to provide a range of family support services (section 13).

3 In England these include 'unreasonable' withholding of consent, persistent failure to discharge parental duties, severe or persistent ill-treatment of the child, and neglect or abandonment of the child [Section 16(2) of the Adoption Act, 1976].

Both countries also have provision for a 'freeing order' to be granted to an adoption agency, with the consent of the biological parents. This transfers parental rights not to adopters but to the agency, which can then place the child without fear of disruption if parents change their minds after a child has become settled in a family for whom the issuing of an adoption order is still pending. A criticism is that this may leave the child without any parent apart from the local authority; however it is a provision which facilitates permanency for a significant number of children.<sup>237</sup>

#### 10.4.7 **Questions raised and options mooted in Issue Paper 13 and the research paper**

The following questions with a bearing on permanency planning were raised in Issue Paper 13:

*Should subsidised adoption ... become an option in South Africa?*

*Should the existing concept of foster care be redefined?*

*Should section 19(b) of the Act be amended to identify situations in which refusal of parental consent (to adoption) may be regarded as "unreasonable", or should the ground be changed to allow for dispensing with parental consent where this is "in the best interests of the child"?*

*How should (a new children's statute) deal with abandoned children?*

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3 Section 18 of the Adoption Act, 1976; Edwards, L and Griffiths, A **Family Law** Edinburgh: W Green / Sweet and Maxwell 1997, 184-5.

There was overwhelming support for provision for subsidised adoption, with a few dissenting or qualified views based on concerns that such a measure would be unaffordable or could lead to abuse.<sup>238</sup> There was also agreement with the idea of broadening the concept of foster care to allow for a permanent form thereof.<sup>239</sup>

Both Issue Paper 13 and the research paper used at the focus group discussion were workshopped before the emergence of the recent lobbies for a universal basic income grant and a universal grant for children. Hence the idea that a non-means-tested grant might be accessible to every child, supplemented by an additional allocation in the case of e.g. a disability or chronic illness, did not enter the discussions at the time. Such a system would of course facilitate adoption by foster

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3 In support were a majority of provincial workshop participants, as well as Health and Human Rights, SANCCFW, Phoenix Child Welfare Society, NICC, Johannesburg Institute of Social Services, Cape Law Society, Durban Child and Family Welfare Society, Disabled People South Africa, and Mr DS Rothman: Commissioner of Child Welfare. Dissenting were the Natal Society of Advocates, which felt that such a system was not practical at this time, and the ATKV, which felt that such an approach would be unaffordable and could lead to abusive situations. The Department of Developmental Social Welfare, Northern Cape, suggested that the cost-effectiveness of subsidised adoption be investigated. Some provincial workshop participants cautioned against the potential for use of children as a source of income. The DPSA said that people with disabilities should not be excluded from adoption, and Professor C Davel of Pretoria favoured foster parents having first option to adopt.

3 Durban Child Welfare Society, provincial workshop participants.

parents in the absence of an adoption subsidy.<sup>240</sup>

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240 See the submission of the Alliance for Children's Entitlement to Social Security (ACCESS) to the Committee of Enquiry into a Comprehensive Social Welfare System, April 2001.

There was support both for the idea of identification of situations in which refusal of parental consent to adoption should be regarded as unreasonable and for using the 'best interests' criterion in deciding on the termination of parental rights.<sup>241</sup> The view was expressed that commissioners were excessively hesitant to apply section 19(b)(vi), while others differed on this issue.<sup>242</sup> It was also recommended that a set of criteria be developed in terms of which refusal to consent would be considered as contrary to the best interests of the child.

In relation to child abandonment, family reunification was seen by participants in provincial workshop groups as being important where possible. It was also felt that there was a need for abandonment to be properly defined, and for consent to adoption to be waived after a given period of time where abandonment had occurred. Durban Child Welfare Society favoured immediate adoption for this group. Ms P Brink felt that abandoned children tended to languish in hospitals for long periods, with their legal status being unregulated.<sup>243</sup>

The following questions were raised in the research paper:

*Is it possible and desirable for permanency planning to be ensured through legislation, and, if so, how could this be achieved?*

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- 3 J Smith and D Rothman supported the former approach, with the SANCCFW, National Council of Women of SA, Cape Law Society supported by the Durban Committee, Durban Child and Family Welfare Society, and Professor C Davel favouring the latter.
- 242 Mr Rothman believed social workers' allegations that commissioners were reluctant to use this provision were based on ignorance of the way that courts have to deal with evidence; also that it was in the first place the court assistant who should use this ground, and that the test for reasonableness is when it is weighed against the best interests of the child. The Natal Society of Advocates had the view that the court should have wide discretion to decide what constitutes unreasonableness.
- 243 This respondent felt that lack of clarity as to who must take responsibility for such children led to their needs not being met. She felt that bureaucratic obstructions, discrimination and insensitivity were blocking black persons who wished to adopt.

*Should time frames be set for achieving permanency, based on the age of the child?*

*What do we need to do to help families and communities successfully resume care of children who have been placed in residential or foster care?*

*What additional resourcing is needed to make effective permanency planning possible?*

All who responded to these questions were in favour of legal provision to ensure permanency planning.<sup>244</sup> Respondents were also in favour of time frames being set.<sup>245</sup> One group of respondents felt that time frames should be based on the age of the child and the circumstances and position of the parents, while another group felt that legislation should prevent children under seven being placed in institutions except as a last resort.<sup>246</sup> Subsidised adoption was again stressed as a means for achieving permanency,<sup>247</sup> as were various forms of family support and community involvement.<sup>248</sup>

With regard to helping families and communities resume care of their children, and resourcing needed for this purpose, the SANCCFW felt that in the early stages of placement parents could usually be motivated to work for the return of their children, and that a lack of sufficient social workers, staff turnover and lack of resources generally led to children remaining in care too long. Where several children were together in a residential care facility for a long period, the possibility of adoption by the caregivers could be investigated if appropriate. Long-term cluster home care was seen as another possibility.

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3 SANCCFW; Ms D van Heerden, Department of Welfare, Northern Cape; Ms T Odyar, Ms D Ritter and the GCWS; UCARC; Group 2 of the Pretoria consultative meeting; SANCCFW (Eastern Cape). The UCARC made the proviso that adjustments to plans should be made as necessary. Group 2 stated that the efficacy of reconstruction services should be assessed and they should be terminated if they were not succeeding; also that the court should review each case after two years to assess progress.

3 The SANCCFW felt that these would promote cooperation by the parents and that the setting of return dates by the court would assist. Ms Van Heerden favoured a twelve-month period for the achievement of permanency.

3 Ms T Odyar, Ms D Ritter and the GCWS; Group 2 at the Pretoria consultative meeting.

3 SANCCFW; Ms D van Heerden of the Northern Cape Department of Welfare and Group 2 at the Pretoria consultative meeting.

248 Ms T Odyar, Ms D Ritter and the GCWS saw a need for parental guidance programmes, aftercare programmes and emergency funds. The UCARC saw community awareness of the needs of children in foster and residential care as being essential. They also stressed the importance of dedication to the achievement of permanency goals. Ms S Leslie of the SANCCFW, Ms D van Heerden of the Northern Cape Department of Welfare and Group 2 at the Pretoria meeting recommended provision for subsidised adoption. Group 2 also suggested a home help system to develop parenting skills, as well as a neighbourhood-based monitoring system.

**10.4.8 Evaluation and recommendations**

**The Commission has opted for an approach to permanency planning which includes the following elements:**

- **A requirement that in every case where there is application to a court for removal of a child from the home, details are given of what possibilities for family preservation have been considered or attempted and why these are being excluded - with the proviso that the child's safety and wellbeing will take first priority.**
- **A requirement that in every case where a child is placed in substitute care, the court will be supplied with a documented plan aimed at achieving stability for the child, with priority given to family reunification unless there are compelling reasons to the contrary. Reunification may involve permanent placement within the extended family circle. The plan must include time frames for reunification which are appropriate to the developmental stage of the child, as well as regular reviews.**
- **Waiving of the requirement for efforts towards reunification with any parent or caregiver who has subjected the child to assaults which have been life-threatening or liable to cause lasting bodily harm, or subjected a sibling of the child to such assaults, or caused the death of a sibling.**
- **Provision for very young children who have, on balance of probabilities, been intentionally abandoned, to be released for adoption with the minimum possible delay.**
- **Provision, in cases of apparent abandonment, for clear procedures to enable a finding to be made within the shortest possible time as to whether or not a child has been abandoned.**
- **Provision for children to be freed for adoption without the consent of the parents, where this can be considered to be in their best interests on the basis of a clearly**



**specified set of principles. More specifically, it is recommended that the department or organisation managing the child's case be empowered to make an application to the children's court for the termination of all or certain parental rights and responsibilities over a child who at the time of placement**

- **was aged seven years or more, and has been in foster or residential care for at least two years;**
- **was aged three to six years, and has been in foster or residential care for at least a year; or**
- **was aged less than three years, and has been in foster or residential care for at least six months.**

**It is further recommended that the children's court should be in a position to terminate all or some parental rights and responsibilities only if -**

- **there are clear indications that the termination of parental rights and responsibilities would be in the best interests of the child;**
- **reasonable efforts have been made to reunify the child with his or her family and these have not succeeded, or the parents have refused to involve themselves in such efforts or have been untraceable, and there is a poor prognosis for the child's return to parental care within a time frame suited to his or her developmental needs; and**
- **there is a high probability that adoption or another form of permanent family care can be arranged.<sup>249</sup>**

**When making an order for the termination of parental responsibilities and rights in a situation where adoption is not envisaged, the court may make an order assigning increased or full parental responsibilities and rights to the current caregiver.**

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<sup>249</sup> On the suspension and termination of parental rights and responsibilities in general, see 8.7.4 above and 23.10.5 below.

- **Limited and circumscribed provision for termination of parental responsibility in cases where adopters have not yet been recruited, where family reunification is clearly not an option but where an end to parental involvement is necessary to facilitate the recruitment of, or the child's placement in, a permanent substitute family. When making an order for the termination of parental rights and responsibilities for purposes of facilitating adoption, the court may request the department or organisation which has made the application for such order to re-appear before the court, within a period prescribed by the court, with a report on whether the child has been adopted or not. At such hearing, if the court finds that the adoption of the child is not likely, it may revoke the termination order and restore parental rights and responsibilities, provided that this is in the best interests of the child.**
- **Provision for permanent forms of foster or kinship care.**
- **Provision for successful long-term foster placements to be converted to subsidised adoption arrangements where appropriate.**
- **Continued support for children and caregivers after reunification or transfer to a new permanent placement, until successful reintegration has been achieved.**
- **Continued support, over a bridging period, to children who turn eighteen while in care.**

## **10.5 Reporting and Registration of Reported Cases**

### **10.5.1 Common features of reporting and registration systems**

Legal provision for the reporting of cases of child abuse, whether mandatory or voluntary, is a feature of the child protection systems of many countries, although the approaches vary considerably. Typical features are (a) a legal compulsion to report abuse and possibly also

suspicions of abuse, or (b) a process to facilitate voluntary reporting, or (c) a combination of the two. For example, there may be a legal requirement binding on every person who knows of or suspects abuse to report this to a specified authority. Alternatively, all reporting may be voluntary, or some categories of people such as health care professionals, nurses, social workers and teachers may be compelled to report cases of abuse which come to their attention, while members of the general public may be provided with channels to do so voluntarily. There is often legal protection, at least for those mandated to report, from criminal or civil action arising from any report made in good faith. Immunity may be absolute, as long as there is reasonable cause to report, or qualified - e.g. with a specification that the report be made 'in good faith', whether or not the suspicion of abuse turns out to be correct. In the case of qualified immunity, there could be the possibility of a lawsuit against the reporter, based on an allegation that malice was involved, or significant facts were ignored.<sup>250</sup> Immunity may extend beyond reporting to participation in legal proceedings, the conducting of medical examinations and associated procedures such as taking photographs and x-rays, and placing the child in protective custody.<sup>251</sup>

Legislation to require and/or encourage reporting of child abuse is often linked to provision for a register of reported cases. This is usually intended to serve as a protective mechanism for children deemed to be 'at risk'. A specific authority may e.g. be given the responsibility to ensure that all children whose names appear on the register are being properly attended to. Provision may also be made for a register of offenders, usually to enable bodies which assign people to positions in which they will have close contact with children, to screen out those with a history of perpetrating child abuse. An important benefit of both child and offender registers lies in their being a source of data on trends and patterns in child abuse, which can serve to guide policy development, planning and budgeting for the relevant sectors.

When reporting systems were first introduced in the USA and the UK several decades ago, the emphasis was on ensuring protection of abused children and support to families under severe stress. There has since come to be an increased weighting towards investigative processes and mobilisation of the criminal justice system – a shift in focus which has given rise to concern in some

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250 Allen, J and Hollowell, E 'Nurses and child abuse/neglect reporting: duties, responsibilities, and issues' (1990) 40(2) *The Journal of Practical Nursing* 56-9; also George, J and Quattrone, M 'Law and the emergency nurse' (1988) 14(1) *Journal of Emergency Nursing* 34-5.

3 Ibid.

quarters.

In all aspects of a reporting and/or registration system, questions of the ethics surrounding confidential relationships arise. In addition, decisions have to be made relating to the levels of certainty which are required before the duty to report arises or a case is registered – e.g. ‘reasonable suspicion’ vs. clear knowledge that abuse has taken place. In the matter of offender registers, for example, there is a strong school of thought to the effect that only a criminal conviction would justify inclusion on such a register. Dissenters point out that very few paedophiles are in fact convicted, and hold that there is a need for known but unconvicted perpetrators of abuse to be prevented from moving from one children’s service to the next as their activities are uncovered.

Reporting and registration systems have their origins in First World countries with highly developed human service systems. In developing countries such as South Africa, which lack this kind of infrastructure, there is a need to clearly identify the aims which reporting can reasonably be expected to achieve, and the resourcing which would be needed in order to achieve such purposes.

#### 10.5.2 Existing situation in South Africa

South Africa has followed the pattern set by the USA since the 1960’s in making the reporting of child abuse compulsory, with failure to do so being a criminal offence for those to whom the obligation applies. It has also over the years followed the American approach of steadily increasing the range of mandated reporters. In terms of section 42(1) of the Child Care Act of 1983 as amended, reporting of suspected ill-treatment of children is now mandatory for dentists, medical practitioners, nurses, social workers, teachers, and persons employed by or managing children's homes, places of care and shelters. The obligation to report applies when any such person ‘examines, attends or deals with any child in circumstances giving rise to the suspicion that the child has been ill-treated, or suffers from any injury ... the cause of which probably might have been deliberate, or suffers from a nutritional deficiency disease’.

Persons mandated to report in terms of the Child Care Act must send notifications of cases of suspected abuse to the Director-General of the Department of Social Development on Form 25, as supplied in the Regulations as amended in 1988. The Director-General is then required to request a police officer, social worker or authorised officer to take appropriate steps, and to call for an

investigation into the circumstances of the case and a report on these circumstances and on action taken, within 30 days. The Director-General may in certain cases instruct that the alleged perpetrator be removed from direct contact with children (presumably where such a person is employed in a registered or government-operated children's facility), and that the matter be referred to the SAPS for possible prosecution.<sup>252</sup>

Section 4 of the Prevention of Family Violence Act of 1993 also creates a legal obligation to report actual or suspected abuse. This applies to anyone 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'. The Act requires that a report be made to a police official, a commissioner of child welfare or a social worker employed by a registered welfare organisation.<sup>253</sup>

The concept of a register based on mandated reporting of child abuse was introduced in South Africa law in April 1998, in new Regulations under the Child Care Act. The purpose of this register is the protection of children, and it will capture information obtained from three sources: criminal court convictions, children's court findings, and notifications received in terms of section 42(1) of the Act. Some uncertainty arises from the wording of Regulations 39B(2)(e) and (f). In terms of the former, identifying details of a perpetrator are to be included after conviction by a criminal court. But in terms of the latter, 'details of the relationship between the child and the perpetrator' must be revealed even where an alleged perpetrator has not been convicted. Such details may serve to identify the person and thus circumvent the protection provided to unconvicted persons by Regulation 39B(2)(e). It may be necessary for the Constitutional Court to decide whether an alleged perpetrator's right of privacy as per section 14 of the Constitution is contravened by Regulation 39B, and also whether this right should be secondary to the right of children to protection.

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3 Regulations 39A (2) and (3).

253 Section 6A of the Aged Persons Act 81 of 1967 also provides for the mandatory notification of abuse of aged persons by certain professionals.

### 10.5.3 **Deficiencies in the existing system**

The lack of coordination between the reporting provisions of the Child Care Act and the Prevention of Family Violence Act has been a source of considerable confusion. Until recently there was no clear system for reporting cases in terms of either Act, and there has been widespread failure to observe their requirements. Although the 1998 amendments to the Child Care Act brought some clarity into the situation, many uncertainties remain. Definitions to guide reporting are lacking, and there is no clarity as to the timing and the level of certainty involved – i.e. whether notification should occur immediately an allegation is received, or only after there has been some assessment of whether abuse has indeed occurred or there is at least some basis for suspicion of abuse. This problem exists in part because there is also no differentiation between criteria for reporting and for registration. Further, there is no clear process for deregistration. Neither is there clarity as to whether only current abuse falls under the reporting requirement, or whether past incidences which come to light later (possibly after many years) are also covered. There is, in addition, confusion among practitioners as to whether the reporting requirement in relation to ‘nutritional deficiency disease’ applies only where this results from deliberate failure by a caregiver to feed a child, as part of a pattern of abuse, or whether it also applies in situations of sheer poverty.

Despite the new Regulations, the reporting and registration system in terms of the Child Care Act is not yet fully functional in much of the country, although the Department of Social Development is engaged in a concerted process of promoting implementation. Cases of child abuse are of course being referred and dealt with - social workers, police and others have continued to respond to reports according to the directives of their employing bodies. The SAPS Child Protection Units and specialised officers have an internal reporting system which has been providing the only hard national data concerning the incidence of child abuse. The national and provincial Departments of Social Development now have databases in place which should, in the near future, begin providing statistics as regards cases of abuse which come to the attention of the formal welfare sector.

The Child Care Act provides no guidance as to when instances of ill-treatment will or will not be referred into the criminal justice system rather than being dealt with purely via child protection and family support interventions. This is likely to be a major consideration for people faced with a decision as to whether to report abuse. At present the Director-General has discretion to make a decision in this regard, but no guidelines are set down for this purpose. There is also no clarity as

to whether, and if so in what form, there should be any linkage between the police data base on crimes against children and the Child Protection Register. Disagreements with regard to the sharing of information arise from time to time between police and social workers, based on the differing ethical and legal frameworks within each group operates.

Although section 42(6) of the Child Care Act provides immunity from legal proceedings for mandated reporters acting in good faith, the Act does not cover non-mandated persons who report abuse. According to the Department of Social Development's legal division no proceedings can be brought against someone who truthfully and in good faith reports a concern regarding possible abuse; however the lack of specific protection could be considered to be a gap in the law. The argument for improved protection for informants has been strengthened by recent legal developments concerning access to information. Social workers are obliged to keep information concerning clients confidential.<sup>254</sup> However, this could be overridden by a court, as communications with a social worker are not regarded as privileged in South African law. The Promotion of Access to Information Act 3 of 2000 creates mechanisms whereby a person who is named in a notification of a case of alleged or confirmed abuse of a child might demand to know the identity of the informant. Given the climate of intimidation and reprisals which not infrequently surrounds such matters, the question arises as to whether some form of legal protection should be attached to reporting provisions.

The NCCAN has pointed out that reporting in isolation from the necessary resourcing and management serves no useful purpose. It may merely serve to increase the vulnerability of the child, given that disclosure creates a crisis which, if not properly managed, can compound his or her trauma.<sup>255</sup> The NCCAN suggests that reporting has in this country has tended to be treated as a magical solution. Concern in this regard has also been voiced as follows:

As public and official alarm about abuse has mounted, the reporting requirement has been extended to additional categories of people, as if this on its own could be expected to solve the problem ... expansions to reporting legislation have not been accompanied by any increase in resources to deal with reported cases ... Neither has there been any apparent awareness ... that the child protective service system to which notifications are supposed to

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3 This is laid down in the Rules relating to the acts or omissions which constitute unprofessional or improper conduct, as laid down under section 27(1)(c) of the Social Work Act of 1978.

3 National Committee on Child Abuse and Neglect, 1996: "National Strategy on Child Abuse and Neglect", Department of Welfare and Population Development, p. 40.

be directed has all along been extremely ill-equipped to handle them.<sup>256</sup>

#### 10.5.4 **An international perspective**

◦ *Mandatory vs voluntary approaches*

As mentioned earlier, two basic approaches are to be found in relation to the reporting of child abuse – those which facilitate voluntary reporting, and those which make reporting mandatory under threat of criminal sanctions. Various combinations of the two are often used, with reporting being mandatory for specific categories of people and voluntary for the broader population.

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3 Loffell, JM 'Dilemmas and critical choices for child protective legislation in a developing country', paper presented at ISPCAN Congress, Durban, 2000.



New Zealand provides an interesting example in having reached a decision after intensive deliberation, paying heed to the impacts of mandatory reporting laws elsewhere in the world. That country in 1994 decided not to go the route of mandatory reporting, but rather to emphasise public education and voluntary reporting protocols.<sup>257</sup> Provision was made for any person to voluntarily report suspicions of child abuse, and for the protection of such persons against civil, criminal or disciplinary reprisals except where the information was provided 'in bad faith'.<sup>258</sup>

Likewise, section 53 of Kenya's draft Children Bill of 1994 provides that a person having cause to suspect that a child is 'in need of protection or discipline' **may** report his or her concerns to an 'authorised officer'. In the UK, the Children Act of 1989 does not refer to reporting, although there

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257 Department of Social Welfare, 1996: "Strategic Directions", Post-election briefing paper, Wellington, 132. Section 7 of the Children, Young Persons and their Families Act of 1989 was amended in 1994 to include requirements that the Director-General of Social Welfare 'raise public awareness of child abuse and how to prevent it and information about when and how to report it'; 'work with all the relevant government and non-government agencies to develop individual but interconnected protocols on reporting child abuse'; and 'monitor the effectiveness of these protocols'. See also 10.2.9.3 above.

258 Section 15 of the Children, Young Persons and their Families Act of 1989.

are apparently firm guidelines in place, developed jointly by the different disciplines and authorities involved, in terms of which specified persons are regarded as having a 'duty to report' suspicions of abuse. These include the police and certain social workers.<sup>259</sup>

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259 Local guidelines and professional codes encourage other professionals such as teachers and health visitors to report. In its report the National Commission of Inquiry into Child Abuse recommends that such groups be 'strongly urged' to report abuse but stops short of recommending legislation to make reporting mandatory for them [see National Commission of Inquiry into Child Abuse (NCIPCA), 1997: "Childhood Matters", Summary of the report of the Commission, NSPCC, London, 2].

In the USA, in contrast, all states have laws compelling a range of professionals, and in many cases any person having grounds to believe that a child is being abused, to report this information. The persons typically required to report are physical and mental health care professionals, coroners, social workers, law enforcement officers and child care providers. Some states include school personnel, pharmacists, firefighters, paramedics and commercial film and photographic processors. About nineteen states extend the requirement to the whole population.<sup>260</sup> Almost all jurisdictions in Canada other than Yukon have chosen the mandatory reporting approach.<sup>261</sup> In most Australian States and Territories, specified professional groups are required by law to report any suspected abuse or neglect to the relevant authority.<sup>262</sup>

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260 NCCANI 1999: Issue paper - "Current trends in child maltreatment reporting laws", Child Abuse and Neglect State Statutes Series, US Department of Health and Human Services, 3-4.

261 FPWGCFS, *op. cit.*, 5ff. In Nova Scotia, Canada, section 23(1) of the Children and Family Services Act of 1990 states: 'Every person who has information, whether or not it is confidential or privileged, indicating that a child is in need of protective services shall forthwith report that information to an agency'. There is protection from civil action against the reporter except in cases of false and malicious reporting. In Alaska, all 'practitioners of the healing arts' (a term which includes a wide range of conventional and alternative health care practitioners along with social workers and psychologists), teachers, child care workers and administrators, employees of crisis intervention and counselling programmes and certain law enforcement officers, are required to report instances in which they have 'reasonable cause to suspect' that a child has been harmed through abuse and neglect, to the Department of Health and Social Services (Alaska Statutes 47.17.020). Other persons are entitled but not compelled to report such instances. Law enforcement agencies are also required to notify the Department of instances of harm to a child. In Ontario, all citizens are required to report known abuse, and a requirement to report any suspicion of abuse or neglect was due to be extended from professionals such as teachers and doctors, to all citizens in the course of 1998 (Globe and Mail, Toronto, June 13 1998: A3).

262 See ACT Community Law Reform Committee Report no. 7, **Mandatory Reporting of Child Abuse**, ACT Community Law Reform, Canberra, 1993, 18ff. In the Australian Capital Territory, one of the few jurisdictions

Section 12 of the Children's Statute of Uganda (1996) contains a particularly broad notification provision - i.e. that any member of the community has a 'duty' to notify the local government council if he or she has evidence that any child's rights are being infringed. Section 17 of the Ghanaian Children's Act requires 'any person with information' regarding child abuse or a child in need of care and protection to report this matter to the Social Welfare and Community Development Department. Section 28 of the Namibian Draft Child Care and Protection Act (1996) contains a mandatory reporting provision very like that in South Africa's Prevention of Family Violence Act.

◦ *Action following reporting*

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without a legal compulsion for specified professionals to report, the Community Law Reform Committee after extensive investigation recommended a phased approach which would emphasise voluntary reporting through targeted education, and bring in mandatory reporting if this approach failed (83).

Where child protection legislation includes provision for a reporting system, this is generally linked with procedures for investigation and action, as already described in the case of the Child Care Act in this country. In contrast to the South African situation, however, there seems in most countries to be a clear assignment of responsibility for responding to reports of abuse. This task is normally vested in a public welfare authority, or occasionally the police. Often both of these work in partnership with each other and with e.g. the judicial, health, and/or education authorities, with one or other carrying the overall case management function.<sup>263</sup>

Different approaches are evident in the extent to which abuse notifications do or do not automatically lead to the involvement of the police and criminal courts. In an analysis emanating from the American Humane Association it has been observed that, in the USA, 21 states use a 'therapeutic' model. Within this approach, law enforcement agencies are only called in for specific purposes and to a limited extent. Another 24 states use a "hybrid" model, combining therapeutic and law enforcement approaches to child abuse, with the social service authority taking the dominant role. Certain problems, e.g. severe physical abuse or sexual abuse, are automatic 'triggers' for the involvement of law enforcement agencies. In contrast, in a relatively few jurisdictions which use the 'justice' model, law enforcement bodies are substantially in control of the intake and investigatory process, calling in the social services in defined situations. It is suggested that the therapeutic model is more effectively directed towards the social and economic rights of the

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<sup>263</sup> In New Zealand, the police officer or social worker who receives a report must undertake or arrange an investigation in consultation with a Care and Protection Resource Panel. In Australia, notifications are generally investigated by a Family Services Department. Investigations may be conducted in conjunction with the police where the alleged incident constitutes a crime. In England, the local authority is responsible for investigating and taking any necessary action in relation to reported child abuse, or of arranging for these functions to be carried out. In most states in the USA, a state or county social service authority has the primary responsibility. In Uganda, the local government Secretary for Children's Affairs may summon the person alleged to be responsible for the infringement of a child's rights and, if the matter is not resolved in this way, refer the matter to the Village Resistance Committee Court for adjudication.

child as outlined in the CRC, while the justice model is geared to his or her political rights. Each has built-in advantages and disadvantages, while the hybrid model seeks to address the range of rights in an integrated manner.<sup>264</sup>

- *Registration of abused children*

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264 Bollenbacher, V 'The effect of the State child protection model on securing children's rights: debunking myth models and constructing legal rights', presentation at ISPCAN Congress, Durban, 2000.

In England children are listed in the child protection register under four main categories representing the primary forms of abuse, i.e. neglect, physical injury, sexual abuse and emotional abuse. The Child Protection Committee in each local area has a duty to maintain a record of the names of children within that area who are considered to be at risk of significant harm. In the USA, 42 States and the District of Columbia have central registries created by statute. These are typically used 'to aid social services in the investigation, treatment, and prevention of child abuse cases , and to maintain statistical information for staffing and funding purposes'.<sup>265</sup> The relevant State laws have a variety of emphases. Some provide specifically for cooperation with other States and with centralised structures, some for the use of the material as a resource in the planning, management and evaluation of services, and some for the tracking of the investigative and protective process, and/or the monitoring of pending cases.<sup>266</sup> As of September 1993, seven Australian States/Territories had central registers containing information pertaining to notified cases of child abuse, and five of these held additional information concerning perpetrators.<sup>267</sup> The registers were seen as 'potentially valuable sources of information for workers involved in intervention, policy makers acting on empirical information and Governments considering the need for increasing or reducing financial resources in this area'.<sup>268</sup>

◦ *Registration of offenders*

In South Carolina, USA, persons convicted of, or pleading guilty to or not contesting, charges of violent or indecent offences against others, or of physical or sexual abuse of a child in a criminal court are entered on a 'Central Registry of Child Abuse and Neglect'.<sup>269</sup> In addition, a family court

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3 NCCANI - Child Abuse and Neglect States Statutes Elements: Central Registries/Reporting Records, No. 9: Establishment and Purpose, 1.

3 Ibid, 5ff.

3 ACT Community Law Reform Committee, Report no. 7, **Mandatory Reporting of Child Abuse**, 19-20.

3 Ibid, 20.

3 Section 20-7-650 of the Child Protection Reform Act of 1996, as amended.

can add a name to the register if a child is found to have been abused or neglected. An agency can petition the family court to order the entry on the register, in which case the perpetrator may request a hearing prior to a final decision being reached. The register can be used to screen potential employees and volunteers.

In England and Wales, the Protection of Children Act of 1999 provides for the Secretary of State to keep a list of individuals who are considered after some form of due process to be 'unsuitable to work with children'.<sup>270</sup> This is part of a process aimed at integrating data bases previously held by the police, education and health authorities. The Act makes four principal changes to the law with the object of both creating the framework of a coherent cross-sector system for identifying people unsuitable to work with children and achieving a 'one stop shop' to compel or allow employers to access a single point for checking the names of people they propose to employ in a post involving the care of children. This involves permitting checks against criminal records and two lists of similar kind of people considered unsuitable for work with children maintained respectively by the Department of Health and the Department for Education and Employment to be made via the Criminal Records Bureau.

First, the Act places the existing 'Consultancy Index List' (a list wholly confined to people considered unsuitable to work with children) of the UK Department of Health on a statutory basis, provides for the referral of names, creates a right of appeal to a new tribunal against inclusion on the list, and - with the leave of the tribunal, and to protect individuals from remaining provisionally listed for unreasonably long periods - allows individuals listed provisionally for at least nine months to request the tribunal rather than the Secretary of State to determine the question of permanent inclusion.

Secondly, the Act amends section 218 of the Education Reform Act 1988, which provides,

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<sup>270</sup> See also Part VII of the UK Care Standards Act 2000, 19.4.4 below, and Chapter 42 of the Commission's **Discussion Paper on Sexual Offences: Process and Procedure**, 2001.



essentially, for prohibiting or restricting the employment of teachers. Under those powers, the UK Department for Education and Employment maintains for analogous but wider purposes a list ('List 99') similar to the Department of Health list. To enable the 'one stop shop' to operate, access to List 99 is permitted. To this end, the Act provides a power permitting inclusion on List 99 on grounds that individuals are not considered fit and proper persons to work as teachers or in work involving regular contact with children. This enables a distinction to be drawn between people who, on the one hand, are included on List 99 because they are unsuitable to work with children and, on the other hand, teachers who are included on the list for other reasons e.g. for fraud and dishonesty. In this way people will be identified who should not be allowed to work with children in both education and childcare settings. The Act also provides for a right of appeal to a tribunal against inclusion on List 99.

Thirdly, the Act amends Part V of the Police Act 1997 to enable the Criminal Records Bureau established under that Act to disclose information about people who are included on either list along with their criminal records. In this way the Act provides a 'one stop shop' system of checking applicants for child care positions against similar criteria through the gateway of the Criminal Records Bureau.

Fourthly, to complete the circle, the Act requires child care organisations proposing to employ someone in a child care position to ensure that individuals are checked through the Bureau against the Department of Health list and the relevant category of 'List 99' and not employ anyone identified on either list.

A child care organisation, or any other organisation, can refer a person deemed 'unsuitable' to the Secretary for inclusion on the list. Such referral may be on the basis of the dismissal of such a person due to misconduct - whether or not this has occurred in the course of the employment - which has 'harmed a child or placed a child at risk of harm'. Referral may also occur if the individual has retired or resigned in circumstances in which his or her dismissal would otherwise have been considered for such reasons, or if the person has instead been transferred to a non-child care position.<sup>271</sup> A person can also be listed if information not in the organisation's possession at the time of the employment, but which would have led to the person's dismissal or to consideration

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271 Section 2(2).

of dismissal, has subsequently come to light.<sup>272</sup> The provisions include in their ambit any employment agency or agency for the supply of nurses which has refused to continue to do business with the person concerned on the grounds of his or her having harmed a child or placed a child at risk of harm. Any child care organisation proposing to offer a person employment in a child care position is required to ascertain whether that person is listed, and is prohibited from offering employment to a listed person.<sup>273</sup>

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272 Section 2(3).

3 Section 7(1). The Secretary, on receiving information concerning such a person, if it seems that it may be appropriate to do so, must provisionally include him or her on the list. That person must then be approached for his/her comments on the information supplied by the organisation, and invite the organisation to submit relevant comments. The Secretary must then consider the information at hand and either confirm the person's inclusion on the list or remove him/her from it. Inclusion on the list will occur if the Secretary is of the opinion '(a) that the organisation reasonably considered the individual to be guilty of misconduct (whether or not in the course of his employment) which harmed a child or placed a child at risk of harm; and (b) that the individual is unsuitable to work with children'. [section 2(7)].

The Interdepartmental Working Group on Preventing Unsuitable People from Working with Children and Abuse of Trust, which produced the report which preceded the Act, made detailed recommendations for a careful balancing of the right of children to protection and the rights of people who stand to be placed on the register. The group recommended access to the information on a differentiated basis, so as to avoid a situation in which people could be barred from all forms of employment, or information could be abused. Thus e.g. families employing nannies could be advised to obtain police certificates showing an absence of criminal convictions. Small informal organisations using volunteers would similarly be offered advice on good practice. Organisations specifically responsible for 'regularly caring for, training, supervising or being in sole charge of persons aged under 18' would qualify for more detailed police information as well as information from other lists. There was also a proposal that it be made a criminal offence for a listed person to seek employment in a position which involves working with children.<sup>274</sup>

Also informative are the criteria in terms of which a person is found not to be suitable to work with children or not a 'fit and proper person'. Section 11(1) of the Victoria Children's Services Act 1996, for instance, lists the following grounds:

- (a) the person has within the 10 years preceding the application been found guilty of an indictable offence against the person or an offence involving dishonesty, fraud or trafficking in drugs of dependence where the maximum penalty exceeds 3 months imprisonment;
- (b) the person has been found guilty of an offence against this Act or any previous corresponding Act;
- (c) the person is not of sound financial reputation and stable financial background;

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<sup>274</sup> Annex H: Report of the Interdepartmental Working Group on Preventing Unsuitable People from Working with Children and Abuse of Trust, 1999. The Working Group points out that the information in question would also have relevance to bodies serving 'vulnerable adults'.

- (d) the person is not of good repute having regard to character, honesty and integrity.

The Act specifically provides that the above grounds do not limit the circumstances in which a person may be considered not to be a fit and proper person to operate a children's service.<sup>275</sup>

◦ *Immunity from legal action and anonymity of reports*

In the USA, all states as a requirement under CAPTA provide immunity from civil or criminal liability for individuals making reports of abuse or neglect in good faith.<sup>276</sup> Some jurisdictions distinguish between mandated and voluntary reporters – e.g. Massachusetts gives absolute immunity for mandated reporters, while voluntary reporters are only protected subject to the report having been made 'in good faith', and Vermont only protects mandatory reporters.<sup>277</sup> In Australia, Victoria, South Australia and Northern Territory provide immunity from civil liability for persons who report abuse, while New South Wales also gives immunity against criminal action.<sup>278</sup> In England the identity of a person who reports suspected abuse is protected, regardless of whether the informer is a health care professional or someone else.<sup>279</sup>

#### 10.5.5 Debates on the merits of mandatory reporting

The Community Law Reform Committee of the Australian Capital Territory provides an overview of the arguments in favour of mandatory reporting which can be summarised as follows:

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275 Section 11(3) of the Children's Services Act, 1996 (Victoria).

276 NCCANI - Child Abuse and Neglect State Statutes Elements, 1999: Issue Paper: "Current trends in child maltreatment reporting laws", US Dept. of Health and Human Services, 17.

3 Ibid, 17.

3 ACT Community Law Reform Committee, Report no. 7 **Mandatory Reporting of Child Abuse**, 25 ff.

3 As per the Access to Personal Files Act 1987, and the Access to Personal Files (Social Services) Regulations 1989.

- Children are unable to defend themselves against abuse, and bringing abused children to the attention of the authorities is essential if further abuse is to be prevented and the causative factors addressed.
- Reporting provides data indicating the incidence and location of abuse, making it possible to identify trends and target areas and to allocate resources accordingly.
- The loss of choice in the matter makes the position of the medical or other helping professional easier – there is less likelihood of a loss of trust where the person who reports clearly has no option.
- Compulsory reporting brings in the expertise of other disciplines, thus individual practitioners are relieved of the sole responsibility for the complex problem posed by child abuse.
- Legal compulsion to report abuse represents public commitment to the protection of abused children and promotes community involvement in achieving this end.<sup>280</sup>

On the other hand, many problems have arisen in relation to reporting and registration. These include the following: lack of adequate resources to deal properly with reported cases, distortions in the allocation of child protection resources, the potential for negative consequences for children and families, tensions between reporting requirements and professional ethics, and unsubstantiated reports.

Some writers point out that systems for the compulsory reporting of child abuse were inspired by doctors and developed on the basis of the public health approach of reporting infectious diseases.<sup>281</sup> These systems are thus based on the medical model in terms of which child abuse is seen as a 'disease' to be identified, diagnosed, 'treated' and 'cured', rather than being rooted in the

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3 ACT Community Law Reform Committee **Report No. 7: Mandatory Reporting of Child Abuse**, 55-6.

281 Lachman, P 'Reported Child Abuse in Cape Town', MD thesis, University of Cape Town, 1997.

structures of society.

Problems have grown with the substantial widening of the scope of reporting and registration laws since they were first introduced. In the USA the range of people required to report abuse increased, starting with doctors and moving across a range of service-providers and eventually, in many states, applying to all people.<sup>282</sup> At the same time, definitions of abuse broadened and the number of categories of abuse for which reporting was required mounted. Legislation which originally had a limited focus on children suffering physical injuries consistent with the 'battered child syndrome', as described by Henry Kempe and his colleagues from the 1960's onward,<sup>283</sup> soon expanded to cover sexual and emotional abuse as well as the various forms of neglect. Early concerns were raised about the possible potential for harm inherent in wide-ranging reporting laws. Sussman and Cohen,<sup>284</sup> for example, expressed concern that the system which was being created could 'invade and harm the lives of parents and children as easily as help them'.<sup>285</sup>

The reporting system, Hutchison points out, was founded on a number of assumptions, some of them questionable. For example, it is assumed that the legal compulsion to report will result in early identification of symptoms of abuse and the prevention of more serious incidents and deaths. This belief, however, is in turn founded on the assumptions that: '(1) professionals have the technology to engage in both early detection and secondary prevention, and (2) that the state will

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282 E D Hutchison 'Mandatory reporting laws: Child protective case finding gone awry?' (January 1993) 38(1) **Social Work** 56 - 63.

283 Kempe RS and Kempe CH **Child Abuse** London: Fontana 1978.

284 A Sussman and S Cohen (eds) **Reporting Child Abuse and Neglect: Guidelines for Legislation** Cambridge MA: Ballinger as quoted by E D Hutchinson 'Mandatory reporting laws: Child protective case finding gone awry?' (January 1993) 38(1) **Social Work** 56 at 57.

3 Ibid, 57.

allocate the increased resources required by increased reporting'.<sup>286</sup> These assumptions have been found to be questionable even in the USA with its sophisticated infrastructure. Funding for services has lagged behind the numbers of reported cases and this has led to 'failure in the delivery of services to reported children'.<sup>287</sup>

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3 Ibid, 57.

3 Lachman, MD thesis, 44.

A shift also seems to have taken place in the consequences of reporting, which was originally designed as a means of ensuring that a child at risk and his or her family received the necessary support and services.<sup>288</sup> Lachman refers to international experience and particularly recent British research, in terms of which the medical model has increasingly been combined with a coercive and adversarial approach emphasising the prosecution of offenders. This has led to a disproportionate allocation of resources to investigative processes, reducing the resources available for preventive and supportive services which he believes to be more likely to succeed in reducing the likelihood of child abuse. In the South African context he advocates against falling into what he calls the 'investigative trap'.<sup>289</sup>

Mandatory reporting laws cut across the confidentiality ethics of a number of professions, including medicine, nursing, psychology and social work. Serious concerns have been expressed about the potential negative consequences of allowing no room for the use of professional discretion in this regard. Particular difficulties have arisen in the USA relating to abuse which has occurred long ago and is divulged in therapy, either by the victim or the perpetrator. Weinstock and Weinstock, e.g., speak of the reporting laws as 'an unprecedented threat to confidentiality' with serious attendant dangers. They suggest that these laws could lead to a steady erosion of patient-therapist privilege

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3 'The central purpose of the child abuse/neglect statute is to protect children by identifying those who need the attention of child welfare professionals, not to aid in the criminal prosecution of the offenders' state Allen and Hollowell in the North American context (op. cit, 58). They go on to say that once the primary aim has been achieved, 'the medical privilege need not be abrogated further'. See also McKittrick, C 'Child abuse: recognition and reporting by health professionals' (1981) 16(1) **Nursing Clinics of North America** 111.

289 Lachman, MD thesis, 45. In similar idiom, paediatrician Margaret Lynch, addressing the recent 13<sup>th</sup> ISPCAN Congress in Durban, named mandatory reporting along with 'overinvestment in investigation' in a list of what she called 'elephant traps' in attempting to confront child abuse ("Children's rights and child protection – working to meet new challenges", Kempe Memorial Lecture).



with all manner of issues possibly becoming open to notification requirements to satisfy the needs of law enforcers as time goes on. Patients who are wanting help in dealing with a history of abuse are less likely to reveal sensitive information if they believe that the therapist may turn informer. Sometimes, the writers comment, the therapist him or herself may be well placed to help the individual or family deal with the abuse, but is prevented from proceeding accordingly because of the compulsion to report.<sup>290</sup>

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290 Weinstock, R and Wrinstock, D 'Child abuse reporting trends: an unprecedented threat to confidentiality' 33(2) **Journal of Forensic Science** 418-31. These writers cite cases where the breaching of confidentiality by therapists to comply with the law has had devastating effects on their clients. The cases include situations in which there was no reason to believe that any child was in danger. They also make the point that, while the reporting laws are intended to protect children, the child protection system itself is capable of creating trauma for them which may exceed that which they experienced in the course of the initial abuse.

The consequences of reporting appear to be far from equitable. Numerous studies have been undertaken into compliance and noncompliance of mandated reporters with their legal obligation to report. Crenshaw et al cite findings from a number of sources to the effect that large numbers of mental health professionals opt not to obey the reporting laws, or use their own discretion in this regard. Reasons include lack of certainty as to whether abuse has occurred; lack of trust in child protection services, which are perceived to be overloaded and unable to respond adequately; and a belief that the practitioner can work effectively to prevent abuse without outside interference.<sup>291</sup> There have been recommendations from a number of sources in the USA for a more flexible approach to reporting requirements which would allow therapists to reach a decision in this regard which they believe to be consistent with the safety of the children in question and in the best interests of their clients.

Apart from the above concerns, a number of extraneous issues seem to affect the likelihood that a person charged with the duty to report will in fact do so. In the USA, racial minority families and lower income families have been found to be more likely to be reported for child abuse than others.<sup>292</sup> Various studies have pointed to effects of age and gender,<sup>293</sup> practice setting<sup>294</sup> and a

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291 Crenshaw, W, Bartell, P and Lichtenburg, J 'Proposed revisions to mandatory reporting laws: an exploratory survey of child protection service agencies' (1994) 73(1) **Child Welfare** 15-27.

292 Hampton and Newberger, 1985, in Warner, J and Hansen, D 'The identification and reporting of physical abuse by physicians: a review and implications for research' (1994) 18 **Child Abuse and Neglect** 11-25.

variety of personal factors<sup>295</sup> on the likelihood that practitioners will comply with reporting requirements.

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- 293 Warner and Hansen (1994) 18 **Child Abuse and Neglect** 11 - 25.
- 294 There have been findings to the effect that doctors practising privately in small towns are less ready to report abuse than urban practitioners (Badger, LW 'Reporting of child abuse: influence of characteristics of physician, practice and community' (1989) 82 **Southern Medical Journal** 281-6). There is also evidence that abuse is more easily reported by doctors in the public health services than those in private practice (Morris, J, Johnson, M & Clasen, M 'To report or not to report - physicians' attitudes towards discipline and child abuse' (1985) 139 **American Journal of Disease of Children** 194-7). Significant differences have been found between mental health workers and child protection service workers in terms of grounds on which they would consider it necessary to report a suspicion of abuse (Deisz, R, Doueck, H, George, N and Levine, M, '*Reasonable cause*: a qualitative study of mandated reporting' (1996) 20(4) **Child Abuse and Neglect** 275-87).
- 295 See Morris, Johnson and Clasen, (1985) 139 **American Journal of Disease of Children** 194 -7; Pollak, J and Levy, S 'Countertransference and failure to report child abuse and neglect' (1998) 13 **Child Abuse and Neglect**, 515-22. According to the latter writers, a range of personal issues such as poor self-esteem, unresolved inner conflicts and a strong need for certainty may determine whether or not a case is reported. The life history of the reporter will influence the decision, as will 'gender, experience and the nature of professional training'.

Unsubstantiated reports pose particular dilemmas. In the USA this problem has been described as being of 'crisis proportions'.<sup>296</sup> The rate of false reporting appears to be particularly high in the case of anonymous reports.<sup>297</sup> In England, also, there is concern that names of children are too easily entered on the register, often on insubstantial evidence, and there has been a call for a criterion for proof of allegations to be introduced as a requirement for a child's name to be listed.<sup>298</sup> While non-substantiation of reports will generally not amount to proof that abuse has not occurred, the trauma to children and families which can result from fallacious or over-zealous reporting is enormous and can include stigmatisation, job losses and major disruption to relationships.<sup>299</sup>

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- 296 Deisz et al (1996) 20(4) **Child Abuse and Neglect** 276. See also Pollak and Levy (1998) 13 **Child Abuse and Neglect** 515-22, who commented in 1988 that a steady rise in reporting rates in the USA over the previous decade had occurred together with a drop in the rate of substantiation of reports. A 1992 report designates 66.4% of reports from social service sources and 71.4% from mental health sources in New York State as being unfounded, while according to the National Centre on Child Abuse and Neglect in the USA in 1994, 54% of all reports were 'either unfounded or unsubstantiated' (Deisz et al (1996) 20(4) **Child Abuse and Neglect** 276.).
- 297 Adams, W, Barone, N, and Tooman, P 'The dilemma of anonymous reporting in child protective services' (1982) 61(1) **Child Welfare** 3-13.
- 298 Bedingfield, D 'The Child in Need: Children, the State and the Law', 1998.
- 299 Tiffany Jenkins of Families for Freedom in England refers to some potential dangers of protective investigation for family and community relationships as follows: 'The process of inspection blatantly infers to the child that they should not trust their parents – that a stranger from the social service department is ... the best protector of their interests ... the school, colleagues, neighbours and other family members are consulted. Once accused, many spend years trying to regain the trust of these people. At a time when parental confidence is already low and

The costs of investigating unfounded reports have also to be taken into account, along with the resources taken up by the investigative component of the system as a whole in relation to the rest of the child protection system.<sup>300</sup> The following statement comes from Britain: 'The management of child protection is most developed around the reporting and investigation of alleged child abuse. It is least developed around preventive work with children at home'.<sup>301</sup>

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people are more mistrustful of one another, the consequences of false accusations and investigations can be to wreck homes and lives'. (1998: "How 'child protection' can destroy families", [www.informin.co.uk/LM/LM113/Taboos.htm](http://www.informin.co.uk/LM/LM113/Taboos.htm)).

300 Lynch, cited above, states that in 1993 in the USA, three million reported cases were investigated and one million were confirmed, all at a cost of \$4 billion.

301 NISW, *op. cit.*

In Australia, an enquiry by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission into children and the legal process has reported both strong support for and serious concerns regarding mandatory reporting. Critics point out that abusers are less likely to seek help if professional persons are required to report them, and that children themselves may be more reluctant to seek help if they know the perpetrator and fear that he will be prosecuted.

Mandatory reporting may also deny children and families the opportunity of finding other ways to deal with the abuse.<sup>302</sup> The report states as a central concern that mandatory reporting is often instituted without adequate resources for its proper operation, and that it may siphon off resources needed for prevention and treatment. Child protection services in Victoria, e.g., found themselves less able to effectively protect children after the introduction of the system than before. The ACT Community Law Reform Committee sees its recommendations against the immediate introduction of mandatory reporting as 'inextricably linked to the resource issue', and states that 'it would be grossly irresponsible to introduce a system of mandatory reporting without at the same time ensuring that the whole child welfare system can cope with the new measures'.<sup>303</sup>

In the South African context, the following concerns have been voiced: mandatory reporting and registration have been imported more or less directly from countries where the basic survival needs of most of the population are met, and where highly developed service infrastructure is in place. Superimposing child protection approaches in situations which differ vastly from those where they have originated and lack the necessary back-up resources creates particular risks of secondary abuse.<sup>304</sup> Distortions arise from trying to address child abuse in isolation from its surrounding problems, and the vulnerability of children is heightened if abuse is exposed without being met with prompt and skilled intervention and the necessary follow-up services.

The question also arises in the local context as to whether it is helpful to criminalise e.g. mothers who fail to report partners who are family breadwinners, when they lack any alternative means of survival for their children and themselves and no state support is available to them.<sup>305</sup> In addition,

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302 ALRC 84, 1997:435, 82, 84.

303 ALRC 84, 82. The Australian Law Reform Committee recommended a phased approach based initially on voluntary reporting encouraged by targeted education.

304 Loffell, JM 'Intervention in child abuse in the South African context – dilemmas and potentially abusive aspects', (1992) 5(1) **The Social Work Practitioner-Researcher**, 3-8.

305 This is an effect of section 4 of the Prevention of Family Violence Act – section 42 of the Child Care Act covers only designated professionals.

account must be taken of the problem of intimidation of and violent reprisals against persons who report or intervene in abuse, given the low rate of successful prosecution of perpetrators, and the fact that protection cannot be guaranteed with current police resources. Further, many examples can be cited of cases where no meaningful form of protective assistance has been forthcoming from the welfare system either. Is it fair to criminalise those who fail to report without first putting in place the mechanisms needed to ensure the safety both of the child and the person who refers the case?

Hutchison points out that there were warnings as early as 1975 in the American context against proceeding with the expansion of reporting requirements 'before programmes to ensure adequate food, shelter, clothing and medical care for poor children and their families were in place'.<sup>306</sup> But the process continued, in a climate of entrenched reluctance to provide organised assistance to families. 'It is attractive to legislate against child abuse ... . So, expansion of the scope of the reporting laws went forward and created a national myth that children would be protected', says Hutchison.<sup>307</sup>

In relation to the registration of perpetrators, significant potential dangers have been noted. Freeman-Longo, referring to provisions which have been introduced in certain districts in the USA to allow for publication of the addresses of released sex offenders, and the harm to innocent people which has been the unintended consequence, speaks of 'feel-good legislation' - i.e. laws which create false reassurance while generating new forms of damage.<sup>308</sup> The recent 'name and shame' campaign by a British publication which made the names and whereabouts of released offenders known has produced further evidence of the hazards of such approaches. These include vicious vigilante action - at times involving cases of mistaken identity, stigmatisation of the victim - whose confidentiality is violated if the offender is a family member; and released offenders being driven underground so that monitoring and follow-up services become impossible. For such legislation to serve its purpose, it must incorporate adequate safeguards against such effects.

The National Committee on Child Abuse and Neglect (NCCAN) states as follows: 'Reporting is only

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3 Hutchinson (January 1993) 38(1) **Social Work** 56 at 57, citing Sussman and Cohen (eds) **Reporting Child Abuse and Neglect: Guidelines for Legislation**, 61.

3 Ibid.

308 'Invited commentary - Feel Good Legislation - prevention or calamity?' (1996) 20(2) **Child Abuse and Neglect**, 112.

useful to the extent that it:

- gives rise to appropriate and skilfully managed services which are immediate and ongoing; and/or
- provides data for planning and policy development'.<sup>309</sup>



The NCCAN nevertheless states that there is considerable consensus on the need for ‘a co-ordinated data base linked with a single, effectively maintained Child Protection Register ... (to be) operated by the state using dedicated resources and person power’.<sup>310</sup> The appointment of an inter-disciplinary task group which would inter alia examine the ethical and technical issues involved, including those relating to the registration of perpetrators, is recommended as a component of the proposed National Strategy on Child Abuse and Neglect (NSCAN).

#### 10.5.6 **Options mooted in Issue Paper 13 and the research paper and responses received**

Issue Paper 13 raised the following questions:

*What, if any are the difficulties with the present provisions for reporting of child abuse? What kind of system should be in place to deal with reports of child abuse? What particular issues should be taken into account in future legislation in this regard?*

Participants in the provincial workshops emphasised the need for clear definitions of abuse. The SANCCFW recommended inclusion of child labour, child trafficking and child prostitution as reportable forms of abuse; also that distinctions be made in the law between abuse which is suspected, alleged or confirmed. Durban Child Welfare Society (DCWS) likewise called for clarification of the level of evidence required for reporting.

Several respondents referred to a need for proper procedures, resources and services to be in place in order to ensure that reporting served a positive purpose. The National Council of Women of South Africa referred to the need for properly run and inspected places of safety for children reported. The DCWS called for a system ensuring proper planning and action to protect the child and address the family’s problems, as well as a mechanism to detect prior offences by the perpetrator. Disabled People South Africa stressed the importance of what happens after reporting and the need for a system which would inspire confidence. The unpredictability of the present situation as regards police and court action, the granting of bail etc. was cause for concern.

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3      Ibid.

The Cape Law Society felt that abuse should be reported to a court rather than a government official and that provision should be made for the courts to deal with after-hour emergencies. The ATKV referred to a need for the channels for reporting to be accessible and to be made well known.

The Natal Society of Advocates also favoured improved public education about child abuse, with a view to the reporting of all abuse, with a central register being in place to serve as a basis for protection of children.

Mr D Rothman favoured extension of the reporting requirement to all persons, while the Durban Committee felt that it should apply to people in regular contact with children such as teachers, therapists and doctors. The Committee favoured a system allowing reporting to any of a range of bodies serving children. The Johannesburg Institute of Social Services supported the recommendations of the NCCAN. These include investigation of the experience of mandatory reporting elsewhere; the establishment of a committee of experts from the various disciplines involved to examine ethical issues; research to establish what data would be stored in the register and the needs of users; a secure system for accessing information; education for mandated reporters; and immunity from legal action for all *bona fide* reporters.<sup>311</sup>

The research paper raised the following questions relating to reporting and registration:

*Should a comprehensive children's statute include provision for:*

- *mandatory reporting of child abuse for selected professionals?*
- *mandatory reporting by anyone who encounters child abuse?*
- *discretionary reporting accompanied by campaigns to promote reporting, and provision for protection against legal action for bona fide reporters?*
- *allowance for the exercise of discretion, subject to conditions, for professionals involved in confidential relationships?*
- *legal backing for professionals engaged in tasks in response to reports - e.g. medical examinations, social work investigations etc.?*
- *indemnity against legal action and protection of the identity of any person who in good faith reports actual or suspected child abuse?*
- *other options? (specify).*

*If you favour mandatory reporting, what should be its purpose(s)? Please number in order of priority, with no. 1 as most important:*

- *Identifying children at risk in order to ensure the necessary protection and support.*
- *Identifying children at risk in order to monitor their wellbeing.*
- *Identifying and rehabilitating offenders.*
- *Identifying and punishing offenders.*
- *Gathering data for purposes of planning and service-provision.*
- *Any other purposes (please specify).*

*If you favour mandatory reporting:*

- *What measures should be undertaken to ensure that the necessary resources are in place to deal effectively with reported cases?*
- *What standard should apply before reporting is required (e.g. reasonable cause for suspicion, full confirmation, etc.)?*
- *How can the problem of unsubstantiated reports be kept to a minimum?*
- *Should nutritional deficiency disease which is not associated with a pattern of abuse by caregivers continue to be included in a mandatory reporting provision?*

*Do you believe that a comprehensive children's statute should include provision for a child protection register? If so,*

- *For what purposes and how should the register be used?*
- *In what circumstances should a child's name be entered on the register?*
- *Who should have access to this register and under what conditions?*
- *Should perpetrators be entered on the register? If so, under what conditions?*
- *What system, if any, should be used for removing names from the register?*
- *What ethical issues are involved and how can these best be addressed?*
- *What structure should operate and finance the register?*

No respondents expressed support for the continued fragmentation of provisions for mandatory reporting between the Child Care Act and the Prevention of Family Violence Act.<sup>312</sup> There were few responses to the more detailed questions posed in the research paper, and these were somewhat contradictory.

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<sup>3</sup> The SANCCFW, the National Interim Consultative Committee, Disabled People South Africa, the National Council of Women of South Africa, the Johannesburg Institute of Social Services, and Commissioner of Child Welfare Mr DS Rothman all supported the incorporation of reporting provisions in the children's statute only.

Mandatory reporting for selected professionals was supported by the SANCCFW, as well as Ms T Odyar, Ms D Ritter and the GCWS. The latter three respondents supported mandatory reporting for anyone who encounters child abuse, while the SANCCFW believed that such reporting should be encouraged but not necessarily legislated. All of the above, however, also supported the idea of provision for discretionary reporting supported by educational campaigns, as well as indemnity against legal action and protection of the identity of *bona fide* reporters. All also supported some space for the exercise of discretion, subject to conditions, for professionals involved in confidential relationships, with some adding that this must be only insofar as it did not jeopardise the case. The same respondents supported the introduction of legal backing for professionals engaging in investigative tasks in response to reports, such as medical examinations and social work processes.<sup>313</sup> They saw the protection of children at risk, and the monitoring of their wellbeing as the most and second-most important reasons for mandatory reporting. They were divided on the prioritisation of the remainder of the issues although all were considered relevant.

As regards ensuring that the necessary resources are in place to deal with reported cases, the SANCCFW recommended firstly addressing the fragmentation and duplication of services and resources, and setting in place a clear legal and policy framework to deal with all aspects of child protection. Service providers in all relevant disciplines must be equipped with the proper training and the tools necessary for delivery, and staff complements must be adequate and workloads manageable. With the essential resources in place, a definite time period should be set within which reports should be acted upon, and monitoring should then be carried out for all children alleged to be at risk. Ms T Odyar and Ms D Ritter suggested continuous evaluation of service delivery, using provincial and regional protocols.

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313 The SANCCFW proposed that research involving all the relevant disciplines be undertaken into the pro's and con's of mandatory reporting in South Africa given our scarce resources, e.g. by means of a pilot study comparing results in two areas, one where reporting and registration are and another where they are not properly under way. Information could be sought from Kenya, Uganda and Namibia, given that in the former there is proposed provision for discretionary reporting whereas the latter two countries have gone the mandatory route. Research from First World countries should also be examined.

### 10.5.7 Evaluation and recommendations

With hindsight, the wisdom of having proceeding with a system of mandated reporting in the South Africa context is perhaps open to question. However, **the Commission acknowledges that the reporting system and the national child protection register as currently provided for have protective potential for children as well as being a prospective source of data for planning, policymaking and resourcing purposes, and that it might be ill-advised to reverse the mandatory provisions which are presently in place in the Child Care Act, 1983.**<sup>314</sup> The Commission however recommends that the reporting provision in the Prevention of Family Violence Act be repealed, and that this issue be addressed only in the new children's statute. It is also recommended that compulsion to report be confined to the categories of persons set out in section 42 of the Child Care Act at this time, and that the emphasis for the general population be on voluntary reporting based on public education and awareness-raising. It is further recommended 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, abandonment, and child labour.

Registration should take place only after investigation has confirmed reasonable grounds for suspicion of ill-treatment. Clear definitions of each category are to be provided. It is recommended that nutritional deficiency disease which is caused by poverty rather than deliberate neglect should be removed from the reporting provision, child malnutrition being a mass problem in South Africa which can more effectively be addressed through other mechanisms. It is further recommended that accounts of abuse which have occurred in the distant past not be subjected to the reporting requirement unless there is reason to believe that a child is currently at risk. Further, a mechanism should be included whereby a report can be registered for statistical purposes only, if the Director General is satisfied that the person reporting the case is in a position to undertake the action necessary to protect the

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<sup>314</sup> The National Child Protection Register is currently kept by the Director-General: Social Development for 'the sole purpose of protecting children' and provides for the following entries: All notifications in terms of section 42(1) of the Child Care Act, 1983; all convictions as contemplated in regulation 39A(2)(c); and all determinations of the children's court as contemplated in regulation 39A(4)(b). See further 6.4.3 above where the Commission recommends that the Register be expanded to include the recording the findings of all children's court cases.

**child. The law should provide immunity for any person, whether or not mandated to report, from legal action after making a *bona fide* report, and the anonymity of informants should be specifically protected. This protection should encompass both persons who submit formal notifications in terms of the Act, and persons referring cases for investigation and intervention. Malicious reporting should carry a severe penalty.**

**The approach taken in the United Kingdom of maintaining a consolidated register of persons found by a court or through some other form of due process to have abused children, or to be likely to pose a risk of abuse, is considered advisable for South Africa, as a means of keeping serial offenders out of children’s services.**<sup>315</sup> Such a register should be available to assist with the screening of prospective staff members, volunteers or substitute caregivers for children within schools, designated child care services and major youth organisations, and for no other purpose whatever. Strict controls on access to this information and strong sanctions for any breach of the limitations should be put in place. Obviously it will be necessary to build in processes to ensure that, in cases involving dismissal, internal transfer or retirement of a person on the basis of prima facie evidence of abuse, principles of administrative justice have been upheld. It is further recommended that severe criminal penalties should apply to malicious reporting

**The Commission recommends that any prospective foster or adoptive parent, prospective volunteer or applicant for employment or voluntary service in a designated child care employment setting or category of work should be required to produce a certificate confirming that his or her name does not appear on such a list or register.**<sup>316</sup> This is regarded as the least invasive way of applying this protective measure.

## 10.6 Conclusion

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315 See also 19.5.4 below. See also the Commission’s **Discussion Paper on Sexual Offences: Process and Procedure**, par. 42.11.

316 Contra section 7(1) of the UK Protection of Children Act 1999 where the duty is placed on the prospective employer.

The formal child protective intervention system as proposed by the Commission is one in which there is a recognition that a children's needs are normally best met in well-functioning families and supportive communities. Policies should be designed and resources allocated with this in mind. The Commission seeks to avoid an over-interventionist approach, in which reporting, official investigations and other authoritarian approaches dominate the system at the expense of preventive, supportive and rehabilitative components. At the same time, provision is made for a well-planned and coordinated protective system, geared to children who have experienced or are at risk of severe forms of abuse. This system is intended to deal effectively with children throughout their involvement with it, on the basis of thorough assessment, planning and appropriate service delivery, until the child is permanently settled in a safe environment. The need for resources to be allocated to all components of the system on a systematic basis, so that each can function as intended, is recognised. The Commission also recognises the need for ongoing coordination of the various sectors and disciplines involved, and proposes a structure for this purpose. Provision for mandatory reporting and registration of child abuse is maintained, but within a more clearly defined framework than has been the case in the past. Further expansion of the system is avoided, protection of voluntary reporters is built in, and provision is made for the registration of offenders, solely for purposes of preventing their entry into positions of responsibility for, or close contact with children.