

CHAPTER 13

CHILDREN IN NEED OF SPECIAL PROTECTION

13.1 Introduction

The term 'children in need of special protection' (CINSP) appears to be replacing the term 'children in especially difficult circumstances' (CEDC), which featured in national and international child rights documents in the 1990's. In this Discussion Paper, use is nevertheless made of the latter term from time to time for clarity and continuity.

The World Summit Declaration on the Survival, Protection and Development of Children, which together with the CRC provided the child rights agenda for the 1990's, had the following clause among the global goals which participating nations committed themselves to achieve by the year 2000: 'Provide improved protection of children in difficult circumstances and tackle the root causes leading to such situations'. The same categories of children will no doubt come into focus in the global agenda to be set for the current decade at the United Nations Special Session on Children, originally scheduled to be held in September 2001, but since postponed.

The following are commonly recognised categories of children in need of special protection:

- children living in severe poverty;
- children infected and affected by HIV/AIDS, including orphaned children;
- children with disabilities and chronic illnesses;
- children experiencing abuse, neglect and abandonment;
- child labourers;
- children living or working on the streets;
- commercial sexual exploited children;
- children in conflict with the law;
- children exposed to armed conflict or violence;¹
- child refugees and undocumented immigrant children.

1 On the issue of child soldiers, see Christine Jesseman 'The protection and participation rights of the child soldier: An African and global perspective' (2001) **African Human Rights Law Journal** 140.

Not all of the above categories will be dealt with in the present Chapter. The issues of physical, sexual and emotional abuse, neglect and abandonment of children have been covered in Chapter 10 above. The issues of child refugees and undocumented immigrant children are dealt with in detail in the context of the international issues facing children in Chapter 22 below. This Chapter focusses only on the care and protection of commercial sexual exploited children, as the Commission's investigation into sexual offences is dealing with the criminal aspects of all forms of child sexual abuse including commercial sexual exploitation. The issue of young people in conflict with the law have been comprehensively dealt with in the Commission's investigation into juvenile justice. It is, however, worth pointing out that the draft Child Justice Bill² makes specific mention of an increased linkage between the child justice system and the child care system.³

This provision in the draft Child Justice Bill makes a much more clearly defined linkage between the criminal justice system and the child care system than exists in the current law, and officials working in the system will be alerted to the need to consider the children's court option when homeless children and other children living in poverty commit crimes and are brought to the criminal justice system.

The children who are at issue in the present Chapter are those whose lives are lived daily in circumstances which place their survival, development and protection at risk. The White Paper on Social Welfare, 1997 defines children in especially difficult circumstances as 'those children who are denied their most basic human rights and whose growth and development are

2 S A Law Commission's **Report on Juvenile Justice**, Project 106, 2000.

3 See clause 70 of the draft Child Justice Bill. This section, particularly subsection 2, was clearly drafted with the special protection for children in mind. The thinking behind this clause is that where a child commits a crime which is directly related to seeking basic needs such as food and warmth, such offences should not be treated as crimes but should be seen as a symptom of the child's poverty or homelessness and the child should then be dealt with as a child in need of care. If a child commits other kinds of crimes, it is still possible, in terms of subsection (1), for the court to stop the proceedings and refer the matter to the children's court.

consequently impaired'. The Child Care Act, 1983, as amended, defines children in especially difficult circumstances as 'children in circumstances which deny them their basic human needs, such as children living on the streets and children exposed to armed conflict or violence'. Some children are in special predicaments because of individual factors such as disability or chronic illness, while others are caught up in historical and social contexts which have led to multiple infringements of their rights. Combinations of such factors are also common.

Many if not most children in need of special protection could be considered to be 'in need of care' in terms of section 14(4) of the Child Care Act, 1983 and would qualify in theory for protection via the conventional children's court processes. It will certainly be necessary at times to follow this route, and for the formal protective system to be better adapted to the needs of these children than is the case at present.⁴ However, such children are typically caught up in mass-based socio-economic situations which case-by-case interventions on their own cannot satisfactorily address. They are also, in the very nature of their situations, marginalised from the mainstream of society and its formal protective mechanisms. Formal protective interventions may also not be practically possible on the required scale. Broader structural interventions are needed which will address the underlying causes of these children's problems and counteract their marginalisation, bringing them within the reach of needed services and enabling them to access their constitutional entitlements.

The Commission does not suggest that children in need of special protection be dealt with as a distinct group apart from other children. Often the issue is mainly one of enabling them to access services and benefits which are intended for all children. However, there is a need to examine each category of such children in order to ensure that their special circumstances are addressed in legislation. The intention is both to address the ways in which they may be marginalised from general forms of provision, and to provide for the specific services which may be needed in order to overcome their problems, as these children often have needs beyond those of children in ordinary situations. For example, specific measures are required to meet the needs of children with disabilities, those with chronic illnesses and those who have been subjected to various forms of trauma or deprivation. Ways of ensuring that such special provisioning can be facilitated by law will be explored in this Chapter.

13.1.1 **Overarching problems and strategies**

After examination of the plight of children in all the categories mentioned above, the Commission is of the opinion that certain broad-based interventions are required to address some problems common to the vast majority of those affected. These are, firstly, poverty and secondly, barriers to the accessing of basic services. Any action which would effectively impact on these would, in the view of the Commission, have the effect that children would in the first place be less likely to be put at risk of disease and disability, or be driven into life on the streets, prostitution or other forms of child labour. Secondly, such interventions would greatly mitigate the destructive effects of these problematic situations. Thirdly, children would be enabled to move out of destructive circumstances and become fully integrated with their communities. In the absence of such interventions, these problems are inclined to be cyclical and self-perpetuating.

Absolute poverty is the main reason why children enter circumstances which place their entire development at risk. As they then become increasingly marginalised from mainstream society, it becomes more and more difficult for them to access basic services. Education and health care are of particular relevance here. The results of this lack of access are far-reaching: lack of health care can render a child chronically unable to survive, develop and function to his or her potential. Lack of education locks children into poverty and denies them the means to move beyond their problematic circumstances, and ultimately to offer their own children a better life.

Research shows, e.g., that orphanhood, particularly that caused by the loss of a mother, often entails a deterioration in the health of the child.⁵ Parallels no doubt exist for many other categories of children. Those on the streets usually miss out on their schooling, as do child workers and those caring for family members who are ill with AIDS.

13.1.2 **Current law and practice**

5 Barrett K "The Rights of Children: Raising the Orphan Generation" Paper presented at the Southern African Conference on Raising the Orphan Generation, Pietermaritzburg, 9 - 12 June 1998.

As will be discussed in Chapter 25, existing social security provision is for the most part limited to children under seven years. Children over the age of six years are not automatically able to access free medical services in the public health sector. The Regulations⁶ to the South African Schools Act 84 of 1996 do not make explicit provision for persons other than a parent (if he or she lacks the necessary finances) or a foster parent or children's home to be exempted from payment of school fees. In addition, schools are under financial pressure and there are many reports about children who cannot pay fees and children who do not have uniforms being denied access, albeit this is in contravention of the regulations. This apparently happens partly through devices such as ensuring that the school is filled to capacity with fee-payers, or through pressures exerted on the learners themselves within the school setting, who may be shamed by staff or barred from extramural activities.

13.1.3 Approaches in other systems

Assistance is provided with primary health care and education for impoverished children in various African countries. In Zimbabwe, primary education is compulsory, and tuition is free in rural areas. Uganda and Malawi also offer free primary education, and Malawi provides grants for books and clothing.⁷ Primary health care in a number of countries is free or available at low cost to certain sectors of the population. For instance, in Zambia this applies to children.⁸ Zimbabwe offers free primary health care in rural health centres, free health care for children below 5 years of age and free health care based on a means test.⁹

13.1.4 Recommendations

6 Exemption of Parents from the Payment of School Fees Regulations, 1998. GN No.1293 of 1998 in Government Gazette No. 19347, 12 October 1998. The relevant provisions of the Regulations read as follows: The Regulations to the South African School Act 84 of 1986 provide as follows for exemption from payment of school fees:

- Parents whose combined annual gross income is less than ten times the annual school fees per learner qualify for full exemption.
- Parents whose combined annual gross income is less than thirty times, but more than ten times the annual school fees per learner qualify for partial exemption.
- A person who has the responsibility of a parent for a learner placed in a foster home, foster care or place of safety is exempted from payment of school fees.

7 UNICEF **Children in Need of Special Protection Measures The Growing Needs of Children who have Lost Caregivers due to HIV/AIDS**, Draft Strategy Paper, March 1998.

8 **Orphans and HIV/AIDS in Zambia** Draft Report of an Assessment of UNICEF Programming in Zambia for Children and Children Affected by HIV/AIDS, July 1998.

9 Hunter S **Draft Report on Community Based Orphan Assistance in Zimbabwe: Developing and Expanding National Models by Building Partnerships with NGOs, CBOs and the Private Sector, September 1998.**

The Commission recommends the following overarching measures to address the problems of children in need of special protection, and to prevent them from falling into or remaining in such circumstances:

- **A universal grant to provide protection against absolute poverty, accessible to every child, along with additional grants to address special needs and circumstances. More detailed recommendations in this regard are supplied in Chapter 25.**
- **Provision for the court to be empowered to order that a grant be paid for a specified period in respect of a child found to be in need of care, if this is deemed necessary to enable the child to return to or remain within in his or her family home, or to be extricated from prostitution or other forms of exploitative labour. It is the Commission's view that children should not be removed from or forced to live away from the family home merely for reasons of poverty.**
- **Genuinely free access for all impoverished children to primary and basic health care services in the public sector. Hence, no public health care facility should be entitled to exclude a destitute child from treatment. Tax concessions should be offered to private clinics which provide emergency services to destitute children.**
- **Genuinely free education for all impoverished children of school-going age. Hence, the Regulations to the S A Schools Act 1996 should be amended to include all categories of caregivers and also children from child-headed households for purposes of exemption from school fees. In addition, provinces should be required to budget for the number of children who in any given year will require education without being able to pay fees, and specific financing should be allocated to schools which accommodate such learners. No public school should be entitled to turn away a child on the grounds of not having a uniform.**

In the remainder of this Chapter, recommendations are made to address specific needs of children in particular categories. These are in addition to the overarching strategies recommended above.

13.2 children living in extreme poverty

13.2.1 Introduction

Although severely impoverished children are addressed in this section as a category of children in need of special protection, it should be borne in mind that, as mentioned above, most children in all the categories discussed in this Chapter experience this problem.

Poverty is a multi-faceted phenomenon with destructive impacts on all aspects of the lives of children. It creates barriers to the realisation of the entire range of their rights. Cassiem et al, for example, refer to poverty in terms of 'capability deprivation' rather than only being a matter of insufficient income. They identify the following four categories of poverty:

- insufficient income and income-earning opportunities;
- lack of human development opportunities (such as education, basic nutrition and health, ability to enjoy leisure and develop one's talents).
- feeling of physical and economic insecurity, or vulnerability;
- lack of ability to participate in family and community life and an inability to influence one's own destiny - powerlessness and social exclusion.¹⁰

In this section, not all of these issues will be addressed in depth. The focus will be on the basic survival issues reflected in indicators such as infant mortality and morbidity, and child malnutrition. Additional information regarding child poverty is included in Chapter 25, dealing with grants and social security for children.

In South Africa, six out of every 10 children live in poverty.¹¹ Children account for 25% of South Africans living in poverty.¹² While the manifestations of poverty in South Africa are similar to those found in many other developing countries, the determinants of this poverty differ in a number of significant ways. The structural nature of poverty in South Africa and the extreme socio-economic dualism were, to a considerable extent, shaped by the segregationist policies of apartheid. The bantustan system, in particular, consigned the majority of Africans to overcrowded, poorly endowed and poorly serviced ethnic reserves. Under this system, moreover, the costs of social reproduction were deflected away from the more affluent centres of production in 'white' South Africa to the impoverished homelands. Thus, it is not surprising

10 Cassiem S; Perry H; Sadan M and Streak J **Are Poor Children Being Put First ? Child Poverty and the Budget 2000** Idasa, Cape Town 2000, viii, 2-3.

11 **A Report on the State of the Nation's Children** National Programme of Action for Children in South Africa, The Presidency 2001 at 33.

12 Deborah Ewing "The Impact of HIV/AIDS on Child Poverty" Paper prepared for The Health Economics and HIV/AIDS Research Division (HEARD), May 2001.

that the poorest segments of South African society are still to be found in these areas, and that within them the incidence of child mortality and malnutrition are the highest.

The fact that poverty has been aggravated by rigorously enforced state policies, strongly indicates that the reversal of such distortions will necessitate concerted interventions by the new Government through the RDP. The redress of structural underdevelopment cannot take place through the influence of market forces alone.

Apartheid has also resulted in an extraordinary level of structural violence in South Africa, with serious effects on the psychological development of its children. There are large numbers of children with special needs, including children with disabilities.

Reflecting both a lack of concern with such issues and the inefficiencies of the ethnically based administration of apartheid, data on mortality, morbidity, malnutrition and other key indicators are woefully inadequate and present an incomplete and partial picture of the current status of children in South Africa, especially of poor, rural African children.

13.2.2 **Mortality**

Perhaps the most profound manifestation of the extent and impact of poverty in South Africa is to be found in the rates of infant and child mortality. More than any other indicators, these signal a society's capacity or incapacity to nurture and maintain its future generation. As such, these indicators represent a fundamental measure of a society's well being.

13.2.2.1 **Perinatal mortality**

The perinatal mortality rate (PNMR) is defined as the death of a foetus or a baby which occurs from 28 weeks of gestation to the first 4 weeks after birth. High rates of PNMR are generally taken as an indication of the quality and availability of antenatal care, as well as the health, nutritional and social conditions of child-bearing women.

A quarter of all 38 047 child deaths in 1995 were in the perinatal period.¹³ A study was recently conducted to estimate a national PNMR in South Africa. The study concluded that the PNMR in South Africa is probably in the order of 40/1000 births.¹⁴ Existing survey data indicate that most

13 **A Report on the state of the Nation's Children: South Africa** (2001) 76.

14 Pattinson RC 'Saving Babies: A Perinatal Care Survey of South Africa' **Science in Africa** 2000.

perinatal mortality is associated with pre-term labour, unexplained stillbirth, abruptio placentae and infections. Perinatal mortality rates point to the inadequacy of antenatal care, as a significant number of deaths in the age category are preventable. Antenatal care is important to ensure that a pregnancy is supervised and that complications are detected and dealt with promptly. The availability of antenatal facilities differs widely according to race, socio-economic standing and locality.

Due to limited services, and inadequate transport and cost, large numbers of women in rural areas give birth at home. Further evidence suggests that some women only attend antenatal clinics once in their late pregnancy. This implies that there is no follow up and no benefit from this visit.

Selected studies indicate that the percentage of home births range from 31 per cent in the former KaNgwane to 66 per cent in parts of the former Transkei.¹⁵ The risks to mother and child are increased with home deliveries especially when there are complications. It has been estimated that traditional birth attendants assist 12.8 per cent of all women who give birth. Due to the high incidence of home delivery in the rural areas, this is likely to be an underestimation. A study conducted in the rural areas of the former KwaZulu found that 60 per cent of all women who delivered at home were assisted by traditional birth attendants.

13.2.2.2 **Infant mortality**

The infant mortality rate (IMR) refers to the number of children who die before they reach the age of one year, expressed as a rate per 1000 live births. The IMR is widely used as a measure of the survival chances of children within society. It is a sensitive indicator of the overall health of the community and a good proxy for environmental and socio-economic conditions in a particular population.

Estimations based on the 1998 Demographic and Health Survey are that 45 per 1000 infants, or one in 22 children born in South Africa will die in the first year of life. The provinces with IMR higher than 45 per 1000 are the poverty stricken provinces of the Eastern Cape (61) and KwaZulu-Natal (52). In the richer provinces of Western Cape and Gauteng, the IMR figures were 8 per 1000 and 32 per 1000 respectively. However, provincial averages IMRs do mask intraprovincial variations. For example, Shung King, et al, (in SAHR 2000) found that the

15 UNICEF / National Children's Rights Committee **Children and Women in South Africa: A Situational Analysis** Johannesburg: UNICEF 1993, p. 30.

metropolitan region of the Western Cape had an IMR of 22.5 and 22.9 in 1998 and 1999 respectively.¹⁶

13.2.3 **Morbidity**

Available data on the extent and nature of morbidity and mortality are limited and partial. The absence of a comprehensive national health information system, coupled with inadequate reporting of notifiable diseases (particularly within the formerly independent homelands), poses problems for an analysis of the health status of different groups according to region, age gender etc. It is possible, nevertheless, to draw some common inferences on the basis of occasional surveys.

Poverty, poor primary health care and unhealthy living conditions are major factors causing illness and death. Many parasitic and infectious diseases, which are aggravated by poverty, are preventable through immunisation, increased access to primary health care, improvements in living conditions and improvements in income levels.

The Department of Health currently maintains a register of notifiable diseases. Of these, infectious diseases were the most prevalent among African and Coloured children.

Tuberculosis (TB) is one of the most common notifiable diseases in South Africa. The lack of firm diagnostic criteria for notification, however, suggests that there is a significant degree of under reporting. Tuberculosis rates are highest in rural areas and particularly amongst children in poor living conditions. Geographically, the incidence of TB is highest in the rural areas of the Western Cape.

Measles is a leading cause of child mortality and morbidity in South Africa, although, once again, it is likely that there is significant under reporting. Unvaccinated children between nine and twelve months are the most vulnerable. Both measles and tuberculosis are eminently preventable through systematic vaccination programmes.

16 **A Report on the state of the Nation's Children: South Africa (2001) 73.**

Other leading notifiable causes of child mortality and morbidity in South Africa are malaria (especially in the northern and eastern parts of the country), viral hepatitis, typhoid fever (which is strongly associated with contaminated drinking water, poor sanitation, and overcrowding), meningococcal disease, and cholera (which tends to be episodic).

A weakness in the existing health information system relates to a preoccupation with notifiable diseases at the expense of recording information on non-notifiable diseases. Diarrhoeal diseases, for example, are not generally notifiable, and yet dehydration from diarrhoea is responsible for thousands of deaths among black children each year.

Acute respiratory infections, likewise, are a major cause of childhood mortality. Significantly, the incidence of this and diarrhoeal diseases correlates very strongly with poverty and poor living conditions. Diarrhoeal diseases, respiratory infections and allergies outnumber all diseases in both ambulatory facilities and hospital admissions.

South Africa is experiencing one of the most rapidly progress HIV/AIDS epidemics in the world,¹⁷ with more people infected than in any other country, with the exception of India. In 1999, at least 1:8 adults were estimated to be HIV infected, representing about 4 million people.¹⁸ The highest rates are among young adults, with an alarming increase observed among teenage girls. In south Africa, it is projected that AIDS will account for a 100% increase in child mortality - from an anticipated 48.5 per 100 000 births without AIDS to almost 100 per 100 000 births in the year 2010. In 1999, at Greys Hospital in KwaZulu-Natal, 81% of all deaths in the paediatric ward were proven AIDS related deaths - the figure is 90% for children under 3 years.¹⁹

Existing data indicate that the virus is spreading rapidly among 15 to 30 year olds, with nearly 50 per cent of reported cases falling within this age group. Although the total number of reported AIDS cases reveal marginally more male than female cases, in the 15 to 24 year age group the number of female cases is more than double that of males. As in many other developing countries, the dominant mode of transmission is via heterosexual sexual intercourse, followed by mother to child transmission.

There are considerable regional variances in the incidence of the disease with the highest

17 **National Report on Follow-Up to the World Summit for Children** submitted by the National Programme of Action for children Steering Committee through the Office on the Rights of the Child in the Presidency on behalf of the Republic of South Africa, December 2000.

18 **Children living with HIV/AIDS in South Africa - A Rapid Appraisal** (2000) 16.

19 **Children living with HIV/AIDS in South Africa - A Rapid Appraisal** (2000) 16.

recorded number of cases in KwaZulu/Natal. The regional breakdown of HIV positive cases among the sexually active population is highlighted in table 3.3 of the publication **Children, Poverty and Disparity Reduction**.

International research indicates that both men and women with sexually transmitted diseases (STDs) are most likely to contract HIV/AIDS. Figures indicating the extent and the consequences of sexually transmitted diseases do not exist nationally. However, studies of women attending family planning and antenatal clinics have shown prevalence rates ranging from 3 per cent for syphilis, 4 per cent to 12 per cent for gonorrhoea and 5 per cent to 16 per cent for chlamydia.²⁰ Although major urban centres have STD clinics where treatment is free, in all other health facilities payment is required for treatment of STDs.

A disturbing feature of the rapid increase in HIV infection, and one that is linked to the high incidence of infection among women, is the growing number of children infected with the virus. Children who are born with the AIDS virus seldom live beyond 5 years. Apart from an actual loss of infant and child life, the pandemic is certain to give rise to a generation of AIDS orphans as it has done in a number of other African countries. The pressure which this state of affairs will place on the resources of society and on the well being of the children themselves (in terms of impoverishment, limited education and psychological deprivation) is likely to be considerable.

International experience has shown that there are no easy solutions for the control of HIV/AIDS since so many adolescent and women's health issues are rooted in social, economic and political factors. As there is no cure for HIV/AIDS at present, it has been accepted internationally that prevention is the only way to slow and contain the spread of the virus. Many countries are thus starting to focus HIV/AIDS interventions on children and adolescents, who are both a vulnerable group and the group with the greatest potential to slow or avoid transmission of the virus.

The HIV/AIDS Directorate within the Department of Health has produced a 2 year plan based on the National Aids Plan established by the National Aids Convention of South Africa (NACOSA). The Directorate's draft plan outlines five key strategies for the next two years, and of these,

20 Department of Health **Maternal, child and women's health**, p. 23.

three are related to the provision of clinical HIV/ AIDS care.

Some strategies for countering HIV/AIDS include the development of school based life skills programmes and the use of the media to popularise key prevention concepts. Support could also be given for the identification of potential problematic issues (for example, children affected by AIDS). Advocacy for, or mobilisation of support to establish an independent National AIDS programme to co-ordinate efforts to counter the effects of HIV/AIDS is also essential as the epidemic takes greater hold.

13.2.4 **Malnutrition**

In South Africa, malnutrition is one of the biggest contributors to childhood morbidity and mortality.²¹ The recent national food consumption survey found that in children aged 1 to 9 years, 1 in 5 children are stunted and 1 in 10 children are underweight.²² In terms of nutrition, the latest national Vitamin Information Centre study results published in the South African Medical Journal, April 2001 shows that: "At the provincial level, households in the Eastern Cape had the highest percentage of hunger (83 percent) followed by the Northern Cape (63 percent) and North West (61 percent). The impact of HIV/AIDS on childhood malnutrition can be observed at many levels. HIV infection in children compromises their nutritional status and with poor nutritional status, disease progression is hastened. In 1989 it was estimated that the prevalence of chronic protein energy malnutrition (PEM) was 30 per cent among black children of 14 years of age and younger. The PSLSD survey collected anthropometric data about young children in late 1993. Fourteen per cent of African children age 7 - 60 months were underweight (two standard deviations or more below the median standard weight for age).

Corresponding prevalence among other groups were 11 per cent of Coloured children, 7 per cent of Indian children and 4 per cent of white children. An estimated 28 per cent of African children were stunted (under two standard deviations from the median standard height for age); a condition which reflects chronic under-nutrition, especially in the weaning period, from age 6 to 18 months, when growth falters. In order to meet the nutritional goals set by the WSC, South Africa will need to reduce severe as well as moderate malnutrition among under 5 children by half of 1990 levels.

Reflecting national patterns, and the strong correlation between poverty and malnourishment,

21 Child Health Policy Institute "Children in South Africa - their right to health" September 1999.

there are significant regional variations in the incidence of malnutrition. While PEM is highest in the rural areas of the former homelands and in the peri-urban informal settlements, 1987 figures show a fluctuation from a low of 5.5 per cent among Africans in the Western Cape, to a high of 34 per cent in the former Transkei. Although the incidence of PEM has remained constant in the rural areas, the rates appear to be declining in the urban areas.

Under-nutrition in South Africa is the result of PEM as well as micronutrient deficiencies. PEM is associated with cerebral atrophy, which may be detrimental to intellectual and psychomotor development. In 1990 it was estimated that some 2.3 million South Africans were nutritionally compromised and that the majority of these were black (87 per cent) children under 12 years of age. Although comprehensive national data are lacking, it is generally accepted that those households living in rural, peri-urban and informal settlements are the most vulnerable. The fragmented survey data available suggest that approximately 16 per cent of children under 5 years of age are under weight for their age and between 20 per cent and 30 per cent are stunted (low height for age) which is an indication of chronic under-nutrition. These indicators are higher than the norms set by the WSC, which specify a reduction in the rate of low birth weight (2.5 kg or less) to less than 10 per cent by the year 2000.

13.2.4.1 **Child feeding**

The pattern of weight gain in young South African children is such that growth faltering often sets in during the weaning period, thereafter children tend to gain weight such that few are wasted, though a significant percentage are stunted. This is itself a strong indication that child feeding during weaning is problematic. Young children are not fed often enough to satisfy their energy requirements and the food they do receive is not energy-dense. Their older brothers and sisters with larger stomachs can eat enough with only one or two main meals a day to satisfy their energy requirements.

A further implication of this pattern of weight gain is that a shortage of food in the household is often not the cause of malnutrition. The additional food which is required by young children is an extremely small proportion of the total consumed by their older brothers and sisters and

adults in their family.

The more important causes of growth faltering during the weaning period is the early introduction of breast milk substitutes and the lack of support for breast feeding women. In addition, the time constraints on childcare givers preclude their having enough time and attention for feeding young children frequently. The lack of energy-dense weaning foods, especially in rural communities, as well as the lack of information and income also prevents many households from making adequate arrangements for the frequent feeding of their infants.

13.2.4.2 **Micronutrient deficiencies**

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For many rural people maize forms part of the staple diet. Without supplements, however, maize is deficient in amino acid tryptophan, while its high leucine content interferes with the absorption of valine and isoleucine. The highly refined maize meal which is currently in demand, furthermore, suffers from losses of up to 14 per cent of protein and 60 per cent of fat content as well as other minerals. It is clear that micronutrient deficiencies are eminently avoidable at relatively low cost. The WSC set as a target the virtual elimination of iodine and vitamin A deficiency disorders by the year 2000. In 1995, regulations were promulgated requiring the iodisation of all food grade salt. The Iodine Deficiency Survey (2000) showed substantial improvements in iodine status and elimination of IDD following the mandatory iodisation of salt, with close to 90 percent of primary schools surveyed showing an adequate iodine intake.²³

13.2.4.3 **Malnutrition and infection**

There is a direct and cyclical link between malnutrition and infection. Inadequate dietary intake can cause weight loss or growth failure in children, which in turn leads to low nutritional reserves. With virtually all nutrient deficiencies there is a lowering of immunity; with deficiencies in protein energy and vitamin A, in particular, there may be progressive damage to mucosa, which lowers resistance to invasion and colonisation by pathogens.

Lowered immunity and mucosal damage are major contributors to the lowering of a body's defences. In such circumstances, the potential for contracting diseases is not only increased, but the severity and duration of diseases are also likely to increase. The disease process itself exacerbates the loss of nutrients, both by the host's metabolic response, and by the loss from the intestine. Many diseases are also associated with a loss of appetite and other disabilities which contribute to a further lowering of dietary intake. The proportion of deaths due to PEM in children under 5 years of age is not known. However, among poor children PEM is known to contribute considerably to mortality associated with diarrhoeal diseases, respiratory infections and measles.

13.2.4.4 **Programmes to improve child malnutrition**

In a 1994 report on the status of nutrition in South Africa, the National Nutrition Committee found that a number of primary factors were contributing to the development of under-nutrition. These were as follows:

(a) **The availability and quality of health services**

Access to primary health facilities was found to be a major factor in the prevention of malnutrition. A shortage of clinics and staff, inappropriate training, a lack of emphasis on growth monitoring and promotion, variable immunisation coverage and the low prevalence of breast feeding all contribute to the high prevalence of malnutrition among infants and children. These factors are compounded by unclean water and an insanitary environment.

(b) **Caring capacity**

Women assume the primary responsibility for the care of children, and especially very young

children. As a consequence of an array of political, economic and social forces, the structure and composition of black (and African in particular) families has been severely distorted.

The migrant labour system, rapid urbanisation, the separation or break-up of families and the consequent changes in the gender division of labour have placed growing pressures on women either to assume full responsibility for domestic production or to enter the wage market. In both sets of circumstances, women have added responsibility without a commensurate increase in decision making power or in control over domestic resources. Working mothers also frequently do not have sufficient time at their disposal to give their full attention to the care and feeding of children. Division of responsibilities based on gender also mean that fathers spend little time caring for and feeding their children.

This situation is aggravated by overcrowding, violence and the fact that working mothers (particularly 'living-in' domestic workers) are frequently unable (or are not permitted) to have their children with them.

(c) The availability of food

At present there is no integrated nutrition surveillance system operating in South Africa. It is thus extremely difficult to generate a comprehensive overview of trends in this area and the nature and extent of different types of malnutrition and their causes. Similarly, there is no system in place to monitor and evaluate the impact of nutrition programmes underway.

A number of public programmes focussing on nutrition and hunger are currently under way. The Protein Energy Malnutrition Scheme is a food supplementation programme largely operating through local authority clinics and health centres. Although the scheme is especially problematic for infants who should be exclusively breastfed, it is aimed at vulnerable groups who are undernourished or at risk. The target groups are: all children under 6 years of age who suffer from or are at risk of developing PEM; all underweight pregnant and lactating women; and the elderly and chronically ill who are underweight or who are at risk of becoming underweight. Although in previous years the budget for the PEM scheme was under-utilised, in the 1994/5 budget R37 million was allocated to this scheme. Thus far, the programme has suffered from a shortage of appropriate staff at clinic and health centre levels, the fragmentation of service

provision and the stocking of inappropriate food supplements.

The National Nutrition and Social Development Programme (NNSDP) was introduced in the Department of Health in 1991, initially to act as a safety net for those likely to be affected by the introduction of value added tax (VAT) on basic food stuffs.

A Primary School Nutrition Programme has recently been introduced with the aim of alleviating hunger among needy primary school pupils. It also aims to improve the nutritional status of those pupils suffering nutritional deficiencies by means of appropriate micronutrient supplementation.

The Department of Health has stressed the importance of primary health care, with the emphasis on Growth Monitoring, Oral Rehydration Therapy, Breast feeding, Immunisation, Family Planning, Feeding and Female Education (GOBIFFF strategy). However, the results of this approach and that of the PEM scheme have been disappointing. This has been due to a lack of staff and infrastructure and to limited participation by communities. The need for community mobilisation and participation has thus emerged as a key component of the integrated nutrition strategy which was recommended by the National Nutrition Committee.

13.2.5 Evaluation and recommendations

The Commission recommends the inclusion of a provision on preventative measures against diseases and malnutrition (along the lines of section 55 of the draft Indian Children's Code Bill, 2000)²⁴ in the new children's statute. Such provision will place an obligation on Government to initiate programmes providing for a package of services comprising nutrition, immunization, and health and referral services for children below a certain age, and regular health check-up, immunisation and supplementary nutrition for pregnant and lactating women. The programmes may take the form of assistance being rendered to non-governmental and other organisations to enable them to provide such services.

13.3 Children infected with and affected by HIV/AIDS

13.3.1 Introduction

The United Nations Programme on HIV/AIDS estimates that South Africa currently has more

24 See chapter 11 at 11.2.2 above.

HIV-infected people than any other country in the world, except India.²⁵ HIV/AIDS places enormous stress on infected individuals and on their families, who are confronted with the demands of caring for the seriously ill and with the trauma of death as well as the loss of breadwinners. Children and the elderly may be left to run households, with severe implications for those concerned. Many children are themselves contracting HIV, with the mother-to-child route being the second most common mode of transfer of the disease. Infected babies generally survive for shorter periods than adults. Many die within two years of birth, and most will die before they turn five. However, a significant number can survive even into their teenage years before developing AIDS.²⁶ South Africa has a very high incidence of child rape and other forms of child sexual abuse,²⁷ and children of all ages are exposed to the possibility of contracting HIV in this manner. The current myth to the effect that sex with a child will cleanse an adult of HIV infection is a tragic aggravating factor.²⁸

²⁵ **HIV/AIDS in South Africa: the impacts and the priorities** Report written by Kinghorn A and Steinberg M of HIV Management Services 1998.

²⁶ Ibid.

²⁷ National Committee on Child Abuse and Neglect (NCCAN) 2000, op cit., 2.

²⁸ McKerrow N, "Childhood sexual abuse and HIV/AIDS", paper presented at SASPCAN conference, Pietermaritzburg, 1997.

All children in a society which is experiencing the HIV epidemic will be affected by its consequences. The term “children living with HIV/AIDS” was adopted by the National HIV/AIDS Care and Support Task Team (NACTT) to encompass all children, namely:²⁹

- those from ‘uninfected’ households who are affected due to the societal impact of the epidemic (reduced access to services and reduced quality of services);
- abandoned children;
- those from infected households who are affected in a range of ways both before and after the death of their parents;
- those who are vulnerable to HIV infection; and
- those who are infected.

This section in general deals with the impact of HIV/AIDS on the ability of children to grow up within an environment which can meet their basic physical, emotional, social and education needs and fulfil their right to family or family-like care. Specific issues dealt with in this section will be: access to social security; care and support options, especially as these relate to orphans and those who stand to be orphaned; the prevention of unfair discrimination; access to education; and access to health care. As the health rights of all children, including those relating to HIV/AIDS have been discussed in Chapter 11 above, this issue will receive only brief mention here.

13.3.2 Categories of AIDS-affected children in need of special protection

Abandoned infants are one category of children who appear to be requiring care and support due to HIV/AIDS. Although this cannot be confirmed it is suspected that an HIV-positive diagnosis is in some cases a precipitating factor for abandonment of infants. It may be at the time of delivery that the mother first learns of her HIV status.

Children in infected households form a rapidly growing category of those affected. In such households one or more members, particularly caregivers, have become infected with the virus, and may:

²⁹ **Children living with HIV/AIDS in South Africa - A Rapid Appraisal (2000).**

- be experiencing discrimination due to HIV status (e.g. a breadwinner may be dismissed or be refused employment once this becomes known);
- be carrying increased financial, physical and emotional burdens due to unemployment, the care of sick individuals, and funeral expenses;
- be wholly or partially incapacitated due to AIDS;
- have died.

Children orphaned by AIDS are a group creating growing concern in sub-Saharan Africa, including South Africa. Traditionally, an orphan is defined as a child that has lost both his or her parents. This definition does not take cognisance of the fact that mothers are usually the primary or only caregivers, or (in the case of AIDS) that the surviving parent is likely also to be infected and perhaps incapacitated, or that the child may for other reasons not be taken care of by the surviving parent. UNICEF defines “AIDS orphans”³⁰ as children who before the age of 15 have lost either their mother or both parents to AIDS. However, the Commission prefers not to use the term “AIDS orphans” due to its stigmatising connotations. An “orphaned child” is defined for purposes of this Discussion Paper as a child under the age of eighteen who has no surviving parent caring for him or her after at least one of them has died.

The AIDS pandemic has been producing orphans in massive numbers on the African continent. For example, by 1989 nearly 13% of children under 15 in the Rakai district of Uganda had been orphaned.³¹ It is estimated that by 2005 in South Africa there will be nearly a million children under the age of 15 who will have lost their mothers to AIDS.³²

³⁰ UNICEF **Children Orphaned by AIDS – front-line responses from eastern and southern Africa** (1999) 5.

³¹ Dunn et al “Enumeration and Needs Assessment of Orphans in Uganda” 1991 Kampala, Social Work Department/ Save the Children Fund.

³² **HIV/AIDS in South Africa: the impacts and the priorities** (1998).

The plight of children orphaned by AIDS may begin long before the death of their parents. In households where a parent is dying, children are often pushed into roles that would be extremely stressful even for most adults. Many have to nurse their parents as they become helpless and incontinent and ultimately die. Older children frequently drop out of school due to heavy domestic responsibilities including care of their younger siblings as well as sick adults. After, and often before, becoming orphaned they will lack the resources for school fees, books or uniforms. These children are often stigmatised and marginalised by the community due to misplaced fears of contamination. They may be rejected by relatives for such reasons or due to economic considerations. Even if they are taken in by these people, there is still the risk of abuse, neglect and exploitation. They may be caught up in child labour, delinquency, homelessness, street-life and prostitution, among other problems.³³ Children in these situations face multiple risks including malnutrition, illness and every hazard arising from lack of the means of survival, as well as those resulting from the absence of parental care and of normal socialisation. Apart from needs such as food, shelter and clothing, orphans require psycho-social support to help them to cope with the trauma associated with the sickness and death of their parents and with remaining alone to face the challenges of life.³⁴ These children are also vulnerable to early pregnancy. Without far-reaching interventions, the generation of children born to them is likely to be caught up in the next stage of a cycle of severe neglect, exploitation and loss of human potential.

Children who are HIV-positive or have AIDS, apart from being faced with debilitating illness and early death, are vulnerable to discrimination and exclusion from basic services.

13.3.3 South African law and practice

While the fundamental rights of children infected or affected by HIV/AIDS are protected in the Constitution, current legislation and administrative systems fail to ensure that they can realise these rights.

³³ Kalembe E "The Development of an Orphans Policy and Programming in Malawi" Paper presented at the Southern African Conference on Raising the Orphan Generation, Pietermaritzburg, 9 - 12 June 1998.

13.3.3.1 **Promotion of Equality and Prevention of Unfair Discrimination Act, 2000**

Section 1(xxii)(a) of this Act prohibits discrimination on grounds such as race, gender, social origin, religion and language. It adds that other grounds which undermine human dignity, promote systemic disadvantage and interfere with the realisation of rights and freedoms in a comparable manner will also constitute prohibited grounds. The Act recognises the reality of discrimination on the grounds of HIV status and stipulates that recommendations for the inclusion of HIV/AIDS as a prohibited ground of discrimination must be made to the Minister of Justice.³⁵ Although almost no research into the extent and impact of discrimination has been conducted in South Africa, it has been noted that, in the welfare setting, children living with HIV/AIDS have been denied access to pre-school care facilities;³⁶ and to residential care facilities.³⁷

13.3.3.2 Child Care Act 74 of 1983

In terms of the Child Care Act the children's court has the power to order that a neglected, abandoned, destitute or orphaned child be adopted, placed in the custody of a suitable foster parent, placed in a children's home or sent to a school of industries.³⁸ This Act also provides for state financial support of a child admitted to a children's home, and enables a local authority to provide financial support to any association of persons working in its area for the protection, care or control of children.³⁹ These options are proving to be insufficient to deal with the realities of the situations of most children who are destitute or without adequate care due to AIDS.

13.3.4 Policy documents

13.3.4.1 White Paper for Social Welfare, 1997

The White Paper recognises the needs of children whose parents are dying of AIDS and those who have already lost one or both parents. The White Paper also states that there is a need to enhance the capacity of the following existing forms of care to meet the needs of children whose parents have AIDS and of children who have been orphaned:

³⁵ Section 34(1).

³⁶ Telephonic Discussion with Bridgette Engelbrecht of Durban AIDS Training and Information Centre, 16 November 1998.

³⁷ For instance, a **Draft SOS AIDS Policy** sent to the offices of Lawyers for Human Rights in October 1997 stated (at paragraph 1.2) that "if a child is determined as HIV positive and alternative care facilities exist, the child should not be admitted". Lawyers for Human Rights recommended that the policy should not discriminate against HIV positive children even where alternative care facilities were available, and that the overriding consideration should be the best interests of the child.

³⁸ Sections 18 and 15 of the Act.

³⁹ Section 56(1) and (2) of the Act.

- the extended family;
- family homes (through support to women in the community who live with and care for orphaned children);
- foster care and/or adoption; and
- institutional care.⁴⁰

The White Paper emphasises that care by the extended family is the most preferred option. However, it gives recognition to the fact that while many families appear to be willing to care for and nurture orphans, some are not able to do so owing to financial strain, poor living conditions or the absence of close relatives to provide the necessary care and support.

13.3.4.2 **Policy on managing HIV/AIDS within schools**

⁴⁰ GN 1108 of 1997 in Government Gazette 18166 of 8 August 1997, chapter 8 section 4.

The Department of Education's National Policy on HIV/AIDS for Learners and Educators in Public Schools, and Students and Educators in Further Education and Training Institutions⁴¹ prescribes how HIV/AIDS must be managed in public schools. This includes inter alia the following:

- No learner, student or educator with HIV/AIDS may be unfairly discriminated against directly or indirectly. Educators should be alert to unfair accusations against any person suspected to have HIV/AIDS.
- Learners, students, educators and other staff with HIV/AIDS should be treated in a just, humane and life-affirming way.
- No learner or student may be denied admission to or continued attendance at a school or an institution on account of his or her HIV status or perceived HIV/AIDS status.
- Testing of learners or students for HIV for admission to or attendance at school is prohibited.
- The needs of learners or students with HIV should as far as is reasonably practicable be accommodated in the school or institution.
- No learner or student or educator is compelled to disclose his or her HIV status to the school or institution or employer.
- Any person to whom any information about the medical condition of a learner, student or educator with HIV/AIDS has been divulged, must keep this information confidential.
- The MEC should make provision for all schools and institutions to implement universal precautions to eliminate the risk of transmission of blood-borne pathogens, including HIV, in the school or institution environment.
- While the risk of transmission of HIV in contact play and sport is insignificant, all schools should take measures to eliminate this risk. This includes the use of universal precautions, and prohibiting any learner from participating in contact sport with an open wound, sore, break in the skin or open skin lesion.

⁴¹ GN 1926 of 1999 in Government Gazette 20372 of 10 August 1999. This Policy is based on the South African Law Commission's recommended Policy on HIV/AIDS in schools as contained in the Law Commission's Third Interim Report on Aspects of the Law Relating to AIDS, April 1998.

A continuing life-skills and HIV/AIDS education programme must be implemented at all schools and institutions for all learners, students, educators and other staff. Measures must also be implemented at hostels.

The above policy has eliminated much of the uncertainty with regard to the management of HIV/AIDS in public schools. However, it does not apply to independent schools, although copies of the policy must be made available to those registered with the provincial departments of education.

13.3.5 **Comparative systems in other countries**

13.3.5.1 **Identifying children in need of care and protection**

Uganda, through its Children's Statute of 1996, has created a post of Secretary of Children's Affairs in each local authority to safeguard and promote the welfare of all children.⁴² A statutory duty is further placed on the community to report abuses of children's rights to the local authority. Malawi, on the other hand, has developed a National Orphan Policy in 1992,⁴³ which created a structure to promote the identification of children in need at local level by giving legal jurisdiction to the District Social Welfare Officer over any NGO providing services to children. The District Social Welfare Officer is also tasked with supervising institutional care, foster placements and adoption, placements of abandoned children, tracing of relatives, and children who have problems with the law. Further, Village Orphan Committees are tasked with identifying and registering orphans within their area.⁴⁴ Similarly to Malawi, Zimbabwe has produced a Draft Orphan Care Policy to identify children in need of care and protection. This would give responsibility to Area and Village Child Welfare Committees for identifying and registering orphans and other vulnerable children and for assessment of their needs. These Committees would also undertake planning and decision-making in order to identify local services to assist and support children in need of care and support, where possible.⁴⁵

⁴² Section 11(1) of the Children's Statute of 1996.

⁴³ Policy Guidelines for the Care of Orphans in Malawi and Co-ordination of Assistance for Orphans, 1992.

⁴⁴ Kalembe E 1998.

⁴⁵ Hunter S 1998.

13.3.5.2 **Discrimination**

A number of UN member States include HIV/AIDS in their laws prohibiting discrimination on the basis of health or disability. The Americans with Disabilities Act defines disabilities to cover many serious health conditions including HIV/AIDS.⁴⁶ HIV/AIDS is considered a disability or handicap under human rights legislation in every jurisdiction in Canada.⁴⁷ In the Canadian case **Biggs and Cole v Hudson** (1998) the human rights tribunal ruled that people who are HIV-positive, who are diagnosed as having or are perceived to have AIDS, who belong to groups widely regarded as especially vulnerable to HIV infection but who are not HIV-positive or whose HIV status is unknown, or who associate with people who belong to such groups or who are HIV-positive, may be protected under the term “physical disability”.

13.3.5.3 **Support for orphans**

Most models of care responding to the needs of large numbers of orphaned children throughout the continent represent variations on traditional practices. The models can be grouped into a number of options:

- Independent living by orphans;
- Independent living with external supervision and support;
- Foster care including traditional family care, cluster care of multiple children, collective care of individuals or multiple children;
- Adoption;
- Institutional care including places of safety, shelters, short-term infant homes and traditional children’s homes.

The options which diverge from the models of care which are clearly provided for in legislation in South Africa are discussed below:

⁴⁶ The information can be accessed at <http://hivinsite.ucsf.edu/social/un/3098.0033.html> .

⁴⁷ The information can be accessed at <http://www.aidslaw.ca/Maincontent/issues/discrimination/discussionpapers/DISCres.html> .

Independent living by orphans

This is an option of child care which, although uncommon and accounting for fewer than 5% of orphans, is found throughout the continent including South Africa. In this instance, orphaned children live alone without an adult in the house and without adult supervision, care or support from outside the household. The oldest child becomes the head of the household, accepting responsibility for his/her younger siblings.

The advantages of this model of care lie in keeping siblings together and leaving children in their own home. The disadvantages arise from inadequate nurturing and the extreme poverty usually associated with a child-headed household. The oldest child not only loses the love and nurturing of a parent by assuming adult responsibilities, but also loses his/her childhood. This means leaving school and going out to work. The oldest child experiences numerous social, financial, emotional and physical problems including exploitation, abuse, stress and depression. The level of care provided to the younger household members is invariably inadequate and associated with social, emotional and health-related sequelae.⁴⁸ These children are also very vulnerable to becoming victims of prostitution.

Independent living with external supervision and support

This option usually occurs as a response by the community to the presence of children living independently in their neighbourhood. In this model, although the children have no adults living with them, they are monitored and they do receive some degree of supervision and support. In addition, if they encounter crises they have access to help. The intensity of the supervision is usually determined by the ages of the children - the younger they are the more frequent the visits to the house - whilst the nature of the support is determined by the socio-economic status of their community.

The advantages and disadvantages of this model are similar to those experienced by independently living children, although with some degree of adult supervision and support the problems are reduced.

⁴⁸ Personal communication Pietermaritzburg Child and Family Welfare Society.

An example of this is Kwasha Mukwenu⁴⁹ (help your friend), an interdenominational community-based NGO run entirely by volunteers who each contribute at least 4 hours a day to the project. The group's main programme is the identification, care and support of orphaned children. Each member is responsible for identifying children in need in their neighbourhood, and for acting as a caretaker parent to 3-5 families of orphans. On identifying orphans the initial response is to attempt to place the children within their extended family. If this is not possible, children are placed in institutions or left in their homes under the supervision of a member of Kwasha Mukwenu. Each caretaker parent will visit her orphan families on a daily basis and ensure that they have adequate shelter, food, clothing and health care, and are attending school and have access to adult attention.

Foster care

Traditional models of foster care entail the placement of one or more children in a family setting under the care of a foster parent or parents. This placement may follow a formal legal process with ongoing supervision of the child by a social worker and the payment of a grant to the foster parent(s), or it may be an informal arrangement with no monitoring or financial aid. The vast majority of informal foster placements occur as private arrangements within families following the abandonment or orphaning of one or more children.⁵⁰

The major advantage of formal and informal foster care lies in the placement of the child within a family environment. Problems experienced are those which may potentially arise for any child in surrogate care, and include exploitation and abuse. This applies both to formal and informal, as well as intra- and extra-familial placements. In theory, the provision for monitoring by a social worker of formal placements should facilitate early intervention to protect the child should these problems occur. The reality is that large case loads, transport problems and poor motivation result in only some placements being monitored. There may therefore in practice be little difference between formal and informal placements as regards ensuring the ongoing well-being of the children concerned – however, the availability of financial assistance in court-ordered arrangements allows at least for basic material provision for the child.

⁴⁹ Kamanga P, "A Case Study of Kwasha Mukwenu: A CINDI Programme in Urban Lusaka, Zambia" in **Community Based AIDS Prevention and Care in Africa: Building on Local Initiatives. Case Studies from Five African Countries** The Population Council, 1997, 29-33.

⁵⁰ Models of Care for Children in Distress and Responses to Orphaned Children: A Review of the Current Situation in the Copperbelt and Southern Provinces of Zambia.

At present, despite active recruitment drives, traditional foster care provides a finite capacity for the placement of orphaned children. To address this issue two variations of foster care have recently been proposed:⁵¹

Cluster Foster Care involves a cluster of houses within a community which are identified as homes for orphaned children. Single women or couples are recruited to care for the children following suitable training. Up to six children are placed in each house. The volunteers are either employed by a local NGO or act independently as foster parents and apply for state funding in the form of a foster care grant. Community workers link these volunteers to whatever resources are required and available within the community. Finally community support structures such as creches and day-care centres are required to free parents to undertake additional income-generating activities.

Collective Foster Care: This is a variation of traditional foster care where, instead of a placement with an individual woman or couple, children are placed into the collective care of a social, religious or work-related body whose members undertake to collectively act as surrogate carers for the children. Individual members of the group may elect to accept responsibility for specific needs of the children.

⁵¹ Laudon M **Report on the Pietermaritzburg Summit on Children in Distress** July 1996
Pietermaritzburg, South Africa, 1996.

The Zimbabwe Commercial Farmers Union⁵² has developed a programme for the fostering of orphans on commercial farms and in surrounding areas. A child who becomes orphaned is placed with a surrogate family living on the farm. This family is responsible for providing care and meeting the day-to-day needs of orphans, whilst the farmer subsidises the stay of the children and facilitates the creation of day-care facilities on his farm. In return for the expenses incurred by the farmer some remuneration is expected from the government in the form of access to labour or tax relief.

Nsambya Hospital⁵³ in Kampala has developed three possibilities within a closed religious community.

- *Total care within orphan houses.* Here a house is run by the church specifically to care for orphans. A maximum of seven children live in one house with a full-time housemother who is responsible for their total care.
- *Family support.* Orphans are placed with extended family members who accept responsibility for the day-to-day care of the children. All expenses incurred by the family towards the care of these children are borne by the church.
- *Limited family support.* Children are placed with members of the extended family who provide for their total care except for schooling. This expense is borne by the church.

- **Institutional care**

⁵² SAfAIDS and the Commercial Farmers Union **Orphans on Farms: Who Cares? An Exploratory Study into Foster Care for Orphaned Children on Commercial Farms in Zimbabwe** Harare, Zimbabwe, 1996.

⁵³ Fincham R and Smart R A **Report of a UNICEF sponsored Study Tour of AIDS programmes in Zambia, Uganda and Tanzania** Pietermaritzburg, South Africa, 1993.

Institutional care is fairly widespread throughout Tanzania⁵⁴ which in 1991 had 34 registered children's homes. All but one of these are run by NGOs who are subsidised by the state and supervised by the Ministry of Labour, Culture and Social Welfare. The majority of these facilities provided temporary homes for children aged 0 - 3 years whereafter they are returned to their extended families, fostered, adopted or transferred to the single state orphanage which caters for older children. Children in orphanages have access to complete support including shelter, food, clothing, schooling, health care and recreation.

- **Swaziland**⁵⁵

An extensive study into the education system has made a number of recommendations related to orphans:

- that a needs assessment of orphans and caregivers be conducted, carefully defining what an orphan is in the Swaziland context, and defining orphans in need;
- that exemptions be offered to homesteads/institutions with orphans to enable children to attend school, waiving school uniform requirements when affordability is a problem, expanding school-based feeding programmes for school children, and introducing flexible school hours where possible to keep children in school who might otherwise have to drop out due to labour requirement elsewhere;
- increasing day care facilities, particularly at schools, to allow children who would otherwise have to take care of their younger siblings to attend classes;
- the creation of an educational insurance scheme permitting parents to invest in policies catering for their children's school fees in the event of their death; and
- the use of national funds as an investment in the education of children.

54 PAAG, **Report on an AMREF sponsored Study tour to Tanzania and Uganda and the Ixth INCASA** Pietermaritzburg, 1996.

55 **Children living with HIV/AIDS in South Africa: A Rapid Appraisal** (2000) 48. See also King J R **Report to the Ministry of Education** (1999).

Malawi⁵⁶

Malawi's national orphan care guidelines stipulate that -

- The first approach must be community-based programmes. Formal foster care will be expanded as the second preferred form of care. Institutional care should be the last resort, though temporary care may be necessary for children awaiting placement.
- Hospitals should record next of kin so that relatives can be traced if children are abandoned. The registration of births and deaths should be improved to assist in the monitoring of orphans.
- The Government will protect the property rights of children and these rights will be widely publicized.
- Self-help groups should be developed to help affected families. NGOs are encouraged to set up programmes of community-based care.
- The needs of all children should be considered on an equal basis, regardless of cause of death of the parent(s).

13.3.6 **Comments received**

The comments covered in this section were received in the course of a focus group discussion held in Durban on 26 March 1999, making use of a Research Paper on Children Living with HIV/AIDS⁵⁷ and a worksheet, coupled with written comments submitted to the Commission thereafter. Certain comments were also submitted in response to Issue Paper 13.

13.3.6.1 **Identifying children in need of care and protection**

In the worksheet respondents were asked to comment on the problems and uncertainties relating to the identification of children in need of care and protection. It was suggested that traditional leaders in rural areas be empowered to make decisions about guardianship and suitable caregivers for orphans. Respondents were also asked to comment on the following preliminary recommendations:

⁵⁶ **Children living with HIV/AIDS in South Africa: A Rapid Appraisal** (2000) 47.

⁵⁷ See also chapter 1, footnote 8.

- The concept of an 'authorised officer' as provided for in section 1 of the Child Care Act should be redefined to ensure that persons and structures beyond those employed by the state may be authorised to identify a child in need of care and protection, so as to include community structures and community leaders such as priests, teachers, community health workers and others.
- Section 60 of the Act should enable the creation of regulations to provide for Child Care Committees, and to determine their structure, composition and function.
- Further research and debate into the structure, composition and functioning of community-based models of identifying children in need of care and protection, and the links between community-based structures and other structures⁵⁸ should be encouraged. At present, some projects within the country have begun to pilot innovative structures and processes in order to decentralise the process of identifying children in need. For instance, the Thandanani Project uses traditional community structures to set up Child Care Committees within communities.
- Further research should be conducted into the area of 'registration' of orphans.

Childline Family Centre favoured the establishment of Child Care Committees and suggested that these be trained at district and local levels, and be integrated into the activities connected with the protocol for the management of child abuse and neglect. This respondent further submitted that child care committees should have greater access to the Family Court system, and proposed that the placement of orphans with families be monitored to ensure the integration of the child into the family system and to prevent the exploitation of the child. With regard to the registration of orphaned children, the respondent submitted that this could have a long-term negative impact and that the act of registration tended to create an expectation of assistance. It was thus recommended that registration be linked to the provision of some sort of service and/or support.

The focus group participants feared that community-based committees/structures might be vulnerable to corruption. A clearly set out system of accountability was regarded as vital. The urgent need for police and volunteer training in child care within communities was stressed. It was also recommended that registration of births and deaths should be automatic at the point of

58 Department of Welfare **Draft Discussion Document on Foster Care Guidelines**, August 1997, paragraph 7.1.1(a) and paragraph 7.4 recommends the formation of a Foster Care Body with the legal mandate and responsibility to protect children, and to guide the process of foster care. The function of this body could possibly be expanded to assist children with other forms of placement.

event. Further, all children in need within the community should be registered.

13.3.6.2 Discrimination

In the worksheet respondents were asked to comment on the following recommendations:

- A clause prohibiting unfair discrimination on the basis of, *inter alia*, HIV/AIDS should be inserted into the Child Care Act as has been done with the Employment Equity Act.⁵⁹ Discrimination on the basis of HIV/AIDS status should be considered to be unfair, unless it can be shown to be fair and in the best interests of the child.
- The South African Law Commission's Project Committee on HIV/AIDS recently conducted extensive research into HIV/AIDS and discrimination in the educational setting,⁶⁰ and the recommended policy has been adopted virtually in its entirety by the Department of Education, as a draft national policy on HIV/AIDS.⁶¹ Many respondents to Discussion Paper 73, on which the Third Interim Report was based, drew attention to the need for application of the same policy, or a similar policy, to other child care institutions such as pre-schools and day-care facilities and residential institutions,⁶² with arguments being advanced both in favour of and against broader application of the policy. It is therefore recommended that the Department of Welfare develop a draft national HIV/AIDS policy, based on the principles of the aforementioned policy, to be developed and adapted for the pre-school, day-care and residential care settings. This draft policy

59 Act 55 of 1998, Chapter II, section 6(1) prohibits unfair discrimination "on one or more grounds including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth".

60 **Third Interim Report on Aspects of the Law Relating to AIDS** April 1998.

61 GN No. 3006, Government Gazette No. 19603, 11 December 1998.

62 **Third Interim Report on Aspects of the Law Relating to AIDS** April 1998 at 159 - 171.

could be used as a basis for further discussion and debate.

- Adoption of the HIV/AIDS policy, once finalised, should be made a ground for registration of a pre-school, creche and residential care facility.

The South African National Council for Child and Family Welfare (SANCCFW) welcomed the development of a draft national HIV/AIDS policy to serve as a basis for further discussion and debate. The respondent cautioned, however, that cognisance should be taken of the fact that admission of a child to a creche, day-care facility or children's home has different implications for these institutions. The respondent opined that, in the first two instances, some of the difficulties surrounding admission could be eliminated via guidelines on admission, universal precautions etc. However, an HIV-positive child whose status moves to AIDS carries long-term and costly implications for a children's home. Further, that this can cause residential care facilities to be cautious in their admission criteria and to refuse admission to an HIV-positive child. Thus, that a global non-discriminatory clause might be seen as lacking in due consideration for the realities faced by the organisation.

13.3.6.3 **Models of care**

In the worksheet respondents were asked whether they agreed with the problems and uncertainties raised in respect of the available models of care. The SANCCFW submitted that the placement options currently available to children are not only limited, it is questionable whether they are accessible. Further, research by the respondent has indicated that it is the legal aspects relating to the models which confuse prospective parents rather than non-acceptance of the care models themselves. Ways thus need to be found to make these models more accessible and less time-consuming, whilst at the same time maintaining some minimum standards. The respondent also suggested that legislation must cater for extended family placements, coupled with some form of support or linkage to a special programme where necessary, as it cannot be assumed that children will be absorbed into the extended family if their parents die of HIV/AIDS. The respondent is also in favour of subsidised adoption as this would contribute to the speedier placement of young children.

Suggestions by focus group participants included the following: (a) there should be redistribution of resources at government level, (b) family group conferencing should be established in law as a first step, (c) family members should be located through the use of tracing agents, and (d) the value of child headed households should not be negated.

The worksheet invited comment on the following preliminary recommendations:

- Section 15 of the Child Care Act should include a broad reference to alternative placement options for children in need of care and protection, so that regulations may be promulgated in the future to provide for alternative models of care.
- Section 60 of the Child Care Act should include a provision empowering the Minister to develop regulations as to alternative models of care for children. It is suggested that a set of minimum standards and guidelines for such care be developed, in order to ensure that informal models of care nevertheless offer legislative protection to children in need of care. Some suggested minimum standards may include:
 - that the best interests of the child are paramount;
 - that adult supervision be a prerequisite for children below a determined age;
 - that all models of care should ensure that a child is appointed with a guardian, or failing that, custodian;
 - that community monitoring and support mechanisms are developed.
- The Child Care Act should review the legal requirements and processes for obtaining custody and guardianship of children in order to allow for more informal models of foster care, and to give legislative force to alternative models of care.
- Further research, evaluation and debate into models of care in South Africa are recommended. In particular the following issues which have legislative implications need to be determined:
 - whether, and in what form,⁶³ child-headed households should be recognised by law as a placement option for children in need of care. Legal aspects which need to be considered include the age at which a child may head a household. This needs to be linked with the legal age for labour, as well as the legal age for accessing social welfare grants such as the Child Support Grant. Additionally, consideration needs to be given to the guardianship and custodianship of children in child-headed households, in order that they may be appointed with a legal guardian or custodian where possible.
 - which alternative forms of foster care should be adopted.
- A policy decision should be taken on models of care to be adopted in the South African situation as soon as possible, in order that the legislative framework may respond accordingly.

In respect of the recommendation with regard to monitoring, the SANCCFW stated that the issue should be further developed. Further, government remains responsible for the protection of children living with HIV/AIDS and the monitoring of this responsibility should be prescribed for in regulations. The monitoring function then becomes the state's contribution to the care of children affected by HIV/AIDS. The respondent suggested that if the community undertakes monitoring, then the parameters within which they may operate, as well as the participants' responsibilities, should be clearly spelt out. The respondent emphasised that, in addition to the need for a policy decision to be taken on models of care, there is a need to establish criteria to

⁶³ A UNICEF consultation on Children Affected by HIV/AIDS, held in Kampala, Uganda in October 1998, recommended that child-headed households should always be accompanied by some form of adult supervision, whether individual or community.

regulate the system of support whether in grant or other form.

Childline Family Centre agreed with the recommendations made. The respondent also highlighted the following problems relating to child-headed households: That it is in the best interests of siblings who have collectively suffered the loss of parental care, to continue to have the support and relationship of the sibling group wherever possible. The respondent submitted that more thought should be given to how child-headed households can materially and psychologically be supported and given access to resources to facilitate their survival in both the physical and psychological sense, without compromising the development and particularly the education of the older caretaker sibling(s), and without exposing the caretaker siblings to exploitative labour and/or sexual practices. It is suggested that the training of district committees might be helpful in the latter regard. The respondent pointed out that the age at which, and conditions under which, caretaker siblings can assume the responsibility of sibling care, needs to be debated. Further, that it is essential for school policy to accommodate the educational needs of child-headed households and to provide for some flexibility within the school curriculum and school hours, and to consider the provision of after-school care to relieve the burden of child caretaking on older siblings.

Question 6 of Issue Paper 13 read as follows: 'What are appropriate forms of alternative community and cluster care options that will affect children who might be affected by HIV/AIDS?'

The Johannesburg Institute of Social Services proposed that children's villages be considered as an alternative to community and cluster care options. The Department of Health contended that families are an option, though there is a need for such families to be assisted. Mr DS Rothman argued that specialist homes and places of safety are needed to accommodate the increasing numbers of such children and should be subsidised by the State. The Durban Child and Family Welfare Society, however, felt that there should be no differentiation and that all options on the continuum of care could be appropriate.

13.3.6.4 **Education**

In the worksheet respondents were asked to comment on the following recommendations and also to make specific suggestions as to how these issues might be tackled by legislation:

- That the Draft National Policy on HIV/AIDS, for Learners and Educators in Public Schools, and Students and Educators in Further Education and Training

Institutions be supported by the Project Committee for the Review of the Child Care Act, if they concur with its contents.

- That the Minister of Education require the adoption of the HIV/AIDS policy as a condition for registration of independent schools in terms of section 46(2) of the Schools Act.

No comments were received.

13.3.7 Evaluation and recommendations

The Commission takes the position that children who are ill with AIDS should as far as possible be enabled to remain in the care of their own families, including the extended family network, and failing this with caregivers in the community. Social assistance for sick children is a key form of provision to promote family-based care. It is noted that South Africa, unlike certain other countries, does not recognise chronic illness, including AIDS, as a form of disability. **It is recommended that family caregivers of children who are chronically and/or terminally ill, including those with AIDS, be eligible for specific social assistance to help them to meet the special needs of such children.**⁶⁴

It is apparent that children who are HIV-positive are subject to discrimination in a variety of contexts. **The Commission therefore recommends:**

- **That the new children's statute provide that no person may discriminate, directly or indirectly, against a child on the basis of his or her HIV status, unless this can be shown to be fair;**
- **That the Department of Social Development, in similar vein to the National Policy on HIV/AIDS for Learners and Educators in Public Schools, and Students and Educators in further Education and Training Institutions, develop a national HIV/AIDS policy for places of care and residential care facilities, and that the adoption of such policy, once finalised, be a prerequisite for the registration of such facilities;**
- **That the South African Schools Act 84 of 1996 be amended to include the provisions of the National Policy on HIV/AIDS for Learners referred to above, as far as these relate to children;**
- **That the Minister of Education require the adoption of the National Policy**

64 See also 13.1.4 and chapter 25 at 25.4 below.

on HIV/AIDS for Learners referred to above, as a ground for registration of independent schools in terms of section 46(2) of the Schools Act.

The Commission takes cognisance of the fact that the admission of HIV-positive children to child care facilities can, once these children become ill, have enormous financial implications for such facilities, which are in the main run by non-profit organisations. We also recognise that the fact that care facilities do not receive a subsidy from government to cater for the additional needs of HIV-positive children is a further constraint against admitting such children. **The Commission therefore recommends that provision be made for special programme funding to be offered to care facilities that care for chronically ill children, including those with AIDS. A care facility which is a receiver of such funding should progressively adjust its environment to ensure that children with AIDS are protected from opportunistic infections.**

The options of formal placement for children in need of care and protection due to HIV/AIDS as set out in section 15(1) of the Child Care Act, 1983 are inadequate to cater for the massive numbers of children who will be involved, for the following reasons:

- the placement options are limited and restrictive;
- the special needs of infants who are spending protracted periods in hospital or institutions are not addressed;⁶⁵
- formal children's court processes as currently provided for are likely to prove too cumbersome to cope with the hundreds of thousands, even millions of children who will require substitute care due to the AIDS pandemic;
- the placement options do not reflect the reality in South Africa, in terms of which many children are simply absorbed into the extended family system, or the community;
- many communities have limited access to social workers, and are unaware of the placement options available for children in need of care and protection; and

65 Infants require more intensive supervision and care than children, and families who are willing to care for children are often reluctant to care for infants. An additional need is for HIV-positive, abandoned or orphaned infants who spend considerable periods in hospitals awaiting clarification of their HIV status, since most adoption and fostering services presently require knowledge of a child's HIV status. As this process may take up to 15 months a more suitable environment is required for these children - Dr N McKerrow, Paediatrician, Grays Hospital. At the same time institutional care is seen by many practitioners as being particularly unsuitable for, and potentially damaging to the development of infants (see 10.4.1 above). It is clear that special attention needs to be paid to this group, who are at a highly sensitive stage of their development.

- options such as formal foster care and, in particular, adoption are at this time not culturally acceptable to all South Africans.⁶⁶

There are already various pilot projects for the care of children within communities. Although it has been suggested that legislative reform in respect of alternative models of care should be delayed in order to give the pilot projects a change to prove successful, the Commission is of the view that there is an urgent need for the enactment of legislation to formalise alternative models of care.

The Commission accordingly recommends:

- **That the new children's statute empower the Minister of Social Development to make regulations to allow for in-home support of families affected by AIDS.** This will discourage children from abandoning their education to care for dying parents and from taking on other adult responsibilities.
- **That, as an alternative to the current placement options, legal recognition be given to the placement of orphaned children within the extended family, through an expedited court process, and that where the extended family has taken on the long-term care of a child, they should have access to a simple procedure whereby the necessary parental responsibilities can be conferred on them. The child must be present at and heard in such proceedings unless this is not realistically possible.**

It is a reality that some children may be absorbed into HIV- positive households. This may subject the child to repeated grief and uncertainty. **The Commission therefore recommends that children absorbed into HIV/AIDS-affected families should be included in relevant**

66 Parry, S "Community Care of Orphans in Zimbabwe : The Farm Orphan Support Trust", paper presented at CINDI Conference **Raising the Orphan Generation**, Pietermaritzburg, June 1998, <http://www.togan.co.za/cindi/papers/paper5.htm>, (at p.3) states that formal adoption is not readily accepted because of the cultural beliefs, which mitigate against taking unrelated children into the family.

support programmes.

As the HIV/AIDS pandemic spreads, child-headed households will become a familiar phenomenon. Despite their serious drawbacks, these arrangements have the advantage of enabling siblings to remain together and provide mutual support, while also providing for continuity of relationships with and support from their local community. **For this reason, the Commission recommends:**

- **that legal recognition be given to child-headed households as a placement option for orphaned children in need of care, provided that any court making such an order is satisfied that suitable adult support will be available. Support structures, e.g. regular visits by community workers should be put in place to ensure the survival of child-headed households.**
- **that support rendered to child-headed households be designed to ensure that the child at the head of the household is not forced to abandon his or her education by taking up adult responsibilities.**
- **that the Departments of Health, Education and Social Development, with the assistance of the Treasury, be tasked to budget specifically for programmes to support child-headed households.**

The issue of at what age and under what conditions a child may head a household was not debated, and the Commission invites comments in this regard.

A child at the head of a household will need some form of recognised parental responsibility over the younger siblings in order to perform certain tasks, e.g. giving consent to a medical operation. However, such a child may be too young and immature to be entrusted with total responsibility for his or her siblings. **For this reason, the Commission recommends that -**

- **legal recognition be given to schemes in terms of which one or more appropriately selected and mandated adults are appointed as ‘household mentors’ over a cluster of child-headed households by the Department of Social Development, a recognised NGO or the court.**
- **the proposed ‘household mentor’ may not make decisions in respect of the siblings without giving due weight to their opinions as appropriate to their capacity and to the opinion of the child at the head of the household.**
- **the proposed ‘household mentor’ be able to access grants and other social**

benefits on behalf of the child-headed household.

- **the proposed 'household mentor' be accountable to the Department of Social Development or a recognised NGO or the court.**

The Commission notes that alternative forms of what is currently termed 'foster care' may be appropriate for children who require substitute care as a result of AIDS. Recommendations in this regard will be discussed in Chapter 16. **It is the attitude of the Commission that institutional care of children, including orphans, should normally be a measure of last resort, and that all possible measures should be undertaken to promote and facilitate family care.**

Children living in families where one or both parents are infected with HIV/AIDS are affected in various ways. For one, they are forced to abandon their education to care for ill parents or to work in order to supplement family income. **The Commission therefore recommends that schools be required to identify children who are absentees due to AIDS and to refer such children to the Department of Social Development or link them to community support structures.**

13.4 **Children with Disabilities**

13.4.1 **Introduction**

There is no statutory definition for the term disability, it however still remains a concept linked to exclusion, inequality and dependency. Children with disabilities are often excluded from mainstream society due to lack of access or impaired access to essential resources and services. There is also a close link between disability and poverty. Disability worsens poverty due to the additional costs attached to disability. More than 80% of black children with disabilities live in extreme poverty and have very poor access to appropriate services.⁶⁷ Due to the lack of services, children with disabilities grow to be disempowered adults with little to contribute to society. In this section effort is made to identify the rights of South African children with disabilities and also to determine to what extent these rights are currently being fulfilled. Recommendations are then made for legislative reform to adequately provide in the needs of disabled children.

13.4.2 **International and regional instruments recognising the rights of children with disabilities**

Various international instruments recognise the rights of children with disabilities. The CRC recognises the right of children with disabilities to develop together with non-disabled children by stipulating that State Parties must respect and ensure the rights set forth in the CRC to each child without discrimination of any kind, including discrimination on the basis of disability.⁶⁸ The CRC places an obligation on governments to ensure, to the maximum extent possible, the development of the child.⁶⁹ This not only includes the child's physical, social and intellectual development, but also the development of the child's capacities and abilities. The CRC further recognises that children with disabilities have the right to enjoy a full and decent life. In recognising the child with a disability's right to special care, the CRC stipulates that assistance to the child with a disability and those responsible for the care of the child should be provided free of charge whenever possible, taking into account the financial resources of the parent or others caring for the child.⁷⁰

The UN Standard Rules for the Equalisation of Opportunities for Persons with Disabilities aim to commit States to take action for the equalisation of opportunities for persons with disabilities and provide for, among others that⁷¹ -

- governments recognise the principle of equal primary and secondary educational opportunities for children and youth with disabilities in integrated settings (where appropriate);
- special attention be given to very young children with disabilities;
- provision be made for social security protection to caregivers;
- children with disabilities are enabled to live with their families and that families are fully informed about taking precautions against sexual and other forms of abuse; and
- children with disabilities are provided with the same level of medical care within the same system as other members of society.

68 Article 2 of the Convention.

69 Article 6 of the Convention.

70 Article 23 of the Convention.

71 **Equalisation of opportunities for children with disabilities** Report of the International Seminar hosted by

The World Programme of Action Concerning Disabled Persons⁷² sets international guidelines to promote the adoption of effective measures for the prevention of disability, rehabilitation and the realisation of equal opportunities for persons with disabilities.

72 the Disabled Children's Action Group and held from 5 - 8 April 1998, Johannesburg.
Adopted by the United Nations General Assembly on 3 December 1982.

As regards regional child rights instruments, the African Children Charter gives to every child who is mentally and physically disabled the right to special measures of protection in keeping with his/her physical and moral needs and under conditions which ensure his/her dignity, and promote his/her self-reliance and active participation in the community. State Parties to the African Children Charter are also obliged, subject to available resources, to ensure that the child with a disability has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration and individual development. State Parties have also an obligation to progressively achieve for people with disabilities easy movement and access to public buildings and other places to which they may legitimately want to have access.⁷³

13.4.3 Policy

The Education White Paper 6 on Special Needs Education⁷⁴ is based on the principle of inclusive education for all learners including those with disabilities. The White Paper outlines, inter alia, the following as key strategies for establishing an inclusive education and training system.

- (a) The qualitative improvement of special schools for children with disabilities. Special schools will provide a high-quality service for learners with severe and multiple disabilities. Special schools will be converted to resource centres and integrated into district support teams. District support teams are to provide professional support in curriculum, assessment and instruction to full-service and other neighbourhood schools to recognise and address severe learning difficulties and to accommodate a range of learning needs.
- (b) Within mainstream schooling, the designation of approximately 500 out of 20 000 primary schools to full-service schools. At least one primary school per district will be designated as a full-service school. Learners who experience mild to moderate disabilities will be accommodated in full-service schools. Full service schools will be equipped and supported to provide for the full range of learning needs of all learners and to address barriers to learning. The support that will be rendered to full-service schools will include physical and material

73 Article 13 of the Charter.

74 July 2001.

resources such as hearing aids and wheelchairs, as well as professional development of the staff to accommodate the full range of learning needs. Lessons learnt from this process will be used to guide the extension of the full-service school model to other primary schools and high schools.

- (c) The overhauling of the process of identifying, assessing and enrolling learners in special schools, and its replacement by one that acknowledges the central role played by educators, lecturers and parents.

13.4.4 **The rights of South African children with disabilities**

Although South Africa has no specific legislation that applies to children with disabilities, there are laws providing for the protection of children with disabilities. The Constitution, 1996, prohibits any form of discrimination on the ground of disability.⁷⁵ A child with a disability has thus the same rights as non-disabled children. Children with disabilities also have the right to health care services, social security⁷⁶ and basic education.⁷⁷ In addition to all the rights that children have under the Constitution, section 28 sets out specific rights that only apply to children. In terms of this section, children have the right to basic health care services and social services. Children with disabilities are also entitled to these rights.

The South African Schools Act, 1996, provides that every person has the right to basic education.⁷⁸ Thus a child with a disability, notwithstanding the degree of his or her disability, has a right to receive basic education. A school also has no right to refuse admission on the basis of a child's disability. The Act further makes it compulsory for all learners from the age of seven to the age of 15 to receive basic education⁷⁹ and recognises the right of deaf learners to learn through the medium of Sign Language at public schools.⁸⁰ The Act prohibits unfair admission policies and stipulates that where reasonably practical children with disabilities should be admitted in mainstream schools.⁸¹

75 Section 9 (3) of the Constitution.
 76 Section 27(1) of the Constitution.
 77 Section 29 of the Constitution.
 78 Section 29 (1) of the Act.
 79 Section 3 (1) of the Act.
 80 Section 6 (4) of the Act.

The Child Care Act, 1983 provides for the protection of children from abuse. All the rights in this Act also apply to children with disabilities.

The National Building Regulations of 1986 make provision for barrier free access to the built environment. Accessibility of buildings to the disabled is therefore a legal requirement. The design of buildings, e.g. must be 'wheelchair friendly'.

Apart from legislation protecting the rights of persons with disabilities, the government has also developed other national instruments giving recognition to the rights of persons with disabilities. The White Paper on an Integrated National Disability Strategy, 1997 acknowledges that persons with disabilities not only form an integral part of our society, but can also contribute to the growth of society. The promotion and protection of the rights of persons with disabilities are therefore important. The White Paper further forms the basis for a paradigm shift from the outmoded medical model to the new social model of disability. The social model requires substantial changes to the physical environment, e.g. that an alternative to stairs should be made available to persons making use of wheelchairs. Also, the Disability Rights Charter of South Africa aims to promote equal opportunities for all disabled people. The Charter is not a legally binding document, but is important for raising awareness around specific issues of disability.⁸²

13.4.5 **Deficiencies in the current system**

Although several laws make provision for the protection of children with disabilities, these laws still contain various loopholes hampering the effective protection of these children.

Although the Child Care Act, 1983 provides for the placement of children in need of care, it does not make any specific provision for children with disabilities who are found to be in need of care in terms of section 14(4) of the Act. There is thus a lack of recognition in the Act that children with disabilities who are found to be in need of care may need to be placed in other forms of alternative care that can provide for their special needs. There are, however, institutions for children with disabilities, some private and some government run homes.⁸³ However, there is no provision for committal of children found to be in need of care to these facilities by the children's court. Thus, children in need of care cannot be placed by the children's court in care facilities registered by the Departments of Health and Education other than facilities established in terms of the Child Care Act. The limited number of available homes for children with disabilities leads to overcrowdedness and a shortage of assistive devices.⁸⁴ A further barrier is that residential care facilities often refuse to admit children with disabilities who are found to be in need of care. Existing residential care facilities are also not accessible to children with

82 **Children and the Law 74.**

83 **Children and the Law 83.**

disabilities. They are structurally inaccessible and do not offer rehabilitation services that will equip the disabled child to live a productive existence. Also, children's homes have never to date been subsidised for the additional cost involved in caring for children with special needs.

There is also a lack of ECD services for children with disabilities and, like residential care facilities, existing ECD facilities are inaccessible to children with disabilities. Where ECD services for children with disabilities do exist, they are often attached to special schools outside of communities and provinces, requiring that a child as young as three years has to attend boarding facilities.⁸⁵ Also, the majority of children with disabilities within ECD centres, are presently accommodated in informal community-based day care centres run by parents of disabled children.⁸⁶ The issue of ECD for children is addressed in chapter 15.

The South African Schools Act, 1996 is premised on the principle of inclusive education. Schools must therefore recognise and respond to the diverse needs of learners. There should also be a continuum of support to match the special needs encountered in every school. However, children with disabilities are not often seen in so-called mainstream schools. Albeit schools may not refuse admission on the basis of a child's disability, children with mental and physical disabilities continue to be discriminated against. Even if schools admit children with disabilities, they are often not accessible to children with physical disabilities, e.g. a child in a wheelchair will find it difficult to move to the next class if that can only be done through using stairs. This is despite the fact that the Act provides that the physical facilities at public schools should be accessible to disabled persons.⁸⁷ The inaccessibility of schools also has the effect that those children who do not attend special schools for the disabled do not attend school at all. This is clearly a violation of the child's right to basic education.

There is a lack of assistive devices for children with disabilities. For example, some children do not go to school due to the absence of a wheelchair. It is not certain whether the disabled child's right to basic health care includes treatment or equipment which is specific to their needs.⁸⁸ It still needs to be determined whether assistive devices such as wheelchairs are considered as an essential component of basic health care.

85 Comment received on the workshop on Early Childhood Development held on 30 March 2000.

86 **White Paper on an Integrated Disability Strategy** 1997.

87 Section 12 (5) of the Act.

88 **Children and the Law** at p. 81.

A disabled child is only entitled to the care dependency grant if he or she receives 24-hour home care.⁸⁹ Thus, in cases where the grant enables a parent to send a child with a severe disability to a special school, which may be the child's only opportunity for education and will also allow the parent to go to work, the grant is taken away. This could have the effect that the parent is no longer able to pay the school fees and the child has to go back home where he most probably will not have access to education. The cost of transport to special schools is also often prohibitive.

Being in a rural area often makes life more difficult for the disabled child. Far from rehabilitation centres, transport facilities and specialised health workers such as a physiotherapist and occupational therapists, children in rural areas have few means to enable them to lead more productive lives.⁹⁰ Part of the problem is that therapists are not exposed to rural areas in their training and, like other health workers, have few incentives to work in rural areas.⁹¹

Children with disabilities are inherently vulnerable to abuse. Their impaired mobility and ability to communicate what is happening to them make them targets for perpetrators of sexual abuse. The excessive stress which parents and other caregivers may experience and the poor working conditions of personnel in many care facilities increase the risk of abusive and neglectful behaviour. Where abuse and neglect do occur, children with disabilities are less likely than other children to access protection. Mentally disabled children are often not taken seriously and are regarded as unreliable witnesses by criminal justice officials. Even if problems are referred to protective agencies, the police, courts and welfare system are not equipped to manage them properly.

The following categories of barriers which lead to the exclusion and/or marginalisation of children with disabilities and their parents from projects aimed at children and/or parents have been identified-⁹²

Attitudinal barriers:

89 See also chapter 25 below.

90 Clarke E 'A guide to living with disability in the rural areas' **Disability Update** Issue no. 41, April 1999.

91 Simon-Meyer J 'Being disabled in a rural area' **Disability Update** Issue no. 41, April 1999.

92 **Equalisation of opportunities for children with disabilities** (1998).

- total ignorance;
- being aware, but believing that disability is a curse or contagious and that affected persons should be banished from society;
- transferring your beliefs about what the disabled child can or cannot do onto the parent;
- focussing only on the child's disabilities and not on his or her abilities;
- patronising attitudes where planners and the community want to care for children with disabilities, but within segregated facilities;
- accepting that children with disabilities have rights, but insisting that plans have to be finalised before attention can be given to the specific needs of children with disabilities.

Physical barriers:

- barriers in the built environment, e.g. steps, narrow doorways, inaccessible toilets etc.;
- poor access roads to schools, clinics etc.;
- poor town planning where schools and clinics are far outside the village/town, or where they are built on the highest point of the town/village;
- inaccessible public transport;
- fixed furniture, e.g. laboratory benches.

Communication barriers:

- lack of Sign Language interpreters;
- lack of training facilities where parents and families can learn Sign Language; and
- lack of alternative and augmentative communication strategies to enable non speaking children to communicate.

13.4.6.1 **Viet Nam**

In an effort to better address the needs of children with disabilities, the government of Viet Nam passed an Ordinance on Disabled Persons on July 30, 1998, which entitles disabled persons to health care and functional rehabilitation. Seriously disabled persons without sufficient income are specifically entitled to free medical examinations, treatment and social allowances. The Ordinance also calls for the integrated education of disabled children and specialised schools for severely disabled children. Article 8 of Decree 55 on the Implementation of the Ordinance on Disabled Persons states that disabled children under fifteen years of age whose families are poor must be provided with artificial limbs and/or orthopaedic aids free of charge.⁹³

13.4.6.2 **United States of America**

93 The information can be accessed at <http://www.unicef.org.vn/disable.htm> .

In America, the Vocational Rehabilitation Act (VRA) of 1973, the Americans with Disabilities Act (ADA) of 1990, and the Individuals with Disabilities in Education Act (IDEA) of 1990 protect children with disabilities from discrimination. IDEA protects children with severe disabilities only. In order for a State to receive federal funding under IDEA, it must provide “free appropriate public education”⁹⁴ to all children with disabilities. The duty imposed on school districts requires that they must identify children with disabilities and that they provide needed educational opportunities, including supplementary services such as occupational and physical therapy if necessary, to ensure that the child benefits from his or her individual education plan (IEP). The IEP describes the specific instructional program that will be put in place to meet the unique educational needs of the child for whom it is developed. The child’s IEP must be reviewed at least once a year and changed if necessary. IDEA further mandates the involvement of a child’s parent in the development of the IEP and the appointment of a surrogate for those children who do not have a parent to act on their behalf. No later than a child’s 16th birthday and as early as his or her 14th birthday, the IEP must describe the services needed by the young person to make the transition to independence. Where appropriate, the IEP should identify the role and responsibilities of those state agencies that will assist the youth in making the transition to independence before he or she leaves the school. IDEA stresses, but does not mandate mainstreaming of children with disabilities. Thus, segregated placements should occur only when the nature or severity of a child’s disability prevents the child from participating in regular classes, even with the use of supplementary aids and services. Other than IDEA, VRA and ADA provides protection to a greater number of people. Protection from discrimination for those not demonstrably disabled is provided by VRA and ADA.⁹⁵

13.4.6.3 **Australia**

In Australia, the Disability Services Act, 1986 provided a framework for developing a range of support services designed to increase individual independence and integration by all people

94 Free appropriate public education is one that addresses the child’s special education needs through the provision of special education classes and related services such as transportation, counseling and physical therapy provided at public expense.

with disabilities, including children, in community life. The following are some of the laws or programs that were designed pursuant to the Act:

a) The Federal Disability Discrimination Act, 1992, prohibits discrimination on the ground of disability in the areas of work, education, access to premises, accommodation, land, clubs and incorporated associations, sport, administration of federal laws and programs. The Act also prohibits harassment of a person with a disability. People, including children, who believe that they have been discriminated against on the ground of disability can make an inquiry or lodge a complaint with the Disability Discrimination Commissioner. The Act also makes provision for the formulation by the Attorney-General of disability standards in respect of the employment, education, accommodation and the provision of public transport for a person with a disability and the administration of Federal Laws and programs.

b) The Commonwealth Rehabilitation Service provides vocational rehabilitation programs to people with disabilities. Services are provided to people between the age of 14 and 65. Vocational rehabilitation programs are also used to assist children with disabilities in the transition from school to work and the wider community.⁹⁶ The legislative authority for the provision of rehabilitation services by the Commonwealth is contained in Part III of the Disability Services Act, 1986.

c) The Commonwealth Disability Strategy is a planning framework for Commonwealth agencies to ensure access to all Commonwealth programs, services and functions for people with disabilities. The aim of the strategy is to remove all barriers for people with disabilities. Children are considered to be an additional disadvantaged group. This means that Federal Departments and agencies will be expected to provide specific information about the progress of activities to address the needs of children with disabilities.⁹⁷

13.4.6.4 **Canada**

96 The information can be accessed at <http://www.workright.org.au/sevsg/crs.htm> .

97 The information can be accessed at <http://www.dss.gov.au/disability/ood/cds.htm> .

In Canada, the Community of Persons with Disabilities presented to the federal, provincial and territorial governments a National Strategy for Persons with Disabilities. The strategy is a comprehensive plan to advance the equality rights of persons with disabilities via a systematic plan of barrier review and removal. Responding to the needs of people, including children, the Federal, Provincial and Territorial Ministers produced "In Unison: A Canadian Approach to Disability Issues". This document was intended to promote the integration of persons with disabilities in Canada. In 1999, the Government of Canada produced a Federal Disability Strategy. These documents contain strong statements of support for the principles of equality. They acknowledge Canada's fundamental commitment to the equality rights of persons with disabilities as stated in section 15 of the Charter of Rights and Freedoms and in international covenants signed by Canada. The documents also provide a basis on which the disability community can work with governments to address issues and concerns.⁹⁸ Several States have legislation and programs for children with disabilities. One such State is Ontario. The Advocacy Act, Consent to Treatment Act, and Substitute Decisions Act deal with children with disabilities. The Advocacy Act provides aid to vulnerable children 16 years of age and older, who due to moderate or severe disabilities, illness or infirmities, find it impossible to say what they want. The rights and wishes of these children should in terms of this Act be respected. The Consent to Treatment Act provides protection to individuals of any age in determining their own health care treatment. The Substitute Decisions Act protects those 16 years of age and older deemed mentally incapable in matters related to their own personal care. The Act also provides safeguards against undue state intervention and defines the process whereby if incapacity is established, substitute decision makers can be appointed.

13.4.7 Evaluation and recommendations

Parents often send their disabled children to special homes as they do not know how to care for their children. The lack of available resources within communities is also a reason for sending children with disabilities to special homes. The Commission is therefore of the view that children with disabilities should be enabled to live with their families. **In order to achieve this, the Commission recommends that -**

- (a) Parents should be empowered to care for their children at home. This could be achieved by the establishment of rehabilitation and health care services within communities, accessible schools for children with disabilities, the provision of

98 The information can be accessed at www.pcs.mb.ca/~ccd/nation~4.html.

assistive devices free of charge or at an affordable cost, and support programmes for parents of children with disabilities which will inform the parent about -

- i the rights of his/her child with a disability;
- ii existing facilities and services for his or her child in the community and how to make use of them;
- iii laws and policies that protect children with disabilities;
- iv channels to seek justice for his or her child when the child's rights have been infringed; and
- v how the parent can contribute to his or her child's development.

Support programmes for parents must also, if necessary, include the teaching of Sign Language.

- (b) An integrated approach be followed in the delivery of rehabilitation services and the role and responsibilities of each Department towards the rehabilitation of children with disabilities should be clearly outlined.
- (c) Rehabilitation centres should offer the following services:
 - i vocational training;
 - ii psychological and other types of counselling;
 - iii medical care and treatment;
 - vi recreational services; and
 - v training in communication and daily living skills.

The above services should be provided in both urban and rural areas.

It is apparent that children with disabilities are forced into institutions for the disabled as existing residential care facilities are not 'disabled friendly'. The limited number of institutions for children with disabilities also has the effect that the existing institutions for such children are overcrowded. Placing children with disabilities in institutions for the disabled, is not in accordance with the principle of inclusiveness of the White Paper on an Integrated Disability Strategy. However, residential care facilities registered in terms of the Child Care Act are run by

NGOs. Most of these NGOs are under-resourced and are battling to manage with their existing services. These facilities are also full of children who have emotional and behaviour problems, some of whom can severely victimise a child with a disability. Placing a child with a disability in such a facility without the proper support structure such as staff who can skilfully manage the situation can have a negative impact on the development of a child with a disability. Absorbing children with disabilities into residential care facilities can also have enormous resourcing implications for such facilities. Also, residential care facilities receive no special subsidies for the additional cost involve in caring for children with special needs. **The Commission therefore recommends that -**

- (a) Special subsidies be offered to residential care facilities that care for children with special needs for the purpose of making them fully accessible to children with disabilities.
- (b) A residential care facility which is a receiver of the proposed subsidy should progressively adjust its programmes and environment in such a manner that will allow, to the maximum extent possible, the development of children with disabilities. This includes the provision of appropriate rehabilitation services and assistive devices.
- (c) Staff of residential care facilities who work with children should receive in-house training in order to provide a comprehensive and inclusive service delivery to all children, including children with disabilities.

The care options for children with disabilities in terms of the Child Care Act, 1983 are limited as the children's court has no power to place children found to be in need of care in facilities that provide special care to children with disabilities as the latter facilities are not established under the Child Care Act. **The Commission therefore recommends that the children's court should be empowered to make orders for the placement of children with special needs, who are found to be in need of care, in care facilities registered by the Department of Health and Education where such facilities are the best available resources for the meeting of their needs.**

The inability of ordinary schools to deal with diversity in the classroom and their physical

inaccessibility force children with disabilities into special schools. The South African Schools Act, 1996 already recognises the need to include children with disabilities into mainstream schools. Children with disabilities are, however, still excluded from mainstream schooling solely on the basis of their disability. The Education White Paper 6 recognises the need for inclusive education for all learners.⁹⁹ The Education White Paper seems to indicate the state's intention to create legislation to provide an inclusive environment which will address the different learning needs of children. **In order to ensure basic education to children with disabilities in an inclusive environment, the Commission recommends that provisions along the directions set out in the Education White Paper be included in the South African Schools Act.**

The Commission further recommends as follows:

- (a) The definition of a "care-dependent child" be amended to remove the reference to permanent (24-hour) care.
- (b) Where the circumstances of the child with a disability and that of his or her family oblige that the disabled child be placed in a special home, the care dependency grant should not be taken away if this enables the child's parent or guardian to pay for the hostel fees.
- (c) The Children's Code should recognise sign language as deaf children's first and natural language and as the primary medium of their communication.
- (d) Sign language services be made available to children with hearing disabilities at Domestic, Children and Sexual Offences Investigation (DCS) Units and during police and court processes and that, as far as possible, sign language interpreters be used who understands the dialect used by the deaf child.
- (e) Sign language interpreters for the children's court must receive training in legal interpreting and special skills in interpreting for children. In other words, sign language interpreters must understand the dialect of the child since the signs used by the deaf child originate in a different reference framework than the one being in use by a deaf adult.¹⁰⁰
- (f) The Department of Justice, in conjunction with the Department of Welfare,

99 See 13.4.3 above.

100 This is in accordance with the submissions to the Law Commission made by DEAFSA on 12 August 1998.

should design appropriate questioning techniques during court and police processes for children with intellectual disabilities.

The Commission is also of the opinion that social assistance to children with disabilities should be determined by a needs test, which considers the extra needs and cost incurred by the child due to his or her disability.¹⁰¹

As public transport is inaccessible to children with disabilities, **the Commission recommends:**

- (a) That the Department of Transport should budget for the transportation of children with disabilities (for whom public transport is inaccessible) to school. This should include the provision of accessible vehicles, and coupons for those children who cannot afford to pay for transport.

101 See also 13.1 above.

13.5 **Child Labour**¹⁰²

13.5.1 **Nature and extent of the problem**

Child labour has been defined as "work by children under 18 which is exploitative, hazardous or otherwise inappropriate for their age, or detrimental to their schooling, or social, physical, mental, spiritual or moral development".¹⁰³ Child labour is a widespread phenomenon especially in developing countries. Assefa Bequele of the ILO suggests that it is the primary form of child abuse in the world today.¹⁰⁴ The ILO's Bureau of Statistics estimates that, worldwide, at least 120 million children aged between 5 and 14 years work full-time at economic activities, and about another 250 million are working part-time. Sixty-one per cent of these children are in Asia, followed by Africa with 32% and Latin America with 7%. Africa has the highest incidence of child labour, with about 40% of its children between 5 and 14 years being workers. Child labour is to be found in many industrialised countries, although it is mainly apparent in the developing world.¹⁰⁵ ILO research indicates that, except in Latin America, a relatively small percentage of children caught up in labour are employed as wage earners. In a number of countries a large majority are involved in family enterprises.¹⁰⁶

Child labour is for the most part poverty-driven, being part of a vicious cycle with the following

102 Commercial sexual exploitation of children, including prostitution, is internationally recognised as being a form of child labour, indeed it is designated in ILO Convention 182 as one of the 'worst forms' thereof. Due to the many specific issues surrounding commercial sexual exploitation of children this is dealt with separately in section 13.10 below and is only mentioned in passing in the present section.

103 Definition used in the South African Child Labour Action Programme, 1998, as adopted by the Programme of Action Workshop of Stakeholders and endorsed by the Child Labour Intersectoral Group (obtainable from the Department of Labour).

104 Bequele A "The effective elimination of child labor: challenges and opportunities" 2000, Paper presented at ISPCAN Congress, Durban.

105 ILO "Child Labour: Targeting the Intolerable" 1998, Report VI(1), International Conference, 86th Session, Geneva.

features:

a) children prematurely enter the work force; b) their education is limited or non-existent, and their physical, emotional and social development is impeded or in some cases severely damaged; c) they emerge as adults only able to command the lowest wages, and - where the labour in childhood has taken a heavy physical toll - with a shortened working life. They are then d) more likely to be dependent on an income from their own children. Because they can be more easily underpaid and generally exploited, it often happens that children are employed in preference to adults. Hence adult unemployment and the resultant poverty increase, setting the scene for an increase in child labour.¹⁰⁷

Children who are themselves marginalised or are from marginalised families or communities are at increased risk of being caught up in child labour, due to the difficulties they encounter in meeting their basic needs and accessing essential services. Hence, e.g., children living on the streets, displaced or refugee children, and those who have been orphaned or whose caregivers are incapacitated by AIDS, are particularly vulnerable.

Bequele points out that there have been enormous strides internationally in developing awareness of child labour, which is now at the top of the global child rights agenda. Products in which child labor has been used are being subjected to international trade bans and the international legal framework for the combatting of child labour has been greatly strengthened. But, believes Bequele, optimism which had developed by 1997 to the effect that the battle against this practice was being won and could be won in all countries within fifteen years, now needs to be tempered with realism. War, famine and HIV/AIDS are changing the context and this needs to be reflected in policy changes. In his view mass poverty, drought and famine have to be addressed rather than relying on formal interventions.¹⁰⁸

107 Loffell, J "Child labour: economic exploitation as a form of child abuse" (1993) 43 **Critical Health** 38.
 108 Bequele, A., op cit.

In South Africa it has long been recognised that abusive child labour is practised in a number of sectors including commercial agriculture, street trading, entertainment and modelling, the taxi industry, brickyards, domestic service and prostitution.¹⁰⁹ The first national survey into child labour as it manifests itself in this country was carried out in 1999 by Statistics South Africa, commissioned by the Department of Labour, with funding from the ILO's International Programme for the Elimination of Child Labour (OPEC). The following are some important findings of the study:¹¹⁰

- In 1999, more than one in every three children in SA was involved in child labour, using a definition based on at least three hours per week per child being spent in economic activities, at least seven hours per week in domestic chores, or at least five hours per week in school labour (i.e. cleaning or improvement of school premises).
- About 1.2 million children spent at least 8 hours per week fetching wood and water. Of these, 67 000 spent between 34 and 43 hours on these tasks. The figure for some was 59 hours or more.
- Nearly 1.3 million children spent at least 5 hours per week on school labour. For 12 000 of them, 34-38 hours per week were spent in these activities.
- 551 000 children spent at least 8 hours per week in economic activities.¹¹¹ For 95 000 of them, 36 or more hours were spent in such work. For 23 000, time at work exceeded 50 hours per week.
- More than 2.1 million child workers had been exposed to one or other hazard in the course of their work -, e.g. injuries; proximity to dangerous substances, heavy machinery or dangerous animals; hot, unlit or dusty conditions; heavy physical work, tiring work or work for long hours.

The main industry in which children working for "pay, profit or family gain" were engaged was agriculture (59%). This was followed by trade (33%). However, the most common economic

109 Bosch, D. and Gordon, A. 'Eliminating child labour in commercial agriculture', paper prepared for the ILO; Schurink, W, Molope, C and Tshabalala, S 'Exploring some dimensions of child labour in South Africa', University of Pretoria, 1997; Loffell, J, 'Child Labour in South Africa: some features, policy considerations and possible strategies', paper presented at Child Labour Programme of Action Workshop, Johannesburg, 1998.

110 Extracted from "Child Labour in South Africa", pamphlet circulated by the Network Against Child Labour and the Child Labour Intersectoral Group, March 2001.

111 This category was defined as including work for pay, profit or family gain; fetching wood and water; and unpaid domestic work in the child's home, where that home was not shared by a parent, grandparent or spouse of the child.

activity for children was fetching wood and water.¹¹² Unpaid domestic work and help on the family farm were the next most frequent forms of economic activity. Lengthy hours spent on domestic chores and in cleaning and improvements to school premises were common forms of "non-economic" work expected of children.¹¹³ What emerges from the survey is that the illegal employment of children is a significant issue in South Africa, but that most work by children is in the pursuit of their own and their families' survival in situations of poverty, in settings other than employment. Relieving the burden of these children will clearly require interventions above and beyond those which are directed to the employment context.

13.5.2 **Approaches to the problem**

It is widely recognised that it is overwhelmingly children in poverty who tend to be exploited for their labour, and that the eradication of child labour will in the long run depend largely on the eradication of poverty. Until that aim can be achieved, there are various schools of thought as to how child labour should be addressed, and heated debates occur both in South Africa and internationally in this regard. Approaches tend to favour immediate and total abolition at one end of the spectrum, and the regulation of some forms of child labour, together with the building in of protective measures for children at the other. Various interim positions also exist.

A strong abolitionist stance would tend to go hand in hand with advocacy of firm implementation of minimum age legislation with no exceptions. Bequele points out that this approach arises from a variety of motives - while some have primarily to do with the protection of children, others are geared, e.g. to protecting jobs and markets in countries where child labour is outlawed, and which face competition from countries which can keep prices low because of exploitative labour conditions, including the use of children.

112 It has been pointed out that hours may be somewhat inflated because young people socialise through the fetching of wood and water.

113 Statistics South Africa 2000: Survey of Activities of Young People - Summary Report and Tables.

Approaches which favour regulation may also be in support of, e.g. provision for flexible school hours which allow working children to continue with their education, the establishment of unions for child workers, and programmes which provide skills training for children and help in producing and marketing their goods.¹¹⁴

The ILO has identified the following elements which are necessary to put in place a comprehensive national strategy against child labour:¹¹⁵

- Designing a national plan of action.
- Research.
- Raising awareness.
- Creating a broad social alliance.
- Establishing the required institutional capacity.

Within this framework, the ILO further identifies three specific areas of action, namely: improving legislation and enforcement measures, improving schooling for the poor, and using economic incentives.¹¹⁶

While it is widely acknowledged that legislation on its own will have little impact on child labour, there is also substantial agreement that strong and well-enforced legislation is an indispensable component in strategies to end this form of exploitation.

Improving schooling for the poor is often identified as the single most effective way to prevent children from entering abusive forms of work; hence the education sector has a critical role to

114 Johannesburg Child Welfare Society, 1990: Report on the International Child Labour Workshop, Free University of Amsterdam, 12. See also Montezuma, L 1990: "Creative and protective programmes on education and work", paper presented at the same seminar.

115 ILO Press 'Child Labour: Action required at the national level' ILO/CLK/2, Geneva, 10 June 1996.

116 Ibid.

play in the elimination of child labour.

Positive incentives for families are a way of addressing the reality that children often work because their families cannot do without their earnings. Thus in some parts of the world programmes have been set up which include cash or in-kind incentives to enable families to move children out of the workplace and into school. A simple example of this kind is an Indian programme which provides each child at school with a packet of rice to take home to the family at the end of the school day. The use of negative incentives has been more controversial. This involves, e.g. consumer boycotts of and legal barriers against the sale of goods which children have been involved in producing. While these measures have raised public awareness of child labour there is some evidence that the children who are shifted out of jobs in these processes tend to be driven underground into more hazardous employment. The ILO thus suggests that there is a need "to move children from the workplace in a phased and planned manner, instead of throwing them overnight, and unaided, into a far worse situation".¹¹⁷

117 Ibid, citing the ILO research report "Child Labour: What is to be done?" - document for discussion at the informal tripartite meeting at ministerial level, Geneva, June 1996.

In South Africa there are very few programmes aimed specifically at removing children from labour or protecting them within the labour context, and activity has been substantially concentrated at the level of awareness-raising, policy and legislation. The overall approach has tended to be abolitionist, with CLIG stakeholders (see section 4.5 below) agreeing on a prohibition of employment of children of less than 15 years¹¹⁸ although some have called for this to be raised to 18. There is also agreement on the need for regulation of work for young persons aged 15-17. There is a view that, while a regulatory approach may be necessary as an interim measure in countries where the employment of children is deeply embedded in the culture and economy, the problem is sufficiently contained in South Africa to render such an approach unnecessary.¹¹⁹ There is some support for an exception being made for the employment of children in modelling, advertising and entertainment subject to strict regulation.

13.5.3 International framework

13.5.3.1 United Nations Convention on the Rights of the Child (CRC)

Article 32 of the CRC reads as follows:

1. States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's health or physical, mental, spiritual, moral or social development.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
 - provide for a minimum age or minimum ages for admission to employment;
 - provide for appropriate regulation of the hours and conditions of employment;
 - provide for penalties or other sanctions to ensure the effective enforcement of the present article.

Other provisions of relevance are article 28 on the right to education, article 31 on the right to rest and leisure, and article 34 on protection against sexual exploitation.

13.5.3.2 African Charter on the Rights and Welfare of the Child

118 SA Child Labour Action Programme, clause 32.

119 Loffell 1998: op. cit, 4. The SA Agricultural Union lobbied in the late 1980's and early 1990's for provision for the employment of children over twelve for light duties on farms to be permitted subject to regulations. This was strongly opposed by NGO's and trade unions. However the SAAU subsequently became part of CLIG and associated itself with the consensus reflected in the Child Labour Action Programme - see section A.5 below.

Article 15 of the African Charter has wording which is virtually identical to that of article 32 of the CRC. It adds a requirement that legislative and administrative measures should cover both the formal and informal sectors of employment, and that information on the hazards of child labour should be disseminated to all sectors of the community [15(2)1]. Articles 11 and 12 affirm the child's right to education and to leisure, recreation and cultural activities respectively.

13.5.3.3 **ILO Conventions and cooperative arrangements with South Africa**

13.5.3.3.1 **Convention 138: Minimum Age Convention (1973)**

Convention 138 requires ratifying states to set a minimum age for employment and to pursue a national policy aimed at the abolition of child labour. The age in question should be no less than that for completion of compulsory schooling and in any case not less than 15; however this can initially be set at 14 in developing countries under certain circumstances. "Light work", which is not clearly defined, carries a minimum age of 13, or 12 in the case of countries which use 14 as the general minimum age. The Convention requires that such work should not interfere with schooling or any other aspect of the child's healthy development. In the case of hazardous work - i.e. "work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons" - the minimum age is 18. If adequate training and protections are in place, this can be reduced to 16. The Convention provides for limited categories of work to be excluded from its ambit. South Africa ratified this Convention in 2000. The Convention is supplemented by ILO Recommendation 146 of 1973, which sets out a broad framework and essential policy measures for the prevention and elimination of child labour.¹²⁰

13.5.3.3.2 **Convention 182: Worst Forms of Child Labour Convention (1999)**

Convention 182 requires members to take urgent, immediate and effective steps to prohibit and eliminate the worst forms of child labour. These include (a) all forms of slavery and similar practices, including sale and trafficking of children, debt bondage and forced or compulsory labour including conscription into armed conflict; (b) the use of children for prostitution and pornography; (c) the involvement of children in illegal activities especially the drug trade, and (d) "work which, by its nature or the circumstances in which it is carried out, is likely to harm the

120 ILO 1998: "Child Labour - Targeting the Intolerable", International Labour Conference - 86th session, report V1(1), Geneva, 24-26.

health, safety or morals of the child".¹²¹ Member states are required to draw up and implement programmes of action to give effect to this Convention. They are required to take steps to prevent children from being taken up into these forms of labour, identify and reach out to those at particular risk, provide the necessary assistance for the removal of children from these situations and for their rehabilitation and reintegration into society, and take into account the particular situation of girls.¹²² South Africa ratified Convention 182 in 2000.

13.5.3.3.3 **Convention 29: Forced Labour Convention (1930)**

Convention 29 aims to end all practices which involve work which is carried out "under the menace of any penalty and for which the said person has not offered himself voluntarily".¹²³ South Africa has been a party to this Convention since 1997.

13.5.3.3.4 **Memorandum of understanding**

In 1998 the Minister of Labour in South Africa signed a Memorandum of Understanding with the ILO, making South Africa an international partner in the process of eliminating child labour. This set the scene for assistance from the ILO in carrying out the national survey of child labour in South Africa in 1999, and will in due course also be the basis for the operation of programmes backed by IPEC.

Other relevant international instruments are mentioned in section 13.7 in relation to commercial sexual exploitation of children.

13.5.4 **Existing legal and policy situation in South Africa**

13.5.4.1 **Constitutional provisions**

Section 28(1) of the Constitution provides as follows:

121 Article 3.
 122 Article 7(2).
 123 ILO 1998: op. cit.,27.

Every child has the right -

...

- (e) to be protected from exploitative labour practices;
- (f) not to be required or permitted to perform work or provide services that -
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.

Also of relevance is section 32 which guarantees every person's right to education, and section 12 which prohibits servitude and forced labour.

13.5.4.2 **The Child Care Act 74 of 1983**

Section 52A of the Act provides as follows:

- (1) Subject to the provisions of this Act or any other law, no person may employ or give work to any child under the age of 15 years.
- (2) The Minister may, on the conditions determined by him
 - (a) by notice in the Gazette exclude any employment or work from the provisions of subsection (1); and
 - (b) grant any particular person, or persons generally, exemption from the provisions of subsection (1).

Subsection (3) provides for conditions to be set for the granting of any exemption, and subsection (4) allows for the amendment or withdrawal by the Minister of Welfare of any certificate or notice of exemption at any time. Maximum penalties for the contravention of section 52A are those generally applicable to offences under this Act, i.e. a fine not exceeding R4 000 or imprisonment for up to one year, or both.¹²⁴

Section 52A was brought into the Child Care Act via the Child Care Amendment Act of 1991, and was initially seen as a potential turning point in relation to child labour in South Africa. The employment of children under 15 had been prohibited under the Basic Conditions of Employment Act 74 of 1984, but thirteen employment sectors, including agriculture and domestic service, had been excluded from this Act. When, through the efforts of the trade union

movement, moves were under way to bring all sectors within its ambit, a recommendation was made by the then National Manpower Commission that child labour be addressed through the Child Care Act as the statute primarily directed towards the wellbeing of children. The wisdom of this approach was subsequently questioned given that the Department of Welfare lacked the resources to address child labour.¹²⁵ In addition the trade unions, which had a stake in preventing child labour and were well organised around labour law and its implementation, were not active in the welfare arena. There was also criticism to the effect that s52A gave too much scope for exemptions, especially general exemptions which would not automatically lend themselves to monitoring or control.¹²⁶ Amendments were called for to provide only for individual exemptions, subject to strict conditions.¹²⁷ Events in due course overtook s52A, and this section was excluded from regulations which were gazetted for other newer sections of the Act, as there was agreement after 1994 that child labour should after all be dealt with via the Basic Conditions of Employment Act.

13.5.4.3 **The Basic Conditions of Employment Act 75 of 1997**

Section 43 of the Basic Conditions of Employment Act (BCEA) reads:

(1) No person may employ a child -

125 Bosch D and Gordon A: op. cit., 20.

126 In particular there were concerns about the possibility that the commercial agricultural sector might succeed in its lobby to be permitted to employ children, subject to conditions which many believed would be unenforceable in practice. The sector has since accepted the minimum age of 15 years.

127 Otis, 1, Thomas, A. and Loffell, 1, 1992: "Introducing Child Labour to the Child Care Agenda in South Africa", paper presented at the International Conference of the Rights of the Child, Cape Town; Network Against Child Labour, November 1991: Section 52A of the Child Care Act: Recommendations and issues for consideration in the drafting of Regulations; and October 1992: Proposals for enforcement of legislation concerning child labour, documents submitted to the Working Group: Child Labour, Department of National Health and Population Development.

- (a) who is under 15 years of age; or
 - (b) who is under the minimum school-leaving age in terms of any law, if this is 15 or older.
- (3) No person may employ a child in employment -
- (a) that is inappropriate for a person of that age;
 - (b) that places at risk a child's well-being, education, physical or mental health, or spiritual, moral or social development.

Section 44 enables the Minister to regulate the employment of children over fifteen years, by prohibiting or placing conditions on the employment of youths in this category. Section 55 enables the Minister to make sectoral determinations which may in various ways modify the conditions of employment applicable to a particular sector or area. According to section 55(6)(b), such determinations can only be made to allow for the employment of children in advertising, sports, artistic or cultural activities. The controversial Basic Conditions of Amendment Bill¹²⁸ would repeal the limitation on sectoral determinations applicable to children, this being among numerous aspects of the Bill which are meeting with opposition from the trade union movement and other role players.

13.6.4.4 **Other relevant legislation**

The South African Schools Act 84 of 1996 provides that a child must attend school until age 15 or completion of grade 9, whichever comes first. Various statutes including the Domestic Violence Act 116 of 1996, the Sexual Offences Act 23 of 1957 and the Film and Publications Act 65 of 1996 prohibit aspects of the commercial sexual exploitation of children.

13.5.4.5 **Strategic and policy initiatives**

The Department of Labour took the initiative in 1998 to convene a wide range of stakeholders in developing a Child Labour Action Programme (CLAP) for South Africa. Other government departments, NGO's, trade union federations and employer organisations joined in this partnership, and together formed the Child Labour Intersectoral Group (CLIG). The CLAP is to be amended on the basis of the results of the SAYP (see section 13.6.1 above), and the

128 Government Gazette, 27 July 2000.

Department of Labour will in the near future be engaging in consultations relating to a Green Paper and a White Paper. The current CLAP includes in its ambit all forms of exploitative, hazardous or inappropriate work by children, while giving priority to immediate removal of children from the most abusive forms of child labour. It emphasises the inter-sectoral nature of the task at hand, and identifies the following key areas for action:

- Employment law, including provisions on the prohibition of child labour and increasing the capacity to enforce the law, which is the responsibility of the Department of Labour.
- Appropriate educational policy and implementation, administered by the national and provincial. Departments of Education, including attention to poor levels of achievement at school and school drop-outs since education, particularly primary education, are the principal means of preventing and eliminating child labor.
- Adequate provision of social security, administered by the national and provincial Departments of Welfare and supported by NGO's.
- Programmes for the creation of employment opportunities for adults and for alleviation of poverty.
- Social mobilisation and educational programmes for the public, employers, parents and children.¹²⁹

The National Committee on Child Abuse and Neglect (NCCAN), convened by the Department of Social Development has, as mentioned in chapter 10, developed a National Strategy on Child Abuse and Neglect (NSCAN). The NCCAN recognises child labour as a form of child abuse, and has called for provision to be made for inter-sectoral intervention into cases of child labour in all provincial, regional and district child protection protocols. These are working agreements which have been developed to guide practitioners from welfare, health, the police, the courts and correctional services in cooperative action when intervening in cases of child abuse. The role of the labour inspector as part of the multi-disciplinary child protection team in cases of exploitation of children is recognised by the NCCAN.

Both CLIG and the NCCAN have provincial structures which are responsible for promoting

129 Clause 9, South African Child Labour Action Programme, as amended 6 May 1998. Obtainable from the Department of Labour.

coordination in case-by-case interventions in situations of exploitation of children. Both have recognised a need for improved synchronisation of their efforts on the ground and are exploring ways in which this can be achieved.

13.5.5 Deficiencies in the existing situation

Both section 52A of the Child Care Act and section 43 of the BCEA are ignored on a wide scale. The results of the SAYP cited above are a clear indication of widespread infringement of the law, especially in agriculture and in trading. Charges in terms of the BCEA have been brought in very few cases, and with little or no success to date, and the procedure for obtaining exemption for the employment of one or more children in terms of S52A of the Child Care Act is seldom used.¹³⁰

Various sets of guidelines have been put together to govern the employment of children in entertainment and modelling, and the Ministry of Labour is in the process of finalising a sectoral determination to protect children employed in this sector. Nevertheless substantial numbers of children are known to be already employed as models and performers, and abuses are reputed to be widespread.¹³¹ There is an impression that the exploitation of children through prostitution is increasing.¹³²

Part of the problem appears to be lack of enforcement. This is a shortcoming shared with many other countries. The ILO observes that enforcement problems are particularly evident "in the informal sector, away from main cities and in agriculture, in small businesses in street trading, in domestic service and in home-based work".¹³³ The ILO identifies gaps or excessive complexity in legislation, inadequate penalties, ignorance of the law and of the hazards of child labour, and problems related to inspectorates as causative factors. Inspectorates tend to have capacity problems; they may lack legal access to sites of child labour; or they may be affected

130 Personal communications, Dept of Social Development and Dept of Labour.

131 Personal communication, Performing Arts Workers Equity.

132 Barnes September R et al **Child Victims of Prostitution in the Western Cape**, Institute for Child and Family Development, UWC 2000; Molo Songololo **The Trafficking of Children for Purposes of Commercial Sexual Exploitation** Cape Town 2000.

by low motivation, poor pay and/or corruption.¹³⁴ The Department of Labour has a very limited inspectorate which must carry the main burden of enforcement of the BCEA, and the criminal justice system is unaccustomed to processing cases of this kind. Child workers and their families are often in a very vulnerable position and may be threatened with eviction from their homes and other forms of abuse if they press charges.¹³⁵

133 ILO 1998: op. cit., 87.

134 Ibid, 87ff.

135 Farm workers are particularly vulnerable in this regard. See e.g. Otis et al., 1992: op. cit., 4. Domestic workers would be in a similar situation.

The Child Care Act lacks specific provisions designed to protect children who are in illegal employment, except in the case of prostitution.¹³⁶ Neither does it provide for any means to enable such children to survive without being prematurely employed. Nor does it address the plight of those who are not in employment but are nevertheless engaged in toil which is inappropriate for their age and stage of development, as indicated in the results of the SAYP.

Child protection workers in the welfare sector and their colleagues in the health, education and criminal justice systems have to date tended to cooperate around cases of physical and sexual abuse and abandonment, while lacking experience and an established pattern of intervention in child labour. Thus the protective system has in general tended not to engage directly with child labour. Both the Child Labour Intersectoral Group convened by the Department of Labour, and the National Committee on Child Abuse and Neglect which is based in the Department of Social Development (see section 4.5. above), have made efforts to promote mutual cooperation and joint action. The Department of Labour has begun inter-sectoral training of labour inspectors together with social workers, educators and criminal justice personnel within the framework of the multi-sectoral SA Child Labour Action Plan (CLAP) (1998). Thus far these efforts have born little fruit in practice.

There is also a lack of interlinkage between the school system and the authorities responsible for the enforcement of legislation against child labour. Universal education is widely regarded as crucial to the prevention of child labour and schools are ideally placed to monitor attendance and reach out to defaulting children and their families.

A major difficulty is the lack of alternatives for the survival of families who are dependent on child labour. The lack of social security provision for children older than six years is a major issue here, given that the vast majority of child workers are above this limit. The SAYP showed that child workers are in general working to meet their own and their families' needs, with only 16% working for pocket money.¹³⁷

136 In terms of section 14(4)(aB)(iii), a child living in circumstances likely to conduce to his or her sexual exploitation can be found to be 'in need of care'.

137 Network Against Child Labour "The SAYP Results: Hard Data for Tough Action", Johannesburg 2001.

13.5.6 Comparative systems in other countries

Virtually all countries have laws specifying a minimum age for employment and setting out conditions under which children may work if this is permitted.¹³⁸ By 1998, 45 countries had set the minimum age at 15, 37 at 14 and 23 at 16. However, in 30 countries it is legally acceptable for children under 14 to work, the basic minimum age in 6 countries being 12.¹³⁹ Some 135 countries provide for exclusions from general rules by the competent authority. Many others exempt particular sectors or industries, with agriculture, domestic service and family enterprises being common examples.¹⁴⁰ Convention 138 provides for a lower minimum age for "light work". European countries tend to set the minimum at 13-14 for such activities, while in the Americas and Africa the age of 12 is the more common legal minimum. Lebanon has a minimum age of 8 for light work.

Convention 138 requires parties to exclude children from hazardous occupations. Common examples of work from which children are excluded by ILO member countries are mining, quarries and underground work (101 countries); aspects of maritime work (57 countries), and various forms of work involving heavy or dangerous machinery. Considerable numbers of states have legislation to exclude children from the production or sale of alcohol and from work considered dangerous to morals¹⁴¹. The exposure of children to a number of substances and agents is also prohibited in many countries - these include in particular explosives; fumes, dust and gas; radioactive and pathogenic substances and hazardous rays; and a number of dangerous chemicals.¹⁴²

There has been a tendency for legislation governing child labour to develop as part of labour legislation, separately from that which is geared specifically for the protection of children from other forms of abuse and neglect. Exceptions are the use of children for prostitution or begging, which often appear in mainstream protective legislation. General references to "ill-treatment" or the likelihood of the child suffering harm of deprivation may or may not be interpreted in practice as including child labour. A disadvantage of this approach is that the enforcement of labour regulations does not ipso facto involve action to address the social context of the child in illegal employment and his or her family. Neither does it offer any remedies for the situation of such a child once the employer has been dealt with and the illegal practice ended. Meanwhile, as mentioned above in the South African context, protective legislation may tend in practice be

138 ILO 1998: op. cit., 33.

139 Ibid, 34.4

140 Ibid, 34.

141 Ibid, 52, 54.

142 Ibid, 48-55.

inoperative in the labour context.

There is a recent tendency for child labour to be addressed along with other child rights issues in comprehensive children's statutes. Some examples follow.

13.5.6.1 **Brazil**

The Statute of the Child and Adolescent (1990) of Brazil is based on the full range of the rights of children and seeks to address all of these in a holistic manner; hence it addresses labour, protective, educational and other related issues pertinent to the prevention and elimination of child labour. Title 1, Chapter 5, dealing with the right to vocational training and protection at work, includes the following provisions:

- Children aged less than fifteen may not work, except as apprentices.
- Work by older adolescents is subject to regulation.
- Education is compulsory.
- Apprenticed children over fourteen years have labour and social security rights.
- Various forms of hazardous work are prohibited for adolescents (work between 22h00 and 5h00, dangerous or heavy work, work which is prejudicial to healthy development; work which interferes with schooling).
- Social programmes based on "educational work" are allowed for - this is labour activity in which the pedagogical demands related to the personal and social development of the person being educated prevail over the productive aspect.¹⁴³
- The adolescent is entitled to vocational training and protection at work.

143 Art. 68, para. 1.

Title 1, Chapter 4 deals with the right to education, culture, sports practice and leisure. This chapter provides *inter alia* for supplementary programmes for the provision of "didactic school material, transportation, nourishment and health assistance". It also places a duty on the public authority (presumably at the local level) to "conduct a census of the student population at the basic education level, and, together with parents and guardians, ensure their attendance at school".¹⁴⁴ Directors of institutions of basic education must report cases of abuse, absenteeism and high levels of repetition to the Council of Guardianship.¹⁴⁵ Municipalities are obliged to "encourage and facilitate the directing of resources and spaces to cultural, sports and leisure programmes oriented to childhood and youth".¹⁴⁶ In a situation in which any of the child's rights are threatened or violated, protection measures can be invoked. Preference must be given to those intended to strengthen family and community ties. These may include, e.g. temporary guidance, support and monitoring; compulsory school attendance; inclusion in a programme of child, adolescent or family assistance, inclusion in a drug rehabilitation programme, placement in a shelter or placement in a foster home.¹⁴⁷

13.5.6.2 **Uganda**

S9 of the Children's Statute of 1996 prohibits the employment or engagement of a child "in any activity that may be harmful to his or her health, education, (or) mental, physical or moral development". As with the infringement of any other right of the child, contraventions of this provision can be referred to the local authority for investigation and follow up by the Secretary for Children's Affairs and, if necessary, by the Local Resistance Committee court.¹⁴⁸

13.5.6.3 **Ghana**

Ghana's Children's Act of 1998 prohibits "exploitative child labour", i.e. labour which "deprives the child of its health, education or development".¹⁴⁹ The Act sets the minimum age for employment at 15 years, or 13 in the case of light work. The latter is "work which is not likely to be harmful to the health or development of the child and does not affect the child's attendance at school or the capacity of the child to benefit from school work".¹⁵⁰ The minimum age for hazardous work is 18 years - this category includes going to sea, mining and quarrying, carrying heavy loads, manufacturing which involves the use of production of chemicals, work in proximity

144 Art 54 (VII).

145 Art. 56.

146 Art. 59.

147 Title 11, Chapter 11.

148 Sections 12 and 13.

149 Section 87.

150 Sections 89, 90.

to machines, and work in venues where there may be exposure to immoral behaviour - e.g. bars, hotels and places of entertainment.¹⁵¹ The engagement of children in work between 20h00 and 6h00 is prohibited.¹⁵² In industrial undertakings, a register must be kept of children employed and of their dates of birth or apparent ages.¹⁵³

The Ghanaian statute incorporates an interesting approach to the involvement of the welfare and labour sectors in enforcement. In the formal sector, enforcement is the responsibility of district labour officers, while in the informal sector it resides with Social Services Sub-Committee or the Social Welfare and Community Development Department of the relevant District Assembly. Where the offender is a family member of the child, a social enquiry report must be requested from a probation officer or social welfare officer, and this must be considered by the police before action is taken.¹⁵⁴

151 Section 91.
152 Section 88.
153 Section 93.
154 Sections 95, 96.

The Act further provides that from the age of fifteen or on completion of basic education, a child may be apprenticed to a craftsman, who then has responsibility for that child's training in the relevant trade, safety and health, nutrition unless otherwise agreed, and moral training, and for the general promotion of his or her best interests.¹⁵⁵

13.5.6.4 **India**

The Children's Code Bill of 2000 provides specifically for the withdrawal of children from labour and for their reintegration thereafter. S57 designates the minimum age for employment "in any establishment" as 14 years, and prohibits the employment of a child of any age in "a mine, plantation or any establishment in which a hazardous process is carried on". However, provision is made for an owner or occupier of any establishment to be granted a licence to employ children if the relevant licensing authority is satisfied about matters including the conditions of service and proposed amenities for the children. Inspectors appointed under the Child Labour (Prohibition and Regulation) Act of 1986, and NGO's are given the right to inspect employment sites and to report to the relevant authority on the conditions of the children working there. The Bill provides that employers who have had to discontinue the employment of children due to these provisions must provide their families with compensation for the loss of their earnings or damages if applicable, and must provide the children with facilities for education.¹⁵⁶ In addition the state must provide "adequate measures in the education system to admit such children who are withdrawn from employment". If they are unable to fit into regular schools the employer must arrange non-formal education for such children so as to enable them in due course to integrate into the formal system.¹⁵⁷ The Bill provides that the central and state governments must conduct educational activities to promote awareness of the evils of child labour, especially among parents of children of schoolgoing age. NGO's and other bodies are commissioned to visit factories and schools to monitor school attendance and the provision of essential facilities.¹⁵⁸

13.5.6.5 **Kenya**

155 Sections 98, 99.

156 Sections 57(5), 58(1) and (2).

157 Section 58(2).

The 1998 draft of The Children Bill in Kenya recognises the right of the child to protection from economic exploitation and any work which is likely to be hazardous or to interfere with the child's education or be harmful to his or her development. Provision is made for regulation of employment of children above the age of 16.¹⁵⁹ These provisions include "any situation in which a child provides labour in exchange for payment". This covers payment of someone else on the child's behalf, payment of another person to whom the child has been deemed to be acting as an assistant, the use of a child's labour for gain by any individual or institution whether or not the child benefits therefrom; and any situation where the child's labour is contracted by an agent.¹⁶⁰ The Kenyan Bill (not yet enacted as at January 2001) provides that a child "Who is engaged in any work likely to harm his health, education, mental or moral development" is a child in need of care and protection.¹⁶¹ This may be the basis for the pressing of charges against an offender and/or the issuing of a care or supervision order.

13.5.7 **Question raised in Issue Paper 13 and responses**

Respondents were asked in Issue Paper 13 to reply to the following question: 'If detailed child labour provisions remain in dedicated labour legislation, what protective mechanisms should the proposed children's statute contain with regard to children's labour?'

Please refer to chapter two, section 2.5.4 above for a summary of responses received from individuals and organisations, most of whom were in favour of child labour being addressed in the new statute. Some, however, believed that the matter should be left to or cross-referenced with labour legislation. Of respondents who completed a questionnaire on the scope of the proposed statute, 87% said that it should deal fully with child labour, 12% said it should do so partially and 1% said it should not do so at all.

The following measures were recommended by respondents who believed that the statute should deal with child labour:

- measures to address poverty;
- provision of social security for children over six years;
- powers for the child and family court to order that state financial or material assistance be awarded to the parents of caregivers of a child who comes before

¹⁵⁹ Sections 9(1) and (4).

¹⁶⁰ Section 9(5). This clause is of interest in South Africa, as employers here have over the years held themselves out to be exempt from minimum age legislation on the grounds that the children concerned are "self-employed", "earning pocket money", not in direct receipt of money paid etc.

¹⁶¹ Section 113(3)(o).

- the court, to enable them to support that child in preference to the child's being placed in alternative care;
- spelling out of the responsibilities of the Departments of Justice, Welfare, Police and Health in taking preventative, rehabilitative and protective measures;
- A rehabilitative as opposed to a punitive approach to children caught up in labour and their families;
- education of farmers and monitoring of the agricultural sector to prevent the employment of children;
- rules as to the nature of work in which children can engage and the applicable working hours;
- greater clarity as to penalties for employers.

Question 11 of the worksheet to the Research Paper on Children Living in the Streets asked: *Having regard to the fact that street children engage themselves in various kinds of employment in order to survive or to supplement family income, should any prohibition on child work be drafted in a new children's code? If so, how should such a provision be formulated? What should the law provide with regard to children who work on the street to supplement the family income? Should the present provisions of the Basic Conditions of Employment Act (which sets the age below which children may not work at 15 years) and the constitutional ban on hazardous and dangerous work be changed or expanded in the proposed new statute to accommodate the realities facing street children?*

Respondents felt that the Basic Conditions of Employment Act and constitutional provisions cover the issue of child labour sufficiently. The problem is how to enforce such legislation in the face of the reality of poverty. It is argued that the new children's statute should draw a distinction between entrepreneurship and child labour.

13.5.8 Recommendations

The Commission recommends as follows:

- **That, along the lines used in the Kenyan Bill as described in 13.5.6.5 above, 'employment' be clearly defined so as to overcome present loopholes in labour legislation as it applies to children, and to avoid blocking survival strategies initiated by children themselves (such as those living on the streets).**

That the provisions of the BCEA in relation to the minimum age for employment, the prohibition of involvement of children in work which is likely to be harmful to their development, and sectoral determinations which may be made concerning the employment of children in the fields of advertising, sports, artistic or cultural activities, be supported in the comprehensive children's statute.

That there be collaboration between the Departments of Labour, Social Development and Education in the drawing up and implementation of Regulations with regard to child labour.

That, similar to the Brazilian approach mentioned in 13.5.6.1 above, social programmes allowing for educational work by young persons be provided. Thus, work which is carried out within the framework of a programme registered in terms of the Nonprofit Organisations Act and that is designed to promote personal development and vocational training, ought not to be deemed to constitute illegal child labour.

That involvement of a child in illegal employment or any form of inappropriate or hazardous work be grounds for the opening of proceedings in the child and family court.

That the Departments of Labour, Social Development, Education, Safety and Security and Justice be required to submit to the Treasury a joint annual estimate of the number of children in each province who are expected to be involved in illegal employment generally, and in the designated "worst forms" of child labour specifically, together with an estimate of the costs of the interventions which will be required for enforcement of the law and rehabilitation of these children in the year in question.

That the Departments of Labour and Social Development be empowered to make funds available to NGO's to operate programmes for the specific purpose of intervening in child labour and promoting the rehabilitation of children who have been extricated from situations of child labour - such allocations to be coordinated and monitored through an appropriate interdepartmental process.

That in accordance with the principle of early intervention,¹⁶² all schools be required to identify those children in their area who are not attending

school regularly and who are suspected to possibly be working, to take appropriate action, where necessary in cooperation with the Departments of Labour and/or Social Development, to ensure their attendance.

That the Department of Education be required to identify schools where excessive use is being made of children as a source of labour for the purpose of cleaning and maintenance tasks, and to ensure that sufficient adults are employed to carry out these tasks.

That the Departments of Mineral and Energy Affairs, Water Affairs and Forestry, and Land Affairs be required to identify areas which must be given priority for service delivery, in order to free children from excessive involvement in fetching wood and water.

That penalties for the illegal employment of children and the use of any form of exploitative child labour be significantly increased, and provision be made for the payment of the costs of rehabilitation of child workers by offenders.

That, in compliance with ILO Convention 182, all forms of child slavery and forced or compulsory labour including debt bondage be specifically designated as criminal offences.

That money or goods acquired through the use of illegal child labour be subject to confiscation by the Assets Forfeiture Unit.

13.6 Children living and working on the streets

13.6.1 Introduction

The phenomenon of street children¹⁶³ the world over has a common aetiology; the children themselves share a common street lifestyle. In their homes, poverty, unemployment, marital instability and alcohol abuse are endemic. In South Africa, rapid urbanisation and an education system, which has failed to redress the imbalances of Apartheid education, intensify the situation. In addition, street children are also vulnerable to exploitation by criminal elements.

For every four street children seen on the streets during the day, three are daytime strollers, that

163 In its use of the term 'street children', the Commission has no intention to stigmatise this particular vulnerable group of children.

is they are supplementing household income and go home at night. The fourth child lives on the streets - that is, he will sleep on the streets at night.

Every community produces either government machinery or NGO's to try to control, care for or punish these children.¹⁶⁴ However, it has been shown over the years that street children do not benefit from traditional facilities and so alternative ways of addressing the problem have to be sought. Interventions should be humane, accountable and multi-faceted as the child moves through a continuum of care. Furthermore, in South Africa, as in other developing countries, the models of childcare should be indigenous in nature.¹⁶⁵

Street children are the responsibility of all South Africans, but particularly the responsibility of the institutions, which represent society, such as the national, provincial and local government, NGO's, and CBO's. The first priority lies in preventing youth from coming into the city, through improving the social environment circumstances of communities. Achieving the necessary conditions for the human rights of street children to be realised has distinct implications for governance and suggests budgetary changes and a commitment to redress equity and support.

13.6.2 Law and Practice

13.6.2.1 The Child Care Act 74 of 1983

Section 30 of the Child Care Act 74 of 1983 makes provision for accommodation for children in need of care in the form of children's homes and places of care. In the past it had been difficult for street children shelters to access funding as only those shelters which provided a full residential service qualified for children's home subsidies. Thus, street children shelters at intake level were marginalised in terms of legally qualifying for subsidies and had to rely on provincial policies to access funding.

The above situation was addressed in the Child Care Amendment Act (No. 96 of 1996) which amended section 30 of the principal Act to read: *'by the substitution for sub-sections (3) and (4) of the following subsection:*

(3) *Application for the registration of a children's home [or] a place of care or a shelter shall be made to the Director-General in prescribed manner ... etc'.*

164 **Proposed integrated policy framework for services to street children in the Western Cape** (Draft), (1997) 9.

165 Ibid.

In addition the following definition of the term '*shelter*' was inserted: '*shelter* means any building or premises maintained or used for the reception, protection and temporary care of more than six children in 'especially difficult circumstances'.

13.6.2.2 **Regulations¹⁶⁶ arising from the Amendment of the Child Care Act (No. 96 of 1996)**

Although the insertion of the word '*shelter*' into the Child Care Act is a clear step to make provision for street children in need of care, the fact remains that regulations governing the registration of shelters are the same regulations that govern the registration of children's homes and places of care.¹⁶⁷ This has led to a situation where street children projects have altered the nature of the shelter to offer more permanent accommodation and by so doing qualify for maximum subsidy from the Department of Social Development. This approach to street children intervention is problematic as it emphasises one type of service provision and it is not in line with the new paradigm of the child and youth care system which emphasises an holistic approach to care. Moreover, the situation places some street children projects in a vulnerable position as they may, after inspection, lose their maximum children's home subsidy and be reregistered as a shelter.

Another shortfall in the regulations governing the care of street children is that besides residential care programmes, other care services to street children are not provided for in legislation. Drop-in centres, for example, which play a pivotal role in early intervention, are not regulated. Other programmes in the prevention and re-integration stages remain unregulated. This situation perpetuates the slow transformation of the child and youth care system.

13.6.2.3 **The South African Schools Act and its implications for 'at risk' learners in mainstream schools**

The South African Schools Act of 1996, refers to 'at risk' learners as 'learners with special education needs'.¹⁶⁸ An explanation of this term is not provided in the definitions section at the beginning of the Act. It can be assumed that when the Act mentions 'schools for learners with

166 Government Gazette No. 18770 of 1998.

167 Regulation 28 Government Gazette No. 18770 of 1998.

168 Section 12(4) of the Act.

special education needs',¹⁶⁹ it is implying that only learners presently catered for in special schools are included in the definition. A comprehensive definition would cover all learners with special needs both in the school system and outside. The question arises as to whether or not to include street children who fall outside of the school system as a separate category, or rather to subsume them under a broader category of 'out of school learners'.

Although the Act ensures that the provision of support services is mandatory, an issue arises in Section 12 (4) of the Act which states:

'the Member of the Executive Council must, where reasonably practicable, provide education for learners with special education needs at ordinary schools and provide relevant education support services for such learners.'

169 Section 3(2) of the Act.

The proviso 'where reasonably practicable' undermines the mandatory power of the Act.¹⁷⁰ The emphasis seems to be more on safeguarding the system than on protecting the rights of the learner.

The Act makes provision for a special needs portfolio at governing body level. Section 25(3) reads:

'The governing body of an ordinary public school which provides education to learners with special needs must, where practical possible, co-opt a person or persons with expertise regarding the special education needs of such learners.'

Once again, the words 'where practically possible' is not mandatory enough. A further weakness in the Schools Act is that no provision is made for the needs of 'overage learners' in schools.

The following scenario captures the present plight of these learners:

Sdima is fifteen years old. He is on the brink of adulthood. Sdima feels it is necessary to return to school to learn to read and write. He dropped out of school when he was seven and only passed Grade 1. He enrolls at a school and is placed in the Grade 2 class. Imagine the trauma for Sdima who day by day has to line up with younger learners; who is made to sit cramped up in a desk designed for a six year old and who is forced to learn from materials and methods which for his needs are inappropriate.

The Primary Open Learning Pathway (POLP) approach may assist the wording for the provisioning of overage learners in the Schools Act. This NGO advocates that older learners in the primary school (i.e. up to the age of fifteen years) be accommodated in 'open learning classes'. In these classes the learners are exposed to relevant materials and teaching practices and 'fast tracked' to a context where they learn with their age cohorts. POLP goes on to recommend that learners in a primary school (grade one to grade seven) older than fifteen years of age be accommodated in high schools and exposed to Adult Basic Education and Training (ABET) classes during the school day.

13.6.2.4 The South African Schools Act and its implications for non-formal education outside of the school system

One of the strong criticisms of the Schools Act is that although provision is made for learners

170 National Commission on Special Needs in Education and Training (NCSNET) **Education for All** (1997) 33.

with special education needs in the school system, no provision is made for those outside of the system. Section 2(1) of the Act states that the Act applies to '*school education in the Republic of South Africa*'. The word '*school*' is defined as a '*public school or an independent school which enrolls learners in one or more grades between grade zero and grade twelve*'. This means that non-formal schools which attempt to form a bridge between 'out of school' learners and mainstream schools are not provided for in the Act unless they register as independent schools. This status does not suit non-formal schools as the Act's interpretation of independent schools emphasises financial autonomy and only in some cases provides for limited state funding.

13.6.2.5 **The Gauteng Street Children Shelters Act 16 of 1998**

Gauteng seems to be the first province to have legislated on the issue of street children. The Gauteng Street Children Shelters Act provides for the establishment of a board of management as the governing body of a shelter.¹⁷¹ The Act further sets out standards with which the physical facilities of a shelter must comply.¹⁷² A shelter operator must provide each street child in its care with the following:

- (a) a development programme and a treatment plan;
- (b) a family reunification or other appropriate placement programmes;
- (c) access to educational services;
- (d) access to health services;
- (e) access to social welfare services; and
- (f) any other prescribed programme or service

A shelter operator is further obliged to provide an outreach programme for street children not within the shelter operator's care, but who are in geographical proximity of the shelter.

171 Section 12 of the Act.

172 Section 20 of the Act.

With regard to the registration of shelters, the Act stipulate that a shelter operator may not operate a shelter, unless the shelter has been registered in accordance with the Child Care Act 74 of 1983 or in accordance with section 32 of the Gauteng Street Children Shelter Act. This section states that the Head of the Department (Social Development) must consider any application for registration of a shelter.¹⁷³ Should the Head of the Department decides to grant the application, he or she may impose any reasonable conditions on a shelter in respect of its registration.¹⁷⁴ The Act further makes provision for the cancellation of registration under certain circumstances.¹⁷⁵ Also, the Act stipulates that the Head of the Department may appoint any suitably qualified or experienced person as an inspector for the purposes of monitoring compliance with the Act.¹⁷⁶ The Head of the Department is also obliged to evaluate the operation of a shelter annually and must compile an annual evaluation report for each shelter.¹⁷⁷ This report may include recommendations for changes in any matter or aspect relating to the shelter.

13.6.3 **Comparative systems in other countries**

13.6.3.1 **Defining street children**

A comparative study of legislation in other countries¹⁷⁸ could not find a comparable definition of 'children in need of special protection'. However, children in need of special protection seem to be included under the definition 'child in need of care'. With regard to street children, the United States seem to be the only country that has enacted legislative provisions to deal with the problem of street children. The Runaway and Homeless Youth Act (42 U.S.C 5701) gives recognition to the fact that children who run away from home and who live on the streets are at risk of developing serious health and other problems. The Act, however, does not define a runaway and homeless youth.

13.6.3.2 **Prevention mechanisms and strategies**

173 Section 32(1) of the Act.

174 Section 33 of the Act.

175 Section 34 of the Act.

176 Section 25 - 27 of the Act.

177 Section 30 of the Act.

178 Australia, New Zealand, United Kingdom, Botswana, Kenya, Ghana, Uganda, Namibia, Zimbabwe.

One of the least explored levels of street children intervention is that of prevention. Services to street children tend to focus on protection and rehabilitation rather than the early identification of potential street children and families 'at risk'.

Various countries have some form of early intervention programmes to ensure maximum development (physical, emotional, etc.) in the first few years in the life of children. Effective intervention/prevention can ensure that children get the love and support they need at home and do not need to seek refuge on the streets. In Canada, Ontario,¹⁷⁹ the 'Better Beginnings, Better Futures' Prevention Model helps parents (living in socio-economically disadvantaged communities) to better care for their children. This project is further aimed at preventing problems (social, emotional, behavioural, physical, cognitive) from happening in children. The following programmes are also offered to families: high quality child care, family visits, prenatal education, fathers' groups and community focussed programmes. Partnership has also developed with various professionals: social service, health, and educational organizations to ensure that families are able to access the resources they need in their own community. This project is funded by the Ontario ministries of Community and Social Services, Health and Education as well as by the federal Department of Indian and Northern Affairs and the Office of the Secretary of State.

In Australia, the Good Beginnings Volunteer Home Visiting Program is a programme using volunteer parents to 'connect with' new parents (in disadvantaged communities) to offer emotional and practical support and to help new parents to build the self-confidence they need to give their children a physically and emotionally healthy start in life. In each area, an experienced professional coordinator is responsible for selecting, training, supporting and supervising volunteer community parents. Community parents are carefully screened before any training begins. This programme is funded by the Commonwealth Government.¹⁸⁰

13.6.3.3 Non formal education outside the school system

179 Flanagan S "The 'Better Beginnings, Better Futures' Prevention Model" (1998) 16:9 **Child and Youth Care** 112.

180 The information can be accessed at <http://www.aifs.org.au/external/nch/nlaut99.html> .

In Nacala, Mozambique, the ADPP School for Street Children forms part of a project that gives educational possibilities to potential street children, who do not go to normal schools because of their age and other problems. The aim of the project is, inter alia, to help children in difficult situations to find a way to get a better future and to reintegrate children without families into the community. The project consists of the following five programmes: (a) the ADPP School for Street Children - primary school, first phase, which is divided into academic lessons, culture, sports, practical lessons and arts and caters for 1st to 5th grades; (b) the Junior Vocational School - primary school, second phase, which is divided into academic lessons, vocational skills in Construction, Commerce and Agriculture, and caters for grades 6 and 7; (c) the Secondary level which offers a similar curriculum to that of general education in Mozambique, and gives possibilities to the graduates to continue their studies up to grade 10, in the evenings; (d) the programme of Reintegration and Adoption which finds substitute families for those children who have lost contact with their parents; and (e) the Integration Programme which helps graduates to reintegrate into the community.¹⁸¹

In Uganda, an organisation named Friends of Children Association (FOCA) assists street children to attend non-formal schools where they are taught basic literacy and numeracy as well as simple book-keeping and management.¹⁸²

The Rich's Academy, located in Atlanta, is an alternative high school that caters for the needs of out-of-school children and those at risk of dropping out of school. Students are placed at random into 'family groups' of 20 - 30 members that meet daily for group counselling and referrals in the 'extended day' program which runs until 6pm. Parents are encouraged to participate and the staff visit each student's home at least once to share the program objectives.¹⁸³

In the United States, the Stuart B McKinney Homeless Assistance Amendment Act of 1990 makes provision for the education of homeless children and youth. It goes beyond mere access to schools, and calls for policies and practices aimed at attendance and success for homeless children. The Act authorises state educational agencies to make grants to local educational agencies for direct services to homeless children and youth. These support services include tutoring, remedial education services, expedited evaluation for special education programmes, counselling, social work, psychological services, early childhood programmes and referrals to

181 The information can be accessed at http://www.humana.org/projekterne/school_for_street_children_nacala.htm .

182 Cockburn A "Work with street children: lessons from Africa" **Child and Youth Care** vol.16:8 August 1998 14.

medical, dental, mental other health services.¹⁸⁴ Discretion also would exist to fund activities for the specific educational needs of runaway youth and of homeless children affected by domestic violence, and to provide other emergency assistance to permit the homeless children to attend school.¹⁸⁵

13.6.3.4 **Consent to surgical intervention and other treatment**

The Children's Protection and Adoption Act (Part VIII 76 'Consent to surgical or other treatment') of Zimbabwe makes provision for magistrates to give consent 'for medical, dental, surgical or other treatment upon a minor in the case where the consent of the parent or guardian is refused or cannot be obtained within a period which is reasonable in the circumstances. The magistrate may by order in writing authorise the performance at a hospital or other suitable place upon the minor concerned of such dental, medical, surgical or other treatment as may be specified in the order'.

Section 76(3) of the Zimbabwean Act further states that 'where the authority for the performance of any treatment has been given in terms of subsection (2), the person legally liable to maintain the minor concerned shall be liable for payment'.

13.6.3.5 **Begging**

The Children's Protection and Adoption Act of Zimbabwe has the following provision in place which may assist in the development of legislation in this regard:

Section 10: Begging and public entertainment

(1) Any parent or guardian of a child or young person who allows that child or young person or any person who causes any child or young person:-

183 The information can be accessed at <http://www.nwrel.org/scpd/c017.html> .

184 "Children without homes" (1990 - 1991) 45 **University of Miami Law Review** 363 -364.

185 Ibid at p 364.

- (a) to beg; or
- (b) to accompany him or any other person while he begs; or
- (c) to induce or endeavour to induce the giving of alms; or
- (d) to perform or be exhibited in any way for public entertainment in a manner likely to be detrimental to the child's or young person's health, morals, mind or body;

shall be guilty of an offence'.

13.6.3.6 **Supporting and reunifying street children with their families**

In Uganda, an organisation named Friends of Children Association (FOCA) has created resettlement programmes whereby children are reunited with their families.¹⁸⁶ Although the government of Guatemala has made efforts to improve its human rights situation, not much attention has been given to street children.¹⁸⁷ For this reason, a number of private organisations such as Casa Alianza (hereafter "Casa") have been created to address the issue of street children. To help children with their transition from the streets into a more stable home setting Casa has designed the following four-step programme:

A - Street educators go out on the streets to provide attention and medical care to street children. However, no food, clothing or money are given to street children as they must accept the consequences for their decision to live on the street. Street educators try to gain the trust of the children and try to convince them to leave the street and enter the crisis centres created by Casa.

B - Crisis centres for both girls and boys offer shelter, food, clothing and counselling for children who have just left the streets. Recreational activities are also provided to the children.

C - Children who stay continuously in the crisis centre for three months are ready to move on to the transition homes. The transition homes are smaller and more stable than the crisis centres.

D - The final step in the process is the group homes. The children stay in the group homes until they turn eighteen, and all of them study and work.

Finally, Casa's Family Reintegration Program strives to reintegrate street children into their families. Counselling with the child and family before and after reintegration is offered to ensure that the child does not return to the street.

13.6.4 **Comments received**

¹⁸⁶ Cockburn A **Child and Youth Care** (1998)113.

¹⁸⁷ "Street children in Guatemala City" (1995) 27:1 **Columbia Human Rights Law Review** 195.

The comments covered in this section were received in the course of a focus group discussion held in Pretoria on 8 April 1999, making use of a Research Paper on Children Living on the Street and a worksheet, coupled with written comments submitted to the Commission thereafter. Certain comments were also submitted in response to Issue Paper 13.

13.6.4.1 **Defining street children**

Question 1 of the worksheet on children living on the streets (hereafter 'the worksheet') asked:

Street children were recognised as a distinct category of children in especially difficult circumstances in the 1996 amendments to the present Child Care Act. Yet, the new definition is relevant only insofar as it links to provisions relating to the establishment and inspection of shelters. Should there be a definition of street children in a new children's statute? If so, how should it be formulated, and to what specific aspects or areas of a new statute should this definition apply? Should provisions concerning the right to basic needs fulfilment be incorporated, and if so, how? Give wording where possible.

The Homestead (Projects for Street Children), Western Cape endorsed the following definition of a street child proposed by the Western Cape Street Children's Forum: 'A person under the age of 18, unless otherwise stated, who for a variety of reasons leaves his/her family and community to survive on the street of the city and is inadequately cared for and protected by responsible adults'.

The Department of Welfare, Eastern Cape proposed the following definition of street child: 'A child without responsible adult supervision within a given living structure'.

The majority of the focus group participants supported the inclusion of a definition on street children in the new children's statute. It was further suggested that since there are different subcategories of street children, the definition should be broad, e.g., also to include runaway children.

13.6.4.2 **Prevention mechanisms and strategies**

Question 2 of the worksheet asked: *Which preventative measures can be taken to ensure that an 'at risk child' does not seek refuge on the street? How best can legislation promote these preventative or early intervention measures? Give specific examples of the kinds of legislative provisions or measures that could illustrate the policy of early intervention.*

The Homestead (Projects for Street Children), Western Cape suggested the following preventative measures:

- Identifying children at risk of dropping out of school (this is usually the first step in becoming a street child).
- Skills training for mothers in order to provide some income for at risk families.
- After school clubs providing constructive activities for children who would otherwise linger in the streets.
- Centres where children and their families can receive advice, counselling, and be referred to legal and/or material resources.

The Department of Welfare, Gauteng submitted that well-planned poverty alleviation programmes to address priorities are needed. Also, funding for preventative work should be provided.

The Department of Welfare, Eastern Cape recommended that programmes on parenting skills and child development should be provided to families. Awareness campaigns in this area are vital. Life skills programmes should be compulsory in schools. The respondent gave the following examples of legislative measures:

- Creation of job opportunities for parents who are unemployed.
- Life skills training to form part of the formal and informal school setting.
- Social work services in schools.
- Social education as part of school curricula.

The focus group participants suggested the following preventative measures:

- Education for parents, families, children.
- Empowerment of families.
- Addressing “pulling” (money) and “pushing” (alcohol abuse, violence) factors.
- Explore ways of alternative care.
- Early identification of children and families at risk.
- Grants in cases of poverty.
- Parents and prospective foster parents need to be trained in parenting skills.
- Funding programmes need to be redirected to established needs.
- More control over local authorities.
- Punitive measures against nursing staff who don't take cases seriously.

- After school care.
- Support for informal educational programmes.
- Career guidance and job preparation.
- Help to rural schools, eg career guidance and resources.
- Ideally each school should have a psychologist or social worker.
- Schools must have inter-disciplinary teams (social workers, nurses, SAPS, teachers, etc).
- More equitable distribution of resources.
- Local governments should be obliged to provide aftercare centres.
- Professionals should be required to do community work.
- Attending school should be enforced more rigorously.
- Schools must become genuinely inclusive.
- Screening for abuse and neglect.

Growing up in cities (SA research under the auspices of Street-Wise SA) submitted that children should be enabled to have a voice in the assessment of their living environments and to recommend improvements. Enabling children to make critical assessments and then to work with the community towards bettering their environment brings a level of community solidarity and support quite unparalleled in formal intervention programmes where the emphasis is on deficiency rather than self-efficacy. The respondent felt that there is a need to get away from deficiency models and concentrate more on resiliency. Communal self-efficacy will go a long way towards lessening the need for children to flee for the streets.

Assisting members of the community in discussing and prioritising their problems and wishes for development, also taking into account the needs of children and youth by having young representatives on such committees, enable them to direct their own upliftment. Then there is no need for an exhaustive list of areas that should be addressed.

13.6.4.3 **Non-formal education outside the school system**

Question 7 of the worksheet asked:

Should a comprehensive children's statute provide for street children's rights to education or is this part of education legislation? Should the children's statute go further by providing that non-formal educational structures be established as part of rehabilitation for street children? If non-formal educational structures are to be established, what should the legal provisions for this be? Who (or which department) would bear responsibility for these education provisions? What should the process of accreditation or registration be? How would such

structures be funded?

The Homestead (Projects for Street Children), Western Cape is of the view that non-formal education comprising remedial assessment, confidence building, and adult education style curricula and syllabi would be most suitable. The respondent argued that the Education Department must take responsibility for the education of all children covered by the SA Schools Act, even when this requires a reorientating foundation phase for older children. Adult Basic Education and Training (ABET) accreditation would be appropriate for 13 years and older if the children give clear indications that they cannot reintegrate, or are irrevocably opposed to, reintegration into mainstream.

The Department of Welfare, Gauteng submitted that the Department of Education should be responsible for developing the criteria for accreditation, registration and funding for non formal structures. Department of Welfare, Eastern Cape recommended that the Departments of Education and Labour should be responsible for training programmes and that non formal structures should be registered and accredited according to education standards. Further, the government should fund the structures.

The focus group participants submitted that children's legislation and education legislation can supplement each other. Further, there is a shift in education legislation to accommodate all children. Free education is, however, a myth and schools do exclude some children. The focus group is of the view that "formal" and "informal" education cannot both be accommodated in the same formal education system. Thus, the focus should be on preventative measures.

Growing up in cities (SA research under the auspices of Street-Wise SA) proposed that the focus should move from "education for street children" to "bridging education" where there is a clearly acknowledged remedial approach - and also the recognition that isolation from other children in the community is not an ideal. Children are overly labelled in our society and they feel the pain of the stigmatisation than negative labelling carries. When children are able and wish to continue formal education it should be possible for them to move naturally out of the remedial environment regardless of where they are living.

SA National Council for Child and Family Welfare (comments on Issue Paper 13) stated that the best way to protect the rights of street children is to provide legislation with financial backing for appropriate educational programmes for the children.

13.6.4.4 Access to health care services

Question 9 of the worksheet asked:

Street children, more particularly those who are not staying in shelters, seem to be hesitant to seek medical attention when ill, usually because of their lack of trust in adults. What can be done in a comprehensive children's statute to make medical care services more 'street child friendly' and to ensure adequate health care to street children? How can specific legal provisions be drafted in this regard? Who should be liable for the payment of medical treatment of street children in the absence of any legally liable caregiver?

The Homestead (Projects for Street Children), Western Cape is of the view that access to medical care does not appear to be a big problem. In the case where street children require medical attention due to injury or disease, state hospitals accept the children and treat them accordingly.¹⁸⁸ Children who need medical attention will go to a drop-in centre where they will receive first aid or be transported to hospital. Street workers also routinely take children to hospital as do members of the public. Most programmes also have access to volunteer doctors. It is, however, difficult to monitor whether children living on the street experience the same access to health services as those who are living in residential care or frequenting a drop-in centre. On the other hand the focus group participants submitted that street children are reluctant to seek medical attention and they seldom do it voluntarily but are brought by the SAPS. Also, staff at clinics are negative towards street children. They lack ID documents and birth certificates. It is suggested that shelters should offer medical services. An inter-sectoral approach is needed in terms of which the non-formal health sector is supported (subsidies). Further, mobile clinics staffed by community primary health care providers are a suggested option and referrals to hospitals can be done by mobile units. Primary health care services are free across the board. Tax incentives should be offered to private clinics that provide emergency services for street children.

The Department of Welfare, Eastern Cape suggested that free health care services should be provided for in a children's statute. Further, a registration requirement for drop-in centres should be a health staff complement. Also, the government should be liable for the payment of medical treatment of street children in the absence of any legally liable caregiver.

13.6.4.5 **Begging**

Question 5 of the worksheet asked: *Should a comprehensive children's statute, similar to the*

188 This seems to be the case in Cape Town. Whether hospitals in other parts of the country do the same are

position in Zimbabwe, prohibit any parent, guardian or other person to cause or allow a child or young person to beg or to accompany him or her while begging? What about older street children that cause younger children to beg or accompany them while begging? What would be an appropriate sanction? Should criminal sanctions be contemplated?

The Homestead (Projects for Street Children), Western Cape is concerned that making begging an offence would lead to large-scale arrests of street people of all ages.

Department of Welfare, Eastern Cape suggested that a children's statute should reflect the position in Zimbabwe and community service should be imposed as an appropriate sanction.

The focus group participants submitted that begging by children is inherently damaging. Further, as legislation cannot stand on its own, the focus should be on prevention and diversion programmes for children to develop entrepreneurial skills. There should be zero police tolerance and the parent/older child must be warned. Schools must be more active and look beyond their gates.

13.6.4.6 **Commercial sexual exploitation of street children**

Question 10 of the worksheet asked:

If a comprehensive children's statute provides for harsh punishment for anyone who sexually exploits children, should special provisions apply to those who engage or involve street children in sexual exploitation? What about older street children who exploit younger children? Should the legislation also make provision for, inter alia, counselling and support services for child victims of commercial and other forms of sexual exploitation?

The Homestead (Projects for Street Children), Western Cape is of the view that street children are more vulnerable to older youths on the streets, intimidation and assault. Thus, harsher sentences without bail should be provided for and counselling and support services are crucial for victims.

The Departments of Welfare in both Gauteng and the Eastern Cape stated that special

provisions should apply to those who engage or involve street children in sexual exploitation. The Department of Welfare, Eastern Cape submitted that provision should be made for counselling and support services for sexually exploited child victims.

The focus group participants also felt that harsher punishment should be provided for all perpetrators who sexually exploit and abuse children. Further, no special provisions should apply to abusers of street children and counselling and support services should be provided for.

13.6.4.7 Deficiencies

Question 3 of the worksheet asked:

What are the current gaps regarding shelters for street children? How can this be addressed by a comprehensive children's statute? If a comprehensive children's statute provides for alternative care options, what other options can be created for older street children who will not necessarily adapt to foster or children's home placement? If shelters are the preferred option for children living on the street, should this be a statutory placement issue? Or should referrals not be by means of what is now termed the statutory system, and is this legally viable? What should the relationship between shelters and children's homes be?

The Homestead (Projects for Street Children), Western Cape submitted that shelters are only one of a number of services offered to street children and is a very limited form of intervention. Thus, shelters need to be viewed in conjunction with other services which should include non-formal education, outreach, family mediation, drop-in centres, skill training programmes, etc. The following phased intervention model is suggested:

Outreach→drop in centre→family mediation and return home **or** intake centre→non-formal education→second phase children's home→return to formal school

The Department of Welfare, Gauteng stated that there is no coordination between the various government departments in respect of the running of shelters. Further, children should be treated in the least restrictive environment with the focus on returning them to the family as soon as possible.

The Department of Welfare, Eastern Cape identified the following gaps regarding shelters:

- Educational needs of children in shelters are neglected.
- The present structure allows for gangs to be formed.

- The staff-child ratio is insufficient.
- Discipline is lacking.
- Programmes offered in shelters are fragmented and there is no uniformity.
- Open door policies negate personal responsibility and accountability for the child's life.

The following remedial measures are suggested:

- A professional staff compliment to provide programmes should be a prerequisite for registering shelters.
- Shelters should be graded according to the following levels: level 1 - drop in centre; level 2 - statutory placement; level 3 - children's home as a last resort after all efforts of reunification have been exhausted.
- Legislation should make provision to accommodate a child in all instances up to the age of 18 years.

The following options for older children are proposed:

- Children above the age of 15 years should be accommodated in something similar to a "kibbutz" - a distinct shelter with work creation programmes.
- Foster families should be trained to care for children who are unable to adapt to conventional foster care or children's homes. An aftercare centre should be created as a bridge between a shelter or home to prepare the child for independence.

The Department of Welfare, Eastern Cape argued that placement should not be statutory but voluntary with a time frame, after which statutory intervention should take place as a last resort. As part of reunification, the family should be introduced to shelter life and the child be reintroduced to the family gradually. The respondent added that there should be no relation between shelters and children's homes although the child could be transferred from a shelter to a children's home if problems are experienced with reunification.

The focus group participants suggested that alternatives to shelters could be group homes and halfway houses. Further, shelters should be registered but should not form part of a statutory placement issue. Shelters are voluntary whereas children's homes require court intervention. Also, alternative arrangements must be made if shelters are closed.

The following comments were received on Issue Paper 13:

The National Council of Women of SA submitted that austerity type shelters should be available for street children and be subsidised. Recognising the difficulty of finding staff for these shelters, it is recommended that a psychologist with a roving commission to visit such shelters be appointed.

Mr DS Rothman submitted that street children should be sheltered within cities or towns in a manner that takes into account -

- repatriation to their own families, who are often advantaged by having their children looked after by others;
- the prevention of further influx of children attracted by such facilities and freedoms offered;
- the prevention of crimes and abuse of dependence producing substances; and
- the provision of educational and entertainment facilities to eliminate boredom etc.

He also suggested that subsidised boarding school types of facilities should be provided, instead of children's homes or schools of industries of the usual kind.

13.6.4.8 **Supporting and reunifying street children with their families**

Question 4 of the consultation paper asked:

What can be done by means of a new children's law to ensure that street children are successfully reintegrated into their families and communities? Should reunification be a statutory or non-statutory matter? Should a comprehensive children's statute make provision for the monitoring of the child's progress after he or she has been reunited with his or her family? Give specific details of proposed legislative models that could be followed to ensure that the legislation promotes reintegration.

The Homestead (Projects for Street Children), Western Cape submitted that it is a very difficult process to return children to the very situation which caused them to run away in the first place.

There is a universal assumption that both child and family want to be reunited. In most instances this is not the case. It is questioned how reunification could be a statutory matter. Who would be held liable if the child leaves the home again, as almost invariably happens? Would it be the usually indifferent parent?

The Department of Welfare, Eastern Cape proposed that reunification should be a statutory

matter. Provision should be made for monitoring the child's progress after reunification. The respondent proposed the following measures to ensure reintegration:

- Developmental assessment - care plan and individual development plan.
- Introducing the child to the home environment outside the institution and introducing the family to the institution.
- Compulsory training in parenting skills.
- Utilize families that are functioning properly to assist with the preparation of dysfunctional families.
- Local authorities should take responsibility for welfare in the community.
- Employment opportunities should be created in rural areas.

The focus group participants felt that a clearly defined process must be followed for reintegration in families. Further, reunification should be a non-statutory matter, since the child enters the shelter voluntarily. It is suggested that monitoring of the child's progress after reunification should be done by the Departments of Welfare, Education and Health. Also, the Office of the Public Protector should monitor shelters. Independent developmental and business plans are required.

The Cape Law Society (comment on Issue Paper 13) submitted that legislation should provide for the keeping of registers. The respondent referred to the problems experienced in Cape Town where many street children come from the Eastern Cape or elsewhere and no effective orders can be obtained in relation to them as they give false names and addresses and their parents cannot be traced. Hence the proposal of a computerised registry. (The Durban Committee on the other hand consider the views expressed by the Cape Law Society with regard to the implementation of a register as unrealistic.)

13.6.5 **Evaluation and recommendations**

The Commission is of the view that children living or working on the streets are a specific category of children in need of special protection. **The Commission thus recommends that the following definition of a street child be included in the new children's statute: 'A person under the age of 18 who, for reasons which may include abuse, community upheaval and/or poverty, leaves his or her family or community permanently to survive on the streets, or alternatively begs or works on the street but returns home at night, and who experiences inadequate care and protection from adults'.**

The Commission realises that the early identification of children at risk is crucial for effective prevention. **The Commission therefore recommends as follows:**

- **Each school should be responsible for identifying children at risk of dropping out of school as well as children at risk of abuse, and should take appropriate action, where necessary in cooperation with the Department of Social Development.**

- **Local Government should be accorded the following functions:**
 - **Each local government must estimate the number of street children in its area of jurisdiction.**
 - **Each local government must then furnish these figures to the Department of Education.**
 - **The Department of Education must then design appropriate programmes for the schooling of those children living or working on the streets.**
 - **The Department of Education should budget for the financing of such programmes.**
 - **Each local government may develop and support programmes and/or make available resources to NGOs to assist with the integration of children living on the street.**
 - **Each local government may identify services available and assist children living or working on the streets in its area of jurisdiction.**

While it is recognised that shelters have a limited role to play in the lives of street children, it is accepted that drop-in centres can help in the identification of street children.

The Commission would like to emphasise that the payment of a non means-tested universal grant will serve as a measure to prevent children from turning to the streets for reasons of poverty.¹⁸⁹

The Commission takes cognisance of the fact that street children often find it difficult to reintegrate into mainstream schooling due to their distinct circumstances. Further, that an alternative form of education is needed to deal holistically with the needs of the child. **The**

Commission thus recommends as follows:

- (a) That the Schools Act be amended to make provision for the creation of non formal educational structures to cater for the needs of street children and other out-of-school learners.
- (b) That the Department of Education should budget for the establishment of such structures and should develop criteria for their accreditation or registration.

Street children often find it difficult to gain access to health care services due to the fact that they do not have adult caregivers to assist them and who can give permission for medical treatment, and because of prejudice on the part of some health care workers. In order to make health care services more accessible to street children, **the Commission recommends that**

- (a) **If a medical practitioner or nurse at a hospital considers it necessary for a street child to undergo an operation or to be submitted to any treatment that requires prior consent of such child's parent or guardian, whether such operation or treatment is *urgent or not*, and the parent or guardian cannot be found, the superintendent of that hospital or person acting on his behalf may give the necessary consent.¹⁹⁰**
- (b) **The Provincial Departments of Health should budget for appropriate basic health care programmes for all children, including street children.**
- (c) **As not all street children are accommodated in shelters or frequent a drop-in centre where they will have access to health care services or from where they can be transported to hospital if needed, it is recommended that appropriate basic health care programmes should include the use of mobile clinics (vehicle/staff), where necessary, in order to provide medical care to children on the street, especially to those far from a drop-in centre. Mobile clinics should also be made available to all other children for whom basic health care services are inaccessible due to distance.**

Regarding street children in particular there are three kinds of children who beg:

- (a) Children who live on the streets. These children may use the money for food but are more likely to use the money received to feed dangerous drug and solvent addictions, or, less destructively, for video games or movies.
- (b) Children who come into the cities each day to beg, often to supplement their families' income. They usually have a place to sleep and a home to return to. These children are known as daytime strollers and no provision is made for their welfare in law.
- (c) Small children, who are managed by older youth or sometimes their parents who beg at traffic lights. 'These are the saddest, most exploited, abused and neglected of all the children seen on the streets. Coerced and afraid they have little choice'.¹⁹¹

190 See also 11.4 above.

191 Cockburn A **Child and Youth Care** 1998.

Begging is a time consuming activity and thus children tend to drop out of the mainstream school to engage in it. Apart from the physical danger and lack of schooling, begging has a disturbing side effect: the practice destroys dignity, creates an unhealthy self image and can easily be internalised as a ‘natural’ way of life.¹⁹²

The Commission therefore recommends that a child who is caused or allowed to beg should be listed as a child in need of care in terms of section 14(4) of the current Child Care Act, 1983. Poverty often forces parents or guardians to cause their children to beg. Although the Commission does not condone the acts of parents or guardians who cause or allow their children to beg, it is of the view that it would not be appropriate to make it a criminal offence for any parent or guardian who cause or allow a child to beg. However, the Commission invites comments as to whether it should be a criminal offence for a non-family member who causes or allows a child to beg.

Street children, particularly, but not exclusively female street children are exploited in the sex industry through child prostitution, child pornography and trafficking.¹⁹³ Many are drawn into the formal system of prostitution very soon after arriving in the city. Children who have been sexually exploited are dealt with as children in need of care in terms of the Child Care Act, 1983. Although in theory the Child Care Act can be used to protect children caught up in commercial sexual exploitation, in practice the Act does not adequately protect these children. There is also a lack of rehabilitative programmes to assist street children involved in commercial sex work. **The Commission therefore recommends as follows:**

- (a) **Each local government must provide an annual estimate of the number of children, including street children involved in commercial sex work in its area of jurisdiction.**
- (b) **Each local government must then furnish these figures to the Department of Social Development.**
- (c) **Each provincial Department of Social Development must then budget for the development and implementation of rehabilitative programmes to**

192 Abass-Johnstone, Z “The Right of a Child to Secure a Family Life” Community Law Centre, UWC, 1994 72.
193 See also 13.7 below.

address the specific needs of these children.¹⁹⁴

Although the insertion of the word 'shelter' into the Child Care Act makes some provision for the appropriate care of street children, it is narrowly focussed and does not accommodate other street children interventions. **The Commission therefore recommends that regulations governing outreach programmes, drop-in centres, shelters and halfway homes be drafted.** The regulations could be formulated as follows:

Application for registration as an outreach programme, a drop-in centre, shelter and halfway home for children living on the street

- (1) Application for registration as an outreach programme, a drop-in centre, shelter and halfway home for children living on the street in terms of section 30 of the Act should be made on a form determined by the Director-General.
- (2) The application shall be accompanied by:-
 - (a) the constitution of the association of persons that is to manage the outreach programme, drop-in centre, shelter or halfway home for children living on the street;
 - (b) a certificate issued by the local authority within whose area the outreach programme, drop-in centre, shelter or halfway home for children living on the street is situated or is to be erected to the effect that plans for the said building or buildings, if still to be erected, have been approved by the local authority or, alternatively, that the said building or buildings, if already erected, complies or comply with all structural and health requirements of the local authority;
 - (c) a certificate issued by the Director-General confirming that a needs assessment which supports the need for this resource in the

194 See also 13.7.7 at paragraph 4 below.

community undertaken by the applicant in collaboration with the Director-General; and

(d) in the case of shelters and halfway homes for children living on the street a certificate referred to in paragraph (c) shall also contain a confirmation that the shelter or halfway house is able to comply with residential care minimum standards.

(3) The constitution referred to in subregulation (2)(a) shall contain at least the following particulars and stipulations:

(a) the name of the outreach programme, drop-in centre, shelter or halfway home for children living on the street and a description of the category or categories of children in to be cared for;

(b) the composition, powers and duties of the management and of the executive committee or management committee, as the case may be;

(c) the powers, obligation and undertaking of the management to delegate all authority with regard to the care, behaviour management and development of children to the head of the outreach programme, drop-in centre, shelter or halfway home for children living on the street.

(d) the procedures in respect of amending the constitution; and

(e) the commitment of the management to ensure the establishment and maintenance of minimum standards as in specific regulations set out for the outreach programme, drop-in centre, shelter or halfway house for children living on the street.

(4) Registration of the outreach programme, drop-in centre, shelter or halfway home for children living on the street shall be reviewed every 24 months on the basis of a quality assurance assessment undertaken by appropriately trained officials appointed by the Director-General.

Additional requirements with which a drop-in centre shall comply

(1) Subject to the provisions of the Act and these regulations no drop-in

centre for children living on the street shall be registered in terms of section 30 of the Act or remain registered after 24 months unless the Director-General is satisfied that proper arrangements have been made to ensure that:-

- (a) the drop-in centre is run on the basis of self referral (or voluntary referral);
- (b) access is not refused to any child based on his/her race, religion, sexual orientation, sex or cultural heritage;
- (c) the drop-in centre meets the child's basic needs by providing food, clothing, developmental opportunities, primary health care and safety;
- (d) the drop-in centre is an accessible structure with adequate physical space, running water and an accessible ablution;
- (e) the drop-in centre sees itself holistically as part of the continuum of services which ensures opportunities for the development, care, education and treatment of children living on the street;
- (f) records of children who attend activities at the drop-in centre are kept by the staff;
- (g) the drop-in centre provides programmes only for children under the age of 18 years;
- (h) the drop-in centre provides each child with a developmentally appropriate plan of care, education and treatment (where necessary) and where the child has been able to participate in this plan as a partner and make changes to it;
- (i) family based services/intervention are part the programme in the drop-in centre and the emphasis is on re-unification with the family and the preservation of family life.'

Additional requirements with which a shelter shall comply

- (1) Subject to the provisions of the Act and these regulations no shelter for children living on the street shall be registered in terms of section 30 of the Act or remain registered after 24 months unless the Director-General is satisfied that proper arrangements have been made to ensure that:-

- (a) children who are of school-going age attend school or are enrolled in an appropriate alternative education programme;
- (b) the shelter is a permanent structure with enough physical space for accommodation and recreation, adequate running water, ablution facilities, bathing or showering facilities and kitchen;
- (c) in the case where shelters accommodate boys and girls, separate sleeping as well as bathing/showering and ablution facilities are provided for;
- (d) older and younger children are separated during times when there is no direct supervision (e.g. in the night when they sleep);
- (e) the environment and/or milieu in the shelter empowers staff to perform their tasks effectively;
- (f) children are provided with every opportunity to develop maturity and responsibility within the context of caring relationships;
- (g) the shelter provides 3 balance meals a day and toiletries to promote personal hygiene;
- (h) the shelter is run on a 24-hour basis by adults who are appropriately screened and trained in child and youth care;
- (i) no child over the age of 16 years is admitted to the shelter and no child over the age of 18 years of age is allowed to stay in the shelter unless he or she is in the process of completing his/her secondary education;
- (j) a documented record of children residing in the shelter is kept by the staff and management of the shelter;
- (k) children who reside in the shelter have a developmentally appropriate plan and programme of care, education and treatment (where necessary) and participate in this plan and make changes to it;
- (l) children who reside in the shelter have personal privacy, adequate free time and their own possessions;
- (m) each child residing in the shelter has contact with his/her family and friends unless such contact is deemed to inappropriate by a team of child and youth care experts.’

Additional requirements with which a outreach programme shall comply

(1) Subject to the provisions of the Act and these regulations no outreach programme for children living on the street shall be registered in terms of section 30 of the Act or remain registered after 24 months unless the Director-General is satisfied that proper arrangements have been made to ensure that:-

- (a) the outreach programme diverts children back to their communities and/or families or to appropriate statutory or non statutory interventions;
- (b) self-referral forms an intrinsic part of the programme;
- (c) contact time with the child's community and family is established in the shortest time possible;
- (d) an individual programme for the child based on his/her needs, developmental stage and personal circumstances is an intrinsic part of the outreach programme;
- (e) links the children's needs to existing resources such as day hospitals, dental clinics, health clinics and, where appropriate, shelters;
- (f) documented records are kept of all children with whom contact is made;
- (g) the outreach programme is conducted by adults who are appropriately trained in child and youth care work and who are appropriately screened to render an effective outreach service;
- (h) appropriate community involvement in the outreach programme is promoted.'

Additional requirements with which a halfway home shall comply

(1) Subject to the provisions of the Act and these regulations no halfway home for children living on the street shall be registered in terms of section 30 of the Act or remain registered after 24 months unless the Director-General is satisfied that proper arrangements have been made to ensure that:-

- (a) the halfway house is situated in a community where the child/youth is likely to find more permanent accommodation;
- (b) the halfway home is a permanent structure with enough physical space for accommodation and recreation, adequate running water, ablution facilities, bathing or showering facilities and kitchen;
- (c) an adult, or adults, who is/are adequately trained in child and youth care work resides in the home on a 24 hour basis;
- (d) the home emphasises confidence building, allowing the child/youth to learn responsibility and independent living;
- (e) the general maintenance and running of the home, such as paying accounts are the responsibility of the residents;
- (f) a vocational skills programme encompassing vocational guidance and skills training is, where possible, run with available community resources.'

With regard reunification of street children with their families, **the Commission recommends that -**

- (a) Counselling be done with both the child and the family before reintegration in order to prepare them for the moment of reintegration.**
- (b) A social service inquiry be conducted to determine why the child left home and to address the issues that have caused the child to leave the family home; and**
- (c) Counselling be done with both the child and the family after reintegration to ensure that the child does not leave the family home and community again.**

13.7 Commercial Sexual Exploitation of Children

13.7.1 Introduction

This section focuses on the care and protection of children who have been, are being or are in

danger of being sexually exploited for commercial reasons, as a category of children in need of special protection. The need to focus on this category of children is mandated, inter alia, by the Stockholm Agenda for Action,¹⁹⁵ to which South Africa has committed itself.

Traditionally, commercial sexual exploitation of children is divided into three categories, namely child prostitution, child pornography and the trafficking of children for sexual exploitation. There is no rigid distinction between these categories as children can also be trafficked¹⁹⁶ for more than one of the stated purposes.

Commercial sexual exploitation of children is defined as the ‘procurement of a child to perform a sexual act for a financial or other reward payable to the child, the parents or guardian of a child, the procurer or any other person’.¹⁹⁷ The Commission has critically analysed the current provision on commercial sexual exploitation in both its investigation into Sexual Offences¹⁹⁸ and in Chapter 6 above and has decided to incorporate the provisions criminalising commercial sexual exploitation in the new sexual offences legislation and not the new children’s statute.¹⁹⁹

195 The Stockholm Agenda for Action was unanimously adopted by the World Congress Against the Commercial Sexual Exploitation of Children on 28 August 1996. The Agenda for Action covers areas such as coordination and cooperation, prevention, protection, recovery and reintegration, and child participation. See further Rose Barnes-September et al **Child Victims of Prostitution in the Western Cape** Bellville: Institute for Child and Family Development, UWC 2000, p. 131 - 134.

196 The trafficking of children (in general terms) was dealt with in section 3.5 above.

197 The definition was introduced by the Child Care Amendment Act 13 of 1999.

198 See also S A Law Commission **Discussion Paper 85: Sexual Offences: The Substantive Law**, August 1999, par. 3.7.11.

199 Section 22.5.4 below.

13.7.2 **Trafficking in children for purposes of commercial sexual exploitation**

This section focusses only on trafficking²⁰⁰ in children for purposes of commercial sexual exploitation. As we have seen,²⁰¹ trafficking in children is not limited to the commercial sexual exploitation of those children and legal provisions need to cover trafficking for other purposes such as, for example, labour or organ removal. To this end, we have recommended the inclusion of specific child anti-trafficking provisions in the new children's statute.²⁰² For an overview of how the current South African legal system deals with the problem of trafficking in children, the reader is referred to 22.5.3 below.

Although South Africa has no anti-trafficking legislation, several legal remedies in the Child Care Act, 1983 can be used to protect children who have been or are being trafficked for purposes of commercial sexual exploitation. The Child Care Act, 1983, as amended, stipulates that a child is a child in need of care if the child (a) has been abandoned or is without visible means of support, (b) lives in circumstances likely to cause or conduce to his or her seduction, abduction or sexual exploitation, (c) lives in or is exposed to circumstances which may seriously harm the physical, mental or social well-being of the child, (d) is in a state of physical or mental neglect, and (e) has been physically, emotionally or sexually abused or ill-treated by his or her parents or guardian or the person in whose custody the child is.²⁰³ A trafficked child can thus be declared a child in need of care and placed in suitable alternative care in terms of this Act. The Act makes it a criminal offence for any parent or guardian of a child or any person having the custody of a child to ill-treat that child or allow that child to be ill-treated.²⁰⁴ Ill-treatment per definition will certainly include trafficking of children for commercial sexual exploitation. The Act further declares the participation or involvement by **any** person in the commercial sexual exploitation of a child an offence.²⁰⁵ It is also unlawful in terms of the Child Care Act, 1983 to abduct or harbour an abducted child.²⁰⁶

13.7.3 **Comparative systems in other countries**

200 For a definition of trafficking, see chapter 22 at 22.5.1 below.
 201 See chapter 22 at 22.5.1 below.
 202 See section 22.5.4 below.
 203 Section 14(4)(AB) of the Child Care Act, 1983.
 204 Section 50(1) of the Child Care Act, 1983.
 205 Section 50A of the Child Care Act, 1983.

13.7.3.1 United States of America

The US **International Trafficking of Women and Children Victim Protection Bill** of 1999, recognises that trafficking in women and children is a fast-growing international business and that trafficked women and children are often subjected to rape and other forms of sexual abuse by their traffickers and often held as virtual prisoners by their exploiters. This Bill seeks to improve protection for victims of trafficking by:

- providing trafficked victims in the USA with humanitarian assistance;
- allowing trafficked victims to remain in the USA for up to three months, or as long as necessary to seek asylum and/or pursue civil or criminal action against those who have abused their human rights;
- increasing funding for services for trafficked victims in countries around the world and creating programs and activities to assist these women and girls internationally;

- revoking the eligibility of foreign governments to receive police assistance²⁰⁷ if they fail to take effective action to investigate and prosecute officials who are involved in trafficking;
- banning common forms of involuntary servitude and debt bondage in the USA;
- establishing an inter-agency task force to monitor and combat trafficking which will report on the status of international trafficking to Congress once a year.

Although laudable in what it aims to achieve, the Bill has not become law in the USA.²⁰⁸

13.7.3.2 Italy

Italy, a destination country for trafficked persons, in 1998 adopted Legislative Decree no. 286 which gives victims who decide to shun prostitution and leave the streets the opportunity to be rehabilitated, to engage in alternative trade and employment and to settle down to 'decent' living in Italy. To qualify for such protection, prostitutes must renounce their trade and provide information that could lead to the arrest and prosecution of their sponsors or pimps. A number of NGOs in Italy are involved in the rehabilitation of prostitutes. The Embassy of Nigeria in Italy also supports the Italian rehabilitation programme by issuing the victims of trafficking with the necessary documents like passports. This is on request by NGOs and after verification that the

207 Police assistance means (i) assistance of any kind, whether in the form of grant, loan, training, or otherwise, provided to or for foreign law enforcement officials, foreign customs officials, or foreign immigration officials; (ii) government-to-government sales of any item to or for foreign law enforcement officials, foreign customs officials or foreign immigration officials; and (iii) any license for the export of an item sold under contract to or for the officials described in (i).

208 This Bill was introduced in the 106th session of Congress, but was not passed in that session. It has since

prostitutes are no longer in the trade and actually undergoing rehabilitation.²⁰⁹

13.7.3.3 Thailand and China

209 not been reintroduced in the current congress.
Most Nigerian children, particularly girls are trafficked to Italy. Some are deceived in that they are promised work in Italy, but on their arrival are informed that they will be required to work in the sex industry. Others know that they will be working in the sex industry.

With regard to Thailand and the Yunnan Province of China, police agencies have agreed to cooperate in a repatriation program of Yunnanese girls trafficked into prostitution in Thailand. Thai authorities and NGOs are to inform the Chinese Embassy or Chinese Consulate in Thailand in case they come across trafficked victims from the Yunnan Province. The Chinese authority will provide support in repatriating the victims and finally reintegrate the victims into their homes, villages, schools etc.²¹⁰

13.7.3.4 **Cambodia**

In Cambodia, many people, and particularly women and children, are vulnerable to exploitation in the form of sexual abuse, abduction, sale, and trafficking due to poverty. The problem is exaggerated by poor law enforcement and the involvement of police officials in trafficking in persons. Many young girls in rural areas are taken by agents to the city or other countries to work in jobs described to be honest and well paid. In actual fact, nearly all of these girls forcibly end up in the sex industry.

Cambodia has, however, taken measures to stop the kidnapping and trafficking of women and children into prostitution. In January 1996, its National Assembly adopted a law on the Suppression of the Kidnapping or Sales of Human Persons. This law, inter alia, imposes a 15 to 20 year prison sentence on those who lure and kidnap persons under the age of 15 for trafficking or sale into prostitution. Many programs in Cambodia by government and NGOs which promote the welfare of women and children, include the prevention of their kidnapping and trafficking.²¹¹

13.7.3.5 **Japan**

Article 8 of the Japanese Law for Punishing Acts related to Child Prostitution and Child Pornography, and for Protection of Children, 1999 makes it a criminal offence for any person to buy or sell a child for the purpose of making the child be a party to sexual intercourse (e.g. for child prostitution) or for the purpose of producing child pornography. The Article further provides that a Japanese national who, for purposes of child prostitution or child pornography, transports a child who has been abducted, kidnapped, sold or bought in a foreign country, out of that country, shall be guilty of an offence.

210 Report on Combatting the Trafficking in Children and their Exploitation in Prostitution and Other Intolerable Forms of Child Labour in Mekong Basin Countries, June 1998.

211 Ibid.

13.7.3.6 African countries

Trafficking in children is a widespread practice in West Africa. Trafficking routes within West Africa include Benin, Cote d'Ivoire, Gabon, Ghana, Mali, Nigeria, Togo, Cameroon, Burkina Faso, Guinea and Niger. While some of these countries are sending countries (suppliers of trafficked children), others are receivers, and others are transit countries. Some countries are both sending and receiving. Although internal child trafficking exists within the borders of West African countries, little is known about it.²¹² Eighty percent of trafficked persons from sub-Saharan Africa and Nigeria in particular, are young girls, including minors of between 12 to 16 years.²¹³ Nigerian girls who are enslaved for sex exploitation in Europe number at least 50 000.²¹⁴ Studies undertaken by UNICEF in 1998 and 2000 show that poverty, cultural values and traditional belief systems combine to weaken the protection of children's rights and push children towards traffickers.

13.7.4 Evaluation and recommendations

The provision of effective and efficient services linked to the availability of resources to children in need of special protection should remain the primary preventative strategy. However, it

212 "Child trafficking in West and Central Africa": Paper presented by Dr R Salah, UNICEF Regional Director for West and Central Africa, at the First Pan African Conference on Human Trafficking in Abuja, Nigeria on 19 - 23 February 2001.

213 Paper presented by the Embassies of Nigeria, Rome, Italy at the First Pan African Conference on Human Trafficking, Abuja, Nigeria.

214 "Report on Nigerian Prostitution in Europe": Paper presented at the First Pan African Conference on Human Trafficking, Abuja, Nigeria.

should be evident that the new children's statute on its own cannot address the numerous and varied root causes underlying the trafficking of children for commercial exploitation.²¹⁵ Indeed, only a prolonged, massive, integrated programme of economic and social upliftment can hope to make a difference. In the long term, however, such a programme will be our only salvation.

215 The Molo Songololo report **The Trafficking of Children for Purposes of Sexual Exploitation - South Africa** Cape Town: Molo Songololo 2000 cites the following reasons: Poverty and school drop-outs; lack of effective safety and protection services for children; the sexual abuse of children; high levels of domestic violence; lack of effective welfare support; increased urbanisation; and parental involvement.

Where a child is trafficked to South Africa from another country, the Commission has recommended in this Discussion Paper that **such a child should be afforded refugee status**,²¹⁶ entitling the child to the protection measures such a classification will bring. In particular we wish to point out that such a child would enjoy full legal protection, in accordance with the rights set out in the Bill of Rights to the Constitution and the Refugees Act 130 of 1998, in South Africa. Where such a refugee child is found under circumstances which clearly indicate that the child in question is in need of care as contemplated in the Child Care Act, 1983, he or she must be brought before the children's court. The children's court enquiry can then trigger the full possible range of protection measures available under the Child Care Act, 1983.

In this Discussion Paper,²¹⁷ the Commission has also recommended the inclusion, in the new children's statute, of **a general provision criminalising the trafficking of children**. Trafficking for commercial sexual exploitation would be but one of the possible forms such an indictment can take.

The Commission believes that severe criminal sanctions linked to trafficking and the other forms of commercial sexual exploitation, the strengthening of the sexual offences legislation, the application of extra-territorial legislation, etc. will serve as a significant deterrent and therefore preventative measure. However, the criminal law has its limitations,²¹⁸ notably when it comes to enforcement.²¹⁹ In this regard the Commission would like to repeat that it is necessary, in addition to ensuring economic upliftment, to raise awareness, to have educational campaigns, etc. NGO's, CBO's and other structures in civil society have an important role to play in this regard.

216 See section 22.5.4 below.

217 See section 22.5.4 below.

218 Joan van Niekerk 'Children and survival sex in Kwa-Zulu Natal', in Rose Barnes-September, Anne Mayne and Ingrid Brown-Adam (eds) **The National Consultative Conference against the Sexual Exploitation of Children, 16 - 18 March 1999** Cape Town: Institute for Child and Family Development, UWC 1999, p. 28: '[C]hanges to law on their own will do little to address the root causes of child sex work. The law is only as effective as those who administer and apply it'.

219 It is recognised, for instance, that it would be easier to prosecute a person for trafficking a foreign child to South Africa, than to prosecute a South African who traffics children from informal settlements in the north of Johannesburg to the northern suburbs of Johannesburg (the in-country trafficking). Foreign children have to go through some port of entry, are more visible and therefore easier to spot.

Research shows that South African children are increasingly being trafficked by their own parents into slavery or prostitution in order to generate an income or to pay off a debt.²²⁰ The authorities and the Children's Court will have little difficulty in proclaiming such a trafficked child a child in need of care; to summarily remove that child, and to place that child in alternative care. In these circumstances,²²¹ it seems rather pointless to expect social workers to perform family reunification services in order to have the child returned to the very person(s) who trafficked him or her in the first place. This is not to say that other welfare services should not be rendered to such family. Indeed, given the extremes to which the parent(s) have gone in trafficking their own child, it should certainly cause red lights to flash. This should be particularly true where other siblings remain with the parents. For this reason, **the Commission recommends that if a court finds that a child has been trafficked for purposes of commercial sexual exploitation by his or her parents or any other person legally responsible for the child, all parental rights of that person be suspended pending an enquiry,²²² that the court holding such an enquiry may terminate all parental rights,²²³ and that the child immediately be placed in alternative care.**

13.7.5 Child Prostitution

13.7.5.1 Introduction

Child prostitution²²⁴ is regarded as one of the manifestations of commercial sexual exploitation of children, and can be defined as the sexual exploitation of a child for remuneration in cash or in kind to the child, usually, but not always facilitated by an intermediary (pimp, parent, family member, etc.).²²⁵

In its **Discussion Paper on Sexual Offences: The Substantive Law**, the Commission recommended that a complete ban should be placed on child prostitution and that anyone involved in the sexual exploitation of a child, whether as a pimp or customer, should face severe

220 Molo Songololo **The Trafficking of Children for Purposes of Sexual Exploitation - South Africa**, p. 34; Rose Barnes-September, Anne Mayne and Ingrid Brown-Adam (eds) **The National Consultative Conference against the Sexual Exploitation of Children, 16 - 18 March 1999**, section III.

221 As would be the case when babies are abandoned.

222 The parent(s) may be under some form of duress or child may wish to return home to his or her parents.

223 See Chapter 8 on the termination of parental rights and responsibilities below.

224 The trend is to move away from the term 'prostitution' to 'commercial sex work'. While the phrase 'commercial sex work' might be less derogatory and more applicable to use in the adult context, the Commission wishes to point out that prostitution should never be a viable career option for children.

225 S A Law Commission **Discussion Paper 85: Sexual Offences: The Substantive Law**, par. 3.7.3.1.

criminal sanction.²²⁶ The Commission stated that the child prostitute should be regarded as a victim in need of care and protection and should not be prosecuted.²²⁷ The Commission further stated that the force of the criminal law should be harnessed to prosecute the customer, pimp, procurer, and parents and guardians who wilfully cause children to participate in child prostitution.²²⁸ Therefore this section will focus on the care and protection of children engaged in prostitution;²²⁹ the criminal law aspects are being dealt with by the Project Committee on Sexual Offences.

13.7.5.2 Child prostitution within the borders of South Africa

226 Par. 3.7.10.2. This included recommendations for the removal of trade licences, confiscation of property, fines, etc. where children are being accommodated on premises for the purpose of prostitution.

227 The rationale is based on the laws of supply and demand: Reduce the demand by making it extremely unattractive for the customer and the facilitators to sexually exploit children thereby reducing the supply of child prostitutes onto the market.

228 Ibid.

229 The Project Committee on Sexual Offences is looking specifically at **adult** prostitution (adult commercial sex work) and is in the process of finalising a discussion paper in this regard.

It is believed that child prostitution is on the increase in all major South African cities. At least 4000 children are estimated to be among the 10 000 prostitutes jostling for clients in the streets of Johannesburg.²³⁰ The House Group, an organisation working in Hillbrow, estimates that 40% of sex workers in Johannesburg are under 18.²³¹ Child prostitution is becoming a growing problem in Cape Town and the mother city is fast becoming a child sex tourist destination where tourists can pay as little as R50 for sex with a child.²³² An estimated 25% of people working as prostitutes in the Western Cape are children under 18.²³³ Messina, situated in the Northern Province, has disturbing reports of child prostitution.

Ms Joan van Niekerk of Childline, Durban says it is essential to note that the use of the child sex worker - especially the street child - is usually not by a child sex tourist. Many paedophiles may use street children sexually despite the high risk of sexually transmitted disease because the likelihood of being reported is negligible. 'The street child has little value, the police are unresponsive to complaints of abuse by the street child and the child and user remain relatively anonymous to each other'. She says some paedophiles believe that they are actually doing the child a favour - "if it was not for me the child would not survive - not have food or the glue to sniff that makes life bearable". Ms Van Niekerk says poverty, lack of family support, and the decimation brought about by HIV/AIDS to families and communities are contributing enormously to the phenomenon of child sex work in Durban.

230 **The Star**, 24 May 2000 by Claudia Mpeta.

231 The information can be accessed at http://www.thenextstep.co.za/child_prostitution.htm .

232 **Sunday Times** news, 21 March 1999; This appears to be linked to the increase in tourism to South Africa.

233 **Cape Times** news, 21 June 1999.

There are many reasons why children become involved in prostitution,²³⁴ but again the main reason seems to be poverty.²³⁵ Apparently, some poor families allow the prostitution of their children as they have no other stable source of income.²³⁶ For child headed households prostitution may be the only means of supporting oneself and one's siblings.

Often the entry of children into sex work is survival driven - the prohibitions on child labour of other forms and the absence of child support grants / maintenance for children over 7 years makes some children more vulnerable to entering the sex work 'market'. However, the large sums of money that can be earned - large in comparison to any other possibility open to the child - does create a desire to remain involved in the work. This, and the high levels of drug and alcohol use among child sex workers, often introduced to the child by the user or pimp because drug use and dependence makes the child more controllable and manipulable, and drug and alcohol use often continued by the young person because it makes what they are involved in more bearable, must also be addressed.

Is it also worth mentioning that child sex workers are also preferred to adult workers in

234 As to how children become involved, see Robinson L N "The Globalization of Female Child Prostitution: A Call for Reintegration and Recovery Measures Via Article 39 of the United Nations Convention on the Rights of the Child"; Barnes-September et al **Child Victims of Prostitution in the Western Cape**, p. 9 et seq.

235 Rose Barnes-September, Anne Mayne and Ingrid Brown-Adam (eds) **The National Consultative Conference against the Sexual Exploitation of Children, 16 - 18 March 1999**, p. 9 : 'In developing countries, macro social and economic factors are important determinants in the increase in the prostitution of children. It seems that the prostitution of children dramatically increases in countries undergoing structural adjustments related to social, political and economic struggles and upheavals. As a result, children become economic and sexual commodities. Because of the disparity between rich and poor, parents become victims of coercion and manipulation and sell their children to brothel owners. In addition, children are more likely to be orphaned or left to care for themselves while parents look for migratory work. In South Africa, thousands of children's lives are endangered, placed at risk and negatively impacted upon because of conditions that leave them vulnerable to recruitment into the sex industry. Children involved in prostitution are more vulnerable to gang violence, drug and alcohol abuse, isolation, and to being condemned and ostracised by families, peers and many sectors of society'.

236 The information can be accessed at <http://www.zoutnet.co.za/archive/2000/February/25th/newsfeb25.asp?StoNum=22> .

communities where HIV/AIDS anxieties are high and the child sex worker is (mistakenly) seen as safer than an adult sex worker. Children also are less likely to be able to insist on condom use. These two factors contribute to an enhanced demand for child sex workers.

13.7.5.3 **Child prostitution and the South African legal system**

An overview of the legislation addressing the issue of child prostitution is given by the Commission in its **Discussion Paper on Sexual Offences: The Substantive Law**.²³⁷ The **draft Sexual Offences Bill** (2001) converges the various offences that target different role-players involved in child prostitution into one universal offence namely 'involvement in child prostitution'. The potential role-players in this offence have also been extended to those who can be considered to be trafficking in children as a trafficker is merely one of several participants in child prostitution. The Bill makes having knowledge of the commission of indecent acts or acts of sexual penetration with a child an offence. Any person who has such knowledge and who fails to report it within a reasonable time will be guilty of the offence of 'failure to report knowledge of child prostitution.' Any person who intentionally receives any reward, favour or compensation from the commission of indecent acts or acts of sexual penetration with a child by any person is guilty of the offence of 'benefiting from child prostitution'. Also, any person who intentionally lives on rewards, favours or compensation for the commission of indecent acts or acts of sexual penetration with child by any person is guilty of the offence of 'living from the earnings of child prostitution'. The Bill also criminalises the organising or facilitation of child sex tours within or to South Africa in any way.

13.7.5.4 **Comparative systems in other countries**

13.7.5.4.1 **Thailand**

Thousands of girls are drawn into the Thai sex industry every year to supplement family income. The selling of young girls by their parents to procurers has also been prevalent in Thailand, especially in the North.²³⁸ In order to address the increasing problem of child prostitution, the government of Thailand has strengthened child prostitution laws by enacting the Prostitution and Suppression Act B.E. 2539 (1996). This Act makes it a serious crime to engage a prostitute if she is under 18 years of age. Parents who collude with sex traffickers could face a jail sentence of four to 20 years and guardianship of their children can be revoked. As far as the Act relates

237 Discussion Paper 85, par. 3.7.3 et seq. A discussion paper contains the Commission's **preliminary** views and recommendations.

238 The information can be accessed at <http://www.sexwork.com/>.

to the protection of children involved in prostitution, it provides that all prostitutes not over 18 years of age must receive protection and vocational development for a period not exceeding two years. Also, the private sector, a foundation, institution or association with the objective of prevention and rectification of prostitution problems can file an application with the authority to establish a primary shelter or a protection and vocational development premises.

13.7.5.4.2 **Britain**

In Britain, the Department of Health has issued guidelines on how to deal with children involved in prostitution. The aim of the guidelines is to safeguard and to promote the welfare of children involved in prostitution and to encourage the investigation and prosecution of those who coerce children into prostitution. These guidelines also enable the relevant agencies to treat the child as a victim of abuse. In terms of these guidelines, a child who is at risk of or involved in prostitution must be considered for immediate referral to the multi-agency group who will meet as soon as possible to consider the situation. This multi-agency group consists of individuals from the Police, Social Services, Health, Education, Youth Service, Probation Service, the Crown Prosecution Service, local voluntary child care agencies and national organisations.

Each role-player has its own responsibility, e.g. the police will play a leading role in the investigation of the crime. The functions of the multi-agency group are: (a) to provide a local resource and source of expertise for those who have concerns that a child may be at risk of being drawn into prostitution; and (b) to provide an initial forum for considering an individual case (or group of cases) when children are found to be involved in prostitution. When considering a case, the multi-agency group need to consider the following: (a) the needs of the child and what arrangements may be necessary for his or her immediate safety; (b) how to coordinate the arrangements for the child's safety with any criminal investigations, and (c) how the arrangements for continuing protection and diversion will be taken forward. If the child is found to be a child in need, he or she must be dealt with under section 17²³⁹ of the Children's Act, 1989 and a child and family assessment should be undertaken. After the assessment, a decision is taken on what help is required to meet the child's needs and a plan should be developed based on the findings of the child and family assessment. Lastly, arrangements then need to be put in place for the implementation and review of the plan.²⁴⁰

13.7.5.4.3 **Japan**

239 This section deals with the provision of services for children in need, their families and others.

In Japan, the Law for Punishing Acts related to Child Prostitution and Child Pornography, and for Protecting Children makes it a criminal offence for any person to commit child prostitution.²⁴¹

Child prostitution is defined in Article 2 of the Act as the act of performing sexual intercourse, an act similar to sexual intercourse, or an act for the purpose of satisfying one's sexual curiosity, etc with a child or of making a child perform such a sexual act in return for giving, or promising to give, a remuneration either to the child, an intermediary, or the protector of the child. The Act also makes it a criminal offence for a person to act as an intermediary in child prostitution²⁴² or to solicit another person to commit child prostitution.²⁴³

13.7.5.5 Evaluation and recommendations

The Commission is considering the aspects relating to the criminalising of child prostitution in its investigation into sexual offences. For present purposes, it suffices to say that our principal approach to child prostitution is that **the child prostitute is not a criminal, but a child in need of care and protection**. Given the focus of the envisaged new sexual offences legislation and the Government's commitment to eradicate child prostitution, it is expected that stricter enforcement and more criminal investigations will bring to light more children involved in or affected by child prostitution. The Commission recommends that where a criminal investigation reveals that a particular child has been involved in prostitution, such child be treated as a child in need of care and be brought before the children's court. Where necessary, the child must be removed to a place of safety, but this should not be the general rule. For instance, it might be more appropriate to arrest and remove a father who pimps his child, than to remove the child.

240 The information can be accessed at <http://www.homeoffice.gov.uk/cpd/sou/child991.htm> .

241 Article 4. The punishment is imprisonment with labour for not more than three years or a fine of not more than one million yen.

242 Article 5(1).

243 Article 6(1).

After an assessment of the child and his or her family, the children's court should make an appropriate order. This order can include the allocation of some form of grant, the placement of the child in alternative care, the removal of the perpetrator from the family, rehabilitation services for the child, etc. While the Commission would support initiatives which allows (former) child prostitutes the opportunity to advance their education and or to acquire marketable skills through **voluntary** rehabilitation efforts,²⁴⁴ it does not support the idea (along the Thailand model) of forcing child prostitutes to receive vocational developmental training for certain periods of time.

The Commission is aware that some children are being sexually exploited, sometimes with the knowledge and active participation of parents or care-givers, because that is their only source of income. It is sad that some children (and adults) are compelled by circumstances to engage in what has become known as 'survival sex' in order to keep themselves or other siblings or family members alive. Again the Commission stresses the need to address the socio-economic circumstances of children in a holistic, integrative fashion.²⁴⁵

There is another group of children who are mainly runaways, often from abusive home environments, where they might have been sexually abused, who get onto the city streets and are systematically drawn into prostitution and drug and alcohol addiction. Ideally, preventative measures should address the home situation of these children before they run away. However, once these children are trapped in the sex industry, special rehabilitation and skill-building programmes are needed in order to get them to break free - the existing places of safety, children's homes, foster care system, etc., simply cannot meet their needs.

Lastly, the point must be made that adult prostitutes (or commercial sex workers) are not *per se* unfit parents. The fact that a child's parent or care-giver is a prostitute does not imply that that

244 This is also recommended by Rose Barnes-September et al **Child Victims of Prostitution in the Western Cape**, p. 135. See also R E Booth, Y Zhang and C F Kwiatkowski "The challenge of changing drug and sex risk behaviour of runaway and homeless adolescents" (1999) 23 **Child Abuse and Neglect** 1295.

245 This is also recommended by Rose Barnes-September et al **Child Victims of Prostitution in the Western Cape**, p. 136.

child is in need of care. Indeed, such parent or care-giver may well be prostituting himself or herself in order to maintain his or her child.

13.7.6 **Child pornography**

13.7.6.1 **Introduction**

Child pornography depicts the participation of children in sexual activities with adults or other children. This type of activity is universally condemned as inappropriate to the psychological and physical well-being of children and, as such, it has been suggested,²⁴⁶ does not deserve to be protected by the constitutional guarantee of freedom of expression. Often the children used in the production of the pornography are subjected to extreme, severe and violent forms of abuse. There is also evidence that such practices fuel the development of paedophilic tendencies and hence the possible increase in incidences of sexual abuse of children.

By all accounts the problem of child pornography is growing in South Africa. Child pornography on the Internet in particular is a matter of great concern and there is pressure from various sectors that Internet service providers should be obliged to monitor the use of their services for the dissemination of child pornography. The issue of child pornography is receiving specific attention in the Commission's investigation into Sexual Offences.²⁴⁷

13.7.6.2 **Child pornography and the South African legal system**

²⁴⁶ **Case v Minister of Safety and Security; Curtis v Minister of Safety and Security** 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) para [105] and [107] per Madala J.

²⁴⁷ Although the Commission did express the opinion in **Discussion Paper 85: Sexual Offences: The Substantive Law** that child pornography should be addressed comprehensively in specific legislation such as the Films and Publications Act 1996 and not the new sexual offences legislation, the Project Committee has decided, in the light of comments received, to prepare a specific discussion paper on child pornography.

The Films and Publications Act, 65 of 1996,²⁴⁸ as amended by Act 34 of 1999, defines child pornography to include ‘any image, real or simulated, however created, depicting a person who is or who is shown as being under the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children’. The Act makes it an offence for any person who ‘knowingly creates, produces, imports or is in possession of a publication which contains a visual presentation of child pornography; or creates, distributes, produces, imports or is in possession of a film which contains a scene or scenes of child pornography’.²⁴⁹ The production and possession of child pornography is thus completely prohibited.

13.7.6.3 Comparative law

While there is an abundance of provisions on the prohibition of the possession or distribution of child pornography, only one example related to the protection of children who have suffered as a result of child pornography (and child prostitution) could be found. According to Article 14(1) of the Japanese Law for Punishing Acts related to Child Prostitution and Child Pornography, and for Protecting Children, 1999, in light of the fact that acts such as child prostitution and the distribution of child pornography would seriously affect the mental and or physical growth of children,²⁵⁰ the State and local public entities must endeavour to educate and enlighten the public to deepen their understanding of the rights of children. To this end, the state and local public entities must endeavour to promote research and studies that can help prevent such acts as child prostitution and the distribution of child pornography.

The unofficial translation²⁵¹ of Article 15 of this Act reads as follows:

Protection of Children who have suffered Mental or Physical Damage

1. With regard to children who have suffered mental and or physical damage as a result of having been a party to child prostitution or having been

248 Steps are being taken to combat child pornography through effective law enforcement. See the report of the National Workshop on Combatting Child Pornography through Effective Law Enforcement, Cape Town, 12 - 14 May 2000, hosted by the Films and Publications Board, the papers presented at a special training session on Investigative and Prosecution Techniques for On-line Child Exploitation Investigations convened by the Director of Public Prosecutions, Pretoria, 6 -7 September 1999.

249 Section 27 (a) and (b) of the Act.

250 For a South African perspective on the links between pornography and child sexual abuse, see Doreen Meissner “Will control of, and education on, pornography reduce sexual abuse and exploitation of children?” in Barnes-September, Mayne and Brown-Adam (eds) **The National Consultative Conference against the Sexual Exploitation of Children**, p. 50. See also Anne Mayne “The links between adult and child pornography” in Barnes-September, Mayne and Brown-Adams (eds) op cit, p. 52.

251 Draft received from the Embassy of Japan, Pretoria, via the Department of Foreign Affairs, in November 1999.

depicted in child pornography, the relevant administrative agencies shall, in co-operation with one another, taking into account the mental and physical conditions of the children as well as the environment in which they have been placed, properly take necessary measures for their protection so that they can recover physically and mentally from the damage they have suffered and grow with dignity. Such measures include consultation, instruction, temporary guardianship and placement in an institution.

2. The relevant administrative agencies shall, in the case of taking the measures mentioned in the preceding paragraph, provide the protector of the child with consultation, instruction or other steps if such steps are deemed necessary for the protection of the child mentioned in the said paragraph.

Article 16 of the Act states that in order to be able to properly provide protection based on professional knowledge with regard to children who have suffered mental and or physical damage as a result of having been a party to child prostitution or having been depicted in child pornography, the state and local public entities must endeavour to promote research and studies on the protection of such children, reinforce systems of cooperation and liaison among relevant agencies in case of the urgent need of protection of such children, arrange systems of cooperation and liaison with private organisations which undertake the protection of such children, and arrange other necessary systems.

13.7.6.4 **Evaluation and recommendation**

It is very difficult to trace and find the actual children used in the production of child pornography.²⁵² This, and the easy access to the Internet and concomitant technological advances, effectively limit the possibility to provide care and protection to the specific children originally used. Indeed, the children might not even have known that images taken of them would be used in pornographic material.²⁵³ Where it is possible to trace an individual child used in the production of pornographic material, and such child is found to be in need of care, then

252 The child might be a Russian national, the photo taken in Germany, the developments done in Britain, the magazine published in the USA, and sold in South Africa.

253 It is technical possible to superimpose the face of a child on an adult engaged in explicit sexual acts.

such child should immediately be brought before the children's court.²⁵⁴

254 Ms Joan van Niekerk of Childline, Durban, however, is of the opinion that children's court proceedings are not necessary in all cases where children have been used in pornography.

Children must also be protected from viewing pornographic material.²⁵⁵ In this regard, it appears that the monitoring mechanism in the Films and Publications Act 1996 is better geared to regulate access to films and publications than access to the Internet. Clearly, parents and care-givers have a responsibility to limit the access of their children to pornographic sites and this can easily be done by installing the appropriate software filters. In addition, **the Commission recommends that an obligation be placed on Internet service providers not to allow child pornography on their servers.** Such a provision could place an obligation on Internet service providers to monitor their sites and can be framed in such a way as to make it an offence for an Internet service provider to knowingly provide access to child pornography.²⁵⁶

13.7.7 Conclusion

The causes of sexual exploitation of children in South Africa are diverse. Dire poverty, the HIV/AIDS pandemic, the high level of domestic violence,²⁵⁷ and sex tourism are some of the factors. No single cause can be attributed to the spread of the incidences of commercial exploitation and it would rather appear that a combination of factors are at work. However, it is clear that poverty and poor socio-economic conditions play major roles, at least for some forms of commercial sexual exploitation.²⁵⁸ What makes it very difficult to address the root causes of commercial sexual exploitation, is the fact that while the victims (the children) generally come from poorer, more indigent families, the perpetrators come from all walks of life. Perpetrators often have very little in common with other perpetrators (other than the need to sexually exploit children) and some are quite sophisticated and well educated.²⁵⁹

For purposes of this section, however, the focus is on the care and protection of children that have been, or are being sexually exploited for commercial purposes. Obviously in such a scenario, a multi-disciplinary inter-departmental approach will yield the best results. In this context the Commission would like to stress the need for proper co-ordination of poverty relief

255 See Chapter 12 on the Protection of Children as Consumers above.

256 See Julia Scheeres 'ISP guilty in child porn case' at www.wired.com/news/ebiz/0,1272,41878,00.html . Obviously the provision will have to provide for some form of notification of the fact that the server is hosting child pornography.

257 In some areas in the Western Cape, up to 10 cases of domestic violence are reported each day - **The Argus** newspaper, 26 April 2000. See also Rachel Khatlane's paper on 'Domestic violence: How it contributes to sexual exploitation of children' in Barnes-September, Mayne and Brown-Adam (eds) **The National Consultative Conference against the Sexual Exploitation of Children**, p. 62.

258 Mainly trafficking and prostitution.

259 The users of child pornography on the Internet, for instance, must have access to a computer.

measures, not only within the Department of Social Development, but also with other forms of social assistance such as old age pensions, the child support grant, unemployment insurance, etc. The poverty relief and social assistance measures should also be integrated with the Government's housing programme, the supply of basic services, labour, education, health - basically every department's activities.

Currently, a child who has suffered mental, emotional and/or physical damage as a result of having been the subject of commercial sexual exploitation can be dealt with as a child in need of care in terms of the Child Care Act, 1983. Although in theory the Child Care Act can be used to protect children caught up in commercial sexual exploitation, in practice the Act does not adequately protect these children. Also, the placement options offered by the Child Care Act do not meet the needs of these children. There is also a lack of rehabilitative programmes to assist affected children, especially those involved in prostitution.

The Commission does not want to lose sight of the fact that some children are forced by poverty and dire economic circumstances into prostitution and pornography. To this end, the Commission recommends that a non means-tested universal grant be paid to all children.²⁶⁰ This will serve as a measure to prevent children from turning to prostitution and or pornography for reasons of poverty. With regard to rehabilitative programmes, **the Commission recommends that the provincial Departments of Social Development should determine the extent of the problem (the number of children involve in commercial sex work) and should budget for rehabilitative programmes.**

A children's court should also have the discretion to order that a child attend a rehabilitation programme. Rehabilitation programmes should also include activities for skills development which will enable young children to find employment after successful completion of the rehabilitation programme. Children who voluntary want to leave prostitution should also have access to such rehabilitation programmes.

With regard to education within schools or the community (to be included in policy), **the Commission recommends that children should be sensitized and educated to consciously detect and identify risk factors or situations making them vulnerable to commercial sexual**

exploitation. Children should be encouraged to seek help and assistance if they are victims of sexual exploitation and organisations who render services to victims of sexual abuse should be publicised. Further, the public should be educated on the adverse and long-lasting consequences of any form of sexual abuse and exploitation of children.