CHAPTER 19

RESIDENTIAL CARE

19.1 Introduction

Issue Paper 13 did not deal substantially with the matter of residential care and consequently the responses to the Issue Paper contained very little relating to this form of care. It was decided by the Commission that despite the existence of South African policy documents[1] regarding residential care it would still be important to consult with people working in this field. A research paper on legislative issues relating to residential care was commissioned for the Commission in this regard. The research paper was used as the basis for discussion at a dedicated focus group discussion on residential care which was held in Durban on 29 and 30 May 2000. The Commission has also drawn on this paper for the writing of this Chapter.[2]

A worksheet was developed by the Commission to guide the discussion at the focus group discussion on residential care. Each group taking part in discussions at the meeting filled in one worksheet. Some of the participants filled in worksheets individually. The NACCW[3] was not able to send a representative to the workshop, but they did provide a detailed written response to the worksheet.

Finally, in the last stages of the writing of this Chapter a meeting was held at the Commission's offices which was attended by a number of specialists in residential care.[4] The purpose of the meeting was to reach final decisions in areas in which there were a number of different views or approaches arising from the consultation process. This meeting took place on 5 June 2001, and the meeting is referred to in this Chapter as the 'meeting of specialists'.

---

1 IMC Interim Policy Recommendations 1997, White Paper for Social Welfare 1997.

2 The discussion paper was written by Professor Sonia Human of the University of Stellenbosch. The Commission is grateful to Professor Human for this research.

3 National Association for Child and Youth Care Workers.

4 The meeting was attended by Ms Ann Skelton, Ms Buyi Mbambo, Ms Merle Allsopp, Ms Elmari Swanepoel, Ms Annette van Loggerenberg, and Messrs André Viviers, Harold Malgas, and Gordon Hollamby. Apologies were received from Mr Ashley Theron.

19.2 Forms of residential care

19.2.1 Current South African law, policy and practice

At present the Child Care Act 74 of 1983 makes provision for the following forms of residential care:[5]

a. A **place of safety**, which is defined in the Child Care Act 74 of 1983 as 'any place established under section 28 [of the Child Care Act] and includes any place suitable for the reception of a child, into which the owner, occupier or person in charge thereof is willing to receive a child'. All State-run places of safety fall under the Department of Social Development (formerly the Department of Welfare).

b. A **shelter**, which is defined in the Child Care Act 74 of 1983 as 'any building or premises maintained or used for the reception, protection and temporary care of more than six children in especially difficult circumstances'. Children in especially difficult circumstances are defined in the Child Care Act 74 of 1983 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'.

c. A **children's home**, which is defined in the Child Care Act 74 of 1983 as 'any residence or home maintained for the reception, protection, care and bringing up of more than six children apart from their parents, but does not include any school of industries or reform school'. Not all children's homes are run by the State. Children's homes that are maintained and controlled by, for example, the church, welfare organisations or the private sector must be registered in terms of section 30 of the Child Care Act 74 of 1983.

d. A **reform school**, which is defined in the Child Care Act 74 of 1983 as 'a school maintained for the reception, care and training of children sent thereto in terms of the Criminal Procedure Act,

---

5 See also Noel Zaal 'Casting children out into a legal wilderness? A critical evaluation of the definitions of care facilities in the Child Care Act 74 of 1983' (2001) 118 **SALJ** 207.

1977 (Act No 51 of 1977)'. Reform schools fall under the Department of Education.

e. A **school of industries**, which is defined in the Child Care Act 74 of 1983 as a 'school maintained for the reception, care, education and training of children sent or transferred thereto under this Act'. Schools of Industries fall under the Department of Education, with the exception of Newcastle School of Industries which is controlled jointly by the Department of Social Development and the Department of Education.[6]

g. **A secure care facility**, which is defined as 'a facility established under section 28A [of the Child Care Act, 1983]'.[7] '**Secure care**' is defined as 'the physical, behavioural and emotional containment of children offering an environment and programme conducive to their care, safety and healthy development'.[8] A secure care facility is defined in the Child Care Amendment Act as 'a facility established under section 28A'. Secure care is a new concept in South Africa. These facilities will fall under the Department of Social Development. As the Amendment Act has only come into operation recently, no facilities have yet been officially registered as secure care facilities although some are referred to by this name. At present, there is one such facility in each province. The management of two of the nine facilities has been outsourced, one to a non-governmental organisation, another to a private company.[9]

---

6 KwaZulu Natal is the only province in which the Department of Social Development has played a management role in schools of industry. This dates back to ad hoc arrangements made in the province prior to 1994.

7 Section 28A of the Child Care Act 1983 empowers the Minister for Social Development to establish and maintain secure care facilities for the reception and secure care of children awaiting trial or sentence.

8 The definitions of 'secure care facility' and 'secure care' were inserted by section 1 of the Child Care Amendment Act 13 of 1999. The date of commencement of this Act was 1 January 2000.

9 The IMC **Interim Policy Recommendations** encouraged the outsourcing of the management of facilities, provided that this is done according to strictly applied minimum standards, by way of clear contractual agreements.

There have been a number of developments in South African residential care policy since 1994. The **White Paper for Social Welfare** which was published in February 1977 contained a section on residential care.[10] This provided that where the placement of children through family and community-based programmes is not an option, children will be placed in residential facilities, but only as a last resort. The White Paper also indicated that residential facilities would be more multi-purpose, more flexible and less formal. In addition the White Paper states that 'the training and re-training of child-care and youth-care workers in residential facilities will be provided. Such training programmes will aim at improving the capacity of these workers to render both preventative and protective services in cooperation with social workers'.[11]

In 1995 an Inter-Ministerial Committee on Young People at Risk (hereafter the IMC) was set up and was tasked with developing a policy framework for the transformation of the child and youth care system. The IMC **Interim Policy Recommendations** which were published in 1996 described the child and youth care system as being 'in crisis'. Whist recognising that residential care is an essential part of the child and youth care system, the policy document indicated that in the current system too many children end up in residential care, and that a transformed child and youth care system would provide other services at an early stage to strengthen families and communities thus allowing more children to remain in their own or in substitute families. The policy recommendations set out an integrated framework for the child and youth care system which consists of four levels, namely prevention, early intervention, statutory process and the continuum of care. The Policy recommendations posited that residential care is the appropriate option for some children,[12] and if children are placed in residential care then the quality of care they receive should be greatly enhanced, with an increased emphasis on ongoing developmental assessment as well as constant work on reintegration. The key role player in the transformation of the child and youth care system is the child and youth care worker, and the policy recommendations placed emphasis on their development, as well as the recognition of child and youth care workers as a separate occupational class. The effective management of facilities and accountability of all personnel is also stressed in the policy document.

---

10 Paragraph 49, p. 43.

11 Paragraph 49(f), p. 44.

12 This is a slight policy shift from the White Paper for Social Welfare which indicated that residential should always be a 'last resort'.

The IMC **Interim Policy Recommendations** at page 19 recommend that:

> [F]acilities which offer programmes at level 4 (the continuum of care) should be encouraged to include prevention, early intervention and reintegration strategies and establish multi-purpose child and youth care centres which can serve a wide range of community needs with regard to children and youth.

In 1996 the IMC was requested by the Cabinet to undertake an investigation into places of safety, schools of industry and reform schools to establish the availability and suitability of such facilities for the accommodation of awaiting trial children. The investigation report[13] revealed widespread human rights abuses in these facilities.[14] The report included a set of recommendations for immediate action which included the rationalisation of residential care services and the appropriate placement of children, the establishment of appropriate programmes and eradication of abuse and the transfer of the control and management of all care facilities under the Ministry and Department of Welfare (subsequently re-named Social Development). At the time of the writing of this discussion paper these key recommendations have not been fully acted upon. The rationalisation of facilities has only occurred in the Western Cape. The development of new programmes has been negligible and schools of industry and reform schools remain under the Department of Education.

19.2.2 **Comparative law**

19.2.2.1 **Kenya**

The Kenyan Children Bill 1998 provides for the following residential care options:

- Charitable Children's Institutions[15]

---

13 IMC **In whose best interests? Report on Places of Safety, Schools of Industry and Reform Schools** July 1996. See also IMC's **Report on the Pilot Projects** (1998).

14 The abuse of children in residential care settings is not unique to South Africa. See in this regard the Canadian Law Commission's report **Restoring Dignity: Responding to Child Abuse in Canadian Institutions** (March 2000).

15 Children Bill 1998 s 55.

A charitable institution is a home or institution established by a person, religious organisation or non-governmental organisation and which has the approval of the Council to manage a programme for the care, protection and rehabilitation or control of children.

- Government Rehabilitation Schools and Remand Homes[16]

16 Children Bill 1998 s 44.

A Government rehabilitation school is aimed at the reception, maintenance, training and rehabilitation of children ordered there under the Act.[17] A remand home is established by the Minister and is used for the detention of children.

° Other residential care facilities[18]

* Nursery

A nursery is defined as any institution or place at which, for the time being, five or more children under the age of seven years are received and cared for regularly for reward.

* Place of safety

A place of safety means any institution, hospital or other suitable place into which the occupier is willing to accept the temporary care of a child.

19.2.2.2 **Uganda**

The Ugandan Children Statute, 1996 provides for the following residential care facilities:

(a) Approved homes[19]

An approved home is one that has been inspected and given a certificate to show that it is suitable to receive and keep children, who are in need of care and protection or are beyond parental control and

17 Children Bill 1998 s 44(1).

18 Children Bill 1998 s 2.

19 The Children Statute, 1996 s 57-67.

are not criminals. Such a home can be state run or it can be a non-governmental home.

The purpose of the home is to give a child a suitable form of care until the parents are able to meet his or her basic needs. Children can only be received in one of two ways: firstly, in an emergency situation, where after the child must be brought to court within 48 hours; secondly, when an interim care order or a care order has been made.[20] An application for a care order shall only be made when other methods of helping the child have failed. The purpose of the order is to remove the child from where he is staying and to make sure that he will return to the community, once the problems have been solved.

(b) Remand home[21]

Where a child is charged with a criminal offence and not released on bail, he or she will be sent to a remand home. It is the duty of all local councils to provide a suitable place where children can be remanded.

(c) National Rehabilitation Centre for Children[22]

This centre is a place for the detention, rehabilitation and re-training of children committed there.

19.2.2.3 **Namibia**

---

20 The Children Statute, 1996 s 28, 29.

21 The Children Statute, 1996 s 2.

22 The Children Statute, 1996 s 97.

Namibia is in the process of developing a new children's law. The Draft Child Care and Protection Act contains a provision outlining the objectives and purposes of the legislation.[23] Although the stated purposes will inform decisions made regarding children, it is also intended to inform and educate society about child and family policy.[24] For example, one of the purposes of the Act is to improve the quality of children's relationships with their families and communities.[25] It is also the purpose of the Act to actively involve families in resolving problems.[26] To summarize, the emphasis is on prevention, intervention only if necessary, and then on active work towards restoration of the family.

The draft Child Care and Protection Act provides for the following types of residential care facilities:

(a) Educational and vocational training centres

This is defined as a school, centre or other place maintained for the reception, care, education and vocational training of children placed there under this Act. These centres are currently called schools of industries.[27] There are four noteworthy aspects regarding these centres.[28] Firstly, the Minister must establish children's homes to accommodate all children, male and female, who are in need of such facilities but cannot be accommodated. Secondly, any school administered by the Minister of Education and Culture can be utilized as an educational and vocational centre on

---

23 Draft Child Care and Protection Act 1996 s 2.

24 Sloth-Nielsen and Van Heerden 'New Child Care and Protection Legislation for South Africa? Lessons from Africa' (1997) **Stellenbosch LR** 261 at 271.

25 Draft Child Care and Protection Act 1996 s 2(1)(b).

26 Draft Child Care and Protection Act 1996 s 2(1)(e).

27 Draft Child Care and Protection Act 1996 s 60(1).

28 Draft Child Care and Protection Act 1996 s 60(2)-(4).

authority of the Minister. Thirdly, it is possible to establish an educational and vocational centre which is not maintained and controlled by the state. Fourthly, the establishment of any centre must be carried out in consultation with the Minister of Education.

(b) Places of safety[29]

A place of safety is any place established, approved or registered in terms of the Act for the temporary reception and care of a child in terms of this act and the Criminal Procedure Act, 1977. The Minister has the obligation to establish places of safety of varying classifications based on different children's needs and the interests of community safety. A secure care facility can for example be established in this way.

(c) Children's home[30]

A children's home is defined as any residence or home maintained for the reception, protection and care of children apart from their parents. A children's home does not include an educational and vocational training centre.

19.2.2.4 **New Zealand**

---

29 Draft Child Care and Protection Act 1996 s 58.

30 Draft Child Care and Protection Act 1996 s 1.

The Children, Young Persons and their Families Act lists the following residential care options:

(a) Family resource centre[31]

This is defined as any premises that provide temporary accommodation for a child or young person and any person who has the care of that child or young person, where that accommodation is provided as part of a programme designed to provide assistance to that person.

(b) Residence[32]

This means any residential centre, family home, group home, foster home, family resource centre, or other premises approved or recognised for the time being as a place of care or treatment.

The Director-General is vested with the necessary authority to establish and maintain any number and type of residences as required in his/her opinion to provide care and control of children and young persons. The Director-General must attempt to establish a sufficient range of residences to cater effectively for the variety of special needs of children and young persons. A residence can be established for the following purposes:

(i) Remand, observation, assessment, classification and short-term training purposes.
(ii) The provisions of a variety of programmes of special training and rehabilitation.
(iii) The provision of periodic training of recreational, educational or vocational activities, or of work either in a residence or in the community under supervision.

---

31 Children, Young Persons and their Families Act, 1989 s 2.

32 Children, Young Persons and their Families Act, 1989 s 364.

(iv) The provision of secure care.

(c) Secure care[33]

Secure care is a residence established in terms of the act and it means containment in that residence within a locked room or enclosure with visible physical barriers.

19.2.2.5 **Scotland**

The Children (Scotland) Act provides for the following forms of residential care:

(a) Accommodation[34]

For purposes of support for children and their families, accommodation means accommodation provided for a continuous period of more than twenty-four hours.

(b) Residential establishment[35]

This is an establishment, managed by a local authority, by a voluntary organisation or any other person, which provides residential accommodation for the purpose of this Act.

(c) Place of safety[36]

A place of safety is a residential or other establishment provided by a local authority, a community

---

33 Children, Young Persons and their Families Act, 1989 s 367.

34 Children (Scotland) Act 1995 s 25(8).

35 Children (Scotland) Act 1995 s 93.

36 Children (Scotland) Act 1995 s 93.

home, a police station or a hospital, surgery or other suitable place. This establishment provides for the temporary reception of a child.

(d) Secure accommodation[37]

This means accommodation provided in a residential establishment for the purpose of restricting the liberty of a child.

19.2.2.6 **Evaluation**

The African child care and protection legislation which has recently been passed or is still in development does not provide a very fresh approach to the issue of forms of residential care. Although all the jurisdictions considered recognize the importance of prevention and early intervention programmes to keep children in the community as far as is possible, when it comes to the residential care options themselves there appears to be an approach of 'recycling' old forms of residential care, with new names in some instances.

Of the African comparative law examined it is only the draft Child Care and Protection Act of Namibia that shows a partial departure from the colonially inherited approach to residential care. The traces of a new approach are seen in the Namibian draft law in the obligation placed on the Minister to establish places of safety of varying classifications based on different children's needs and the interests of community safety. However, this apparent move towards differentiated child and youth care services is only partial as it applies solely to temporary accommodation. Facilities for longer term care are still defined according to old categorisations although the names may have

37 Children (Scotland) Act 1995 s 93.

been changed. One other useful aspect of the Namibian draft legislation is that it will be possible to have educational and vocational centres which are not maintained and controlled by the state. This opens the way to outsourcing of the management of facilities, something which is not possible with regard to the schools of industry under current Namibian law.

What the New Zealand and Scottish Acts have in common is that the order is made for 'residence' or 'accommodation', rather than an order for placement in a particular type of facility. The approach recommended by the IMC **Interim Policy Recommendations** of having 'child and youth care centres' which offer a range of differentiated services appears to be closely related to the New Zealand approach in which the Director-General is empowered to establish and maintain any number and type of residences as required to provide care and control of children and young persons. The purposes for which a residence can be established are then described.

19.2.3 Comments and submissions received

The first question posed in the worksheet was as follows: 'Are there any existing residential care facilities which should be cut out of the system? Should they be replaced with different placement options? If so, what should these be?'

All four groups discussing this question made the point that changing the names or definitions of facilities is not in itself sufficient and would have to be accompanied by change in the ethos and paradigm according to which the facilities are run. The programmes on offer would also have to change. Groups 1 and 4 both indicated that the management of all (state) residential facilities should be transferred to the Department of Social Development. Groups 1 and 4 expressed the view state that schools of industry and reform schools in their current form do not currently provide adequately for the needs of the children accommodated in them. However, all four groups indicated that there is a need for more secure care or 'treatment' centres. Group 4 indicated that some children spend long periods in places of safety and that there should be a statutory limit on the time spent in such facilities, possibly a period of six weeks which would allow for an initial assessment.

Moving to the individually completed worksheets, Mr Viviers of the Department of Social Welfare, Bloemfontein,[38] submitted that schools of industries and reform schools should be cut out of the system. He explained that these facilities were established in terms of the 1960 Children's Act and are out of keeping with current approaches. The respondent stated that the 1996 Cabinet investigation conducted by the IMC showed that these facilities operate in a manner that is not helpful to children and that, as the only residential facilities which fall outside of the ambit of the Department of Social Development, they have been relatively 'isolated'. The respondent added that his personal experience with these schools has affirmed many of the findings of the investigation. The respondent suggested a shift from schools of industries and reform schools to new forms of residential care that will meet the needs of children appropriately. He further recommended that all residential care facilities should fall under one Ministry.

The NACCW supported the transformation of facilities into one-stop child and youth care programmes offering a range of developmental programmes to meet the individual needs of the young people. The services should be versatile and dynamic and constantly changing to meet the needs of the children in the facility. The NACCW cautioned against transferring all facilities under the Department of Social Development at this stage.

At a meeting of specialists held on 5 June 2001 all of the above views were considered. It was concluded that whilst there may be long term advantages for all residential facilities for children to be placed under one Ministry, this is not an immediate priority. The major problem of schools of industries and reform schools falling under the Department of Education relates to administrative issues and designation of children. It was suggested that the administrative functions linked to placement of children should be transferred to the Department of Social Development.

---

38 The worksheet was completed by Mr André Viviers, the manager: Child and Family Care Services.

A second question posed by the worksheet in relation to forms of residential care was as follows:

> Residential care facilities are defined in the Child Care Act mainly by reference to the services provided. One option would be to retain the current distinctions, but to reformulate traditional care functions as programmes. Would you agree with this option?

Almost all respondent agreed with this option.[39] Group 1 made the point that whilst traditional care functions should be reformulated, facilities must nevertheless be empowered to deal with children effectively.

The NACCW also agreed with the option and links it to the issue of funding, stating that facilities should be funded not just because they exist but directly in response to the service programmes offered.

Ms Leisha Cornelius of the Department of Welfare, Pietermaritzburg was of the view that where possible residential care facilities should offer all required services and that children should be freely moved within the different sections within the same institutions, depending on their needs.

Mr Viviers of the Department of Social Welfare: Bloemfontein said that in order to ensure that the Act enables practitioners and commissioners to respond to the needs of a child, provision should be made for orders that are needs-based rather than system-based. The respondent made the following proposals:

---

39 This view was expressly supported by Groups 1 and 4 at the workshop and in writing by Villa Lubet Kinderdorp; Nelspruit Displaced Children's Trust; Mr Viviers, Department of Social Welfare, Bloemfontein; Moses Sihlangu Health Care Centre, NACCW, and the Asfaleia Temporary Children's Home.

- short term residential care placements for not longer than 6 months
- residential care programmes (less restrictive, as in current children's homes)
- secure residential care programme
- open custody programme for emotionally and behaviourally troubled children
- secure custody programme for emotionally and behaviourally troubled children

At the meeting of specialists this list was though to be suitable, although it was said that provision should also be made for special interest groups such as children with substance abuse problems and for young sexual offenders. It was further suggested that the list should describe types of facilities and not types of children. The meeting was of the view that the list should be open-ended, ending with a clause such as 'any other programme in line with the principles and objectives of this Act'.

A third question was posed which related to the issue of forms of residential care: 'Another option would be to rename all the existing residential care facilities for example as "child and youth care centres". This will signify a movement away from traditional service delivery functions. It will also provide the framework for residential care facilities to become centres where children, youth and families from the surrounding communities can access a variety of programmes and resources on a daily, weekly or ad hoc basis. Would you agree with this option?'

The vast majority of respondents was in favour of this suggestion.[40] The expressed advantages are that this moves away from a labelling approach and provides for a range of services under one roof. The dissenters raised concerns that changing names does not change what actually happens within a facility. Group 4 had reservations based on a concern that this can lead to confusion, as outsiders

40 Those in favour were Group 1; Group 2; Group 3; Villa Lubet Kinderdorp; Nelspruit Displaced Children's Trust; Ms Leisha Cornelius, Department of Welfare, Pietermaritzburg; Mr Viviers of the Department of Social Welfare, Bloemfontein; the Moses Sihlangu Health Care Centre; and the NACCW.

such as magistrates will not be able to discern what type of services are on offer.

The final question relating to forms of residential care described the proposal of IMC for the establishment of reception and assessment centres. The worksheet asked: 'Should statutory recognition be given to such reception and assessment centres?'

The responses to this question were mixed. Although all respondents believed assessment to be essential to the process, a number of respondents pointed out that assessment is a process rather than a place,[41] and that assessment can thus take place at home or in any type of residential care setting. Others pointed out that assessment is an ongoing process and felt that the idea of an assessment centre detracts from this understanding.

However, a number of respondents supported the establishment of such centres, provided that they do not turn into sites for compulsory residential assessments. If assessment centres are seen as an aspect of early intervention services which help to avoid children being referred to residential care (unless such referral is appropriate) then they will be a welcome addition to the system.

19.2.4 **Evaluation and recommendations**

If the policy considerations underlying the transformation of residential care are to be followed, changes to the current forms of residential care will be necessary. These policy changes can be summarized as follows:[42]

(a) Residential care should move away from pathology and problems to a focus on increasing competency and ensuring healthy development. The family, family group and community are central to this paradigm shift.

(b) Residential care should become multi-faceted and integrated into the community.

(c) Residential care should be competent to deliver an integrated and holistic service to a child

---

41 Group 3; Group 4; Mr Viviers of the Department of Social Welfare, Bloemfontein.

42 IMC **Interim Policy Recommendations** 57-59.

as client in the residential programme and to his or her family.

The Commission recognises that there is widespread support for the view that the way in which the Child Care Act currently lists different categories of facilities needs to be altered.[43] The majority of views appear to be in favour of requiring the state to be responsible for providing residential care to a child who has been assessed as needing such care. There is also widespread support for the view that the legislation should be flexible enough to allow for these care facilities to be run by the state or for the running of such facilities to be outsourced to non-governmental organisations or other bodies according to strictly applied minimum standards. The respondents were generally of the view that rather than trying to delineate the types of centres, all facilities could be called 'child and youth care centres' with the understanding that different facilities may offer different programmes (e.g. secure care) whilst at the same time allowing for one centre to offer a range of programmes. All centres must include reintegration services as part of the programme they offer. There was wide-spread agreement, also, that the current schools of industries and reform schools are not generally offering the care services required.

The Commission recommends that the new children's statute should provide for the assessment of all children prior to placement, preferably assessment in their own homes unless this is not in the interests of the child (in other words, a child should not be institutionalised merely to be assessed).[44] Assessment is an ongoing process and the record of assessment must be kept and furnished to any service providers undertaking future assessment. The Minister may establish centres to facilitate assessment of the child with the primary aim of preventing children from moving further into the system.

---

43 Good residential care requires 'a clear statement of purpose' for each facility: per Lord Laming as quoted by Zaal 'Casting children out into a legal wilderness? A critical evaluation of the definitions of care facilities in the Child Care Act 74 of 1983' (2001) 118 **SALJ** 207 at 208, 214.

44 See further 10.3 above.

The Commission recommends, further, that the Minister of Social Development be enabled to establish and maintain child and youth care centres, and that there should be a sufficient range of such centres to cover the various different needs of children requiring residential care. Provisions should also be made for the possibility of one centre offering a range of programmes. The new children's statute should list the purposes for which such centres may be established and maintained. This list could include: shelter, remand, assessment, short-term treatment or training programme for not longer than 6 months, open residential care programme, secure care programme, etc. The list should be open-ended, so that new programmes can be included as the need arises.

The new children's statute should not make a distinction between children being referred by the care system or the criminal justice system. The referring forum is not relevant, although the programmes can be differentiated to care for different groups of children separately if this is seen as the most appropriate way of managing children in the system.

All child and youth care centres should be subject to registration by the Department of Social Development, in accordance with minimum standards to be set out in regulations to the final legislation. The Department should be able to register centres on the basis that they would be fully or partially privately funded. The Department should be enabled to initiate the outsourcing of the establishment and/or maintenance of child and youth care centres on a full or partial funding basis.

On the issue of the schools of industries and reform schools which currently fall under the Department of Education, the consultation process revealed that there is considerable support for the suggestion that these facilities should be placed under the auspices of the Department of Social Development, as the children in these facilities have special care needs rather more than special education needs. However, concern was also raised by those consulted that the process of transferring these facilities to the Department of Social Development will take a long time and will be very complex, with buildings and staff posts needing to be transferred. Bearing these practical

considerations in mind **the Commission recommends that schools of industries and reform schools should, for the time being, remain under the Department of Education. All administrative functions relating to placement, designation and discharge should be properly co-ordinated to ensure an efficient and effective process, and this should be ensured through clear regulations about which department is responsible for which task.**

19.3 Regulation of residential care

19.3.1 Current South African law and practice

Where a state-run children's home is established, the Minister must appoint a board of management.[45] This board shall consist of no fewer than three and not more than nine members, who shall hold office during a prescribed period. The 1998 amendment to the regulations also made shelters and schools of industries subject to these management structure requirements. Regulation 30(3) provides that the constitution of a registered facility must contain particulars about the composition, powers and duties of the management board.

No private children's home can function as such unless it is registered and managed by an association of persons consisting of at least seven members. No similar requirement is set for a private place of care or a shelter (government and private) to be registered. On the other hand the regulations to the Child Care Act stipulate that the application for registration shall be accompanied by the constitution of the association of persons that is to manage the children's home, place of care or shelter.

19.3.2 Comments and submissions received

In the worksheet which was used at the focus group discussion on residential care a number of questions were posed which relate to the management of residential care facilities. The first

45 Section 29 of the Child Care Act, 1983.

question posed in this regard was as follows:

> What is the role and function of the board of management? Can the continued existence of such a board of management be justified in view of the transformation of the child and youth care system?

Groups 1 and 2 submitted that the board of management is essential, adding that the board should have an advisory capacity, serve as a supportive structure, monitor human resource development and ensure transparency and consultation. Group 3, however, was concerned that the management board sometimes interferes in the work of the professional staff. It was of the view that the powers of the management board should be limited and that these limitations should be clearly spelt out in the legislation or regulations. This view is supported in the individual response of Mr Viviers (Department of Social Welfare, Bloemfontein). The respondent believed that the role of management boards should be limited to key policy and financial issues and to ensure that they remain appropriate and relevant their terms should be for a stipulated limited time.[46] The respondent also said the Minister should be able to intervene if the board is inhibiting the work of the facility. The Moses Sihlangu Health Care Centre was also of the view that the role of the board of management should be clearly limited, and that they should not be involved in the immediate care of children.

The NACCW supported the existence of the boards of management in some form, giving the reason for this view that the inclusion other role players from the community improves decision-making and promotes the acceptance of the facility in the community. It also draws on people with other relevant expertise to contribute to the effective functioning of the facility. However, the respondent went on to emphasise that the differentiation of roles is critical. The professional role of the personnel and their accountability to professional obligations must be clearly understood and respected by the board of management. The board of management must hold the professional staff

---

46 There is support from a number of other respondents for the stipulation of a term of office for board members, as well as a statutory requirement of the number of times that the board should meet. The weight of opinion seems to favour a 2 year term for board members (with a possible renewal of a further 2 year period) and at least 4 meetings per year.

accountable for the provision of professional services in keeping with the minimum standards in child and youth care. The board members should not themselves be involved with assessment or direction of the professional functioning of the personnel - the professional functioning of a facility is the role of the manager of the facility.

The meeting of specialists also supported the retention of boards of management, and recommended that their role should be spelt out, and that the board should not be involved in the placement, assessment or treatment decisions relating to individual children. It was also stressed that professional staff should be held accountable through their own professional bodies and not through the management board.

A further question posed in the worksheet was: 'If the board of management still has a role to play, are there any professional requirements to be met before a person can be appointed as a board member?'

The responses to this question were mixed. Some respondents[47] were of the view that no professional qualifications should be required as long as the members are drawn from the community. Some respondents added that the members, whilst not required to have professional expertise, must be clear about departmental policy on child and youth care as well as the vision of the facility. Ms Leisha Cornelius of the regional office of the Department of Welfare, Pietermaritzburg said that the board members should be elected by the community that the facility would serve. Other requirements mentioned were that board members should have no direct interest in the facility, have leadership qualities, have a 'love for children', and have no record of involvement in any case of child abuse, neglect or exploitation.

The NACCW replied that each member of the board must have a role to play. They must come in with clearly articulated expertise to contribute to and enhance the professional programme. They

47 Groups 1, 2 and 3, as well as Ms N L T Ngqangweni, Department of Welfare, Bisho and the Moses Sihlangu Health Care Centre.

need to understand enough of the professional expectations to be able to assess whether the programme is practising the minimum standards in child and youth care. The respondent indicated that board members may need training to undertake their tasks effectively.

The worksheet then posed the following question:

> Should the community, NGO's, parents and children be represented on the board of management?

Groups 1 and 2 were divided on this issue. Groups 1 argued that parents should be represented on the board of management, whilst Group 2 was of the view that it is desirable but not essential for parents to be represented on the board. Group 3 answered the question in the affirmative and suggested that children who were previously in a facility should be represented on the board. The last point was also suggested by Ms N L T Ngqangweni of the Department of Welfare, Bisho.

NACCW pointed out that the boundaries of the involvement of parents and families need to be clearly defined whilst their children are in care. The subjectivity that could influence decision-making especially about staffing matters could be a concern in terms of the full involvement of children and parents on the board. The respondent suggested that the viewpoint of parents and children could come through formal representation at certain meetings or through a special sub-committee of the board. Similar ideas of sub-committees or other structures to allow for the participation of children and parents were also expressed by some other respondents.

The worksheet posed questions about the reasons for a discrepancy in requirements for private children's homes on the one hand and places of care or shelters on the other hand.

The majority of respondents were of the view that this is an anomaly which should be removed in the draft legislation. The respondents also expressed the view that an 'association of persons' plays the same role as a board of management and that there should be no such distinction in the future

legislation.

19.3. 4 Evaluation and recommendations

The weight of opinion clearly indicates that there is a role for boards of management. Concern was expressed that boards have sometimes interfered with the effective management of facilities and for this reason it is deemed appropriate to spell out their role clearly.

It is recommended that each child and youth care centre shall have a board of management. This shall consist of not fewer than 6 and not more than 9 members, although there should be the possibility of co-opting additional members for their expertise. The new children's statute should include a requirement that the details relating to eligibility, tenure, duties, responsibilities and disbandment will be set out in the regulations to the Act.

We accordingly recommend the inclusion of the following provision in the new children's statute:

Establishment of management committees

(1) A management committee shall be established for each child and youth care centre as prescribed by the national Minister by regulation in terms of section XX.

(2) The national Minister shall prescribe, by regulation -

(a) the composition of every management committee to be established under subsection (1), which shall include representation of the residents and staff of the relevant centre and the public in general;

(b) the election and appointment, qualifications, term of office, and grounds of removal from office, of the members of that committee and the filling of vacancies

on that committee; and

(c) the number of, and procedure at, meetings of that committee.

(3) A management committee established under subsection (1) shall ensure that the manager of the centre in question-

(a) facilitates interaction between the residents of the centre and their families, the public in general and that committee;

(b) provides quality service to the centre;

(c) provides opportunities for the training of the staff of the centre;

(d) applies principles of sound financial management and submits quarterly financial reports to the Department and the committee;

(e) monitors activities at the centre in order to deal speedily with any incidents of abuse of the residents of the centre and takes steps to report such incidents to the appropriate authority;

(f) consults the management committee in the appointment of the staff of the centre;

(g) determines whether the names of members of staff appear on the register of persons found unfit to work with children and discloses such findings to the management committee;[48]

48 See section 19.4.4 below.

(h) establishes complaints procedures for the residents and staff of the centre and persons who wish to lodge a complaint on behalf of any such resident; and

(i) does everything necessary or expedient for the effective functioning of the centre.

19.4 Human resources

19.4.1 Current South African law and practice

The role of the manager is critical to effective and efficient service delivery. It is recognised that this position requires specialised knowledge of child and youth care work and should be filled by a registered professional from an appropriate discipline. In addition such a person must have leadership qualities and the ability to manage staff and children, and must ensure effective administration.

Nowhere in the Child Care Act, 1983, or regulations are any requirements set for the appointment of a residential care manager or a worker at a child and youth care centre. The new child and youth care system can only be successfully implemented if it is supported at every level by persons with the required knowledge and skills.[49]

The following regulations as to the maintenance of good order and discipline in children's homes and places of care reflect some of the skills required from a manager and staff:[50]

---

49 IMC **Interim Policy Recommendations** 84-87.

50 Child Care Act 74 of 1983 reg 32(4)-(7).

(a) The head of the children's home, place of safety, school on industries or shelter shall ensure that children are provided with the skills and support which enable constructive and effective social behaviour.

(b) The head and staff team of a children's home, place of safety, school of industries or shelter shall demonstrate the expected behaviour by modelling this in their attitudes and interactions with the children.

(c) The head of the children's home, place of safety, school of industries or shelter shall ensure that the children feel respected and physically, emotionally and socially safe when service providers manage their behaviour and provide support.

(d) The head of the children's home, place of safety, school of industries or shelter shall ensure that children are given plenty of opportunity and encouragement to demonstrate and practise positive behaviours.

19.4.2 **Comparative review**

The **Care Standards Act** 2000 (England and Wales) sets out a number of provisions relating to people working in residential care settings. The main purpose of the Act is to reform the regulatory system for care services in England and Wales, including children's homes. The Act establishes new independent Councils to register social care workers, set standards in social care work and regulate the education and training of social workers in England and Wales.

Another relevant Act is the **Protection of Children Act** 1999 (England and Wales). This Act requires a list to be kept of persons considered unsuitable to work with children. A child care organisation shall refer to the secretary of state the name of any individual who has been:

(a) dismissed on the grounds of misconduct which harmed a child or placed a child at risk of

harm, or

(b) who has retired or resigned in circumstances such that the organisation would have dismissed or considered dismissing him if he had not resigned or retired, or

(c) transferred to a position in the organisation which is not a child care position because of the misconduct described earlier, or

(d) suspended or provisionally transferred on the grounds of the alleged misconduct.

When the secretary of state is satisfied that he or she has received sufficient information, the individual's name shall be included in the list. The Act does include a number of protections for the individual whose name is included in the list and he or she may appeal to a tribunal against the decision. The effect of inclusion on the list is that when a child care organisation proposes to offer any individual employment in a child care position the organisation must check whether the person's name is included in the list. If it is, the organisation shall not offer him or her employment in such a position,

19.4.3 Comments and submissions received

The question posed in the worksheet on this topic was:

> Should new child care legislation set minimum standards for a person to be employed within the child and youth care system?

There was wide-spread support for this idea. The NACCW saw a need for specified requirements for the appointment of child care personnel at every level of the staffing structure. Attention must be given to qualifications and experience, as well as the appraisals of the professional functioning of personnel. A broad team of people consisting of boards of management, governmental and non-government role players could then be called to screen prospective employees of a facility. Some of these representatives should be on a team of interviewers in order to bring the relevant professional, cultural and other expertise into the process. This respondent added that the whole process must be

in keeping with the expectations of the relevant registration board.

Mr Viviers of the Department of Social Welfare, Bloemfontein felt that it is not the place of the new children's statute to set minimum standards for a person to be employed within the child and youth care system as this is a very complex matter and is operational on another level. The respondent mentioned that the South African Council for Social Service Professions (SACCP) has the mandate to set standards for certain categories of work such as social workers and child and youth care workers. Personnel who are to work directly with children must be registered with the SACCP or any other relevant statutory body. This should apply to all staff working in residential care facilities, not just managers.

19.4.4 Evaluation and recommendations

Whilst there is broad support for the idea that new child care legislation should include some provisions to ensure that children in residential care are cared for by appropriate people, the comments of Mr Viviers are noted. The new children's statute should not duplicate provisions which are applied through the South African Council for Social Service Professions. Nevertheless, measures can be included in the legislation and regulations which will provide additional protections to ensure that staff caring for children are suitable for that work.

The Commission recommends that a set of minimum standards for residential care (which includes indicators for personnel) be included in or annexed to the regulations to the new children's statute. Further, a code of ethical practice for all personnel working in residential care (linked to the minimum standards) should be included in or annexed to the regulations.

The new children's statute should include some procedures for a staff interviewing process. Where a manager of a residential facility is to be appointed, the interview panel should include at least one independent person who has expertise in child and youth care.

After due consideration of the issue of a list of persons deemed unsuitable to work with children, **the Commission is of the view that there is considerable merit in the approach taken by the United Kingdom in keeping and maintaining a consolidated register of persons found by a court or some other form of due process to be unsuitable to work with children.**[51] **The Commission recommends that the task of maintaining and administering the consolidated register should vest in the South African Council for Social Service Professions established in terms of the Social Service Professions Act 110 of 1978. The Commission believes such a register should be linked to the national child protection register already provided for in the regulations to the current Child Care Act.**[52] **The Commission recommends that the manager of a child and youth centre, in the appointment of staff, must determine whether the name of a prospective employee appears on such register and he or she must disclose the outcome of such investigation to the management committee**. In the appointment of a manager, it shall be incumbent upon the management committee to consult such a register. In addition, it must be pointed out that when a professional is found guilty of professional misconduct the registration or licence of that professional can be withdrawn. However, **at present there is no requirement on the manager or management committee of a facility to ensure that a prospective employee is registered to practice, and it is suggested that this be made a requirement of the new legislation**.

19.5 Registration and classification

19.5.1 Current South African Law and Practice

At present the Child Care Act[53] makes provision for the registration and classification of children's homes, places of care and shelters. The children's homes and places of care referred to are limited

---

51 See also 10.5.4 above and Chapter 42 of the Commission's **Discussion Paper on Sexual Offences: Process and Procedure**, 2001.

52 See Regulation 39B.

53 Section 30.

to non-governmental institutions. The guidelines for application for registration and requirements with which a children's home, place of care or shelter shall comply are set out in the regulations.

In particular, no place of care shall be registered or remain registered after 24 months unless the Director-General is satisfied that behaviour management practices listed in regulation 30A are expressly forbidden. The rights of children in care are also stipulated in regulation 30A serves as an example of compliance with international documents and constitutional provisions.

Registration of a children's home or shelter is not subject to similar requirements to those set out in regulation 30A. What is required is that the Director-General must be satisfied as to the following:[54]

> [T]hat proper arrangements have been made or will be made –
>
> (a) for the care, protection and development of each child in the children's home or shelter, in line with established minimum standards; and
> (b) to ensure that children who are of school-going age attend school or are enrolled in an appropriate alternative education programme.

19.5.2 Comments and submissions received

The first question posed in the worksheet on this topic was:

> Should similar requirements for registration not apply, regardless of whether it is a shelter, place of care or children's home?

The response from Mr Viviers (Department of Social Welfare, Bloemfontein) emphasised the fact that a place of care is not a residential care facility. It pointed out that a place of care is a day-care centre or creche. The respondent stated that Regulation 30A is ignored in practice when it comes to

---

54 Regulation 31.

places of care as it is totally inappropriate and irrelevant. With regard to the other facilities, which are all residential, the respondent indicated that there need to be basic requirements that regulate the registration of all residential care facilities in order to make sure that children's rights are protected. Additional requirements can be put in place through regulations for certain types of programmes or facilities.

There was widespread support from respondents that there should be no differentiation between different residential facilities with regard to requirements for registration.

A further question was: 'What should the requirements for registration of a residential care facility be?'

Groups 1 and 2 submitted that a residential care facility should be required to have a clear vision and mission as well as the capacity for quality service delivery. Mr Viviers of the Department of Social Welfare, Bloemfontein recommended that the following requirements be set for registration:

- the facility should have a constitution;
- the facility should comply with the minimum standards set for the child and youth care system;
- there should be a need for such a facility in the area;
- the facility should have a local authority certificate certifying that the building and premises meet the basic health requirements;
- the facility must have competent personnel;
- the facility must be subjected to the DQA; and
- registration should be renewed after every 24 months.

The NACCW listed the following requirements for the registration of a residential care facility:

- the constitution of a suitably qualified board of management

- the appointment of a suitably qualified manager of the facility
- the appointment of suitably qualified staff at different levels of the staffing structure
- the provision of a programme within the legal requirements and the policy of the transformation of the child and youth care system
- the maintenance of minimum standards.

At the meeting of specialists it was pointed out that non-profit organisations are encouraged to register in terms of the Nonprofit Organisations Act 71 of 1997. Registered non-profit organisations may receive State benefits or allowances as prescribed by the Minister for Social Development. The question was then posed as to whether the registration requirements envisaged for residential care facilities are in addition to those of the Nonprofit Organisations Act, 1997. The meeting concluded that it should be necessary to first register under the new children's code and then under the Nonprofit Organisations Act. It was agreed that it should be possible to frame an enabling provision is such a way as to make the registration process in terms of the Nonprofit Organisations Act subservient to the registration process envisaged in the new children's code, with the use of wording such as '[n]otwithstanding the provisions of the Nonprofit Organisations Act, ...'. It is also possible to make registration (and therefore the receipt of benefits or allowances) under the Nonprofit Organisations Act subject to registration under the new children's code. This could be achieved through a clause stating '[A] non-profit organisation rendering residential care programmes shall not be registered (in terms of the Nonprofit Organisations Act) unless it is registered as a facility offering residential care programmes with the Department of Social Development in terms of the Child Care Act'.

After further discussion the meeting agreed that all facilities need to be registered with the Department of Social Development and that the Department will have the responsibility to inspect and investigate facilities offering residential care programmes without registration *for the purpose of registering that facility*. However, it was agreed that registration cannot be the only purpose - there is a need to empower the Minister to also close down a facility, whether registered or not, after a DQA (Developmental Quality Assurance) process. The meeting further agreed that the Minister

should be given the power to immediately close down a facility where it is necessary to protect the children involved. In addition to closure, the Minister should be allowed to suspend closure and or registration on certain terms and conditions. He or she may e.g. place the facility under curatorship, order a Developmental Quality Assurance process, or instruct the facility to work with officials of the Department of Social Development. Section 32 of the Child Care Act gives ample guidance on when a certificate of registration can be cancelled. It was agreed that 'the Minister' should be the *national* Minister for Social Development. He or she should be able to delegate functions to the provincial MEC's.

19.5.3 Evaluation and recommendations

There is no doubt that the registration of facilities is essential. This is a way to ensure that a facility has met the basic minimum standards before being permitted to receive children. The registration of a facility is the first step towards accountability and appropriate funding procedures which will then be taken forward through a quality assurance process.

It is recommended that the primary legislation should set out the broad requirements of registration for any facility caring for more than six children. These would include matters such as the appointment of a suitable board of management, the appointment of a suitably qualified manager through an approved interview process, the appointment of sufficient appropriately qualified staff, the provision of programmes in accordance with the minimum standards, and a certificate of approval for health and safety standards. The details relating to the issues can be provided for in the regulations to the proposed Act.

The Commission recommends that all facilities need to be registered with the Department of Social Development (whether or not they are funded by the Department) and that the Department will have the responsibility to inspect and investigate facilities offering residential care programmes without registration *for the purpose of registering that facility*. The Commission recommends further that the Minister should have the power to also close down a

facility, whether registered or not, before or after a Developmental Quality Assurance (DQA) process. The Commission further recommends that the Minister should be given the power to immediately close down a facility where it is necessary to protect the children involved. In addition to closure, the Minister should be allowed to suspend closure and or registration on certain terms and conditions, such as placement of the facility under curatorship or mentorship, ordering a DQA process, and instructing the facility to work with officials of Department of Social Development. This could be done through the issueing of an enforcement notice.[55]

19.6 Programmes

19.6.1 Current South African Law and Practice

55 See 15.8 above.

The CRC[56] establishes the need to provide care and treatment to children clearly indicating that mere custodial care is not sufficient. South African (state) residential care facilities generally lack programmes designed to meet developmental and therapeutic needs of children. The report on the investigation into place of safety, schools of industry and reform school has the following to say in this regard:[57]

> It was found that there is a dearth of appropriate developmental and therapeutic programmes in Places of Safety, Schools of Industry and Reform Schools. While some sport and recreation programmes do exist in most facilities, programmes such as social skills training, life skills, counselling and a range of therapeutic activities to meet the needs of emotionally and behaviourally troubled children and abused, traumatised and neglected children, were found to be missing in almost every facility. Very few facilities have individual treatment or developmental plans for children and in many facilities children do not have access to a social worker or psychologist.

Programmes should be differentiated or multi-dimensional, offering a range of appropriate child and youth care services to the surrounding community such as family preservation, early intervention services, educational bridging, school return, drop-in shelters, weekend treatment and so on. Programmes should cater for the full range of developmental needs appropriate to the age and developmental phase of the child, including emotional, physical, spiritual, intellectual and social needs.

The amendments in recent years to the regulations[58] of the Child Care Act have introduced various examples of mandating of developmental programmes. In the first place,[59] where a child is ordered to return or to remain in the custody of a parent, guardian or custodian, certain requirements must be complied with.[60] These requirements are as follows:

---

56 Articles 3,19, and 25.

57 **In whose best interests? Report on Places of Safety, Schools of Industry & Reform Schools** (July 1996), par. 3.2.2.

58 The amendments were promulgated on 1 April 1998.

59 Child Care Act 74 of 1983 s 15(1)(a) read with reg 15. Where a child is placed in the custody of a parent, guardian or custodian, as a result of an administrative transfer, similar requirements apply.

60 Likewise, the requirements shall form part of the orders for an administrative transfer.

(a) The parent, guardian, or custodian shall have access to appropriate family reunification services in the form of developmental and therapeutic programmes. The developmental programme must be agreed upon by the parents, the child (where appropriate), the court and the supervising social worker;

(b) Support and guidance must be provided to ensure the most effective use of the developmental programme;

(c) The parties mentioned shall participate in a regular review of the programme, resulting in a progress report to the Director-General and the court; and

(d) The relevant requirements shall form part of the court order.[61]

Secondly, leave of absence in terms of section 35 of the Child Care Act may be granted to a child with the consent of the Director-General at any time and for any period not exceeding six weeks for the purpose of meeting the developmental goals for a child as mentioned in the developmental programme. No leave of absence shall however be granted where such leave is based on an absence of developmental programmes at the institution or place of safety during the holiday period.

Thirdly, any decision on the transfer of a child from one custody or institution to another, the extension of an existing order, or the discharge of a child, is supposed to be taken within the framework of family reunification services.[62] Developmental programmes form an essential part of these services and this is reflected in the report which is submitted on the child. Such a report must be based on the developmental assessment of the child and his or her ecological circumstances. The report must also reflect the following:

(a) The existing and future developmental programmes for the child and family; and

---

61 Child Care Act 74 of 1983 reg 15.

62 Child Care Act 74 of 1983 reg 34A(c), (d), (e), (l).

(b) services provided to the child and family to meet developmental goals, as stipulated in the developmental programmes.

Fourthly, the right of a child in a place of care, children's home or shelter to such a developmental programme is explicitly recognised, along with the following rights:[63]

(a) To participate in formulating their developmental programme, to be informed about their plan, and to make changes to it;
(b) to expect that their plan and programme is based on an appropriate and competent assessment of their developmental needs and strengths and where possible is in the context of their family and community environments;

(c) to a regular review of their placement and care and development plan;

(d) to the involvement of their family and significant others in their care or development programme.

63 Child Care Act 74 of 1983 reg 30A.

It must also be noted that behaviour modification may not be used by a person in care facilities[64] unless reflected as treatment or a development technique in a development programme and monitored by a multi-disciplinary team.[65]

The educational component of programmes is also an important matter for discussion. Education for living as well as academic and vocational education play a critical role in the lives of children at risk and thus should be seen as core components in an effective child and youth care system. The experience which each child has in terms of daily formal schooling contributes positively to their holistic development.

The CRC[66] requires that children have a right to education appropriate to their needs. This right is also articulated in Rule 38 of the JDLs[67] which makes allowance for special education for young people who are illiterate or have cognitive learning difficulties. Thus, in order to meet these

---

64 Children's home, place of safety, school of industries, shelter.

65 This prohibition forms part of the additional requirements to be complied with for the purpose of registration of a place of care.

66 Articles 28 and 29.

67 UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990. For the text, see Geraldine van Bueren (ed) **International Documents on Children** Dordrecht: Martinus Nijhoff Publishers 1993 217.

expectations, where children experience intellectual and/or emotional problems special resources would be required by residential facilities.

Residential care has to date often been used for placement of children who cannot be accommodated in community schools. Ideally, children should never be placed in residential care because community schools are unable to deal effectively with them. This is also reflected in the **Report on Special Needs in Education** which emphasises the neighbourhood schools concept. This concept is based on the view that all children, regardless of their particular needs, should be accommodated and effectively educated within the community schools. It follows from this that no young person should be placed in residential care on the basis that he or she has been expelled from school and that no community school will accept him or her.

At present all children in a place of care, children's home, place of safety, shelter and school of industries have the right to education appropriate to their level of maturity, their aptitude and their ability.[68]

Residential care for children with special needs is also an area worthy of mention. The principle of non-discrimination embodied in Article 2 of the CRC implies that children with disabilities should have equal access to 'mainstream' residential care services. A certain number of separate residential care facilities for disabled children do exist, and some of them may continue to be necessary. The policy document on learners with special needs in education identifies key strategies which include infusing needs and support services throughout the system. Where residential care services and boarding school facilities exist for children with special needs the care, protection and development of these children will need to be ensured. Collaboration between the Departments of Education, Social Development and Health may be necessary to bring about effective management.

19.6.2 Comparative law

---

68 Child Care Act 74 of 1983 reg 31A(p), (t).

19.6.2.1 **Kenya**

A charitable children's institution which intends to implement a child welfare programme must notify the Area Advisory Council and must provide full information on the mode of operation and the specific objects of the programme.[69] The Advisory Council must submit the particulars of the proposed child welfare programme to the Director of Children's Services.[70] It is the duty of the Director to place the proposed programme before the National Council for Children's Services and the Council may approve or disapprove the programme.[71]

The Director must review the programme within twelve months of date of approval and thereafter on a yearly basis. The purpose of the review is to advise the Council or whether the programme should continue or be cancelled.[72]

The Council, acting on the advice of the Director, may disapprove of a programme on the following grounds:[73]

(a) The institution is unfit for the care, protection and control of children; or

(b) the children admitted into the institution are suffering or are likely to suffer harm; or

(c) the manager of the institution has contravened any of the regulations made under this Act.

19.6.2.2 **New Zealand**

---

69 Children Bill 1998 s 65(1).

70 Children Bill 1998 s 65(2).

71 Children Bill 1998 s 65(3).

72 Children Bill 1998 s 66.

73 Children Bill 1998 s 67.

There is a jurisdictional requirement that a plan[74] be prepared in relation to a child or young person before the court makes any of the following orders: a services order, a support order, a custody order, or a guardianship order appointing any person as the sole guardian.[75] The plan must state the following:[76]

(a) the objects sought to be achieved and the period within which those objectives should be achieved;
(b) the details of the services and assistance to be provided for the child or young person, and any parent, guardian or care-giver;
(c) the persons or organisations who will provide such services and assistance;
(d) the responsibilities of the child or young person and any parent, guardian, or care-giver;
(e) the personal objectives for the child or young person, and for any parent, guardian or care-giver;
(f) other matters relating to the education, employment, recreation and welfare of the child or young person as relevant.

---

74 See further 10.4 above on permanency planning.

75 Children, Young Persons and their Families Act 1989 s 128(1).

76 Children, Young Persons and their Families Act 1989 s 130.

Once a plan has been prepared the court shall on making an order, fix a date by which a review of the plan is to be carried out. Where the child is younger than seven, the review must be within six months from making the order. In any other case, review of the plan must be carried out within twelve months.[77] The results of the review must be submitted to the court in a report.[78] The court must then consider what are the best possible future care arrangements for the child and act accordingly.

Plans and reviews enable the court to oversee the implementation of its orders and to ensure the future wellbeing of the child or young person. It also ensures that all relevant parties are involved in the planning.

19.6.3 Comments and submissions received

Documents relating to the transformation of the child and youth care system make a distinction between the residential care facility and the programme offered at such facility. The Welfare **Financing Policy** indicates that in the future funding of facilities will be linked to programmes. It therefore is apparent that in registering facilities the programme needs to be included in that registration process.

A question was posed in the worksheet: 'What would the requirement for registration of a

---

77 Children, Young Persons and their Families Act 1989 s 134.

78 Children, Young Persons and their Families Act 1989 s 135.

programme be?'

Groups 1 and 2 proposed that a programme should be developmentally appropriate and culturally sensitive. Villa Lubet Kinderdorp suggestted that a programme must be cost effective, workable, realistic and should be able to address the needs of the client. The Nelspruit Displaced Children's Trust suggested that a programme must:

- develop the child's physical, emotional and spiritual well-being;
- provide skills to sustain the child in the future; and
- provide the child with recreation.

Mr Viviers of the Department of Social Welfare, Bloemfontein recommended that the programme should comply with the minimum standards for the South African child and youth care system, and it should be accessible in terms of language and culture.

The Moses Sihlangu Health Care Centre proposed that a programme should be in line with departmental policy and says the objectives, outcomes, activities, ways of monitoring, time frames, networking and human resources of a programme should be clearly stated.

The NACCW indicated that in their view the programme must demonstrate that it is within the new policy for the transformation of the children and youth care system. It must be in keeping with minimum standards, it must articulate the practice principles of the policy, and it must demonstrate the promotion of children's rights. Programmes must be relevant to the needs of the children and youth in the community serviced and must be developmental. Programmes must be integrated, holistic and creative.

With regard to education, the majority of respondents supported the view that the Department of Education has a responsibility to provide equal access to education for all children, including those in residential care. In open residential facilities children should attend the community schools.

There is an exemption from school fees for children in residential care, but the wording of this provision[79] has caused much confusion. Some respondents were of the view that school fees should be waived for these children, others favoured subsidisation of the fees by either the Department of Social Development or the Department of Education. Programmes for in-house schooling should be provided for in some facilities - such as those providing secure care.

19.6.4 Evaluation and recommendations

The current regulations create some confusion with regard to a programme to be a offered by a facility and a plan which is specific to the child. For example, in Regulation 13 the following is stated: 'the reports referred to in sub-regulation (3) should be based on the developmental assessment of the child and his or her ecological circumstances and shall reflect the existing and future developmental programmes for the child and family as well as services provided to the child and family to meet developmental goals, as stipulated in the developmental programmes'. Regulation 31A, however, refers to a 'plan and programme of care and development' in sub regulation (b), but to a 'care and development plan' in subregulations (c) and (e).

A distinction needs to be made between a development plan for each individual child and a programme which is to be offered by a particular residential care facility. The individual development plan relates to every aspect of the child's management including developmental objectives, therapeutic needs, reintegration activities. The plan is developed with the participation of the child and can be regularly reviewed.

The programme is offered by the residential facility, and the child's individual development plan will indicate which aspects of the programme the child will need to access.

---

79 See the Regulations to the South African Schools Act 84 of 1996 published in Government Gazette 1937 of 12 October 1998.

The Commission recommends that the new children's statute should provide that each child admitted to a residential facility must have an individual development plan within 7 days of arriving at the facility. New regulations should cover the method of developing the plan (including who should be involved in its development), the aspects which can be included in the development plan and the way in which the plan can be reviewed. The regulations should be similar to those included in Regulation 31A of the current regulations, with the confusion of wording relating to 'plan' and 'programme' resolved.

The Commission further recommends that the new children's statute must also provide that each residential facility should have a programme or programmes. The nature of this programme should be included in the registration documents, but should be flexible and able to be changed fairly easily. The programmes should be reviewed as part of the DQA process. The new children's statute should include an open-ended list of possible programmes.

Issues relating to education should be clarified by the proposed legislation. **It is recommended that there should be a subsidy paid for by the Department of Education for every school-going child in residential care to cover school fees to be paid for public school education**. The subsidy should be paid directly to the school. The Commission believes that such an approach is better than a 'waiver' system as one particular community school may end up taking large numbers of children in residential care due to geographical proximity to a children's home. The waiving of fees, the costs of which must be borne by the school, is onerous for that particular school. The result is that there is an incentive to fill the school with fee-paying children and exclude those for whom there is no payment. A subsidisation approach avoids this problem. Residential care facilities offering in-house education programmes should build this into their programme descriptions. The costs of employing educational staff and related expenses should be carried by the Department of Education.

19.7 Geographical location and size

19.7.1 Current South African Law and Practice

The following rights of children in a children's home, place of safety, school of industries or shelter listed in Regulation 31A is of particular relevance to this discussion:[80]

(1)(d) to expect that their plan and programme is based on an appropriate and competent assessment of their developmental needs and strengths, and where possible is in the context of their family and community environments;

(k) to regular contact with parents, family and friends unless a court order or their care or development programme indicates otherwise, or unless they choose otherwise;

(l) to the involvement of their family and significant others in their care or development programme, unless proved not to be in their best interests, and the right to return to live in their community in the shortest appropriate period of time;

(2)(d) to communicate with and be visited by his or her parent or parents, guardian, custodian, next of kin, social worker, religious counsellor, medical practitioner, psychologist, legal representative, child and youth care worker or any other person with the approval of the children's home, school of industries, place of safety or shelter concerned.

---

80 See Regulation 30A for similar rights for children in a place of care, with exception of regulation 31A(2)(d).

It is sometimes difficult to enforce these rights due to the distance at which many children are placed away from home. It is required of the Director-General in so far as is reasonably practicable to designate a children's home or school of industries in the same district as where the parent, guardian or custodian resides.[81] This is not always possible, due to the physical location of residential care facilities and/or lack of space available at a particular facility.

19.7.2 Comments and submissions received

The worksheet posed the following questions in this regard: 'How can geographical location be addressed in new child care legislation? Should there be a right of a child not to be placed at a certain distance from his parents or community?'

All discussion group participants were in favour of a right for a child not to be placed at a certain distance from his or her parents or community. It was, however, realised that placing a child in a facility nearer to his family home may not be in the best interest of the child, e.g. the facility nearer to home may not have the required programmes or services for the child. Some group participants recommended that if it is not possible to place a child within a certain distance from home, the decision to place the child further away should be taken by a higher authority. Further, set criteria for the placement of a child should be developed, e.g. that the court should take into account factors such as distance and family reunification. Another suggestion made was that facilities should attempt to obtain funds for the purpose of transporting children from and to parents and vice versa.

Mr Viviers of the Department of Social Welfare, Bloemfontein submitted that geographical location of residential care facilities should not be addressed in legislation. However, the right of every child

---

81 Child Care Act 74 of 1983, regulation 12(1).

to be placed close to his / her family or origin should be set out in legislation, e.g. 'Each child shall be placed in such alternative care placement by an order of the children's court that will ensure reasonable access by the parents and/or guardian of the child with priority given to the child's right to family reunification and preservation'. The respondent added that it will be impractical to mention a specific distance, though the principle should be that the placement should support family reunification services.

The Moses Sihlangu Health Care Centre mentioned that it is located in a province (Mpumalanga) that is short of children's homes. It is thus compelled to place a child wherever a place is found irrespective of distance. The respondent added that if the issue of distance is legislated on, its situation would be rendered extremely difficult.

A further question posed in this regard was: 'Should the new children's statute place a limit on the number of children in a residential care facility or on the staff-to-child ratio?'

The discussion groups submitted that the number of children in a residential care facility should be determined by guidelines based on the types of programmes a facility offer, the physical set-up of the facility and the needs of children within that facility. Another suggestion was that the limit on the number of children should be stipulated in regulations and in minimum standards. It was proposed that a children's home should have a maximum of hundred children. The principle should, however, be that a smaller children's home is better than a bigger one. The group participants were hesitant to comment on whether the limit should be based on the staff-to-child ratio as many issues impact on the ratio.

The Nelspruit Displaced Children's Trust opined that if a limit is placed on the number of children in residential care or on the staff-to-child ratio, minimum standards will be adhered to.

Ms Cornelius of the Department of Welfare, Pietermartizburg, proposed that the number of children in a residential care facility should not exceed 150. With regard to the staff to child ratio, the

respondent suggested that there should be a different ratio for different age groups and for different behaviour management needs. Further, behavioural assessment should be included in legislation.

Ms N L T Ngqangweni of the Department of Welfare, Bisho, submitted that the staff-to-child ratio should not be included in the legislation, but should rather be dealt with in regulations. The respondent recommended that the number of children in a residential care facility should not be more than 100. However, if it is a 'campus type' facility, the number of children should not exceed 150.

Mr Viviers of the Department of Social Welfare, Bloemfontein, submitted that huge residential care facilities do not serve the best interest of children and are very impersonal and sometimes clinical. Further, the reason for keeping a large number of children in huge institutions is because it is more cost effective and not because it is efficient in serving the best interests of the child. The respondent mentioned that the international trend is to ensure that residential care facilities are relatively small. Thus, a new children's statute or the regulations thereto should regulate the number of children in a residential care facility and should limit the number of children to a maximum of 80 to 100. The respondent submitted that the issue of staff ratio is complex and will be influence by the following factors: (a) competency of the staff; (b) design and outlay of the building; (c) type of children (age or behaviour or both); and (d) nature of the programme. The respondent recommended that a child-to-staff ratio be set out in the regulations.

The Moses Sihlangu Health Care Centre also indicated that there is a world-wide trend to move towards smaller institutions in order to retain the family aspect of any placement. The respondent submitted that smaller houses such as the SOS type is more desirable. Further, the more intensive therapy a facility is expected to provide, the smaller the facility should be to ensure proper care. The respondent submitted that the staff-to-child ratio depends on the type of programme provided and suggested that a smaller ratio should be required for a more intense programme.

At the meeting of specialists the principle of small units was supported, but is was pointed out with

regard to staff-to-child ratios that this will differ depending on the particular programme offered. It was suggested that the ratio of staff to children should be regulated through the registration process. It was further suggested that MECs be required to develop a plan every 5 years in order to ensure appropriate geographical spread of facilities as well as a wide range of programmes available in such facilities.

19.7.3 Evaluation and recommendations

It is suggested in the IMC **Interim Policy Recommendations**[82] that all programmes intended as resources for a particular community, town or city should be located as close to the appropriate community as possible and should be designed in such a way as to blend with the community without causing offence or placing young people at risk of stigmatisation. Young people, families and the community should have easy access to the facility, as is appropriate, and the facility should have easy access to community resources. As already explained, a needs assessment confirming the need for this resource in the community is contained in the amended regulation to the Child Care Act pertaining to the application for the registration of a children's home, place of care or shelter. A requirement such as this for all facilities (including state-run facilities) will undoubtedly strengthen the right of a child to be placed in a facility as close as possible to his or her parents, or within his or her community.

It is recommended that there should be a general provision in the proposed legislation that where a child is to be placed in a residential care centre that centre should be as close to his or her family and community as possible and that only where there is no such facility offering the particular programme which the child requires within a reasonable distance from the child's

---

82 Par 6.6, p. 63 - 64.

family can this general rule be departed from. A further provision should indicate that new residential care centres should aim towards the pattern of small units and that the staff-to-children ratios should be included in the registration requirements for the particular programme or facility.

It is further recommended that the (national) Minister for Social Development, in consultation with the Members of the Executive Councils (MEC's)[83] should be required to develop a plan for residential care every 5 years, which should include matters pertaining to appropriate geographical spread and range of programmes available in a particular region.

19.8 Procedures[84]

19.8.1 Current SA Law and Practice

19.8.1.1 Designation

Where the child and family court orders that a child be sent to a children's home or a school of industries designated by the Director-General, he or she has thirty days from the court order to make such a designation. The Director-General shall not designate a children's home unless the management of that home agrees to the admission of the child. Most often than not, the child concerned is in a place of safety, awaiting placement. This is a difficult time for children as they wait for finality about their case.

---

83 The responsible **provincial** Minister.

84 See further Chapter 23 (Courts) below.

19.8.1.2 Duration of orders

The duration of any court order made under section 15 of the Child Care Act is usually two years. This period of time is regarded as sufficient for the reunification process. The Minister for Social Development can extend this order for two-year periods.[85] If the child is in a school of industry the Minister of Education can extend the order for longer periods of time.[86] He or she can even bring the child back to the institution after the order has expired. The only limitation on the power of the Minister of Education is that the order to return or the extension of an existing order shall lapse at the end of the year in which the child turns 21.[87]

19.8.1.3 Appeals from the children's court

The situational analysis undertaken by the IMC revealed that approximately one-third of children in state-owned and run facilities were considered by the staff to have been inappropriately placed.[88] Due to the lack of a simple procedure to review the children's court decision, the child is usually kept at the facility.

19.8.1.4 Release at the age of 18

Under the current law, the Minister of Education has the power to order that any former pupil of or a pupil in a school of industries, return to or remain in that school of industries for such period as he or she may deem fit provided that this order shall not extend the period of retention of that pupil beyond the year in which he or she attains the age of 21 years.[89] However, where a child in any other

---

85 Child Care Act 74 of 1983 reg 12(1).

86 Child Care Act 74 of 1983 s 16(2).

87 Child Care Act 74 of 1983 s 16(3).

88 IMC **Interim Policy Recommendations** 49.

89 Section 16(3) of the Child Care Act 74 of 1983.

residential facility is older than eighteen and still at school, the placement can be extended in order to enable him or her to complete his or her education or training. On application of the child or with the consent of the child, the Minister can grant approval for the child to remain in the institution to complete his schooling or education.[90]

19.8.1.5 **Discharge**

90 Section 33(3) of the Child Care Act 74 of 1983.

According to section 37 of the Child Care Act, the Minister may discharge a child from placement in a residential care facility at any time if he or she considers it to be in the interests of such child. However, the discharge of a child must take place within the context of family reunification services.[91]

19.8.1.6 Children who abscond

Certain procedures are prescribed in the current South African law to deal with children who abscond. A child who has absconded may be apprehended by a policeman, social worker or authorized officer.[92] He or she will be brought before a commissioner of child welfare as soon as possible, and must be kept in a place of safety awaiting his or her appearance.[93]

It is expected of the commissioner of child welfare to interrogate the child on the reasons why he or she absconded. After the process of interrogation the commissioner of child welfare may do the following:[94]

(a) Order that the child be returned to the facility from which he or she absconded; or
(b) If there are good reasons not to return the child to the facility, order that he or she be removed to a place of safety, pending action by the Minister.

The Minister may, after consideration of the report of the commissioner and such inquiry as he or she may consider necessary, do the following:[95]

---

91 Child Care Act Regulation 15.

92 Child Care Act 74 of 1983, s 38(1)(a).

93 Child Care Act 74 of 1983, s 38(1)(a).

94 Child Care Act 74 of 1983, s 38(2)(a).

95 Child Care Act 74 of 1983, s 38(3).

(a) transfer or discharge the child; or

(b) deal with the child as if it is the removal from a residential care facility to a place of safety for observation, examination and treatment;

(c) order that the child be returned to the facility from which he or she absconded.

The matter must be dealt with by the Minister within a period of no more than fourteen days after the apprehension of the child.

19.8.1.7 Administrative transfers

There has been a practice in South Africa of transferring children from one residential facility to another, through an administrative process. These transfers have been effected in terms of section 34 of the Child Care Act. This section allows the Minister to transfer any pupil or child from any custody in which he or she has been placed to any other custody and leave from any institution which he or she is in to any other institution mentioned in section 15 of the Act, namely a children's home or a school of industries. Until recently, the law also allowed for children to be transferred to a reform school in terms of this section (read with section 34(3)). The amendments to the Child Care Act in 1999[96] removed the option of transferring children into a reform school. Now the only way in which a child can be sent to a reform school is by a criminal court, in imposing such a sentence.

It is still possible, however, for children to be transferred administratively from children's homes to schools of industries. The former national Minister of Social Development (then described as the Department of Welfare and Population Development) took steps to discourage the abuse of section 34 transfers by issuing a letter to her Department in 1997 placing a 'moratorium' on the transfer of children deeper into the residential care system. The number of children transferred from one facility to another in this way has thus declined.

---

96 By the Child Care Amendment Act 13 of 1999. The Amendment Act came into effect on 1 January 2000.

Any transfer of a child within the residential care system should be based on a decision-making process involving at least the child and his or her parents or family members. The challenge is to find a process which will ensure that any decision on the transfer of a child is made in his/her best interests. On the one hand there may be merit in an administrative transfer if it has certain built-in safety measures in recognizing the right of a child to voice an opinion and to be involved in decisions affecting his or her life. On the other hand, court procedures are not necessarily the answer, as is proven by the track record of children's courts.

To a certain extent, Regulation 15 is evident of the safety measures required for an administrative decision to be taken. This Regulation involves family reunification services and must be read in conjunction with section 15 orders, transfers in terms of section 34 and discharges in terms of section 37. In essence, the relevant parts of this regulation are as follows:

(1) Where it is in the interests of meeting the developmental goals of a child in foster care or in an institution to be transferred or discharged, a report and recommendation must be submitted to the Director-General. The submission of the report and recommendation is the responsibility of the social worker rendering family reunification services and the supervising social worker. These two have a duty to consult each other and where possible people like the parent of the child, the head of the institution and the child concerned.

(2) The report is based on the developmental assessment of the child and must reflect the existing and future developmental programme for the child and the family.

(3) The Director-General must submit the report to the Minister who may review alternative placement of the child. Certain interested parties shall be entitled to be invited to and to participate in proceedings of the review. It is of particular relevance to this discussion that the child and his or her legal representative are included in the list of interested parties.

According to the Minimum Standards a child in residential care has the right to participate in

formulating their plan of care and development; the right to a regular review of their placement and developmental plan; and the right to be consulted and to express their views, according to their abilities, about significant decisions affecting them. These rights are also reflected in Regulations 30A, 31 and 31A.

It is clear from the above, at least theoretically, that ample opportunity is created for a child to be involved in the decision-making process.

19.8.1.8 Leave of absence

Leave of absence may be granted by the manager of an institution, a foster parent or by the Director-General where the child is in a place of safety.[97] A report on the desirability of holiday placement with parents must be furnished before leave is granted. This, however, is not a statutory requirement.

Where a child is placed with parents and the safety of the child is in question, leave can be cancelled by management or the foster parent.[98]

19.8.2 Comments and submissions received

19.8.2.1 Designation

A question considered by the Commission is whether or not the commissioner of child welfare should be empowered to designate a residential care facility, based on the initial assessment and the report of the social worker. In the responses to the worksheet on this matter the discussion groups were of the view that the commissioner of children welfare should be empowered to designate a

---

97 Child Care Act 74 of 1983, s 35(1).

98 Child Care Act 74 of 1983, s 35(3).

residential facility based on the social worker's report. In the individual responses this view was supported by Villa Lubet Kinderdorp, Nelspruit Displaced Children's Trust, the Moses Sihlangu Health Care Centre and NACCW. Mr Viviers of the Department of Social Welfare, Bloemfontein, and Ms N L T Ngqangweni of the Department of Welfare, Bisho, did not share the view of the majority, suggesting instead that the power of designation should remain with the Director-General and the period of time be extended from the current 30 days to 60 days. The meeting of specialists suggested that the commissioners of child welfare should be able to designate the type of facility (e.g. secure care facility, temporary facility) without specifying the particular facility by name.

19.8.2.2 **Duration of orders**

A number of questions were posed in the worksheet relating to the duration of the children's court order.[99] The first question posed was: 'Should the Ministerial power to renew and amend children's court orders be altered, and if so, in what way?' Two of the discussion groups held the view that each case should be reviewed by the court and that both the child and his or her parents should have the rights to be heard. The third group felt that the status quo should be retained. The retention of the status quo (the Minister's power to renew and amend children's court orders) was also supported in the individual responses by the Villa Lubet Kinderdorp, Nelspruit Displaced Children's Trust, Mr Viviers, and Ms Cornelius.

A second question posed was whether the two year duration period of a placement order is seen as realistic to implement reunification processes. The majority[100] of respondents were of the view that the two-year period is sufficient, but that there should obviously be some flexibility so that if reunification is not possible the period can be extended. Some respondents[101] pointed out that reunification could occur more rapidly in some instances and that this should then be facilitated.

---

99 See also Carmel Matthias and Noel Zaal 'Can we build a better children's court? Some recommendations for improving the processing of child-removal cases' (1996) **Acta Juridica** 60-64.

100 Two of the three discussion groups; Villa Lubet Kinderdorp; Nelspruit Displaced Children's Trust; the Moses Sihlangu Health Care Centre and Mr Viviers of the Department of Social Welfare, Bloemfontein.

101 Ms N LT Ngqangweni, Department of Welfare, Bisho and NACCW.

A further question posed was: 'Should a maximum period be set for the duration of children's court order, or should a court, in appropriate cases, be able to issue an order that will last, for example, until the child is eighteen years old or until the order is amended?' The discussion groups were all of the view that once a child enters the system his or her placement should be reviewed regularly. Mr Viviers suggested that a maximum period be set for the duration of a placement order. No court should have the power to place a child in residential care indefinitely as this will be in conflict with the Constitution, the CRC and the African Charter on the Rights and Welfare of the Child.

A question posed in the worksheet was whether a child who has been placed should have the right to request a children's court hearing during the currency of the placement, and if so, what should be the grounds for such a request? Should a parent, social worker or manager of an institution have a similar right?

The discussion group participants were unanimous that children should have a right to request a children's court hearing during the currency of a placements. Some discussion group participants suggested that the child should be heard internally first, where after the children's court could be approached. Further, the child's request must be timeously processed and any obstruction of the process should be explained to a court. Finally, the commissioner should inform the child of his or her rights at the time of making the initial order.

Villa Lubet Kinderdorp recommended that the child should not have the right to request a children's court hearing, but should have the right to request a panel discussion involving all the relevant parties. This recommendation was based on the fact that commissioners of child welfare are not always working on ground level and do not have detailed understanding of a children's institution. Nelspruit Displaced Children's Trust, Ms Cornelius (Department of Welfare, Pietermaritzburg) and Ms N L T Ngqangweni (Department of Welfare, Bisho) answered the questions in the affirmative.

Mr André Viviers (Department of Social Welfare, Bloemfontein) proposed the following:

- the child should be able to request a children's court hearing if he or she feels that he or she is no longer a child in need of care;
- the parents should have the same right;
- the child should be able to appeal against the placement order made or the administrative action taken;
- no social worker or manager of an institution should have the right to request a children's court hearing as it will create a major loophole in the legislation which will be open for abuse if a child is no longer wanted (in the facility).

Moses Sihlangu Health Care Centre recommended that anyone should have the right to request a children's court hearing during the currency of the placement of the child, including the child. The respondent submitted that the grounds for such a request could be based on (a) the type of facility the child was placed in; (b) the length of time the child has been in a facility; (c) a social worker's failure to provide reunification services; (d) failure to involve the child in his or her periodic assessment or to provide such a periodic reassessment.

The meeting of specialists was of the view that the duration of the order should be not less than six weeks and not longer than two years, and that placements should always be open to periodic review. With regard to the question of whether it should be possible to request a children's court hearing during the currency of placement, the meeting suggested that the right to approach the court should also be extended to the child's guardian, in addition to the parents of the child. The meeting also noted that a social worker or manager can lodge an appeal in terms of section 16A of the Child Care Act, and recommended that this should be retained. There are, however, different opinions on this issue which hold that social workers are not entitled to lodge an appeal as they are not accorded legal standing by the courts.

A further question relating to children's court placement orders was whether the children's court should be given greater powers to monitor, review and amend their own placement orders?

Some group participants argued that the child and his or her parents should be able to approach a court to review the placement. The Nelspruit Displaced Children's Trust argued that as long as it is in the best interest of the child, a court should have the power to monitor, review and amend its own placement order. The Moses Sihlangu Health Care Centre submitted that as children's courts have all the role players at hand and have a full picture of the child's situation, they should be given all the powers needed to monitor, review and amend their own placement orders. The suggestion presupposes that commissioners of child welfare are adequately trained (possibly, with the addition of a child care professional as assessor) for the task.

Ms Cornelius of the Department of Welfare, Pietermarizburg, proposed that commissioners of child welfare should have the power to review progress on a case at the request of the social worker, child or parents, and a similar view is expressed by the Ms N L T Ngqangweni of the Department of Welfare, Bisho.

Mr Viviers of the Department of Social Welfare, Bloemfontein, questioned the capacity of the children's court to monitor, review and amend its own placement orders and cautions that this may just become an administrative process that is done somewhere else as a routine. He emphasised that one should not split the system of care too much between the different departments as it usually does not serve the best interest of the child. As the Department of Social Development is primarily responsible for the execution of the children's court order, all administrative processes should be kept within the said Department as it will be easier to manage, and only one party will be held accountable which will avoid an ongoing shifting of responsibilities. The NACCW posed the opposite view, stating that at this point in the transformation of the child and youth care system as many role-players as is possible are necessary to monitor and influence the integrity of the process.

The meeting of specialists noted that the children's court has the power to review and amend placement orders, even those of other courts, in terms of section 15(2) of the Child Care Act. It was suggested that a children's court should in addition be empowered to say that it wants to see the

child back in court in six months to see whether the placement has worked out or not. It was pointed out that this approach could allow commissioners the opportunity to make creative orders dependent on certain conditions - for example that a child be placed at home provided that a parent gives up drinking.

On the issue of visits and inspection of facilities by commissioners of child welfare, section 31(1) of the Child Care Act already provides that a commissioner may enter any children's home, place of care, shelter or place of safety in order to inspect that facility and to observe and interview any child therein. The meeting of specialists agreed that the current provisions should be extended by providing that the commissioner must submit a report after such visit to the Director-General: Social Development and may make recommendations where applicable. It was noted that it should be clear that the commissioner is not allowed to review orders already made without going through a proper court process on the basis of the visit made or interviews undertaken.

19.8.2.3 **Appeals from the children's court**

A further aspect explored in the worksheet was the issue of appeals against orders made by a children's court. The following questions were posed: 'Should appeals be facilitated by a broad ground that the order appealed against was not in the best interest of the child concerned? To which court should any appeal lie?'

There was general agreement amongst discussion group participants that provision should be made for appeals against all orders made by a children's court. The group participants suggested that a time limit to institute an appeal should be stipulated. It was recommended that not only the parties concerned should have the right to appeal against a children's court order, but also external parties in order to ensure the protection of the child concerned. Further, an appeal should be made to a higher court on regional level and not the High Court.

Nelspruit Displaced Children's Trust and Ms Cornelius (Department of Welfare, Pietermaritzburg)

believed that there should be the possibility of appeal from any decision of the children's court. Ms Cornelius added that an appeal from the children's court should be made to the High Court.

Mr André Viviers agreed that people should have a right to appeal against an order of the children's court. He added that an appeal should also be possible against any administrative actions in terms of the child care legislation. Further, appeals should be facilitated based on the best interest of the child and the rights of the child. He suggested that an appeal should be heard in the High Court and each High Court should designate one judge who will be responsible to hear these appeals. Also, appeals should be free of charge and linked to legal aid for the child or parents.

The Moses Sihlangu Health Care Centre was in favour of a right to appeal against all orders made by the children's court, if it can be shown that the order was not in the best interest of the child. The respondent proposed that the appeal should be made to a regional court in order to facilitate the appeal and to reduce costs.

19.8.2.4 **Release of a child at the age of 18 years**

The questions posed in the worksheet relating to this were as follows: 'Does this mean in practice that a child can remain in an institution, regardless of age until education is completed? Compare this with the power of the Minister of Education and Culture who can only extend the placement of a child in a school of industries to the end of the year in which the child turns 21. What is the reason for the difference in approach and can this reason be upheld in new child care legislation?'

The discussion groups suggested that all the residential care facilities should be run by the Department of Social Development as this will enable a uniform approach which should allow children the opportunity to complete their education.
Villa Lubet Kinderdorp was of the view that a child should not be allowed to stay in an institution after the age of 21 and said other arrangements should be made for such a child. Further, the space may be needed for other (younger) children. This was also the view of Ms Cornelius (Department of

Welfare, Pietermaritzburg). On the other hand Ms N L T Ngqangweni (Department of Welfare, Bisho), stated that there should be no limit on the time a child can remain in care (while completing his or her education).

Mr Viviers submitted that in theory, section 33(3) allows children to stay in a children's home until they have completed their secondary or tertiary education. However, the cut-off age in practice is 21 years and a section 33(3) order is rarely issued beyond this age. The respondent explained that the historic reason behind the above-mentioned is that children in children's homes and foster care stay there voluntarily after the age of 18 years to complete their secondary education, whereas children in schools of industries or reform schools can be forced by the Minister to stay and complete their secondary education until the age of 18 years. The respondent suggested that the section 33 extension should be upheld in the new child care legislation and limited to the completion of secondary education or the attainment of the age of 21 years, whichever comes first.

The meeting of specialists suggested that provision be made for an application for an order to allow the child to remain in a residential facility until the end of the year in which the child turns 18 years of age in order to allow such child to complete his or her schooling or training. It was further suggested that the order should not be extended past age 21.

19.8.2.5 **Discharge**

The following questions about discharge were included in the worksheet: 'Should any Minister have the power to terminate the effects of a court order? If there appear to be grounds for such a termination, will the child not be better protected if there is a proper hearing before the same court that issued the order? Is a Ministerial power to overrule a court order not also bad in principles, given the role of courts in a democratic society?'

The discussion group participants did not reach consensus on this question. Some, however, argued that the Minister should retain his or her power to overrule a court order.

Villa Lubet Kinderdorp stated that it will not be practical to have an order reviewed by the same court who issued the order. For example, if a child was placed by a court in Durban in an institution in Vereeniging, the child will have to go back to Durban to have his or her case heard. It was thus recommended that the Minister should retain the power to terminate the effects of a court order.

Ms Cornelius (Department of Welfare, Pietermaritzburg) explained that the termination of a court order by the Minister is not done lightly and is usually only done after intensive reunification services which are documented. The respondent proposed that an appeal system should be put in place and that discharge should be done by a panel.

Mr Viviers (Department of Social Welfare, Bloemfontein) submitted that the Minister should retain the power to terminate the effects of a court order. The respondent explained that discharge by ministerial power usually involves a complex process and the child is usually placed on extended leave with the parents or guardians to observe how the child progresses. The discharge will then be based on the social worker's report. The respondent stated that the discharge option is not often used as most of the time the court order lapses or the child is transferred to the care of his or her parents in terms of section 34 of the Child Care Act.

The Moses Sihlangu Health Care Centre held the view that the commissioner of child welfare who issued the order should have the power to terminate the said court order. The respondent stated that in practice, it is not the Minister that terminates the court order, but somebody somewhere in the bureaucracy. No hearing is held and this becomes only an administrative procedure.

The meeting of specialists suggested that the decision to discharge a child should not be the decision of one person, but that of a panel or of an assessment review process. It was further agreed that a child should not be discharged without family reunification services having been rendered. As to the persons to be involved in the decision to discharge, reference was made to regulation 15(1) of the Child Care Act, 1983.

19.8.2.6 **Children who abscond**

The question posed in the worksheet was: 'What changes should be made to abscondment proceedings?'

The discussion groups submitted that it is the responsibility of facilities to adopt measures for the apprehension of children who abscond. It was suggested that abscondment rates should be monitored in order to identify facilities that have a high abscondment rate.

Villa Lubet Kinderdorp recommended that the abscondment proceedings must be more formal and should also allow commissioners to make alternative placements. The commissioner must also obtain a report from the institution from which the child absconded before the hearing.

Ms Cornelius submitted that complaints by children should be followed up with the relevant departments and should not just be included in the record of proceedings. Ms Ngqangweni stated that the responsibility of residential care facility as regards abscondment should be clearly stipulated. Further, residential care facilities should be accountable for efforts made to apprehend the child. The respondent suggested that the Department of Social Development should monitor the abscondment rate in facilities in order to determine whether facilities are functioning properly.

Mr Viviers submitted that there should be a more intensive investigation into the reasons why the child absconded as children usually run from something (such as boredom or abuse) or to something (friends, worry about family). Further, the complexity of abscondment needs to be understood.

The Moses Sihlangu Health Care Centre submitted that a child who absconds should still be apprehended by a police officer, etc. and brought before a commissioner of child welfare as soon as possible. Further, the child should be kept in a place of safety awaiting his or her appearance. The respondent added that the commissioner should interrogate the child on the reasons why he or she absconded and should request from the social worker who worked with the case any information he

or she may deem relevant. The respondent suggested that the present power of the Minister should be transferred to the commissioner as he or she is in a position to take a more meaningful decision. This will also avoid bureaucracy.

The meeting of specialists considered section 38 of the current Child Care Act and expressed the view that more intensive investigations are needed. It was recommended that part of the investigation should focus on what is going on at the facility from which the child absconded.

19.8.2.6 Administrative transfers[102]

Questions posed in the worksheet with regard to administrative transfers were as follows:

> Should an administrative system of transfers be maintained? Should a court procedure rather be followed? What alternative options are there for facilities or institutions who do not have the means or skills to deal with 'difficult' or 'problem' children?

The discussion groups were divided on whether an administrative or court process should be followed when transferring children. Some were of the view that an administrative system of transfers should be maintained, provided that the decision to transfer a child is made by a panel consisting of professionals from different disciplines. Clear guidelines for transfers are, however, needed. Further, a person aggrieved by a decision should have a right to an appeal. Others, who were also in favour of an administrative system, proposed that an assessment team should decide whether the child should be transferred. The recommendation was also made that children who are placed in less restrictive environments should be dealt with administratively while the court process should be use for more restrictive placements. Mention was made that currently in the Western Cape, if a child is to be transferred deeper into the system, the case must be reviewed by more than one staff member. Further, both the child and his or her parents can request a hearing at which their lawyer can be present. Some discussion group participants recommended that a court procedure should be followed when transferring children. They were, however, open to suggestions that an

102 See further Chapter 23 (Courts) below.

administrative system be maintained provided that such a process is administered properly with the necessary supportive and safety mechanisms. It was submitted that once a child is placed away from home, the state has a responsibility to monitor that child. Further, there need to be incentives for residential care facilities that prove successful.

The following alternative options are proposed for facilities or institutions who do not have the means or skills to deal with some of the children referred to them:

- support teams should be put in place in these institutions;
- ongoing intensive training and screening of staff members should be undertaken;
- programmes should include training on behavioural management;
- there should be differentiation of facilities in terms of skills;
- temporary transfers that are therapeutic and rehabilitative should be introduced as part of the system; and
- interim treatment orders should be introduced.

The Nelspruit Displaced Children's Trust was in favour of maintaining an administrative system. The respondent added that qualified staff are needed to deal with difficult children, and that the transfer of such children should not be the first option.

Ms Cornelius (Department of Welfare, Pietermaritzburg) also argued in favour of an administrative system of transfers and suggested that panels comprising of NGOs and officials from the Department of Social Development should be utilised to consider the transfer of children. The respondent submitted that the courts do not have the time and expertise to deal with the matter.

Mr Viviers (Department of Social Welfare, Bloemfontein) submitted that an administrative system of transfers can both be positive and negative. Mechanisms need to be put in place to ensure that an administrative system of transfers is not abused. The respondent argued that a court procedure may be theoretically appropriate, but in practice can do more harm than good. In the view of the

respondent very few commissioners have sufficient knowledge of the Child Care Act and commissioners are often led by social workers or personnel from residential facilities. The respondent believed there is a risk that transfers will be done more arbitrarily and frequently if a court process is followed as the decision need only be made by the commissioner. On the other hand, administrative transfers involve more people, and thus there are more safeguards to prevent abuse of power and arbitrary transfers.

The Moses Sihlangu Health Care Centre added its voice in favour of an administrative system of transfers. The respondent submitted that the court's roll is always full and suggests that a shift should be made from traditional structures to structures that cater for children according to their needs.

NACCW commented that an administrative system of transfers has the advantage of swift alternative options for the young person in need without the trauma of a court procedure. The disadvantage is the loophole for practitioners in the field to move children without the proper assessment and to take decisions that are not in the best interests of the child. The respondent was of the view that the only safeguard lies in the assessment skill of the person who processes administrative transfers. The respondent asserted further that according to the developmental assessment process a full case review has to take place before a care plan can change - ensuring that all relevant role players are consulted including the child and family. Finally, the respondent was of the view that administrative transfers are most applicable when the child is moved to a more empowering environment rather than a more restrictive one.

A further question posed was '(i)f an administrative system of transfers is to be maintained, what safety measures need to be incorporated in the new child care legislation to ensure that children do not end up being in a one-way street deeper into residential care?'

The discussion groups made the following suggestions:

- facilities should know what kind of cases they can deal with in order to prevent transfers;

- parties involved should have a right to appeal against decisions made;
- decisions on whether a child should be transferred must be made by a panel;
- a child should be properly assessed before referral;
- an individual development plan is needed for each child
- a child's family should be involved in decisions regarding his or her transfer;
- social workers must be aware of all the alternatives available, e.g. programmes, before placing a child.

Villa Lubet Kinderdorp proposed that panel discussions with all the role players involved in a particular case should be held annually. The Nelspruit Displaced Children's Trust recommended that parents, guardians, relatives of the child and the child must be involved in any matter or decision affecting the child. Ms Cornelius (Department of Welfare, Pietermaritzburg) submitted that the child must be consulted by the review panel or a social worker representing the panel on issues or decisions affecting the child.
Ms N L T Ngqabgweni (Department of Welfare, Bisho) made the following recommendations:

- a panel should review whether the child should be transferred deeper into the system;
- the child should first be assessed;
- an aggrieved person should have the right to appeal against a transfer;
- the family of the child and or the community should be involved in decisions affecting the child;
- social workers should be aware of resources available; and
- training of commissioners should involve child care issues.

Mr André Viviers (Department of Social Welfare, Bloemfontein) submitted that the impact and experiences pertaining to Project Go[103] have had positive results and have impacted on the lives of

103 Project Go was a project of the Inter-Ministerial Committee on Young People at Risk, one of the aims of which was to prevent children being transferred to more restrictive placements and to promote the placement of children back in communities as far as this was possible. On the other hand, there has been considerable dissatisfaction with Project Go from NGO's. It is e.g. claimed that children have become destitute and have taken to the streets due to being send home too readily due to pressure to create space in residential care

children. He was of the opinion that Project Go has also prevented many children from ending up in a one-way street deeper into the system. Mr Viviers suggested the following safety measures:

- all administrative transfers or actions in terms of the legislation should be subjected to an appeal;
- all administrative transfers must be a team decision and based on a developmental assessment and review;
- an independent party, e.g. a small team at the Department of Social Development's provincial office should authorise such transfers after engaging with all parties (child, facility, parents, etc.) concerned; and
- all transfers approved must be subject to submission of all the documents (after the transfer) to a quality control and monitoring process.

The NACCW suggested that all assessments regarding possible transfers should be undertaken by trained personnel and in multi-disciplinary teams.

It was further recommended by one of the discussion groups that the words 'deeper into the system' should not be used as this is labelling certain groups of children. Further, if the issue of permanency is addressed at the outset, the child will not need to be transferred to a more restrictive placement.

At the meeting of specialists it was agreed that the administrative transfer of children in residential care deeper into the system should happen only as a measure as last resort. It was mentioned that

---

settings for children in conflict with the law. It is also alleged that children who need residential care are being kept out of facilities with very detrimental consequences. A common assertion is that, while the thinking behind Project Go has been very sound, a lack of adequate resources makes its proper implementation impossible.

some institutions are finding loopholes in section 36 of the Child Care Act by laying criminal charges against a child in the criminal court for a petty offence such as the breaking of a window. It was noted by some of the specialists present that administrative transfers deeper into the system are happening less and less.

As for transfers to less restrictive types of care it was mentioned that such transfers take place after the social worker has filed a report which is then dealt with by the canalisation officer. The meeting agreed that in the case of transfers to less restrictive forms of care, the requirements need not be so strict, especially as regards placements back into the child's family. In all cases, however, more than one person would be involved in the decision-making process to transfer the child.

19.8.3 Evaluation and recommendations

19.8.3.1 Designation

The Commission recommends that the commissioner of child welfare should have the power to designate the type of programme, such as a secure care or a treatment programme. The Commission further recommends that the decision as to which particular child and youth care centre where the child is to be placed should be made by relevant officials of the (provincial) Department of Social Development, based on the programmes offered by such centre and on the developmental assessment needs of the child.

19.8.3.2 Duration of orders

The Commission has considered the various inputs regarding duration of initial residential care placement orders and is of the view that a children's court can place a child in a residential care programme for longer than 2 years without reviewing the order. However, it may be possible to have an order which is shorter in duration, and the Commission recommends a minimum period of 6 weeks. This might be appropriate in some cases where an

assessment of a child indicates that a child has a particular problem which could be dealt with in terms of an intensive but brief intervention, such as a substance abuse treatment programme.
With regard to the extension of a residential care order beyond the original period set by the court, **the Commission recommends that such extensions can be made by way of an administrative procedure. The procedure to be followed should be set out in regulations to the Act, and should include a requirement that the decision is to be made by a team rather than an individual, that the child and his or her family have rights to participate in the decision making process, that they be given reasons for the decision and be informed of their right to a review of the decision. The right of review should lie to the child and family court and this should be provided for in the Act**.

The Commission considers it necessary to leave all orders open to the possibility of periodic review at any time. **Regarding the matter of who should have the right to approach the court for a hearing during the currency of an order, the Commission recommends that the child, his or her parent or a guardian should be able to approach the court. A court may also order that a case be brought back to court for purposes of review. A social worker or manager who disagrees with the placement of a child can lodge an appeal in terms of the current Act, and the Commission recommends that this possibility should be included in the new legislation as well**.

With regard to the question of whether the children's court has the power to review and amend placement orders, the Commission recognises the power to do so in terms of section 15(2) the current Child Care Act. **It is recommended that this power be reflected in the new children's statute and be augmented to include a power for the presiding officer of the court to request a child to appear again before him or her at a particular time**. The Commission is persuaded by the view that this will allow presiding officers to make more creative orders, on the basis that they will be able to monitor them to some extent.

On the issue of visits and inspection of facilities by commissioners of child welfare, the Commission

notes that section 31(1) of the Child Care Act already provides that a commissioner may enter any children's home, place of care, shelter or place of safety in order to inspect that facility and to observe and interview any child therein. **It is recommended that all commissioners of child welfare must at least once a year inspect all child and youth care centres in their areas of jurisdiction. The current provision[104] in the Child Care Act, 1983 regarding inspection of children's homes and places of care can therefore be retained in the new children's statute and be extended by providing that the commissioner must submit a report after any such visit to the Director General: Social Development and by empowering the commissioner to make recommendations where applicable**.

19.8.3.3 **Appeals from the children's court**

The Commission is of the view that in the new children's statute appeals should lie against any residential care placement order, or any variation thereof, made by a children's court. These appeals should lie to a higher court, and provision should be made for application to the Legal Aid Board by the child, parent or guardian should such person lack the financial means to obtain legal representation at his or her own cost.

19.8.3.4 **Release of a child at the age of 18 years**

104 Section 31.

After consideration of all the comments on the issue of the release of a child from a residential facility at the age of 18 years, **the Commission recommends that provision should be made for an application for an order to allow the child to remain in a residential facility until the end of the year in which the child turns 18 years of age in order to allow such child to complete his or her schooling or training**.[105] This should not be dependent on the consent of the parent as is presently the case. **It is further recommended that the order should not be extended past age 21, and that this rule should apply regardless of whether the residential facility falls under the management of the Department of Social Development or of Education**.

19.8.3.5 **Discharge**

The Commission recommends that the power of discharge from a child and youth care centre may remain an administrative one, but that the decision to discharge a child from a facility should be made by a *team* of people rather than by an individual. It is further recommended that the requirement that the discharge of a child should, where possible, be within the context of family reunification services as currently contained in Regulation 15(1) should be included in the new children's statute. Guidelines as to the exact procedures and the persons to be involved in the process of discharge can continue to be reflected in regulations to the Act.

19.8.3.6 **Children who abscond**

The Commission is of the view that the section 38 of the current Act should be expanded upon. Firstly, there should be a more detailed investigation into the reasons that led to the child absconding. Secondly, the court should have the power to change the order where it would be appropriate to do so.

105 See further 4.5 above.

19.8.3.7 Administrative transfers

The Commission is of the view that administrative transfers should not be completely removed from the system. In this regard, it is important to distinguish between administrative transfers which lead to children being placed in more restrictive environments, and those which lead to children being placed in less restrictive environments or even back in their own homes. Where children are to be moved to a placement which is less restrictive, such decisions can be made administratively, although the decision should still be made by a team rather than by an individual. **Where a child is to be transferred to a more restrictive environment the Commission recommends that the matter should be referred back to court**. The decision to place a child in 'deeper into the system' is one which has serious implications for the child and it is thus necessary for such a decision to be scrutinised by the court.

Where an administrative transfer is being considered in order to place a child in a less restrictive environment, the requirements may be less stringent, but it should still be a requirement that a team, rather than an individual, be involved in the decision-making process.

19.9 Rights to care and protection in residential care facilities

19.9.1 South African law and practice

The following excerpt from the **Final Report** (1995-1999) of the Inter-Ministerial Committee on Young People at Risk clearly expresses the need to give urgent attention to care and protection of children in residential care:[106]

> Children in care and custody are the most vulnerable of all. Most of them have never been informed of their rights. In fact in many facilities the manager and staff have never heard of the UN Convention on the Rights of the Child, and if they have, they do not know how to implement it within the facility. The system in which these some 20 000 children find

106 IMC **Final Report** (1995-1999) 60.

> themselves is extremely powerful and power-centred. The majority of the children are neglected, abused, abandoned, homeless, or dislocated from their families and communities in one form or another. The majority have no recourse to anyone who is available purely to ensure that the child's rights are upheld and take decisive actions when this is not the case.

The protection of children in residential care requires a holistic approach. In the first place it requires a process whereby children are made aware of and understand their rights and responsibilities as children, and specifically as children in residential care. This process must take full cognisance of the language requirements of the specific child and the age and maturity of the child.

In the second place a holistic approach requires a process whereby every service provider fully comprehends the rights and responsibilities of every child with whom they are in contact. Service providers also need to know what their own rights and responsibilities are. Failure to do so or the seeming over-emphasis on the rights of children can easily lead to negativity or a feeling of disempowerment by service providers. It is clear that specialised ongoing training of service providers is required.

Thirdly, grievance procedures and communication channels must be put in place that are user-friendly for children, their families, the local community and service providers. Very often children fail to report violations of rights or instances of abuse. This happens because they fear that they will be victimized in the residential care setting or that they will not be believed because they are children. On the other hand service providers must find confidence in the fact that any allegations of abuse will be handled in an objective and professional manner. As a minimum requirement all parties involved must have the opportunity to voice an opinion.

In the fourth place a system of monitoring is required to ensure the effective care, development and protection of children in residential care. This requirement is in accordance with rule 72 of the United Nations Rules for the Protection of Juveniles deprived of their Liberty. In terms of this rule a duly constituted authority should be established which should be empowered to conduct inspections

on a regular basis and to undertake unannounced inspections [of residential care facilities] on their own initiative. There must also be full guarantees of independence in the exercise of this function.[107]

At present the rights of children in residential care are addressed in much detail in the regulations to the Child Care Act.[108] In terms of thereof all children in a children's home, place of safety, school of industries or shelter shall have the right:

(a) to know their rights and responsibilities;

(b) to a plan and programme of care and development, which includes a plan for reunification, security and life-long relationships;

(c) to participate in formulating their plan of care and development, to be informed about their plan, and to make changes to it;

(d) to expect that their plan and programme is based on an appropriate and competent assessment of their developmental needs and strengths, and where possible is in the context of their family and community environments;

(e) to a regular review of their placement and care and development plan;

(f) to be fed, clothed and nurtured according to community standards and to be given the same

---

107 The Cabinet accepted the report of the IMC on Children in Care and Custody and Care in South Africa and instructed that immediate action be taken on the recommendations made by the IMC. However, in the Final Report on 58 it is remarked that no progress has been made to establish such an authority in accordance with rule 72 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

108 Regulations 30A(2), 31A(1) and (2).

quality of care as other children in the children's home, place of safety, school of industries or shelter, as the case may be;

(g) to be consulted and to express their views, according to their level of maturity, about significant decisions affecting them;

(h) to reasonable privacy and to possession of their personal belongings;

(i) to be informed of behaviour expected by service providers and of the consequences of not meeting the expectations of service providers;

(j) to care and intervention which respects their cultural, religious and linguistic heritage and the right to learn about and maintain this heritage;

(k) to regular contact with parents, family and friends unless a court order or their care or development programme indicates otherwise, or unless they choose otherwise;

(l) to the involvement of their family and significant others in their care or development programme, unless proved not to be in their best interests, and the right to return to live in their community in the shortest appropriate period of time;

(m) to be free from physical punishment;

(n) to positive disciplinary measures appropriate to their level of maturity;

(o) to protection from all forms of emotional, physical, sexual and verbal abuse;

(p) to education appropriate to their age, their aptitude and their ability;

(q) to send and receive mail which is not read by others: Provided that in those rare cases when mail must be read by a service provider, the child has a right to be present or to give permission for mail to be read without being present;

(r) to be informed that prohibited items in their possession may be removed and withheld;

(s) to respect and protection from exploitation and neglect;

(t) to opportunities of learning and opportunities which develop their capacity to demonstrate respect and care for others;

(u) to an interpreter if language or disability is a barrier to consulting with them on decisions affecting their custody or care and development;

(v) to privacy during discussions with families or significant others, unless this can be shown not to be in the best interest of the child;

(w) in the event of any violation of their rights as referred to in this subregulation notify

(i) any nurse, social worker, child and youth care worker or person authorised thereto by the Director-General or any commissioner when interviewed in terms of section 31(1)(b) of the Act; or

(ii) any dentist, medical practitioner, nurse, social worker, teacher, child and youth care worker or person employed by or managing a children's home, place of safety, school of industries or shelter, when examined, attended to or dealt with in terms of section 42(1) of the Act, or at any other stage.

Every child who is cared for in a children's home, place of safety, school of industries or shelter must be informed of his or her rights and responsibilities in terms of this regulation.[109] This includes the right –

(a) to be informed promptly in a language which he or she understands of the reason for his or her admission or detention, as the case may be;

(b) to have his or her parent, guardian, custodian or next of kin informed of the place to which he or she has been admitted or in which he or she is being detained, as the case may be, and of the reason of his or her admission or detention, as the case may be;

(c) in the case of a place of safety, to be detained only as a measure of last resort in his or her best interests for the shortest appropriate period of time;

(d) to communicate with and be visited by his or her parent or parents, guardian, custodian, next of kin, social worker, religious counsellor, medical practitioner, psychologist, legal representative, child and youth care worker or any other person with the approval of the children's home, school of industries, place of safety or shelter concerned;

---

109 Regulation 31A(2).

(e) to personal privacy and to privacy with regard to any visitation or any communication addressed to or by him or her, unless there is reason to believe that intervention by a social worker, child and youth care worker, educationist or psychologist, after due consultation with such child, is justified as being in his or her best interests; and

(f) to be cared for separately from persons over the age of 18 years.

The reference to certain prohibited behaviour management practices in the regulation to the Child Care Act must be read with the context of the transferral of parental powers to the management of an institution.[110] The transferral of parental powers expressly includes the right to punish and to exercise discipline. The management of an institution may authorize the head of the institution to exercise on its behalf any powers in connection with punishment and discipline.

The Regulations (as amended) specifically prohibit certain behaviour management practices by any person in a children's home, place of safety, school of industries or shelter.[111] In addition, no place of care shall be registered or shall remain registered after 24 months unless the Director-General is satisfied that specific behaviour management practices are forbidden.[112] These practices are as follows:

(a) group punishment for individual behaviour;

(b) threats of removal, or removal from the programme;

(c) humiliation or ridicule;

---

110 Section 53 of the Child Care Act, 1983.

111 Regulation 32(3).

112 Regulation 30A(2).

(d) physical punishment;

(e) deprivation of basic rights and needs such as food and clothing;

(f) deprivation of access to parents and family;

(g) denial, outside of the child's specific development plan, of visits, telephone calls or correspondence with family and significant others;

(h) isolation from service providers or other children admitted to the place of care, other than for the immediate safety of such children or such service providers only after all other possibilities have been exhausted and then under strict adherence to policy, procedure, monitoring and documentation;

(i) restraint, other than for the immediate safety of the children or service providers and as an extreme measure. This measure is governed by specific policy and procedure, can only be undertaken by service providers trained in this measure, and must be thoroughly documented and monitored;

(j) assignment of inappropriate or excessive exercise or work;

(k) undue influence by service providers regarding their religious or personal beliefs including sexual orientation;

(l) measures which demonstrate discrimination on the basis of cultural or linguistic heritage, gender, race, or sexual orientation;

(m) verbal, emotional or physical harm;

(n) punishment by another child; and

(o) behaviour modification such as punishment or reward systems, or privilege systems, other than as a treatment or development technique within a documented individual treatment or development programme which is developed by a team including the child and monitored by an appropriately trained multi-disciplinary team.

The prohibited behaviour management practices which may not be used by any person in a children's home, place of safety, school of industries or shelter are similar in content. As in the case of places of care, the prohibition on physical punishment is formulated in the language of children's

rights.[113] Therefore, all children in a place of care, children's home, place of safety, school of industries or shelter, shall have the right to be free from physical punishment. A child who is disciplined shall have the right to positive disciplinary measures appropriate to his level of maturity.[114]

---

113 Regulations 32(3)(d), 30A(1)(d), 30A(2)(m), 31A(1)(m).

114 Regulations 31A(1)(n), 30A(2)(n).

The Regulations leave little doubt as to the extent of the responsibilities of the head of a children's home, place of safety, school of industries or shelter within the context of behaviour management practices.[115] This person must ensure that the child and his or her family are oriented appropriately upon the child's admission with regard to the rules and the safety and complaints procedures, as well as the child's rights and responsibilities. Other responsibilities include the following:

(a) The head of the institution must ensure that children are provided with the skills and support which enables constructive and effective social behaviour.[116]

(b) The head and the staff team of the institution must demonstrate the expected behaviour in their attitudes and interactions with the children.[117]

(c) The head of the institution must ensure that children feel respected, and physically, emotionally and socially safe when service providers manage their behaviour and provide support.[118]

(d) The head of the institution must ensure that children are given plenty of opportunity and encouragement to demonstrate and practice positive behaviours.[119]

19.9.2 Comments and submissions received

The worksheet posed the following questions about the regulations: 'Are these regulations user-friendly? Do they serve the purpose of informing children of their rights and responsibilities?'

The discussion groups were of the view that the regulations that contain the rights of children are

---

115 Regulation 32(2).

116 Regulation 32(4).

117 Regulation 32(5).

118 Regulation 32(6).

119 Regulation 32(7).

user-friendly. It was, however, felt that the regulations generally should be made more user-friendly.

Villa Lubet Kinderdorp, Mr Viviers (Department of Social Welfare, Bloemfontein) and the NACCW were all in agreement that the regulations regarding children's rights are user-friendly. Moses Sihlangu Health Care Centre submitted that although the regulations are user-friendly, they over-emphasise the rights of children at the expense of their responsibilities. Thus, children in care facilities should be aware of their responsibilities to do house chores, to perform well at school, to participate in sports, to respect their peers, etc. The respondent said that the responsibilities of children in care facilities should be given greater meaning to prepare them for the future.

Ms Cornelius (Department of Welfare, Pietermaritzburg) submitted that the regulations are cumbersome and are not easily understood by children. Further, the regulations are regarded as threatening by the staff and the management of residential care facilities. The respondent proposed that the rights of children should be included in the ethos of each children's home.

A further question was posed asking whether the regulations on care protection, development and control, management of good order and behaviour management work in practice.

Groups 1 and 2 submitted that the regulations do not work effectively in practice due to the lack of trained personnel. Group 3 chose to state the same idea in a more positive way, saying that the regulations do work in practice in cases where staff are well trained, adding that management influences the way regulations are implemented.

Ms Cornelius answered the question in the negative and submitted that management, including the board of management do not always understand the transformation of the child and youth care process. Further, they focus on the negative and confuse behaviour management with behaviour modification. The respondent opined that the system has still not recovered from the banning of corporal punishment and that persons are not imaginative enough to be strength-motivated.

Mr Viviers submitted that the regulations as set out in Regulation 31A in essence facilitate the implementation of the Minimum Standards for the South African Child and Youth Care System. Further, the regulations do work in practice and are understood where persons in residential care know their job and the philosophy behind child care. However, programmes that lack the competency in residential care usually struggle with them. He was of the opinion that Regulation 31A is there to protect children and to provide them with a system that meets their needs and respects their rights. Thus, these regulations do work in practice for children if properly implemented by the staff of a facility.

19.9.3 Evaluation and recommendations

The Commission recommends that the Regulations continue to set out children's rights. However, greater emphasis should be placed on the responsibilities of children, and additional efforts must be made to ensure that the regulations are easy to understand and work with. **Even more emphasis should be placed on training of staff in residential care facilities**. The wording of the Regulations should be revisited in consultation with practitioners to specifically address concerns related to uncontrollable or unacceptable behaviour of children in such institutions.[120] **The Regulations should include the requirement that children be informed about their rights as well as their responsibilities**.

19.10 Minimum standards and quality assurance in residential care

19.10.1 Current South African Law and Practice

120 Identified as particularly problematic were Regulations 30A(2)(a), (b), and (o) which respectively forbid group punishment for individual behaviour, threats of removal, or removal from the programme, and certain behaviour modification systems.

The Child Care Act, 1983, makes provision for the inspection[121] of children's homes, places of care, shelters and places of safety. The procedures and instructions for review and evaluation are set out in the regulations to the Child Care Act, 1983.[122]

The person designated to do the inspection can be a social worker, nurse, commissioner or any person authorised thereto by the Director-General: Social Development. Such person may enter a residential care facility in order to inspect such facility, as well as any relevant books and documents. As part of the inspection, any child in the facility may be observed and interviewed. This includes the possibility of the child being examined by a medical officer, psychologist or psychiatrist. A report of the inspection must be submitted to the Director-General.

Review and evaluation of children's homes, places of safety, places of care and shelters focus on two aspects: Firstly, whether the requirements for registration of the relevant residential care facility are met, and secondly, the standard of care, protection or development of children in these institutions. This includes disciplinary management and the keeping of the required registers or files.

Where the report indicates that a requirement for registration has not been met, the Director-General has the following course of action:

---

121 Section 31 of the Child Care Act 74 of 1983.

122 Regulation 34A.

a. The management and head of the facility must be informed of the content of the report;
b. If necessary the head and management must respond in writing within fourteen days of receipt of the report;
c. A developmental programme, guidance and support shall be provided to enable the management and head to meet the requirements within two to six months;
d. After the six-month period, a further report and review must be undertaken;
e. If the requirements for registration have still not been met satisfactorily, the facility may be closed down.

Should concern be expressed about any matter relating to the care, protection or development of children, the control, maintenance or good order and behaviour management or the keeping of registers and files, the head of the department responsible for the facility shall be informed of the report. He or she shall also be required to respond in writing to the concerns expressed in the report.

The head of the department will be placed under the obligation to provide a developmental plan, guidance and support to the facility for a stipulated period. After this period a further inspection will be ordered and reported on within fourteen days. Should the report indicate that the original concerns have not been satisfactorily addressed or remedied, the head of the department will be granted another three months to remedy the situation. As a last option, the facility may be closed down by the Director-General.

The IMC on Young People at Risk initiated a process to develop a quality assurance system. A set of minimum standards was circulated for general comment and discussion during 1998. These have formed the basis for a national programme on 'Developmental Quality Assurance' (DQA) which is being integrated into the line function of the national and provincial Departments of Social Development.

The DQA process requires that (i) the residential facility does an internal assessment, (ii) an independent team assesses the facility over a period of 3 to 4 days, (iii) an organisational

development plan is established by the facility's team and the DQA team and agreed upon, and (iv) the DQA team appoints a mentor who continues to support the organisation as they implement the plan.

The DQA and the minimum standards are inextricably linked. The Minimum Standards and the DQA are reflected in the regulations to the Child Care Act. All children's homes, places of care, shelters and places of safety (including facilities maintained and controlled by the state) must be subjected to a quality assurance review with respect to the minimum standards for residential care. This review shall be undertaken by the Director-General and will result in a report and developmental programme.[123] The registration of a children's home, place of care or shelter shall be reviewed every 24 months on the basis of a quality assurance assessment undertaken by appropriately trained officials appointed by the Director-General.[124] Subject to the provisions of the Child Care Act and regulations no children's home or shelter shall be registered or remain registered after 24 months unless the Director-General is satisfied that proper arrangements have been made or will be made for the care, protection and development of each child in the children's home or shelter, in line with the established minimum standards.

As a monitoring tool, the DQA is intended to ensure that organisations comply with legislation, policy principles and international instruments and that an effective and efficient service is delivered at least at the minimum standards level. Where violations are identified by the DQA team, the

123 Regulation 34A(3).

124 Regulation 30(4).

following should take place:

(a) The DQA team leader is responsible for reporting these to the DQA authorities telephonically and in writing within 36 hours. In extreme cases the reporting should be done within 24 hours.

(b) The DQA team is responsible for formulating immediate and medium term actions which will provide protection for the individuals, families, or communities concerned.

(c) The DQA authorities are responsible for ensuring that violations are addressed and that there is close monitoring until the situation is satisfactory.

(d) The DQA authorities are responsible for reporting violations, in writing, to the National or Provincial Government authorities that have oversight with regard to the particular service. The reporting should be done within 7 days, except in extreme cases where this should be done within 48 hours. The national and/or provincial government is responsible for either ensuring that the DQA authorities are empowered to follow through on the violations or for monitoring violations themselves.

(e) Where abuses or extreme violations are identified, the DQA team is responsible for ensuring that the appropriate law enforcement authorities (such as the Child Protection Unit of the Police) are called in and charges are laid.

(f) Where registered professionals (such as psychologists, social workers, teachers or child and youth care workers) have been aware of abuse, or party to the abuse, the DQA provides for the reporting of individuals to their respective councils and to the government authorities for any further legal action. This particularly applies where professionals are required by law to report abuse.

19.10.2 Comments and submissions received

With regard to inspections the worksheet posed the following questions: ‘Does inspection really ensure compliance with the regulations? Are there any other means to ensure that the rights of children are recognised and respected?’

All 3 groups submitted that the inspection of facilities in terms of the Child Care Act is not sufficient to ensure adequate protection of children. The groups were in favour of the DQA process and say there is a need for guidelines in the respective provinces. The majority of respondents supported this view.

Mr Viviers (Department of Social Welfare, Bloemfontein) submitted that although inspections have been conducted for the past 40 years, they have had little effect on the compliance of minimum standards. He stated that these inspections were (and in some cases are) still done by officials who have no experience in residential care and very limited understanding of the programme, which resulted in a focus on the physical conditions rather than programme-related matters and the experience of children. Thus, these inspections were usually experienced as negative, non-empowering and absolutely power-based.

Mr Viviers submitted that the DQA is a suitable alternative to the 'old inspections'. He mentioned that when he conducted DQA at children's home, he experienced the DQA process to be very empowering and that it focused on the child rather than the system. Mr Viviers stated that the primary focus of the DQA is to look at how the service recipients experience the service and whether their rights are respected and protected. The residential care programme is thus monitored in a developmental manner. Further, the DQA is conducted by persons who know the service and the standards that apply to the service. It also shows out which programmes are focussing on the child and serve his or her best interest, and which programmes are harmful towards children.

With regard to the DQA process the following questions were included in the worksheet: ‘Who should the team implementing quality control ideally consist of? What qualifications or experience should they have? Should it be a team representing an objective and an independent organisation? Should it be a team represented by community members, NGOs and government personnel?’

All 3 discussion groups suggested that Government personnel and NGOs with relevant experience

should serve on the team implementing quality control. The community and other volunteers could also be involved. Broadly speaking, the individual respondents' views accorded with this.

Mr Viviers suggested that the composition of the team to do the DQA should be flexible and not rigid. He would prefer that the new children's statute refer to 'developmental quality assurance process conducted by a team of appropriately trained persons'. Mr Viviers saw the following as important:

- the composition of the team should be based on the kind of facility to be subjected to the DQA;
- the team should be balanced with experienced and qualified persons in child and youth care / residential care services;
- it is essential that one of the team members be a government official (though not necessarily the person who leads the team);
- NGO representatives and community members may be part of the team if appropriate; and
- all persons doing a DQA or involved in a DQA team should be trained in DQA.

The Moses Sihlangu Health Care Centre suggested that the DQA should be conducted by an objective and independent organisation and not by the Department. The respondent submitted that the persons conducting the DQA should be knowledgeable and experienced in the particular field of care. Further, people serving on the DQA team should co-opt a departmental person responsible for the facility and a member from the community in which the facility is located. Also, NGOs should be represented in all DQA's, whether it is a DQA for an NGO or a departmental facility.

Further questions posed on the DQA were: 'How often must quality control take place? Is it necessary to differentiate between a process of internal or external control and will it affect the frequency of quality control?'

Groups 1 and 2 recommended that quality control should take place once every two years and as

often as needed in special needs cases. Further, a distinction should be drawn between a process of internal and external control.

The NACCW was of the view that DQA's should be done biennially and whenever there is a need for a DQA. However, the mentoring aspect of the DQA should go on between the evaluations to promote a culture of internal assessment.

The recommendations of other respondents were that the DQA should occur between one and five years apart, with more regular internal evaluations being undertaken.

Mr André Viviers submitted that the DQA is a developmental monitoring tool and is based on a developmental approach. He stated that internal DQA is an opportunity for the organisation or residential care facility to prepare themselves for the external DQA process and also provide them with the opportunity to evaluate themselves. This is thus valuable to the organisation and contributes to the developmental approach. It was further submitted that the external DQA is done by an external team who conducts the DQA. Mr Viviers said that it is necessary to differentiate between the two processes as they are complimentary processes although different from each other.

An additional question posed was whether commissioners of child welfare or children's courts should have a role to play in the inspection of residential care facilities.

Groups 1, 2, and 3 emphasised that commissioners of child welfare or children's courts should play a significant role in the inspection of residential care facilities. This view was concurred with in the individual responses from Villa Lubet Kinderdorp, Mr André Viviers, and Ms N L T Ngqangweni (Department of Welfare, Bisho).

Ms Cornelius (Department of Welfare, Pietermaritzburg) expressed concern over the fact that some commissioners do not understand the Child Care Act. She submitted that commissioners should only play a role in the inspection of residential care facilities if they are trained to understand the

purpose of residential care and the transformation of the child and youth care system.

The Moses Sihlangu Health Care Centre stated that as commissioners are usually overburdened, provision should be made that they visit facilities once a year to meet with the board of management, staff members and children. This will help them to become aware of what is taking place within their area of jurisdiction.

The worksheet raised the question as to whether the Minimum Standards should be reflected in the Act itself or in regulations to the Act.

The groups submitted that minimum standards should be reflected in regulations as these are more flexible. This view was supported by all the other respondents other than Mr André Viviers. He suggested that the minimum standards should be a schedule to the regulations. The Minimum Standards will thus acquire the force of law while changes to the Standards can still easily be effected.

The worksheet posed the question: 'Is monitoring an independent function or does it form part of the general process of quality control?'

The discussion groups agreed that children should be monitored while in the system. Further, children's homes etc. should be compelled to submit a progress report on children in their care. The groups were, however, divided on whether monitoring should be seen as an independent function or not. Some felt that the DQA process can serve a monitoring function whilst others were of the view that monitoring is an independent function. The establishment of a child care control unit was proposed. This unit should be tasked with the monitoring of children in the system. The views of the Villa Lubet Kinderdorp and the Nelspruit Displaced Children's Trust accorded with this general view.

Ms Cornelius (Department of Welfare, Pietermaritzburg) suggested that monitoring should take

place internally first, i.e. management should ensure that the plan / programme for each child is implemented. Further, monitoring can also form part of external quality control such as the DQA process. Ms N L T Ngqangweni (Department of Welfare, Bisho) submitted that children should be tracked and monitored while in the system. This can be done by canalizing officers and through an administrative process. Mr Viviers stated that DQA is a monitoring process and that there need not be a separate monitoring process.

The Moses Sihlangu Health Care Centre submitted that DQA is both an independent function and part of quality control. The respondent stated that although monitoring is done by a facility, that facility should still be monitored through DQA as internal monitoring may be poorly done. For instance, some developmental assessments and care plans are poorly done, if at all. They are also not implemented or adjusted in some institutions and this is to the detriment of children. The respondent mentioned that developmental assessment and care plans require a minimum of 10 hours with a child and additional hours are required for the parents. A further few hours will also be required for implementation and adjustment. The respondent, however, emphasised the importance of funding and personnel.

The NACCW recommended that in addition to the DQA there is still a need for an independent ombudsman or other similar person or body to provide the overall monitoring of the entire process and in this way ensure that the state fulfils its responsibility to protecting children in the system.[125]

At a meeting of specialists it was agreed that the residential care programme of all registered facilities must be subjected to a DQA at least every 36 months. In this context it was pointed out that the DQA process is intended to provide for the monitoring of the programmes offered on an ongoing basis, while an inspection is an once-off undertaking. It was also noted that the DQA process is supposed to include a 'mentoring' aspect, as follow-up after the quality assurance visit, and it was agreed that this aspect should be included in the description of the DQA process in the proposed legislation.

---

125 This was also the recommendation of the Law Commission of Canada report **Restoring Dignity: Responding to Child Abuse in Canadian Institutions**, p. 245.

The meeting also discussed the issue of an over-arching mechanism to protect children in residential care. It was suggested that children in custody or residential care should have direct access to a small structure with the power to commission investigations of its own accord and on the basis of complaints received. It was recommended that an independent body should be established outside the Department of Social Development due to the fact that there are difficulties with government monitoring itself.

19.10.4 Evaluation and recommendations

Having considered the various submissions with regard to the Developmental Quality Assurance (DQA) processes, **the Commission is of the view that the DQA processes as being currently tested by the Department of Social Development will form a more appropriate monitoring process than the current inspection procedures do**.

The Commission recommends, therefore, that the DQA process be included in the proposed legislation, with the detail relating thereto to be contained in regulations. It is further recommended that every residential care programme of all registered facilities must be subjected to a DQA at least every 36 months. It is recommended that every DQA should be conducted by a team of appropriately trained persons appointed by the Director-General: Social Development. The majority of the members of the team should have expertise in child and youth care. The team should consist of no less than 2 but no more than 6 members. At least one member of the team must be an independent person not in the full-time employment of Department of Social Development. The Council for Social Services Professions should keep lists of such independent persons and they should receive remuneration as is agreed upon by the Minister of Social Development in consultation with the Minister of Finance. **It is also recommended that the DQA process should include a 'mentoring' aspect, as follow-up after the quality assurance visit**. One member of the DQA team or a person agreed upon by them should be appointed to act as a mentor to the facility until such time as the next DQA takes place. The role, qualifications and

remuneration of the mentor must be provided for in the regulations to the proposed legislation.

In order to ensure that residential facilities do not get left without funding due to the fact that the DQA has not taken place, **the new children's statute must be clear about the fact that it is the responsibility of the Department of Social Development to ensure that the DQA is carried out every 36 months. There should be a clause which provides that should the Department fail to complete the DQA within this period, the current funding arrangements made by the Department to the facility will continue until such time as the DQA has taken place, and that the DQA must take place within 6 months of the expiry of the 36-month period**.

The Commission has also considered the suggestion that there should be some sort of 'ombudsman' or other independent figure or body which could, together with the DQA process, provide a protection mechanism for children in residential care. **The Commission supports the view that an independent body should be established outside the Department of Social Development**. It is recommended that the members of this independent structure should be appointed by the Minister from nominations received for a 5 year period. The structure should prepare an annual report for tabling in Parliament. A further suggestion was made that copies of all DQA reports need to be filed with this independent structure. The structure can then scrutinise the DQA reports, launch investigations, commission research, visit and inspect facilities, and monitor DQA investigations.[126]

19.11 Funding of residential care

19.11.1 South African Law and Practice

126 See also Chapter 24 on monitoring below.

Of the total amount budgeted for welfare services, 87% is spent on residential services and facilities. However, most of this goes to residential care for the aged (old-age homes). It is recognised that residential care programmes are expensive[127] services and the standards set for these programmes need to be reviewed. Facilities are generally not used as multi-purpose centres and are often inappropriate to the needs of people in informal settlements, large urban township and rural areas.

It is hoped that the planned transformation of the child and youth care system will address these problems. It is intended that over the next 5 to 8 years funding with respect to residential care in both the government and non-government sector should be decreased.[128] It is proposed that this decrease in spending should correspond with an increase in spending with regard to prevention and early intervention measures. This assumes that during the period of transformation rationalisation of residential care services will take place, ensuring that only those centres which are operating within defined practice guidelines based in nationally defined minimum standards, which can demonstrate effectiveness and efficiency, and which are offering programmes needed by the community, will continue to be funded.

The **Financing Policy for Developmental Social Welfare Services** echoes some of the ideas expressed in the **White Paper for Social Welfare**, particularly the recommendation that funding in residential care should not be a unit or per capita cost, but should focus instead on programmes which demonstrate relevance and effectiveness and which are regularly evaluated within the quality assurance process. The quality assurance system is inextricably linked with funding and should

---

127 See IMC **In whose best interests? Report on Places of Safety, Schools of Industry & Reform Schools**, p. 7 -8.

128 See 10.2.8.3 above for a criticism of this plan.

apply to both government and non-government programmes.

The **White Paper for Social Welfare**, published in February 1997, provides the following guidelines for financing of social development programmes:

a. The National Department of Social Development will be responsible for the development of national guidelines on the financing of welfare programmes. The guidelines will be developed in consultation with stakeholders.

b. The Departments of Social Development will facilitate the fundamental restructuring of the financing of welfare services. This will include capacity building initiatives in order to facilitate the changes.

c. All systems and administrative and accountability procedures must be user-friendly and efficient.

d. The financing of social welfare programmes will be based on approved business plans. Standard business plans will be developed to be used by all the provinces.

e. Government will finance welfare services according to the current formula during the change from one system to another. Pending the outcome of the guidelines on the financing of welfare programmes, interim arrangements will be devised in consultation with relevant parties. The criteria which will be relied upon for the reprioritisation of current programmes will be agreed upon on a national basis.

f. The lack of financial management and policy capacity at the national and provincial levels needs to be addressed in order to ensure the effective delivery of programmes.

The **Financing Policy**, published in 1998, follows the recommendation in the **White Paper for**

Social Welfare, namely that funding in residential care should not be per-capita cost but programme-cost based. For this purpose three categories of service delivery are identified and programmes represent an essential component in each of the categories. Each category will have generic plus special financing criteria and minimum standards applied to it. Each category will also be subject to service level agreements and the DQA.

These categories are as follows:[129]

a. Category A: Direct Services. These services are defined as holistic and effective direct services to children, youth and families and /or women and or older persons at one or more of the service delivery levels. These services could be delivered by NGO's, CBO's, local and provincial governments. Programmes are one of the main vehicles for achieving the mission and would be specific to this category.

b. Category B: Policy, management, co-ordination and monitoring of services: These would be holistic and effective services to organisations and departments providing services to children, youth, families and/or women and/or older persons at one or more of the service delivery levels. The services would be delivered by the national and provincial head of offices of the Department of Social Development and NGO's. The broad aim is to maximise and monitor transformation, development, effectiveness and efficiency of social welfare service offices and the organisations affiliated to the national and provincial NGO's. It is envisaged that strategies, programmes and projects would be the main vehicle to achieve the aim.

c. Category C: Capacity Building and/or research services and/or advocacy. These support services would be directed at welfare sector service organisations (including the Department of Social Development) and social service personnel across the broad range of disciplines. Such services would be delivered by national and/or provincial Departments of Social

---

129 **Financing Policy for Developmental Social Welfare Services** (1999) 19-21.

Development, and / or by national and / or provincial NGO's. Here the broad aim would be to maximise the transformation, development, effectiveness, and efficiency of social welfare service departments and organisations, as well as social service personnel, and/or provide research information on trends, needs and policy directions as required by the sector or departments or NGO's, and / or advocates for children's rights. Strategies, programmes and projects would be the main vehicle of achieving the aim and would be of a particular nature for this type of service.

Each of the categories would be delivered within a service basket. This service basket must have a certain content[130] in order to be financed and would be monitored within the DQA.

There are several financing options available which will be applied in combination or on their own:[131]

° **Differentiated financing of services**

This kind of financing may be applicable in instances where residential facilities render their own family reunification services.

° **Financing in phases**

---

130 The **Financing Policy** (1999) p. 23 provides that the service basket must include :

a. Strategies, project and programmes
b. Staffing/salaries
c. Stationery, fax and telephones
d. Staff development
e. Equipment
f. % Fixed assets.

131 **Financing Policy** (1999) p. 23-24.

The condition will inter alia be that transfer payments for a next phase will only be processed after a DQA process for the previous phase has been finalised. This will also include submission of monthly financial statements and audited financial reports.

° **Financing to support early development of a programme or project**

In instances where a service is in the early stages of development but is not yet able to qualify for financing according to criteria set, grant financing may be considered. This will also be applicable to projects which only need seed money and who will ultimately be self sustainable.

° **Project financing**

In instances where specific short-term projects form part of a broader service, financing linked to specific project objectives may be considered.

° **Transfer of lump sum**

Consideration will be given to the transfer of substantial funds where projects have proven credibility and are subject to a contract. This will enable the service to utilize the interest as additional income.

° **Linking social assistance**

Social assistance, i.e. foster care grants, should be linked to service delivery by making a cluster grant payment available to a community caring for children at risk.

° **Outsourcing**

In instances where government identifies the need for services in specific areas, it may outsource the service by means of a tender procedure.

° **Venture financing**

In instances where service deliverers wish to start new innovative services, venture financing may be considered.

° **Service purchasing**

When applicable, Government can also purchase services from service deliverers.

As financing policy and practice represent one of the three cornerstones in the DQA process, the DQA is seen as the core monitoring tool for ensuring that financing is spent wisely, efficiently and effectively and that the maximum benefit is derived from financing.

Financial sanctions will be applied on the basis of a DQA process and can mean that financing is terminated, reduced or not renewed. The circumstances which justify sanctions are outlined in the **Financing Policy** and are as follows:[132]

(a) Failure by an organisation to reflect the principles within their service delivery.

(b) Failure to comply with and maintain principles and minimum standards once a DQA has indicated that an organisation has the resources and capacity to do so.

(c) Where an organisation does not show growth in transformation shifts, in implementing principles throughout service delivery and towards functioning of minimum standard level within a six-month period following the initiation of the Organisation Development Plan.

(d) Failure to comply with the Constitution, all relevant legislation and regulations, and all

132 **Financing Policy** (1999) 37-38.

relevant international instruments.

(e) Failure to report a violation of rights or the abuse of children, women, or older persons and failure to deal effectively with any social service personnel who fail to report abuse or participate in violation of rights and abuse.

(f) Failure to deliver the service level agreement outcomes.

(g) Where an organisation knowingly permits, supports or perpetuates activities which are physically, emotionally, or sexually abusive of service recipients or staff, or which violate rights of service recipients as indicated in the Constitution and the various international instruments.

Although it is possible to restore financing on application it is a time-consuming process. In the interim period, it is the children in the residential care facilities who will be the victims of lack of funding.

19.11.2 Comments and submissions received

The Welfare **Financing Policy** echoes the recommendation in the **White Paper for Social Welfare** that funding in residential care should not be per capita-based but programme-based.

The following questions were posed: 'Will programme-based funding rather than per capita funding be more effective? What are the basic concerns / advantages / disadvantages?'

Most of the discussion group participants seemed to be in favour of programme-based funding as they believed that this would force facilities to adopt certain programmes. The Nelspruit Displaced Children's Trust, Ms N L T Ngqangweni (Department of Welfare, Bisho), the Moses Sihlangu Health Care Centre, and the NACCW supported this view.

Mr André Viviers added that programme-based funding will be more effective than per capita funding. He mentioned that programme-based funding has been tried in the Free State Province and it was found that 79% of the programme cost was funded, compared to the 65% of the per capita cost

that was funded. There was also a 10% to 15% reduction in the number of children in children's homes. Mr Viviers stated that programme funding allows children's homes to be creative and innovative with their programmes and the number of children or being filled to capacity does not influence financing any more. This will also ensure that children's homes do not 'cling' to children to ensure that they do not struggle financially.

Ms Cornelius of the Department of Welfare, Pietermaritzburg, differed slightly from the other respondents, suggesting that a combined approach regards per capita funding and programme funding should be followed. She proposed that there should be a basic per capita grant which will cover the child's physical needs, where after extra funding can be made available for programme funding.

Children are accorded certain constitutional rights.[133] The progressive realisation of constitutional rights such as the right to appropriate care when removed from the family environment has huge financial implications. A question raised in this regard was: 'Can the lack of sufficient funding to realise these constitutional rights of children be regarded as a justified infringement (limitation) of those rights?'

Some discussion groups viewed the lack of sufficient funds as a justification for the infringement of the constitutional rights of children. However, the point was made that the state should ensure that programmes are comprehensively funded. Other discussion groups did not see the lack of sufficient funds as a justification for such an infringement of children's rights.

Mr Viviers (Department of Social Welfare, Bloemfontein) answered the question in the affirmative, but added that children in care are wards of the state and the state must ensure that adequate

133 See also Chapter 4 above.

resources are available to afford these children their basic rights. Further, as the state has the authority to intrude into the lives of the child and his or her family, it also has the responsibility to ensure that sufficient resources are available to take care of these children through programmes, etc.

The Moses Sihlangu Health Care Centre submitted that the most important needs of the child need to be prioritised, and priority should be given to the transformation of existing care facilities by developing adequate programmes that will cater for the individual problems of children. To achieve this, professional caregivers and social workers must be 'transformed'.

A further question was: 'To what extent should questions of funding be addressed in legislation?'

The discussion groups recommended that the Commission should propose legislation on the principles of funding and that the state's obligation to care for and maintain children should be made clear in the new children's statute. Concern was, however, expressed over the way funds are distributed.

Mr Vviers of the Department of Social Welfare, Bloemfontein submitted that funding should to the fullest extent be addressed in legislation. Further, he said the legislation should indicate what the state's obligation is with regard to funding of residential care programmes and should set out the minimum requirements so that they are uniformly applied for all residential care programmes.

The Moses Sihlangu Health Care Centre argued that the question of funding should be addressed fully in legislation so that no demands may be made on NGOs without providing the necessary funds. Further, NGOs are failing to comply with new requirements due to the lack of personnel. Thus, by legislating on funding, NGOs will be protected from being accused of not performing adequately. In addition, legislation should ensure that the same salary scale is used for NGO employees as that of government employees when a service plan is presented.

At a meeting of specialists it was agreed that the primary legislation should include an unambiguous

provisions setting out government's obligation to financially support the placement of children in appropriate alternative care placements.

19.11.3 Evaluation and recommendations

The Commission recommends that the funding principle that the proposed legislation should endorse and be informed by is that funding of residential care will be based on programme *and* per capita funding. The per capita funding must be such as to ensure that the needs of the child in that residential care facility can be met in order to give effect to the State's constitutional obligation to care for that child placed by the State in statutory care. The balance between programme and per capita funding should be managed in such a way as not to endanger viable residential care service providers or children being accommodated in these facilities. This can be achieved through appropriate transitional arrangements.

The fact that funding of residential care programmes will be closely linked to the Developmental Quality Assurance (DQA) process is another important principle which should emerge clearly through the proposed legislation. The new children's statute should make it clear that the constitutional right of children to be provided with appropriate alternative care when removed from the family environment should be the key principle,[134] and lack of funding, the failure to have carried out a DQA and other impediments cannot compromise the child's right to state funded care.[135]

134 Article 28(1)(b) of the Constitution of South Africa Act, Act 108 of 1996.

135 See also **Government of the Republic of South Africa v Grootboom and others** 2000 (11) BCLR 1169 (CC), 2001 (1) SA 46 (CC). See further the discussion in section 4.2 below.