

Chapter 5

Child protection legislation in South Africa

1 A GENERAL OVERVIEW OF THE DEVELOPMENT OF CHILD PROTECTION LEGISLATION IN SOUTH AFRICA

1.1 The period before the implementation of the Children's Act 33 of 1960

Special legislation in regard to the protection, welfare and supervision of children exists in any modern legal system. At the beginning of the 20th century, Special Children's Protection Acts were in force in the Cape¹ and in the Transvaal.² The first attempt to consolidate the law came in the form of the Children's Protection Act 25 of 1913. This Act was repealed by the Children's Act 31 of 1937. The Children's Act 31 of 1937 was then repealed by the Children's Act 33 of 1960 (hereinafter referred to as the "Children's Act").

1.2 The Children's Act 33 of 1960

The Children's Act made provision for judicial interference with parental authority by a commissioner of child welfare, who exercised this authority after holding an inquiry in the children's court over which he or she presided. The aim of this inquiry was to determine whether the child was a child in need of care.³ The Children's Act defined "child in need of care" as follows:

¹ Act 4 of 1907.

² Act 24 of 1909.

³ S 30.

“child in need of care’ means a child who-

- (a) has been abandoned or is without visible means of support; or
- (b) has no parent or guardian or has ... a parent or guardian who ... does not or ... is unfit to exercise proper control over that child; or
- (c) is in the custody of a person who has been convicted of committing upon or in connection with that child any offence mentioned in the First Schedule to this Act; or
- (d) cannot be controlled by his parents or guardian or the person in whose custody he is; or
- (e) is an habitual truant; or
- (f) frequents the company of any immoral or vicious person, or is otherwise living in circumstances calculated to cause or conduce to his seduction, corruption or prostitution; or
- (g)
 - (i) begs; or
 - (ii) being under the age of twelve years engages in any form of street trading within the area of jurisdiction of a local authority unless that local authority has by means of bye-laws made under s 22 or any other law, prescribed that such a child may engage in that form of street trading and unless he does so in accordance with bye-laws made under s 22; or
 - (iii) being not under the age of twelve years but under the age of sixteen years engages in any form of street trading within the area of jurisdiction of a local authority in contravention of bye-laws made by that local authority under s 22; or
- (h) is being maintained apart from his parents or guardian in domestic circumstances which are detrimental to his interests and whose parents or guardian cannot be found or have failed to make suitable provision for the care and custody of the child although they have been called upon to do so; or
- (i) is in a state of physical or mental neglect.”

In terms of the Children’s Act, children in need of care could be returned to the custody of his or her parents subject to certain conditions. The child could also be placed in foster care, or in the care of an approved agency, children’s home, or school of industries.⁴

1.3 The Child Care Act 74 of 1983

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S 31 read with s 1.

The Children's Act was repealed in total by the Child Care Act 74 of 1983, except in so far as it relates to the appointment of probation officers and the establishment, maintenance and management of schools of industries and reform schools. Section 58 of the Children's Act (dealing with the appointment and functions of probation officers) was subsequently repealed by the Probation Services Act 116 of 1991,⁵ while the provisions of the Children's Act relating to the establishment, maintenance and management of reform schools and schools of industries were repealed by the Educations Affairs Act (House of Assembly) 70 of 1988.⁶

According to the Minister of Health and Welfare at the time of promulgation of the Child Care Act, the change in name signalled a recognition of "the general principle that the family is the normal social and biological structure within which the child must grow and develop. The legislation does not, therefore, focus solely on the child, or solely on the child's parents, but on both. The emphasis is, therefore, on the care of the child by its parents or by those entrusted with the custody of the child."⁷

The most important change, for the purposes of this thesis, brought about by the Child Care Act, was the removal of the concept "child in need of care" found in the Children's Act. The aim of an inquiry by a children's court under the Children's Act was to ascertain whether the child before it was a child in need of care. In terms of the Child Care Act, the children's court had to be satisfied,⁸ prior to the commencement of the Child Care Amendment Act,⁹ that the child had no parent or guardian or had a parent or guardian who

⁵ S 20.

⁶ S 113(1).

⁷ House of Assembly Debates (Hansard) of 9 May 1983 6560, as cited by Spiro *Parent and child* 350.

⁸ In terms of s 14(4) read with s 15 of the Child Care Act.

⁹ The Child Care Amendment Act 96 of 1996 came into operation on 1 April 1998, with the exception of s 2 (which inserts s 8A into the Child Care Act), which still has to be proclaimed.

could not be traced, or had a parent or guardian or was in the custody of a person who was unable or unfit to have custody of the child in that he or she:¹⁰

- “(i) is mentally ill to such a degree that he is unable to provide for the physical, mental or social well-being of the child;
- (ii) has assaulted or ill-treated the child or allowed him to be assaulted or ill-treated;
- (iii) has caused or conduced to the seduction, abduction or prostitution of the child or the commission by the child of immoral acts;
- (iv) displays habits and behaviour which may seriously injure the physical, mental or social well-being of the child;
- (v) fails to maintain the child adequately;
- (vi) maintains the child in contravention of section 10;¹¹
- (vii) neglects the child or allows him or her to be neglected;
- (viii) cannot control the child properly so as to ensure proper behaviour such as regular school attendance;
- (ix) has abandoned the child; or
- (x) has no visible means of support.

As will be indicated below,¹² these criteria for judicial interference with parental authority by means of protective measures were all worded as defects or faults in a parent or guardian or custodian. Extra-familial or child-initiated problems thus did not justify a compulsory removal of the child by the state. This state of affairs was severely criticised for the problems it created for both child care workers and families.¹³

¹⁰ The previous s 14(4)(b) of the Child Care Act.

¹¹ S 10 provides that no person other than the managers of a maternity home, hospital, place of safety or children's home shall receive any child born out of wedlock under the age of seven years, or any child for the purpose of adopting him or her or causing him or her to be adopted, and maintain him or her apart from his or her parents for longer than 14 days, unless such person has applied for the adoption of the child, or has obtained the consent in writing of the commissioner of the district in which the child was residing immediately before he or she was received.

¹² See ch 5 par 2.4.3 & 2.4.4 below.

¹³ Barlow 1982 *De Rebus* 339; Robinson 1992 *THRHR* 74; Sloth-Nielsen & Van Heerden 1996 *SAJHR* (1) 247; Zaal 1988 *SALJ* 224.

1.4 The Child Care Amendment Act 96 of 1996

The Child Care Amendment Act signalled a dramatic shift by the re-introduction of the concept of the “child in need of care”. This introduced a child-centred and non-punitive approach to care proceedings.¹⁴ As was the case under the Children’s Act, the Child Care Act now provides, in the interests of children,¹⁵ for judicial interference with a parent’s exercise of the parental authority. This authority is vested in the commissioner of child welfare¹⁶ having jurisdiction, who exercises it after duly holding an inquiry in the children’s court over which he or she presides.¹⁷ Broadly speaking, the commissioner’s authority to intervene arises where the child concerned is “in need of care”. The circumstances in which a child is considered to be in need of care are as follows:¹⁸

“(aB) the child-

- (i) has been abandoned or is without visible means of support;
- (ii) displays behaviour which cannot be controlled by his or her parents or the person in whose custody he or she is;
- (iii) lives in circumstances likely to cause or conduce to his or her seduction, abduction or sexual exploitation;
- (iv) lives in or is exposed to circumstances which may seriously harm the physical,

¹⁴ Zaal in Robinson (ed) *et al Children* 98.

¹⁵ Spiro *Parent and child* 351 submits that the best interests of the child are always the governing consideration, although the Act does not always expressly say so. This argument is confirmed by s 28(2) of the Constitution of the Republic of South Africa 108 of 1996 (hereinafter “the Constitution”), which provides that the best interests of the child are of paramount importance in every matter concerning the child.

¹⁶ Adjudicators in children’s courts are called commissioners of child welfare and any magistrate may be called upon to serve in this capacity (Child Care Act s 6(1)).

¹⁷ The commissioner having jurisdiction is the one in whose area the child “resides or happens to be” (s 13(1)), provided that, if the child ordinarily resides in another district, the commissioner may refer the inquiry to the children’s court of that district (s 13(3)). Every magistrate’s court is a children’s court for the area of its jurisdiction (s 5(1)).

¹⁸ Child Care Act s 14(4)(a) as amended by the Child Care Amendment Act. Also see ch 5 par 2.4.2.1 below.

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- mental or social wellbeing of the child;
 - (v) is in a state of physical or mental neglect;
 - (vi) has been physically, emotionally or sexually abused or ill-treated by his or her parents or guardian or the person in whose custody he or she is; or
 - (vii) is being maintained in contravention of section 10.”¹⁹

If a children’s court finds a child to be in need of care, the court can order that the child be returned to the care of its parents under the supervision of a social worker, or that the child be placed in foster care, or in a children’s home or school of industries.²⁰

1.5 The draft Children’s Bill

1.5.1 Introduction

This section deals with the innovations of the draft Children’s Bill proposed by the South African Law Commission²¹ in broad outline. The discussion paper of the South African Law Commission on the review of the Child Care Act issued in 2002 contains the draft Children’s Bill (hereinafter referred to as the “draft Children’s Bill”) proposed by the Commission. On 12 August 2003, the Department of Social Development published its own draft Children’s Bill (hereinafter referred to as “Social Development’s draft Children’s Bill”) for comment. They indicated their intention to table it in Parliament during 2003. Except where expressly indicated, the provisions of the Law Commission’s draft Children’s Bill, and Social Development’s draft Children’s Bill are similar.

¹⁹ S 10 provides that no person other than the managers of a maternity home, hospital, place of safety or children’s home shall receive any child born out of wedlock under the age of seven years, or any child for the purpose of adopting him or her or causing him or her to be adopted, and maintain him or her apart from his or her parents for longer than 14 days, unless such person has applied for the adoption of the child, or has obtained the consent in writing of the commissioner of child welfare of the district in which the child was residing immediately before he or she was received.

²⁰ S 15(1). See ch 5 par 2.6.1 below.

²¹ SA Law Commission *Review* ch 6.

With the exception of the proposals on children's courts, which will be dealt with under this section, the Law Commission's proposals that are relevant to this thesis will be dealt with in more detail in the rest of this chapter.

1.5.2 *Children's courts*

The South African Law Commission proposes in its discussion paper on the review of the Child Care Act that the current children's courts be replaced by child and family courts, which will have similar status to that of magistrate's courts, and includes provisions to that effect in their proposed draft Children's Bill. However, in terms of Social Development's draft Children's Bill, the current children's courts are retained.

Children's courts will have jurisdiction in a wide variety of matters covered by the new children's statute,²² including the suspension or termination of parental responsibilities or rights,²³ the provision of early intervention services,²⁴ children in need of care and protection,²⁵ the protection of children, temporary safe care of children,²⁶ and alternative care of children.

In terms of the draft Children's Bill, every magistrate will be a presiding officer of a children's court (which will replace the current commissioner of child welfare). The Law Commission's draft Children's Bill contained a provision that child and family magistrates (the term used for what Social Development's draft Children's Bill calls presiding officers) must have a sound knowledge of child and family law, children's court procedures, and the

²² Draft Children's Bill clauses 57 & 58; Social Development's draft Children's Bill clauses 44 & 45.

²³ See ch 3 par 6 & ch 4 par 3.8.

²⁴ See ch 5 par 2.3.3 below.

²⁵ See ch 5 par 2.4.2.2 & 2.6.2 below.

²⁶ See ch 5 par 2.2.2 below.

resources available for the social development of children. They must also have basic understanding of child development, psychology and family relationships, and the linguistic skills and ability to communicate effectively with dysfunctional families and traumatised children.²⁷ The draft Children's Bill also provides for training courses for presiding officers and assessors to be established by the Minister of Justice, acting on the advice of the Minister of Social Development.²⁸ Both these provisions were omitted from Social Development's draft Children's Bill.

In terms of Social Development's draft Children's Bill, the current function of children's court assistants will be replaced by clerks of children's courts.²⁹ The Law Commission's draft Children's Bill provides that these officials must have, *inter alia*, a sufficient understanding of the needs of children, mediation skills, and a sufficient knowledge of legal measures, processes and resources available for the protection of children.³⁰ This provision was dropped from Social Development's draft Children's Bill.

One of the innovations of both the Law Commission and Social Development's draft Children's Bills, is the fact that a children's court may, before it decides a matter, order a lay forum hearing in an attempt to settle the matter. The lay forum may include mediation by a family advocate, social service professional³¹ or other professionally qualified person, a family group conference contemplated in the Bill, or mediation by a traditional authority. Before ordering a lay forum hearing, the children's court must take into account all relevant

²⁷ Draft Children's Bill clause 70.

²⁸ Draft Children's Bill clause 74.

²⁹ Social Development's draft Children's Bill clause 67. The Law Commission's draft Children's Bill named this function "child and family court registrars" (clause 92).

³⁰ Draft Children's Bill clause 93.

³¹ The term "social service professional" is defined in Social Development's draft Children's Bill as including probation officers, development workers, child and youth care workers, youth workers and social security workers (clause 1). This definition is not included in the Law Commission's draft Children's Bill.

factors, including the vulnerability of the child, the ability of the child to participate in the proceedings, the power relationships within the family, and the nature of any allegations made by parties in the matter.³²

Further, both the Law Commission's and Social Development's draft Children's Bills give the children's court the authority, if a matter brought to or referred to a children's court is contested, to order a pre-hearing conference to be held with the parties involved in the matter in order to mediate between the parties, settle disputes between the parties to the extent possible, and define the issues to be heard by the court. However, pre-hearing conferences may not be held in the event of a matter involving the alleged abuse or sexual abuse of a child. The child involved in the matter may attend and may participate in the conference unless the children's court decides otherwise.³³ The draft Children's Bill proposed by the Law Commission leaves the decision whether a pre-hearing conference must be held in the hands of the children's court assistant ("child and family court registrar"), whereas Social Development's draft Children's Bill leaves this decision in the hands of the children's court.

The draft Children's Bills proposed by both the Law Commission and the Department of Social Development further give the children's court the authority, in a matter brought to or referred to that court, to cause a family group conference to be set up with the parties involved, including any other family members of the child, in order to find solutions for any problem involving the child. The children's court must appoint a suitably qualified person or organisation to facilitate at the family group conference, must ensure that a record is kept of any agreement or settlement reached between the parties, and must consider the report on the conference when the matter is heard.³⁴ As is the case with pre-hearing conferences, the draft Children's Bill proposed by the Law Commission leaves the

³² Draft Children's Bill clause 66; Social Development's draft Children's Bill clause 49.

³³ Draft Children's Bill clause 96; Social Development's draft Children's Bill clause 69.

³⁴ Draft Children's Bill clause 97; Social Development's draft Children's Bill clause 70.

decision whether a family group conference must be held in the hands of the children's court assistant ("child and family court registrar"), whereas Social Development's draft Children's Bill leaves this decision in the hands of the children's court.

The children's court may also refer a matter brought or referred to a children's court (excluding a matter involving the alleged abuse or sexual abuse of a child) to any appropriate lay forum, including a traditional authority, for an attempt to settle the matter by way of mediation out of court.³⁵ Similarly, the decision whether to refer a matter to an appropriate lay forum is left in the hands of the children's court assistant in terms of the Law Commission's draft Children's Bill, and in the hands of the children's court in terms of Social Development's draft Children's Bill.

1.5.3 *The child in need of care and protection*

The South African Law Commission further proposes³⁶ that the criteria in terms of which a child may be found to be in need of care as listed in section 14(4) of the Child Care Act be retained and supplemented. In this regard, the Commission recommends that the wilful failure of a person who has parental responsibilities and rights in respect of a particular child to fulfil his or her parental responsibilities and rights should constitute a criterion for finding a child in need of care.³⁷ However, this lastmentioned provision was omitted from Social Development's draft Children's Bill.³⁸

A very important issue pointed out by the Commission, is the fact that finding a child to be in need of care should not necessarily constitute a ground for removal of that child. Under the new children's statute the aim should rather be to support that child and his or her family

³⁵ Draft Children's Bill clause 98; Social Development's draft Children's Bill clause 71..

³⁶ SA Law Commission *Review* ch 6 at 116 *et seq.*

³⁷ See ch 5 par 2.4.2.1 below in this regard.

³⁸ See ch 5 par 2.4.2.2 below.

in order to ensure that that child remains with its family.³⁹ Accordingly, the draft Children's Bills proposed by both the Law Commission and the Department of Social Development provide for prevention and early intervention services,⁴⁰ and also expand the possible orders that the children's court can make when a child is found to be in need of care and protection.⁴¹ The protection measures proposed in the draft Children's Bill, after finding a child to be in need of care, are wide and varied, and include orders such as placing the child in foster care, kinship care, a child in youth care centre, temporary safe care a child-headed household, partial care, shares care, *et cetera*.⁴²

2 DEALING WITH CHILDREN IN NEED OF CARE IN SOUTH AFRICAN LAW

2.1 Introduction

Various legislative child protection procedures exist in South African law to ensure that parents exercise their parental authority in the interests of their children. In this section I deal with the Child Care Act, focussing on the protection measures contained in the Act. I also incorporate references to protection measures contained the proposed draft Children's Bill.

2.2 Identifying the child in need of care

³⁹ SA Law Commission *Review* ch 6 at 117.

⁴⁰ See ch 5 par 2.3.3 below.

⁴¹ See ch 5 par 2.6.2 below.

⁴² *Ibid.*

2.1.1 Introduction

The aim of the children's court inquiry is to determine whether certain children are in need of care.⁴³ Any child in regard to whom a children's court assistant is of the opinion that he or she is a child in need of care, may be brought before the children's court of the district in which the child resides or happens to be by any police officer, social worker or authorised officer or by a parent, guardian or other person having the custody of the child.⁴⁴ In this instance, there has been no removal of the child prior to the children's court inquiry.

Sometimes it is necessary to remove a child pending the inquiry of the children's court. The Child Care Act makes provision for three forms of removal prior to the children's court inquiry. Firstly, under section 11(1) of the Act all courts have a broad power to order that a child be taken to a place of safety and that the child be brought before a children's court as soon as possible thereafter.⁴⁵

In contrast to an emergency situation where there is immediate and serious danger of harm, less pressing situations occur where it is clear that the child's present circumstances are inappropriate but there is still time to obtain a prior warrant from the children's court authorising the accommodation of the child in a place of safety pending a children's court inquiry. An example is when a police officer or social worker discovers a child living at premises where he or she has been abandoned or is neglected. If there is no reason to believe that the child is about to disappear, the proper procedure is to go before the local commissioner of child welfare to give information on oath that there are reasonable grounds for the child to be accommodated in a place of safety pending a children's court inquiry.⁴⁶ This is the second form of prior removal, and it takes place in terms of section

⁴³ See ch 5 par 2.4.2.1 below.

⁴⁴ S 13(2).

⁴⁵ See ch 5 par 2.2.2 below.

⁴⁶ Zaal & Matthias in Davel (ed) *et al Introduction* 121.

11(2).⁴⁷

Thirdly, there is the section 12(1) removal, which is an emergency removal.⁴⁸ The immediate removal of a child can only be justified in an emergency where there is reason to believe that the child is in imminent danger of serious harm. An example is when a child is discovered in a situation where his or her parent was intoxicated and determined to assault the child.⁴⁹

If the child's present living conditions seem adequate and there is no danger in allowing the child to remain where he or she is until a children's court inquiry has established whether the child should be removed into alternative care, the above procedure should not be followed.⁵⁰ The correct procedure is to inform a social worker or the local children's court assistant about the case in terms of section 13(2) of the Act.⁵¹

Any child removed to a place of safety in terms of sections 11(1), (2) or 12(1) must be brought before the children's court of the district in which the child resides or happens to be by any police officer, social worker or authorised officer.⁵²

It should be noted that, apart from these removals prior to the children's court inquiry, the Child Care Act also provides that, if a court postpones an inquiry, the court may order that in the meantime the child remain in a place of safety, or be kept in a place of safety for

⁴⁷ See ch 5 par 2.2.3 below.

⁴⁸ See ch 5 par 2.2.4 below.

⁴⁹ Zaal & Matthias in Davel (ed) *et al Introduction* 120.

⁵⁰ Zaal & Matthias in Davel (ed) *et al Introduction* 121.

⁵¹ See ch 5 par 2.4.1 below.

⁵² S 13(1). Also see ch 5 par 2.2.2, 2.2.3 & 2.2.4 above.

observation for the information of the court.⁵³ Moreover, a children's court who has found a child to be in need of care and protection can order that the child be removed from the parental home and placed in, for example, foster care.⁵⁴

It should be noted that usually, it is members of the public, rather than the courts, who discover that certain children may be in need of a care inquiry.⁵⁵ As a matter of fact, our law compels certain persons to make a report if he or she finds a child in circumstances giving rise to a suspicion that the child has been ill-treated. Both the Child Care Act⁵⁶ and the Prevention of Family Violence Act 133 of 1993⁵⁷ contain such mandatory reporting provisions. The Child Care Act imposes a duty on every dentist, medical practitioner, nurse, social worker, teacher and person employed by or managing a children's home, place of care or shelter who examines, attends or deals with a child in circumstances giving rise to the suspicion that the child has been ill-treated or deliberately injured or suffers from a nutritional deficiency disease, immediately to notify the Director-general of Welfare and Population Development or any designated officer of those circumstances.⁵⁸ These professional persons are liable to be prosecuted for a criminal offence should they fail to make such a report.⁵⁹ On the other hand they (but not members of the public) are protected from any defamation action if their notification is "given in good faith in

⁵³ S 14(3). See ch 5 par 2.5 below.

⁵⁴ S 15(1). See ch 5 par 2.6 below.

⁵⁵ Zaal & Matthias in Davel (ed) *et al Introduction* 121.

⁵⁶ Child Care Act s 42(1).

⁵⁷ S 4. Note that ss 1, 2, 3, 6 & 7 of the Prevention of Family Violence Act were repealed by the Domestic Violence Act 116 of 1998. Ss 4, 5, 8 & 9 of the Prevention of Family Violence Act remain in force.

⁵⁸ S 42(1). On receipt of a notification in terms of subsection (1) the Director-general of Welfare and Population Development or the designated officer may issue a warrant in the prescribed form and manner for the removal of the child concerned to a place of safety or a hospital (s 42(2)).

⁵⁹ S 42(5).

accordance with this section".⁶⁰

The Prevention of Family Violence Act places an obligation on any person who examines, treats, attends to, advises, instructs or cares for any child in circumstances which ought to give rise to the reasonable suspicion that such child has been ill-treated, or suffers from any injury the probable cause of which was deliberate, to immediately report such circumstances to a police official, or to a commissioner of child welfare or a social worker.⁶¹ However, unlike the Child Care Act, the Prevention of Family Violence Act creates no indemnities for persons who in good faith comply with their reporting provisions under this Act.⁶² With the repeal of section 6 (which criminalised the failure to report) of the Prevention of Family Violence Act by the Domestic Violence Act, it would appear that the reporting obligation in section 4 of the Prevention of Family Violence Act was deprived of any teeth. The South African Law Commission thus recommends the repeal of s 4 of the Prevention of Family Violence Act.⁶³

The draft Children's Bills proposed by both the Law Commission and Social Development contain comprehensive mandatory reporting provisions. It places an obligation to report a conclusion (formed on personal observation) that the child has been abused, sexual abused or deliberately neglected on the following persons: any teacher, medical practitioner, dentist, nurse, social worker, social service professional, minister of religion,

⁶⁰ S 42(6).

⁶¹ S 4.

⁶² Van Heerden *et al* (eds) *Boberg* 652 fn 527; Sloth-Nielsen & Van Heerden 1996 *SAJHR* (1) 263.

⁶³ SA Law Commission *Review* ch 6 at 130.

religious leader, member of staff at a partial care facility,⁶⁴ shelter,⁶⁵ drop-in centre,⁶⁶ or child and youth care centre,⁶⁷ or labour inspector.⁶⁸ The conclusion must be reported to a designated child protection organisation, police officer or clerk of the children's court.⁶⁹ The envisaged provision is welcomed as it is much wider than the current one.

2.2.2 *Removal following a court order (s 11(1))*

If it appears to any court⁷⁰ in the course of any proceedings before it that any child has no parent or guardian, or that it is in the interest of the safety and welfare of any child that he or she be taken to a place of safety, that court may order that the child be taken to a place

⁶⁴ A partial care facility is defined in clause 1 of the Draft Children's Bill as any place used partly or exclusively for the partial care of six or more children. Social Development's draft Children's Bill contains a similar definition. Partial care is regulated extensively in ch 9 of the draft Children's Bill (ch 6 of Social Development's draft Children's Bill).

⁶⁵ A shelter is defined in the draft Children's Bill as a facility located at a specific place which is managed for the purpose of providing basic services, including overnight accommodation and food, to children, including street children, who voluntarily attend the facility but who are free to leave (clause 244(1); Social Development's draft Children's Bill clause 213(1)). Shelters are regulated extensively in ch 17 of the draft Children's Bill (ch 15 of Social Development's draft Children's Bill).

⁶⁶ A drop-in centre is defined as a facility located at a specific place which is managed for the purpose of providing basic services, excluding overnight accommodation, to children, including street children, who voluntarily attend the facility but who are free to leave (clause 244(2) of the draft Children's Bill; clause 213(2) of Social Development's draft Children's Bill). Drop-in centres, along with shelters, are regulated extensively in ch 17 of the draft Children's Bill (ch 15 of Social Development's draft Children's Bill).

⁶⁷ A child and youth care centre is defined in the draft Children's Bill as a facility for the provision of residential care to more than six children outside the child's family environment in accordance with a residential care programme(s) suited for the children in the facility (clause 210; Social Development's draft Children's Bill clause 191). Child and youth care centres are regulated extensively in ch 15 of the draft Bill (ch 14 of Social Development's draft Children's Bill).

⁶⁸ Draft Children's Bill clause 167; Social Development's draft Children's Bill clause 105.

⁶⁹ See ch 5 par 1.5.2 above.

⁷⁰ Any court, eg a criminal or civil court, may direct that a child be sent to the children's court even where the child was not an accused person or party in the former court (Zaal in Robinson (ed) *et al Children* 95 109-110).

of safety and that the child be brought before a children's court as soon as possible thereafter.⁷¹

The draft Children's Bill contains a slightly different provision. It provides that, if it appears to a court in the course of any proceedings that a child involved in or affected by those proceedings is in need of care and protection, the court may order that the question whether the child is in need of care and protection be referred to a children's court for decision. The children's court may also order that the child be put in temporary safe care⁷² if it appears to the court that this is necessary for the safety and well-being of the child.⁷³

2.2.3 *Removal in pursuance of a warrant (s 11(2))*

A commissioner of child welfare who discovers from information given on oath, that there are reasonable grounds for believing that a child who is within his or her area of jurisdiction has no parent or guardian, or that it is in the child's interest that he or she be taken to a place of safety, may issue a warrant authorising a police officer or social worker or any other person to search for the child and to take the child to a place of safety until he or she can be brought before a children's court.⁷⁴ The officer authorised by the aforementioned warrant may enter, by force if necessary, any house or other premises mentioned in the warrant, and may remove the child therefrom.⁷⁵

⁷¹ Child Care Act s 11(1).

⁷² Temporary safe care is defined in clause 1 of the draft Children's Bill as care of a child in a child and youth care centre, shelter or private home or any other place that may be prescribed by regulation, where the child can safely be accommodated pending a decision or court order concerning the placement of the child, but excludes a prison or police cell. A similar definition is included in Social Development's draft Children's Bill.

⁷³ Draft Children's Bill clause 168; Social Development's draft Children's Bill clause 47.

⁷⁴ Child Care Act s 11(2).

⁷⁵ S 11(3).

A police officer, social worker or authorised officer⁷⁶ who removes a child under a warrant in terms of section 11(2) and brings him or her to a place of safety must grant authority to such place of safety for the interim detention of the child.⁷⁷ A notice of the removal of the child must be given to the parent or guardian of the child (or the person in whose custody the child was immediately before the removal), and to the children's court assistant⁷⁸ by the police officer, social worker or authorised officer who removed the child. This notice is given by sending or handing a true copy of the authority mentioned in regulation 9(2)(a) to the parent or guardian of the child (or the person in whose custody the child was immediately before the removal), and to the children's court assistant within 48 hours.⁷⁹

The draft Children's Bill contains a slightly different provision. It provides that, if on evidence given by any person on oath or affirmation, it appears to the presiding officer⁸⁰ that a child who resides or happens to be in the area of that presiding officer is in need of care and protection, the presiding officer may order that the question of whether the child is in need of care and protection be referred to a children's court for decision. The presiding officer may also order that the child be placed in temporary safe care if it appears to the court that it is necessary for the safety and well-being of the child. Like the current provision of the Child Care Act, the draft Children's Bill contains a provision that the person who has removed a child must without delay inform the primary care-giver of the

⁷⁶ An "authorised officer" is any person authorised in writing by a commissioner of child welfare, social worker, or police officer to remove the child (Child Care Act s 1).

⁷⁷ Reg 9(2)(a) of the Child Care Regulations 1986 (promulgated in terms of section 60 of the Child Care Act (GN 2612 of 12/12/86 as amended by GN 416 of 31/03/98, GN 65 of 11/01/99, and GN 119 of 3/02/1999)).

⁷⁸ Children's court assistants provide general support (including representing parties) in the children's courts (Child Care Act s 7). Unfortunately, very few full-time children's court assistants are being employed presently (Zaal & Matthias in Davel (ed) *et al Introduction* 118). In some children's courts, prosecutors are used as children's court assistants. As pointed out by Matthias & Zaal in Keightley (ed) *Children's Rights* 51-57, the traditional adversarial mode of prosecutors at a child care hearing is often "rather akin to having a bull in a china shop". Also see Zaal in Robinson (ed) *et al Children* 102-103.

⁷⁹ Reg 9(2)(b)(i).

⁸⁰ See ch 5 par 1.5.2 above.

child of the removal of the child if that person can readily be traced.⁸¹ The provisions of the Law Commission's and Social Development's draft Children's Bills are similar, although the Law Commission's draft Children's Bill allowed the presiding officer to act only "on evidence given by a designated social worker".

The current provision of the Child Care Act refers only to "information given on oath", without stating the source. Furthermore, the current requirement that, before the removal can be affected, the commissioner of child welfare must be of the opinion that there are reasonable grounds for believing that a child who is within his or her area of jurisdiction has no parent or guardian, or that it is in the child's interest that he or she be taken to a place of safety, is replaced by the requirement that the presiding officer must be of the opinion that the child is in need of care and protection, and that it is necessary for the safety and well-being of the child.⁸²

2.2.4 *Removal without a warrant (s 12(2))*

A child may be removed to a place of safety without a warrant by a police officer, social worker or authorised officer if the officer concerned has reason to believe that the child is a child referred to in section 14(4)⁸³ and that the delay in obtaining a warrant will be prejudicial to the safety and welfare of the child.⁸⁴

If the parent or guardian of the child, or the person in whose lawful custody the child is, is known to be in the district from where the child was removed and can be traced without undue delay, the officer who has removed the child must inform the parent, guardian or

⁸¹ Draft Children's Bill clause 169; Social Development's draft Children's Bill clause 151.

⁸² *Ibid.*

⁸³ See ch 5 par 2.4.2.1 below.

⁸⁴ S 12(1).

person in whose lawful custody the child is, of the child's removal as soon as possible.⁸⁵ The children's court assistant must also be informed of the reasons for the child's removal.⁸⁶

As in the case of removal under a warrant,⁸⁷ this notice to the parent or guardian of the child (or to the person in whose custody the child was immediately before the removal), and to the children's court assistant must be given by the police officer, social worker or authorised officer who removed the child by sending or handing a true copy of the authority mentioned in regulation 9(2)(a)⁸⁸ to the parent, guardian or custodian of the child, and to the children's court assistant.⁸⁹

The draft Children's Bill contains a similar provision. It provides that a police officer, designated social worker⁹⁰ or authorised officer may remove a child and place the child in temporary safe care without a court order if there are reasonable grounds for believing that the child is in need of care and protection, and needs immediate emergency protection, and that the delay in obtaining a court order for the removal of the child and

⁸⁵ S 12(2)(a). S 12(1) provides for the removal of children without prior notice to the custodian parent. In *Swarts v Swarts* 2002 3 SA 451 (T) the court decided that a removal order in terms of s 12(1) did not violate the parent's right to just administrative action, as entrenched in s 33 of the Constitution and s 3 of the Promotion of Administrative Justice Act 3 of 2000. Bertelsman J pointed out that the Child Care Act intended to address precisely the cases where the parents of children in need of care are not available to be informed of the proposed removal. The so-called "Form IV" procedure, in terms of which the custodian parent is informed of the removal within 48 hours, provides constitutionally tenable protection of the parent's interests, especially since the action must be confirmed by the commissioner of child welfare virtually immediately and must thereafter be subjected to a full inquiry.

⁸⁶ S 12(2)(b).

⁸⁷ See ch 5 par 2.2.3 above.

⁸⁸ *Ibid.*

⁸⁹ Reg 9(2)(b)(i).

⁹⁰ A designated social worker is defined as a social worker in the service of the Department of Welfare and Population Development or a provincial department of social welfare, or a designated child protection organisation (draft Children's Bill clause 1).

placing the child in temporary safe care may jeopardise the child's safety and well-being. It is further provided that the person who has removed the child must without delay inform the primary care-giver of the child of the removal of the child, if that person can readily be traced, inform the relevant clerk of the children's court⁹¹ of the removal, and bring the matter before the children's court.⁹²

2.3 The period pending the children's court inquiry

2.3.1 Introduction

In the interim period pending the inquiry of the children's court, the children's court must hold a preliminary inquiry in cases where children have been removed under sections 11(1), 11(2) and 12(1) set out above). This is also referred to as the "opening of the inquiry".⁹³ The "opening" takes the form of a brief initial appearance.⁹⁴ As will be pointed out below, the purpose of this inquiry is to determine whether the child should have been removed at this stage and, if so, whether the temporary arrangement for his or her accommodation pending the main inquiry is the most appropriate one. After reviewing the reasons provided for a preliminary removal of the child, the commissioner can either confirm the removal or set it aside.

⁹¹ See ch 5 par 1.5.2 above.

⁹² Draft Children's Bill clause 170; Social Development's draft Children's Bill clause 152.

⁹³ Matthias & Zaal in Keightly (ed) *Children's rights* 53-54; Zaal in Robinson (ed) *et al Children* 609.

⁹⁴ Zaal & Skelton 1998 *SAJHR* 553.

An important further task that has to be carried out before the main inquiry can be held, is an investigation into the present living circumstances and familial environment of the child. At the opening of the inquiry, the children's court sets a date for the main inquiry, allowing time for the social worker⁹⁵ to fulfill this function.

2.3.2 *The review of the interim detention by the children's court*

The authority for the interim detention of the child removed under a warrant in terms of section 11(2), or without a warrant in terms of section 12(1)⁹⁶ must be submitted to the commissioner of child welfare for review.⁹⁷

If the parent or guardian of the child (or the person in whose custody the child was immediately before the removal) is known to be in the district from which the child was removed and can be traced without undue delay, such parent, guardian or other person must be informed by the police officer, social worker or authorised officer who removed the child⁹⁸ of the date and time of the review by the commissioner of the child's detention.⁹⁹

⁹⁵ S 7(2) of the Act provides that the Minister of Welfare and Population Development may appoint any officer in the public service (or two or more such officers) as a children's court assistant (or children's court assistants) for every children's court. The children's court assistant(s) must at any proceedings of the children's court to which he or she is or they are attached, perform the functions assigned to the children's court assistant by or under this Act, and generally assist the said court in performing its functions. Reg 2(2)(a) further provides that, if the Minister of Welfare and Population Development appoints a social worker as a children's court assistant under s 7(2), all social workers' reports contemplated in s 14(2) of the Act must be channelled through that assistant. In terms of s 1 of the Child Care Act, "social worker" means any person registered as a social worker under the Social Work Act 110 of 1978, or deemed to be so registered, and who, save for the purposes of s 42, is in the service of a state department or a provincial administration or a prescribed welfare organisation.

⁹⁶ See ch 5 par 2.2.3 and 2.2.4 above.

⁹⁷ The children's court assistant must submit the authority to the commissioner for review no later than the first court day following his or her receipt of the authority (reg 9(2)(c)).

⁹⁸ See ch 5 par 2.2.3 and 2.2.4 above.

⁹⁹ Reg 9(2)(b)(ii).

The commissioner must consider the reasons for the child's detention as stated in the authority, and such other information as he or she may obtain, or which the parent or guardian of the child (or the person in whose custody the child was immediately before the removal), the children's court assistant, social worker, police officer, or authorised officer may furnish him or her. The commissioner must then confirm the detention of the child by issuing an order of detention or set the authority aside and direct that the child be restored to the care of his or her parent.¹⁰⁰

Although the regulations do not expressly require the issue of an authority for the interim detention of the child when the child is removed following a court order in terms of s 11(1),¹⁰¹ it appears from a later provision that an authority for the interim detention of the child (and the subsequent review of the authority by the commissioner) is also required when children are removed following a court order. Regulation 9(4) provides as follows: "[a]ny child who is removed ... in terms of section 11(1) or (2) or 12(1) *and whose detention ... is confirmed by the commissioner ...* shall be brought before the children's court ..." (my emphasis).

2.3.3 *The role of social workers in a children's court inquiry*

The main evidence furnished to the children's court at the inquiry in regard to the circumstances of the child and whether he or she is in need of alternative care is presented in the form of a compulsory investigative report drawn up by the social worker.¹⁰²

¹⁰⁰ Reg 9(2)(d).

¹⁰¹ See reg 9(2)(a), which requires this authority only when children are removed under a warrant in terms of s 11(2), or without a warrant in terms of s 12(1). See ch 5 par 2.2.3 and 2.2.4 above.

¹⁰² Child Care Act s 12(2). Also see ch 5 fn 95 above and ch 5 par 2.5 below.

Regulation 2(4)¹⁰³ sets out in detail the basic minimum information to be included in these reports. This minimum information includes the following:

- The report must include “a full family profile setting out the marital, financial, educational, physical and mental health, religious and socio-cultural circumstances” of the child and the parents or other caregiver.¹⁰⁴
- The report must also contain “a summary of prevention and early intervention services rendered” and “a brief background” in regard to any previous statutory interventions in respect of the child.¹⁰⁵
- The report must state the reasons why the child has been identified as a child in need of care.¹⁰⁶ First of all, the circumstances which have led to the child being identified as a child in need of statutory intervention must be set out in the report. Secondly, the grounds for state intervention on behalf of the child must be indicated.¹⁰⁷
- Fourthly, the social worker must recommend which ground from the list of

¹⁰³ The detailed requirements in this regulation are mandatory, indicating that the legislator is determined to improve services by social workers to children in care proceedings. However, since no sanction is indicated for a failure to meet these requirements, law reform may be necessary in this regard (Zaal & Matthias in Davel (ed) *et al Introduction* 124).

¹⁰⁴ Reg 2(4)(a).

¹⁰⁵ Reg 2(4)(b).

¹⁰⁶ It is interesting to note that it is expected of the social worker to set out the grounds for state intervention in the report, and also to recommend which ground from the list of grounds provided in s 14(4) (see ch 5 par 2.3.2.1 below) the commissioner should select when making the order of court. As it is the outcome of the children's court inquiry to determine whether the child is a child in need of care, this seems premature.

¹⁰⁷ Reg 2(4)(c).

grounds provided in section 14(4)¹⁰⁸ the commissioner should select when making the order of court. The report must also recommend to the commissioner “the most empowering and least restrictive order in terms of section 15(1) of the Act that will serve the best interests of the child”.¹⁰⁹

- Where it is recommended in the report that the child should be removed from the caregiver and placed in alternative care, the possibility of returning the child to his or her family and community (in the longer term) must be canvassed in the report. The regulations require that the report must contain “where applicable” a proposed plan to facilitate the reunification of the child and his or her family and the ultimate restoration of the child to his or her community.¹¹⁰
- Lastly, it is required in the regulations that the investigative social worker’s report must contain “a clear indication” of who will be responsible for the subsequent management and review of the child’s case.¹¹¹

Undue delay in finalising the care inquiry is likely to be psychologically destructive to the child and, possibly, other members of his or her family.¹¹² Although the Act limits adjournments to a maximum of fourteen days once an inquiry has been opened, it does not set any deadline for the starting date of the inquiry once a case has been opened.

¹⁰⁸ See ch 5 par 2.4.2.1 below.

¹⁰⁹ Reg 2(4)(d)-(e). Also see ch 5 par 2.6 below.

¹¹⁰ Reg 2(4)(f). Reunification and integration services have in the past often been neglected and this regulation therefore quite correctly makes it mandatory for such services to be considered and arranged even before a removal of the child is agreed to by the children’s court (Zaal & Matthias in Davel (ed) *et al Introduction* 124).

¹¹¹ Reg 2(4)(g). This regulation ensures that the child is not forgotten about in the post-hearing phase (Zaal & Matthias in Davel (ed) *et al Introduction* 124).

¹¹² Matthias & Zaal in Keightly (ed) *Children’s rights* 54-56; Zaal & Skelton 1998 *SAJHR* 553.

Research undertaken by Matthias and Zaal indicates that the absence of such a deadline has resulted in considerable variations in the periods allowed by commissioners for case preparation.¹¹³ The flexibility allowed for by the absence of a statutory deadline for the start of the inquiry, is sometimes necessary. Longer delays may be necessitated by a number of factors, for example the need to find a suitable foster parent, or having to obtain a supplementary social worker's report from a distant rural area.¹¹⁴ It should also be borne in mind that the interim period between the opening and finalisation of the children's court inquiry is used by conscientious social workers not only to report on the circumstances of the child, but also to engage in "reconstruction services" with the parents or guardian and the child in the hope of being able to recommend the happiest solution of all, namely return of the child to his or her family. It is clear that great skill is often required of the children's court to balance due-process and welfare considerations.¹¹⁵ Like the current Child Care Act, the draft Children's Bill limits adjournments to a maximum of fourteen days,¹¹⁶ but sets no deadline for the starting of the inquiry once the case has been opened.

One of the most prominent features of the draft Children's Bills proposed by both the South African Law Commission and the Department of Social Development, is the creation of a legislative framework for providing prevention and early intervention services. The draft Children's Bill provides that, before making an order concerning the temporary or permanent removal of a child from his or her family environment, a children's court may order¹¹⁷

¹¹³ Research undertaken by Matthias & Zaal (Matthias & Zaal in Keightly (ed) *Children's rights* 54) shows that the time period between the opening and the finalisation of the inquiry stretches from about eight weeks to approximately 16 weeks.

¹¹⁴ Zaal & Matthias in Davel (ed) *et al Introduction* 125.

¹¹⁵ Matthias & Zaal in Keightly (ed) *Children's rights* 55.

¹¹⁶ Draft Children's Bill clause 174; Social Development's draft Children's Bill clause 155.

¹¹⁷ Draft Children's Bill clause 164(1); Social Development's draft Children's Bill clause 148(1).

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- “(a) the provincial department of social development or any other relevant organ of state to provide early intervention services in respect of the child and the family or parent or care-giver of the child if the children’s court considers the provision of such services appropriate in the circumstances;
 - (b) the child’s family and the child to participate in a recognised family preservation programme.”

Such an order must be for a specified period not exceeding six months. When the case resumes after the expiry of the specified period, a social worker’s report setting out progress with early intervention services rendered to the child and the family or the parent or care-giver must be submitted to the children’s court. After considering the report, the court may decide the question whether the child should be removed, or order the continuation of early intervention services for a further specified period not exceeding six months.¹¹⁸

In terms of the draft Children’s Bill, early intervention services refers to social development services which are designed to serve the following purposes:¹¹⁹

- “(a) preserving a child’s family structure;
- (b) developing appropriate parenting skills and the capacity of parents and care-givers to safeguard the well-being and best interests of their children;
- (c) establishing appropriate interpersonal relationships within the family;
- (d) promoting the well-being of children and the realisation of their full potential;
- (e) preventing the neglect, abuse or inadequate supervision of children and preventing other failures in the family environment to meet children’s needs;
- (f) preventing the recurrence of problems in the family environment that may harm children or adversely affect their development;
- (g) diverting children away from the child and youth care system and the criminal justice

¹¹⁸ *Ibid.*

¹¹⁹ Draft Children’s Bill clauses 158 & 159; Social Development’s draft Children’s Bill clauses 143 & 144.

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- system; and
- (h) avoiding the removal of a child from the family environment.”

The provision of early intervention services fits in with one of the general principles of the draft Children’s Bill, namely that whenever a provision of the Act requires the best interests of the child standard to be applied, one of the factors to be taken into consideration is the need for the child to remain in the care of his or her parent, family and extended family, as well as the need for a child to be brought up within a stable family environment.¹²⁰ It also fits in with the basic underlying purpose of child care work, namely to heal dysfunctional family relationships. In this regard it should also be noted that the draft Bill also provides for so-called “prevention services”, which is defined as social development services designed to serve the purposes mentioned above, and is provided to families with children in order to strengthen and build their capacity and self-reliance to address problems that may occur in the family environment which, if unchecked, may lead to statutory intervention.¹²¹ The Minister of Social Development must include in the departmental strategy a national strategy aimed at securing the provision of these services to families, parents, care-givers and children across the country.¹²²

2.4 The inquiry of the children’s court

2.4.1 *Bringing a child before the children’s court*

The following children should be brought before the children’s court:

- Any child removed to a place of safety in terms of sections 11(1) (ie removal

¹²⁰ Draft Children’s Bill clause 10; Social Development’s draft Children’s Bill clause 6.

¹²¹ Draft Children’s Bill clauses 158 & 159; Social Development’s draft Children’s Bill clauses 143 & 144.

¹²² Draft Children’s Bill clause 161; Social Development’s draft Children’s Bill clause 146.

following a court order), 11 (2) (ie removal in pursuance of a warrant) or 12(1) (ie removal without a warrant) must be brought before the children's court of the district in which the child resides or happens to be by any police officer, social worker or authorised officer.¹²³

- Furthermore, any child in regard to whom a children's court assistant is of the opinion that he or she is a child in need of care,¹²⁴ may be brought before the children's court of the district in which the child resides or happens to be by any police officer, social worker or authorised officer or by a parent, guardian or other person having the custody of the child.¹²⁵

2.4.2 *Children in need of care*

2.4.2.1 In terms of the Child Care Act 74 of 1983

Having considered the obligatory report of a social worker,¹²⁶ the children's court before which a child is brought must hold an inquiry to determine whether the child is a child in need of care.¹²⁷ The circumstances in which a child is considered to be in need of care are as follows:¹²⁸

“(aB) the child-

- (i) has been abandoned or is without visible means of support;

¹²³ S 13(1). Also see ch 5 par 2.2.2, 2.2.3 & 2.2.4 above.

¹²⁴ For a detailed discussion of when a child is in need of care, see ch 5 par 2.4.2.1 below.

¹²⁵ S 13(2).

¹²⁶ See ch 5 par 2.3.3 above.

¹²⁷ S 13(3). Also see ch 5 par 1 above.

¹²⁸ Child Care Act s 14(4)(a) as amended by the Child Care Amendment Act.

- (ii) displays behaviour which cannot be controlled by his or her parents or the person in whose custody he or she is;
- (iii) lives in circumstances likely to cause or conduce to his or her seduction, abduction or sexual exploitation;
- (iv) lives in or is exposed to circumstances which may seriously harm the physical, mental or social wellbeing of the child;
- (v) is in a state of physical or mental neglect;
- (vi) has been physically, emotionally or sexually abused or ill-treated by his or her parents or guardian or the person in whose custody he or she is; or
- (vii) is being maintained in contravention of section 10.¹²⁹

2.4.2.2 In terms of the draft Children's Bill

In the draft Children's Bill proposed by the South African Law Commission, it is provided that a children's court must decide the question of whether a child who was brought before it is in need of care and protection. If the court finds that the child is in need of care and protection, it may make an appropriate order,¹³⁰ taking into account the provision that deals with providing early intervention services.¹³¹ The Commission has proposed the following criteria in terms of which a child may be found to be in need of care and protection, and has included the following clause giving effect to their recommendations in the draft Children's Bill:¹³²

- “(a) If the person having the parental responsibility to care for the child

¹²⁹ S 10 provides that no person other than the managers of a maternity home, hospital, place of safety or children's home shall receive any child born out of wedlock under the age of seven years, or any child for the purpose of adopting him or her or causing him or her to be adopted, and maintain him or her apart from his or her parents for longer than 14 days, unless such person has applied for the adoption of the child, or has obtained the consent in writing of the commissioner of child welfare of the district in which the child was residing immediately before he or she was received.

¹³⁰ See ch 5 par 2.6 below.

¹³¹ See ch 5 par 2.3.3 above.

¹³² Draft Children's Bill clause 166.

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- (i) deliberately fails to fulfil that responsibility in respect of that child in a material respect;
 - (ii) sexually abuses the child or a sibling of the child;
 - (iii) has inflicted life-threatening injury on the child or a sibling of the child;
 - (iv) has murdered a sibling of the child;
 - (iii) has disappeared or cannot be traced.
- (b) If there is no person exercising the parental responsibility to care for the child.
- (c) If the child
- (i) has been abandoned, orphaned or is without visible means of support;
 - (ii) displays behaviour which cannot be controlled by the parent or care-giver;
 - (iii) lives or works on the streets or begs for a living;
 - (iv) is addicted to a dependence producing substance and is without any support to obtain treatment for such dependency;
 - (v) lives in circumstances that expose the child to commercial sexual exploitation or to being trafficked;
 - (vi) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
 - (vii) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously injure the physical, mental or social well-being of the child;
 - (viii) is in a state of physical or mental neglect;
 - (ix) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibility or a family member of the child, or by a person under whose control the child is; or
 - (x) is subjected to an exploitative labour practice."

The draft Children's Bill proposed by the Department of Social Development omits points (a) and (b). It further reformulates the fifth ground under point (c) to read as follows: "has been exploited or lives in circumstances that expose the child to exploitation". Two further grounds are added. It is provided that a child is in need of care and protection if the child:

- “(g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child
- (j) is subjected to exploitation.”¹³³

2.4.3 *Problems experienced by child care workers*

2.4.3.1 Section 12(1) and 13(2)

2.4.3.1.1 Before the commencement of the Child Care Amendment Act 96 of 1996

Prior to the commencement of the Child Care Amendment Act,¹³⁴ police officers, social workers or authorised officers¹³⁵ acting under section 12(1) (ie removal without a warrant), and children’s court assistants acting under section 13(2) were compelled to undertake the initial removal of children, or recommend children’s court enquiries only after prejudging their parents or guardians according to the criteria provided in section 14(4).¹³⁶

As indicated above,¹³⁷ a police officer, social worker or authorised officer, in order to remove a child to a place of safety without a warrant in terms of section 12(1), must have reason to believe that the child is a child referred to in section 14(4) and that the delay in obtaining a warrant will be prejudicial to the safety and welfare of the child.¹³⁸ Furthermore in terms of section 13(2), any child in regard to whom a children’s court assistant is of the opinion that he or she is a child referred to in section 14(4), can be brought before the

¹³³ Social Development’s draft Children’s Bill clause 150.

¹³⁴ See ch 5 fn 9 & par 1.4 above.

¹³⁵ See ch 5 fn 76 above.

¹³⁶ See ch 5 par 1.3 above.

¹³⁷ See ch 5 par 2.3.4 above.

¹³⁸ S 12(1).

children's court of the district in which the child resides or happens to be by any police officer, social worker or authorised officer or by a parent, guardian or other person having the custody of the child. As indicated above,¹³⁹ prior to the commencement of the Child Care Amendment Act,¹⁴⁰ section 14(4) centred around the question whether the child had no parent or guardian, or had a parent or guardian who could not be traced, or had a parent or guardian or was in the custody of a person who was unable or unfit to have custody of the child due to the circumstances mentioned in the section.

The requirement that the removal without a warrant (in terms of s 12(1)) and the referral to an inquiry (in terms of s 13(2)) had to take place within the framework of section 14(4), therefore had the result, prior to the commencement of the Child Care Amendment Act,¹⁴¹ that parents had to be "stigmatised" before steps could be taken to protect the child. With regard to section 12(1) removals, this also had the effect of damaging the therapeutic image of social workers with parents, leading to "loss of credibility".¹⁴² According to Zaal, the significance of this destruction in credibility was twofold: First of all, should the children's court not have confirmed the removal, then the parent whose behaviour had been used to found the application may have taken out his or her anger at the "false accusations" directed at him or her on the child. Secondly, even if the removal application was successful, the loss of credibility tended to undermine the social worker's own ability to place the child back with the parents (should this later have proved desirable), or to work effectively with them afterwards.¹⁴³

¹³⁹ See ch 5 par 1.3 & 1.4 above.

¹⁴⁰ See ch 5 fn 9 & par 1.4 above.

¹⁴¹ See ch 5 fn 9 & par 1.4 above.

¹⁴² Robinson 1992 *THRHR* 76-77; Sloth-Nielsen & Van Heerden 1996 *SAJHR* (1) 258; Zaal 1988 *SALJ* 232. Zaal uses the phrase "loss of credibility" to denote the fact that the therapeutic image of social workers with parents has been damaged (Zaal 1988 *SALJ* 233). I think it is better to use a phrase such as "loss of trust".

¹⁴³ Zaal 1988 *SALJ* 233.

The child care worker is obliged to inform the parent or guardian of the child, or the person in whose lawful custody the child is, of the removal as soon as possible, provided that such parent, guardian or person is known to be in the district from where the child was removed and can be traced without undue delay.¹⁴⁴ At this point, a mere statement that the child is being removed suffices. Zaal argues that the parent could thus be allowed to perceive the removal as “child-helpful” rather than “parent-condemnatory” in motivation. The removal process becomes easier in that the child can be removed with the minimum degree of verbal confrontation and aggressiveness. Only later, if an inquiry into their behaviour is to occur under section 13(3) need the grounds for removal be formally made known to them.¹⁴⁵

However, in terms of regulation 9(2), after having conducted the emergency removal, the said child care worker is obliged to put down their reasons in writing and then give or send them to the parent and children’s court assistant.¹⁴⁶ Since this notice is to go to the children’s court,¹⁴⁷ it is clear that these reasons have to include the official section 14(4) formulation which, prior to the commencement of the Child Care Amendment Act,¹⁴⁸ referred to parental misconduct or defect. Zaal argues that, previously, this regulation saw to it that the parent who had suffered a removal which was not confirmed by the children’s court, was armed for a defamation action should he or she have wished to seek one.¹⁴⁹ I am of the opinion that the possibility of a defamation action is only a remote possibility. To be successful with an action for defamation, the parent has to prove the intention to defame, and wrongfulness on the side of the child care worker. A *bona fide* belief on the

¹⁴⁴ S 12(2)(a).

¹⁴⁵ Zaal 1988 *SALJ* 234.

¹⁴⁶ Reg 9(2)(a) & (b) as read with Form IV. Also see ch 5 fn 95 above.

¹⁴⁷ See ch 5 par 2.3.2 above.

¹⁴⁸ See ch 5 fn 9 & par 1.4 above.

¹⁴⁹ Zaal 1988 *SALJ* 234-237. Also see Robinson 1992 *THRHR* 78.

side of the child care worker that his or her conduct was necessary would exclude consciousness of wrongfulness or intention.¹⁵⁰

2.4.3.1.2 After the commencement of the Child Care Amendment Act 96 of 1996

With its child-centred and non-punitive approach, the changes brought about by the Child Care Amendment Act¹⁵¹ represent a substantial advance in improving the child's experience of removal proceedings and in aiding the fulfilment by social workers of their therapeutic and reconstructive function.¹⁵²

However, one problem remains. The requirement that the police officer, social worker, or authorised officer who wishes to remove a child to a place of safety without a warrant in terms of section 12(1) must have reason to believe that the child is a child referred to in section 14(4), has the following implications for the child care worker (children's court assistants are in a similar position under section 13(2)): There has to be facts present of such a nature that they lead to a certain conviction or belief on the side of the social worker that the child is a child referred to in section 14(4). The child care worker who undertakes an emergency removal must be prepared later to be tested against an objective standard. Mere *bona fides* in the form of a genuine desire to rescue a child in what is perceived as a pending disaster situation in the absence of a reasonable conviction or belief will not be sufficient.¹⁵³

2.4.3.1.3 In terms of the draft Children's Bill

¹⁵⁰ See, in general, Neethling *Persoonlikheidsreg* 125 *et seq.*

¹⁵¹ See ch 5 par 1.4 & 2.4.2.1 above.

¹⁵² Matthias & Zaal in Keightly (ed) *Children's rights* 58-59; Sloth-Nielsen & Van Heerden 1996 *SAJHR* (2) 653-654.

¹⁵³ Robinson 1992 *THRHR* 74-76; Zaal 1988 *SALJ* 233.

Should it be accepted, the provisions of the draft Children's Bill should alleviate the burden of social workers carrying out emergency removals. As indicated above,¹⁵⁴ the draft Bill provides that a police officer, designated social worker¹⁵⁵ or authorised officer may remove a child and place the child in temporary safe care without a court order if there are reasonable grounds for believing that the child is in need of care and protection, and needs immediate emergency protection, and that the delay in obtaining a court order for the removal of the child and placing the child in temporary safe care may jeopardise the child's safety and well-being. The draft Children's Bill retains the objective standard contained in the current provision ("reasonable grounds for believing"). However, the removal will no longer have to take place within the framework of the criteria for finding a child in need of care and protection. The current provision of the Child Care Act states that the person affecting the removal must have reason to believe that the child is a child referred to in section 14(4) and that the delay in obtaining a warrant will be prejudicial to the safety and welfare of the child. In terms of the draft Children's Bill, all that is required, is that the person affecting the removal must have reasonable grounds for believing that the child is in need of care and protection, and needs immediate emergency protection. The proposed provision is not explicitly linked to the criteria for finding a child to be in need of care and protection, like the current one.

The draft Children's Bill proposed by the Law Commission envisages the re-introduction of criteria for finding children to be in need of care and protection that are based on serious defects in or forms of misbehaviour by a guardian in addition to the child-centred criteria. In terms of the draft Children's Bill, a child is in need of care and protection if the person having the parental responsibility to care for the child¹⁵⁶

¹⁵⁴ See ch 5 par 2.3.4 above.

¹⁵⁵ A designated social worker is defined as a social worker in the service of the Department of Welfare and Population Development or a provincial department of social welfare, or a designated child protection organisation (draft Children's Bill clause 1).

¹⁵⁶ Children's Bill clause 166(a). Also see ch 5 par 2.4.2.2 above.

- “(i) fails to discharge that responsibility in a material respect;
- (ii) commits an exploitative labour practice in relation to the child;
- (iii) sexually abuses the child;
- (iv) has disappeared or cannot be traced.”

With these criteria based on parental fault, the draft Children’s Bill can thus be seen, at least in part, as moving back to the position as it was before the commencement of the Child Care Amendment Act.¹⁵⁷ Under the Law Commission’s draft Children’s Bill, the question arose whether the abovementioned criticism against the pre-1996 criteria (and problems experienced by child care workers), namely that parents had to be “stigmatised” before steps could be taken to protect the child, leading to a damaged therapeutic image of social workers with parents and loss of trust, will not hold true under the new children’s statute, should it be accepted. As the provision contained in Social Development’s draft Children’s Bill omitted the amended provision contained in Social Development’s draft Children’s Bill should thus be welcomed.¹⁵⁸

2.4.3.2 The absence of professionally trained children’s court assistants

2.4.3.2.1 In terms of the Child Care Act 74 of 1983

The absence of professionally trained children’s court assistants¹⁵⁹ has also impacted on social workers. Social workers sometimes find themselves forced into the role of representing and advocating for the child at children’s court hearings, a role for which they have not been trained. Their position is particularly difficult when they are confronted by an adversarial lawyer appearing on behalf of the parent. From an ethical point of view, social workers are also placed in a difficult position. They are not always present to assist only

¹⁵⁷ See ch 5 par 1.3 & 2.4.3.1.1 above.

¹⁵⁸ See ch 5 par 2.4.2.2 above.

¹⁵⁹ See ch 5 fn 95 above.

the child, and they often need to preserve a positive relationship with the child's parents in order to facilitate subsequent reconstructive work with the family. The possibilities for such work can be compromised should it become necessary for the social worker to present damning evidence against the parents. Expecting social workers to "fill the gap" as substitute child advocates is often unfair and counterproductive. Their actual role as envisaged by the Child Care Act is merely one of expert witnesses in children's court proceedings.¹⁶⁰

2.4.3.2.2 In terms of the draft Children's Bill

It was already pointed out that the Law Commission's draft Children's Bill provides that children's court assistants (which will replace the current children's court assistants) must have, *inter alia*, a sufficient understanding of the needs and stages of development of children, mediation skills, and a sufficient knowledge of legal measures, processes and resources available for the protection of children.¹⁶¹ However, hopes that this provision will address the abovementioned concerns relating to the training of children's court assistants were dashed when the Department of Social Development omitted the provision from its draft Children's Bill.

2.4.4 Problems for families affected by removals

2.4.4.1 Before the commencement of the Child Care Amendment Act 96 of 1996

Prior to the commencement of the Child Care Amendment Act,¹⁶² formal declarations of parental misconduct or incompetence were likely to serve little further purpose than to embitter the parent or parents concerned. If the children's court did not confirm the removal,

¹⁶⁰ Zaal in Robinson (ed) *et al Children* 104.

¹⁶¹ Draft Children's Bill clause 93. Also see ch 5 par 1.5.2 above.

¹⁶² See ch 5 fn 9 & par 1.4 above.

the parent who had been “stigmatised” was likely to take out his or her anger at “false accusations” on the child. Even if the particular child was definitely going to be permanently removed, there was a real danger that the parent could take out his or her anger on other children in the family. Furthermore, Zaal points out that a common kind of case is one where parental cooperation with state welfare authorities remains important for some time, because it may turn out that a monitored return to the parental home is the best for the child in the long term. This kind of cooperation was unlikely after a finding of parental misconduct or incompetence as contemplated by the previous section 14(4)(b). The type of “stigmatising” contemplated in the previous section 14(4)(b) was further likely to exacerbate parental problems such as an inferiority complex or hostility towards children.¹⁶³

Prior to the commencement of the Child Care Amendment Act,¹⁶⁴ it was technically possible to confirm the compulsory removal of a child, or to initiate it under section 12(1) or 13(2), purely upon the track record of the “poorer” parent. This is so because of the wording of the previous section 14(4)(b), which provided that the children’s court had to determine whether the child “has a *parent or guardian* ... who is unable or unfit ...”. Zaal argues that the “better” parent could easily feel that he or she was “being asked by the state to take part in a process of character assassination of the other spouse”, and this could inhibit the “better” parent to provide valuable information in the inquiry.¹⁶⁵

From the child’s point of view, the removal grounds under the previous section 14(4) provided cause for concern. As pointed out above, the need to prove parental misconduct or incompetence under the previous section 14(4)(b) made it more difficult for the state to remove children. This could lead to situations where children who were regularly assaulted

¹⁶³ Zaal 1988 *SALJ* 228-229, 233. Also see Barlow 1982 *De Rebus* 339; Matthias & Zaal in Keightly (ed) *Children’s rights* 59; Robinson 1992 *THRHR* 78; Robinson & Olivier 1991 *TRW* 132; Zaal & Matthias in Davel (ed) *et al Introduction* 126.

¹⁶⁴ See ch 5 fn 9 & par 1.4 above.

¹⁶⁵ Zaal 1988 *SALJ* 230-231.

could not be removed because of the inability of the state to prove that it was actually a parent who was committing or facilitating the assaults. The problem of proof was exacerbated further by the following facts:¹⁶⁶

- Since parental misconduct is likely to occur in the privacy of the home, there are often no witnesses.
- There is often family collusion in abuse cases.
- Children are often too young to describe their experiences and point out the perpetrator, and often do not feel that they have been treated wrongly.

2.4.4.2 After the commencement of the Child Care Amendment Act 96 of 1996

The changes brought about by the Child Care Amendment Act¹⁶⁷ represent a substantial advance in improving the child's experience of removal proceedings and in aiding the fulfilment by social workers of their therapeutic and reconstructive function.¹⁶⁸ The criteria contained in the Child Care Amendment Act are child-centred and non-punitive.

However, one of the grounds listed in section 14(4) may prove problematic. The ground making it possible to find a child to be in need of care purely because he or she is "without visible means of support",¹⁶⁹ is controversial. Given the degree of poverty in South Africa at present, and given that many parents are not to blame for their poverty, a very cautious approach should be followed when considering a child for removal where he or she is without visible means of support, but has a loving parent. Many authors recommend that the Child Care Act should be amended to allow children's courts to make special

¹⁶⁶ Barlow 1982 *De Rebus* 339; Zaal 1988 *SALJ* 231.

¹⁶⁷ See ch 5 par 1.4 & 2.4.2.1 above.

¹⁶⁸ Matthias & Zaal in Keightly (ed) *Children's rights* 58-59; Sloth-Nielsen & Van Heerden 1996 *SAJHR* (2) 653-654.

¹⁶⁹ See ch 5 par 2.4.2.1 above.

temporary maintenance grants where poverty is the sole or primary factor mandating removal of a child into state care. They correctly add that it is usually less expensive to maintain a child with his or her family than to take over the care of a child in a residential care facility.¹⁷⁰

2.4.4.3 In terms of the draft Children's Bill

As was pointed out above,¹⁷¹ the draft Children's Bill proposed by the Law Commission envisaged the re-introduction of criteria for finding children to be in need of care and protection that are partially based on serious defects in or forms of misbehaviour by a guardian. With this envisaged return to criteria based (in part) on parental fault, the question arose whether the problems for families affected by removals pointed out above,¹⁷² would not be experienced once more, namely parents taking out their anger on the child or siblings, and parental cooperation with state welfare authorities being compromised. Furthermore, the need to prove parental misconduct or incompetence could make it more difficult for the state to remove children because of the inability of the state to prove that it was actually a parent who was committing the abuse. In view of the fact that the criteria based on parental fault are not the only criteria proposed in the draft Children's Bill, this point of criticism loses much its significance.

However, it should be noted that the provisions proposing criteria for finding a child to be in need of care based on parental fault or misconduct have been omitted from the Children's Bill proposed by the Department of Social Welfare. This Bill contains child-centred criteria similar to the current ones. Should it be accepted, it will alleviate the aforementioned problems.

¹⁷⁰ Sloth-Nielsen & Van Heerden 1996 *SAJHR* (1) 258-260; 1997 *Stell LR* 272-273; Zaal & Matthias in Davel (ed) *et al Introduction* 127.

¹⁷¹ See ch 5 par 2.4.3.1.3 above.

¹⁷² See ch 5 par 2.4.4.1 above.

The abovementioned point of criticism regarding the removal of children who are without visible means of support,¹⁷³ is addressed in the Law Commission's draft Children's Bill, which provides that (if the child was found to be in need of care and protection due to the fact that the person under whose control the child was lacked the means to care for the child) an emergency court grant can be paid to the child to provide for the basic needs of the child until the person under whose control the child is becomes able to provide for those basic needs.¹⁷⁴ Unfortunately, this provision was omitted from Social Development's draft Children's Bill.¹⁷⁵

2.5 The procedure of the children's court

The children's court inquiry is conducted by an adjudicator who is called a commissioner of child welfare. Any magistrate may be called upon to serve in this capacity.¹⁷⁶ Unless the commissioner of child welfare directs otherwise, notice of the holding of an inquiry, and that the attendance of the person to whom the notice is given is required, must be given in the prescribed manner to the parent, guardian or person having custody of the child.¹⁷⁷

At a children's court inquiry in terms of section 13(3) of the Act, the child, his or her parent(s)¹⁷⁸ or guardian, and a respondent¹⁷⁹ all have the same rights and powers as a

¹⁷³ See ch 5 par 2.4.4.2 above.

¹⁷⁴ Draft Children's Bill clause 175.

¹⁷⁵ Clause 156.

¹⁷⁶ Child Care Act s 6(1).

¹⁷⁷ S 13(5)(a).

¹⁷⁸ Reg 4(1).

¹⁷⁹ A respondent is any person legally liable to maintain or to contribute towards the maintenance of a child or of a pupil for whose maintenance a contribution order is sought or was made (Child Care Act s 1).

party to a civil action in a magistrate's court in respect of the examination of witnesses, the production of evidence and of address to the court.¹⁸⁰ The commissioner may allow any person to join the proceedings if the commissioner considers it to be in the best interests of the child concerned, and this person is then deemed to be a party to the proceedings and has the same rights and duties as a party referred to above.¹⁸¹

The children's court may at any time during an inquiry summons any person as a witness or may examine any person who is present although not summonsed, and may recall and re-examine any person who has already been questioned.¹⁸² The children's court must receive such evidence as may be adduced by or on behalf of any party to the proceedings and may cross-examine any person who adduces evidence for or on behalf of any party.¹⁸³

At an inquiry of the children's court in terms of section 13(3) of the Act, the mere submission of a written report purported to be compiled and signed by a social worker or any other person who in the opinion of the court can form an authoritative opinion on the child concerned (or on the child's circumstances, or those of the parents or the person having custody of the child), is *prima facie* proof of the facts stated in that report.¹⁸⁴ The contents of the report must be disclosed to any party directly affected by it at his or her request, and if that party so wishes, he or she must be given the opportunity to cross-examine the author of the report in regard to any matter arising from the report and to refute any statement appearing in the report.¹⁸⁵

¹⁸⁰ Reg 4(1).

¹⁸¹ Reg 4(2).

¹⁸² Reg 4(4)(b).

¹⁸³ Reg 4(5).

¹⁸⁴ Reg 5(1).

¹⁸⁵ Reg 5(2) & (3).

If it appears to the children's court that a child referred to in section 13(1) or (2)¹⁸⁶ should by reason of his or her infancy, ill-health or other sufficient cause not be brought before the court, the court may hold the inquiry in the absence of the child.¹⁸⁷ A children's court holding an inquiry in terms of section 13(3) of the Act may at any time during the inquiry order any medical officer or psychologist to examine the child concerned and to report to the court.¹⁸⁸ The commissioner must during that inquiry request any social worker¹⁸⁹ to furnish a report on the circumstances of the child concerned and his or her parents or guardian or the person having the custody of the child.¹⁹⁰ The court may, if it deems it expedient, from time to time postpone or adjourn the inquiry for periods not exceeding 14 days at a time. The court may order that in the meantime the child remain in a place of safety, or be kept in a place of safety for observation for the information of the court.¹⁹¹

In keeping with the basic underlying purpose of child care work, namely to heal dysfunctional family relationships, procedures in children's court inquiries are less formal than in other courts. Less formal procedures also minimise intimidation of children who are usually already traumatised by their circumstances.¹⁹² For these reasons, it is required that a children's court must sit in a room other than a usual courtroom, unless no such room is

¹⁸⁶ See ch 5 par 2.4.1 above.

¹⁸⁷ S 13(4). This usually happens if evidence is likely to be presented that will be upsetting for the child to hear. However, this may be difficult to judge, and the child's right, in terms of article 12 of the United Nation Convention on the Rights of the Child, to participate and have his or her views given due weight, *inter alia*, in judicial hearings, should be kept in mind (Zaal & Matthias in Davel (ed) *et al Introduction* 119). See further ch 9 par 2.3 below.

¹⁸⁸ S 14(1).

¹⁸⁹ In terms of s 1 of the Child Care Act, "social worker" means any person registered as a social worker under the Social Work Act, or deemed to be so registered, and who, save for the purposes of section 42, is in the service of a state department or a provincial administration or a prescribed welfare organisation.

¹⁹⁰ S 14(2).

¹⁹¹ S 14(3).

¹⁹² Zaal & Matthias in Davel (ed) *et al Introduction* 118.

available and suitable.¹⁹³ Only persons whose presence are necessary in connection with the proceedings of that court, their legal representatives, and persons granted permission by the commissioner may be present at sittings of the children's court.¹⁹⁴ There is a prohibition on the publication of any information relating to children's court proceedings which reveals or may reveal the identity of any child concerned in those proceedings. However, the Minister of Welfare and Population Development or the commissioner concerned may authorise the publication of so much of the said information as he or she may deem fit if the publication thereof would in his or her opinion be just and equitable and in the interest of any particular person.¹⁹⁵

2.6 Powers of children's courts after inquiries

2.5.1 *In terms of the Child Care Act 74 of 1983*

A children's court which, after holding an inquiry in terms of section 13, is satisfied that the child is a child in need of care, may make one of the following orders:¹⁹⁶

- The court may order that the child be returned to or remain in the custody of his or her parents (or, if the parents live apart or are divorced, the parent designated by the court), or guardian or the person in whose custody the child was immediately before the commencement of the proceedings. The child is so returned under the supervision of a social worker, on condition that the child or his parent or guardian

¹⁹³ S 8(1).

¹⁹⁴ S 8(2).

¹⁹⁵ S 8(3).

¹⁹⁶ S 15(1). The order may be made in respect of any person who at the commencement of the inquiry was younger than 18, notwithstanding that before the date of the order that person has attained the age of 18 years.

or custodian complies with the prescribed requirements determined by the court.¹⁹⁷

Possible requirements which the commissioner may prescribe include, *inter alia*, the following: the commissioner may require the parents to attend therapeutic counselling sessions. Another requirement might be that the parents attend and complete a parenting-skills programme designed to educate them in the parenting needs of the child.¹⁹⁸ In laying down requirements the court should take into account the community in which the family lives, and not merely consider the family in isolation.¹⁹⁹

- The court may order that the child be placed in the custody of a suitable foster parent designated by the court under the supervision of a social worker.²⁰⁰
- The court may order that the child be sent to a children's home.
- The court may order that the child be sent to a school of industries.²⁰¹

The children's court must at this stage consider whether the person from whom he is

¹⁹⁷ If any of these requirements is in the opinion of the social worker not being complied with, the social worker may bring the child before the children's court of the district in which the child resides. The children's court must then hold an inquiry in terms of section 13(3), after which it may vary the said order or make a new order under section 15(1) (Child Care Act s 15(2)).

¹⁹⁸ These requirements are set out in wide terms in reg 13(1).

¹⁹⁹ Zaal & Matthias in Davel (ed) *et al Introduction* 127.

²⁰⁰ Removal of children from their present living environment, should always be treated as a measure of last resort. The principles of minimum state intervention and maximum contact for the child with his or her family are supported by article 9 of the United Nations Convention on the Rights of the Child, to which South Africa is a signatory (Zaal & Matthias in Davel (ed) *et al Introduction* 129; Zaal & Skelton 1998 *SAJHR* 545 fn 20). In terms of best social work practice principles, where a child is at risk of harm, a preferable first step would be to apply "early intervention services".

²⁰¹ The argument that removal of children from their present living environment, should always be treated as a measure of last resort, is especially relevant when the option of sending the child to a school of industries is considered.

ordering the child to be removed can afford to contribute towards the expense of accommodating the child in the alternative care that has been ordered by the court. Where appropriate, the commissioner must order payment by the previous caregiver of a “contribution order”.²⁰² Pending the removal of the child to the category of placement that has been ordered by the children’s court, he or she may be kept in a place of safety.²⁰³

Any order made under section 15(1) (see points (1) - (4) above) lapses after the expiry of two years after the date on which the order was made, or such shorter period as the children’s court may have determined when making the order.²⁰⁴ The Minister of Welfare and Population Development may extend the validity of the order for a further period not exceeding two years at a time.²⁰⁵ The order may, however, not be extended to a date after the date on which the child attains the age of 18 years.²⁰⁶ If he or she deems it necessary, the Minister of Welfare and Population Development may order that any former pupil in a school of industries whose period of retention has expired or is about to expire, return to or remain in that school for any further period which he or she may fix. The Minister of Welfare and Population Development may from time to time extend this period. However, the order of extension may not extend the period of retention beyond the end of the year in which that pupil attains the age of 21 years.²⁰⁷

²⁰² S 43(1)(a).

²⁰³ S 15(3).

²⁰⁴ S 16(1).

²⁰⁵ At least three months before the expiry of a children’s court order made in terms of section 15(1) of the Act, the director-general must request a report and motivated recommendation from “the social worker rendering family reunification services and the supervising social worker” on whether the Minister of Welfare and Population Development should extend the validity of such order for a further period in terms of section 16(2) of the Act. These reports must be based on the developmental assessment of the child and his or her ecological circumstances and must 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 (reg 15).

²⁰⁶ S 16(2).

²⁰⁷ S 16(3).

If the children's court has ordered that the child be sent to a children's home or school of industries,²⁰⁸ the director-general has to find a place for the child in such an institution.²⁰⁹ It unfortunately often takes the director-general so long to find such a place that even after two years the child is still awaiting placement.²¹⁰ This problem has led to the amendment in 1991 of section 15 of the Child Care Act so as to permit the Minister of Welfare and Population Development to effect a change to a children's court placement in a children's home or school of industries in order to try to facilitate some sort of long-term institutional placement as soon as possible. This amendment also permits the Minister of Welfare and Population Development, where there has been a failure to secure placement prior to the final day of the children's court order, to simply discharge the child.²¹¹

2.6.2 *In terms of the draft Children's Bill*

In accordance with one of the general principles of the draft Children's Bill, namely that, whenever a provision of the Act requires the best interests of the child standard to be applied, one of the factors to be taken into consideration is the need for the child to remain in the care of his or her parent, family and extended family, as well as the need for a child to be brought up within a stable family environment,²¹² the draft Children's Bill proposed by the South African Law Commission considerably expands the possible orders that a children's court can make when a child is found to be in need of care and protection.²¹³ In terms of the Law Commission's draft Children's Bill,²¹⁴ the children's court who has found

²⁰⁸ S 15(c)-(d).

²⁰⁹ S 15(5)(a).

²¹⁰ Matthias & Zaal in Keightly (ed) *Children's rights* 59. Also see Bosman-Swanepoel & Wessels *Practical approach* 47; Zaal in Robinson (ed) *et al Children* 113.

²¹¹ S 15(5)(a) & (b) read with sections 34 and 37 of the Child Care Act.

²¹² Draft Children's Bill clause 10; Social Development's draft Children's Bill clause 6.

²¹³ See ch 5 par 2.4.2.2 above.

²¹⁴ Clause 175; Social Development's draft Children's Bill clause 156.

that a child is in need of care and protection, may make any order which is in the best interests of the child, which may include, first of all, an order referred to in clause 59. Clause 59 is included in chapter 6 of the Law Commission's draft Children's Bill,²¹⁵ which deals with the establishment, status and jurisdiction of children's courts. It deals with all the possible orders a children's court can make, and is thus not restricted to orders following a finding that a child is in need of care and protection. The orders the court may make in terms of clause 59 are the following:

- An alternative care order, which includes an order placing a child in the care of a foster parent, kinship care-giver,²¹⁶ child and youth care centre²¹⁷ or in temporary safe care.²¹⁸
- An order placing a child in a child-headed household in the care of the child heading the household under the supervision of an adult person designated by the court.
- An adoption order, which includes an inter-country adoption order.
- A partial care order instructing the parent or care-giver to make arrangements with a partial care facility²¹⁹ to take care of the child during specific hours of the day or night or for a specific period.

²¹⁵ Social Development's draft Children's Bill contains a similar provision in clause 46, although the possibility of a parental responsibilities and rights order was omitted.

²¹⁶ The draft Children's Bill defines a kinship care-giver as a relative of the child who has court-ordered kinship care of a child (clause 1). Social Development's draft Children's Bill contains a similar provision.

²¹⁷ See ch 5 par 2.2.1 above.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

- A shared care order instructing different care-givers or centres to take responsibility for the care of the child at different times or periods.
- A supervision order, placing the child, or the parent or care-giver, or both, under the supervision of a social worker or other person designated by the court.
- An order subjecting the child, parent, care-giver, or person holding parental responsibilities and rights in respect of the child, to early intervention services, a family preservation programme, or both.
- A child protection order, which can include various possible orders, for example an order that the child remains in, be released from, or returned to the care of a person, subject to the conditions imposed by the court. It can also include for example an order giving consent to medical treatment or an operation on the child, an order instructing a parent or care-giver of the child to undergo professional counselling, or an order instructing a hospital to retain a child who on reasonable grounds is suspected of having been subjected to abuse or deliberate neglect, pending further inquiry.
- A parental responsibilities and rights order, which includes various possible orders, for example an order assigning some or all parental responsibilities or rights in respect of a child to any person, extending any parental responsibilities or rights which any person has in respect of a child, suspending or restricting a person's capacity to exercise any parental responsibilities or rights in respect of a child, or terminating a person's parental responsibilities or rights in respect of a child. However, a parent may not be deprived of the right to have contact with a child except when contact with the child is not in the child's best interest.
- A contribution order, or a maintenance order in terms of the Maintenance Act 99 of 1998.

Apart from the orders referred to in clause 59, the orders that a children's court can make after finding a child to be in need of care and protection, include the following:²²⁰

- An order confirming that the person under whose control the child is may retain control of the child, if the court finds that that person is a suitable person to provide for the safety and well-being of the child.
- An order that the child be returned to the person under whose control he or she was before being placed in temporary safe care, if the court finds that that person is a suitable person to provide for the safety and well-being of the child.
- An order that an emergency court grant be paid to the child to provide for the basic needs of the child until the person under whose control the child is becomes able to provide for those basic needs (if the child was found to be in need of care and protection due to the fact that the person under whose control the child was lacked the means to care for the child). This provision was omitted from Social Development's draft Children's Bill.
- An order that the child be placed in court-ordered kinship care (if the child has a relative who is able, suitable and willing to take care of the child), foster care, temporary safe care pending an application for the adoption of the child, shared care (where different care-givers or centres alternate in taking responsibility for the care of the child at different times or periods), or a child and youth care centre which provides a residential care programme suited to the child's needs (the current children's home). This provision overlaps with clause 59. However, it is important to note that it is expressly provided that this type of order (ie the removal of the child from the family home) can only be granted by the children's court if the child has no

²²⁰ Clause 175 (Social Development's draft Children's Bill clause 156). Some of the orders than can be made in terms of clause 175, overlap with the clause 59 orders, and will not be repeated here.

parent or care-giver or has a parent or care-giver but that person is unable or unsuitable to care for the child.

- An order that the child be placed in a facility for the care of children with disabilities or chronic illnesses, if the court finds that the child has a physical or mental disability or chronic illness, and it is in the best interest of the child to be cared for in such facility.
- An order that the child be sent to a child and youth care centre which provides a secure care programme suited to the needs of the child (the current school of industries) if the court finds that the parent or care-giver cannot control the child, or that the child displays criminal behaviour.
- An order that the child receive appropriate treatment (if necessary at state expense), if the court finds that the child is in need of medical, psychological or other treatment.
- An order that the child be admitted as an inpatient or outpatient to an appropriate facility, if the court finds that the child is in need of treatment for addiction to a dependence-producing substance.
- An order interdicting a person from maltreating, abusing, neglecting or degrading the child, or from having contact with the child, if the court finds that the child has been or is being maltreated, abused, neglected or degraded by that person, the relationship between the child and that person is detrimental to the well-being or safety of the child, or the child is exposed to a substantial risk of imminent harm.

It is clear from the draft Children's Bill that the children's court order should be aimed at securing stability in the child's life. It is expressly provided that a children's court may issue an order placing a child in the care of a child and youth care centre only if another option

is not appropriate.²²¹ It is further provided that before a children's court gives an order for the removal of a child from the care of the child's parent or care-giver, the court must obtain and consider a report by a social worker on the conditions of the child's life, which must include an assessment of the developmental, therapeutic and other needs of the child, details of family preservation services that have been considered or attempted, and a documented permanence plan taking into account the child's age and developmental needs aimed at achieving stability in the child's life. The court must also consider the best way of securing stability in the child's life. The following options should be considered as ways of securing stability in the child's life.²²²

- whether such stability could be achieved by leaving the child in the care of the parent or care-giver under the supervision of a social worker (provided that the child's safety and well-being must receive first priority);
- placing the child in alternative care for a short period to allow for the reunification of the child and the parent or care-giver with the assistance of a social worker;
- placing the child in alternative care with or without terminating parental responsibilities and rights of the parent or care-giver;
- making the child available for adoption.

In terms of the draft Children's Bill, an order made by a children's court in terms of clause 175 lapses on expiry of two years from the date the order was made, or such shorter period for which the order was made, and may be extended by a children's court for a period of not more than two years at a time. No order referred to under this clause extends

²²¹ Draft Children's Bill clause 177; Social Development's draft Children's Bill clause 158.

²²² Draft Children's Bill clause 176; Social Development's draft Children's Bill clause 157.

beyond the date on which the relevant child reaches the age of 18 years.²²³

On close inspection of the abovementioned options provided for in the draft Children's Bill, it appears that the South African Law Commission has heeded the warning of Zaal that removal of children from their present living environment, especially to schools of industries, should always be treated as a measure of last resort. In this regard, a specific provision of the draft Children's Bill should be highlighted, namely clause 175(f),²²⁴ which only allows a children's court to place a child in kinship care, foster care, temporary safe care, shared care, or a child and youth care centre if "the child has no parent or care-giver, or has a parent or care-giver but that person is unable or unsuitable to care for the child". Zaal adds that the principles of minimum state intervention and maximum contact for the child with his or her family are supported by article 9 of the United Nations Convention on the Rights of the Child, to which South Africa is a signatory.²²⁵

2.7 The effect of the children's court order

A parent or guardian of any child who has been placed in any custody other than the custody of his or her parent or guardian, is divested of his or her right of control over and custody of the child. Those rights, including "the right to punish and to exercise discipline" (in the words of the Act), is vested in the management of the institution to which the child was sent, or in the person in whose custody the child was placed.²²⁶ However, physical punishment is expressly prohibited in children's homes, places of safety, schools of industries and shelters.²²⁷ The rights so transferred do not include the power to deal with

²²³ Draft Children's Bill clause 178; Social Development's draft Children's Bill clause 159.

²²⁴ Clause 156(e) of Social Development's draft Children's Bill.

²²⁵ Zaal & Matthias in Davel (ed) *et al Introduction* 129; Zaal & Skelton 1998 *SAJHR* 545 fn 20. See ch 8 par 4 below.

²²⁶ S 53(1).

²²⁷ Reg 32(3).

the property of the child, or the power to consent to the marriage of the child or to an operation or medical treatment upon the child which is attended with serious danger to life.²²⁸ Therefore, these powers remain with the child's guardian. A parent retains his or her common-law right of reasonable access to the child as well.²²⁹

If a child who has been placed in any custody other than the custody of the parent or guardian, gets married (whether with or without the consent of his or her parent or guardian), that marriage may be annulled by the High Court at any time within six months after the date of the marriage on application by the Minister of Welfare and Population Development if the court is of the opinion that the annulment is in the interests of the child.²³⁰

If a minor living with his or her parent or guardian has been placed under the supervision of a social worker, the parent or guardian must exercise his or her right of control over the minor in accordance with the directions of the social worker.²³¹

2.8 Appeal and review

Although no appeal lies against a finding that a child is in need of care and an order in terms of section 15,²³² the matter may be brought before the High Court on review by an

²²⁸ S 53(3). If the head of the institution or the person in whose custody the child is, has reasonable grounds for believing that an operation or medical treatment is necessary to preserve the child's life or to save him or her from a serious and lasting physical injury or disability, and that the need for the operation or medical treatment is so urgent that it ought not to be deferred for the purpose of obtaining the necessary consent, the head or person concerned may himself or herself authorise the operation or treatment (s 53(4)).

²²⁹ Van Heerden *et al* (eds) *Boberg* 637-638.

²³⁰ S 53(5).

²³¹ S 53(2).

²³² Van Heerden *et al* (eds) *Boberg* 644. The lack of appeal to a higher court against the decision of a children's court has been severely criticised. It has been described as compounding "the veil of secrecy behind which inefficiency can flourish, allowing children

aggrieved party or by a commissioner. The court will not interfere with the commissioner's decision merely because it disagrees with it upon the merits, but will set it aside if the proceedings were irregular in a manner prejudicial to the applicant or the child.²³³

The test upon review is not whether the High Court agrees with the commissioner's decision, but whether a reasonable person might have reached the conclusion to which the commissioner came.²³⁴

2.9 Legal representation

2.9.1 Introduction

Although legal representation for children in children's court proceedings is not expressly forbidden in the Child Care Act, there is at present no mechanism in the Act for ensuring legal representation for children. The lack of provision in the Child Care Act for legal representation on behalf of children in children's court proceedings have for years been criticised as a glaring omission. The validity of such criticism has also been confirmed by recent developments regarding the protection of children's rights (as will be discussed in ch 8). Legal representation for children in children's court proceedings is important for various reasons.

First, there have been cases in the past where there have been conflicts between the parents' and the child's legal interests, and the parents have been represented, but the child not.²³⁵ Secondly, one should keep in mind the natural powerlessness of children,

to become particularly vulnerable" (Matthias & Zaal in Keightly (ed) *Children's rights* 66).

²³³ *Weber v Harvey* 1952 3 SA 711 (T); *Snyder v Steenkamp* 1974 4 SA 82 (N); *J v Commissioner of Child Welfare, Durban* 1979 1 SA 219 (N) at 222H; *Young v Swanepoel* 1990 2 SA 54 (C); *Swarts v Swarts* 2002 3 SA 451 (T). Also see Spiro *Parent and child* 364-366, 644-645.

²³⁴ *Jordaan v Evans* 1953 2 SA 475 (A).

²³⁵ Barlow 1982 *De Rebus* 339.

along with the fact that many commissioners are actually regular magistrates who lack training and experience in child care work.²³⁶ Thirdly, social workers are often expected to “fill the gap” as substitute child advocates, placing them in a difficult position should they be expected to lead evidence against a parent with whom they need to keep a positive relationship for the purpose of possible future reconstructive work.²³⁷

Fourthly, the United Nations Convention on the Rights of the Child 1989 was ratified by South Africa on 16 June 1995.²³⁸ This convention is the most important international legal instrument for the promotion of children’s rights, and provides the context within which amendments to legislation concerning children must take place. Also, in terms of the Constitution, a court must consider international law when interpreting the Bill of Rights.²³⁹ Article 12, one of the key articles of the convention, provides that the child shall have the right to be heard in any judicial or administrative proceedings affecting his or her life - this may be achieved through direct participation (directly allowing the child to express his or her opinion), through a representative or an appropriate body. This article has been identified as one of the four core articles providing the Convention with a “soul” since it recognises that the child’s interests and the adult’s interests may not always intersect, and that a need exists for separate representation of the child’s views.²⁴⁰

Fifthly, the Constitution provides that every child has the right to have a legal practitioner assigned to him or her by the state, and at state expense, in civil proceedings affecting the

²³⁶ Matthias & Zaal in Keightly (ed) *Children’s rights* 56; Zaal & Skelton 1998 *SAJHR* 545.

²³⁷ See ch 5 par 2.3.3 above.

²³⁸ For a discussion of the provisions of the Convention, see ch 9 par 2 below.

²³⁹ S 39(1)(b).

²⁴⁰ Sloth-Nielsen 1995 *SAJHR* 408, 410-411. Also see Zaal & Skelton 1998 *SAJHR* 540. See ch 9 par 2.4 below.

child, if substantial injustice would otherwise result.²⁴¹

2.9.2 Section 8A of the Child Care Act 74 of 1983

The Child Care Amendment Act²⁴² inserts section 8A, dealing with legal representation of children, into the Child Care Act. Note that section 2 of the Child Care Amendment Act (which inserts s 8A into the Child Care Act), dealing with legal representation of children, is not yet in operation, owing to the need to set up an appropriate budget.²⁴³ This section provides that a child may have legal representation at any stage of a proceeding under the Act.²⁴⁴ The children's court is obliged to inform a child who is capable of understanding, at the commencement of any proceeding, that the child has the right to request legal representation at any stage of the proceeding.²⁴⁵ Matthias and Zaal²⁴⁶ point out that at the stage of the child's first appearance, he or she already has a great deal at stake. The

²⁴¹ S 28(1)(h). In Zaal's view, the phrase "civil proceedings affecting the child" is clearly wide enough to cover the care proceedings as dealt with in the children's courts. He adds that by setting up the "rather vague, predictive ground of 'if substantial injustice would otherwise result'", s 28(1)(h) of the Constitution creates a need for the development of new guidelines regarding when exactly a child should be entitled to a legal representative in civil proceedings (Zaal 1997 *SALJ* 335).

²⁴² Child Care Amendment Act. Also see ch 5 fn 9 & par 1.4 above.

²⁴³ Zaal & Matthias in Davel (ed) *et al Introduction* 118.

²⁴⁴ S 8A(1).

²⁴⁵ S 8A(2).

²⁴⁶ in Keightly (ed) *Children's rights* 53.

commissioner will now decide whether the child is to be the subject of an inquiry which may drastically affect his or her future. Pending the inquiry, the commissioner may well decide to have the child detained in a place of safety. As it is clear that the child's liberty is often at stake, the child should be given the opportunity to express his or her wishes at this stage. A children's court may also approve that a parent may appoint a legal practitioner for his or her child for any proceeding under the Act, should the court consider it to be in the best interest of such child.²⁴⁷

Furthermore, a children's court may, at the commencement of a proceeding or at any stage of the proceeding, order that legal representation be provided for a child at the expense of the state, should the court consider it to be in the child's best interest.²⁴⁸ Should a children's court order that legal representation be provided for a child at state expense, the clerk of the children's court is responsible for requesting the legal aid officer in respect of the magisterial district concerned, to appoint a legal practitioner in accordance with the legal aid guidelines determined by the Legal Aid Board, to represent the child.²⁴⁹ The Legal Aid Board is designated to provide legal representation at the expense of the state pursuant to the abovementioned order made by a children's court.²⁵⁰

After the appointment of a legal practitioner the children's court must hold an inquiry. The aim of this inquiry is to establish particulars relating to the financial circumstances of the child, the parent(s) or guardian of the child, whether any other legal representation at state expense is available or has been provided, and any other particulars which, in the opinion

²⁴⁷ S 8A(3). Zaal argues that this broad criterion provides commissioners with hardly any more guidance than the "substantial injustice" test of s 28(1)(h) of the Constitution. He points out the need for more detailed guidelines (1997 *SALJ* 335-336). The legislator has obliged. See ch 5 fn 255 below.

²⁴⁸ S 8A(4).

²⁴⁹ S 8A(5)(a).

²⁵⁰ S 8A(5)(b).

of the children's court, have to be taken into account.²⁵¹ After making the abovementioned inquiry, the children's court may order that the cost of the legal representation be recovered from the parties or any one of the parties to the proceedings, the parents or any one of the parents of the child, or the guardian of the child.²⁵² Before making this order, the children's court must have regard to any recommendation made by the legal representative appointed by the court so as to make an appropriate order regarding the recovery of costs.²⁵³

Section 8A must be read together with the new regulation 4A, which will only come into effect on the date of commencement of the new Section 8A of the Child Care Act. In terms of this regulation the children's court is obliged to order legal representation at state expense for a child involved in any proceedings under the Act in the following circumstances:²⁵⁴

- “(a) where it is requested by a child who is capable of understanding;
- (b) where it is recommended in a report by a social worker or an accredited social worker;
- (c) where any party besides the child will be legally represented in the proceedings;
- (d) where it appears or is alleged that the child has been physically, emotionally or sexually assaulted, ill-treated or abused;
- (e) where the child, a parent or guardian, a person in whose custody the child was immediately before the commencement of the proceedings, a foster parent or proposed foster parent, or an adoptive or proposed adoptive parent contests the placement recommendation of a social worker or of an accredited social worker who has furnished a report [to the children's court in terms of the Act];
- (f) where two or more persons are each contesting in separate proceedings for the placement of the child in their custody;

²⁵¹ S 8A(6)(a)-(d).

²⁵² S 8A(7)(a).

²⁵³ S 8A(7)(b). The order in terms of s 8A(7)(a) is deemed to be an order as to costs in favour of and recoverable by the Legal Aid Board (s 8A(7)(c)).

²⁵⁴ Reg 4A(1). This regulation is based on recommendations made by Zaal 1997 *SALJ* 343.

- (g) where the child is capable of understanding the nature and content of the proceedings, but differences in languages used by the court and the child prevent direct communication between the court and the child, a legal representative who speaks both the relevant languages must, subject to paragraph (h), be provided;
- (h) where a legal representative as contemplated in subsection (g) can not be provided, an alternative arrangement should be made, including the provision of an interpreter for the child;
- (i) where there is reason to believe that any party to the proceedings or any witness intends to give false evidence or to withhold the truth from the court; and
- (j) in any other situation where it appears that the child will benefit substantially from legal representation either as regards the proceedings themselves or as regards achieving in the proceedings the best possible outcome for the child”.

2.9.3 *Criticism against section 8A*

The formulation of section 8A is, unfortunately, not above criticism. First, it is not obligatory for the children’s court properly to consider the matter of legal representation for the child in all cases. Many children who are subject to children’s court proceedings are not “capable of understanding” due to their tender years. Furthermore, it is unclear what the responsibility of the children’s court is when the child does request legal representation. Can a “frivolous” request simply be denied? And, if a child refuses legal representation, as frequently happens in juvenile criminal courts, must the court go further and consider whether the best interests of the child require legal representation notwithstanding such refusal? This appears not to be the case - section 8A(4) merely states that “a children’s court may ... order that legal representation be provided for a child at the expense of the state, should the Children’s Court consider it to be in the best interest of [the] child”. Legal representation therefore remains discretionary, both at the time of commencement of the proceedings as well as at any later stage in the proceedings.²⁵⁵ Matthias & Zaal call for an

²⁵⁵

Sloth-Nielsen & Van Heerden 1996 *SAJHR* (2) 650.

automatic right of legal representation.²⁵⁶

A further problem with the proposed section 8A is that it requires the commissioner, before he or she has the full knowledge which comes only with the hearing of oral evidence, to decide whether a child should have a legal representative. Matthias & Zaal argue that it would be more appropriate for the children's court assistant to make a decision in this regard. The assistant is, after all, in a position to investigate the matter before the hearing and thus gain sufficient information about whether, for example, there are likely to be difficult legal issues to consider at the hearing.²⁵⁷

Section 8A also appears to fall short of the standard set by article 12 of the Convention on the Rights of the Child, which provides that states parties must assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with his or her age and maturity. This may be achieved through the child's direct participation or through a representative or appropriate body.²⁵⁸

Furthermore, an important statutory mechanism designed to test the efficiency of decision-making in this regard, namely the court's obligation to record reasons for not providing legal representation for a child,²⁵⁹ has not been included in the final version of section 8A of the Act.²⁶⁰

²⁵⁶ Matthias & Zaal in Keightly (ed) *Children's rights* 57. Zaal 1997 *SALJ* 342 points out that a representative in every case is no doubt the ideal. However, a major counter-consideration is unfortunately that of cost.

²⁵⁷ Matthias & Zaal in Keightly (ed) *Children's rights* 57.

²⁵⁸ Sloth-Nielsen 1995 *SAJHR* 410-411; Sloth-Nielsen & Van Heerden 1996 *SAJHR* (1) 251; Zaal 1997 *SALJ* 335-336. See ch 9 par 2.4 below.

²⁵⁹ The June 1995 draft provided in section 8A(4) that where the children's court determines that legal representation is not necessary to protect a child's interests, the reasons for such decision must be entered in the minutes of the court proceedings.

²⁶⁰ Sloth-Nielsen & Van Heerden 1996 *SAJHR* (2) 650.

2.9.4 *The draft Children's Bill*

A major point of criticism against section 8A of the Child Care Act is that it falls short of article 12 of the United Nations Convention on the Rights of the Child. This concern seems to have been addressed in the draft Children's Bill as part of the chapter dealing with general principles. One of the principles contained in this chapter is the following: if a child is in a position to participate meaningfully in any decision-making process in any matter concerning him or her, the child must be given that opportunity, and proper consideration must be given to the child's views and preferences, bearing in mind the child's age, maturity and stage of development.²⁶¹

In the discussion paper on the review of the Child Care Act,²⁶² the South African Law Commission recommends that the draft Children's Bill should expressly provide that a child involved in a matter before a children's court is entitled to legal representation. A clause regulating legal representation for children has been included in the Law Commission's draft Children's Bill.²⁶³ If a child does not appoint a legal representative of own choice and at own expense, the court must inform the parent or care-giver of the child or a person who has parental responsibilities and rights in respect of the child and the child (if he or she is capable of understanding) of the child's right to legal representation. If no legal representation is appointed by the child after the court has done the aforementioned, or if the court has terminated the appointment of a legal representative (because the legal representative does not serve the interests of the child or serves the interests of any other party in the matter), the court may order that legal representation be provided for the child at the expense of the state. However, the Commission recommends that the court must automatically provide legal representation for a child involved in a matter before a

²⁶¹ Draft Children's Bill clause 9; Social Development's draft Children's Bill clause 5.

²⁶² SA Law Commission *Review* ch 6 at 99 *et seq.*

²⁶³ Clause 78.

children's court in the following circumstances:²⁶⁴

- if it is requested by the child;
- if it is recommended in a report by a social worker or an adoption social worker;
- if it appears or is alleged that the child has been abused or deliberately neglected;
- if any recommendation of a social worker who has investigated the circumstances of the child that the child be placed in alternative care is contested by the child, a parent or care-giver of the child, a person who has parental responsibilities and rights in respect of the child, or a would-be adoptive parent, foster parent or kinship care-giver of the child;
- if two or more adults are applying in separate applications for the placement of the child with them;
- if any other party besides the child is or is to be legally represented at the hearing;
- if the court has terminated the appointment of a legal representative in terms of subsection 2(b);
- in any other situation where it appears that the child will benefit substantially from representation either in regard to the proceedings themselves or in regard to achieving the best possible outcome for the child, or
- substantial injustice would otherwise result.

These recommendations correspond to a great extent to the guidelines contained in regulation 4A(1), which in turn are based on recommendations by Zaal.²⁵² On close inspection of the abovementioned envisaged provisions, it appears that all the points of criticism against section 8A referred to above²⁵³ would be addressed by the Law Commission's draft Children's Bill, should it be accepted. The appointment of legal representation for the child is mandatory in certain clearly defined circumstances, leaving

²⁶⁴ *Ibid.*

²⁵² See ch 5 fn 255 above.

²⁵³ See ch 5 par 2.9.3 above.

little to the discretion of the presiding officer. Furthermore, the children's court must record its reasons if it declines to issue an order that legal representation be provided for a child.

It is very unfortunate that the draft Children's Bill proposed by the Department of Social Development omits the clause listing the circumstances in which the appointment of legal representation for children is mandatory.²⁵⁴ This is certainly a step backwards, and one of the biggest shortcomings of Social Development's draft Bill.

A further important clause of the Law Commission's draft Children's Bill is entitled "Participation of children".²⁵⁵ It provides that a presiding officer in a matter before a children's court must

- (a) allow a child involved in the matter to express a view and preference in the matter if the court finds that the child, given the child's age, maturity and stage of development, is able to participate meaningfully in the proceedings, and the child chooses to do so;
- (b) record the reasons if the court finds that the child is unable to participate meaningfully in the proceedings or is unwilling to express a view or preference in the matter; and
- (c) intervene in the questioning or cross-examination of a child if the court finds that it is not in the best interests of the child.

This provision is clearly intended to implement article 12 of the United Nations Convention on the Rights of the Child. It should be welcomed, as it allows for participation of children in children's court proceedings even if no legal representative has been appointed for the

²⁵⁴ Clause 55.

²⁵⁵ Clause 84; Social Development's draft Children's Bill clause 61.

child.