

Chapter 10

Conclusion

1 INTRODUCTION

This chapter begins with a discussion of South Africa's ideological stance on the protection of children's rights and family autonomy. As pointed out earlier,¹ a study of the theoretical aspects of the protection of children's rights is of the utmost importance for this study. Viewpoints on the level of self-determination or autonomy that should be afforded to children, and the extent to which the state should be allowed actively to interfere in family life, inform the decisions of judges, legislators and policy-makers.

The following question is addressed in this chapter: What is South Africa's ideological stance on the protection of children's rights and family autonomy? The answer to the aforementioned question is of the utmost importance for this thesis for various reasons:

- First, it must be determined whether South African law follows an approach of minimum or maximum intervention into family affairs. This question cannot be answered without first determining the exact nature and content of parental authority in South African law (with reference to its common-law roots), and the circumstances in which the courts can interfere with parental authority in our law.
- Secondly, it will be of assistance in trying to establish whether the provisions relating to interference with parental authority contained in South African child protection legislation are appropriate, and afford adequate protection to the rights

¹ See ch 1 par 1 above.

and interests of the child, taking into account the provisions of the children's clause and the United Nations Convention on the Rights of the Child 1989. In this regard, the ideological stance of South African law on the protection of children's rights and family autonomy determines how the courts interpret the children's clause (final Constitution section 28). Moreover, it is important to try and predict what the Constitutional Court's stance on the abovementioned issue would be should it ever be faced with the task of testing the child protection measures against the children's clause.

The discussion of the ideological approach of the South African law to the protection of children's rights, is followed by a discussion of the conclusions reached in the comparative analysis. Lastly, certain law reform provisions are proposed.

2 THE IDEOLOGICAL APPROACH OF THE SOUTH AFRICAN LAW OF PARENT AND CHILD TO THE PROTECTION OF CHILDREN'S RIGHTS

2.1 An acceptable approach to the protection of children's rights

2.1.1 "Nurturance" or "self-determination"

As I pointed out in an earlier chapter,² an unqualified individualistic model for the protection of children's rights cannot be accepted. Children have interests to protect long before they have wills to assert. The reason why the law regards young children as incapable of rational thought, is the protection of the child. To enable children to develop into rational, autonomous adults who are capable of making their own decisions, children should initially be protected against their own irrational actions.³ In my view, this is the most convincing

² See ch 8 par 7.2 above.

³ Freeman *The rights and wrongs of children* 57, as cited by Human in Davel (ed) *et al Introduction* 158. Also see Jones & Marks 1994 *IJCR* 275-276 and ch 8 par 6.2.1.3. above.

reason why a certain degree of paternalism towards children is necessary and justified.

In spite of what was said above, one cannot ignore the overwhelming research findings by developmental psychologists regarding the intellectual, social and moral development of children. These findings indicate that a child reaches adult decision-making capacities around mid-adolescence.⁴ This evidence calls for the re-evaluation of the age-old restrictions on children's capacities.

This raises the question as to what precisely the acceptable limits of paternalism are. In my view, the so-called "*Gillick*-competency test" is the most appropriate answer to the question as to what precisely the acceptable limits of self-determination are. According to Lord Scarman,⁵ a child acquires capacity to make his or her own decisions when he or she reaches a sufficient understanding and intelligence to be capable of making up his or her own mind on the matter requiring decision. The test formulated by Lord Scarman involves an individualistic assessment of a particular child's level of maturity and intellectual ability. However, in my view, an important rider should be added to this test, namely that children may not be allowed to make decisions that are clearly contrary to their best interests.

From the aforementioned discussion, it is clear that the "nurturance" and "self-determination" approaches to the protection of children's rights⁶ are not mutually exclusive. Both approaches should be followed, depending on the stage of development of the child. If the child is still an irrational being, the "nurturance" approach should be more important, whereas the "self-determination" approach should become more important when the child approaches mid-adolescence. For this reason, I support Freeman's call for a *via media*

⁴ See ch 8 par 5, 6.2.1.3 & 6.4.5.4 above in this regard.

⁵ *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS* [1985] 3 All ER 402. See ch 8 par 5 above.

⁶ See, in general, ch 8 par 6.1 above.

or dual approach.⁷

2.1.2 *Maximum or minimum state intervention?*

Due to the importance for children of growing up in stable family environments, a policy of maximum coercive intervention by the state cannot be accepted. However, the policy of absolute minimum state intervention⁸ can, in my view, also not be accepted in unqualified form. It falsely supposes that parents always have their children's best interests at heart. It further perpetuates the view that women and children belong to the *oikos* (private life), and have no place in the *polis* (public life).⁹

In my view, the correct policy lies somewhere between the extremes of maximum coercive intervention and minimum intervention, particularly in the correct application of the best interest of the child standard.¹⁰

2.3 Historical roots of the concept “parental authority”

As I concluded in chapter 2,¹¹ parental authority as it applied in Roman-Dutch law was based on Germanic customs, and not on the *patria potestas* concept found Roman law. This fact appears from the following:

- In Roman law, the *paterfamilias* had absolute control over his children.¹² In sharp

⁷ Freeman in Freeman & Veerman *Ideologies* 39. Also see ch 8 par 6.2.1.3 above.

⁸ followed *inter alia* by Goldstein *et al Before best interests*. See ch 8 par 2.3.5, 3 & 4 above.

⁹ Freeman 1985 *CLP* 166-167; Boshoff 1999 *TSAR* 277. Also see ch 8 par 4.1 above.

¹⁰ See ch 10 par 3.2 below.

¹¹ See ch 2 par 5 above.

¹² Sohm *Institutes* 507. See further ch 2 par 2.1 & 2.5 above.

contrast is the protective character of parental authority in Roman-Dutch law. In Roman-Dutch law, parents were obliged to care for and educate their children.¹³ The position in Roman-Dutch law was similar to the position in Germanic law. Legal capacity in Germanic law depended upon the ability to bear arms. Since women and children were physically unable to bear arms, they were subjected to *munt*. *Munt* had to be exercised in the interests of the child.¹⁴

- The Roman *patria potestas* lasted until the death of the father, unless it was terminated before that date by emancipation, adoption or the marriage of a daughter.¹⁵ In Roman-Dutch law, on the other hand, parental authority was automatically terminated when the child reached a certain age, or when the child got married.¹⁶ As indicated above, the termination of parental authority when the child reached a certain age, or when the child got married, also has a Germanic origin.¹⁷
- In Roman law *patria potestas* was exercised by the *paterfamilias*. The mother, who was herself subject to *potestas*, had no authority in respect of her children.¹⁸ In contrast, parental authority over the person of the child was shared by both parents in Roman-Dutch law, while the father was vested with guardianship.¹⁹ The origin of this rule can also be found in Germanic customary law.²⁰

¹³ Voet *Commentarius* 25.3.4. Also see Studiosus 1946 *THRHR* 38 and ch 2 par 4.4.2.5 above.

¹⁴ Sohm *Institutes* 507; Studiosus 1946 *THRHR* 33-34, 36. See further ch 2 par 3.5 above.

¹⁵ Schulz *Roman law* 150; Sohm *Institutes* 507. See further ch 2 par 2.4 above.

¹⁶ Grotius *Inleidinge* 1.6.4; Voet *Commentarius* 1.7.11,13. See further ch 2 par 4.3 above.

¹⁷ Brunner *Grundzüge* 229; Hahlo & Kahn *Legal system* 382-383; Huebner *History* 662-663. See further ch 2 par 3.5 above.

¹⁸ G 1.48; D 1.6.4. Also see Buckland *Roman law* 101-102; Thomas *Institutes* 25; Van Zyl *Geskiedenis en beginsels* 82 fn 43. See further ch 2 par 2.3 above.

¹⁹ Voet *Commentarius* 1.6.3; *Calitz v Calitz* 1939 AD 56 61. See further ch 2 par 4.2 above.

²⁰ Hahlo & Kahn *Legal system* 344. See further ch 2 par 3.3 above.

South African law applies the Roman-Dutch law of parent and child, and thus the Roman-Dutch concept of parental authority.²¹ Due to the strong protective character of the Germanic concept of parental authority, and its emphasis on the interests of the child and the responsibilities of the parent, one can state that the concept parental authority in its historical context follows a strong “nurturance” approach to the protection of children’s rights.

2.4 The content of parental authority

Although significant development and refinement of the original Roman-Dutch concept “parental authority” has taken place in modern South African law (eg relating to guardianship of children and the age of majority²²), the strong protective character inherited from Germanic customary law, and the emphasis on the interests of the child and the responsibilities of the parent, remain.

As early as 1948, the Appellate Division found in *Fletcher v Fletcher*²³ that the best interests of the child is the main or paramount consideration or guiding principle when granting a custody order after divorce, to which the rights of the parents (who are parties to the divorce) have to yield. It is therefore apparent that early South African law followed a “nurturance approach”²⁴ to the protection of children’s rights, with a strong emphasis on protection of children rather than their autonomy.

The inherent vagueness of the best interests of the child criterion lends itself to an interpretation that parents are in the best position, within the family context, to judge what

²¹ *Van Rooyen v Werner* (1892) 9 SC 425 428 *et seq*; Spiro *Parent and child* 5. See further ch 2 par 6 above.

²² See ch 2 par 6.2 above.

²³ 1948 1 SA 130 (A).

²⁴ The “nurturance approach” to the protection of children’s rights is discussed in ch 8 par 6.1 above.

is in their children's best interests (ie a paternalistic interpretation). This explains why some courts did not question a parent's authority to decide with whom his or her child may associate, and regarded a third person's infringement of this authority as an *iniuria* against the parent.²⁵ It also explains why the right of parents to discipline their children by means of moderate and reasonable chastisement (including corporal punishment, if necessary),²⁶ is still recognised in our law in spite of the fact that corporal punishment was abolished from South African public life in 1997,²⁷ and in spite of calls for the abolition of corporal punishment of children by their parents.²⁸

From the above it is clear that, at least in the pre-constitutional period, the South African private law tended towards the "minimum intervention" end of the public/private continuum (ie not to be interfered with by the state),²⁹ protecting family integrity and the autonomy of parents to raise their children as they see fit.

2.5 Judicial interference with parental authority

In spite of their historical inherent authority as upper guardian of minors to interfere with parental authority, it is clear that the courts initially went out of their way to protect the sanctity of parental autonomy when dealing with the question whether they are entitled to interfere with parental authority. The courts thus followed a paternalistic approach, an

²⁵ *Meyer v Van Niekerk* 1976 1 SA 252 (T); *Coetzee v Meintjies* 1976 1 SA 257 (T); *Gordon v Barnard* 1977 1 SA 887 (C); *H v I* 1985 3 SA 237 (C); *L v H* 1992 2 SA 594 (E).

²⁶ *R v Janke & Janke* 1913 TPD 382 at 385; *Du Preez v Conradie* 1990 4 SA 46 (B) at 51E-F.

²⁷ Corporal punishment may no longer be imposed as a sentence by a court of law (Abolition of Corporal Punishment Act 33 of 1997 s 1), or used as a means of enforcing discipline in schools (South African Schools Act s 10(1)) and prisons (Correctional Services Second Amendment Act 79 of 1996).

²⁸ Labuschagne 1991 *De Jure* 23; Van Heerden *et al* (eds) *Boberg* 679-680; Pete 1998 *SAJHR* 449.

²⁹ For a discussion of the public/private dichotomy, see ch 8 par 4 above.

approach of minimum state intervention. This fact appears *inter alia* from the decision in *Calitz v Calitz*,³⁰ that is regarded as the *locus classicus* on the circumstances in which the High Court is entitled to interfere with parental authority. The Appellate Division decided that, in cases where no divorce or judicial separation had been granted, it could deprive a father of the custody of his child (and award it to the child's mother) only on special grounds. These special grounds include *inter alia* danger to the child's life, health or morals.³¹

The initial paternalistic approach of the courts towards interference with parental authority was later replaced with a more lenient approach, an approach that allowed for a more active role for the state in family life. This point can be illustrated by means of examples of interference with parental authority by the High Court in terms of its common-law and statutory jurisdiction as upper guardian.

First, some divisions of the High Court have expressed a willingness to compel a parent to subject his or her child to blood tests in spite of the parent's refusal, if the interests of the child require it.³²

Secondly, the Marriage Act 25 of 1961³³ authorises the High Court to consent to the marriage of a minor in cases where the parent, guardian or commissioner of child welfare, without adequate reason and contrary to the interests of the minor, refuses to consent to

³⁰ 1939 AD 56.

³¹ At 63. It was pointed out in a number of subsequent decisions that interference with parental authority was only justified on special grounds, but that these special grounds were not limited to cases where there was danger to the child's life, health or morals. The grounds mentioned in *Calitz v Calitz supra* are thus only examples of such special grounds. See *Short v Naisby* 1955 3 SA 572 (D); *September v Karriem* 1959 3 SA 687 (C); *Horsford v De Jager* 1959 2 SA 152 (N); *Petersen v Kruger* 1975 4 SA 171 (C). See further ch 4 par 2.2 above.

³² *Seetal v Pravitha* 1983 3 SA 827 (D) at 862C-863A, 864A-B; *M v R* 1989 1 SA 416 (O) at 420D-421G; *O v O* 1992 4 SA 137 (C) at 139H-I. Also see ch 4 par 2.3 above.

³³ S 25(4).

the marriage. However, it should be noted that the court will not lightly overrule the parent's decision not to consent to the marriage of the minor; serious consideration will be given to the objections of the parents.³⁴

Thirdly, the Child Care Act 74 of 1983 provides for the substitution of parental consent to an operation or medical treatment for the child in cases where the parent cannot be found, or is unable to give the required consent due to mental illness, or is deceased, or refuses consent. In such cases any medical practitioner who is of the opinion that it is necessary to perform an operation upon the child, or to submit the child to any treatment which may not be given without the consent of the child's parent or guardian, must report the matter to the Minister of Welfare and Population Development. If the Minister of Welfare and Population Development is satisfied that the operation or treatment is necessary, he or she may consent thereto in lieu of the parent.³⁵ Furthermore, the Act provides for consent to an operation or medical treatment on a child by the medical superintendent of a hospital or the medical practitioner acting on his or her behalf. This consent may be given if the superintendent is of the opinion that the operation or medical treatment is necessary to preserve the life of the child or to save the child from serious and lasting physical injury or disability, and that the need for the operation or treatment is so urgent that it ought not to

³⁴ *Allcock v Allcock* 1969 1 SA 427 (N) at 429E-430B; *Kruger v Fourie* 1969 4 SA 469 (O) at 473A-B. Also see ch 4 par 3.2 above.

³⁵ S 39(1). 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 proposed by the Commission. On 12 August 2003, the Department of Social Development published its own draft Children's Bill for comment. The department indicated their intention to table the Bill 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. The draft Children's Bill proposed by the South African Law Commission provides that if a child has been abandoned, or the parent or primary care-giver of the child refuses to give consent, or is physically or mentally incapable of giving consent, or is deceased or cannot readily be traced, a child and family court may consent to the medical treatment of, or surgical operation on, the child (clause 135(5) of the draft Children's Bill). Social Development's draft Children's Bill contains a similar provision in clause 129(5), although it provides that a *High Court or children's court* may consent to the treatment or operation. It further requires that the parent's or primary care-giver's consent must have been *unreasonably withheld*.

be deferred for the purpose of consulting the parent or guardian.³⁶

2.6 The emergence of an ideology of children's autonomy

Initially, the South African law of parent and child showed very little recognition of the autonomy of children - their right to have a say in matters affecting their well-being. However, in the late 1970's some development began to occur in this regard. In *Meyer v Van Niekerk*³⁷ the court held that the mental and moral education of a child, which are important components of parental authority, clearly diminishes progressively as the child matures, until they consist of nothing more than advice. Parental authority may thus include the authority to act against third parties who interfere with these components, but this will only be the case where a undeveloped young child is concerned, one who still lives with her parents, still goes to school, and still has to be educated and disciplined in a very direct way.³⁸ In *Gordon v Barnard*³⁹ the court held, with reference to *Hewer v Bryant*,⁴⁰ that parental authority

“is a dwindling right which the Courts will hesitate to enforce against the child the older he is. It starts with a right of control and ends with little more than advice”.⁴¹

The aforementioned two cases illustrate a recognition by the courts of the so-called “maturation factor” that was discussed in an earlier chapter,⁴² in terms of which it is

³⁶ S 39(2). The draft Children's Bill contains a similar provision (clause 135(4)), and Social Development's draft Children's Bill contains a similar provision (clause 129(4)).

³⁷ 1976 1 SA 252 (T). Also see ch 3 par 7.3.2 above.

³⁸ At 257A-B.

³⁹ 1977 1 SA 887 (C). Also see ch 3 par 7.3.2 above.

⁴⁰ [1969] 3 All ER 578 (CA).

⁴¹ *Gordon v Barnard* 1977 1 SA 887 (C) at 889H.

⁴² See ch 8 par 5 above.

recognised that children soon move out of dependence and into a phase where their capacity for taking responsibility for their own actions should be encouraged. Moreover, the approach in *Meyer v Van Niekerk* is strikingly similar to the approach followed in *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS*,⁴³ where the majority in the House of Lords held that parental authority was not absolute. Lord Scarman held that parental rights in general (including the right to decide on medical treatment on behalf of the child) are derived from parental duty and exist only as long as they are needed for the protection of the child.⁴⁴

*Meyer v Van Niekerk*⁴⁵ can in my view be seen as the beginning of a movement towards the recognition of children's autonomy in South African law. Although the court did not expressly state that children reach an age when they can make their own decisions, this is in my view the logical consequence of the court's decision that parental authority diminishes progressively as the child matures, until it consists of nothing more than advice.

For the past few decades, there has been a steady movement in South African law towards a child-centred, individualistic approach to the protection of children's rights, an approach that recognises the right to self-determination of the child. A few legislative provisions are noteworthy in this regard.

In terms of the Child Care Act, a person over the age of 18 can consent to an operation without parental assistance, and a child over the age of 14 can consent to medical treatment without parental assistance.⁴⁶ The provision does not stipulate whether the

⁴³ [1985] 3 All ER 402. See, in general, Bainham *Children* 270 *et seq*; Eekelaar 1986 *LQR* 4 *et seq*; Eekelaar 1986 *NLJ* 184 *et seq*; Eekelaar 1986 *Oxford JLS* 177 *et seq*; Human 2000 *Stell LR* 71 *et seq*; Robinson 1993 *TRW* 52 *te seq*. Also see ch 8 par 5 above.

⁴⁴ At 421e.

⁴⁵ 1976 1 SA 252 (T).

⁴⁶ S 39(4).

parent has a right to veto the child's decision. Ngwena⁴⁷ submits that the provision does not vest minors with exclusive power to consent. The parent's common-law right to consent remains until the child's majority, but it is subject to the provision contained in section 39(4). If the minor's age meets the statutory criteria, the parent's right is *inferior* to that of the minor. The parent only has the right to consent if the minor wishes not to exercise his or her right. However, a minor who wishes to exercise the right to consent, can veto their parents. The right to say "yes" is co-existent with the right to say "no". Something less than this would render section 39(4) nugatory.

The draft Children's Bill proposed by the South African Law Commission⁴⁸ lowers the age at which a minor can consent to medical treatment or surgery to 12 years, provided that the minor is of sufficient maturity and has "the mental capacity to understand the benefits, risks, and social implications of the treatment or operation". In the case of surgery the child must however have the "assistance" of his or her parent or primary care-giver although the parent or care-giver's consent is not required. The child's parent or primary care-giver's consent is required if the child is under the age of 12 years, or over that age but is of insufficient maturity or does not have the mental capacity to understand the benefits, risks and social implications of the treatment or operation. Note that the draft Bill empowers a caregiver who is not a parent or guardian to consent to medical treatment or surgery.⁴⁹

This provision should be welcomed as it recognises the fact that children over the age of 12 years may, in certain circumstances, be of sufficient maturity and mental capacity to understand the benefits, risks and social implications of medical treatment or an operation.⁵⁰ Nevertheless, it does not give all children over the age of 12 years the

⁴⁷ Ngwena in Keightly (ed) *Children's rights* 144. See further Clark 2001 *THRHR* 605 *et seq.*

⁴⁸ See ch 10 fn 35 above.

⁴⁹ Law Commission's draft Children's Bill clause 135. Social Development's draft Children's Bill contains a similar provision in clause 129.

⁵⁰ This test is similar to the "*Gillick* competency test". See ch 8 par 5 & ch 10 par 2.1.1 above.

capacity to consent, but only those of sufficient maturity and mental capacity. Moreover, it recognises the role of the parent by providing that, in the case of surgery, the child must have the “assistance” of his or her parent or primary care-giver although the parent or care-giver’s consent is not required.

Further, the Choice on Termination of Pregnancy Act 92 of 1996 provides that, in the case of a pregnant minor (ie a female person below the age of 18), a medical practitioner or a registered midwife must advise such minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated. However, the termination of the pregnancy may not be denied because such minor chooses not to consult them. This Act bestows total autonomy upon a pregnant minor, allowing her to terminate her pregnancy without parental consent. No age limitations are imposed at all.

3 THE SOUTH AFRICAN CONSTITUTION

3.1 The ideological approach of the South African Constitution to the protection of children’s rights

The common-law concept of parental authority, with its Germanic roots, still emphasises the protection of the interests of the child (ie the “nurturance approach”) in spite of the recent emergence of an approach of self-determination and the recognition of the “maturation factor” in case law and legislation. The increased status of the child brought about by the children’s clause and the recognition of children as the bearers of other fundamental rights besides those contained in the children’s clause, is in stark contrast with

the common-law notion of parental authority.

The Constitution provides for two categories of rights for children. First, there are the general rights that are applicable to everyone, including children. Secondly, there are those rights that have been entrenched for children only in section 28, which recognises that children are especially vulnerable to violation of their rights, and that they are in need of special protection in addition to their ordinary rights.

An analysis of the rights entrenched for children in the Bill of Rights reveals that a dual approach is followed regarding the protection of children's rights. Both the "nurturance" and "self-determination" approaches can be found in the Bill of Rights.⁵¹ An example of the "nurturance approach" is found in section 28(1)(b), which provides that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment. A further example appears from section 28(1)(c), which provides that every child has the right to basic nutrition, shelter, basic health care services and social services. An example of the "self-determination approach" is found in one of the general rights applicable to everyone (including children), namely the right to freedom of religion, belief and opinion.⁵²

3.2 The influence of the South African Constitution on the parent-child relationship

As indicated above, section 28(1)(b) of the Constitution provides that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment,⁵³ whereas section 28(1)(c) affords every child the right to basic

⁵¹ See, in general, ch 8 par 6.1 above.

⁵² S 15. See, in this regard, the decision in *Kotze v Kotze* 2003 (3) SA 628 (T) discussed in an earlier chapter (ch 9 par 4.2.3 above).

⁵³ See ch 9 par 4.3.3 above.

nutrition, basic health care, shelter, basic health care services, and social services.⁵⁴

The Constitutional Court has found in *Government of the Republic of South Africa v Grootboom*⁵⁵ that section 28(1)(b) has direct horizontal application⁵⁶ in that it imposes a duty on the parent or family of a child. It passes to the state only if a child's parents or family members fail or are unable to provide care to the child.⁵⁷ Moreover, the Constitutional Court held that sections 28(1)(b) and 28(1)(c) must be read together. Section 28(1)(b) defines those responsible for giving care while section 28(1)(c) "lists various aspects of the care entitlement".⁵⁸

The Constitutional Court's interpretation of section 28(1)(b) as applying horizontally between parent and child has introduced a completely new aspect to the parent-child relationship. For the first time in South African law, it is now recognised that children can enforce fundamental rights directly against their parents. This decision formally adds the state as an active party to the parent-child relationship, resulting in a triangular relationship.⁵⁹ Sloth-Nielsen calls this relationship the "child/family/state matrix".⁶⁰

⁵⁴ See ch 9 par 4.3.4 above.

⁵⁵ 2001 1 SA 46 (CC); 2000 11 BCLR 1169 (CC).

⁵⁶ On horizontal and vertical application of the Bill of Rights, see ch 9 par 4.1 above.

⁵⁷ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); 2000 11 BCLR 1169 (CC) par [77]; *contra Jooste v Botha* 2000 2 SA 199 (T); 2000 2 BCLR 187 (T), where Van Dijkhorst J held that the child's right to family or parental care was only vertically applicable against the state in the form of a duty not to interfere with the family unit, and not directly horizontally applicable against parents or the state (195F, 196J-197A, 197). Also see ch 9 fn 168 & fn 203 above.

⁵⁸ *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) par [76]. Also see *Heystek v Heystek* 2002 2 SA 754 (T) at 757D, where the court held that "[i]nherent in the notion of parental care is concomitantly the child's right to basic nutrition, shelter and basic health care services".

⁵⁹ Bekink 2003 *THRHR* 254.

⁶⁰ Sloth-Nielsen 1995 *SAJHR* 418.

As good as affording children directly enforceable fundamental rights against their parents may be perceived to be for the cause of children's rights, the resultant child/family/state matrix is fraught with complexities. This triangular relationship is firstly complicated by the fact that children are often implicated directly or indirectly in circumstances where parents seek to enforce their own rights, which mostly (but not always) flow from their common-law parental authority over their children.

The second complication can be found in the fact that section 28(1)(b) is formulated as the constitutional right of the child, and not of the parent. Neither the children's clause nor any other provision in the Bill of Rights affords parents or children the right to family life. I agree with Sloth-Nielsen that this *lacuna* may hamper the development of a children's rights philosophy in South Africa, for instance in the interpretation of section 28(1)(b).⁶¹ The fact that the Constitution does not protect the right to family life will further undoubtedly have a negative effect on the institution of the family. In an earlier chapter, I stressed that the importance for children of growing up in a stable family environment where they can form lasting psychological bonds with family members can hardly be over-emphasised.⁶² I pointed out that, in order to enable children to develop into rational, autonomous adults who are capable of making their own decisions, children should initially be protected against their own irrational actions. It should in my view be emphasised that it is parents and other family members, in the first instance, who have the duty to assist a child to develop into a rational adult. This is another reason why it is so important for children to grow up in stable family environments. If children are not initially assisted, within stable family environments, to develop into rational adults, there would be no point in attempting to protect their rights to autonomy and self-determination.

The third complication flows from the first. As the potential for conflict between the rights and interests of the child and the interests of adult members of the family often occurs, the

⁶¹ *Ibid.*

⁶² See ch 8 par 7.2 above.

courts will inevitably have to weigh or balance these competing rights or interests. This is undoubtedly a very difficult task. However, the Constitution expressly provides that the best interests of the child is of *paramount importance* in every matter concerning the child and thus entrenches the paramountcy principle in our law.⁶³ The Constitutional Court regards section 28(2) as more than a mere general guideline. It is regarded as a separate constitutional right of the child, a legal rule with direct horizontal application.⁶⁴

As was pointed out earlier,⁶⁵ the Appellate Division (now known as the Supreme Court of Appeal) found as early as 1948⁶⁶ that the best interests of the child is the main or paramount consideration or guiding principle when granting a custody order after divorce, to which the rights of the parents (who are parties to the divorce) have to yield. What was for decades only applied as a general guideline, has now become a fundamental right of the child.

I agree with the interpretation of the paramountcy principle in *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys*,⁶⁷ where Bertelsmann J held that section 28(2) of the Constitution vests children with a fundamental right that their interests will come first in the process of balancing the constitutional rights of other persons with those of children.⁶⁸ However, the phrase “will come first” is in my view confusing as it suggests that the court will inevitably have to find in favour of the child (although I doubt whether this is what Bertelsman J meant). I find the formulation of the

⁶³ Constitution s 28.

⁶⁴ *Fraser v Naudé* 1999 1 SA 1 (CC); 1998 11 BCLR 1357 (CC); *Minister of Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 (CC); 2000 3 SA 422 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); 2002 10 BCLR 1006 (CC). Also see ch 9 par 4.1 & 4.3.2 above.

⁶⁵ See ch 10 par 2.4 above.

⁶⁶ in *Fletcher v Fletcher* 1948 1 SA 130 (A).

⁶⁷ 2003 4 SA 160 (T).

⁶⁸ 178C of the report. See further ch 9 par 4.3.2 above.

paramountcy principle in *Hay v B*⁶⁹ clearer and more acceptable:

“[The paramountcy principle] is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children.”

To summarise: Every child has the fundamental right that his or her interests will be considered as the single most important factor when balancing or weighing his or her rights or interests with the rights or interests of other persons. It is important to note that it is not the only factor. The rights of adults, for example, may also be considered, but the child has a fundamental right that his or her interests will be considered as the most important factor.

To put it differently: when children’s rights and interests are balanced against the rights of adults (eg parents), the best interests of the child will always be the most important factor that is considered. However, this does not necessarily mean that the decision will always be in favour of the child. The court can, for example, find that it is in a child’s best interests to protect his or her parent’s right to decide which school the child should attend. Moreover, it can be found that the infringement of the child’s rights (either in terms of section 28(2), or any of the other fundamental rights of the child) is justified in terms of the justification clause.⁷⁰

I am of the view that courts and academics alike sometimes interpret the paramountcy principle incorrectly. First, this fact is illustrated by the following statement of Bekink:⁷¹

⁶⁹ 2003 3 SA 492 (W) at 494J.

⁷⁰ Constitution, s 36, which provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose.

⁷¹ Bekink 2003 *THRHR* 255.

“One can therefore positively conclude that when children’s rights are balanced against their parents’ rights to religious freedom, in almost all cases the scale will be significantly tipped in the child’s favour.”

Secondly, the aforementioned fact is illustrated by the decision in *Kotze v Kotze*.⁷² In this case, Fabricius AJ in the Transvaal Provincial Division of the High Court refused to make a clause in a settlement agreement, which provided that both parties undertake to educate a minor child (three years old at the time of the action) in a certain church, part of the divorce order. The court held that the clause did not afford the child the freedom he was entitled to in terms of section 15 of the Constitution (freedom of religion, belief and opinion), and that it was not in the child’s best interests. As the child’s best interests were paramount, the court held that it was obliged to vary the agreement.⁷³

I am of the view that the court applied the paramountcy principle incorrectly in the aforementioned case. The paramountcy principle does not mean that the court always has to find in favour of the child. On the contrary, I think that in *Kotze v Kotze* the court should have found that, in view of the very young age of the child, it was in the child’s best interests that his parents should be allowed for the present to decide in which church he should be educated. After all, they have the primary responsibility to ensure that he develops into a rational, autonomous adult. Of course, had the boy in question been older (eg 13 years old), I am of the opinion that a decision like the one in *Kotze v Kotze* would have been justified.

An example of a case where the court in my view applied the paramountcy principle correctly, is *Hay v B*.⁷⁴ A paediatrician brought an urgent application for an order authorising her to administer a blood transfusion to a baby whose parents had refused to

⁷² 2003 3 SA 628 (T).

⁷³ At 632G-I.

⁷⁴ 2003 3 SA 492 (W). See further ch 4 par 2.3 above.

consent to the blood transfusion on religious grounds. The court found in the paediatrician's favour, and stated that the best interests of the child is the most important factor to be considered when balancing or weighing competing rights and interests concerning children. The court further held that a baby's right to life is inviolable. In the present case the baby's parents' religious beliefs negated the essential content of the baby's right to life and were neither reasonable nor justifiable. Their religious beliefs could therefore not override their baby's right to life. The parents' reasons for withholding consent to medical treatment should not be ignored and should be given proper consideration, but in the present case the baby's interests in receiving the blood transfusion outweighed the reasons the parents advanced in opposing the blood transfusion. The court therefore authorised the blood transfusion.

A further problem with the best interests of the child standard, is that it is vague and indeterminate.⁷⁵ The personal opinion of the presiding officer, who has the task of coming to the final conclusion regarding what is in the best interests of the child, will undoubtedly play a role in his or her decision. This opinion may to a lesser or greater extent be influenced by the presiding officer's own background and prejudices, and, importantly, by his or her view on the protection of children's rights, and the role of the state in family life. It is thus possible that very different results may flow from an application of the same standard (ie the best interests of the child).

In my opinion, many of the aforementioned difficulties with the child/state/family matrix and the application of the paramountcy principle will be solved if a provision protecting the child's right to family life is included in the envisaged new children's statute, as well as an express provision relating to the interrelationship between state, family and child. A provision similar to article 5 of the Convention, which provides that state parties "must respect the responsibilities, rights and duties of parents or where applicable the members of the extended family or community as provided for by local custom, to provide, in a

⁷⁵See, in general, Heaton 1990 *THRHR* 95 *et seq.*

manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention”, would in my view be appropriate. This provision recognises that children are part of a unit which has primary responsibility for their well-being, but at the same time emphasises that it is the child who is the bearer of the rights afforded to him or her in the Convention.⁷⁶

3.3 The influence of the South African Constitution and the children’s rights provisions in the Children’s Bill on child protection measures

As was pointed out above,⁷⁷ the Constitutional Court’s attitude in respect of section 28(1)(b) is that it primarily imposes a duty on the parent or family of a child. It passes to the state only if a child’s parents or family members fail or are unable to provide care to the child.⁷⁸

Section 28(1)(b) places both a positive and a negative duty on the state.⁷⁹ Apart from the positive duty it places on the state to provide alternative care when family or parental care is lacking, the state is also obliged “to create the necessary environment” for parents and family members to provide children with proper care. This must be done, *inter alia*, by

⁷⁶ Human 2000 *SAPR/PL* 92; Sloth-Nielsen 1995 *SAJHR* 405; Van Bueren in Davel (ed) *et al Introduction* 203. See further ch 9 par 2.5 above.

⁷⁷ See ch 9 par 4.3.3.1 above.

⁷⁸ See ch 9 par 4.3.3.1 above.

⁷⁹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); 2000 11 BCLR 1169 (CC) par [77]; *contra Jooste v Botha* 2000 2 SA 199 (T); 2000 2 BCLR 187 (T), where Van Dijkhorst J held that the child’s right to family or parental care was only vertically applicable against the state in the form of a duty not to interfere with the family unit, and not directly horizontally applicable against parents or the state (195F, 196J-197A, 197). Also see Robinson 1998 *Obiter* 337-338 and ch 9 fn 168 & 203 above.

providing “the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28”, and by affording families access to land, housing, health care, food, water and social security “on a programmatic and coordinated basis, subject to available resources”.⁸⁰

Apart from the positive duty incumbent on the state to provide alternative care when family or parental care is lacking, the section 28(1)(b) right also imposes a negative obligation on the state, namely an obligation to respect the existing family or parental care, and limits state interference with family or parental care to cases where it is justified.⁸¹ The question is: when is interference with family or parental care justified? This issue is discussed below.⁸²

It is noteworthy that the interim Constitution only entrenched the child’s right to *parental* care. The final Constitution, on the other hand, contains a much wider provision. It may be argued that section 28(1)(b) of the final Constitution (especially the part that provides that a child has the right to “appropriate alternative care when removed from the family environment”) allows (or even obligates) the state to remove children from their parental homes in certain circumstances. It has been argued that if constitutional protection of parental rights or the right to family life is too strong it becomes difficult for the state to remove children from families in which they are subjected to mistreatment or abuse. The argument is thus that the omission of a right to family life from the Bill of Rights was intentional.⁸³

From the above it could be concluded that the purpose of the omission of the right to family life from the Bill of Rights, together with the wider formulation of the child’s right to care

⁸⁰ par [77].

⁸¹ Bekink & Brand in Davel (ed) *et al Introduction* 185.

⁸² See ch 10 par 5.2 below. See further ch 8 par 7.3 & ch 10 par 2.1.2 above.

⁸³ Cockrell *Bill of Rights* par 3E12.

(parental care, family care, or appropriate alternative care) is evidence of a movement towards a more active role for the state in family life. However, I doubt whether this is the case. I agree with Bekink and Brand that the express incorporation of the phrase “family care” in addition to “parental care”, does not imply a more active role for the state in family life. All that it suggests is that a child has the right to care operating against its family, including the extended family, and not only against its parents. It further suggests that the state is under the obligation to respect the existing parental care, or care by the extended family, and to limit state interference into family or parental care to cases where it is justified.⁸⁴ A different interpretation would militate against everything that the new children’s statute (currently included in the draft Children’s Bill) stands for.

4 COMPARATIVE CONCLUSIONS

4.1 A comparison between child protection measures in Scotland and New Zealand

4.1.1 The tribunal

4.1.1.1 Introduction

Both the New Zealand and Scottish child protection systems make use of lay tribunals. In New Zealand, the family group conference is the key mechanism for achieving one of the objectives of the Children, Young Persons and Their Families Act 1989 (“the 1989 Act”), namely family participation in decisions. The family group conference is aimed at making decisions and recommendations regarding the promotion of the welfare of children and young persons.⁸⁵ However, the family court fulfills an important function alongside the

⁸⁴ Bekink & Brand in Davel (ed) *et al Introduction* 183.

⁸⁵ See ch 6 par 3.3 above.

family group conference, as will be shown below.⁸⁶

Scottish local authorities have an important overarching role in child protection measures. Apart from the overarching duty to safeguard and promote the welfare of *all* children in its area who are in need,⁸⁷ Scottish local authorities have certain duties in respect of children they are looking after. A child is looked after by a local authority when the local authority is providing the child with accommodation, when the child is subject to a supervision requirement (whether or not there is a condition of residence attached to the requirement), and when the child is the subject of an order in terms of which the local authority has responsibilities towards the child (such as a parental responsibilities order).⁸⁸

Scottish law is characterised by voluntary and compulsory child protection measures. The provisions dealing with provision of accommodation by local authorities are non-compulsory in nature. In broad terms, these provisions are designed to provide for cases in which parental care, or the care of guardians, has failed, whether permanently or temporarily, and there is no one else able and willing to look after the child.⁸⁹ Sometimes circumstances arise where it is not possible to provide support for a child on a non-compulsory basis and the only way to safeguard the child's welfare is through supervision requirements, which are compulsory.⁹⁰ In Scottish law, children in need of compulsory measures of supervision are dealt with by a lay tribunal known as the children's hearing.⁹¹

4.1.1.2 The composition of the tribunal

⁸⁶ See ch 10 par 4.1.1.4 below. Also see ch 6 par 3.3.6 above.

⁸⁷ Children (Scotland) Act 1995 ("the 1995 Act") s 93(4). Also see ch 7 par 3.1 above.

⁸⁸ 1995 Act s 17(6). See further ch 7 par 3 above.

⁸⁹ 1995 Act s 25. See ch 7 par 3.5 above.

⁹⁰ 1995 Act s 70.

⁹¹ See, in general, ch 7 par 3.6.2 above.

The composition of the lay tribunal in New Zealand is vastly different from the composition of the Scottish tribunal. A few categories of persons are entitled to be present at a family group conference in New Zealand.⁹² The first category of persons entitled to be present, is the child or young person in respect of whom the family group conference is held.⁹³ Secondly, the child's or young person's parent, guardian, or caregiver, and members of the family, *whanau*, or family group of the child or young person are entitled to attend.⁹⁴ Although the concepts "family" or "extended family" are not explicitly defined in the Act, the concept "family group" is very widely defined in the Act to include persons with whom the child has a biological or legal relationship, persons to whom the child has a significant psychological attachment, and persons that are members of the child's *whanau* or other culturally recognised family group.⁹⁵ The coordinator has the power to exclude the child and his or her parents and family members from the conference in certain circumstances, for example if the person's attendance would not be in the best interests of the child, or if it would be undesirable.⁹⁶

Certain other groups of persons (eg the care and protection coordinator who convened the family group conference, any representative of the child, the agent of the High Court if the child is under guardianship of that court, and any person whose attendance is an accordance with the wishes of the family) are entitled to be present at the family group conference.⁹⁷ However, these persons (with the exception of the agent of the High Court) are not entitled to attend if the conference is engaged in "discussions or deliberations",⁹⁸ which includes the whole process, with the exception of administrative matters which may

⁹² See, in general, ch 6 par 3.3.4 above.

⁹³ 1989 Act s 22(1)(a).

⁹⁴ 1989 Act s 22(b).

⁹⁵ 1989 Act s 2(1).

⁹⁶ 1989 Act s 22(1)(a) & (b).

⁹⁷ 1989 Act s 22(1)(c) - (i).

⁹⁸ 1989 Act s 22(2).

be in the hands of the coordinator and information and advice sessions in terms of section 23(2).⁹⁹ It appears from the aforementioned that the family group conference in New Zealand is for all intents and purposes composed only of the child's or young person's parent, guardian, or caregiver, and members of the family, *whanau*, or family group of the child or young person. The child is entitled to be present, but can be excluded by the coordinator, and the child's representative is not entitled to be present during "discussions or deliberations". I will refer to participation by the child below.

A children's hearing in Scotland consists of a chairperson and two other members, and must include both a man and a woman.¹⁰⁰ The members of a children's hearing are chosen from the members of children's panels constituted for each local authority area (comprising lay members of the public),¹⁰¹ who are appointed by the Secretary of State. The 1995 Act confers upon the child an absolute right, and imposes upon him or her a qualified duty, to attend at all stages of the hearing.¹⁰² Further, each relevant person (ie any person who has parental responsibilities or parental rights, and any person who appears to be a person who ordinarily (and other than by reason only of his or her employment) has charge of, or control over, the child)¹⁰³ has the right to attend at all stages of a children's hearing.¹⁰⁴ The Scottish children's hearing thus represents wider external representation than only family members.

4.1.1.3 When must the tribunal meet?

In New Zealand, the calling of a family group conference is mandatory in the following

⁹⁹ Atkin 1990 *VUWLR* 329. See further ch 6 par 3.3.4 above.

¹⁰⁰ 1995 Act s 39(5). Also see ch 7 par 3.6.2 above.

¹⁰¹ 1995 Act s 39(1). Also see ch 7 par 3.6.2 above.

¹⁰² 1995 Act s 45(1). See further ch 7 par 3.6.7.1.1 above.

¹⁰³ See ch 7 par 3.6.4 above.

¹⁰⁴ 1995 Act s 45(8)(a). See further ch 7 par 3.6.7.1.2 above.

situation: Where any social worker or member of the police believes, after inquiry, that a child or young person is in need of care or protection,¹⁰⁵ that social worker or member of the police must report the matter to a care and protection coordinator, who must call a family group conference.¹⁰⁶ Further, if a court sitting in respect of any matter involving a child or young person “believes” that the child or young person is in need of care or protection, and refers the matter to a coordinator, the coordinator has a discretion to call a conference and may call for a social worker to investigate the matter.¹⁰⁷

In Scotland, the so-called “reporter” (the official charged with arranging and bringing cases before the children’s hearing) is central in children’s hearings. Although the reporter has certain duties of investigation,¹⁰⁸ he or she is almost always dependent initially on information supplied by others. The 1995 Act provides that where any person has reasonable cause to believe that compulsory measures of supervision may be necessary in respect of a child, he or she may (and if a police officer he or she must) give to the reporter such information about the child as he or she has been able to discover.¹⁰⁹ Secondly, where a local authority receives information, for example from social workers, which suggests that compulsory measures of supervision may be necessary in respect of a child, it is obliged to cause inquiries to be made into the case.¹¹⁰ Thirdly, where it appears to a court in relevant proceedings that any of the conditions for referral (except that the child has committed an offence) are satisfied in respect of a child, it may refer the matter to the reporter, specifying the condition.¹¹¹

¹⁰⁵ See, in general, ch 6 par 3.4 above.

¹⁰⁶ 1989 Act s 18(1). Also see ch 6 par 3.3.1 above.

¹⁰⁷ 1989 Act s 19(b) read with s 19(3).

¹⁰⁸ See ch 7 par 3.6.6.1 above.

¹⁰⁹ 1995 Act s 53(2). See, in general, ch 7 par 3.6.3 above.

¹¹⁰ 1995 Act s 53(1).

¹¹¹ 1995 Act s 54(1).

It is only when the reporter is satisfied both that at least one of the grounds of referral exists, and that compulsory measures of supervision are necessary in respect of the child, that he or she is obliged to arrange a children's hearing.¹¹² The case is then referred to such hearing for consideration and determination.¹¹³

4.1.1.4 The functions of the tribunal

The function of the family group conference in New Zealand is to consider any matter relating to the care and protection of the child or young person as it thinks fit. If it decides that such child or young person is in need of care, it has the further function to make such decisions or recommendations or formulate such plans as are necessary or desirable, having regard to the principles of the Act.¹¹⁴

Although the family court has to make the final determination, and can change the decision of the family group conference, the importance of the family group conference cannot be overemphasised. A family group conference will have to be involved in decision-making regarding a child in need of care or protection. Little decision-making can be done without the conference first being convened and having the opportunity to find a solution.¹¹⁵ For example, an application to the court cannot normally be made unless there has been a family group conference.¹¹⁶ If an application to the court has been made, the court may under normal circumstances not grant a declaration that the child is in need of care or protection unless there has been a conference.¹¹⁷ Further, the decisions or recommendations of a family group conference will in many cases be highly influential on

¹¹² 1995 Act s 65(1). See ch 7 par 3.6.6.1 above.

¹¹³ 1995 Act s 56(6).

¹¹⁴ 1989 Act s 28(a) - (b). See further ch 6 par 3.3.3 above.

¹¹⁵ Atkin 1990 *VUWLR* 327; Robinson 1996 *Stell LR* (2) 322. See further ch 6 par 3.3.2 above.

¹¹⁶ 1989 Act s 70.

¹¹⁷ 1989 Act s 72.

the court's final determination.¹¹⁸

When the reporter in Scottish law is satisfied both that at least one of the grounds of referral exists, and that compulsory measures of supervision are necessary in respect of the child, he or she is obliged to arrange a children's hearing,¹¹⁹ which has to consider the case and determine the outcome. The hearing commences with an explanation given to the child and the relevant person(s) of the grounds stated by the reporter for the referral of the case.¹²⁰ Where the child and all the relevant persons who attend the hearing accept the grounds, the hearing proceeds to consider the case. If either the child or the relevant person or both do not accept the grounds of referral, or if the child did not understand the explanation of the grounds of referral, the hearing must (unless they decide to discharge the referral) direct the reporter to make an application to the sheriff for a finding as to whether the grounds are established.¹²¹

Where the sheriff decides that none of the grounds in respect of which the application was made has been established, he or she must dismiss the application and discharge the referral in respect of those grounds.¹²² Where the sheriff finds that any of the grounds in respect of which the application was made is (or should be deemed to be) established, he or she must remit the case to the reporter to make arrangements for a children's hearing to consider and determine the case.¹²³ The policy of the 1995 Act is to separate the body that decides what compulsory measures to take concerning the child, and the body that decides whether there are grounds on which such measures can lawfully be

¹¹⁸ Atkin 1990 *VUWLR* 330-335, 340-342; Swain *IJLF* 172. See further ch 6 par 3.3.6 above.

¹¹⁹ 1995 Act s 65(1). Also see ch 7 par 3.6.6.1 above.

¹²⁰ 1995 Act s 65(4). Also see ch 7 par 3.6.7.3 above.

¹²¹ 1995 Act s 65(7). See further ch 7 par 3.6.7.3 & 3.6.8 above.

¹²² 1995 Act s 68(9).

¹²³ 1995 Act s 69(1). See further ch 7 par 3.6.8 above.

taken.¹²⁴

4.1.2 *The child in need of care and protection versus the child in need of compulsory measures of supervision*

The basis for action under the Children, Young Persons, and Their Families Act in New Zealand is that a child is in need of care or protection. The Act sets out the meaning of this phrase in section 14. The Act is intended to focus primarily on abuse and neglect, but there are other grounds for deciding that a child is in need of care or protection, ranging from parental incompetence and conflict to uncontrollable behaviour. Neglect must be “serious”. In contrast, where there has been abuse, it is not necessary to show that the abuse was serious. It is enough to show that the abuse exists or is likely.¹²⁵

The children’s hearing system in Scotland hinges on the question whether compulsory measures of supervision may be necessary in respect of a child. The question whether a child is in need of compulsory measures of supervision arises only if certain conditions specified in the Act are satisfied.¹²⁶ The 1995 Act contains an extensive list of child-centred, non-punitive grounds of referral, some very specific in nature (eg the fact that the child has failed to attend school regularly without reasonable excuse,¹²⁷ or the fact that the child has misused a volatile substance by deliberately inhaling its vapour, other than for medical purposes¹²⁸ (eg “glue sniffing”)).

¹²⁴ *Sloan v B* 1991 SLT 530 548D-E. See further ch 7 par 3.6.8.1 above.

¹²⁵ Atkin 1990 *VUWLR* 336. See further ch 6 par 3.4 above.

¹²⁶ 1995 Act s 52(1) read with s 52(2). S 52(1) provides that the question of whether compulsory measures of supervision are necessary in respect of a child arises if at least one of the conditions mentioned in s 52(2) is satisfied. See, in general, ch 7 par 3.6.5 above.

¹²⁷ S 52(2)(h). See ch 7 par 3.6.5.8 above.

¹²⁸ S 52(2)(k). See ch 7 par 3.6.5.11 above.

4.1.3 *The powers of the tribunal after making a declaration*

If the family group conference in New Zealand decides that a child or young person is in need of care, it must make such decisions or recommendations or formulate such plans as are necessary or desirable, having regard to the principles of the Act.¹²⁹

Much of the conference's work hinges on the initial question of whether the child is "in need of care or protection". The family court, however, can only declare a child to be in need of care or protection if it is satisfied that there are no other practicable and appropriate means of dealing with the child. The court is thus obliged to consider options other than declaring that the child is in need of care or protection, even if the need of the child for care and protection is obvious.¹³⁰

After making a declaration that the child is in need of care or protection, the family court in New Zealand may do a number of things.¹³¹ It may, for example, discharge the child or parent from the proceedings without making an order, order that the child and/or parent receive counselling, or make a restraining order under section 87 of the Act. The powers of the family court are wide and varied, and removing the child from the parental home is only one of a number of options.

The policy of the Scottish Act is that the hearing should explore what is in the interests of the child free from any narrow constraints.¹³² Having considered the case (taking into

¹²⁹ S 28(b).

¹³⁰ Atkin 1990 *VUWLR* 340. See further ch 6 par 3.5 above.

¹³¹ 1989 Act s 83. See further ch 6 par 3.6 above.

¹³² See ch 7 par 3.6.9.1 above.

account the section 16 principles¹³³), the children's hearing can discharge the referral, continue the case to a subsequent hearing, or make a supervision requirement.¹³⁴ The last-mentioned option is available where the hearing finds that the child is in need of compulsory measures of supervision. The supervision requirement may require the child to reside at any place specified in the requirement, and to comply with any condition contained in the requirement.¹³⁵ This system is less flexible than the New Zealand system.

4.1.4 *The approach to the state's role in family life*

The child protection system in New Zealand places considerable emphasis on the importance of the family. In the 1989 Act, emphasis is placed on assisting the family to make decisions.¹³⁶ A policy of minimum state intervention "far towards the private end of the continuum"¹³⁷ is followed.¹³⁸ In an earlier chapter, I highlighted the specific points on which this conclusion is based.¹³⁹

The Scottish Act contains an extensive list of child-centred grounds of referral, some very specific in nature (eg the fact that the child has failed to attend school regularly without

¹³³ ie the paramountcy of the welfare of the child, the wishes of the child, and the principle that the hearing must make no requirement or order unless they consider that it would be better for the child that the requirement or order be made than that none should be made at all. See ch 7 par 3.6.9.2 above.

¹³⁴ 1995 Act ss 69(12), 69(3) & 70(1) respectively. See further ch 7 par 3.6.9.4 above.

¹³⁵ 1995 Act s 70(3). See further ch 7 par 3.6.9.4 above.

¹³⁶ Robinson 1996 *Stell LR* (2) 314; Robinson 2000 *Obiter* 131; Tapp 1990 *NZRLR* 83. Also see ch 6 par 3.1 above.

¹³⁷ Tapp 1989 *NZRLR* 144. Also see Atkin 1990-91 *JFL* 392-393; Haupt & Robinson 2001 *THRHR* 24 fn 6. See further ch 6 par 3.2.3.4 above.

¹³⁸ For a discussion of the dangers inherent in a policy of minimum state intervention, see ch 8 par 4 below.

¹³⁹ See ch 6 par 4 above.

reasonable excuse).¹⁴⁰ Added to this is the fact that the Act confers relatively narrow powers on the court to deal with children who are subject to supervision requirements, with few mechanisms to facilitate return of children to their parental homes.¹⁴¹ The Scottish child protection system can thus be construed as a system allowing a more active role for state in family life, a system which does not value family privacy and family integrity as primary consideration.

4.1.5 Participation and representation of the child

The 1989 Act in New Zealand provides that consideration should be given to the child's or young person's wishes as far as those wishes can reasonably be ascertained, and that those wishes should only be given such weight as appropriate in the circumstances, having regard to the age, maturity and culture of the child or young person.¹⁴² However, the duty to encourage participation is restricted to proceedings before the family court. There is no duty on the family group conference to encourage the child to participate.¹⁴³ There is thus only diluted protection of the child's right to participate.

A further important protection for the child in New Zealand is the appointment of legal representation for the child.¹⁴⁴ Appointment is mandatory when the child is the subject of proceedings,¹⁴⁵ but will often not have been made when a family group conference meets in an attempt to resolve the case. This is an unfortunate omission.¹⁴⁶

¹⁴⁰ 1995 Act s 52(1) read with s 52(2). See further ch 7 par 3.6.5 above.

¹⁴¹ See ch 7 par 3.6.9.4 above.

¹⁴² 1989 Act s 5(d). Also see ch 6 par 3.2.3.2 above.

¹⁴³ Atkin 1990 *VUWLR* 325. See further ch 6 par 3.2.4 above.

¹⁴⁴ 1989 Act ss 159-162. See further ch 6 par 3.2.4 above.

¹⁴⁵ 1989 Act s 159(1).

¹⁴⁶ See ch 6 par 3.2.4 above.

In an earlier chapter I referred to the biggest strength of the Scottish child protection system, namely the high level of participation and/or representation given to children.¹⁴⁷ Emphasis is placed throughout on the views of the child.¹⁴⁸ A safeguarder can be appointed in certain proceedings by the children's hearing or sheriff court. In addition to the safeguarder, any child whose case comes before a children's hearing, and any relevant person who attends a children's hearing, may each be accompanied by one person for the purpose of assisting the child or relevant person in the discussion of the case.¹⁴⁹ Lastly, the 1995 Act provides that children under 16 can instruct solicitors in civil matters as long as they have a general understanding of what it means to do so.¹⁵⁰

4.2 A comparison between child protection measures in South Africa and New Zealand

4.2.1 The tribunal

The first difference between child protection measures in South Africa and New Zealand, can be found in the tribunal making the decisions. In New Zealand, decisions are made by a non-adversarial lay tribunal called the family group conference, and thereafter confirmed by the family court.¹⁵¹

In South Africa, on the other hand, the children's court makes decisions relating to child protection.¹⁵² The children's court is an adversarial tribunal presided over by a magistrate

¹⁴⁷ See, in general, ch 7 par 5.2 above.

¹⁴⁸ See ch 7 par 3.2, 3.6.9.1, 3.6.9.2 & 3.7.2 above.

¹⁴⁹ See ch 7 par 4.3.2 above.

¹⁵⁰ See ch 7 par 4.3.3 above.

¹⁵¹ See ch 6 par 3.3 above.

¹⁵² See ch 5 par 2 above.

acting in the *ex officio* capacity of commissioner of child welfare.¹⁵³

In terms of the draft Children's Bills proposed by the South African Law Commission and the Department of Social Development, the children's court has the discretion to order a lay forum hearing in an attempt to settle the matter. The lay forum may include mediation by a family advocate, social service professional or other professionally qualified person, a family group conference contemplated in the Bill, or mediation by a traditional authority.¹⁵⁴ The children's court further has the discretion, if a matter brought to or referred to a children's court (excluding matters involving alleged abuse or sexual abuse of a child) 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. The child involved in the matter may attend and may participate in the conference unless the children's court decides otherwise.¹⁵⁵ Lastly, the children's court has the discretion, 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.¹⁵⁶

Whereas family participation in decisions affecting children is one of the key objectives of the 1989 Act in New Zealand,¹⁵⁷ it plays no role whatsoever in the current South African

¹⁵³ Child Care Act s 6(1). See further ch 5 par 1.4 above.

¹⁵⁴ Draft Children's Bill clause 66; Social Development's draft Children's Bill clause 49. See further ch 5 par 1.5.2 above.

¹⁵⁵ Draft Children's Bill clause 96; Social Development's draft Children's Bill clause 69.

¹⁵⁶ Draft Children's Bill clause 97; Social Development's draft Children's Bill clause 70.

¹⁵⁷ See ch 6 par 3.2.3.2 above.

children's hearing system. However, should the proposed draft Children's Bill be accepted, the children's court will have the *discretion* to include the family of the child, whether it be as part of the lay forum hearing, the pre-hearing conference, or the family group conference. The non-compulsory nature of these envisaged hearings and conferences should be emphasised.

4.2.2 *When must the tribunal meet?*

In New Zealand, the calling of a family group conference is mandatory in the following situation: Where any social worker or member of the police believes, after inquiry, that a child or young person is in need of care or protection,¹⁵⁸ that social worker or member of the police must report the matter to a care and protection coordinator, who must call a family group conference.¹⁵⁹ Further, if a court sitting in respect of any matter involving a child or young person "believes" that the child or young person is in need of care or protection, and refers the matter to a coordinator, the coordinator has a discretion to call a conference and may call for a social worker to investigate the matter.¹⁶⁰

If it appears to any court in South Africa 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 of safety and that the child be brought before a children's court as soon as possible thereafter.¹⁶¹ Further, 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

¹⁵⁸ See, in general, ch 6 par 3.4 above.

¹⁵⁹ 1989 Act s 18(1). Also see ch 6 par 3.3.1 above.

¹⁶⁰ 1989 Act s 19(b) read with s 19(3).

¹⁶¹ Child Care Act s 11(1). Also see ch 5 par 2.2.2 above.

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.¹⁶² Lastly, 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)¹⁶³ and that the delay in obtaining a warrant will be prejudicial to the safety and welfare of the child.¹⁶⁴ 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.

4.2.3 *The child in need of care*

In New Zealand, the criteria for finding a child to be in need of care or protection, focus primarily on abuse and neglect, but there are other grounds for deciding that a child is in need of care or protection, ranging from parental incompetence and conflict to uncontrollable behaviour. Neglect must be "serious". In contrast, where there has been abuse, it is not necessary to show that the abuse was serious. It is enough to show that the abuse exists or is likely.¹⁶⁵

In South Africa, on the other hand, both the current Child Care Act, and the proposed draft Children's Bill contain child-centred and non-punitive criteria for finding a child to be in need of care.¹⁶⁶ None of the abovementioned provisions require that neglect must be serious. It is enough to show that the child is in a state of physical or mental neglect.

4.2.4 *The powers of the tribunal after making a declaration*

¹⁶² Child Care Act s 11(2). Also see ch 5 par 2.2.3 above.

¹⁶³ See ch 5 par 2.4.2.1 above.

¹⁶⁴ Child Care Act s 12(1).

¹⁶⁵ Atkin 1990 *VUWLR* 336. Also see ch 6 par 3.4 above.

¹⁶⁶ See ch 5 par 2.4.2 above.

Another difference between child protection measures in New Zealand and South Africa can be found in the possible orders that the court can make after finding a child to be in need of care. The range of orders that the children's court can currently make in South Africa is very limited. The court can send the child back to the care of his or her parents, place the child in foster care, or send the child to a children's home or school of industries.¹⁶⁷ However, the draft Children's Bill 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.¹⁶⁸ This is 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 considered 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.¹⁶⁹

In New Zealand, the family court is obliged to consider options other than declaring that the child is in need of care or protection, even if the need of the child for care and protection is obvious.¹⁷⁰ After making a declaration that the child is in need of care or protection, the family court can do a number of things, for example, discharge the child or parent from the proceedings without making an order, order that the child and/or parent receive counselling, or make a restraining order under section 87 of the Act. The powers of the family court are wide and varied, and removing the child from the parental home is only one of a number of options.¹⁷¹ The powers of the family court in New Zealand are wider than those of the current South African children's court, but not as extensive as the ones contained in the draft Children's Bill.

¹⁶⁷ Child Care Act s 15(1). See further ch 5 par 2.6.1 above.

¹⁶⁸ See ch 5 par 2.6.2 above.

¹⁶⁹ Draft Children's Bill clause 10; Social Development's draft Children's Bill clause 6. See further ch 5 par 2.6.2 above.

¹⁷⁰ Atkin 1990 *VUWLR* 340. See further ch 6 par 3.5 above.

¹⁷¹ 1989 Act s 83. See further ch 6 par 3.6 above.

4.2.5 *The approach to the state's role in family life*

New Zealand and South Africa also have different approaches to the state's role in family life. In terms of the current children's court system in South Africa, the state plays a relatively active role in family life. The child-centred and non-punitive criteria for finding a child to be in need of care make interference with parental authority relatively easy.¹⁷² The narrow range of orders that the children's court can make after finding a child to be in need of care also results in removal often being the only appropriate order - there is simply not enough options to facilitate the return of the child to the parental home.¹⁷³

The draft Children's Bill, on the other hand, follows a policy leaning towards minimum state intervention. This fact appears from the following:

- One of the general principles of the draft Children's Bill is 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.¹⁷⁴
- The draft Children's Bill 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, many of which facilitate the return of the child to the care of his or her parents, care-givers or family members.¹⁷⁵

¹⁷² Child Care Act s 14. See further ch 5 par 2.4.2.1 above.

¹⁷³ Child Care Act s 15(1). See further ch 5 par 2.6.1 above.

¹⁷⁴ Draft Children's Bill clause 10; Social Development's draft Children's Bill clause 6. See further ch 5 par 2.2.3 above.

¹⁷⁵ See ch 5 par 2.6.2 above.

- It is expressly provided in the draft Children's Bill 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.¹⁷⁶
- One of the most prominent features of the draft Children's Bill 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 order that early intervention services be provided in respect of the child, and the family or parent or care-giver of the child, and that the child's family and the child participate in a recognised family preservation programme.¹⁷⁷
- 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.¹⁷⁸

New Zealand similarly places considerable emphasis on the importance of the family. In the 1989 Act, emphasis is placed on assisting the family to make decisions.¹⁷⁹ A policy

¹⁷⁶ Draft Children's Bill clause 177; Social Development's draft Children's Bill clause 158. See further ch 5 par 2.6.2 above.

¹⁷⁷ Draft Children's Bill clause 164, Social Development's draft Children's Bill clause 148. See further ch 5 par 2.2.3 above.

¹⁷⁸ Draft Children's Bill clause 176, Social Development's draft Children's Bill clause 157. See further ch 5 par 2.6.2 above.

¹⁷⁹ Robinson 1996 *Stell LR* (2) 314; Robinson 2000 *Obiter* 131; Tapp 1990 *NZRLR* 83. Also see ch 6 par 3.1 above.

of minimum state intervention “far towards the private end of the continuum” (ie the public/private dichotomy)¹⁸⁰ is followed.¹⁸¹ New Zealand follows a much more radical approach of minimum intervention than the one envisaged in the draft Children’s Bill.

4.2.6 *Child participation and representation*

Earlier¹⁸² I referred to the diluted protection of the child’s right to participate in New Zealand law. The 1989 Act in New Zealand provides that consideration should be given to the child’s or young person’s wishes as far as those wishes can reasonably be ascertained, and that those wishes should only be given such weight as appropriate in the circumstances, having regard to the age, maturity and culture of the child or young person.¹⁸³ However, the duty to encourage participation is restricted to proceedings before the family court. There is no duty on the family group conference to encourage the child to participate.¹⁸⁴

Appointment of legal representation for children in New Zealand is mandatory when the child is the subject of proceedings,¹⁸⁵ but will often not have been made when a family group conference meets in an attempt to resolve the case.

Although legal representation for children in children’s court proceedings is not expressly forbidden in the existing Child Care Act in South Africa, there is at present no mechanism

¹⁸⁰ Tapp 1989 *NZRLR* 144. Also see Atkin 1990-91 *JFL* 392-393; Haupt & Robinson 2001 *THRHR* 24 fn 6. See further ch 6 par 3.2.3.4 above.

¹⁸¹ For a discussion of the dangers inherent in a policy of minimum state intervention, see ch 8 par 4 below.

¹⁸² See ch 10 par 4.1.5 above.

¹⁸³ 1989 Act s 5(d). Also see ch 6 par 3.2.3.2 above.

¹⁸⁴ Atkin 1990 *VUWLR* 325.

¹⁸⁵ 1989 Act s 159(1). See further ch 6 par 3.2.4 above.

in the Act for awarding legal representation to children.¹⁸⁶ A clause regulating legal representation for children has been included in the Law Commission's draft Children's Bill.¹⁸⁷ It provides that 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, the court may order that legal representation be provided for the child at the expense of the state. However, the court must automatically provide legal representation for a child involved in a matter before a children's court in certain specified circumstances.¹⁸⁸ 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.¹⁸⁹

4.3 A comparison between child protection measures in South Africa and Scotland

4.3.1 *The tribunal*

The first difference between child protection measures in Scotland and South Africa can be found in the tribunal charged with making decisions. Scottish law is characterised by

¹⁸⁶ See ch 5 par 2.9.1 above.

¹⁸⁷ Clause 78. See further ch 5 par 2.9.4 above.

¹⁸⁸ *Ibid.*

¹⁸⁹ Clause 55.

voluntary and compulsory child protection measures. The provisions dealing with provision of accommodation by local authorities are non-compulsory in nature. Sometimes circumstances arise where it is not possible to provide support for a child on a non-compulsory basis and the only way to safeguard the child's welfare is through supervision requirements, which are compulsory.¹⁹⁰ In Scottish law, children in need of compulsory measures of supervision are dealt with by a lay tribunal known as the children's hearing,¹⁹¹ which consists of a chairperson and two other members, and must include both a man and a woman.¹⁹² The members of a children's hearing are chosen from the members of children's panels constituted for each local authority area,¹⁹³ who are appointed by the Secretary of State.

In South Africa, on the other hand, the children's court makes decisions relating to child protection.¹⁹⁴ The children's court is an adversarial tribunal presided over by a magistrate acting in the *ex officio* capacity of commissioner of child welfare.¹⁹⁵ Earlier¹⁹⁶ I referred to the lay forum hearing,¹⁹⁷ pre-hearing conference,¹⁹⁸ and family group conference¹⁹⁹ that can, in terms of the proposed draft Children's Bill, be ordered by the children's court in matters brought before it. However, the non-compulsory nature of these hearings and conferences should be emphasised.

¹⁹⁰ 1995 Act s 70.

¹⁹¹ See, in general, ch 7 par 3.6.2 above.

¹⁹² 1995 Act s 39(5). Also see ch 7 par 3.6.2 above.

¹⁹³ 1995 Act s 39(1). Also see ch 7 par 3.6.2 above.

¹⁹⁴ See, in general, ch 5 par 2 above.

¹⁹⁵ Child Care Act s 6(1). See further ch 5 par 1.4 above.

¹⁹⁶ See ch 10 par 4.2 1 above.

¹⁹⁷ Draft Children's Bill clause 66; Social Development's draft Children's Bill clause 49. See further ch 5 par 1.5.2 above.

¹⁹⁸ Draft Children's Bill clause 96; Social Development's draft Children's Bill clause 69.

¹⁹⁹ Draft Children's Bill clause 97; Social Development's draft Children's Bill clause 70.

A further noteworthy difference between Scottish and South African child protection measures, is the fact that the policy of the 1995 Act in Scotland is to separate the body that decides what compulsory measures to take concerning the child, and the body that decides whether there are grounds on which such measures can lawfully be taken.²⁰⁰ Thus, if either the child or the relevant person or both do not accept the grounds of referral, or if the child did not understand the explanation of the grounds of referral, the hearing must direct the reporter to apply to the sheriff for a finding of whether or not the grounds of referral are established.²⁰¹ In South Africa, the body that decides whether a child is in need of care, and the body that decides what measures to take, is the same, namely the children's court.

4.3.2 *When must the tribunal meet?*

When the reporter in Scottish law is satisfied both that at least one of the grounds of referral exists, and that compulsory measures of supervision are necessary in respect of the child, he or she is obliged to arrange a children's hearing,²⁰² which has to consider the case and determine the outcome.

I have already indicated above²⁰³ how children in South Africa come to be before the children's court, which must hold an inquiry to determine whether the child is a child in need of care.

4.3.3 *The child in need of compulsory measures of supervision versus the child in need of care*

²⁰⁰ *Sloan v B* 1991 SLT 530 at 548D-E.

²⁰¹ S 65(7) and (9).

²⁰² 1995 Act s 65(1). See ch 7 par 3.6.6.1 above.

²⁰³ See ch 10 par 4.2.2 above.

The children's hearing system in Scotland hinges on the question whether compulsory measures of supervision may be necessary in respect of a child. When the reporter is satisfied both that at least one of the grounds of referral exists, and that compulsory measures of supervision are necessary in respect of the child, that he or she is obliged to arrange a children's hearing,²⁰⁴ which has to consider the case and determine the outcome. The question whether a child is in need of compulsory measures of supervision arises only if certain conditions specified in the Act are satisfied.²⁰⁵ The 1995 Act contains an extensive list of child-centred, non-punitive grounds of referral, some very specific in nature (eg the fact that the child has failed to attend school regularly without reasonable excuse).²⁰⁶

In South Africa, on the other hand, both the current Child Care Act, and the proposed draft Children's Bill, contain child-centred and non-punitive criteria for finding a child to be in need of care.²⁰⁷ None of the abovementioned provisions require that neglect must be serious. It is enough to show that the child is in a state of physical or mental neglect.

4.3.4 *The powers of the tribunal after making a declaration*

The policy of the Scottish Act is that the hearing should explore what is in the interests of the child free from any narrow constraints.²⁰⁸ Having considered the case (taking into account the s 16 principles²⁰⁹), the children's hearing can discharge the referral, continue

²⁰⁴ 1995 Act s 65(1). See ch 7 par 3.6.6.1 above.

²⁰⁵ 1995 Act s 52(1) read with s 52(2). S 52(1) provides that the question of whether compulsory measures of supervision are necessary in respect of a child arises if at least one of the conditions mentioned in s 52(2) is satisfied. See, in general, ch 7 par 3.6.5 above.

²⁰⁶ S 52(2)(h). See ch 7 par 3.6.5.8 above.

²⁰⁷ See ch 5 par 2.4.2 above.

²⁰⁸ See ch 7 par 3.6.9.1 above.

²⁰⁹ See ch 7 par 3.6.9.2 above.

the case to a subsequent hearing, or make a supervision requirement.²¹⁰ The last-mentioned option is available where the hearing finds that the child is in need of compulsory measures of supervision. The supervision requirement may require the child to reside at any place specified in the requirement, and to comply with any condition contained in the requirement.²¹¹

The range of orders that the children's court can currently make in South Africa is very limited. The court can send the child back to the care of his or her parents, place the child in foster care, or send the child to a children's home or school of industries.²¹² However, the draft Children's Bill 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 This is 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.²¹⁴

4.3.5 *The approach to the state's role in family life*

The Scottish Act contains an extensive list of child-centred grounds of referral, some very specific in nature (eg the fact that the child has failed to attend school regularly without reasonable excuse).²¹⁵ Added to this is the fact that the 1995 Act confers relatively narrow

²¹⁰ 1995 Act ss 69(12), 69(3) & 70(1) respectively. See further ch 7 par 3.6.9.4 above.

²¹¹ 1995 Act s 70(3). See further ch 7 par 3.6.9.4 above.

²¹² Child Care Act s 15(1). See further ch 5 par 2.6.1 above.

²¹³ See ch 5 par 2.6.2 above.

²¹⁴ Draft Children's Bill clause 10; Social Development's draft Children's Bill clause 6. See further ch 5 par 2.6.2 above.

²¹⁵ 1995 Act s 52(1) read with s 52(2). See further ch 7 par 3.6.5 above.

powers on the court to deal with children who are subject to supervision requirements, with few mechanisms to facilitate return of children to their parental homes.²¹⁶ The Scottish child protection system can thus be construed as a system allowing a more active role for state in family life, a system which does not really value family privacy and family integrity.

Earlier²¹⁷ I referred extensively to the fact that, in terms of the current children's court system in South Africa, the state plays a relatively active role in family life, whereas the draft Children's Bill, on the other hand, follows a policy of minimum state intervention.

4.3.6 *Child participation and representation*

Earlier²¹⁸ I referred to the biggest strength of the Scottish child protection system, namely the high level of participation and/or representation given to children.²¹⁹ Emphasis is placed throughout on the views of the child.²²⁰ A safeguarder can be appointed in certain proceedings by the children's hearing or sheriff court. In addition to the safeguarder, any child whose case comes before a children's hearing, and any relevant person who attends a children's hearing, may each be accompanied by one person for the purpose of assisting the child or relevant person in the discussion of the case.²²¹ Lastly, the 1995 Act provides that children under 16 can instruct solicitors in civil matters as long as they have a general understanding of what it means to do so.²²²

²¹⁶ See ch 7 par 3.6.9.4 above.

²¹⁷ See ch 10 par 4.2.5 above.

²¹⁸ See ch 10 par 4.1.5 above.

²¹⁹ See, in general, ch 7 par 5.2 above.

²²⁰ See ch 7 par 3.2, 3.6.9.1, 3.6.9.2 & 3.7.2 above.

²²¹ See ch 7 par 4.3.2 above.

²²² See ch 7 par 4.3.3 above.

Earlier²²³ I indicated that although legal representation for children in children's court proceedings is not expressly forbidden in the existing Child Care Act in South Africa, there is at present no mechanism in the Act for awarding legal representation to children.²²⁴ The draft Children's Bill provides that 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, the court may order that legal representation be provided for the child at the expense of the state. The draft Children's Bill proposed by the Department of Social Development omits the clause contained in the Law Commission's draft Bill listing the circumstances in which the appointment of legal representation for children is mandatory.²²⁵

4.4 Conclusions

Maori customary law was integrated into the New Zealand positive law in a revolutionary way. Family participation in decision-making in the child care setting is emphasised, and the well-being of the child is tied in with the well-being of the family. Little recognition is given to Western nuclear families. New Zealand follows an approach of minimum state intervention into family life. There is only diluted protection of the child's right to participate.

The Scottish child protection system is based on a non-adversarial lay tribunal. However, little emphasis is placed on family participation. Scottish law allows a more active role for the state in family life. A strong point of the Scottish system is the high value placed on child participation.

²²³ See ch 10 par 4.2.6 above.

²²⁴ See ch 5 par 2.9.1 above.

²²⁵ Clause 55.

South African law follows a fairly balanced approach to the state's role in family life. However, an adversarial tribunal makes decisions relating to children in need of care. No input from family members or professional staff is provided for. The child's right to legal representation is only given limited recognition.

5 PROPOSALS FOR LAW REFORM

5.1 General

Having analysed the current and proposed South African law, international trends and comparative systems, the main shortcomings of the South African system (including proposed legislative changes), are the fact that decisions regarding children in need of care are made by an adversary tribunal with no family or professional input, and the fact that no provision is made for legal representation for children or child participation in children's hearings. To my mind, these shortcomings would best be addressed by the following measures.

In view of the fact that section 28 of the Constitution (the children's clause) is basically a synopsis of the rights entrenched in the United Nations Convention on the Rights of the Child 1989,²²⁶ I am of the opinion that the envisaged new children's statute (currently embodied in the draft Children's Bill) should specifically entrench some of the rights contained in the Convention which have not been included in the children's clause.

I propose that the following provision should be expressly included in the provision dealing with children's rights in the Children's Bill: a provision prohibiting direct and indirect unfair discrimination against a child on the ground of the race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth of the child or the child's parent, guardian,

²²⁶

See ch 9 par 6 above.

caregiver or family member is prohibited. The provision should further prohibit direct or indirect unfair discrimination against a child on the ground of his or her family status, health status, socio-economic status, HIV status or nationality, or that of his or her parent, guardian, caregiver or family member. This provision is similar to the Convention's carefully drafted non-discrimination clause, which bans discrimination not only on the ground of characteristics pertaining to the child, but also discrimination against children on the ground of the parents' traits.²²⁷ It was included in the Law Commission's draft Children's Bill,²²⁸ but omitted from Social Development's Bill.

In view of the difficulties with the child/state/family matrix and the application of the paramountcy principle I alluded to earlier,²²⁹ I propose that a provision protecting the child's right to family life should be included in the Children's Bill. In addition to this, I propose an express provision relating to the interrelationship between state, family and child. A provision similar to article 5 of the Convention, which provides that state parties "must respect the responsibilities, rights and duties of parents or where applicable the members of the extended family or community as provided for by local custom, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention", will in my view be appropriate. This provision recognises that children are part of a unit which has primary responsibility for their well-being, but at the same time emphasises that it is the child who is the bearer of the rights afforded to him or her in the Convention.²³⁰

5.2 Child protection measures

²²⁷ A 2. See ch 9 par 2.3 above.

²²⁸ Clause 13(1). See further ch 9 par 5 above.

²²⁹ See ch 10 par 3.2 above.

²³⁰ Human 2000 *SAPR/PL* 92; Sloth-Nielsen 1995 *SAJHR* 405; Van Bueren in Davel (ed) *et al Introduction* 203. See further ch 9 par 2.5 above.

I favour the idea of family participation in decisions relating to child protection, as well as the non-adversarial nature of lay tribunals. However, I am of the view that the family group conference used in New Zealand is not the appropriate way to achieve this. I referred to the reasons for this view in an earlier chapter.²³¹ Briefly, the family group conference lacks objectivity and professional expertise.

The Scottish children's hearing system²³² is in my view not appropriate either. The Scottish provisions do not, in principle or in practice, empower the child's family in decision-making about the child's future. The important role of the family and extended family is not acknowledged, and the children's hearing system lacks professional expertise.²³³

In my view an appropriate lay tribunal to deal with decisions relating to child protection is one similar to the case conference process contained in the 1986 Bill in New Zealand²³⁴ which sought to legislate the already established and effective procedure for managing cases of alleged child abuse.²³⁵ It embodied a multidisciplinary approach which brought together three different groups: the relevant family members, front-line staff, and those with specific expertise in the child abuse field who were members of the local Child Protection Team.

This mixture of family and professional staff, with its own internal set of checks and balances, provided a sound mechanism for addressing two key issues: First of all, has child abuse occurred? Secondly, if so, what steps need to be taken to protect the child and

²³¹ See ch 6 par 4 above.

²³² See ch 7 par 3.6 above.

²³³ Swain 1995 *IJLF* 185.

²³⁴ This system is followed in Aotearoa, New Zealand (Swain 1995 *IJLF* 184-185).

²³⁵ Tapp *et al* in Henaghan & Atkin (eds) *Policy* 181. Also see Atkin 1990-91 *JFL* 392-393. See further ch 6 par 3.8.3 above.

assist the family?²³⁶ The deficiencies of one group were overcome by the particular contributions made by the others. It was a dynamic process. Its success depended on some continuity of membership from one conference to another, and on the interaction between the different groups over the whole of the decision-making process.

The following quotation by Swain emphasises why the case conference system is such a powerful system:²³⁷

“[The case conference system] is thus unique in its emphasis on consensual decision-making and the empowering of families (broadly defined) to take responsibility (with safeguards) for decision-making, care and oversight of children in need of care and protection ...”

I am of the opinion that the Children’s Bill should be amended to make provision for a lay tribunal similar to the case conference process. I am of the view that it can be used with success, not only in cases of alleged child abuse, but in all cases of children who are thought to be in need of care. It should in my opinion be called a lay forum hearing, and it should investigate the case and determine the possible outcome. The lay forum should include mediation by a family advocate, social service professional²³⁸ or other professionally qualified person. Both the child and the parent(s) should participate in the hearing. This lay forum is similar to the one currently embodied in the draft Children’s Bill.²³⁹ However, the provision should be amended to provide that a children’s court *must*, before it decides a matter, order a lay forum hearing for an attempt to settle the matter. As in New Zealand, the children’s court should make the final determination. The court should thus act as a safeguard against the dangers of incorrect decisions by the lay forum

²³⁶ Tapp *et al* in Henaghan & Atkin (eds) *Policy* 182.

²³⁷ Swain 1995 *IJLF* 185.

²³⁸ as defined in Social Development’s draft Children’s Bill, namely including probation officers, development workers, child and youth care workers, youth workers and social security workers (clause 1).

²³⁹ Law Commission’s draft Children’s Bill clause 66; Social Development’s draft Children’s Bill clause 49. See further ch 5 par 1.5.2 above.

hearing.

I am aware of the financial implications of the aforementioned proposal. Perhaps the proposed solution given by Zaal and Matthias is worth considering.²⁴⁰ They propose (with reference to family group conferences) that “[g]iven the lack of resources in South Africa as compared with New Zealand, we should perhaps legislate for family group conferences to be set up only where there appear to be resources within the extended family that could be mobilized in order to keep the child within the family”.

I am of the opinion that the guidelines contained in the draft Children's Bill for finding a child to be in need of care and protection are well-balanced and should be retained. As I indicated earlier,²⁴¹ the draft Children's Bill follows a policy leaning towards minimum state intervention, although it is not as radical as the policy followed in, for example, New Zealand.²⁴² I favour the underlying policy of the draft Children's Bill, as it recognises the importance for children of growing up in a stable family environment. Further, the fact that the draft Children's Bill expressly provides that a children's court that finds a child to be in need of care and protection may make any order *which is in the best interests of the child*, coupled with the fact that the Bill contains a list of twelve factors to assist the court in deciding whether a decision is in the best interests of the child. These factors should go a long way in rectifying on of the major objections against the best interests of the child standard, namely its indeterminacy.²⁴³ Further, one of the general principles contained in the draft Children's Bill states that all proceedings, actions or decisions in a matter concerning a child must “respect, protect, promote and fulfil the child's rights set out in the

²⁴⁰ Zaal & Matthias in Davel (ed) et al *Introduction* 130.

²⁴¹ See ch 10 par 4.2.5 above.

²⁴² See ch 10 par 4.2.5 above.

²⁴³ Heaton 1990 *THRHR* 95 *et seq.*

Bill of Rights and ... Chapter 3 of this Act ...".²⁴⁴ The aforementioned two provisions will in my view ensure that the envisaged new child protection system will always serve the child's best interests.

As far as legal representation for children is concerned, I propose that the Children's Bill should provide as follows: 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, the court may order that legal representation be provided for the child at the expense of the state. However, the court must automatically provide legal representation for a child involved in a matter before a children's court in certain specified circumstances. This provision is similar to the one contained in the Law Commission's draft Children's Bill²⁴⁵ (which was omitted from Social Development's draft Children's Bill).

As far as participation of children is concerned, I propose that the provision in the draft Children's Bill²⁴⁶ providing that a presiding officer in a matter before a children's court must 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, should expressly be made applicable to the lay forum hearing referred to above. However, I am of the view that the provision should expressly state that the presiding officer should have regard of the child's views.

²⁴⁴ Law Commission's draft Children's Bill clause 9(3); Social Development's draft Children's Bill clause 5(3).

²⁴⁵ Clause 78. See ch 5 par 2.9.4 above.

²⁴⁶ Law Commission's draft Children's Bill clause 84; Social Development's draft Children's Bill clause 61. See further ch 5 par 2.9.4 above.

The adoption of the proposed legislation and the proposals set out above should ensure that the shortcomings of the South African system are addressed, and avoid the pitfalls illustrated by the comparative analysis.