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child rights in focus
Research • Advocacy • Education

SUBMISSION¹ Number 1

ON THE CHILDREN'S RIGHTS CHAPTER OF THE CHILDREN'S BILL

From the **Children's Institute**, University of Cape Town
To the Portfolio Committee on Social Development
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This submission is endorsed by Johannesburg Child Welfare, RAPCAN, SASPCAN, Network Against Child Labour, Molo Songololo, S A National Council for Child Welfare, Education Law Project (CALS, Wits), and Child Accident Prevention Foundation of South Africa (CAPFSA)

Introduction

The Children's Institute (CI) is a policy research and advocacy institute based at the University of Cape Town². We conduct policy and law reform research, development and advocacy to promote the realisation of children's rights, particularly socio-economic rights.

The predecessor to the CI, the Child Health Policy Institute (CHPI) was established in July 1996. Our first major project was the development of a framework for the National Programme of Action (NPA) for Children, for the Department of Health. Since then, the CI has participated in the development and evaluation of several policies, programmes and laws, particularly in the health and social development sector.

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² We have a multi-disciplinary team of dedicated professionals with qualifications and experience in social anthropology, political science, law, psychology, paediatrics, child health and social development service delivery, social and medical research, policy development and advocacy. We promote a multi-disciplinary and consultative approach to child policy and law reform.

The Children's Bill, coming at the end of the first decade of freedom, presents South Africa with the golden opportunity to legislate for the priority realisation of children's rights to survival, development, participation and non-discrimination – the four pillars of the UN Convention on the Rights of the Child.

Over the past ten years, South Africa has achieved many successes for children. However, our child well-being indicators such as the child death rate, child poverty statistics and incidence of child abuse do not reflect these successes. The Children's Bill represents a vehicle for a renewed and unified effort to continue to address these challenges as we move into our second decade of freedom and democracy. All the child sector umbrella organisations, all the statutory councils, and a twenty people strong cross-departmental task team are involved in the Children's Bill initiative. Its provisions touch every child in the country and every organisation working with children. There is an army of committed people behind this initiative and if we harness everyone's efforts, invite more people to join and work together we can turn the tide towards a better life for all children in South Africa.

Our submission focuses on the **Children's Rights Chapter** of the Bill. We motivate why the inclusion of a comprehensive list of rights in the Bill will equip us all in our renewed and combined efforts to address the challenges facing our children.

In a supplementary submission (see page 40), we provide commentary on the following chapters:

Chapter 1 – Interpretation and objects

Chapter 9 – Primary prevention and early intervention

Chapter 4 – Parental rights and responsibilities

Chapter 8 – Protection of Children

Chapter 3 – Children's Rights

Constitutional promotion and protection of children's rights in South Africa

In 1994, South Africa became a democracy with a Bill of Rights entrenching everyone's fundamental rights and freedoms. With a past where children were deprived of basic rights to health care, water, sanitation, food and education; and detained without trial and tortured; the drafters of the Constitution included a children's rights clause in the Bill of Rights to ensure that children's rights and needs were prioritised in the new democracy.

The situation of children in South Africa

In 2004, with ten years of democracy behind us, South Africa has much to be proud of with regards to the signing of international human rights instruments and the development of many new policies and laws that are based on the Constitution and the principles of democracy.

However, the following statistics reflect the reality for South Africa's children:

- *South Africa has an above average child death rate.*

Our Infant Mortality Rate (IMR) is 60 per 1000 live births (Medical Research Council). This means that out of 1000 births, 60 babies will not live to see their first birthday. In some rural areas in the Eastern Cape, the IMR is as high as 100 per 1000 live births. Our average IMR is higher than Cuba, Vietnam and India, countries with comparably weaker economies to South Africa. The main cause of infant deaths is HIV/AIDS followed by preventable conditions such as gastroenteritis, respiratory infections and malnutrition.

Our under-5 mortality rate is 95 per 1000 live births. Thus 95 children per 1000 do not live to their 5th birthday. The main causes of death in this age group are trauma, gastro infections, respiratory infections, malnutrition and HIV.

The mortality profile of children aged 5 to 14 shows that the major cause of death is trauma (violent intentional trauma and accidental trauma).

Mortality figures, especially the IMR, are key indicators used by the international community and bodies such as the UN Committee on Children's Rights as a measure of the extent to which a society protects the health and well-being of children. The current IMR reflects a situation worthy of serious concern for South Africa.

- *Children in South Africa continue to suffer from preventable and easily treated conditions such as gastro, malnutrition and respiratory infections*

Infants and children under 5 continue to suffer from preventable and easily treated conditions such as gastroenteritis, malnutrition and respiratory infections. Poverty places a greater burden on children and their families living in deprivation jeopardising them even further their chances of achieving their potential. The Department of Social Development is set on "creating an enabling environment and reducing poverty" by empowering communities through developing "conditions for sustainable livelihoods that involves expanding the range of choices available to communities". The Children's Bill comes at an opportune time when such objectives of the Department of Social Development can bring forth the socio-economic and health rights of children living in South Africa.

The following services need to be prioritised in order to reduce the IMR and child death and illness rates:

HIV

- Provision of condoms
- Comprehensive country wide PMTCT³ programmes to prevent mother to child transmission of HIV
- Care Dependency Grants for HIV positive children upon diagnosis to enable them to access nutritious food and health care services to stay healthy

Gastro

- Provision of water and sanitation services, especially to areas that have high child poverty and death due to gastro and HIV

³ Prevention of Mother to Child Transmission of HIV

- The health department needs to prioritise the management of gastro infections at clinics and hospitals
- Parents and care-givers need health promotion information
- Families need access to poverty alleviation cash grants to enable them to pay for transport to the clinic or hospital

Malnutrition

- The social grants system needs to be expanded so that families can provide for children's basic nutrition needs. If large families are struggling to survive on one child support grant and one pension, their ability to ensure that babies receive adequate protein and fat to protect them against malnutrition, is compromised. Families tend to buy staples in bulk as a way to save costs, and such staples tend not to have the nutrition that babies need.
- Families also need education on the best types of food to feed young children in order to prevent malnutrition

Respiratory infections

- Children living in shelters that do not protect them from the cold and which promote the spread of infections such as TB due to over-crowding, are more prone to continuous bouts of respiratory infections. Families need access to housing.
- The use of wood and coal for energy also contributes to high levels of respiratory infections. Families need access to electricity.
- Clinics and hospitals need to prioritise the management of respiratory infections

Trauma

- Stricter gun control is essential to reduce the high rates of gun related deaths, particularly in the age group of 14 – 18. Gun shots is the number one cause of death in the 14 - 18 age group.
 - Schools need to build conflict resolution skills training into the education curriculum
 - Violence as a solution to problems needs to be challenged through ensuring that the state and community leaders do not use violence against people or sanction the use of violence. The use of violence as a means of disciplining children needs to be challenged to start shifting people's attitudes with regards to the primacy of violence as a problem solving technique.
 - Families need access to electricity to avoid the scourge of paraffin burns and shack fires that kill children or leave them scarred for life.
 - Local government needs to consider the high numbers of child pedestrians killed on the roads and draft and implement strategies to improve road safety, especially near schools and other areas where children tend to congregate.
- *Many children are disabled by preventable trauma accidents or bad management of acute and chronic illnesses*

As many as 50% of disabilities are preventable and directly linked to poverty.⁴ Preventable causes of disabilities and chronic illnesses include poor nutrition,

⁴ DFID 2000 Disability, poverty and development Issues series.

dangerous living conditions, limited access to vaccination programmes and to health and maternity care, motor vehicle accidents, poor hygiene, bad sanitation and inadequate information about the causes of different conditions. Prevention in early childhood is particularly important as this is the stage at which much potential damage can be averted and during which period the development and growth of the brain is at its greatest.

- *Many children suffer from hunger*

In a country with plenty of food to feed its people and a large surplus for exporting, children continue to suffer from hunger. There are two causes of this problem:

- more than half the SA population is living in poverty and do not have the necessary income to afford to buy sufficient food. Social grants are essential to address this lack of income, as is the control of food price increases
- without access to land and the necessary services such as water, families cannot produce their own food

- *South Africa has an above average rate of child abuse.*

Factors contributing to SA's high rates of child abuse include high levels of poverty, a culture of violence and patriarchy, unemployment, inadequate provision of safe and affordable partial care options for working parents, and alcohol abuse.

To reduce these high levels, we therefore need:

- poverty alleviation
 - gender equality
 - skills development and job creation
 - adequate provision of safe and affordable crèches and after school centres
 - alcohol abuse counselling and rehabilitation centres and services
- *Many children are not attending school simply because they are poor and cannot afford school fees or other education related costs such as uniforms, stationary and transport*

The fact that the school fee exemption system is not working needs to be recognised and addressed as a matter of priority. Families are using their social assistance grants to pay for education related costs when they could be using this money to provide for the child's nutritional, clothing, and accommodation needs. It does not make sense for government money to be cycled from one department to another.

Analysing the indicators

The situation analysis above shows a lack of delivery to children. We need to ask ourselves why this is happening. There is clearly a commitment at the highest level to "put children first", and we are privileged to have an economy that can provide better services for children. With such commitment and access to the necessary resources, why do the statistics show that there is a lack of delivery?

The problem could be ascribed to a number of reasons, including:

- Many urgent priorities facing government and many backlogs that need to be addressed
- Children do not vote and as such are not a pressure group that can actively demand prioritisation
- A lack of understanding of the meaning of section 28 of the Constitution, especially by Departments who do not consider themselves responsible for children's needs
- A lack of knowledge on how to practically realise children's rights (many countries around the world are struggling with this problem)
- The relegation of "children's issues" to one Ministry with insufficient attention being paid to cross departmental and inter-sectoral planning, budgeting and implementation.

The brief sketch of South Africa's child well-being indicators above shows quite clearly that all departments have a contributory role to play in improving the wellbeing of South Africa's children. However, not all Departments accept that they have a role to play and most do not build child well-being indicators or child impact assessments into their policy, law, budgeting or service delivery programmes of reform. It is often assumed that general poverty and equity indicators will be sufficient for ensuring equitable and targeted reform, however, children experience and are disadvantaged by poverty and HIV in a way that is different to adults. This is particularly so because of the developmental nature of childhood and children's inability to look after themselves.

To use a practical example:

The biggest killer of children under the age of one year of age is HIV, followed by gastro. HIV is transmitted to babies from their mothers primarily during the birth process or through breastfeeding. Transmission during breastfeeding is most likely to occur if the mother "mix feeds" in that she breast feeds and bottle feeds. It's not the mixed feeding that causes the problem, so much as the fact that mothers living in poverty stricken conditions cannot guarantee that the bottles are hygienic and the water is safe. Mothers living in poverty stricken conditions do not always have easy access to clean water and live in housing conditions that are not sanitary due to their being no sanitation services. As a result, the babies' bottles can become infected with germs and the baby can get gastro or lesions in his or her stomach. When the mother then later breastfeeds the baby, the HIV virus in the breastmilk can pass into the baby's blood stream through the lesions in his or her stomach.

A good question to ask of the Department of Water and of municipalities is whether they consider the use of child well-being indicators in their planning, budgeting and targeting of water infrastructure development and free basic water programmes. Certain parts of the country have very high rates of babies dying of HIV and gastro. If municipalities were to target such communities in the roll out of water and sanitation infrastructure and services, we could see a decline in the number of babies dying of HIV and gastro. Similarly, the Department of Housing and municipalities could consider such indicators when planning where to build houses and who to prioritise for housing subsidies.

However, the use of child wellbeing indicators by Departments other than Social Development and Health is a rare occurrence.

A further problem is that there is a general lack of understanding on the meaning of section 28 of the Constitution and on how to put children's rights into practice. Decision makers and service providers are generally supportive of the call for the prioritization of children's needs in government reform and service delivery. However, in reality, this commitment does not often bear fruit. One of the reasons why is that as a country, we do not yet fully understand how to put the commitment into practice.

The opportunity presented by the Children's Bill

There is therefore a need for Parliament to provide guidance on the meaning of children's constitutional rights. One way is through the inclusion of a Children's Rights Charter in the Children's Bill. The Charter can provide guidance by elaborating on the meaning of children's rights and the state's duties using international law and South Africa's particular history and challenges. This would provide decision makers and service providers with clear guidance with regards to their constitutional obligations to children and enable them to put the obligation into practice.

The SALRC⁵ Draft Bill took us many steps forward in this endeavor through its elaboration of some of the essential children's rights in the Child Rights Chapter of the Bill. This elaboration was based on international and comparative research and South Africa's jurisprudence and particular circumstances.

However, the current draft of the Children's Bill [B70 of 2003] while including some essential rights, omits most of the rights proposed in the SALRC version.

The SALRC proposals

The SALRC included an almost comprehensive list of rights in its draft bill which elaborated on the rights contained in the Bill of Rights in the Constitution and added some rights that are not included in the Constitution. The rights included were the following:

- Prohibition of Unfair Discrimination
- Best interests of the child
- Name, nationality and identity
- Family relationship
- Property
- Protection against maltreatment, abuse, neglect, degradation, exploitation and other harmful practices
- Prohibition of harmful social and cultural practices
- Protection against economic exploitation
- Education
- Basic health care
- Social security
- Refugee and undocumented migrant children

⁵ South African Law Reform Commission

- Children with disabilities and chronic illnesses
- Leisure and recreation
- Access to child and family court
- Responsibilities of children
- Age of majority

For the full text of the SALRC proposals, please see appendix A.

It is submitted that the SALRC Draft Bill took us many steps forward through its elaboration of some of the essential children's rights. This elaboration was based on international and comparative research. The formulations proposed by the SALRC generally found favour with many children's rights organisations, however concerns were expressed at the omission of key rights and core internationally accepted norms and standards with respect to certain rights⁶.

The Tabled Bill [B70 of 2003]

The Bill no longer contains a comprehensive list of rights.

The rights that remain in the draft Bill are the following:

- Best interests of the child paramount
- Child participation
- Rights of children (this section is simply a restatement of section 28 of the Constitution)
- Prohibition against harmful social and cultural practices
- Information on health care
- Access to children's courts
- Enforcement of rights (this section is simply a restatement of s.38 of the Constitution)
- Responsibilities of children
- Age of majority

Key rights that have been totally omitted include:

- Social security
- Education
- Refugee and undocumented migrant children
- Children with disabilities and chronic illnesses
- Leisure and recreation
- Prohibition against unfair Discrimination
- Property

Constitutional rights that have simply been re-stated (the whole of section 28 is simply inserted into the Bill):

- Social services

⁶ Concerns were expressed by the Education Law Project at the Centre for Applied Legal Studies (University of Witwatersrand) and the Children's Institute (University of Cape Town) with regards to the rights to education, nutrition, shelter, water and health care.

- Basic health care services
- Basic nutrition
- Shelter
- Name and nationality
- Family care or alternative care
- To be protected from maltreatment, neglect or abuse
- To be protected from exploitative labour practices
- Not to be permitted to perform inappropriate work
- Not to be detained except as a measure of last resort
- To legal representation

Rights or provisions that have been added:

- Information on health care
- Enforcement of rights (this is simply a restatement of s.38 of the Constitution)

The information on health care and confidentiality with regards to health care is not new and was subsumed under the health care right in the SALRC version of the Bill. The enforcement of rights clause is simply a copy from section 38 of the Constitution and therefore does not add anything new.

For the full text on the Bill's list of rights, please see Appendix B.

Recommendation for amendment

We recommend the inclusion of a Child Rights Charter in the Children's Bill that:

- is comprehensive (includes all relevant⁷ rights set out in the UN Convention on the Rights of the Child and the African Charter);
- is binding on all government departments;
- elaborates on the rights in the Constitution using international law adapted to South Africa's particular circumstances and challenges and supplements where the Constitution is silent;
- obliges all national, provincial and local government departments to
 - review their legislation, policies and programmes to ensure that the relevant rights are incorporated and adhered to
 - Conduct child impact assessments before making decisions with regards to policy, legislative or programme options
 - draw up annual plans showing how they intend to promote and protect children's rights through their policies, plans, budgets programmes and actions.
 - report on the implementation of such plans to the Minister of Social Development using prescribed performance indicators
 - table the plans and reports in Parliament to be considered by the Joint Monitoring Committee on Children, Youth and Persons with Disabilities.

⁷ Rights that are relevant to the South African context and South Africa's particular challenges

Motivation

A comprehensive list of rights

The inclusion of a comprehensive list of rights in the Children's Bill provides us with the opportunity to legislate for the prioritisation of children's needs by **every** government department.

The list should not only contain "welfare protection rights" but all the rights to which children are entitled to. Such an approach would help us move away from an approach to children's issues being viewed as matters of charity that must be dealt with by the Department of Social Development on its own. Children are entitled to the full spectrum of human rights plus additional protection due to their young age.

We recommend that the following rights should be included:

- Prohibition against unfair Discrimination
- Best interests of the child
- Child participation
- Name, nationality and identity
- Family relationship and alternative care
- Property
- Protection from maltreatment, abuse, neglect, degradation, exploitation and other harmful practices
- Protection from harmful social and cultural practices
- Protection from economic exploitation
- Education
- Health care
- Food and nutrition
- Water and sanitation
- Shelter
- Social Security
- Environment
- Social Services
- Refugee and undocumented migrant children
- Children with disabilities and chronic illnesses
- Leisure and recreation
- Access to child and family court
- Age of majority

A list that is binding on all government departments

By giving the Children's Bill legislative superiority over all other legislation (besides the Constitution), when it comes to matters affecting children, the listed rights will serve as minimum standards for all government Departments to follow when they draft legislation and policy, make budgetary decisions or implement programmes. All national legislation and programmes, eg the National Health Act, the Aliens Control

Act, the SA Schools Act, the Water Services Act, Free Basic Water Programme, Housing Subsidy Scheme etc, would be required to be assessed against the rights set out in the Children's Bill and amended if necessary in order to incorporate the principles of the relevant rights. This would help ensure the prioritisation of children's needs within all government departments.

As an example, local governments could be obliged through the rights chapter to include child well-being indicators when drawing up their Integrated Development Plans (IDPs) and when deciding which areas to target first with regards to the roll out of basic water and sanitation services.

Providing guidance on our international and constitutional obligations to children

While South Africa has signed many international instruments committing us to prioritise children's needs, in practice, children's needs tend to get lost amidst the many other competing societal needs, especially within Departments that do not consider children's issues to be their responsibility. This is partly because there is a lack of clarity as to what exactly our international and constitutional obligations oblige us to do, who is responsible and how to do it.

It therefore does not take us further in our struggle to realise children's rights, to simply re-state section 28 of the Constitution in the Bill. This does not provide the much needed guidance that decision makers and service providers need. We could wait 20 years and spend millions on litigation in order to force delivery, or we could invest that money now and reap the returns sooner.

The Children's Bill, through the incorporation of a comprehensive list of rights **that interprets the obligations** will provide all government departments with clear guidance with regards to their obligations to children. This will help ensure that children's rights are prioritised.

Please see appendix C for our recommended wording for each right and the motivation for each right. The recommendations are based on the SALRC's proposals with some amendments and additions. The SALRC proposals and our additions are based on international interpretations of children's rights adapted to South Africa's particular circumstances.

Planning, Implementation and reporting on children's rights

We suggest that the Chapter should contain a provision that obliges all National Departments to review their legislation, policies and programmes to ensure that the relevant rights are incorporated and adhered to. They should also be obliged to conduct child impact assessments before the make final policy decisions with regards to programmes that affect the rights listed in the Bill. We recommend that the Best Interest's right be amended as follows in order to oblige department's to conduct child impact assessments:

“Best interest of child paramount

(1) An organ of state, an official, employee or representative of an organ of state, or any other person in authority who has official control over a child, must, when acting in any matter concerning the child, apply the standard referred to in section 28 (2) of the Constitution that the child's best interest is of paramount importance.

(2) **All national, provincial and local organs of state must be guided by the principle of best interests of the child when making policy, legislative, budgetary and administrative decisions that concern children.** “

While the use of the best interests principle is well established and accepted when a court or official is dealing with an individual child, the use of the principle with regards to groups of children or children in general is less developed. The UN Committee on the Rights of the Child has recently recommended that state parties should conduct child impact assessments before making policy and budgetary decisions that concern children. When talking about “policy and budgetary decisions that concern children”, the Committee refers not only to services aimed directly at children such as education, but also to services and policies that affect people generally and therefore children as a group as part of the general population. The Committee is recommending therefore that governments must assess the impact on children of macro policy decisions, not only decisions about services aimed directly at children⁸.

Children make up roughly half of the population, yet the impact of policy options for services such as health, water, electricity, sanitation, housing, and land; on children; is seldom actively considered when policy choices are made. It is often assumed that the policy choice that will benefit the majority of adults will also benefit children. However, this is not necessarily true as children have specific vulnerabilities which need to be taken into consideration.

Besides impact assessments, each Department should be obliged to draw up annual plans showing how they intend to promote and protect children's rights within their Department's policies, budgets, plans, programmes and actions.

They should also be required to regularly report on the implementation of such plans.

The plans and reports should have to be submitted to the Minister of Social Development (or other appropriate body) as part of the National Policy Framework process⁹ and tabled in Parliament to be considered by the Joint Monitoring Committee on Children, Youth and Persons with Disabilities¹⁰.

⁸ See page 42 and 43 of the Implementation Handbook for the UN Convention on the Rights of the Child.

⁹ Please see the submission from Childline SA with regards to the National Policy Framework

We further suggest that monitoring, reporting and inter-sectoral co-operation be informed by the use of prescribed performance and child well-being indicators linked to the minimum standards in the rights concerned. The reporting and use of indicators requirements would greatly assist the Presidents Office in its 5 yearly task of submitting a report to the UN Committee on the Rights of the Child, and the South African Human Rights Commission in its bi-yearly task of compiling a report on the progressive realisation of socio-economic rights. The Human Sciences Research Council, Stats SA, Children's Institute and Idasa all have projects that are focussed on the development of child well being indicators and the use of such indicators in policy development and budget decision making. These initiatives are informed by the dictates of international human rights law and the recommendations of international human rights or public health bodies such as UNICEF and WHO. These initiatives could all be strengthened by legislating for the obligatory use of such indicators by all government departments in their planning and reporting.

Conclusion

The potential that the Children's Bill holds to greatly improve the lives of children should not be under utilised. We have before us a golden opportunity to put our commitment to children into a rights based framework that would ensure delivery. If we miss this opportunity, we need to be able to explain why.

In June 2003, Cabinet instructed the Department that the Child Rights Chapter of the SALRC Draft of the Children's Bill should be amended in order to ensure that it complied with the Constitution. As a result the chapter was severely diluted. Child rights experts would disagree with Cabinet's assertion that the chapter did not comply with the Constitution¹¹. The Children's Bill Working Group will be commissioning legal opinion on this matter. We suggest that the Portfolio Committee also seek legal opinion on whether the SALRC Draft of the Child Rights Chapter (and our proposed recommendations) complies with the Constitution.

If the legal opinion finds that the chapter does comply with the Constitution, we respectfully request the Portfolio Committee to amend the Bill by re-inserting the Child Rights Chapter as drafted by the SALRC, with our proposed amendments set out in appendix C.

¹¹ The Chapter was drafted by Professor Julia Sloth Nielson from the public law department at the University of Cape Town, a well respected legal academic on children's rights. The South African Law Reform Commission Project Committee on the Review of the Child Care Act approved the inclusion of the Chapter. They would not have done so if they were of the opinion that the Chapter did not comply with the Constitution. The Education Law Project at the Centres for Applied Legal Studies at the University of the Witwatersrand is also of the opinion that the chapter does comply with the Constitution.

CHAPTER 4 CHILDREN'S RIGHTS

Application

11. (1) The rights which a child has in terms of this Chapter supplement the rights which a child has in terms of the Bill of Rights.

(2) All organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect, promote and fulfil the rights of children contained in this Chapter.

(3) Any provision of this Chapter binds all persons, natural or juristic, if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

Conflicts with other legislation

12. In the event of a conflict between a provision of this Chapter and any other legislation, the provision of this Chapter prevails except –

- (a) to the extent that such other legislation is or could be interpreted as a limitation of general application on such provision that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including those listed in section 36 (1) (a) to (e) of the Constitution; or
- (b) as otherwise provided in section 3 (1) (b).

Unfair discrimination

13. (1) No organ of state, and no official, employee or representative of an organ of state, and no other person may unfairly discriminate directly or indirectly against a child on the ground of –

- (a) 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 of any parent, guardian, care-giver or family member of the child; or

- (b) the family status, health status, socio-economic status, HIV-status or nationality of the child or of any parent, guardian, care-giver or family member of the child.

(2) Discrimination on any of the grounds listed in subsection (1) is presumed to be unfair unless it is established that the discrimination is fair.

Best interest of the child

14. (1) An organ of state, an official, employee or representative of an organ of state, or any other person in authority who has official control over a child, must, when acting in any matter concerning the child, apply the standard referred to in section 28 (2) of the Constitution that the child's best interest is of paramount importance.

(2) Every child capable of participating meaningfully in any judicial or administrative proceedings in a matter concerning that child has the right to participate in an appropriate way in those proceedings. Views expressed by the child must be given due consideration.

Name, nationality and identity

15. Every child has the right –

- (a) to be promptly registered in terms of the Registration of Births and Deaths Act, 1992 (Act No. 51 of 1992), if that child is a South African citizen; and
- (b) to the preservation of his or her identity and nationality, subject to the other provisions of this Act.

Family relationship

16. (1) Every child has the right not to be separated from his or her family or primary care-giver against the will of the family or primary care-giver and of the child where the child is capable of expressing a choice, except when that separation is in the best interest of the child.

(2) Every child separated from his or her parents has the right to maintain a personal relationship and regular contact with the parents, except when those personal relations and that contact are not in the best interest of the child.

Property

17. Every child who owns property has the right to the administration of that property in the best interest of that child.

Maltreatment, abuse, neglect, degradation, exploitation and other harmful practices

18. (1) Every child has the right to be protected, through administrative, social, educational, punitive or other suitable measures and procedures, from all forms of torture, physical violence, mental harassment, injury, maltreatment, abuse, neglect, degradation and exploitation.

(2) Every child who has been tortured, maltreated, harassed, abused, neglected, degraded or exploited has the right to have access to support services and, where appropriate, to medical treatment at state expense.

Harmful social and cultural practices

19. (1) Every child has the right not to be subjected to harmful social and cultural practices which affect the well-being, health or dignity of the child.

(2) Every child –

- (a) below the minimum age set by law for a valid marriage has the right not to be given out in marriage or engagement; and
- (b) above that minimum age has the right not to be given out in marriage or engagement without his or her consent.

(3) Female genital mutilation or the circumcision of female children as a cultural practice is prohibited.

(4) Every male child has the right –

- (a) to refuse circumcision; and

(b) not to be subjected to unhygienic circumcision.

(5) Every child has the right –

(a) to refuse to be subjected to virginity testing, including virginity testing as part of a cultural practice; and

(b) not to be subjected to unhygienic virginity testing.

Economic exploitation

20. Every child has the right to be protected, through administrative, social, educational, punitive or other suitable measures and procedures, from –

(a) economic exploitation; and

(b) performing any work –

(i) that is inappropriate for a person of that child's age; and

(ii) that places at risk the child's well-being, education, physical and mental health, and spiritual, moral or social development.

Education

21. (1) Every child has the right to –

(a) have access to education on the basis of equal opportunities for all;

(b) have access to educational and vocational information and guidance;
and

(c) receive education and information through a medium which makes such education and information accessible to the child, having regard to the child's personal circumstances and any disability from which the child may suffer.

(2) The education of a child must be directed towards –

(a) the development of the child's personality, talents and intellectual and physical abilities to their fullest potential;

(b) the development of respect for the democratic values of human dignity, equality and freedom enshrined in our Constitution;

(c) the development of respect for the child's parents, cultural identity and values, and language;

(d) the preparation of the child for a responsible life in a free society, in the spirit of peace, friendship, humanity, tolerance and national unity among cultural,

- religious and linguistic communities on the basis of equality, non-discrimination and free association; and
- (e) the development of respect for our natural and cultural heritage.

Basic health care

- 22.** Every child has the right to –
- (a) basic health care services and to have access to such services;
- (b) confidential access to information on health promotion and the prevention of ill-health and disease, including HIV/AIDS, sexuality, and reproduction;
- (c) confidentiality regarding his or her health status and the health status of a parent, care-giver or family member;
- (d) have access to clean drinking water; and
- (e) have access to sanitation services aimed at promoting their health and preventing infections and diseases.

Social security

23. (1) Every child has the right to social security, including access to social assistance if the parent or care-giver cannot or does not provide for the basic needs of a child.

(2) A child suffering from malnutrition or who is at risk of malnutrition has the right to have access to sufficient and appropriate food, including emergency measures by the state for a child whose survival is at stake.

Refugee and undocumented migrant children

- 24.** Every child who is a refugee or seeking refugee status in accordance with international or domestic law, and every undocumented migrant child, whether unaccompanied or accompanied by a parent or other adult person, has –
- (a) the rights set out in this Chapter, as may be appropriate in the circumstances;
- (b) the right to be re-united with his or her parents or family if the child was separated from his or her parents or family; and
- (c) the right to receive humanitarian protection and assistance to realise the rights referred to in paragraphs (a) and (b).

Children with disabilities and chronic illnesses

25. (1) Every child with a physical, intellectual or psychiatric disability has the right –

- (a) to enjoy life in conditions which ensure dignity, promote self-reliance and facilitate active participation in the community; and
- (b) to receive special care; and
- (c) to receive reasonable financial assistance from the state.

(2) Every child who is chronically ill has the right to receive special care and reasonable financial assistance from the state.

Leisure and recreation

26. Every child has the right to rest and leisure and to engage in play and recreational activities appropriate to the child's age.

Access to child and family courts

27. Every child has the right to bring a matter to a child and family court, provided that matter falls within the jurisdiction of that court.

Responsibilities of children

28. Every child has responsibilities appropriate to the child's age and ability towards his or her family, society, the state, other legally recognised communities and the international community.

Age of majority

29. A child, whether male or female, attains the age of majority and become a major upon reaching the age of 18 years.

CHAPTER 3

CHILDREN'S RIGHTS

Application

7. (1) The rights which a child has in terms of this Chapter supplement the rights which a child has in terms of the Bill of Rights.

(2) All organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children contained in this Chapter.

(3) A provision of this Chapter binds a natural or a juristic person, if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

Conflicts with other legislation

8. In the event of a conflict between a provision of this Chapter and any other legislation, the provision of this Chapter prevails except –

(a) to the extent that such other legislation is or could be interpreted as a limitation of general application on such provision that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including those listed in section 36 (1) (a) to (e) of the Constitution; or

(b) as otherwise provided in section 3.

Best interest of child paramount

9. In all matters concerning a child the standard referred to in section 28(2) of the Constitution and section 6 of this Act that the child's best interest is of paramount importance must be applied.

Child participation

10. Every child capable of participating meaningfully in any matter concerning that child has the right to participate in an appropriate way in those proceedings and views expressed by the child must be given due consideration.

Rights of children

11. Every child has the right –

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that –

- (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
 - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
 - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child's best interests are of paramount importance in every matter concerning the child.

Harmful social and cultural practices

- 12.** (1) Every child has the right not to be subjected to harmful social and cultural practices which affect the well-being, health or dignity of the child.
- (2) Every child –
- (a) below the minimum age set by law for a valid marriage has the right not to be given out in marriage or engagement; and
 - (b) above that minimum age has the right not to be given out in marriage or engagement without his or her consent.
- (3) Female genital mutilation or the circumcision of female children as a cultural practice is prohibited.
- (4) Taking into consideration the child's age, maturity and stage of development, every male child has the right –
- (a) to refuse circumcision; and
 - (b) not to be subjected to unhygienic circumcision.
- (5) Every child has the right –
- (a) to refuse to be subjected to virginity testing, including virginity testing as part of a cultural practice; and
 - (b) not to be subjected to unhygienic virginity testing.

Information on health care

- 13.** Every child has the right to –
- (a) have access to information on health promotion and the prevention of ill-health and disease, sexuality, and reproduction; and
 - (b) confidentiality regarding his or her health status and the health status of a parent, care-giver or family member, except when maintaining such confidentiality is not in the best interests of the child.

Access to courts

- 14.** Every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court.

Enforcement of rights

15. (1) Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Chapter of the Children's Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

(2) The persons who may approach a court, are:

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.

Responsibilities of children

16. Every child has responsibilities appropriate to the child's age and ability towards his or her family, community and the state

Age of majority

17. A child, whether male or female, becomes a major upon reaching the age of 18 years.

CHILDREN'S RIGHTS

Application

(1) The rights which a child has in terms of this Chapter supplement the rights which a child has in terms of the Bill of Rights.

(2) All organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect, promote and fulfil the rights of children contained in this Chapter.

(3) A provision of this Chapter binds all persons, natural or juristic, if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

Notes: This section is the same as appears in the SALRC and the Tabled Bill.

Conflicts with other legislation

In the event of a conflict between a provision of this Chapter and any other legislation, the provision of this Chapter prevails except to the extent that such other legislation is or could be interpreted as a limitation of general application on such provision that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including those listed in section 36 (1) (a) to (e) of the Constitution.

Notes: This section contains a sub-section (b) in both the SALC and the Departmental Drafts which states “*except - (b) as otherwise provided in section 3 (1) (b).*” We have not included it in our draft as the effect would be to subject the rights provisions to negotiation with provinces if the rights provisions conflict with provincial legislation affecting children. We submit that the Children's Rights Charter in the Children's Bill should be a national Charter to which all provinces are bound and there should be no negotiation around whether or not a provinces is bound to a particular right in the Charter.

Unfair discrimination

- (1) No organ of state, and no official, employee or representative of an organ of state, and no other person may unfairly discriminate directly or indirectly against a child on the ground of –
- (a) 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 of any parent, guardian, care-giver or family member of the child; or
 - (b) the family status, health status, socio-economic status, HIV-status or nationality of the child or of any parent, guardian, care-giver or family member of the child.
- (2) Discrimination on any of the grounds listed in subsection (1) is presumed to be unfair unless it is established by the respondent that the discrimination is fair.

Notes: This right appears in the SALRC draft bill but not in the Tabled Bill.

While children are already protected against unfair discrimination in the equality clause in the Bill of Rights (Section 9) and the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 2000, the inclusion of a prohibition on unfair discrimination in the Bill is aimed at providing children with extra protection in accordance with International Law.

This call for extra protection is found in article 2 of the UN Convention on the Rights of the Child. Article 2 has been identified by the UN Committee on the Rights of the Child as one of the four general principle of fundamental importance for implementation of the whole Convention. It should therefore be given sufficient attention in domestic South African legislation.

The extra protection that needs to be provided to children is due to the fact that they are often discriminated against based on the status of their parents. The listed grounds in the Bill repeat the ones in the Equality Act and in the Constitution but in the Bill they are made applicable to both the child and to the care-giver, parent or family member of the child. This is important as discrimination of children can happen through discrimination of the parent. If the right was included in the Bill, children in such cases would have specific recourse to the courts through the Bill. By making discrimination against the parent a specified ground in terms of discrimination against children the unfairness of the discrimination against the child is *presumed* and the child does not carry the onus of proof. The discrimination is easier to prove if the discrimination is on a specified ground because the onus shifts to the person alleged to be discriminating.

Note also that the list of grounds in sub-paragraph (b) is not included in the Equality Act but may be at a later stage. These include family status, health status, socio-economic status, HIV-status or nationality of the child or of any parent, guardian, care-giver or family member of the child. The question as to whether they should be included as specified grounds of discrimination was left unanswered by Parliament when the Equality Act was passed. Parliament instead decided to send the question for review and the review has not yet been completed.

There are a number of arguments as to why the grounds listed in sub-paragraph (b) should be included in the Children's Bill.

(1) The Constitution affords children special protection in the 'best interest' clause. The effect of listing the grounds in the Bill is simply to shift the burden of proof to the defendant (the alleged discriminator). If the grounds are not listed the discrimination can still be unfair if the grounds described above are proven but the onus of proof is born by the child. The best interests clause can be cited as motivation for the inclusion of these grounds in the Bill.

(2) Non-discrimination has been identified by the UN Committee of the Rights of the Child to be a general principle of fundamental importance for the implementation of the whole Convention. The principle does not bar affirmative action to diminish or eliminate conditions that cause discrimination. In fact the Committee has underlined the need to give special attention to disadvantaged groups of children.¹² The Committee of the Rights of the Child recognizes that for rights to have meaning they must be justiciable. Children, due to their dependant status may have problems pursuing remedies for breaches of their fundamental rights such as the right to non-discrimination. The Committee suggests that special attention should be paid to ensuring that there are effective child sensitive procedures available to children and their representatives. This includes the provision for support of self-advocacy. The reverse onus on discrimination on a listed ground could be one of those measures.¹³

(3) The general comments made by the UN Committee on the Rights of the Child also state that the right to non-discrimination obliges States to actively identify individual children and groups of children whose realization of rights may demand special measures.¹⁴ The taking of special measures is also encouraged by the UN Human Rights Committee, which has also stated children as minors have the right to measures of protection against discrimination on the part of their families. Such measures can take any form but legislative and administrative measures are specifically mentioned.¹⁵

Discrimination is any distinction, exclusion, restriction or preference with the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons on an equal footing of all rights and freedoms.¹⁶ The grounds that are listed

¹² Rachel Hodgkin and Peter Newell (1998). The right to education. Implementation Handbook for the Convention on the Rights of the Child. New York, UNICEF: page 19.

¹³ General comment No. 4 On the implementation of the CRC by the Committee on the Rights of the Child at paragraph 24.

¹⁴ General Comment No. 5 by the Committee on the Rights of the Child paragraph 12

¹⁵ General Comment No. 18 by the Human Rights Committee paragraph 6.

¹⁶ Rachel Hodgkin and Peter Newell (1998). The right to education. Implementation Handbook for the Convention on the Rights of the Child. New York, UNICEF: page 19.

in paragraph (b) are grounds that make children especially vulnerable, because they are characteristics of the discrimination of which the equal human dignity of every child is threatened.¹⁷

(4) The UN Convention on the Rights of the Child expressly prohibits the discrimination against a child due to the child's or the child's parent's nationality, and provides that all children within the state's jurisdiction must be afforded the protection of all the rights set out in the Convention¹⁸. There is therefore little justification for not including nationality within the list of prohibited grounds of discrimination when it comes to children.

Best interest of child paramount

(1) An organ of state, an official, employee or representative of an organ of state, or any other person in authority who has official control over a child, must, when acting in any matter concerning the child, apply the standard referred to in section 28 (2) of the Constitution that the child's best interest is of paramount importance.

(2) All national, provincial and local organs of state must be guided by the principle of best interests of the child when making policy, legislative, budgetary and administrative decisions that concern children.

Notes: In September 1990, 71 Heads of State attended the UN World Summit on Children. The UN Convention on the Rights of the Child (the first child specific holistic international child rights instrument) had just been adopted by the UN (1989) and the World Summit was called for Heads of State to make commitments to the implementation of the Convention and to set implementation goals for the next ten years. The slogan and rallying call adopted by the Summit was **"A First Call for Children"**. This call represents a political and moral commitment by State Parties to **put children first when allocating resources, particularly when it relates to socio-economic rights and children's basic needs**. What this means is that they commit themselves to implementing the Convention and in particular its four founding principles which includes the best interests principle.

While the use of the best interests principles is well established and accepted when a court or official is dealing with an individual child, the use of the principle with regards to groups of children or children in general is less developed. In interpreting article 3

¹⁷ To illustrate this point one should look to the definition of what constitutes an analogous ground in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹⁸ Article 2

- (1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
- (2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

of the Convention¹⁹, the UN Committee on the Rights of the Child has recently recommended that state parties conduct child impact assessments before making policy and budgetary decisions that concern children. When talking about “policy and budgetary decisions that concern children”, the Committee refers not only to services aimed directly at children such as education, but also to services and policies that affect people generally and therefore children as a group as part of the general population. The Committee is recommending that governments must assess the impact on children of macro policy decisions, not only decisions about services aimed directly at children.

Children make up roughly half of the population, yet the impact of policy options for services such as health, water, electricity, sanitation, housing, and land; on children; is seldom actively considered when policy choices are made. It is often assumed that the policy choice that will benefit the majority of adults will also benefit children. However, this is not necessarily true as children have specific vulnerabilities which need to be taken into consideration.

Article 3 provides as follows:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"

The section below breaks the article down and interprets its key phrases to show how it obliges states to actively conduct child impact assessments when making policy, budgeting, law and programming decisions.

"In all actions concerning children"

This means that any policy or law reform decision and any decision with regards to budgeting and the allocation of resources, that will impact on children, must be assessed against the best interests principle²⁰. The process of choosing the most appropriate policy must include an **active child impact assessment process** that interrogates the impact of each policy option on children

"public or private social welfare institutions, courts of law, administrative authorities or legislative bodies"

¹⁹ Article 3(1) "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"

²⁰ An analysis of the UN Committee on the Rights of the Child's "Reporting Guidelines" for state parties and its various examinations of individual State Parties' reports interprets article 3(1) to mean that consideration of the best interests of the child should be built into national plans and policies for children and into the workings of parliaments and government, nationally and locally, including, in particular, in relation to budgeting and allocation of resources at all levels. (*UN Handbook on the Implementation of the Convention of the Rights of the Child. Hodgkin R and Newell P. Unicef. 1998*)

The wording of the principle indicates that its scope is very wide, going beyond State-initiated actions to cover private bodies too, and embracing all actions concerning children as a group²¹.

Decisions by government departments must therefore all be based on having done an active child impact analysis.

"The best interests of the child"

After ascertaining the impact of each scenario/model on children, how do you determine which one will be "in the best interests of the child?"

The UN Committee on the Rights of the Child documents and statements can be analysed to reveal some guidance in this regard:

(a) In determining what is in the best interests of children as a group in a particular situation; the 3 other general principles and values of the Convention should be applied to the situation²².

These general principles are non-discrimination, maximum survival and development, and participation (respect for the views of the child).

Therefore, looking at the impact assessments, we need to look at the level of *discrimination* that children will suffer under each scenario and how each scenario will improve or increase the discrimination suffered by children as a group.

Using HIV prevention and treatment policy reform as an example, we would need to look at the discrimination currently suffered by children due to the HIV pandemic and whether they are bearing an extra discrimination burden in comparison to other affected groups. If they are bearing an extra burden, the policy option that we choose for prevention and treatment needs to include an affirmative action/positive discrimination component to start addressing this inequality.

When applying the principle of maximum survival and development of children to the impact assessments, we need to establish how each policy choice will impact on the infant and under 5 mortality and morbidity rates; and the emotional, physical, psychological and mental development of young children.

When applying the principle of participation and respect for children's views: Firstly, the impact assessments conducted must have included real consultation with children, their primary care givers, and children's sector organisations. Secondly; children, their primary care givers and the children's sector must be allowed to actively participate in the decision making with regards to the ultimate policy choice.

(b) Consideration of best interests must embrace both short and long term considerations for children.

²¹ UN Handbook on the Implementation of the Convention on the Rights of the Child. Hodgkin R and Newell P. Unicef. 1998

²² As above

(c) State policies cannot interpret best interests to deny rights to children that are guaranteed in the Convention.

"a primary consideration"

The wording indicates that the best interests of children will not always be the single, overriding factor to be considered. There may be competing or conflicting human rights interests, for example between individual children, between different groups of children and between children and adults. The interests of children must, however, be the subject of active consideration. It needs to be demonstrated that children's interests have been actively explored and taken into account as a primary consideration²³.

Child Participation

(1) Every child capable of participating meaningfully in any matter concerning that child has the right to participate in an appropriate way in those proceedings and views expressed by the child must be given due consideration.

(2) Children with disabilities must be supported where appropriate to enable participation.

Name, nationality and identity

Every child has the right –

- (a) to be registered promptly in terms of the Registration of Births Act, 1992 (Act No. 51 of 1992); and
- (b) to the preservation of his or her identity and nationality, subject to the other provisions of this Act.

Note: Children living in poverty and children who have been orphaned and the caregivers looking after them are currently experiencing many barriers when trying to access birth certificates and identity documents. Without these documents, these children are unable to access social grants and various other state services and in some instances, babies are dying from malnutrition as a result. By including the right

²³ Note however that the SA Constitution uses the words "a paramount consideration" and the African Charter on the Rights and Welfare of the Child uses the words "the primary consideration".

to be registered promptly ito of the Births and Registrations Act, the Rights Charter would compel the Department of Home Affairs to prioritise the delivery of civic services. Even in the wealthier provinces such as the Western Cape, the Department of Social Development often as to perform Home Affairs duties or pay for Home Affairs expenses in order to help caregivers access the identity documents needed to access social grants. Social Development should not be footing the bill for the provision of a service that falls squarely within the mandate of the Department of Home Affairs. Including this right in the Bill, along with the impact assessment and reporting provisions, could assist with ensuring that Home Affairs prioritises delivery to children.

Family care or alternative care

(1) The child's parents and family have the primary responsibility to provide for the child's care and protection.

(3) The State must render appropriate assistance to families in the performance of their child rearing responsibilities and must ensure the development of accessible institutions, facilities and services for the care of children.

(4) Where the child's parents or family are not willing or are unable to fulfill their duty of care, the State has an obligation to step in and provide assistance to the child and family or appropriate alternative care for the child²⁴.

Family relationship

(1) Every child has the right not to be separated from his or her parents or family against the will of the parents or family and of the child where the child is capable of expressing a choice, except when that separation is in the best interest of the child.

(2) Every child separated from his or her parents or family has the right to

²⁴ Article 19 of the CRC provides that the State must take all appropriate measures to protect the child from abuse and neglect while in the care of their parents. Such protective measures shall include the establishment of programmes to provide the necessary support for the child and for the parent, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow up of instances of child maltreatment and where appropriate, for judicial involvement. Article 20 provides that a child deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. Such care could include foster placement, adoption or if necessary placement in suitable institutions for the care of children

maintain a personal relationship and regular contact with their parents or family, except when those personal relations and that contact are not in the best interest of the child.

Notes: The SALC Discussion Paper referred to “parents” only, the SALC Draft Bill to “family and primary caregiver” and the Departmental Draft does not include the right except through the incorporation of section 28 (1) (b) of the Constitution, the “right to family care or parental care, or to appropriate alternative care when removed from the family environment”.

Property

Every child who owns property or who is a dependent of a deceased person who owned property, has the right to the administration of that property in the best interest of that child.

Notes: Current predictions estimate that, in the absence of any major treatment intervention, by 2015 roughly 5.6 million children under the age of 18 will have been orphaned by the death of one or both parents, the majority of these to AIDS²⁵.

Upon the death of a parent, it is unclear what is happening to the property of orphaned children, irrespective of whether the estates officially fall under customary or civil law. For a variety of reasons, the vast majority of such estates never appear in the legal records, and there is reason to believe that many do not devolve as they should according to either system of law and women and children are often deprived of their homes, insurance policies and funeral benefits.

With the advent of HIV/AIDS, not only are there far more deaths but also far more women and children are being disadvantaged. Dying parents are too ill to fight for their rights and orphaned children, isolated by the social stigma of the disease, are without accessible mechanisms for asserting their property rights. Even though official customary law provides mechanisms which are aimed at protecting the rights of minor heirs, there is evidence to suggest that children’s rights are not effectively protected in practice, and that property grabbing is a problem frequently faced by orphans in particular. This problem could possibly be addressed in part by legislation and policy. The social context in which the law operates however suggests that attention should also be paid to exploring the role of other institutions in assisting children faced with issues regarding inheritance and dispossession.

²⁵Meintjes, H., D. Budlender, S. Giese, and L. Johnson (2003) *Children 'in need of care' or in need of cash? Questioning social security provisions for orphans in the context of the South African AIDS pandemic*. Joint working paper of the Children's Institute and the Centre for Actuarial Research, University of Cape Town, and personal communication Leigh Johnson.

By including a right to property in the Children's Bill, the Department of Justice would need to review the Administration of Estate's Act and amend it in order to provide sufficient protection to children. The property right could also be effectively used by institutions and organisations acting on behalf of children to argue in the Children's Court for the effective protection of a specific child's right to inherit.

Maltreatment, abuse, neglect, degradation, exploitation and other harmful practices

(1) Every child has the right to be protected, through administrative, social, educational, punitive or other suitable measures and procedures, from all forms of torture, physical violence, mental harassment, injury, maltreatment, abuse, neglect, degradation and exploitation.

(2) Every child who has been tortured, maltreated, harassed, abused, neglected, degraded or exploited has the right to have access to social services including counselling and medical treatment at state expense.

Harmful social and cultural practices

(1) Every child has the right not to be subjected to harmful social and cultural practices which affect the well-being, health or dignity of the child.

(2) Every child –

- (a) below the minimum age set by law for a valid marriage has the right not to be given out in marriage or engagement; and
- (b) above that minimum age has the right not to be given out in marriage or engagement without his or her consent.

(3) Female genital mutilation or the circumcision of female children is prohibited.

(4) Every male child has the right –

- (a) to refuse circumcision; and
- (b) not to be subjected to unhygienic circumcision.

(5) Every child has the right –

- (a) to refuse to be subjected to virginity testing; and
- (b) not to be subjected to unhygienic virginity testing.

Economic exploitation

Every child has the right to be protected, through administrative, social, educational, punitive or other suitable measures and procedures, from –

- (a) economic exploitation; and
- (b) performing any work –
 - (i) that is inappropriate for a person of that child's age; and
 - (ii) that places at risk the child's well-being, education, physical and mental health, and spiritual, moral or social development.

Education

(1) Every child has the right to –

- (a) education that is compulsory and available free to all
- (b) educational facilities of a reasonable standard
- (c) vocational information and guidance; and
- (d) to receive education and information through a medium which makes such education and information accessible to the child, having regard to the child's language, personal circumstances and any disability from which the child may suffer.

(2) The education of a child must be directed towards –

- (a) the development of the child's personality, talents and intellectual and physical abilities to their fullest potential;
- (b) the development of respect for the democratic values of human dignity, equality and freedom enshrined in our Constitution;
- (c) the development of respect for the child's parents, cultural identity and values, and language;
- (d) the preparation of the child for a responsible life in a free society, in the spirit

- of peace, friendship, humanity, tolerance and national unity; and
- (e) the development of respect for our natural and cultural heritage.

Notes: See Education Law Project (WITS) submission for further guidance for formulation.

Health Care

Every child has the right to basic health care that promotes the child's health, prevents acute and chronic health conditions and disabilities, adequately manages and treats acute and chronic health conditions and that provides rehabilitation after illness or injury. This right includes the right to -

- (a) confidential access to contraceptives and health related information on sexuality, reproduction, termination of pregnancy, STDs and HIV, regardless of age.
- (b) confidentiality regarding his or her health status and the health status of a parent, care-giver or family member.
- (c) request and receive information on health promotion and the prevention of ill-health and disease.
- (d) have access to appropriate assistive devices that are necessary to enable the participation of children with disabilities and chronic illnesses in community life.

Notes: In order to reduce teenage pregnancies, STDs, HIV and child abuse, it is essential that children feel comfortable to request information on contraceptives, STDs, HIV and pregnancy without the fear that their confidence will be broken. Our child participatory research, in particular the National Children's Forum on HIV has revealed that children do not feel that their questions and information will be kept confidential, this is particularly because some nurses consider the children too young to be asking such questions. A clear right that children have the right to ask for and the right to receive information would ensure that health care personnel know their obligations and give children more confidence to ask about these "taboo" subjects.

Social security

- (1) Every child has the right to social security, including access to social assistance if the parent or care-giver cannot or does not provide for the basic needs of the child.
- (2) Every child with a disability has the right to have access to social assistance if such social assistance is needed to enable the child to survive, develop and participate to full potential.

Water and sanitation

(1) Every child has the right to have access to clean water within a reasonable distance from his or her home.

(2) Every child has the right to have access to sanitation services aimed at preventing infections and diseases

Environment

(1) Every child has the right to an environment that is not harmful to his or her safety or health.

Basic nutrition

(1) Every child has the right to basic nutrition in order to prevent illness and disease and to promote their right to survival and development. The state must provide programmes that are designed to reach all children living in poverty.

(2) A child suffering from malnutrition, or who is at risk of malnutrition has the right to prompt assistance from the state through the immediate provision of food or other emergency relief.

Notes: A national survey conducted by the Department of Health (1995) to assess the nutritional status of children in the country revealed that:

- 10% of South African children are underweight for their age and 20 % of children are stunted for their age (indicating acute and chronic malnutrition)
- 33% of children have marginal vitamin A deficiency, which by world standards indicates a severe public health problem in the country
- 10% of children have iron deficiency, which is also of public health concern

These results indicate that under nutrition, including micronutrient deficiency is a serious problem in South Africa, especially in young children.

A workshop undertaken by the Right to Food Campaign noted that “over 79% of rural people live in poverty and, 1 in 4 children are stunted by the age of 6”²⁶, According to the National Food Consumption Survey (1999), 21.6% of children aged between 0-9 years suffered from stunting, 10% were underweight and 4% had wasting.

²⁶ www.communitylawcentre.org.za/ser/right

Shelter

Every child has the right to shelter that adequately protects the child against the elements.

Legal representation

(1) Every child has the right to legal representation in criminal proceedings affecting the child and the state must assign a suitably qualified practitioner to represent the child if the child cannot afford his or own legal representative.

(2) Every child has the right to legal representation in civil proceedings affecting the child and the state must assign a legal practitioner to represent the child if the child cannot afford his or her own legal representative and if substantial injustice would result if the child was not represented.

Social services

Every child has the right to social services, including services that are aimed at:

- a) Assisting the child's caregiver or parent to provide for the child's survival, development and participation needs
- b) Assisting the child and the child's parent or caregiver to address social problems within the family and community that are violating the child's rights
- c) Assisting parents and caregivers of children in especially difficult circumstances to provide adequately for their children's needs
- d) Providing adequate protection for children who have been abandoned, abused or exploited
- e) Providing adequate alternative care for children whose parent's or caregivers are unable or unwilling to care for them
- f) Providing adequate shelter and care for children living on the street or in child headed households
- g) Providing adequate protection, care and humanitarian assistance to regupee and undocumented migrant children.

Notes: See discussion in SALC Discussion Paper

Refugee and unaccompanied minors

(1) Every child who is a refugee or asylum seeker in terms of the Refugees Act and every unaccompanied foreign child, has –

- (a) the rights set out in this Chapter,
- (b) the right to be re-united with his or her parents or family if the child was separated from his or her parents or family.
- (c) the right to receive humanitarian protection and assistance to realise the rights referred to in paragraphs (a) and (b).

(2) No child may in any way whatsoever be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such a refusal, expulsion, extradition, return or other measure, such child is compelled to return to or remain in a country where -

- (a) He or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
- (b) His or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination, other events seriously disturbing or disrupting public order in either part of the whole of that country.

Children with disabilities and chronic illnesses

(1) Every child with a physical, sensory, neurological, intellectual or psychiatric disability and every child with a chronic illness, has the right –

- (a) to enjoy life in conditions which ensure dignity, promote self-reliance and facilitate active participation in the community; and
- (b) to receive support that contributes to and enhances the quality of life; and
- (c) to receive financial assistance from the state to ensure a standard of living adequate for his or her development and equal enjoyment of his or her constitutional rights.

Notes: Article 23 of the UN Convention on the Rights of the Child states that disabled children should be provided with conditions for living 'that promote self reliance' and 'facilitate active participation in the community'. Paragraphs 2 and 3 set out the right of the disabled child to 'special care' stressing again that assistance should be designed to ensure 'effective access' to various services in a manner 'conducive to the child's achieving the fullest possible social integration and individual development. The child has a right to education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities.. Assistance must be appropriate to the child's condition and to the circumstances of parents or other care-givers. It should be provided for free whenever possible taking into account the financial resources of the parents and others caring for the child.

The Standard Rules on the Equalization of Opportunities for Persons With Disabilities²⁷, adopted by the United Nations General Assembly, emphasize that States should ensure that disability aspects are included in all relevant policy making and national planning²⁸. States have financial responsibility for national programs and measures to create equal opportunities for persons with disabilities.²⁹ States also have the responsibility to create the legal basis aimed at achieving the objectives of full participation and equality of persons with disabilities. Disability matters should be included within legislation dealing with particular topics such as children.³⁰

The Committee on Economic, Social and Cultural Rights has also issued a General Comment on Disability. The General Comments of this Committee are of great value as they have in the past been incorporated into Constitutional Court judgments.³¹ The Committee draws attention to the importance of addressing disability explicitly. They state that the rights of persons with disabilities must be protected and promoted through general as well as specifically designed laws, policies and programs.³²

The Economic and Social Council also adopted a resolution in 1997 on 'Children with Disabilities'³³. This resolution recognizes that special attention should be directed towards children with disabilities and their families or other caretakers. It calls on governments to ensure equal access to education. It also emphasizes the right of disabled children to the highest attainable standard of health.³⁴

Leisure and recreation

Every child has the right to rest and leisure and to engage in play and recreational activities appropriate to the child's age. Including the right to have access to recreational facilities within reach of his/her home or school .

²⁷ A/RES/ 48/ 96/, 85th Plenary Meeting 20 December 1993 taken from <http://www1.umn.edu/humanrts/instreet/disabilitystandards.htm> accessed on the 7/19/2004.

²⁸ Rule 14.

²⁹ Rule 16

³⁰ Rule 15. 3 (b).

³¹ For example in the case of *Grootboom*.

³² Committee on Economic, Social and Cultural Rights, General Comment 5, HRI/GEN/1/Rev.2, p. 66.

³³ Resolution 1997/ 20 adopted on the 36th plenary meeting on the 21st of July 1997, taken from <http://www.un.org/documents/ecosco/res/1997/eres1997-20.htm> accessed on the 10/ 7/ 2004.

³⁴ Article 10.

Access to courts

Every child has the right to bring a matter to court, provided that matter falls within the jurisdiction of that court. A child may be assisted in bringing the matter to court according to the ordinary rules of law, however, may also do so in his or her own name.

Notes: As some matters place children directly in conflict with their parents or guardian, it will be incongruous to require a child to be assisted in each matter that he or she brings to court. A child should have the right to approach the children's court independently, precisely when the nature of the proceedings relate to the child's protection, care and well-being.

Age of majority

A child, whether male or female, becomes a major upon reaching the age of 18 years.

Enforcement of rights

(1) Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Chapter of the Children's Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

(2) The persons who may approach a court, are:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.



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**SUBMISSION³⁵
Number 2
ON THE
CHILDREN'S BILL**

From the **Children's Institute**, University of Cape Town
To the Portfolio Committee on Social Development
27 July 2004

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Introduction

The Children's Institute's main submission focusses on the Children's Rights Chapter of the Bill. This is a supplementary submission on the following aspects of the Bill:

- Chapter 1 – Objects and Implementation
- Chapter 9 – Primary prevention and early intervention
- Chapter 4 – Parental rights and responsibilities
- Chapter 8 – Protection of Children

Chapter 1 – Interpretation, Objects, Application and Implementation

The SALRC Discussion Paper refers in many places to the need to support families to look after their children so as to prevent abuse and neglect from occurring. However, despite the SALRC's recommendations, the tabled Bill is focussed on secondary and tertiary interventions after a child has been abused or neglected. While secondary and tertiary interventions are essential and need to be improved, if the Bill does not adequately provide for greatly improved provision of primary prevention and early intervention services, the second and tertiary layers of care will continue to operate in crisis mode as more and more abused and vulnerable children need to be taken up into the formal child protection system. The White Paper on Social Welfare of 1997 was very clear that the Department's new philosophy included a shift towards a social developmental approach and away from a residual welfare approach. However, the tabled Bill does not reflect this shift in policy direction.

³⁵ Written by Solange Rosa and Paula Proudlock

Secondary and tertiary interventions are easier to legislate for, while the promotion of substantive equality through primary prevention is difficult to legislate and requires considerable resources. However, our Constitution and Policy Documents such as the White Paper on Social Welfare oblige us to promote substantive equality and the prevention of abuse and neglect.

We therefore recommend that the Children's Bill should also play its part towards our country's equity transformation agenda and unambiguously provide for the promotion of substantive equality and primary prevention.

We therefore recommend that a clear focus on primary prevention needs to come through stronger as a primary principle of the legislation. An important ingredient for such an approach would be to include the principle of primary prevention as an object of the Act. We also provide comments on how chapter 9 can be strengthened to ensure improved delivery of primary prevention and early intervention services.

Recommended amendment:

Objects

- 1) The objects of this Act are -
 - a. To make provision for structures, services and means for promoting the **survival**³⁶ and sound physical, mental, emotional and social development of children;
 - b. **To assist families to care for and protect their children**³⁷
 - c. To utilize, strengthen and develop³⁸ community structures which provide care and protection for children;
 - d. To prevent, [as far as possible], any ill-treatment, abuse, neglect, deprivation and exploitation of children;
 - e. To provide care, protection and **treatment**³⁹ for children who are suffering ill-treatment, abuse, neglect, deprivation or exploitation or who are otherwise in need of care and protection; and
 - f. Generally, to promote the well-being of **all** children.

³⁶ Article 6 of the UN Convention on the Rights of the Child obliges state parties "to ensure to the maximum extent possible the survival and development of the child". South Africa has a high child death rate, particularly in rural areas where children have limited access to social development and health services. The legislation needs to take cognisance of the need to promote the equal distribution of services and structures and to provide for interventions that are designed specifically to target children in rural areas where courts, social workers and NGOs are scarce. The inclusion of the word "survival" will ensure that structures, services and resources are dedicated to addressing the basic survival needs of children living in remote rural areas.

³⁷ Chapter 9 does include this provision, however, to give it prominence, we suggest that it be included as a core principle we well.

³⁸ Will this be interpreted to place an obligation on the Department to develop existing community structures or to also enable community structures to be set up? Many community structures could be set up if the Department took a pro-active approach of encouraging such initiatives through publicizing the availability of technical and financial support and providing such support in an accessible manner.

³⁹ Article 39 of the UN Convention on the Rights of the Child obliges state parties "to take all appropriate measures to promote physical and psychological recovery and social re-integration of child victims...". The word "treatment" may not be the most appropriate word to convey this article, but our recommendation is that this intention must be included as an object of the Act. Primary prevention requires that child victims be given appropriate psychological counselling to ensure that they can recover from the abuse or neglect to prevent the cycle of abuse from continuing.

Chapter 9

We are concerned that the chapter does not make the provision of early intervention and primary prevention services compulsory for provincial departments. "Social services" currently receives under 7 % of provincial social development funding. This 7% includes the main poverty alleviation funds that are channeled to state and NGO run projects, funds for children's homes and street children shelters, funds for old age homes, funds for victim empowerment and diversion programmes for children in trouble with the law, and funds for alcohol and drug rehabilitation centres and programmes.

The yearly shrinking of this budget compared to the growing numbers of vulnerable families is of great concern to all the organisations working in the sector. Families under stress from poverty, unemployment, and HIV are cracking under this triple burden and the children in these families often bear the brunt of the strain experienced by their parents. Neglect and abuse are more likely to occur in families under stress from dire poverty, unemployment and HIV than in families that have do not have to carry the stress of worrying whether they will be able to eat and feed their children every day.

In order to improve the allocation of money towards social services and to ensure that provinces prioritise the delivery of these services when dividing up the equitable share, we recommend the following changes:

Section 145 (1) of the August 2003 version of the Bill provided that the "MEC may, from funds appropriated by the relevant provincial legislature for this purpose, provide for (a) facilities and services for prevention and early intervention services to families, parents, care-givers and children; and (b) the subsidisation of facilities and services by non-governmental bodies and other organs of state for prevention and early intervention services to families, parents, care-givers and children."

However, the Bill no longer contains this provision.

We recommend that the provision be re-inserted into the Bill and that the word "may" is replaced with the word "**must**" in order to ensure that provincial departments budget for and provide prevention services.

We are also concerned that the strategy mentioned in **section 146** is restricted to a national department of social development strategy. A National Strategy that only relates to the Department of Social Development will continue to encourage the fragmentation of services and functions of all State departments who are responsible for providing basic services and primary prevention services to families and care givers who are unemployed and struggling under the burden of HIV/AIDS. It is a futile exercise for the Department of Social Development to develop strategies that would also affect other government departments if these government departments aren't obliged by legislation to participate in the development of such strategies. By

legislating for an inter-departmental and inter-sectoral strategy that falls under the umbrella of the National Policy Framework we can better ensure that all relevant State departments are compelled to work together and eradicate the duplication of services and funding. We therefore recommend that s161 of the SALRC Bill should be re-inserted into the Bill.

National policy framework to include strategies for securing provision of prevention and early intervention services

161. The Minister must include in the national policy framework referred to in section 5 a comprehensive national strategy aimed at securing the provision of prevention and early intervention services to families, parents, care-givers and children across the country, including strategies –

- (a) to ensure an integrated approach among all spheres of government in the planning of sound and stable family structures;**
- (b) to establish an equitable distribution of resources among all spheres of government to ensure the involvement of all such spheres in the provision of prevention and early intervention services;**
- (c) to build the capacity of government in all spheres to cope with the need for prevention and early intervention services where such capacity is lacking; and**
- (d) to develop an efficient and adequate infra-structure for the provision of prevention and early intervention services.**

Chapter 4 - Parental Responsibilities and Rights (PRR)

The diversity of family forms in South Africa

Although South African law has no single definition of a 'family', various pieces of legislation present the perception that the 'nuclear family form', based on the relationship of a married man and woman and their biological or adopted children is the dominant form of family.⁴⁰ This does not reflect the reality of South African society where responsibility for children is by no means only linked to biological parenthood. The South African Law Reform Commission (SALRC) in their review of the Child Care Act discussed this issue in depth and recommended that it is important and necessary to recognise a broader concept of 'family' than the traditional nuclear

⁴⁰ See Child Care Act 74 of 1983; Children's Status Act 82 of 1987; Guardianship Act 192 of 1993.

family.⁴¹ The SALRC Discussion Paper comments that it is currently difficult for a caregiver to obtain legal recognition of their parenting role as a 'social' or 'psychological' parent, despite the wide diversity of family forms in existence.⁴²

The nature of family life is far from static and is shaped by the historical and socio-economic conditions in society, amongst other things. In South Africa, the history of colonialism, the creation of a migrant labour system, the complex system of apartheid laws, and more recently the scourge of the HIV/AIDS pandemic, has had enormous impact on family life.⁴³ It is common for children to live apart from their parents in many types of family arrangements. An analysis of the General Household Survey 2002 in fact shows that 24% of African children under the age of 18 do not live with either of their parents, 11% of coloured children, 3% of Indian children and 2% of white children – with an overall average of 21%.⁴⁴

The AIDS pandemic is likely a causal factor for larger numbers of children living without their parents. As a further consequence, children increasingly have to assume more significant roles of responsibility. Though not a new phenomenon, more children have to take care of younger siblings or other children while caregivers are sick and dying or when they have died already. These children have to perform all or some of the functions of a 'primary care-giver' in a family environment, including procuring food, preparing it, dressing and feeding younger children, earning money and performing other household chores.

It is these considerations that must be taken into account when examining the provisions in the Children's Bill related to parental responsibilities and rights (PRR) so that we may assess them in the light of the different family forms which exist in South Africa and thereby adequately provide for children in these various contexts.

Parental rights and responsibilities provisions in the Children's Bill

The new Children's Bill will modernise South African Law as it takes a child rights approach, promotes mediation rather than conflict and recognises flexible and diverse family forms. These aspects converge to provide a shift in emphasis from parental power to parental responsibilities and rights (PRR). Parental power is historically rooted in private law and was used more to reduce conflict between

⁴¹ South African Law Commission, Project 110, *Review of the Child Care Act* Discussion Paper, Chapter 8, 183 (hereafter 'SALC Discussion Paper'). It showed that, for example, in South African case law only in exceptional circumstances will the High Court be prepared to award guardianship or custody of a child to a non-parent to the exclusion of the natural parents and that it is highly unusual for the court to appoint non-parents as guardians or custodians to act as such *together* with the parents of the child in question.

⁴² Ibid, SALC Discussion Paper, 183. The Law Commission also goes on to discuss in some depth a comparative review of recent law reform endeavours in the area of child law in other countries. The Commission reported that the law in other African countries is beginning to reflect an increased recognition of both a broad range of family forms and the role of 'social parents', viz. persons who are not biological parents but who fulfil parental functions by taking care of children or being otherwise involved in their upbringing. See 184-187.

⁴³ S Burman (1991) 'Capitalising on African Strengths: Women, Welfare and the Law' 7 *SAJHR* 2, 215; M Ramphela (1993) *A Bed Called Home* Cape Town: David Phillip, Chapter 6, for a discussion of the impact of migrancy on families; Goldblatt & Liebenberg (n 4).

⁴⁴ D Budlender & H Meintjes, *Children's Family/Household Context in Contemporary South Africa* (2004). Paper presented at the Workshop on the provisions for Parental Rights and Responsibilities in the Children's Bill, Children's Institute, Cape Town, 24 February 2004 (unpublished and on file with the author).

parents on divorce; however this did not recognise the emerging self-determination of the child and the varied roles of 'care-givers' in the lives of children.

Chapter 4 on Parental Responsibilities and rights proposed in the new Children's Bill is thus a welcome change to the law. Below is specific commentary on the various provisions in Chapter 4 with particular comments and suggestions for refining those sections which highlight problems with application to the reality of children's lives, in particular in the context of HIV/AIDS and poverty. The comments are based on views shared and conclusions reached at a workshop held by the Children's Institute in Cape Town in February 2004.⁴⁵

Section 21 and 22 - Parental responsibilities and rights of unmarried fathers and parental rights agreements

A particularly controversial provision in the Bill is the PRR of unmarried fathers. The Bill provides for a biological father to have rights and responsibilities over his child if he is married to the child's mother or if he was married to her at the time of the child's conception, the child's birth or any time between the child's conception and birth. For those biological fathers who do not fall into the above categories, section 21 provides that unmarried fathers may acquire such PRR in respect of the child if the father has lived with the child's mother for a period of 12 months or more consecutively or for periods which together amount to 12 months; or if he has cared for the child with the mother's informed consent for 12 months or more consecutively or for periods which together amount to 12 months.

Section 22 further provides that unmarried biological fathers may acquire PRR by entering into an agreement with the mother or the person having PRR over the child. The agreement must set out which PRR are acquired, must be registered with the family advocate or made an order of the High Court, a divorce court or a children's court.

The controversy relates to unmarried fathers acquiring automatic rights and responsibilities in respect of their children when they have lived with the mother or cared for the child for a period of time but thereafter may no longer play a role in the child's life and have acquired PRR over the child. On the other hand, from a father's rights' perspective, it could be argued that not granting unmarried fathers automatic rights over their children amounts to unfair discrimination based on gender and marital status, as per section 9 of the Constitution of South Africa.⁴⁶

The *Fraser*⁴⁷ case, which dealt with rights of unmarried fathers, tried to carefully balance the rights of biological fathers and mothers and considered that a nuanced approach which accommodated the different roles that mothers and fathers can and do play, was necessary in today's context where men hold unequal socio-economic power. Neither a blanket provision in support of the rights of all unmarried fathers to veto adoption of their children nor a blanket provision against was the answer to the problem. Instead the Court stressed that the guiding principle in each case must be

⁴⁵ Notes from Children's Bill Workshop, Hosted by the Children's Institute, UCT, 24 - 25 February 2004.

⁴⁶ Constitution of the Republic of South Africa, Act 108 of 1996.

⁴⁷ *Fraser v Children's Court, Pretoria North* 1997 (2) BCLR 153 (CC).

the best interests of the child and that the onus should remain on the unmarried father to approach the court as placing this onus on women who did not have equal power in South Africa and who were bearing the burden of child care responsibilities, would not be reasonable and fair . Parliament then passed the Natural Fathers Born out of Wedlock Act 86 of 1997 where the factors that a Court must take into account when deciding what would be in the best interests of the child were listed.

Section 21 appears to be a middle ground between providing automatic PRR for all unmarried fathers, and providing the opportunities and encouragement for fathers to play a stronger caring and support role in the lives of their children. However, we submit that great uncertainty may be created by simply leaving the determination as to whether the conditions listed in section 21 do or don't exist up to the father and mother concerned. Due to the power imbalance in South African society being weighted against women, mothers may be disadvantaged because in reality the fathers are likely to make the decision as to whether the conditions exists or not thereby putting the burden on the mother to challenge the situation in Court if she believes that the conditions do not exist. In the Fraser case mentioned above, the Court was careful to avoid placing the onus on the women to challenge the matter in Court principally because of the current power imbalance and socio-economic status of women versus men.

We therefore recommend the insertion of a clause stating that the acquisition of PRR by an unmarried father should be confirmed by a court order (in High Court, divorce court or children's court) and the burden of proof would be on the unmarried father to show that he satisfied the conditions mentioned above. Unmarried fathers would be in a better position than they currently are under the law in that they would just need to prove that the conditions in section 21 were present, thereby making their burden considerably lighter than at present. A further change would be that they can approach the Children's Court or Divorce Court whereas at present they have to go to the High Court. This would make access to the Court easier and less costly.

Insert the following:

- 21.** (1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child –
- (a) if at any time after the child's birth he has lived with the child's mother –
 - (i) for a period of no less than 12 months; or
 - (ii) for periods which together amount to no less than 12 months;
 - (b) if he, regardless of whether he has lived or is living with the mother, has cared for the child with the mother's informed consent –
 - (i) for a period of no less than 12 months; or
 - (ii) for periods which together amount to no less than 12 months.
- (1A) Acquisition of parental responsibilities and rights in terms of this section must be made an order of the High Court, a divorce court or the children's court in order to have validity.**

(2) This section does not affect the duty of a father of a child to contribute towards the maintenance of the child.

Section 22(3) and 23 (2) - Jurisdiction of Courts to adjudicate over applications for the acquisition or termination of guardianship of a child

It is of great concern that the Children's Bill retains the High Court jurisdiction as upper guardian of all children. This means that any matters related to the guardianship of children has to be dealt with by the High Court, which reduces the original aim of improving accessibility to the courts for all. It is submitted that the High Court, divorce court and children's court should have jurisdiction to assign and terminate *all* parental rights and responsibilities, including guardianship. [Please see Community Law Centre submission for more detail.]

In the context of HIV/AIDS, many children are being orphaned and their rights to inherit the property of their parents are often not being upheld. The informal caregivers of orphaned children, such as aunts and grannies need to have easy access to the Courts in order to acquire guardianship of the child which they need as a pre-requisite in order to protect the child's property rights. If guardianship is kept as the sole prerogative of the High Court, the only interests being served will be those of the legal profession and the very few children lucky enough to be wealthy. The majority of children will be disadvantaged and will not be able to access the Courts and therefore the necessary protection needed to protect their rights to their homes and insurance policies when their parents have died.

Delete the following:

- 22. ...**
[(3) Only the High Court may confirm a parental responsibilities and rights agreement that relates to the guardianship of a child.]
- 23. ...**
[(2) Only the High Court may issue an order that relates to the guardianship of a child.]

Section 26 (1) - Assignment of parental responsibilities and rights to parent-substitutes

The issue of passing on guardianship and custody through a document or a formal will is also of grave concern in the context of many parents and care-givers dying due to the AIDS pandemic. The provision in section 26 whereby PRR may be assigned to other care-givers via in a written document or as part of a will is thus welcome and allows parents to plan ahead for the care of the children they will leave behind in the event of their death. It is important that care-givers may be appointed through a mechanism that is easily accessible and does not require the courts.

There is however, an increased need for education of people in order to ensure that they make provisions for their children upon their death. Mere legislation is not enough. We recommend that the regulations provide that home based care-givers

and social workers be instructed to make succession planning part of their duties when caring for and attending to sick and dying parents.

If there is a failure to appoint someone else with PRR through using section 26 or a will, then provision is also made in section 23 for persons to apply to the High Court, a divorce court or a children's court for PRR. The court is also required to take into account certain factors, including what is in the best interests of the child. This provision is supported. However, note our concerns above with respect to section 23(2) restricting guardianship applications to the High Court.

Section 149 (Chapter 8) - Parental rights and responsibilities in relation to child-headed households

In 2002 it was estimated that there were approximately 90 000 children under the age of 18 who had lost a mother to HIV. The majority of children who are orphaned are cared for by relatives without any support from the state. A small proportion are adopted or cared for in foster care, or residential care. And a small proportion live in child-headed households. It needs to be recognized that while child headed households do exist, the majority of orphans are not living on their own. However, despite the small extent of child headed households, they do exist and it is predicted that the numbers will increase as more children are orphaned and extended families become full to capacity and unable to take in any more children. The reality of the situation needs to be recognised and therefore we need to recognise the existence of child headed households and provide adequately for their care and protection.

The major problems for these children are that they become vulnerable without an adult to take on the parental rights and responsibilities for them, they are unable to consent to medical treatment (particularly for siblings) and their property rights could be abused.

Currently if both parents die it is unlikely that the children will have guardians or custodians. Without a will there is difficulty with the assignment of PRR and a High Court appointment is very formal and largely inaccessible. Therefore child-headed households are left without guardians or custodians. This has legal implications in that a child can't institute legal proceedings, their property is vulnerable and there is no custodian for the daily activities.

There are three possible solutions to this:

Firstly, the SALC Draft Children's Bill gives legal recognition to child-headed households and allows for an adult mentor who would have access to and be able to administer their grants and social benefits, but would be required to give due weight to the choices of the children. There is thus the possibility of the mentor acquiring some PRR in respect of the child. The household mentor could take responsibility, together with the child-head, for making decisions regarding the child's health, well-being and development. The provisions for household mentor could thus apply in conjunction with s23.

Secondly, a child who is heading a household could acquire some rights and responsibilities under s 32, where the child is *de facto* caring for other children. This

raises the issue and question as to which age a child would be able to acquire PRR, but it is submitted that where a child is de facto caring for other children and it is in the best interests of those children to continue to live together in the child-headed household, that the child-head should – just as everybody else – be able to exercise any PRR as reasonably necessary to care for the other children. In addition, provision may be made for others, such as nurses and physicians, to make the necessary decisions in relation to medical treatment for the children, for example.

Thirdly, if there is a relative living nearby who is caring for the child/ren but is not resident, they could still exercise PRR over the children under s32. They could also have PRR assigned to them by an order of court under s23 as there is no specific requirement that they in fact be living with the child.

Chapter 8 – Protection of Children

Part 3 – Protective measures relating to health of children

When the notice for hearings was advertised, the Bill upon which the hearings were called did not include Chapter 8 and we therefore did not plan for including our comments on chapter 8. However, we were informed on Friday the 23rd of July that the Department of Social Development will be advising Parliament to incorporate Chapter 8 into the s.75 Bill. We did not have enough time to finish our research and consultation on Part 3 in time for the submission deadline of 27 July and therefore would like to request that we be allowed under the circumstances to table a further submission on Part 3 on the 11th of August.

Part 4 – Other protective measures

Section 136 - Child Headed Households

By December 2002, roughly 900 000 children under the age of 18 in South Africa were estimated to have lost a mother, the majority of these to HIV/AIDS, and that figure is expected to rise to roughly 3 million by the year 2015, in the absence of major health interventions⁴⁸.

There is no comprehensive national data on the prevalence of child-headed households at this point in time.⁴⁹ On the basis of their national household survey on HIV/AIDS, the Human Sciences Research Council (HSRC) argues that:

‘Many community-based assistance programmes report an increase in households headed by children, or consisting only of children, i.e. orphans or

⁴⁸ Dorrington, R., Bradshaw, D., & Budlender, D. *HIV/AIDS Profile in the Provinces of South Africa: Indicators for 2002*, Cape Town: Centre for Actuarial Research, University of Cape Town, 2002.

⁴⁹ Nelson Mandela’s Children’s Fund, *A Study into the Situation and Special Needs of Children in Child-headed households*, 2001. <http://www.mandela-children.com/english/worddoc/Report.doc>, p. 4. Gow, Jeff & Desmond, Chris, *The Current and Future Impact of the HIV/ AIDS Epidemic on South Africa’s Children*, in Cornia, Giovanni Andrea, *AIDS, Public Policy and Child-Well-Being*, 2002, at p.19 <http://www.unicef-icdc.org> also remark on the lack of statistical information available on child-headed households.

children without resident adult guardians. However, no national data on child-headed households has yet been reported.⁵⁰

Other studies also provide anecdotal data of the existence of child headed households in South Africa. The lack of statistical evidence and probable low incidence of child-headed households should not, however, detract from the fact that child-headed households exist. Furthermore, in the context of increasing numbers of orphans as the HIV/AIDS pandemic progresses, it is likely that South Africa will face increasing numbers of children living without adult caregivers. This recognition is important in order to guide equitable, appropriate and effective responses of support.

Children living in child-headed households are particularly vulnerable without the care and support of parents or substitute parents, and require extra support to meet their various basic needs, including financial, emotional, psychological, health, education etc. We are particularly concerned with support (financial and otherwise) to children within the context of living without adult care-givers.

Under the Constitution, the State is obliged to provide social security to everyone, including social assistance if they are unable to support themselves and their dependants. In addition, the State has a responsibility to children who are orphaned and have no parental care. The Government thus has an obligation to provide social assistance to these children, via a mechanism that is practical, reasonable and appropriate.

One of the ways, we recommend, is the mentorship scheme proposed in the SALRC draft of the Children's Bill and section 136 of the Tabled Bill. This scheme should apply to children where it is not in their best interests to be living in a child-headed household without adult supervision, *and* where a potential adult mentor is available. Essentially, child-headed households could be assisted by mentors, as required and available, (individuals working in NGOs or CBOs and other responsible individuals) to provide the necessary adult supervision in the application and spending of the grant. However, it is important to stress that children who are in fact performing the function of primary care-giver should be able to claim and access the CSG on their own behalf and on behalf of children in their care. The mentorship scheme should only kick in when children are too young or immature to perform the functions of a primary care-giver, or where there are no adult mentors available in the community.

The SALRC Draft Bill contained a provision which allowed adult mentors to be appointed by an organ of state, non-government organization or a children's court. This mentorship scheme was incorporated to give recognition to the support that adults (community volunteers) in affected communities already provide to children living in child-headed households and enable them to access grants on behalf of these children. We therefore strongly recommend that the SALRC model be reinstated in order to also allow for an adult to be appointed as a mentor of a child-headed household, as designated by an NGO or organ of state.

We recommend the amendment of s136, in order to protect the rights of child-headed households in relation to access to social grants from the state, in relation to care

⁵⁰ *Human Sciences research council (HSRC) study on HIV/AIDS, Household Survey 2002*, p. 68.

and support more broadly and in order to protect their property interests as raised above.

Child-headed households

136. (1) A provincial head of social development may recognise a household as a child-headed household if –

- (a) the parent or primary care-giver of the household is terminally ill or has died or has abandoned the household;
- (b) no adult family member is available to provide care for the children in the household; and
- (c) a child has assumed the role of primary care-giver in respect of a child or children in the household.

(2) A child-headed household must function under the general supervision of an **[organ of state or non-governmental organisation] adult designated by** –

- (a) **an organ of state or non-governmental organization** determined by the provincial head of social development; or
- (b) a children's court.

(3) The **adult person [organ of state or non-governmental organisation]** referred to in subsection (2) –

- (a) may collect and administer for the child-headed household any social security grant or other grant or assistance to which the household is entitled; and
- (b) is accountable to the provincial department of social development or the children's court, **or to another organ of state or a non-governmental organisation designated by the provincial head of social development,** for the administration of any money received on behalf of the household.

(d) may assist to protect the property interests of children living in the child-headed household;

(e) may exercise any parental rights and responsibilities as reasonably necessary in the provision of care for the children as per section 32.

(4) The **adult person [organ of state or non-governmental organisation]** referred to in subsection (2) may not take any decisions concerning such household and the children in the household without consulting –

- (a) the child at the head of the household; and
- (b) given the age, maturity and stage of development of the other children, also those other children.

(5) The child heading the household may take all day-to-day decisions relating to the household and the children in the household as if that child was an adult primary care-giver.

(6) A child-headed household may not be excluded from any aid, relief or other programme for poor households provided by an organ of state in the national, provincial or local sphere of government solely by reason of the fact that the household is headed by a child.

Insert the following definition in section 1 of the Bill:

"mentor" means an individual or organisation who has been appointed by the relevant provincial Department of Social Development, a designated non-governmental organisation, or the Child and Family Court, to apply for, collect and administer a grant on behalf of a street child or a child living in a child headed household.