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*The Protection of Children
from Violence*

THE LEGAL PROTECTION OF CHILDREN AGAINST MALTREATMENT IN SOUTH AFRICA

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INTRODUCTION

South Africa is in a process of transformation. Much of the process of change is brought about through legal reform. The process started with the promulgation of a new Constitution which contains, for the first time, a Bill of Rights and includes the ratification of Human Rights Conventions and other Treaties which bring South Africa out of its former position as a pariah State.

The process extends to Law Commission investigations, the circulation of issue papers followed by discussion papers, and then reports containing lists of recommendations and draft bills drawn-up in order to comply with the new Constitutional and public international undertakings. It involves numerous Constitutional Court cases to interpret and protect the new rights, often followed by amendments to, or the repeal of, existing Acts.

Amongst the welter of legal reform driven by new public international undertakings, this paper focuses on legal measures taken to protect children from violence, abuse, neglect and maltreatment.

In the South African context, the task is a daunting one. As the South African Law Commission states:²

‘Apartheid policies, deep-rooted poverty and unemployment, poor and non-existent schooling, the breakdown of family life and the strains on a society in transition have left the majority of South African children in an extremely vulnerable position.’

The legislature does not act in a vacuum and drafting legal provisions is not merely an academic exercise. The vulnerable position of the majority of South Africa’s children has consequences for the legislature as to how to identify children who suffer from ‘maltreatment’, ‘abuse’ and ‘neglect’; what procedures need to be followed when they are identified; and who must take responsibility. The Appendix attached to this paper is an attempt to describe and quantify South African children who are in a ‘vulnerable position’ and for whom legislative, administrative and other measures need to be sought in order to honour the obligation under the CRC.

THE STATE’S COMMITMENT TO PROTECT CHILDREN AGAINST MALTREATMENT

The new South African State’s commitment to protect children started in 1993 when Mr F W de Klerk, State President at that time, and Mr Nelson Mandela, soon to become State President, signed the World Declaration on the Survival, Protection and Development of the Child in December 1993.

Thereafter a list of well-known Constitutional and public international undertakings followed:

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²South African Law Commission, Issue Paper 13, Project 110, *The Review of the Child Care Act*, April 1998 1.

- X adoption of the 1993 'interim' Constitution which contained a Children's Right Clause, inter alia, giving 'every child' the right 'not to be subject to neglect and abuse'¹;
- X ratification of the United Nations Convention on the Rights of the Child containing several articles related to the child's right to protection United Nations Convention of the Child (CRC)²;
- X adoption of the 'final' Constitution which retained and expanded the Children's Rights clause³;

¹Constitution of the Republic of South Africa Act No 200 of 1993, s30(d).

²Articles 3(2), 6, 16, 19, 34, 36, 37 are some dealing with protection from abusive treatment.

³The 'final' constitution was adopted by a two thirds majority of the Constitutional Assembly on 4 May 1996. After certain amendments and certification by the Constitutional Court, the Constitution of the Republic of South Africa Act 108 of 1996 was promulgated on 16 December 1996. It came into force on 4 February 1997.

- ratification of the African Charter on the Rights and Welfare of the Child in January 2000¹.

From these public international and Constitutional documents, the undertakings which deal with violence, maltreatment, neglect and abuse are Article 19 of the CRC, Article 16 of the African Charter and, as a comparison, Section 28(1)(d) of the SA Constitution.

Article 19 of the CRC is no doubt well-known to this audience. However I shall repeat the entire content of Article 19 for the purpose of this examination².

- 19.1 ‘States Parties shall take all *appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*
- 19.2 ‘Such protective measures should, as appropriate, include *effective procedures* for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for *other forms of prevention* and for *identification, reporting, referral, investigation, treatment and follow-up* of instances of child maltreatment described heretofore, and as appropriate, for judicial involvement.’

¹The OAU Children’s Charter contains provisions for the protection of children which are similar to those in the CRC, for instance, Article 16 on protection against child abuse and torture, and Article 2, protection against harmful social and cultural practices.

²The emphasis is mine and indicates the aspects of the provision I have focussed my attention on.

Article 16 of the African Charter¹ virtually repeats Article 19 of the CRC:

States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman and degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child.

The inclusion of Children's Rights in South Africa's Bill of Rights, which started with the interim Constitution, 'is derived from the Convention'². In the final Constitution³, the protection against 'neglect and abuse' was expanded and now includes maltreatment and degradation:

¹Geraldine van Bueren (Ed) *International Documents on Children* (1993) 38. The italics are mine and indicate the words which are the same as those in Article 19 of the CRC.

²Julia Sloth-Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law'(1995)*SAJHR* Vol 11 Issue 3 at 401.

³S28(1)(d) of SA Constitution, op cit note 5.

‘Every child¹
has the right .. to be protected from maltreatment, neglect, abuse or degradation’.

Differences in the wording

¹According to s28(3) a ‘child’ is a person under the age of 18.

Although Section 28 does not refer to violence this does not mean that children do not have a *Constitutional* right to protection against violence in South Africa. They do, along with all other citizens, under section 12(1)(c) - the right to freedom and security of the person which includes the right ... 'to be free from all forms of violence from either public or private sources' as citizens¹ and as children. The protection that is particular to children as far as the SA Constitution is concerned is protection from 'maltreatment, neglect and abuse'². Moreover, the term 'maltreatment' is more generic and encapsulates violence, both physical and mental.

Article 19.1 includes the reference to protection of children 'while in the care of parents' etc. The question of whether the CRC only protects children 'whilst in the care of parent(s), guardian(s)' etc can also not be drawn. There are many other provisions for the protection of children whether in or out of parental care. For instance Article 3.2 - 'protection ... as is necessary for his or her well-being ..' and Article 6.2 - 'State Parties shall ensure to the maximum extent possible the survival and development of the child.'

The difficulty of translating the CRC rights into law

At the outset, a State Party's success in providing legal measures that enshrine the articles of a Convention will depend on how the terms of the Conventions are translated into legal provisions. The law will protect what it says it protects, and prohibit what it says it prohibits. If what the law actually says does not reflect what the Conventions say then, at the outset, the incorporation of the articles of the Convention into domestic law will not be successful.

¹Article 10, 'to have their dignity protected; A 11, their life; A 12 'to be free from all forms of violence from either public or private sources', SA Constitution op cit note 5.

²The issue of protection from 'degradation', which occurs in s 28(1)(d) and the African Charter is obviously an important one in a country where people have been degraded by racialism, for example. The topic merits research on its own which is beyond the limited scope of this paper.

A difficulty lies with the fact that words such as ‘maltreatment’, ‘sexual abuse’, ‘neglect’, ‘violence’ and ‘mental violence’ are abstract. They are ‘moral precepts’¹. They mean different things to different people and their meaning can be culturally biased. Van Bueren states²:

‘The ambit of the provisions is very broad. The terms abuse and neglect are intentionally undefined in order to avoid the danger that a definition of child abuse and neglect could unwittingly be based upon either arbitrary or ethnocentric assumptions.’

However, there is an area of common ground. In spite of the fact the African Charter on the Rights and Welfare of the Child was, *inter alia*, drawn up because ‘each region, with its unique culture, traditions and history, is best placed to handle and resolve its own human rights situation’³, the African Charter repeats the CRC on the issue of protection against violence, abuse and maltreatment (see above).

Moreover, the CRC had, by January 1997, been adopted by 189 States, a global average of 70%.⁴ At the same time, Sloth Nielsen and van Heerden report that it had been ratified by all African states except Somalia⁵. It therefore appears that there is almost universal recognition that States need to take on the responsibility of protecting children from harms which may ‘impair their development’⁶, or they need to assist parents in their role as custodians and legal guardians in doing so.

In spite of our universal recognition that children need protection from harms, terms such as ‘maltreatment’, ‘abuse’, ‘mental violence’ are not recognised as crimes in South African common law. Without more, the law concerns itself with the consequences of conduct which may be abusive, neglectful, violent. For example, the law does not concern itself with aggression or jealousy unless this conduct leads to assault or some other recognised crime. They become conditions from which legal consequences flow by incorporation into Statutes.

Protection under the common law

The most frequent common law crimes that arise from behaviour which may have been violent, abusive or neglectful of children are murder, culpable homicide, rape, assault, assault with intent to do grievous bodily harm, indecent assault, sodomy, incest, *crimen injuria*⁷.

The common law protection of children is the same as for adults. There are no common law crimes which relate specifically to children except one which is unused. According to Robinson⁸:

‘The only existing common law offence which specifically pertains to children is *crimen expositionis infantis*, that is the abandonment of an infant with the intention of killing it or with

¹Michael King ‘Against children’s rights’ *Acta Juridica* (1996) 28 at 29.

²Geraldine van Bueren *The International Law on the Rights of the Child*(1995) 88

³SA Wako ‘Towards an African Charter on the Rights of the Child’, (paper delivered at a workshop on the Draft Convention on the Rights of the Child, Nairobi, 9-11 May (1988) at 7, quoted in ‘Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child’ by Frans Viljoen in *Comparative and International Law Journal of Southern Africa* Volume 31, Issue 2 (1998) at 199.

⁴Frans Viljoen, op cit note 16 at 201.

⁵Julia Sloth-Nielsen and Belinda van Heerden ‘New Child Care and Protection Legislation for South Africa? Lessons from Africa.’ (1997) *Stell LR* 3 261 at 266.

⁶Van Bueren op cit note 15 at 88

⁷See Table One in the appendix for the number of certain common law crimes reported to the South African Police Services perpetrated against children between 1996 and 2000. Culpable homicide was not included on the list which was given to me.

⁸FFW Van Oosten and AS Louw, ‘Children, young persons and the criminal law’ in JA Robinson (Ed) *The Law of Children and Young Persons in South Africa* (1997) 134.

reckless disregard for its survival. Prosecutions... are, because it inevitably also constitutes murder or attempted murder, extremely rare'

Common law crimes do not *per se* take the age of the victim into account in determining guilt¹, except where parental authority is raised as a defence for assaulting a minor. Under the common law in South Africa, parent's still have the authority to inflict corporal punishment on their children and parental authority will constitute a defence for a crime such as assault as long as it is 'reasonable and moderate'². Corporal punishment which is violent or excessive may lead to a conviction of assault, assault with intent to do grievous bodily harm, or some other crime, depending on the circumstances.

The common law distinction between legitimate corporal punishment and punishment which invites criminal liability depends on the circumstances and, in this case, takes the condition of the child into account:

¹In sentencing there are certain scheduled crimes in which the age of the victim results in a more serious punishment. Eg, the rape of a girl under the age of 16 carries a mandatory life sentence; indecent assault on a child under the age of 16 which involves bodily harm carries a mandatory minimum sentence of 10 years for a first offence, 15 for second and 20 for a third or subsequent offence. Criminal Law Amendment Act 105 of 1997.

²*Rex v Janke and Janke* 1913 TPD 382 at 385.

‘The general rule adopted both by the Roman, the Roman-Dutch law and the English law is that a parent may inflict moderate and reasonable chastisement on a child for misconduct provided that this be not done in a manner offensive to good morals or for other objects than correction and admonition. ... The law has been well-stated in the case of *Regina v Hopley* (2 F. & F.202)... “A parent or a schoolmaster ... may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment always however with this condition that it is moderate and reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree, or if it be protracted beyond the child’s power of endurance or with an instrument unfitted for the purpose and calculated to produce danger to life and limb, in all such cases the punishment is excessive and the violence is unlawful”¹

Formerly the common law allowed parents to delegate their authority concerning corporal punishment to persons *in loco parentis*², such as a school teacher, but the position has been modified by the Constitutional Court in *Christian Education South V Minister of Education*³. Parents may no longer **authorise** schools, as ‘institutions’, it seems, to use corporal punishment to discipline their children.

The plaintiff, Christian Education South Africa, a voluntary association representing 196 independent Christian Schools in South Africa with a total of some 14 500 pupils, had applied to be exempted from section 10 of the Schools Act⁴ without success. Its subsequent application to the High Court to have the section declared unconstitutional to the extent that it prohibits corporal punishment in independent schools, where parents have consented to its application, was also dismissed. The appellant then appealed to the Constitutional Court.

¹Ibid

²*G* 1954 1 PH H 59(O); *Booyesen* 1977 2 PH H 148 (C) quoted by Van Oosten and Louw, op cit note 21 at 133.

³2000 (1) BCLR 1051 (CC)

⁴No 84 of 1996, Section 10 provides that no person may administer corporal punishment at a school to a learner and any person who does so is guilty of an offence and liable on conviction to a sentence which could be imposed for assault. The section was promulgated in line with other legislative provisions to prevent corporal punishment in courts, tribal courts (The Abolition of Corporal Punishment Act No 33 of 1997) and children’s homes, schools of industry, reform schools and other places of residential care for children (Regulations to the 1998 amendments to the Child Care Act No 74 of 1983)) after the Constitutional court declared corporal punishment to be cruel, inhuman and degrading in the case of *S v Williams and others* 1995 (3) SA 632 under the ‘interim’ Constitution.

In a judgment which was sensitive to, and mindful of, the convictions of the appellant the Constitutional Court accepted that certain rights of the parents¹ were violated and that the corporal punishment which was inflicted in the schools did not infringe the limitation placed on it in section 31(2). The second stage of the enquiry was to decide whether such violation was reasonable and justifiable under section 36, the limitation clause.

¹S15 - the right to freedom of conscience, religion, .. belief and opinion; s 31 that persons belonging to a religious community may not be denied the right, with other members of that community, to practise their religion and to maintain religious associations, as long as they do not exercise this right in a manner inconsistent with any provision of the Bill of Rights.

To begin, Sachs J dealt with the nature and scope of the right which was being limited. He concluded that it was the parents' right to delegate their own right to use corporal punishment which was being limited¹:

'The parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They can do both simultaneously. What they are prevented from doing is to authorise teachers, acting in their name and on school premises, to fulfill what they regard as their conscientious and biblically-ordained responsibilities for the guidance of their children. Similarly, save for this one aspect, the appellant's schools are not prevented from maintaining their specific Christian ethos.'²

The State's aim was 'to transform the education system, to bring it into line with the letter and spirit of the Constitution ...(and) ... to protect all people especially children from maltreatment, abuse or degradation'³. The State, therefore, has a responsibility to protect all children. To make an exception would undermine the State's compliance with its duty to protect people from violence.⁴

Moreover, the Court saw the child's right to protection as more important than the rights of their parents. The Judge reaffirmed⁵ that in every matter concerning the child, the child's best interest must be of paramount importance and is not limited to the rights enumerated in s28.:

'The child, who is at the centre of the enquiry is probably a believer, and a member of a family and a participant in a religious community that seeks to enjoy such freedom. Yet the same child is also an individual person who may find himself⁶ "at the end of the stick", and as such be entitled to the protections of sections 10⁷, 12⁸ and 28⁹. Then, the broad community has an interest in reducing violence wherever possible and protecting children from harm.'¹⁰

The court did not consider the question of whether the common law right that parents have to inflict corporal punishment on their children is also unconstitutional.

'whether ... the common law has to be developed so as further to regulate or even prohibit caning in the home, is not the issue before us.'¹¹

¹At 1070 C

²At 1076-7 H-A

³At 1070 D

⁴At 1076 D

⁵At 1070 H. See *Minister of Welfare and Population Development v Sara Jane Fitzpatrick* 2000(3)SA 422 at 428 C. '... the reach of s28(2) cannot be limited to the rights enumerated in s28(1) and s28(2) must be interpreted to extend beyond those provisions.'

⁶Sachs J noted that he used the masculine gender because the appellant had said that corporal punishment in the school was limited to boys in the senior schools because it was well known that girls were better disciplined than boys..

⁷The right to have one's dignity respected and protected.

⁸The right to freedom and security of the person including the right to be free from all forms of violence from either public or private sources.

⁹The Rights of Children, see above.

¹⁰At 1058 D - 1059 A.

¹¹At 1075 A.

However, he did suggest that the situation of punishment in the home is different from punishment in an institution:

‘Section 10 grants protection to children by prohibiting teachers from administering corporal punishment. Such conduct happens not in the intimate and spontaneous atmosphere of the home, but in the detached and institutional environment of the school’.¹²

Therefore, it is not clear from this judgment whether the common law right of parent’s to inflict corporal punishment on their children would ever be declared unconstitutional. The Court has reaffirmed that the rights of children are paramount and go beyond the reach of s28, the Children’s Rights clause. However, the Court has also hinted that corporal punishment in the home is not as intolerable as institutional corporal punishment.

As far as civil law is concerned, children, like all other legal subjects, have the right to claim financial compensation from the wrongdoer, or redress such as an interdict to prevent further wrongful conduct, through the courts on the grounds of the delictual liability of the defendant. A procedure for dealing with this common law right in the case of conflict in families was first provided in the Prevention of Family Violence Act¹³. The sections dealing with interdicts were amended by the Domestic Violence Act¹⁴ and these interdicts are now referred to as ‘protection orders’. They will be discussed more fully below.

LEGISLATIVE MEASURES TO PROTECT THE RIGHTS

As we have seen, the common law does not provide children with protection from maltreatment, abuse and neglect *per se*. Those faced with the task of providing legal measures which are effective in protecting children under the CRC have to provide definitions for these terms. The definitions must promote certainty and fairness in law.

For example, Cockrell¹⁵ suggests that s 28(1)(d) is a constitutional provision which ‘is buttressed by s 50(1) of the Child Care Act¹⁶’:

‘Any parent or guardian of a child or any person having the custody of a child who -
(a) ill-treats that child or allows it to be ill-treated; or
(b) abandons that child,
or any other person who ill-treats a child shall be guilty of an offence.’

The provision¹⁷ uses the more generic term ‘ill-treats’ which covers all forms of abuse, violent treatment and neglect.

A more recent example of the problem of translating the CRC terms into legislative provisions can be found in the definition section of the Domestic Violence Act¹⁸:

¹²At 1075 C

¹³No 133 of 1993

¹⁴No 116 of 1998

¹⁵Alfred Cockrell ‘The Law of Persons and the Bill of Rights’, *Bill of Rights Compendium* (1998) Issue 7 at 3E-16.

¹⁶74 Of 1983

¹⁷The legislative provision was introduced into the law (s 18(1) of the Children’s Act No33 of 1960)before the s28 and its predecessor s30, were introduced into the SA Bill of Rights.

“domestic violence” means -

‘(a) physical abuse; (b) sexual abuse; (c) emotional , verbal and psychological abuse: (d) economic abuse; (e) intimidation; (f) harassment; (g) stalking; (h) damage to property: (i) entry into the complainant’s residence without consent, where the parties do not share the same residence; or (j) any other controlling or abusive behaviour towards a complainant, where such conduct hards, or may cause imminent harm to, the safety, health or well-being of the complainant.’

“emotional, verbal and psychological abuse” means a pattern of degrading or humiliation conduct towards a complainant, including -

(a) repeated insults, ridicule or name calling;

(b) repeated insults to cause emotional pain; or

(c) the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant’s privacy, liberty, integrity or security;’

Emotional violence is presumably the equivalent of the ‘mental violence’ of article 19 of the CRC. The circumstances used to describe the term, that is, ‘repeated insults’, ‘exhibition of obsessive possessiveness’ are limited and effect people differently. They can be, and frequently are, manipulated for vexatious reasons¹ by complainants in domestic situations. They are susceptible to different interpretations by judicial officers, police officials, social workers in a land of many different cultures, religions, attitudes to children and their upbringing.

The task of drafting legal measures that protect children’s rights has fallen largely on the shoulders of the South African Law Commission.

In 1996 Minister of Welfare and Population Development and the Minister of Justice requested the South African Law Commission to include a review of child care legislation in its programme². The need for a review came about as a result of ‘disquiet amongst practitioners, social workers and child and youth care workers with respect to the functioning of, and principles underlying, the 1996 amendments³ to the Child Care Act⁴. A major concern was ‘that piecemeal amendments (in order) to comply with the constitutional imperatives and the ratification of the CRC would not resolve deep-seated concerns about the content and application of the current South African child law, nor indeed the relevance of its underlying philosophy to present-day South Africa.’ There was also a need to ‘Africanise child care and protection mechanisms’ and ‘to harmonise all relevant child related law’⁵.

To this end the Law Commission established a project committee which brings together a multi-disciplinary team of experts in order to achieve inter-sectoral co-operation ‘and the involvement of stakeholders in the process’ of drafting new legislation. The first issue, the Review of the Child Care Act, was published in April 1998⁶.

At the outset it must be noted that the inclusion of Children’s Rights in the SA Bill of Rights is an important legal step in implementing the CRC⁷. The Committee on the Rights of the Child⁸, responsible for ‘examining the progress⁹’ made by State Parties in implementing their undertakings under the CRC is not concerned with the method of application of the CRC in domestic law, but rather with the legal protection of its principles and provisions¹⁰.

The most important pieces of legislation dealing with the protection of children from maltreatment, neglect and abuse are The Domestic Violence Act 116 of 1998, the Child Care Act 74 of 1983 and the Sexual Offences Act 23 of 1957.

The Domestic Violence Act

As was stated above, the Domestic Violence Act, amended the provisions relating to interdicts in the Prevention

¹Phillippa Kruger, Head of the Family Law Unit, Law Clinic, University of the Witwatersrand, personal communication.

²Law Commission report op cit note 2 at 1.

³Child Care Amendment Act No 96 of 1996.

⁴No 74 of 1983.

⁵Law Commission Report op cit note 2 at 2

⁶At the time of writing, two other issue papers on the status of children (including adoption) and children in care proceedings were not yet available from the Law Commission, op cit note 2 at 4.

⁷Sloth-Nielsen op cite note 9 at 417.

⁸Established under Article 43

⁹In terms of articles 44 and 45 of the CRC the Committee is responsible for receiving, reviewing and making recommendations on reports from State Parties about measures adopted and progress made under their CRC undertakings

¹⁰T Hammarberg ‘Children’ in A Eide, C Krause and A Rosas (eds) *Economic, Social and Cultural Rights* (1995) at 298 quoted in Sloth-Nielsen op cit note 9at 403.

of Family Violence Act of 1993. The two sections of the Act which have not been amended are s4 (obligation to report ill-treatment of children) and s3 (a husband may be convicted of the rape of his wife). S4, relevant to this discussion will be discussed with a similar provision under the Child Care Act below.

The Act has improved the position all complainants, which includes children, in the following ways:

1. Under the 1993 Act, s2 dealing with the grant of interdicts, referred only to the right of 'a party to a marriage' to apply for an interdict 'against the other party to the marriage'. So a child, who was able, could not apply but had to have a parent to apply on his or her behalf.

Now the definition of who can apply is covered by the term 'complainant' - '

'any person who is or has been in a domestic relationship with a respondent and who is or has been subjected or allegedly subject to an act of domestic violence, including any child in the care of the complainant;'¹

1. The range of issues which constitute 'domestic violence' and against which complainants may obtain protection has been widened. This extends the protection of all complainants, not only children, who can now apply for protection against physical, sexual, emotional, verbal, psychological and economic abuse. It includes intimidation, harassment, stalking, damage to property, entry into the complainant's residence without consent where the parties do not share the same residence, or 'any other controlling or abusive behaviour' towards a complainant.
1. The reach of the Protection Orders² has been extended to assist complainants. For instance, apart from the usual orders to prohibit physical violence, or restraining entry into a place of residence, or part of it, the court may also impose conditions which it deems necessary to protect the safety, health and well-being of the complainant. These include orders to pay rent, mortgage bond instalments, or for emergency monetary relief which have the effect of a civil judgement in a magistrate's court. The court may make orders for the seizure of firearms. Of particular help to children, magistrate may order police to accompany the complainant and to assist with arrangements for removing property. If it is in the best interests of the child, the court may prevent the respondent from having contact with the child, or impose conditions on the contact³.
1. The Act has improved the position of children affected by domestic violence in that it permits a counsellor, health service provider, member of the SAPS, social worker, teacher or any other person 'who has a material interest in the well-being of the complainant' to apply for a protection order on behalf of complainant⁴. In the case of a child, written consent is not necessary nor is the consent of a parent, guardian or anyone else.

Obligation to report ill-treatment of children

Anyone who suspects that the child is being ill-treated, or suffers from any injury, the probable cause of which was deliberate, 'shall immediately report the harm to a police official, the commissioner of child welfare', or a registered social worker under s4 of the Prevention of Family Violence Act.

Section 42 of the Child Care Act⁵ has the same provision but the range of people who are obliged to report the matter includes teachers, dentists, medical practitioners, people employed in or managing children's homes,

¹S1Definitions

²Section 8

³In a meeting with the Department of Justice and Members of the Local Steering Committee for the Family Court Pilot Project on 6 September 2000, the Family Advocate, Ms Barbara Hechter said the orders issued by magistrates court sometimes override orders made by the High Court during divorce proceedings.

⁴Section 4(3)

⁵74 of 1983

places of care, shelters⁶, or who deal with ‘any child in circumstances giving rise to the suspicion.’⁷

Under the Child Care Act the obligation is to report the matter to the Director-General⁸ or any officer designated by him or her for the purposes of this section. Under both Acts it is an offence to fail to report such suspicion. The Child Care Act provides protection from prosecution for any notification given in good faith, but the Prevention of Family Violence Act does not provide that protection.

The Child Care Act⁹, moreover, provides a procedure that has to be followed when a case of suspected abuse is reported. The Director-General (or said officer) may issue of warrant for the removal of the child to a place of safety or a hospital, but *shall* arrange that the child and his parents receive treatment, as well as any other action against or treatment of the parent and child prescribed by the Act. The obligation to provide treatment for the parents and their child is peremptory. The effectiveness of a provision such as this needs to be considered in the light of the large number of children who are in need of protection¹⁰ and the dearth of trained personnel.

Other amendments to the Child Care Act

The most important legislation for the protection of in children is the Child Care Act¹¹. Its main purpose is to

⁶The Child Care Amendment Act 96 of 1996 extended the range of people required to report abuse by the addition of the words ‘teacher, any person employed by or managing a children’s home, place of care or shelter’. See preamble to the Act below.

⁷Ann Skelton (Ed) *Children and the Law* (1998) at 113 provides practical guidance in the signs of abuse. Unless physical signs are obvious, it is not easy to identify whether a child has been abused. In cases of psychological, mental and sexual abuse involving fondling, touching, exposure to pornographic material, for example, there may be no visible indications.

⁸Of Welfare, Population and Development, at the time of writing.

⁹S42(2) - (4)

¹⁰See appendix A and concluding comments below.

¹¹No 74 of 1983.

provide a system of children's courts and presiding officers, called commissioners of child welfare¹², for the adjudication of decisions concerning 'children in need of care' (see below), adoptions, and the establishment of institutions for the reception and treatment of children after reception.

The Act was amended in 1996 to introduce urgent interim reforms, 'pending a more comprehensive rewrite of child care legislation.'¹³

The purpose of the amendments are to

- 'shift the focus from the unable parent or the unfit parent to the child in need of care' (for the purpose of removal);
- to provide for the registration of shelters;
- to extend the inspection of children's homes and places of care;

¹²In terms of s6 of the Act, every magistrate shall be a commissioner of child welfare. Therefore, child welfare commissioners are not, as the title suggests, especially trained in child psychology, child welfare or any other appropriate discipline.

¹³Julia Sloth Nielsen and Belinda van Heerden 'Proposed Amendments to the Child Care Act and regulation in the context of Constitutional and International Law Developments in South Africa' (1996) 12 *SAJHR* 247 at 248

- to further regulate the notification in respect of injured children¹.

1. The shift of attention away from unfit parents to child in need of care.

Police officers, social workers and other authorized persons² may remove a child 'from any place to a place of safety without a warrant' if that authorized person has reason to believe the child is a 'child in need of care' under section 14³ of the Act⁴. The social worker has to report the matter to a children's court assistant and see that the child is brought before a children's court for the purpose of determining whether the child is a child in need of care.

Once it has been established that the child is in need of care there are several alternatives which the court may order⁵

- return the child or allow it to remain in the custody of its parent(s), under supervision of a social

¹ Preamble to Act No 96 of 1996..

²Means any person authorized in writing by a commissioner of child welfare, social worker, or police officer. Child Care Act 74 of 1983, Definitions, S1.

³Section 14(4) provides that a child will be a child in need of care if (a) the child has no parent or guardian; or the child has been abandoned or is without visible means of support; or displays behaviour which cannot be controlled by his or her parents, or custodian; or lives in circumstances likely to cause his or her seduction, abduction or sexual exploitation; or lives in circumstances which may seriously harm his or her physical, mental or social well-being; or is in a state of physical or mental neglect; or has been abused or ill-treated by his or her parents, guardians, custodians or is being maintained in contravention of section 10 dealing with the keeping of children under 7, or for the purpose of adoption, apart from their parents for more than 14 days.

⁴Section 12

⁵Section 15

- worker, on condition the parent(s) comply with certain requirements;
- order the child to be placed with foster parent under the supervision of a social worker;
 - order the child to be sent to a children's home⁶, school of industries⁷ or to a place of safety⁸ until such time as 'effect can be given to the order'⁹ concerning the children's home foster parent or school of industries.

⁶Defined in s1 of Act No 74 of 1983 - any residence or home maintained for the reception, protection, care and bringing-up of more than six children apart from their parents.

⁷Defined in s1 of Act No 74 of 1983 'as a school maintained for the reception, care, education and training of children sent or transferred thereto under this Act.'

⁸Defined in s1 of Act No 74 of 1983, briefly, as any building or premises used for the reception, protection and *temporary care* of more than six children apart from their parents, but not including any boarding school, school hostel or training institution which has been registered or approved by the State.

⁹Section 15(3)

These orders lapse after two years. The Minister has the power to extend them.¹

Before the Act was amended the primary ground for the enquiry was whether the child had no parent or guardian or the parent or guardian could not be traced or *the parent* was unfit or unable to care for the child². The 1996 amendment removed any consideration of the suitability of the parent. Now a child is a child in need of care if it has no parent(s) or the parents cannot be traced and if the child itself, for instance, 'is without visible means of support' as opposed to whether 'the parents' have no means of support; or whether 'the child' lives in a state of physical or mental neglect as opposed to whether 'the parent(s)' have assaulted, ill-treated or neglected the child. Thus a child could be removed if it is in a state of physical or mental neglect, even though it has two parents who fit and able to care for it.

'This dramatic shift may be defended as being in line with section 28(2) of the Constitution however, it is arguable that the child's best interest might have been served more efficiently by a balanced set of removal grounds. Both child and parent-centred approaches should have been equally provided for in the Child Care Act. By shifting attention almost entirely away from the parents, the newly amended section 14 of the Act might be seen as a charter for parental irresponsibility. Social workers who specialise in children's court proceedings have discovered that at least some cases do arise in which the best results are achieved by requiring parents to confront and deal with their own responsibility for harm or neglect which they have inflicted on the child'³.

Although there are writers who have approved this amendment⁴, the Law Commission has acknowledged that this issue needs to be revisited. In its Review of the Act⁵ it poses the question:

'Should both child and parent-centred approaches be allowed for in the formulation of the grounds for removing a child? If so, how should this best be done?'

The answer to the question could lie in a list of factors which need to be considered to determine whether a child is in need of care. Some of them must be about whether the child's parent(s) or guardian(s) are fit and able to care for it and with whether the child has bonded with the person(s) who had the custody of the child. Only then can an appropriate decision be made of what to do in the best interests of the child. Social workers report (see below) that children are traumatised by removal from their homes. Children love their parents, in spite of the maltreatment they may have received from them.

The removal of children to 'places of safety' and 'children's homes' is can be a retrogressive step in providing restorative therapy and help for a child in need of care. An Inter-Ministerial Committee on Young People at Risk (IMC) was established in May 1995 to transform the Child and Youth Care system over a period of time.⁶ The

¹Section 16

²Section 14(4)(b) which was deleted by the Amendment Act 96 of 1996 provided for a children's court enquiry to determine whether 'the child has a parent or a guardian or is in custody of a person who is unable or unfit to have the custody of the child, in that *he(the parent)* - (i) is mentally ill to such a degree that he is unable to provide for the physical, mental or social well-being of the child; (ii) has assaulted or ill-treated the child or allowed him to be assaulted or ill-treated; (iii) has caused or condoned to the seduction, abduction or prostitution of the child or the commission by the child of immoral acts; (iv) displays habits and behaviour which may seriously injure the physical, mental or social well-being of the child; (v) fails to adequately maintain the child; (vi) neglects the child or allows him to be neglected; (vii) cannot control the child properly so as to ensure proper behaviour such as regular school attendance; (ix) has abandoned the child or (x) has no visible means of support.'

³FN Zaal 'Children's courts: An underrated resource in a new constitutional era' in *The Law of Children and Young Persons in South Africa* op cit note 21 at 98.

⁴Julia Sloth Nielsen and Belinda van Heerden, 'The Child Care Amendment Act 1996: Does it improve children's rights in South Africa?' *SAJHR* (1996) 649 at 653.

⁵SA Law Commission Question 59 op cit note 2 at 81

⁶The Inter-Ministerial Committee on Young People at Risk *Interim Policy Recommendations*(1996)8

IMC investigated the situation in State-controlled places of safety, schools of industry and reform schools. The results showed that the standard of care in these places falls short of standards set by the United Nations Conventions and the Constitution. Use of small windowless isolation cells and corporal punishment was widespread. There was almost no privacy in bathrooms and in some lavatories. Strip searches were common. Children in these facilities reported that they had been emotionally, physically and sexually abused by staff as well as other children. There was a lack of supervision and a dearth of developmental and therapeutic programmes. Very few facilities had individual treatment and developmental plans for children. Many children had no access to a social worker at all. There was a lack of contact with family members with children being placed in institutions far from home. There were long delays before children were appropriately transferred.⁷

1. The registration of shelters and provision for the inspection of them and other places of care.

Arising from commitments and requirements of the public international undertaking⁸, the Law Commission⁹ distinguishes between children generally and ‘children in especially difficult circumstances’¹⁰, *inter alia*, children living on the street, refugee children¹¹ and children with disabilities.

Similarly, the UN Committee on the Rights of the Child¹² raises questions about ‘the most vulnerable groups’ of children¹³. The Law Commission conceives them as being in a special position with regard to the need for legal protection.

From the data collected and included in the appendix to this paper it is clear that there are tens of thousands of children who live in especially difficult circumstances. Their numbers are likely to grow in the future. The need for out-of-home places of safety, shelters, subsistence, treatment and follow-up of one sort or another is far below the requirement. For instance, it is estimated that there are between 10 and 12 000 street children living on the streets on South Africa¹⁴. The State institutions provide shelter for just over 4000 street children¹⁵. NGOs provide other shelters, drop-in centres, soup kitchens and other programmes such as basic literacy and job skills.

⁷Ibid at 11 -13. IMC ‘In whose best interests?’, *Report on Places of Safety, Schools of Industry and Reforms Schools* (1996) 12 -15.

⁸Article 44 of the CRC requires States Parties to submit reports on the measures they have adopted which give effect to the rights recognized in the Convention and the progress made on the enjoyment of the rights.

⁹Op cit note 2 at 11

¹⁰The phrase appears to originate from the *World Declaration on the Survival, Protection and Development of Children*, item (7) of the ten-point programme to protect the rights of children, published in *International Documents on Children*, Ed. Geraldine van Bueren (1993) at 328. The item refers to children who are victims of apartheid, orphans, street children and children who are displaced, disabled, abused, socially disadvantaged and exploited. The Child Care Act, S1, defines these children as ‘children in circumstances which deny them their basic human needs, such as children living on the streets and children exposed to armed conflict and violence.’

¹¹Article 2 of the CRC provides that ‘State Parties shall... ensure the rights... (of) each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s ... national ethnic or social origin, disability, birth or other status.’

¹²See notes 54 and 55.

¹³In January 2000, SA submitted a ‘Supplement to the Initial Country Report’ to answer some 30 questions arising from its ‘Initial County Report’ of November 1997. In question 4 of South Africa’s Supplement to the Initial Country Report, p 11, the UN Committee asks whether data collected on the status of children, ‘especially the most vulnerable groups.’

¹⁴See appendix.

¹⁵The Office on the Rights of the Child in the Presidency, ‘Children in 2001: A report on the state of the Nation’s Children’(2001)15

The Law Commission's inclusion of a definition of 'shelter'¹⁶ in the Act, coupled with the inclusion of shelters in s30 on the registration and classification of children's homes, is a step towards providing for the protection of one component of the children in especially difficult circumstances.

The Sexual Offences Act¹⁷

As was stated above, there is no common law crime relating specifically to the abuse of children, whether of a sexual or other nature. Under the common law, abuse of children is the same as for adults and it is actionable if it complies with the requirements for crimes such as assault, indecent assault, etc. In addition, there is at present no statutory crime of sexual abuse of children.

The common law sexual offences mentioned in Table One of the appendix, namely, rape, indecent assault, abduction and incest, to name the most important ones affecting children, have been supplemented by legislative provisions to prohibit sexual activity involving children and vulnerable people.

Section 14¹⁸ provides for statutory rape, or attempted rape of a girl under the age of 16. It prohibits 'any male person' from having 'unlawful carnal intercourse' with a girl under the age of 16 years or from 'attempting to commit an immoral or indecent act' with a girl or boy under the age of 19. In addition, the section prohibits 'any male person' from soliciting or enticing such a girl or boy to the commit an immoral or indecent act. Ss 14(3) and (4) prohibit women from doing exactly the same thing.

In 1999 the SA Law Commission published a discussion paper¹⁹ which contained a draft Sexual Offences Bill. The purpose of the bill is to consolidate and amend the law relating to sexual offences. It proposes the introduction of several statutory offences of a sexual nature to protect children from abuse more comprehensively.

¹⁶No 96 of 1996 Section 1(f) "shelter" means any building or premises maintained or used for the reception, protection and temporary care of more than six children in especially difficulty circumstances."

¹⁷No 23 of 1957

¹⁸Of Act 23 of 1957.

¹⁹South African Law Commission *Sexual Offences: The Substantive Law*, Project 107, Discussion paper 85

It proposes to repeal the common law crime of rape which is restricted to the penetration of the vagina by the penis. The Commission proposes to extend this definition to a gender-neutral definition as follows¹:

- (1) Any person who intentionally and unlawfully commits an act of sexual penetration² with another person, or who intentionally and unlawfully causes another person to commit such an act is guilty of an offence.
- (1) For the purpose of this Act, an act of sexual penetration is *prima facie* unlawful if it takes place in any coercive circumstances.

“Coercive circumstances” include any circumstances where the complainant is under the age of twelve years; there is an abuse of power or authority, whether explicit or implicit, direct or indirect, to the extent that one person is inhibited from indicating his or her resistance to an act of sexual penetration, or his or her unwillingness to participate in such an act; or a person mistakes an act of sexual penetration which is being committed upon him or her for something other than an act of sexual penetration.

Therefore, the crime of statutory rape is now reduced to 12 years but the crime of rape includes all forms of penetration which it did not before and younger and more innocent children are covered by the requirement of coercion.

Another important innovation as far as children are concerned is the introduction of the crime of ‘child molestation’³. Any person who intentionally commits a sexual act⁴ with a child (below the age of 16, in this case) will be guilty of an offence if the child is two or more years younger than the person committing the sexual act. Consent shall not be a defence under this section.⁵

The Bill also provides for the new crime of persistent sexual abuse of a child. This involves the situation where a person has engaged in a sexual act or an act of sexual penetration in relation to a child on two or more occasions during a specified twelve month period. This crime was introduced to avoid the situation in which child victims

¹Ibid at 269.

²The definition of ‘sexual penetration’ can be any act which causes penetration ‘to any extent’ of the penis into various body orifices of another person or animal; and of any object or part of the body of one person into the vagina or anus of another, or into any body orifice of another person in a manner which simulates sexual intercourse, or by any part of the body of an animal into the anus or vagina of a person etc.

³Ibid at 271.

⁴Basically it means any indecent act, including contact between sexual organs of two people or display of sexual organs of one person to another.

⁵S7(1) and (3) *ibid* at 271

have difficulty recalling precise details of the time and place when and where the alleged offences are said to have occurred. As a consequence state prosecutors accept a plea of guilty to a single incident of sexual abuse knowing that the incident was not an isolated one.⁶

The Bill prohibits child prostitution, keeping a brothel for child prostitution, offering or engaging a child for commercial sexual exploitation, and other crimes involves commercial sexual exploitation.

USING LEGAL MEASURES ‘IN THE BEST INTERESTS OF THE CHILD’

⁶Ibid at (vii) - (viii)

No matter how skilled, comprehensive and precise the legislature has been in providing legal measures that 'buttress' the rights of the CRC and the Constitution, social workers and others¹ who deal with child-victims say that the 'system fails the child'.

At the one extreme, the 'system' provides for the arrest, conviction and removal of the perpetrator from society in general, and the home environment in particular². But this is the rarest of solutions. Schwikkard refers to the 'inability of the criminal justice system to protect the child complainant as well as questioning whether the criminal justice system itself is not a perpetrator of abuse as regards children who testify³'.

The Commander of the Family Violence, Child Protection and Sexual Offences Unit in Johannesburg, Superintendent Andre Neethling believes that it is not the criminal justice system which fails. Many charges are often withdrawn because 'victims' lay charges for vexatious reasons, for instance, to use as 'leverage' to gain compensation, or to gain some other advantage. Families settle disputes amongst themselves. When the perpetrator pays compensation to the victim's family the charges are withdrawn. In addition, the prosecutor may sometimes withdraw the case for lack of evidence.

In the case of children, prosecutors are reluctant to pursue a charge if, after investigation, the evidence is doubtful. Most children are traumatised by their courtroom experiences. If at the end of the case, the perpetrator, who is often a family member, perhaps even a breadwinner, is jailed, the child suffers remorse and may be victimised by the rest of the family for 'breaking the silence'. Child care practitioners refer to the court situation and the recriminations and remorse which follow as 'secondary abuse'. The prosecutor is therefore only prepared to pursue cases in which the outcome is virtually a foregone conclusion.

The matter of evidence is a thorny problem in cases involving child-complainants. The difficulty of obtaining evidence⁴ that is beyond a reasonable doubt is compounded by cautionary rules⁵ that apply to child-victims who are witnesses, firstly, and secondly where the evidence is about sexual abuse. Thirdly, cautionary rules apply in cases in which there is only one witness, which is often the case with child abuse.

Other aspects of the trial which disadvantage the child-victim are the adversarial system with its process of cross-examination in which aggressive defence attorneys can easily 'make mincemeat' of child witnesses who are already traumatised by the court situation⁶. Presiding officers are themselves untrained in putting questions to assist children in this situation⁷.

At the same time as the police investigate a case to determine whether to charge the perpetrator or not, the child-victim is by definition, a child in need of care⁸. As stated above the police are compelled to report the matter to

¹Linda Grobler, Head of the Child Protection Social Work Unit in the Dept of Welfare and Population Development, Aileen Langley, Manager of Child Abuse Treatment and Training Services, CATTs, a project of the Johannesburg Child Welfare Society, Superintendent Andre Neethling, Commander of the Family Violence, Child Protection and Sexual Offences Unit of the South African Police Services in Johannesburg, Luke Lamprecht, Manager of the Teddy Bear Clinic, Johannesburg, interviews conducted between March and July 2001.

²There were no figures available to show who the perpetrators of the crimes against children are, whether they are family members, their ages, their incomes nor of the places where the crimes were reported. The people interviewed estimated the 'most of the crimes' or '50%' of the crimes are committed by family members, members of an extended family or people living 'in the same crowded back yard' as the victims.

³PJ Schwikkard 'The abused child: A few rules of evidence considered' *Acta Juridica* (1996) 148.

⁴Karen Muller and Mark Tait, "'A Prosecutor is a person who cuts off your head": Children's perception of the Legal Process' *SALJ* 593

⁵Skelton op cit note 63 at 122

⁶Ibid at 118.

⁷Muller and Tait, op cit note 107.

⁸See S14 of the Child Care Act above.

the Dept of Welfare⁹. In large metropolitan centres where social workers and specialised police units are available there is inter-sectoral cooperation to achieve a results that is 'in the best interests of the child.'¹⁰

These officials use the legal measures at their disposal to determine whether it will be possible to remove the perpetrator, at the one end of the continuum of action, or whether it will be better to remove the child at the other. In a case where a child has to be removed the child again suffers 'secondary abuse'. Social workers and psychologists report that even though children are abused by their parents they love their parents and are severely traumatised by the experience of being removed from their homes. If one adds to this the report of the IMC on the conditions in places of safety and children's homes¹¹ then the plight of maltreated children who are removed from their homes is like taking the child from the frying pan into the fire.

A third possibility is to provide the child and the family with restorative therapy. In reality, few children and families receive the quality and amount of therapy that is required to restore and heal the child and his or her family. Firstly, neglect and abuse are closely linked. A typical situation arises where a single mother¹² goes away to find work and leaves her child(ren) in a shack or home in which she shares a backyard with other families. The child becomes neglected and finally abused by others sharing the 'home'. Secondly, lack of staff, training and resources in general make it impossible to provide children and their families with the restorative care that the situation requires.¹³

To assist child witnesses s170A¹⁴ of the Criminal Procedure Act permits a child to be examined through an intermediary. If testifying would expose a witness under the age of 18 to 'undue mental stress or suffering' the section permits a court to appoint an intermediary through whom all examination, cross-examination and re-examination shall take place. The appointment of an intermediary is at the discretion of the court, and the family or any person assisting the child may request the appointment of an intermediary.

In addition, s170(3) makes provision for the child to testify at

'any place which is informally arranged to set that witness at ease, is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness and which enables the court and any person whose presence is necessary at the proceedings to see and hear, either directly or through the medium of electronic or other devices', the intermediary and the witness.

A recent Constitutional case dealing with procedure in domestic violence cases suggests that the Constitutional Court is in favour of greater flexibility with the 'rigid' rules of court procedure.

*** Summary judgment for perpetrators of domestic violence**

⁹See s42 of the Child Care Act above.

¹⁰See note 116 below on the Protocol on Child Abuse and Neglect.

¹¹See above.

¹²The Presidential Report on the State of the Nations Children, op cit note 93 at 27 states that 42% of children under 7 years of age live only with their mother and 20% do not live with either parent. The 1996 Population Census showed that there were 95 963 households headed by a child who was under the age of 18. Nearly half the household heads were below the age of 15 with 4 483 below the age of ten Ibid at 57.

¹³Linda Grobler, op cit note 104 is the head of the unit which provides such services for Johannesburg, Soweto, Randburg, Midrand, Sandton, Lenasia and Eldorado Park with a population of more some 5 million people. She has a staff of five to assist her. In addition, a Protocol on Child Abuse and Neglect was established by the National Committee on Child Abuse and Neglect (NCCAN) of the Dept of Welfare in 1997 to promote inter-sectoral cooperation in dealing with child abused and neglect. Feedback provided by the Dept of Welfare on the achievements and perceived gaps in the implementation of the protocol to IDASA (see note 130) showed that the most important gaps in seven of the nine provinces which provided feedback was lack of trained staff and insufficient funds.

¹⁴Criminal Procedure Act No 51 of 1977.

In *S v Baloyi*¹⁵, the appellant, Baloyi, who was an army officer, had allegedly assaulted his wife. She had reported the matter to the Police who had advised her to obtain an interdict against him in terms of the Prevention of Family Violence Act¹⁶. As the Act required, a magistrate granted the interdict ordering the appellant not to assault his wife and their child and not to prevent them from leaving or entering their joint home. At the same time the magistrate issued a warrant for the arrest of the appellant which he suspended 'subject to such conditions regarding compliance with the interdict' as he deemed fit in terms of S2(2) of that Act.

The appellant allegedly assaulted his wife again and threatened to kill her. The complainant reported the matter to the police. In terms of S3(1), the police requested her to make an affidavit setting out the alleged facts and on the strength of it they arrested the appellant and brought him before a magistrate for an enquiry¹⁷ into the alleged breach of the interdict.

At the enquiry the complainant, her brother, and the appellant all testified. The magistrate, on a balance of probabilities, decided that the appellant's version, to the effect that the wife had thrown something at him and the brother had tried to throttle him, were improbable and untrue. She convicted the appellant for violating the interdict and sentenced him to twelve months imprisonment, with six months suspended.

The appellant appealed to the High Court on the grounds that section 3(5) of the Prevention of Family Violence Act, in prescribing that a summary procedure described in S170 of the Criminal Procedure Act should apply to an enquiry under S3(5) of the Prevention of Family Violence Act, to which the police had taken him on the strength of his wife's affidavit, was unconstitutional. It infringed his right to a fair trial¹⁸ because the procedure prescribed in S170 of the Criminal Procedure placed the onus on him to satisfy 'the court that his failure (to comply with the terms of his interdict) was not due to fault on his part'. The section violated his right to be presumed innocent and for the State to prove his guilt beyond a reasonable doubt.

The High Court declared s3(5) of the Prevention of Family Violence Act to be invalid and referred the matter to the Constitutional Court for confirmation¹⁹.

The Constitutional Court held that S3(5) did not violate the Constitutional right to a fair trial. The Prevention of Violence Act only imports the **summary procedure** into the enquiry concerning the violation of an interdict. A summary procedure dispenses with the normal process of charge and plea. Only this aspect of S170 applied to the domestic situation. S3(5) did not import the reverse onus of requiring the person accused of violating a family violence interdict to prove his own innocence. The question of who bears the onus is a matter of substantive law. The reverse onus in S170 therefore applies to those people to whom S170 actually applies, viz, accused persons who fail to appear on the date and at the time to which their cases have been adjourned. 'The presiding officer in an enquiry (under S3(5)) is obliged to ensure that the proceedings afford an accused a fair trial.'²⁰

Sachs J, who delivered the judgment with which another nine²¹ of the Constitutional Court judges concurred, declined to confirm the High Courts order and sent the matter back to the High Court to be dealt with in accordance with his judgment.

¹⁵2000 (1) BCLR 86 (CC)

¹⁶No 133 of 1993. The Domestic Violence Act No 116 of 1998 came into force on 15 December 1999 after this judgment was handed down.

¹⁷In terms of S3(5) of the Prevention of Family Violence Act.

¹⁸S35(3)(h) of the Constitution - the right to be presumed innocent.

¹⁹S167(5) of the Constitution provides that the Constitutional Court must make the final decision about whether an Act of Parliament is unconstitutional and must confirm any order of invalidity made by the Supreme Court of Appeal, High Court, or court of similar status.

²⁰At 102 G

²¹There are 11 Constitutional Court Judges. Nothing was said in the report about the eleventh Judge and whether he or she had written a minority judgment.

The question of whether the proceedings in the enquiry held before the magistrate were fair or not, considering that the magistrate had decided ‘on a balance of probabilities’, was not decided by the Court, because it was not raised ‘nor was it an issue before us in the confirmation. That issue would have to be resolved when it arises²²’.

However, some of Sachs J’s comments have important implications for young children and others who are disadvantaged by the adversarial nature of these criminal proceedings.

The Judge stated that -

‘an insistence on rigid and inflexible rules would be inappropriate in this developing area, with its complex nuances and new procedures. Provided it remains within constitutionally appropriate limits, the legislature must enjoy a reasonable degree of latitude or margin of appreciation in choosing solutions to a grave social ill, particularly when the need for special law enforcement procedures has become manifest. In the present case this requires a construction of section 3(5) that is sensitive to its context and seeks to balance out the interests of all concerned in the fairest manner possible...’²³.

CONCLUDING COMMENTS

²²At 103 D

²³Ibid

The use of criminal law measures to protect citizens is based on the idea that rational people will try to avoid exposing themselves to the punishment set up under the criminal law, and that those who do commit crime will be removed from society.¹

¹Jonathan Burchell & John Milton *Principles of Criminal Law* (1997) 43

Clearly, neither of these protections are effective¹, particularly in the case of young children. Much of the abuse and maltreatment takes place behind closed doors and goes on undetected until it is too late. Children, especially young children, are not competent to report the harm that is being done to them.

We have also seen that in the case of children there are particular difficulties with providing evidence that is beyond a reasonable doubt. This compounds the problem of being able to remove offenders from society. In addition, we have seen that where convictions are successful, the child suffers secondary abuse. The possibilities for restorative therapy, given the dearth of resources in the context of the needs of hundreds of thousands of child, are slim.

Finally, we have also seen that removing children from the situation leads to secondary abuse from the trauma of being removed from home and the inferior state of alternative care facilities.

In trying to find 'legal measures' we must start to bark up the other side of the family tree. We must start to work with parents and potential parents to assist them to become responsible parents in order to *prevent* neglect, maltreatment and abuse. In this way children will be able to have their right to parental care fulfilled.

The African Charter on the Rights and Welfare of the Child emphasises this right:

'Every child shall be entitled to the enjoyment of parental care and protection and shall, wherever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority subject to judicial review determines in accordance with appropriate law, that such separation is in the best interest of the child.'²

APPENDIX

THE VULNERABLE POSITION OF MANY SOUTH AFRICAN CHILDREN

Population size and income distribution

According to the 1996 census, there are just over 17 million children in South Africa. They make up 42% of the population of 40.6 million people³. Income distribution is extremely unequal with the poorest 40% of the households earning less than 6% of the total national income, while the richest 10% earn more than half the national income⁴.

Economic vulnerability

Of these 17 million children, 72% live below the subsistence level needed to guarantee a healthy and secure life. In other words, there are over 12 million children who are poor in the sense that they have insufficient income on which to live. Of these children, some 95% are African and 75% live in rural areas⁵.

Mortality as an indicator of vulnerability

When one compares the mortality of South Africa's children with those of children in other countries with similar levels of per capita Gross National Product, South Africa's Child Mortality Rate (CMR) is significantly higher.

¹See the escalation in cases reported for ignoring interdicts issued under the Domestic Violence Act and the general increase in the level of common law crimes reported against children in the appendix.

²Van Bueren op cit note 8 at 39

³Judith Streak, 'The extent and provincial distribution of child poverty in South Africa 2000' in *Are Poor Children being put first? Child Poverty and the Budget 2000* (2000), produced by the Budget Information Service of IDASA (The Institute for Democracy in South Africa) Ch 1p2. In mid 1999 the population of SA was estimated to be 43.054 million, Statistics South Africa, *Stats in Brief 2000* 10.

⁴Mary Newman 'Early Childhood Development in South Africa: Key Issues' (Briefing document to the Law Commission's project committee (1998) at 4 quoted in SA Law Commission op cit note 2 at 24

⁵Streak op cit note 130 at 7

In 1997, for instance, the CMR for SA compared with those of three other countries with similar per capita GNPs was relatively and disproportionately higher as follows:

		CMR	per capita GNP in US_
South Africa		65	2 880
Thailand	38	2 200	
Russian Federation		25	2 300
Paraguay		28	2 460 ⁶

Children in especially difficult circumstances

From data collected for the purpose of writing this paper there appear to be more than 100 000 children who are not living in the care of their own families or extended families in South Africa. These include children living and working on the streets⁷, children in out-of-home care (places of safety, children's homes etc)⁸, foster care⁹. In addition, there are an unknown number of children living apart from their parents in informal arrangements with surrogate caregivers, 'having been displaced from their biological families by a range of socio-economic factors (especially the migrant labour system)¹⁰.

It is not known how many children are disabled but it is estimated that over 2 million children between the age of 1 - 15 are either severely or moderately disabled¹¹. They live mostly in the rural areas where disabilities result from poverty, preventable diseases and community violence.

Probably the greatest impact of HIV/AIDS on children will come via orphaning as a result of their parents' infection. Within the population of children orphaned by HIV/AIDS, child-headed households and children living on the streets will form the two most vulnerable groups.

⁶Ibid at 13

⁷According to Streak 'It is estimated that there are about 10 000 to 12 000 children living and working on South Africa's streets. The number of street children continues to rise due to increasing unemployment among parents, child abuse and the impact of HIV/AIDS on children .' (op cit note 37 at 7)

⁸According to the SA Law Commission (op cit note 2 at 26) there were 29 000 children in out-of-home residential care in 1998.

⁹According to the same Law Commission report there were 74 000 children in foster care in 1998 *ibid*.

¹⁰*Ibid*

¹¹Office on the Rights of the Child in the Presidency, op cit note 93. The number 3 million was calculated from the statistics provided on page 13 applied to data about the size of the population in 1999, see note 93.

Because women form the epicentre of the HIV/AIDS epidemic, the direct and indirect impact on children is particularly severe¹

¹Streak op cit note 130 at 24.

According to a Law Commission estimate, as many as 2.5 million children under the age of sixteen stand to be orphaned by AIDS by the year 2005.¹

Abandoned Infants

The number of abandoned children is also increasing.² The Department of Social Development handled 12 364 cases of abandoned children in 1997/8.

Indicators of physical vulnerability

According to Streak, 'the data on crimes against children suggests a high level of abuse of children.'³ The table below shows the number of certain common law crimes committed against children and reported to the South African Police Services (SAPS) between 1996 and 2000.

TABLE ONE: COMMON CRIMES AGAINST CHILDREN REPORTED TO SAPS⁴

Criminal offence	1996	1997	1998	1999	2000
Murder	2 216	1 851	1 744	1 750	1 458
Attempted murder	2 794	2 730	2 838	2 864	2 618
Assault with intent to inflict GBH ⁵	16 107	15 037	14 486	15 806	16 187
Common assault	17 371	17 309	16 741	18 501	20 024
Rape and attempted rape	19 926	21 450	19 881	21 064	21 438
Indecent assault	3 292	3 121	3 034	3 652	4 027
Incest	212	201	139	143	113
Kidnapping	1 874	1 690	1 652	1 845	1 942
Abduction	1 345	1 770	2 055	2 176	2 219
TOTAL	65 137	65 159	64 776	67 801	70 026

There are a range of statutory crimes which are not included in the table. For instance, cruelty towards and ill-treatment of children (excluding sexual offences, assault and murder), reported under Section 50(a) of the Child Care Act⁶ during the same years were as follows:

2 315, 2 368, 2 083, 2 407, 2 483.

¹McKerrow and Verbeek *Models of Care for Children in Distress*(1995) quoted in SA Law Commission Issue Paper on cit note 2 at 28.

²Office of the Rights of the Child in the Presidency op cit note 93 at 16

³Streak op cit note 130 at 20

⁴Source: Crime Information Analysis Centre of the South African Police Services (SAPS)

⁵GBH = grievous bodily harm

⁶Section 50(1)(a) of the Child Care Act No 74 of 1983 states: 'Any parent or guardian of a child or any person having the custody of a child who - (a) ill-treats that child or allows it to be ill-treated; or (b) abandons that child, or any other person who ill-treats a child, shall be guilty of an offence. (2) Any person legally liable to maintain a child who, while able to do so, fails to provide that child with adequate food, clothing, lodging and medical aid, shall be guilty of an offence. (3) Any person convicted of any offence under this section shall be liable to a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.' At the time of writing R20 000 was equivalent to ?1 724.

Ignoring of interdicts issued under the Domestic Violence Act has escalated from 1997 to 2000 as follows: 676, 742, 1476, 13030 in 2000.

Crimes against adults where children are indirectly involved.

South African society is generally violent¹. The general level of violence affects children indirectly².

Concluding remarks concerning the vulnerability of SA's children

The data above show that the majority of children are economically vulnerable. They are at risk of being neglected, although poverty and neglect are not synonymous. There is pressure on the State to provide programmes to prevent neglect. There are over 100 000 children who could be classified as 'children in especially difficult circumstances'. There is pressure on the State to provide social programmes, treatment and follow-up for them. In addition, there are thousands of children across South African society generally who are victims of violence, either directly or indirectly. The pressure on police services, the judicial system and other social services is enormous.

¹The following comparative information is drawn from tables provided by the SAPS Crime Information Centre. The source of the statistics is INTERPOL, Lyons. In 1996, South Africa had the world's highest rates per 100 000 of the population for the following crimes: murder (61.05), rape (119.54), robbery and violent theft (281.21). In 1997 South Africa's rates of murder (121.67) and rape (120.34) were the second highest in the world and were exceeded by Lesotho at 1818.76 and 1353.29 respectively. In that year, SA's rate for robbery and violent theft was third highest in the world (282.33) with higher rates in Lesotho (1767.35) and Bahamas (518.33) In 1998 it again had the second highest murder rate (59.04) exceeded by Honduras at 154.02, the highest rape rate (116.97) and the second highest robbery and violent theft rate (357.06) exceeded by Bahamas at 566.21. Comparative figures for 1999 and 2000 were not available.

²The Centre for the Study of Violence and Reconciliation states: 'children ... are involved in and exposed to almost the entire range of violent crime'. The Centre runs a Trauma Clinic for victims of violence. In an unpublished paper presented at an International Conference for Crime Prevention Strategies to Build Community Safety on 29 October 1998, researchers Helen Hajjiannis, Claire Alderton and Mary Robertson provided statistics taken from case material of clients seen at the Clinic for the period January to December 1997. In the case of violent crimes the number of adult clients compared with child clients was as follows: Murder - 72 adults, 32 children; car hijacking - 125 adults, 25 children, domestic violence - 11 adults, 5 children; armed robbery - 215 adults, 18 children.